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Transitional Justice for Papua – Lessons to be learned from Indonesian experiences?

M.Phil. in the Theory and Practice of Human Rights

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Abbreviations and Names

ABRI – *Angkatan Bersenjata Republik Indonesia*, or the former name of the Indonesian Armed Forces

AGO – Attorney General’s Office

AI – Amnesty International

AMM – Aceh Monitoring Mission

ANU – Australian National University

ASEAN – Association of Southeast Asian Nations

BIN – *Badan Intelijen Negara*, or State Intelligence Agency

BRA – *Badan Reintegrasi Damai Aceh*, or Aceh Reintegration Agency

Brimob – *Brigade Mobile*, or Mobile Brigade (Police Special Operations Force)

CAVRE – *Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste*, or Commission for Reception, Truth and Reconciliation in Timor-Leste

CMI – Crisis Management Initiative

CTF – Commission for Truth and Friendship

DDR – Disarmament, Demobilization and Reintegration

DOM – *Daerah Operasi Militer*, or Military Operations Zone

DPR – *Dewan Perwakilan Rakyat*, or the People’s Representative Council/House of Representatives

EU – European Union

GAM – *Gerakan Aceh Merdeka*, or Free Aceh Movement

GCDD – Ghana Centre for Democratic Development

GoI – Government of Indonesia

HRC – Human Rights Court

HRW – Human Rights Watch

ICC – International Criminal Court

ICG – International Crisis Group

ICTJ – International Center for Transitional Justice

IPWP – International Parliamentarians for West Papua

KDP – Kecamatan (Sub-district) Development Program

KPP HAM – Commission for Human Rights Violations in Timor-Leste

Komnas HAM – *Komisi Nasional Hak Asasi Manusia*, or National Commission for Human Rights

Komnas Perempuan – *Komisi Nasional Anti Kekerasan Terhadap Perempuan*, or National Commission on Violence Against Women

KontraS – *Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan*, or Commission for ‘the Disappeared’ and Victims of Violence

Kopassus – *Komando Pasukan Khusus*, or Indonesian Elite Special Forces

KPA – *Komite Peralihan Aceh*, or Aceh Transitional Committee

KPK – *Komisi Pemberantasan Korupsi*, or Corruption Eradication Commission

LIPI – *Lembaga Ilmu Pengetahuan Indonesia*, or Indonesian Institute of Sciences

LoGA – Law on Governing Aceh, Law No. 11 of 2006

LPSK – *Lembaga Perlindungan Saksi dan Korban*, or the Witness and Victim Protection Agency

MNC – Multi-National Company

MoU – Memorandum of Understanding of 15th August 2005 in Aceh

MPR – *Majelis Permusyawaratan Rakyat*, or People’s Consultative Assembly

NGO – Non-Governmental Organization

OHCHR – Office of the High Commissioner of Human Rights

OPM – *Organisasi Merdeka Papua*, or Free Papua Movement

OTSUS – *Otonomi Khusus Papua*, or Special Autonomy Law on Papua, Law No. 21 of 2001

Pepera – The 1969 Act of Free Choice

SBY – Susilio Bambang Yudohono, President of Indonesia

TNI – *Tentara Nasional Indonesia*, or Indonesian Armed Forces

ToR – Terms of Reference

TRC – Truth and Reconciliation Commission

UN – United Nations

UNGA – United Nations General Assembly

UNFPA – United Nations Population Fund

UNSC – United Nations Security Council

UNTEA – United Nations Temporary Executive Authority

UP4B – Special Unit for the Acceleration of Development in the land of Papua

US – United States

1. Introduction and Methodology

1.1. Aims of research

1.1.1. Research objective

The purpose of this thesis is to gain an understanding of how tools of transitional justice have been adopted and to what extent they have been fulfilled or implemented in post-Soeharto Indonesia and what this means for Papua¹. Indonesia has been undergoing an encompassing transformation to democracy over the past decade and frameworks for dealing with the past have been created.

However, I am also attempting to develop a “blueprint” of mechanisms of transitional justice in order to influence the discussion before peace negotiations have begun in Papua. As seen in Aceh, the lack of planning and preparation before the establishment of the 2005 Memorandum of Understanding (MoU) greatly contributed to the failure to successfully implement mechanisms of transitional justice in its aftermath. It is a process which requires tremendous amounts of research and groundwork in order to fulfil long-term goals and needs of a society. Research questions include:

- To what extent has transitional justice mechanisms been applied in post-Soeharto Indonesia and how, if at all, can such tools be used to achieve sustainable peace in Papua?
- How has transitional justice mechanisms played a role in the era of *reformasi* in Indonesia?
- What are the ‘lessons learned’, if any, from the implementation of transitional justice mechanisms in Aceh? Can they be applied in Papua?
- To what extent, if at all, is it possible to create a “blueprint” of transitional justice mechanisms in Papua?
- To what extent can transitional justice mechanisms develop into peace enablers for Papua rather than act as reactions to conflict settlements?
- What are the underlying factors decisive to the implementation, or the lack thereof, of transitional justice mechanisms in Indonesia?

¹ The name Papua will be most frequently used, but is synonymous with the former names such as Dutch West New Guinea, Irian Jaya, and West Papua. The term Papua includes both provinces in the land of Papua, Papua and West Papua. I regard the area as one geographical entity despite administrative changes in 2003.

1.1.2. Rationale for research

Internal conflict and a lack of implementation of legal frameworks concerning human rights continue to dominate the *reformasi* process. Separatist challenges in Aceh and Papua have been major stumbling blocks for true transition to take place. Unsurprisingly, both conflicts continued after the fall of Soeharto's authoritarian regime, but there have also been minimal efforts to achieve reconciliation with the past and human rights violations have not ceased. Nonetheless, the Aceh conflict has been solved although the lack of fulfilment of many MoU requirements. The peace negotiations in Aceh were fast-tracked by the 2004 tsunami and a third party mediator created an environment for a solution-seeking government with a considerable amount of political will along with a separatist movement, namely *Gerakan Aceh Merdeka* (GAM), which realized that independence from Indonesia was impossible and violence was futile. However, the extraordinary conditions after the tsunami enabled both parties to show goodwill and strength to reach an agreement in 2005.

Human rights abuse and the potential for dialogue in Papua as well as the results of transitional justice in Aceh have both been studied by a few, but there is a knowledge gap in the creation of a framework for transitional justice in Papua. The Papua conflict must be seen within the greater process of *reformasi* in Indonesia, initiated in 1998. In essence, tools of transitional justice can be a key part of any Jakarta-Papua dialogue for peace. Moreover, a framework of transitional justice in Papua may also be necessary for sustainable peace to develop in the future. Transitional justice can and will play a determinate role for sustainable change in Papua.

1.2. Methodology and review of sources

1.2.1. Choice of single in-depth case study

The decision to pursue a single-country, in-depth study was primarily taken on the basis of the conceptual perimeters of the transitional justice framework. Transitional justice is a highly context-specific concept, both as a comprehensive process and as individual mechanisms. In essence, social, cultural, political, historical and legal elements shape mechanisms of transitional justice and the final outcome of the process. Every country has a naturally unique combination of various attributes which in turn are instrumental for the development of transitional justice. It is also extremely difficult to quantify the long-term results of these processes.

On the other hand, the moulding and development of the four mechanisms of transitional justice discussed in this thesis - truth-seeking initiatives, legal proceedings, reparations, and institutional reform - have derived from societal experiences combined with the need for studying how a repressive regime may complete a transition to democracy. Through such a method it has been possible to understand how the larger frameworks of tools of transitional justice should look like although they must show the right level of flexibility for local implementation. Thus, it is entirely possible to pursue a “lessons learned” approach with transitional justice mechanisms as victims often call for the same. I pursue this method to some extent within the Indonesian context by discussing the implementation of transitional justice in Aceh and if there are lessons to be drawn from this experience in relation to Papua. An additional difficulty with using a comparative analysis is time. For example, the long-term effects of pursuing the establishment of a truth commission are hard to measure and the true outcome might take a generation to see. Nevertheless, one factor remains certain; if whatever mechanisms that are implemented in the name of transitional justice do not follow what can now be regarded as “international standards” negative long-term effects will be occurred on a society’s ability to process massive human rights abuse in the past.

A weakness, or rather a hole, in my study is the need for comprehensive primary research to be undertaken in Papua. I did not have the opportunity to complete such an endeavour as victims’ needs must mapped and what mechanisms would be welcomed for a society as a whole to process the past. Although I conducted interviews in Jakarta and with individuals with intrinsic knowledge of the province, it has been a constant difficulty to not have been able to conduct local field work. However, more work on transitional justice is currently undertaken at the Australian National University (ANU) through several Indonesian PhD candidates. It is also a difficult operational climate, due to government restrictions on research as well as genuine concerns over personal security. The current situation in Papua is tense and researching controversial topics, such as human rights related issues, can only be completed in a covert manner. Also, I was officially associated with KontraS (The Commission for ‘the Disappeared’ and Victims of Violence), perhaps the most controversial human rights non-governmental organization (NGO) in Indonesia, which could prove to be a major obstacle. However, I have tried to make to most of my internship with KontraS in Jakarta to write this thesis. This shall be further elaborated upon below as it became an invaluable source of its own.

In addition, the author’s lack of proficiency in the Indonesian language, Bahasa Indonesia, has been a limitation and a weakness from the outset. It has unable me to

access Indonesian archives and other sources without a translator. During the time spent with KontraS I was relying on aid from staff, but I was not able to interact directly with non-English speaking interview subjects and original legal texts etc. This is an obvious limitation, which I have tried to overcome by asking for help and researching possible translations, while still learning as much Indonesian as possible.

Finally, a massive limitation that any researcher on Papua will occur is the lack of access to official data and documentation. As Papua has been closed to any international scrutiny for decades due to military control it is extremely difficult to verify a track record of the past. This especially difficult when looking for human rights violations as it is completely impossible to access old military records. Thus, this allows for speculation or unofficial, self-collected documentation among activists and academics, and inconsistency of data and statistics regarding events and incidents of the past may occur.

The depth of analysis was another consideration for choosing a single-country study. Due the limited scope of the thesis it was necessary to focus on a single country only, in order to pursue a deep and comprehensive analysis. More specifically, the thesis will outline relevant historical events, dating back to the early 1960s. This is vital for the understanding of today's Papua and the difficulties of claiming independence from Indonesia. Indonesia's incorporation of Papua into the Republic was completed with the approval of the international community, through the United Nations General Assembly (UNGA). It remains crucial for the understanding and validity of sentiments entrenched in Papuan society today. Thus, the historical period of interest stretches from the 1960s to the fall of Soeharto and the beginning of the Indonesian transition in May 1998, until today.

At the time of writing, transition, or *reformasi* (reformation), is far from over and the failure to implement key mechanisms of transitional justice remains the last major obstacles for this emerging democracy and powerhouse of Southeast Asia. Furthermore, concepts such as justice, truth, forgiveness, and punishment, underlying the approaches of transitional justice shall be touched upon in the introduction as it is important to recognize their roots in philosophy and political theory.

1.2.2. Choice of Indonesia and Papua as objects of study

The reasons for selecting Indonesia as the focus of this thesis became clear to me as I quickly realized that Indonesia's transformation process had yet not been completed; mainly due to

the lack of willingness to bring up the past as an ingrained culture of impunity remain a systemic feature. Indonesia is an interesting case study as it has largely completed a democratization process and established a solid legal framework for protecting human rights and settling truths of the Soeharto regime. Furthermore, Indonesia has experienced several secessionist challenges such as in Timor-Leste, Aceh and Papua, which have threatened the unity of this newfound democracy and confronted the government with upholding promises of human rights protection. Besides, both challenges to Indonesian sovereignty in Timor-Leste and in Aceh were resolved, for better or for worse, with the intervention of foreign actors. Thus, the government of Indonesia (GoI) remains cautious and even fearful of similar interaction in Papua. In essence, Papua remains the final frontier to Indonesia's democratization project as the human rights situation has kept deteriorating in certain areas over the past five to six years.

The situation in Papua has come to a vital crossroads due to two significant factors, which has contributed to me choosing Papua as the focus of my thesis. First, as Aceh's call for independence died with the peace agreement in 2005, Papua remains the last single major obstacle to *reformasi* and for Indonesia to be seen as abandoning tactics and policies associated with the era of Soeharto. Second, the next presidential election is coming up in 2014 and as the president remains very powerful, and exercises a vertical top-down management style, it remains absolutely determinant to resolving the situation in Papua. The current president, Susilo Bambang Yudhoyono (SBY), is constitutionally limited to two terms in office and will step down. However, the election of a new president can completely change the prospects for Papua overnight. On the other hand, if SBY was seen to resolve the situation in Papua and pursue the implementation of mechanisms of transitional justice, as called upon by the Papuan people, it would remain a highlight of his political career. Thus, the writing of this thesis comes at a time of great magnitude as SBY has three years left in office and developments have been observed in Jakarta's dealings with Papua through the newly established the Special Unit for Acceleration of Development for the Land of Papua (UP4B), led by former commanding general in Aceh during the tsunami and the following peace negotiations, Lt. Gen. Bambang Dharmono. This became a major factor in justifying the use of Papua as the cornerstone of this thesis.

Finally, the internship opportunity with KontraS became part of the justification for using Papua as the major case study in my thesis, as the organization focuses on the conflict and wanted me to work on the development of justifications for a truth and reconciliation commission in Papua. I wanted to utilize this opportunity to the fullest as it would enable me

to conduct primary research and give me a unique insight from the ground. The experience with KontraS shall be further discussed below.

1.2.3. Review of literature

There are few key studies that are vital to my research. The newly published report by KontraS and the International Center for Transitional Justice (ICTJ), titled *Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto* (March 2011), is important for a local evaluation of transitional justice mechanisms in Indonesia as a whole. Furthermore, there has been a Master's thesis written at Lund University, Sweden, titled *The Implementation of Transitional Justice in Post-Conflict Situations: Case Study of Aceh and Papua* (2007) written by Ranyta Yusran, but which mainly focuses on legal aspects. My approach will be more multidisciplinary as transitional justice as a whole is a field that requires such an approach. Legal analysis will be used, but a qualitative method of political science will be dominant. Even though I use some anthropological sources for deep and specific content I will not use such methods for this thesis. I shall now highlight important secondary sources, then turning to primary sources.

For an important discussion of a Jakarta-Papua dialogue, the newly published *Papua Road Map: Negotiating the past, improving the present and securing the future* (2010) is essential, not only for its inventive content on conflict resolution in Papua, but also because it is written by the most influential social science institute in Indonesia. It has also raised transitional justice mechanisms as solutions to trust-building between the central government and Papuans. Furthermore, the authors recommend a “reconciliatory political path”, including the investigation of past violence, as a major element to facilitate a dialogue (Widjojo, 2010, p. 158). Importantly, it remains the most developed academic study on the future of Papua, as it is based on primary research, and it remains relevant for further studies on transitional justice mechanisms in Papua.

Other studies are relevant for particular sections and sub-sections of my thesis. For example, for the historical aspect of the Papua conflict authors like John Saltford and Pieter Drooglever are important, whereas authors such as Richard Chauvel plays a key role in the evaluation of Papuan nationalism. In addition, Rodd McGibbon's work is indispensable for a discussion of the Special Autonomy Law and so is Neles Tebay's work on the role of the faith community and the future of a Jakarta-Papua dialogue (see bibliography). Edward Aspinall's thorough analysis of Aceh and the implications of implementing transitional

justice mechanisms have proved invaluable to my understanding of the underlying factors leading up to the peace agreement, but also the challenges this agreement protrude in light of a transitional justice framework. International Crisis Group (ICG) and Human Rights Watch (HRW) have both frequently published reports and collected evidence highlighting detail and essential statistics used for this thesis.

In general, this thesis will fill a gap in the academia, and in the larger discussion of a Jakarta-Papua dialogue, by analyzing Papua through transitional justice mechanisms. It will combine discussion about transitional justice in Indonesia with new insight regarding the role of transitional justice mechanisms in Papua and their potential for sustainable peace. However, this thesis will also critically evaluate the feasibility of such a prospect and the difficulties of implementation.

1.2.4. Primary sources

The primary sources used are mainly interviews, but also e-mail exchanges and more informal conversations, conducted with key individuals within academia, government and the human rights community in Indonesia. I used the time I spent in Jakarta to conduct several interviews as well as group discussion with Papuan students, but I also travelled to Canberra, Australia, to speak with key experts from ANU. More specifically, I was able to talk to Lt. Gen. Bambang Dharmono, on two occasions, along with the Father Neles Tebay, the key advocate of a Jakarta-Papua peace dialogue. In addition, I interviewed one of the main authors of the *Papuan Road Map* (2010), Dr. Adriana Elisabeth, from the Indonesian Institute of Sciences (LIPI). Within the human rights field I conducted an interview with one of the most influential and vocal leaders, Mr. Usman Hamid. Previously Coordinator of KontraS, now working for the ICTJ, and a possible candidate for the human rights section of the newly established task force, UP4B. Furthermore, I was able to interview Ridha Saleh, commissioner and deputy chairperson of Komnas HAM (National Human Rights Commission), who closely monitors developments in Papua and have instrumental inside knowledge from the whole spectrum of actors. Among the Papuans in Jakarta, I established a sound relationship with a highly regarded human rights champion and tribal leader, whose name I prefer to keep anonymous. He continuously provided me with unique insight from the inside of the activist movement in Papua and in Jakarta, including information about key political prisoners in Papua. Besides, he facilitated a discussion with the Papuan students, Markus Mabel and Ganius Warida. They enabled an unmatched glimpse into the opinions and hopes of future Papuan leaders.

In Canberra I had a fruitful discussion with Dr. Edward Aspinall, focusing on transitional justice mechanisms in Aceh, but also deliberating over positive differences to the situation in Papua, which may give way to a greater likelihood of implementation. Additionally, I interviewed former ICTJ employee Sri Lestari Wahyuningroem, now a PhD candidate at ANU, about the various options of implementing transitional justice mechanisms in Papua. More specifically, she made me aware of civil society initiatives to establish an unofficial truth commission based on past violence documented by local church networks.

1.2.5. Internship experience with KontraS

The reason my experience with the NGO KontraS is mentioned separately is because it has been a determinant source and motivation for the writing of this thesis².

The organization itself was formed in the midst a period of political turmoil in the mid- to late 1990s where the dictatorship of President Soeharto tried to crush any political opposition to his reign. From 1996 to 1998, people grew increasingly opposed to the regime, but the State also responded by even greater violent repression. Several student activists were kidnapped by state security organs and never heard from again. These enforced disappearances were a state attempt to eradicate any sign of opposition. However, the pro-democracy movement only cemented deeper with the Indonesian people and especially amongst the students themselves.

KontraS was born in March 1998, out of an increasing concern regarding increasing state-sponsored violence. Moreover, it quickly became the leading Indonesian organization confronting Soeharto's brutal regime. In simple words, KontraS symbolized the very essence of the pro-democracy movement and the core of anti-state sentiments. Despite Soeharto's downfall in May 1998, KontraS remained a government target in an attempt to break its will to fight on for the most basic civil and political rights, such as the right to life and due process, until a recent change in government tactics. Furthermore, the assassination of Munir Said Thalib in 2004, one of the founders of KontraS, contributed to KontraS remaining at the center of the human rights dialogue through the *reformasi* and cemented its credibility as arguably the most revered non-governmental organization in this new-born democracy.

Thus, my internship with KontraS became an unparalleled source of its own and a catalyst for further primary research as the organization has a vast network within

² The internship was made possible through the course 'Human Rights in Practice' which was a requirement of the Master's programme at the Norwegian Centre for Human Rights (NCHR). More specifically, the opportunity to work with KontraS in Jakarta was facilitated by the Indonesia Programme at the NCHR.

government, the public, and the human rights sector, both domestically and internationally. I was able to further my knowledge greatly with the assistance of KontraS staff although I was never expected to participate in campaigning activities.

Importantly, we shared a common overarching mindset in regards to human rights, but our methods and focus differed greatly. However, my main challenge was to adapt to mindset of a NGO compared to the academic way of thinking and writing. I found that KontraS often focused on how this could lead to change, whereas I thought about trying to analyze the facts more objectively. In my opinion, I have experienced several academics working on the area for peace in Papua who seemingly lost their academic focus in exchange for rather semi-activist work, but who still published articles and books through academic forums. In general, I believe this is a true challenge for academics working on human rights issues, as cooperation with NGOs is often preferable when conducting field research. For example, I was able to use the contacts I had established to set up interviews to conduct research while residing in Indonesia. This was extremely valuable and it is unthinkable that qualitative research of a high standard within this field can be reached without it. However, I think my integrity as student of academia was preserved throughout my internship and that my methodology and writing did not suffer from a close interaction with an activist community.

1.3. Structure of the thesis

This thesis is divided into six chapters. Chapter 1 is concerned with outlining the mindset behind the thesis and the methodology as well as sources used. In addition, the chapter illuminates how the thesis complements existing academia on the topic, but also the knowledge gap it is attempting to fill.

Furthermore, Chapter 2 familiarizes the reader with the conceptual parameters of transitional justice and highlights many of the main issues often encountered.

Chapter 3 moves on to Indonesia's experience with such mechanisms since its initial transition in 1998 and the Papuan conflict itself, highlighting historical and political factors determinant to today's need for dialogue. Further, it outlines these factors as justifications for the creation of transitional justice mechanisms in Papua and sets the stage for the actual "blueprint" that is expanded upon in Chapter 5. In essence, it connects the concepts of transitional justice with Indonesia creating a platform for evaluating Aceh and later Papua through this particular lens.

In Chapter 4 Aceh is of focus. It not only discusses the 2005 peace agreement, ending a 30-year old conflict, but also offers a wholesome perspective on the transitional justice aspects of the post-conflict period. It takes the reader on an evaluation of the implementation of such mechanisms in order to find “lessons” to be learned for reaching sustainable peace in Papua.

Thus, Chapter 5 is concerned with analyzing the use of transitional justice mechanisms in Papua. It offers insight and detail on specific mechanisms and how they could best function in Papua to complement dialogue. Importantly, they are presented as tools for establishing a sustainable peace as a province of the Republic of Indonesia.

Finally, Chapter 6 offers a conclusion, including the implications of this thesis.

2. Concepts of Transitional Justice

“The old world is dying away, and the new world struggles to come forth: now is the time of monsters” – Antonio Gramsci (1892-1937)³

The idea of transitional justice is not new. The question of how to appropriately address large-scale violence is not new. Although specific terminology and the creation of transitional justice as a separate academic and practical entity within the theory and practice of democratization are relatively new, the underlying values of mechanisms of transitional justice are not. The emotional and philosophical, but also juridical and ethical values of concepts such as justice, peace, truth, punishment, forgiveness, and accountability lay at the heart of such mechanisms. In essence, mechanisms of transitional justice attempt to grapple with societies that have experienced a transformation from armed conflict, dictatorial or authoritarian regime into an “emerging democracy” (Kritz, 1995). The past is alienated from newfound respect for human rights and democracy after experiencing some level of transition.

Creating a framework for handling such grave abuse that has scarred an entire people is not by any measure a small feat. In a post-conflict environment, the immediate peace must be kept, but a long-term resolution also developed. The equilibrium between chasing perpetrators and bringing them to justice and looking towards the future, reconciling a people that have perhaps been fragmented for half a century, is a unique test. Notions of forgiveness, truth, justice and accountability are not universal values, thus making the definitions depend on a particular cultural, social, historical, and political landscape. Although people have very similar needs, differentiated opinions easily emerge in regards to how to meet them and what takes priority. Transitional justice pioneer, Priscilla Haynes, asked the imperative, but yet simple question to a Rwandan official after the 1994 genocide; “Do you want to remember, or to forget?” (Hayner, 2011, p. 1). Although it might not seem so, the answer to this question may redefine an entire society and its ability to come to grips with past horror.

Arguably, features of transitional justice can be found in the aftermath of World War II. The Nuremberg Trials can be seen as an early judicial measure of accountability for gross human rights violations and war aggression foreshadowing a new era where such abuse cannot and will not be accepted by the larger international community. However, it was also a process dictated by the victors of the War and the final judgments were foregone

³ Quote attributed to Antonio Gramsci. Cited in Smith, Eric D. 2010. “‘A Presage of Horror!’: Cacotopia, the Paris Commune, and Bram Stoker’s Dracula”, *Criticism*, 52(1), pp. 71-90.

conclusions with the problematic elements of ‘punishment’ dominating a process of justice. Nevertheless, it remains a notable precursor to mechanisms of transitional justice.

A more holistic approach was to be called upon and it was towards the end of the Cold War, in the late 1980s and early 1990s, that judicial, truth-seeking, reparatory, and institutional reform mechanisms grew into a global phenomenon in order to shape a theoretical and practical field, better known as ‘transitional justice’. The transitions from military rule to a liberal market democracy pursued in Latin America were of focus. More specifically, the collapse of the military dictatorship and the election of Raul Alfonsín in Argentina in 1983 spurred a passionate debate about who should be punished for human rights violations and what should be done for victims of those violations. Alfonsín, in an unprecedented move, opted for a trial of the military junta and established a truth commission in order to learn the truth of what happened to the “disappeared” at the hands of the security forces (Arthur, 2009, p. 322/3). Before outlining a deeper analysis of transitional justice and its mechanisms, conceptual definitions deserve further elaboration.

2.1. Defining transitional justice

The United Nations (UN) offers the most comprehensive approach to transitional justice, which vividly clarifies its role, function and importance, but also its nearly insurmountable challenges (UN, 2010, p. 3):

For the United Nations system, transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Whatever the combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.

One of the most influential advisory bodies and NGOs in regards to furthering the field of transitional justice, both in theory and practice, is the ICTJ. They offer a compact conceptual summary (ICTJ, 2009):

Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote the possibilities for peace, reconciliation and democracy. Transitional justice is not a ‘special’ form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.

Finally, transitional justice is continuously developing as it is a very young field still and “lessons” are learnt with every new experience, thus allowing the discipline to continue to evolve. Above, transitional justice has been defined as a ‘response’ to gross violations of human rights. This so-called ‘response’ has been outlined as four overarching mechanisms of prosecutions, truth-seeking initiatives, victim reparations, and institutional reform. They can be considered the backbone of transitional justice and their exploration have a natural place in this thesis.

2.2. Prosecutions

It is useful to elaborate on the conceptual and philosophical understanding of criminal justice as a tool often utilized in states of transition to hold individuals responsible for grave crimes of the past. Such a discussion is not only valuable for its own merit, but can also shed light on the Indonesian experience with criminal justice as an element of *reformasi*. Furthermore, it is a particular interesting mechanism of transitional justice which has endured profound developments in the Indonesian legal system and on the political arena. A greater debate focusing on the philosophical and moral underpinnings of prosecutions and punishment is beyond the scope of this thesis.

More specifically, there are several arguments for punishment as an element of accountability of past crimes which are widely regarded as falling into the categories of retributivism, deterrence, victims’ rights and the education of the wider society (Sriram, 2004, p. 7). Retributivism is arguing that a crime must be punished because the actions of the criminal were reprehensible. In essence, prosecutions should be carried out after a transition to ensure the nation, through the new regime, recognizes that wrong-doing was committed (Sriram, 2004, p. 7). However, this argument calls for a blanket policy which would have to be applicable to all perpetrators, not just a select few. It remains problematic as the new

regime often selects who should be held accountable for human rights violations depending on the level of political willingness to prosecute high-ranking individuals who ordered the crime, the people who carried it out, or both.

The deterrent effect of prosecuting individuals for committing grave human rights violations is a common argument for applying criminal justice, or prosecutions rather, as a mechanism of transitional justice. Deterring future violations by ending the impunity of past violations has long been recognized as an important justification for pursuing prosecutions. Amnesty International's (AI) policy statement on impunity echoes this deterrent effect of pursuing criminal prosecutions and highlights the danger of not doing so as it encourages a self-perpetuating cycle of violence, which may result in a continuation of human rights violations veiled by a culture of impunity (as published in Kritz, 1995, p. 219). Not only can prosecutions deter future abuses, but also greatly increase the credibility of the new regime as it respects the rule of law. On the other hand, Sriram highlights a fundamental problem with the deterrent effect of prosecutions. Such an argument is based on the assumption that the perpetrator knew him/herself to be wrong at the time of their actions, which may often not be the case within an authoritarian regime where committing grave human rights abuse may be a systemic feature (Sriram, 2004, p. 8).

Yet, another argument put forward defending the use of prosecutions as a tool of transitional justice is that of victims' suffering. By not prosecuting individual perpetrators one fails at acknowledging the victims and the costs that have been incurred in the past regime. However, it is perhaps a less convincing argument than the first two as victims are often more concerned about the truth and being heard in a public forum than in prosecutions ending convictions or compensation. For example, the Truth and Reconciliation Commission (TRC) in El Salvador named a number of perpetrators by name in their final report despite facing heavy resistance in the name of 'reconciliation' (Buergenthal, 1994, p. 519-23). In addition, victims' rights are also about reparations and reintegration of conflict victims into society where victim-centered programs may achieve greater results than criminal prosecutions of perpetrators.

Finally, prosecutions of human rights abuse may move beyond that of distributing justice and strengthen a new democracy through their educational impacted of past events (Sriram, 2004, p. 10). As large segments of society may have been impact by the past regime's ability to more or less control formal education and cast a vast carpet over any previous allegations of human rights violations. An authoritarian regime would also control the media's ability to shed light on atrocities of the past. In a country as large as Indonesia

this may very well be an important reason to prosecute individuals, although a national TRC may also serve the purpose of educating the public.

2.3. Truth-seeking initiatives

Truth-seeking initiatives in transitional societies investigate past human rights violations mainly through truth commissions, commissions of inquiry, and fact-finding investigations (UN, 2010, p. 8). Although fact-finding investigations and other commissions of inquiry are undoubtedly important elements of truth-seeking, the use of truth commissions is an emerging phenomenon. Truth commissions have played a significant and growing role within a global trend of utilizing a framework of transitional justice. More specifically, truth commissions have been set up in over 30 countries including the well-known commissions in South Africa, El Salvador, Guatemala, Timor-Leste, and Argentina. The UN defines truth commissions as “official, temporary, non-judicial fact-finding bodies that investigate patterns of abuses of human rights and humanitarian law committed over many years” (UNSC, 2004, p. 17). In essence, the right to truth has also been recognized in international law, obligating states to provide information to victims or to their families or even an entire society regarding the circumstances of past serious human rights abuse (Naqvi, 2006, p. 245). The groundbreaking case *Velásquez Rodríguez vs. Honduras* (1988) affirmed that the state has a duty to investigate the truth. Also, in *Barrios Altos vs. Peru* (2001) the Inter-American Court confirmed the right to truth as a State obligation in other serious violations of human rights (para. 48). The origins of the concept of the right to truth in international law, stems from Article 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 wherein States are required to search for missing persons and families have the right to know the fate of their relatives. Broadly speaking, the Geneva Conventions were widely interpreted and, therefore, the right to truth was always closely linked to the notion of a victim of a serious human rights violation (Naqvi, 2006, p. 248).

Priscilla Hayner, suggests a comprehensive definition limiting the parameters of a truth commission, while highlighting several key characteristics (Hayner, 2011, p. 11/12):

A truth commission is focused on past, rather than ongoing, events; investigates a pattern of events that took place over a period of time; engages directly and broadly with the affected populations, gathering information on their experiences; is a temporarily body, with the aim of concluding with a final report; and is officially authorized or empowered by the state under review.

Such a commission not only offers a degree of accountability of past crimes, but it may also promote psychological healing and reconciliation, discourage future crimes, and (re-)establish a moral order and respect for human rights, while contributing to a common societal memory of the past (Greenawalt, 2000, p. 189).

Truth and justice were seen as unable to complement each other. Although this relationship is no longer seen as antagonistic by most commentators, it must be understood as they both have far-reaching impacts on the future of a transitional society. In addition, the intentions and impacts of truth commissions has been a complex issue, as a truth commission may seemingly be established with the intent to act as a substitute for prosecutions. It has been seen as a compromise to accountability in countries where the lack of political will to pursue criminal justice is extremely high. In other words, truth commissions could potentially act as a way to weaken prospects of true justice and to avoid more serious accountability (Hayner, 2011, p. 91).

However, the global experience with truth commissions since the early 1980s have shown that despite unclear and perhaps muddled intentions for their creations, they still do not have had negative impact on the prospects of prosecutions. In fact, truth commissions may aid a process of judicial proceedings at a later stage, through the commission's mapping of perpetrators and access to crucial documentation. Some truth commissions, namely in Morocco, Chile and in the Solomon Islands, truth commissions have been prohibited from naming perpetrators or playing any role in judicial proceedings and the commission in Guatemala was mandated to have "no judicial aim or effect" (Hayner, 2011, p. 93). Nevertheless, the information gathered by the commissions may used at a later stage by prosecutors.

To further explore the relationship between truth and justice it is necessary to touch on the issue of amnesty as a potentially deeply problematic issue for truth commissions to come to terms with.

Rebecca Saunders presents intriguing insight into the definition of amnesty by summarizing the concept to be "a functional and documentary forgetting, of dangerous memories, consequences, punishment and indemnity" (Saunders, 2011, p. 125). The deliberation of amnesties is inevitable in establishing a truth commission as the commission's ability to complete its work may depend on perpetrators telling their story and admitting their crimes. Essentially there are several ways in which giving amnesties to perpetrators may aid a truth

commission. However, before outlining these possibilities one must establish what amnesty truly represents in moral terms.

To what extent is it morally defensible to administer amnesties to individuals who have committed serious human rights violations? For example, if amnesties are handed out, does that mean the perpetrators are forgiven for their crimes? The UN Commission on Human Rights emphasized the possible implication that establishing a truth commission should not be seen as an alternative to criminal prosecution (UN ECOSOC, 2005, p. 8). Does this mean that UN's directive is only broken if amnesty is administered on the premise that no criminal charges will be brought against the perpetrators in the future? Forgiveness is a term often associated with amnesties although often differentiated on a moral level. However, in the South African context the role of forgiveness played a central role as victims chose to personally forgive perpetrators and this was seen as participating in the national decision to pursue reconciliation through amnesty (Saunders, 2011, p. 125). In this unique case, amnesty was given in exchange for complete protection against judicial proceedings. Despite this close, and often blurred, link between amnesty and forgiveness it is possible to morally defend the distribution of amnesties in order to secure the truth or national reconciliation to be attempted. More specifically, there are four main ways in which amnesty can be necessary for a truth commission to operate as a mechanism of transitional justice that deserve a closer look.

Firstly, the method of 'naming names' can be important for a commission in order to serve some purposes of ordinary criminal trials (Greenawalt, 2000, p. 190). Naming names is a way to "punish" the perpetrators either through media, i.e. TV broadcasts of public hearings, or through the commission's final report. However, in order for perpetrators to do this, amnesty might be the only solution to ensure a full and true account of past events. This technique is similar to that of international human rights organizations, such as HRW, who have utilized the method of 'naming and shaming' in order achieve some measure of accountability.

Secondly, amnesty might be used by truth commissions if it is seen as a prerequisite to ensure its successful performance (Greenawalt, 2000, p. 190). Thus, it can be the used as 'the carrot and the stick', as the promise of amnesty might be the only way for a commission to receive the necessary cooperation from perpetrators of the past.

Thirdly, the ability for a truth commission to distribute amnesties might echo the commission's wider goals of promoting national unity and sustainable peace, making it possible for a society to move towards the future through a greater project of national

reconciliation (Greenawalt, 2000, p. 191). It may be difficult, or even impossible, for a truth commission to achieve such goals if prosecutions are also utilized as it can create a deeper split between old enemies and make it unattainable for a future reconciliation.

Finally, and importantly for this thesis, amnesties might not only be used for perpetrators, but also for unlawful prisoners and ex-combatants in order to recognize their wrongful detention during the previous regime. This use of amnesties also carries a substantial symbolic value as it cleanses the names of those previously unlawfully detained. Moreover, such an approach shall be further elaborated upon as a function of transitional justice after the conflict in Aceh, but also as a potential tool to be utilized in Papua in Chapter 5.

2.4. Victim reparatory measures

Reparations are perhaps the cornerstone of transitional justice mechanisms as they are ways of trying to achieve remedy for victims of gross violations of human rights. The UN has developed an encompassing approach to reparations through the *Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UNGA, 2006). Before elaborating on the *Basic Principles* a differentiation between two categories of reparations is deemed appropriate. Jemima García-Godos highlights the complex nature of reparations, which can lead to conceptual misinterpretations, and draws attention to Pablo De Greiff's suggestion to distinguish between two categories of reparations as used in international law and in reparations programs (García-Godos, 2008, p. 120). In essence, it is an important distinction to make as markedly different conceptual parameters exist, thus leading to confusion if the details of one are applied to the other.

Firstly, victim reparations within international law, and coherent with the *Basic Principles*, represents a juridical definition that refers to a broad set of reparatory measures, not specific violations, closely interlinked to other mechanisms of transitional justice (García-Godos, 2008, p. 121). Moreover, the UN outlines five forms of juridical reparations in the *Basic Principles*: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. These principles are far-reaching and almost an umbrella manifest for transitional justice as other mechanisms such as institutional reform, judicial sanctions as well as truth-seeking are all loosely covered. The essential objective is to cover as many factors as possible in order to achieve remedy for victims of gross violation of human rights.

On the other hand, it can be argued that this resolution goes too far in its definition of reparations under international law by going too broad and that other mechanisms of transitional justice are more appropriate instruments to address certain issues. A deeper discussion of the *Basic Principles* is beyond the scope of this thesis, but it remains an invaluable contribution to the international legal understanding of victim reparations.

Nonetheless, the juridical concept of victim reparations is not particularly useful for the development of comprehensive reparations programs beyond general guidance, as it needs to narrow the precise target groups of victims and the specificities of the violations inflicted. In essence, it focuses on reparations only, not other elements of transitional justice, and it is mainly concerned with the types of reparations and the means of distribution (García-Godos, 2008, p. 121). Furthermore, the context of a reparations program, such as the cultural, historical and social factors, is highly country-specific and makes a template nearly impossible to find. The UN (2010, p. 8), through the Secretary-General, stresses that reparations programs may include

monetary compensation, medical and psychological services, health care, educational support, return of property or compensation for loss thereof, but also official public apologies, building museums and memorials, and establishing days of commemoration.

In addition, it must be decided whether a particular reparations program shall focus on individual victims or collectives as this will have a tremendous impact on the success of the program. Again, the UN highlights the challenges involved in shaping an appropriate reparations program and the multitude of issues involved (UNSC, 2004, p. 18/19):

Difficult questions include who is included among the victims to be compensated, how much compensation is to be awarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed.

Moreover, the challenges of creating a reparations program which truly meets the needs of victims of gross human rights violations are many. It is also a process needing the support of other mechanisms of transitional justice to meet its full potential for effective reparation.

2.5. Institutional reform

Institutional reform can be considered a mechanism of transitional justice, which may prove determinant to a process of transition and for building a democracy, respecting and protecting human rights. In essence, reforming public institutions that were rooted in the previous

regime should be a priority for the new regime. The UN emphasizes its essential function as “by reforming or building fair and efficient public institutions, institutional reform enables post-conflict and transitional governments to prevent the recurrence of future human rights violations” (UN, 2010, p. 9). This may be accomplished through a comprehensive vetting program of key public institutions, such as the security forces and the judiciary. More specifically, “vetting usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army, and the judiciary” (UNSC, 2004, p. 18). As this thesis has already demonstrated, transparent and efficient public institutions working towards a sustainable democracy is absolutely pivotal for other mechanisms of transitional justice to be implemented.

Despite the importance of vetting personnel, there are other profound ways by which a transitional regime may engage in institutional reform. In particular, measures may include the creation of civilian oversight, structural reform, and transforming existing legal frameworks (OHCHR, 2006, p. 4). Creating civilian oversight of public institutions can be an important method by which clandestine activities of the security forces or the abuse of finances may be detected or deterred. Secondly, reforming or even replacing some public institutions associated with the past regime and gross violations of human rights may be necessary for a country to break with the past and build a civic relationship based on trust in governance. Complemented by a process of vetting, structural reform in public institutions will help the prevention of a recurrence of human rights abuse and enhance a country’s international reputation. Finally, transforming legal frameworks is often a necessary beginning to greater institutional incorporation of codes of ethical conduct. Using international instruments of human rights is often the first step for the implementation of mechanisms of transitional justice and it also recognizes a country’s progress to adhere to international standards. Moreover, it is a way in which the state recognizes the need to address victims and abuse of the past. For example, institutions such as human rights courts and truth commissions need legislative support for their creation and authority.

3. Indonesia's Experience with Transitional Justice Mechanisms

This chapter outlines Indonesia's experience with prosecutions, truth-seeking initiatives, victim reparations and institutional reform as a response to widespread and systematic human rights abuse. Examples of implementation shall be provided in order to paint a picture of Indonesia's practice with justice mechanisms in times of recent transition. This chapter will also outline the roots of Papuan nationalism and introduce the source of historical grievances in Papua.

3.1. Finding political will? Prosecutions in post-Soeharto Indonesia

The legal framework in Indonesia has changed radically in regards to human rights in the post-Soeharto period. A major part of the incorporation of human rights has been centered on the prosecutions of grave human rights violations of the New Order. Judicial mechanisms have gained profound attention in the *reformasi* process, which have proved the willingness of the elite to accommodate to civil society pressure regarding state accountability of past crimes. A highlight of such change was the enactment of Law 26 of 2000⁴, which not only established four permanent provincial human rights courts, but also allowed for the creation of ad hoc courts to try alleged crimes committed prior to the Law's enforcement in 2000. The regional human rights courts in Makassar, Jakarta, Medan and Surabaya have the jurisdiction to try crimes of genocide and crimes against humanity occurring before year 2000. Their definitions of genocide and crimes against humanity are based on that of the International Criminal Court (ICC), even though war crimes were omitted. However, the permanent human rights court of Makassar is yet the only currently existing.

In addition, the Law also shaped the process by which an investigation can be opened by the National Commission for Human Rights, or Komnas HAM, and individual indictments may be initiated by the Attorney General's Office (AGO) in order for prosecutions of human rights abuses to take place. Law 34 of 2004 also mandates the prosecution of military personnel, who allegedly committed human rights abuses against civilians, to be tried in civilian courts instead of in military tribunals. This was a major legal development as military tribunals were secretive and clouded with a thorough lack of accountability for human rights violations. However, these institutional and legal developments allowing for the potential prosecution of human rights crimes before and after the fall of Soeharto have not been reflected in practice.

⁴ See English translation Asian Human Rights Commission, <http://indonesia.ahrchk.net/news/mainfile.php/hrlaw/18?alt=english>, accessed 21.10.2011.

There are several gaps in the implementation of human rights prosecutions in Indonesia. More specifically, there have only been three cases that led to prosecutions by the AGO using Law 26 of 2000. Two ad hoc courts were created for the prosecution of individuals involved in the 1999 violence in Timor-Leste and the Tanjung Priok incident from 1984 where Indonesian security personnel opened fire on civilian protesters. The third trial, the Abepura case, was held in the Makassar permanent regional court with two individuals accused. Komnas HAM investigated several other incidents, but no action was ever taken by the AGO. In essence, the commission named 137 individuals to be prosecuted by the AGO, but only a total of 34 individuals have been indicted by the Attorney General and not a single person has been jailed for gross violations of human rights in Indonesia as of present (ICTJ & KontraS, 2011, p. 41).

There are several factors contributing to this total inability to seek criminal justice for human rights perpetrators, but the failure of vetting personnel in the AGO, judiciary and the military, combined with corruption in the very same institutions, as well as the lack of political will of the president and the parliament remain the largest obstacles to accountability. For example, during the New Order the AGO was an organ used to prosecute Indonesians opposed to Soeharto and since the *reformasi*, the AGO find themselves investigating and prosecuting former (or sometimes current) colleagues for acts committed when they may also have been part of the military. In addition, the president has been hesitant to initiate prosecutions through ad hoc courts, which require a presidential decree, as it could damage his ties with the military and other elite elements vital to his campaign. It is undoubtedly clear that impunity has been allowed to continue as the system is still dominated by large patronage networks, fuelling the lack of true reform (Hadiz, 2003, p. 112).

3.1.1. The Ad Hoc Human Rights Court for Timor-Leste

The Ad Hoc Human Rights Court for Timor-Leste was mandated by former President Megawati to try alleged perpetrators for the violence that occurred around the referendum, in April and September 1999. There was clear evidence of the Indonesian Armed Forces (TNI) orchestrating the creation and funding of a number of militia groups whose mission was to discredit and defeat Timorese pro-independence groups through violence, affecting a great number of civilians. Timor-Leste wanted to break away from Indonesia and former President Habibie surprisingly allowed a referendum to take place, underestimating the sincerity of the

peoples wish for independence. The TNI was doing what they could to desperately undermine the pro-independence movement. Moreover, this resulted in the aforementioned violence around the time of the referendum.

The prosecutions before the Ad Hoc Human Rights Court, known as the Timor Trials, highlighted the insurmountable difficulties of ending the culture of impunity, despite the goodwill of judges to try to arrive at independent judgments based on the facts laid before the court by the prosecution and the defence. Out of the 18 accused standing trials, 12 were acquitted and six convicted at trial, but all convictions were overturned at appeal. There were numerous issues in these trials that are representative weaknesses of the entire system, making it virtually impossible to successfully use prosecutions of human rights perpetrators. More specifically, three overarching flaws shall be briefly elaborated upon to create a greater understanding of the Indonesian system.

Firstly, the failure of the prosecution to use evidence, despite its clear existence and availability, was a major flaw leading to lack of facts verified in the trials (Cohen, 2003, p. 5). For example, a report by the Commission for Human Rights Violations in Timor-Leste (KPP HAM) investigating the violations between January and October 1999 in Timor-Leste came to the groundbreaking conclusion, after numerous cross-examinations of high-level officials as well as the exhumation of bodies, that Indonesian security officials were implicit in crimes against humanity (ICTJ & KontraS, 2011, p. 46). This was the very initiator to the creation of the Ad Hoc Court, but during the trial the prosecutors from the AGO failed to use the investigation as evidence. In addition, AGO failed to get and use evidence from thousands of eyewitnesses collected by the UN. In general, the UN was seen as an actor with shared responsibility for the violence and challenging Indonesia's sovereignty by siding with the pro-independence groups (ICG, 2002, p. 8).

Secondly, and perhaps most importantly, there was a total failure of AGO's prosecution team to present a clear and coherent account of the violence in Timor-Leste, ridiculing the serious charge of crimes against humanity. In essence, the indictments were ill-prepared and did not focus on discovering systematic features of the GoI-sponsored violence, but rather presenting the various massacres as individual incidents, committed by a range of different groups (Cohen, 2003, p. 5/6). Furthermore, the prosecutors portrayed the massacres around the referendum as being results of conflict between two equally responsible and equally matched parties (ICG, 2002, p. 6;8). This created confusion regarding the actual chain of events in Timor-Leste and it has had a negative pedagogic effect on the Indonesian people. If the prosecutors had acknowledged the genuine role of the Indonesian security

forces this would have had severe consequences on the judicial proceedings in other Indonesian conflict zones, such as in Aceh and Papua. Most importantly, the officers indicted were not charged by the AGO on actual involvement in the abuses, which could amount to crimes against humanity, but rather that they failed to control their subordinates on the specific dates when the massacres occurred. For example, the indictments of the former provincial police commander, Timbul Silaen, and former governor, Abilio Osorio Soares, emphasized “failure to take appropriate measures to control his [Abilio] subordinates” and Silaen’s leadership fell short on specific dates only (ICG, 2002, p. 5;7). Conveniently, the indictments emphasized that Silaen was absent in Jakarta during the massacres, thus himself a “victim” of insubordination.

Finally, another overarching flaw with the Timor Trials, which has been a continuous feature of the transition process, was the deep-rooted lack of political will. The Timor Trials are representative in this respect as it highlights a fundamental and endemic problem. Moreover, it is especially difficult to find the needed political will within the AGO. Due to the hierarchical and top-down system of governance in Indonesia it is not even necessary for the ruling elite to predetermine the Timor Trials by giving orders, as a culture of loyalty exists, based on the blind belief in that the governments seeks the interest of the people (Cohen, 2003, p. 45). Despite their lack of training in human rights law and the flawed trials presented by both the prosecution and the defence, the judges in the Human Rights Court (HRC) for Timor-Leste handed down judgments as they saw fit. Although the outcome of the trials was not predetermined, they were victims of a culture of impunity and self-preservation. In essence, the lack of upheld convictions, which was the final outcome of the Trials, was due to the apparent ineptitude of the AGO to build and prosecute for crimes against humanity. David Cohen describes these professional shortcomings well (2003, p. 45):

This results in a complex interplay of factors that shape the process as a whole, thereby rendering it fundamentally opaque, especially in terms of locating individual responsibility for its failings. Incompetence or its appearance, for example, may be managed to produce desired results while obscuring accountability for them.

Additional to the failure of the AGO to exercise enough political will to prosecute the alleged perpetrators, the presidential decree establishing the Ad Hoc Human Rights Court severely limited the outcome of the Trials from the outset as the mandate did not allow indictments over the many attacks that took place before the August 1999 ballot and only included three out of 13 districts in Timor-Leste. In essence, this limited mandate, sanctioned by the

president, made it even more challenging to prove a systematic and widespread use of violence to amount to the charge of crimes against humanity (ICTJ & KontraS, 2011, p. 47).

Ruti Teitel, one of the pioneers of transitional justice, emphasized the need for prosecutions to realize their constructive potential; “they need to be prosecuted in keeping with the full legality associated with working democracies during ordinary times” and warned that unless trials associated with the former regime are not conducted in a “visibly fair way, the very same trials may backfire” (Teitel, 2000, p. 30). Moreover, the Indonesian experience so far, emphasized by the Timor Trials, clearly suggests that the culture of impunity and the lack of accountability in Indonesia has not been successfully implemented, despite the establishment of an appropriate legal framework.

3.2. Truth-seeking in an emerging democracy

Truth-seeking in Indonesia has recently been plagued by setbacks and challenges despite positive signs in the early years of *reformasi*. No national or provincial truth commission has been established, with the exception of the Commission for Truth and Friendship (CTF), regarding violence in Timor-Leste. Furthermore, legislative complications have halted all progress on creating such commissions as the government continues to show a complete lack of will to achieve accountability of the past. However, other fact-finding inquiries have been executed. The CTF and its value as a truth commission shall be briefly elaborated upon as it remains the only Indonesian illustration of its kind.

Some positive developments include the revived importance of Komnas HAM, the National Commission for Human Rights. It is cemented as permanent features in the political landscape pursuing rigorous investigations into past human rights abuse. Komnas HAM submits detailed investigative reports to the AGO, recommending individuals to be prosecuted for gross violations of human rights. It is mainly made up of former human rights activists and their role can often be described as being “between a rock and a hard place”. More specifically, Komnas HAM is a state institution, but it almost operates as a quasi-state organization as it is an independent body often collaborating with NGOs and enjoying more support outside government circles than within. As it investigates allegations of state-sponsored violations of human rights it has often been seen as a state antagonist. However, human rights NGOs are often critical to the Komnas HAM for not doing more and being more progressive in the fight against impunity. Needless to say, the choice of Komnas HAM

commissioners has a great impact on the commission's direction and relentlessness to pursue bold human rights investigations. Law 26 of 2000 on Human Rights Courts (art. 19) mandates the commission to conduct investigations into incidents that are suspected of constituting gross violations of human rights as well as receiving individual complaints. Among other powers, the commission should monitor the human rights situation and accumulate research on human rights in Indonesia, but also call on witnesses and subpoena documents. As touched upon earlier, despite Komnas HAM's ability to complete substantial investigations, documenting gross violations of human rights and delegating individual responsibility, its conflictual relationship with the AGO has limited its influence (ICTJ & KontraS, 2011, p. 24). In essence, the prosecutor's unwillingness to proceed with cases involving the security forces has left truths of the past unacknowledged by the state apparatus.

Another major gap and obstacle to truth-finding in Indonesia is the legislative challenge posed by the 2006 annulment of the 2004 Law on a Truth and Reconciliation Commission by the Constitutional Court. This has had dire consequences for the possibility of a national truth commission, but also for provincial commissions in Aceh and Papua. Moreover, the issues surrounding the annulment and its effects will be elaborated upon at a later stage, but safe to say it has contributed to upholding the lack of state accountability.

3.2.1. The Commission of Truth and Friendship

The CTF was a collaborative project between Timor-Leste and Indonesia, with commissioners from both countries. This was unprecedented in itself as there has never been a truth commission set up by two governments before anywhere in the world. However, it has been argued that the establishment of the CTF was mainly to avoid the possibility of an international tribunal to be set up regarding the 1999 atrocities. Thus, it was important for the GoI to empower the commission with the authority to recommend amnesties and ensure no future prosecutions of the perpetrators (Hidayat, 2008, p. 17/18). The final report was a positive surprise to commentators, as it chose not to delegate amnesties and acknowledged that Indonesian security forces were responsible for crimes against humanity in Timor-Leste. More importantly, it has been seen as a step toward accountability and justice in Indonesia as its findings were highly relevant for individual criminal liability, including command responsibility at the highest level although the CTF was primarily concerned with the question of institutional accountability (Hirst, 2009, p. 16). Even though the Terms of

Reference (ToR) mandated the CTF to “establish the conclusive truth”, the final report represents the closest the GoI has ever come to admitting crimes against humanity. On the other hand, and despite a positive report, the process by which the commission conducted its inquiries was highly unconvincing and revealed fundamental methodological gaps in implementing a genuine truth commission.

The primary and major flaw of the public hearing process was that it did not focus on victims’ testimonies, but gave perpetrators of serious human rights violations a platform to defend themselves without being challenged by incriminating evidence (Hirst, 2008, p. 25). Although victims were limited to 30 minutes per testimony, alleged perpetrators were allowed to go beyond this in order to complete their entire explanation, sometimes going on for hours at the time. Only 13 victims were heard in the public hearings out of 56 individuals who testified, contrasting sharply from other truth commissions throughout the world (Hirst, 2008, p. 26). Moreover, the reason for having public hearings was rather unclear as the ToR did not mandate such. Specifically, it is uncertain whether they were held to support the truth-telling process itself or whether their primary purpose was to create publicity around the commission. The motives remain clouded although it seems most likely that it gave military commanders and opportunity to deny accusations.

Ultimately, the CTF did not follow many of the international standards developed out of other truth commissions and pursued a process of denying victims a true voice at the public hearings which skewed the picture of events in Timor-Leste. In addition, the accused were allowed to speak freely and deem their innocence, making the public hearing into something falling short of a deeply flawed trial. However, the final report shows progress in combating impunity for Indonesian security officials and it shows the potential importance for establishing other truth commissions in Indonesia. From a cynical perspective, publishing a well-formulated and respected final report, despite not establishing the “conclusive truth”, was also a way for the Indonesian authorities to close the last chapter regarding the 1999 atrocities in Timor-Leste.

3.3. Victims still in search of reparations

Victim reparations in Indonesia have neither been successful nor extensively developed, despite supportive legislative change in the post-Soeharto period. It is yet another transitional justice mechanism protected under Indonesian law, but which has not been reflected in governmental practice. More specifically, Law 26 of 2000 on Human Rights Courts provides

the necessary framework to justify victim reparations as it states that “every victim of human rights violations, and his/her beneficiaries, shall receive compensation, restitution, and rehabilitation” (art. 37). As Law 26 primarily focuses on perpetrators and their violations, this provision is important as victims are to be at the heart of reparations and represents a crucial part of transitional justice. However, the government has failed to follow the *Basic Principles*.

In essence, reparation programs have been pursued in the post-conflict environment in Aceh, but plagued with problems of distribution and the responsible government agency, the Aceh Reintegration Agency (BRA), failed to adequately define victims’ needs, thus shaping a collective reparation program proven ineffective. As post-conflict Aceh shall be used as an in-depth case study at a later stage to attempt to identify possible lessons learned in regards to regional Indonesian conflicts and mechanism of transitional justice, there is no need repeat the arguments here. Safe to say, Indonesia still lacks a successful reparations program despite the identification of thousands of victims. One reason for this is the difficulty in making individual claims as it intrinsically linked to the prosecution of perpetrators. As a defendant must first be found guilty of committing a human rights violation and then the victim, or his or her family, must rely on the prosecutor to make a claim for reparations on their behalf (ICTJ & KontraS, 2011, p.68).

Nevertheless, the establishment of the Witness and Victim Protection Agency (LPSK) was meant to make this process go more smoothly with victims able to go through the LPSK to receive compensation. A human rights court judge still had to approve the decisions, but no longer wait for the court’s eventual conviction. However, the LPSK has stated that it would be difficult to process any kind of compensation as long as the permanent human rights courts do not exist. In addition, the LPSK is struggling as an agency over allegations of corruption and difficulties with funding (ICTJ & KontraS, 2011, p. 65). Apart from the reparations programs in Aceh, the legal system in Indonesia has handed down an unprecedented decision of compensation in the civil case of the assassination of human rights activist, Munir Said Thalib.

Munir was assassinated by arsenic poisoning on a Garuda flight from Jakarta, through Singapore, en route to Amsterdam in September 2004 by a former Garuda pilot, Pollycarpus, most likely on orders from the former deputy head of the State Intelligence Agency (BIN), Muchdi Purwopranjono. Pollycarpus was acquitted at the court of first instance, but later convicted to twenty years imprisonment by the Supreme Court, although Muchdi escaped accountability (Suparyarti, 2010). Furthermore, Munir’s wife, Suciwati, pursued a civil case,

demanding compensation for her loss. The Central Jakarta District Court ruled that the state airline, Garuda and the pilot to pay Suciwati close to \$70,000 in compensation. The Supreme Court later upheld the judgment, but increased her compensation to amount to almost \$400,000 (Hapsari and Indrasafitri, 19.02.2011). Moreover, Suciwati, remains an unceasing symbol and a representative to thousands of victims, and their families, subjugated to gross violations of human rights in Indonesia, although this civil proceeding remains unique in the fight for victim reparations.

Finally, victim reparation has a long way to go as a functional, comprehensive mechanism of transitional justice in post-Soeharto Indonesia. One of the main reasons for this lack of political will is deeply interrelated to the admission of guilt. In fact, making the distribution of victim reparations a means by which the GoI would recognize the many gross violations of human right committed in the past.

3.4. Indonesia and institutional reform

Institutional reform in Indonesia has proven to be one of the most difficult processes of the *reformasi* for a number of reasons.

Firstly, there has been absolutely no systematic program of vetting personnel implicated in human rights abuses of the past. Vetting has neither occurred within the security forces, nor within the political elite. The lack of vetting continues to be a stumbling block for institutional reform in Indonesia, but also for the country's development as a modern democracy as civilians continue to mistrust security forces as they did throughout the New Order (ICTJ & KontraS, 2011, p. 77). Not only has there been a lack of vetting of New Order personnel, but soldiers who has committed gross violations of human rights in the *reformasi* period have not only escaped losing their position in the military, but have been transferred and even promoted in the aftermath. For example, the assassination of the Papuan leader Theys Eluay in November 2001 led to a conviction⁵ of seven Kopassus (Indonesian Elite Special Forces) mid-level officers for mistreatment and battery, not murder, but the soldiers remained in duty, despite receiving dismissals from the Army (Hamid, 30.10.2010). A Lt. Col. Hatomo was even promoted to a senior post in Kopassus and only transferred out of the elite special force, but stayed within the military, once his promotion was revealed by a

⁵ The soldiers were convicted by a military tribunal although they committed a crime against a civilian. Parliament passed a resolution that military personnel should be tried in civilian courts for violations of the civilian criminal code the appropriate legislation regarding military courts, Law 31 of 1997, has yet to be amended (The Jakarta Post, 31.01.2011, <http://www.thejakartapost.com/news/2011/01/31/papua-violence-should-lead-military-court-reform.html>).

NGO in 2010 (ICTJ & KontraS, 2011, p. 21). Thus, military impunity and lack of accountability from New Order human rights abuse has contributed to a continued culture of violence within the security forces even after the fall of Soeharto.

Moreover, the lack of vetting and comprehensive systemic reform clearly shows that a suitable legal framework is not enough in order to protect human rights or initiate transitional justice mechanisms. Nevertheless, it is vital to highlight that Indonesia has established a substantial legal framework that has the theoretical potential for lasting change.

In order to highlight the difficulty of accomplishing structural reform and civilian oversight in Indonesian public institutions a closer evaluation of TNI reform since 1998 is worth pursuing as it was the backbone of Soeharto's regime and responsible for the majority of human rights violations in Indonesia. It also remains a socio-political power of its own, without appropriate mechanisms to ensure its restraint, accountability or transparency.

3.4.1. TNI in the time of *reformasi*

Structural reform and civilian oversight are both two measures of institutional reform that are constant concerns regarding the security sector. The Indonesian Armed Forces, previously called known as ABRI, has endured a certain degree of structural reform and its role in Indonesian society has changed since the New Order. However, there are still a number of areas of unease as it remains a unit without much civilian and parliamentary oversight. After the fall of Soeharto, the armed forces became a target of intense criticism due to its role in the New Order, thus it became inevitable that the military renewed itself to survive in the era of *reformasi* and democratization. The two issues of *dwifungsi* (dual function) and TNI business activities deserve a particular elaboration as they are both remnants of the era of Soeharto and have been focus of reform.

First, *dwifungsi*, or dual function, refers to the socio-political role the Indonesian military has enjoyed throughout its existence. On the one hand, the TNI is defending the Republic of Indonesia against external and internal threats. On the other hand, *dwifungsi* highlights the socio-political doctrinal elements which allowed, and continues to allow, the armed forces an ability to intervene in Indonesian politics and everyday life. The TNI justified their role by claiming the military played a vital role in creating and justifying the state as opposed to being an institution created by the state, thus declaring it was created by the people as an independent institution (Sebastian, 2006, p. 323). Moreover, this distinction is an important one as it is not entirely without foundation, but also problematic as it aims to

exclude the armed forces from the control of the GoI. Although the military had been more or less an extension of the will of the president during the New Order, its independence and role as the guardian of the nation never diminished. Despite the military's failure to quench unrest in the aftermath Soeharto's fall from power combined with its despicable role in the 1999 violence in Timor-Leste, its influence on the political stage remains alarming. The military had always possessed a high number of reserved seats in Parliament and they often placed active officers in the government.

Beside from immense public and internal pressure to structurally reform, the military elite was aware that changes and sacrifices had to be made, aligned with the process of *reformasi*. However, due to its independence and power, reform was only pursued on their own premises. Thus, the process was to be decided upon internally without transparency or public input. Former president Abdulrahman Wahid appointed General Wiranto, a key orchestrator of the Timor-Leste violence, as the Coordinating Minister for Politics and Security. Leopold Sebastian summarizes some of the most significant structural reforms of the TNI dictated by Wiranto's 'New Paradigm' (Sebastian, 2006, p. 330/1):

- The end to assigning active military personnel to non-military positions. If anyone wants to pursue a non-military careers (including running for political office), they must retire from the armed forces.
- Severing Golkar⁶-TNI ties, assuming a neutral position towards all political parties.
- Separating the National Police from the military (ABRI) and changing the name from ABRI to TNI.
- A civilian Minister of Defence was to be appointed and shift emphasis away from internal security to external defence.

In addition to these changes, the TNI agreed to reduce their number of seats from parliament's lower house (DPR) from 75 to 38. Importantly, Law 34 of 2004 on the TNI sought to improve professionalism, increase civilian control of the military, but also to eliminate all TNI business activities (ICTJ & KontraS, 2011, p. 74). Essentially, the TNI initiated a slow withdrawal from the political process in Indonesia through self-proclaimed and self-censored structural reform and legislation.

On the other hand, TNI's influence on Indonesians' lives remained intact, despite the New Paradigm declaring withdrawal from politics. More specifically, the military's territorial structure upkeeps its political importance as two-thirds of its battalions are spread throughout

⁶ The Golkar Party was Soeharto's political vehicle during the New Order and was merely his extended voice at the political stage.

the archipelago in small territorial units, shadowing civil administration and potentially intervening in local politics under the disguise maintaining stability (Sebastian, 2006, p. 336). In addition, the 350,000 soldiers' strong military continues to fulfil policing duties, especially in conflict zones such as Papua and continues to send more troops to these areas. This means most TNI soldiers are still tied down in internal security rather than external defence matters. TNI's territorial structure not only allows for political intervention, but also hinders civilian oversight and allows for the continuation of its business activities.

Law 34 of 2004, calls for an end to all military business through a government take-over of all legal businesses within a five-year period of its enactment. In essence, the military's role in Indonesia's economy has been represented in a variety of forms such as military-owned businesses organized under TNI foundations and cooperatives; collaboration with the private sector, including protection payments and leasing of public land; criminal enterprises, such as involvement in illegal logging and prostitution; and various forms of corruption (HRW, 2010, p. 1). These activities have long been justified on the grounds of raising funds in order to supplement the official government budget. However, this has not only created conflicts of interest and led to an abuse of power, but it is also a major obstacle to civilian oversight of the armed forces. However, TNI business activities are becoming gradually less important as the official government budget has been vastly increased. Finally, disentangling from business would not only lead to more transparency and civilian oversight, but also potentially lead to greater public trust in a professional military committed to external defence.

Conclusively, the TNI has not regained its "glory days" enjoyed under Soeharto, but its role as a powerful socio-political actor is clearly far from over. A genuine lack of transparency, lack of accountability of the past, lack of systematic vetting, and a self-dictated agenda of partial reform has left the Indonesian armed forces as a shining example of an institution which has carried large parts of the New Order into the future.

3.5. The origins of Papuan nationalism

At the time of writing, it is the ten-year anniversary of the creation of the Special Autonomy Law on Papua (Law 21, 2001), better known as OTSUS. This key piece of legislation was a vital move from the GoI and left many hopeful of the future. However, its consequent lack of implementation throughout the last decade has left spirits dwindling. Military impunity continues and Papuans keep on suffering from the past and the present. The time for a serious

Jakarta-Papua dialogue⁷ has come, as OTSUS passes a decade without implementation of justice-seeking initiatives. In addition, Jakarta's policies towards Papua rely heavily on presidential willingness and support, and as the current president, SBY only has three years left in office, action must be taken. The historical background to the conflict in Papua shall be briefly discussed. A more comprehensive analysis of OTSUS shall be presented in Chapter 5.

The New York Agreement, of 1962, and the consequent Act of Free Choice (Pepera) in 1969 remain controversial issues, unlikely to be solved in a Jakarta-Papua dialogue as they question the lawfulness of Indonesia's claim to Papua. Although historical records tell the story of the past it is politically impossible for the central Indonesian government to pursue a true rectification of the Pepera. The 1960s would turn out to be ever-changing for the Papuan people and represents the source of the continuous struggle for *merdeka* (freedom) and today's situation. Several generations of Papuans carry the injustice of the Pepera with them, even though many did not experience the event. It has created a collective idea of injustice and mistrust of the central government. The burden of the Act fuelled Papuan nationalism and shaped a clear ethnic distinction for Papuans between themselves and Indonesians and managed to, more or less, unite a land with approximately 310 different ethno-linguistic groups (Chauvel, 2005, p. 54). This is a paradox in itself, but it shows to what extent the Act influenced the indigenous Papuan people and reveals its power as a source of grievance for almost half a century. Thus, a brief look at the historical background to the Act and the emergence of Papuan nationalism is appropriate.

The Dutch made an indirect claim to Papua, or West New Guinea, in 1848 and the first missionaries arrived from Germany a few years later before the Dutch finally established an actual physical presence in the 1920s and 1930s (Bertrand, 2004, p. 145; Mandowen, 2005, p. 28). It was not until the end of World War II when Papua became the subject of an international dispute between the Netherlands and Indonesia. Both countries had very different aims and aspirations for Papua and when the Dutch finally left Indonesia in 1949 they kept West New Guinea as it was considered a separate colony by the Dutch (Bertrand, 2004, p. 145). This was to become a source of intense confrontation between the Netherlands and Indonesia in the years to come and outright war was barely avoided (Mandowen, 2005, p. 28). During the end of the 1950s and early 1960s Indonesia disrupted all diplomatic ties with

⁷ The term 'dialogue' is not recognized by the Indonesian Government, because it implies two equal parties communicating although the human rights community continue to promote a Jakarta-Papua dialogue. Jakarta does not recognize Papua as an equal negotiations partner, but a subsidiary of the central Government. The term 'constructive communication' is preferred by the Government, but for the purposes of this thesis the term 'dialogue' will be used. Source: Interview with Dr. Adriana Elisabeth (LIPI – The Indonesian Institute of Sciences), Jakarta, 20.05.2011.

the Netherlands and threatened to use military force to claim West New Guinea as a part of the Indonesian nationalist policy. Papuans were not consulted and did not participate in this turbulence between Indonesia and the Netherlands which were to determine their future a few years later. First and foremost this was an international dispute over territorial control in the midst of the Cold War.

By September 1969 the Dutch government envisaged a Dutch withdrawal from Papua to be replaced by a UN administration with complete territorial control and sovereignty until they had organized a referendum in which the Papuan people could freely choose their own future and self-determination (Saltford, 2003, p. 10/11). As this was in the middle of the Cold War and the United States (US) argued that the only way to avoid Indonesia falling into Soviet control and manipulation would be to grant Indonesia West New Guinea as a symbol of Western goodwill and cooperation. Simultaneously, while the conflict between Indonesia and the Netherlands was contemplated at the international stage through the UN, a nationalist movement was developing in Papua. More specifically, the Dutch had established the New Guinea Council in early 1969 for the purpose of aiding the decolonization process, which was intended to end in Papuan independence.

On December 1, 1961, the *Bintang Kejora* (Morning Star), the Papuan flag and often regarded as a symbol of independence, was raised for the first time, alongside a Dutch flag, in the capital Hollandia (Jayapura). This declaration was the first official rejection of Indonesian rule in Papua and the leaders of the *Nationaal Comite* were soon facing treason charges (King, 2002, p. 91). This nationalist movement demanding self-determination was in many ways created and shaped by the Dutch over the past ten to fifteen years. From 1949 the Dutch invested heavily in the economic and political development of Papua. Furthermore, it included educating and creating an elite class of Papuans who would later be the driving forces of the nationalist movement. With the education level rising amongst some Papuans the thought of a Papuan nation became stronger and culminated in the flag raising ceremony in Jayapura as well as the publication of a nationalist manifesto claiming West Papua as their own (Bertrand, 2004, p. 146/147).

The negotiations between Indonesia and the Netherlands were encouraged by the US Attorney General Robert Kennedy, who visited Jakarta and The Hague to bring the parties to the table. Throughout the entire process, Papuans were neither consulted nor invited to join the negotiations regarding their own homeland. The negotiations were brokered by the American Ambassador Elsworth Bunker, who proposed that Papua should initially be transferred to the UN and then to Indonesia with an eventual opportunity for self-

determination by the Papuan people (Chauvel, 2005, p. 29). Importantly, this rose suspicions amongst Papuan nationalists who feared that Indonesia would never allow a referendum to take place once it had gained control over the territory. Arguably, the US knew this as well, but it would be beneficial in the current Cold War climate at the time and it was well known that Indonesia was against the self-determination of Papua. None of the Papuan leaders were invited to join high-level discussions about Papua's future. The extent of their participation was to send protest telegrams and petitions to Washington, Jakarta and The Hague (Chauvel, 2005, p. 28). Finally, both governments, of the Netherlands and Indonesia, appointed Papuans to their delegations towards the end, but the Papuan advisers arrived in the US after the negotiations had been finalized and the New York Agreement was signed on August 15, 1962 (Chauvel, 2005, p. 30).

The New York Agreement (the Agreement), signed at the UN headquarter in New York City, outlined the transfer of the administration from the Dutch to the UN Temporary Executive Authority (UNTEA), which would again transfer Papua to Indonesia by May 1 1963. Furthermore, article XX demanded the act of self-determination to be held before the end of 1969. Importantly, the Agreement, under article XXI, held UNTEA and Indonesia accountable for guaranteeing the rights to free speech, the freedom of movement and assembly of the Papuan people. On September 30, 1962, the Morning Star that was raised in Jayapura less than a year earlier was lowered before Papua officially became the territory of the UNTEA on October 1 1962 (Timmer, 2006, p. 1101).

The Republic of Indonesia was officially handed over the territorial and administrative control of Papua on May 1 1963. However, it also marked the true beginning of the UN as an accomplice to the injustice and lack of democratic implementation in the territory orchestrated by the GoI. The period between the beginning of Indonesian rule in 1963 and the Act in 1969 was a time of determinant importance for the grounding of a Papuan national movement, although Indonesia asserted its power throughout Papua. In essence, the more Indonesia exercised its 'ownership', the more disgruntled Papuans became.

Even though, the formal founding of the OPM was not until 1970, the true birth of this movement aimed at gaining independence through armed struggle was in 1965. Moreover, the movement showed a clear confrontational opposition to Indonesian rule. The OPM was shaped among the Arfak people, found in the inner highlands of Papua, but rapidly spread out to other regions throughout Papua (Bertrand, 2004, p. 149). After several hit-and-

run missions against the military, ABRI took drastic action killing around 3500 Arfaks, mainly through aerial bombardment (Osborne, 1985, p. 37).

3.5.1. “The Act of No Choice”: an internationally condoned experience

UN Secretary-General U Thant appointed the Bolivian diplomat Fernando Ortiz Sanz as his Special Representative to West Irian, which was the new name of Papua at the time, in order to “assist, advice and participate” in the act of self-determination. He arrived with a small UN staff on August 23 1968 and commenced a ten-day tour of the territory (Saltford, 2000, p. 76). The method by which the referendum was to take place was a major issue between the UN and the Indonesian government. Throughout the beginning of 1969 Ortiz Sanz suggested a ‘mixed method’ that would involve the use of the traditional *musyawarah* (tribal consultations), with councils representing the people in the rural communities and a democratic system of ‘one man-one vote’ in the urban areas (Mandowen, 2005, p. 30). However, Indonesia proclaimed that the sole use of *musyawarah* would truthfully reflect the will of the Papuan people due to its particular political and cultural history.

Ortiz Sanz was informed in February that the Indonesian government planned to enlarge the current eight representative councils and to include one group chosen by officially approved cultural, social and political organizations, one group consisting of traditional tribal chiefs selected by existing local councils, and lastly one group to be elected by the people themselves on a district-wide basis (Saltford, 2003, p. 123). Importantly, only the last group would be formed by democratic means. Altogether, these eight enlarged councils contained a total of 1025 council members for the whole of West Irian. With no observation of ‘international democratic standards’ this was to be the maximum number allowed to represent the approximately 700,000-800,000 Papuan inhabitants (Annex II to Secretary-General’s Report, 1969, p. 37). Moreover, the small number of council members and the methods of their appointment ensured their complete illegitimacy and remains at the core of current Papuan calls for historical rectification. The Act of Free Choice took place from late July to early August of 1969 in the eight regional consultations, widely believed to have been staged by the Indonesian military and intelligence officials, who either hand-picked delegates who believed in Indonesian annexation of Papua or forced others to opt for Indonesian rule (McGibbon, 2006, p. 13). Eye witnesses or council delegates themselves claim that council members were isolated and under armed guard for several weeks in camps prior to the Act

while continuously denied contact with relatives or friends and subjected to threats and bribes in order to do as told by Indonesia military officials (Saltford, 2003, p. 158).

The result of the Act of Free Choice was a unanimous support for Indonesian annexation and the only complaint heard from the representative council members participating in the Act, was that they found the entire plebiscite to be unnecessary because West Irian had always belonged to Indonesia. Furthermore, all of the 1022⁸ council members, whereof all but 195 were selected by the Indonesian authorities, voted for Papua to be part of the sovereign Republic of Indonesia. Rehearsed speeches praising Indonesia could be heard at every single regional council meeting all over Papua (Scott & Tebay, 2005, p. 601). The Secretary-General's report was submitted along with a report from the GoI to the UNGA without any further debate and culminated in Resolution 2504 (19 November 1969). Finally, Resolution 2504 saw the New York Agreement and all its content as satisfactorily implemented under the auspices of the UN. Thus, two widely different narratives of the past have developed for decades, but their reconciliation may be necessary for a long-term solution to the current conflict to be found.

⁸ Three council members were absent from the voting procedure due to illness, thus decreasing the original number of voting members from 1025 to 1022.

4. Transitional Justice in Aceh

This chapter examines the conflict in Aceh. The history of the conflict is discussed, but focus is given to its later stages and its final resolution. Transitional justice aspects of the post-conflict environment are examined along with potential lessons to be learned.

4.1. The conflict in Aceh

Aceh, located on the most northern tip of Sumatra, represents a massive resource for Indonesia and has historically been important for the formation of Indonesia as one nation. It is strategically located by the Straits of Malacca, one of the world's busiest waterways, and Aceh's economic resources can be found in oil and gas deposits just off the Acehnese shore (Kingsbury, 2005, p. 74). However, it has also been the home to one of Southeast Asia's most prolonged conflicts in modern times. In the past, the secessionist challenges from Aceh and Papua have appeared to share many characteristics, especially for international observers. Both provinces have declared the illegitimate rule of Indonesia with the support or leadership of armed independence movements. Furthermore, both GAM and the Free Papua Movement (OPM) have appeared to anchor their claims of separatism on historical grounds and the idea of the 'other'. Assertions have been made that Indonesia has never truly existed and that it remains post-colonial construction by the Javanese. In broad terms, both conflicts can be described as ethnonationalist challenges to Indonesian sovereignty (Bertrand, 2004, p.161). On the other hand, the foundations of the conflict in Aceh were of an inherently different nature to those in Papua. In addition, Aceh had always been a part of Indonesia, whereas Papua was included in the Republic at the end of the decolonization process. Despite these differences, lessons can be learned from the peace process in Aceh and the elements of transitional justice that were shaped in the 2005 peace agreement and both have another issue in common; large scale violations of human rights through decades of military pressure and a strong movement for independence.

More specifically, this chapter will briefly discuss the roots of the Acehnese conflict, but the primary purpose is to analyze the peace agreement, or the Helsinki Memorandum of Understand, and the post-MoU implementation period within a framework of transitional justice. The evaluation of the conflict resolution in Aceh can play a vital role for how to initiate a dialogue in Papua and reach terms for a sustainable peace. Importantly, the conflict in Aceh represents a success for Indonesia in the *reformasi* period on how to solve an ethnonationalist confrontation. However, upon closer examination of the post-MoU environment and the pillars of the conflict, there are lessons to be understood. Additionally,

such examination shall also show the necessity for mechanisms of transitional justice to function, both for the Acehese people, but also for the larger project of national reconciliation.

4.1.1. Origins of the conflict in Aceh and the creation of GAM

In contrast to Papua, which was integrated into Indonesia after the final stages of decolonization, Aceh was always a part of Soekarno's nationalist project which culminated in the establishment of the Republic of Indonesia in 1949. The Acehese grievances which surfaced for the first time in 1953 were also of a completely different nature to those in Papua. As a highly pious people, the Acehese were fundamentally opposed to Sukarno's secular project of Indonesian nationalism and the continuous centralization of powers under Soeharto from the mid-1960s. More specifically, this was the source of the initial unrest, known as the Darul Islam rebellion, led by Daud Beureuch. Although the Darul Islam rebellion was sparked off by the 1951 incorporation of Aceh into the province of North Sumatra, its foundations can be found in the differences about the role of Islam in the state (Schulze, 2004, p. 1). At first, the Acehese thought Sukarno's idea of an Indonesian state was to the benefit of Aceh and showed their support for such a concept, ideologically as well as financially. In essence, the Acehese were not seeking to break away from Indonesia through the 1953 rebellion, but rather to influence the Republic from within. Compared to the later secessionist challenge from GAM, this was a vastly different initiative. However, Aceh changed from fully participating within Indonesia to strongly supporting independence. The relationship between Jakarta and Aceh, or the center and the periphery, became a source of immense anger and disappointment amongst the Acehese people (Bertrand, 2004, p. 161). Hence, Aceh came to share more with the Papuans in that they also had a highly distrustful and dysfunctional relationship with the central government in Jakarta. The Acehese felt betrayed by the central government as Aceh was not initially given a special status or autonomy within the newly created Republic of Indonesia which they had been promised by the ruling Javanese elite.

Despite the Darul Islam rebellion, GAM was not established until October 1976 when Hasan di Tiro returned from residing in the US since 1950. He founded the organization and became its true leader, but spending most of his life in exile in Sweden. Di Tiro was from a privileged family and had pursued studies in the US where he became sympathetic towards the Darul Islam rebellion. Thereafter, he returned to Indonesia in order

to fight for Acehese independence. It was to mark the beginning of a violent struggle that would endure several decades. Aguswandi and Zunzer (2008) have outlined Aceh's struggle in four distinct phases worth discussing.

First, the period from 1976 to 1989 was distinguished by a firm grounding of GAM as a movement. Di Tiro declared Aceh to be an independent nation and the conflict developed into an armed struggle, albeit with low intensity. In GAM's early years it was almost eradicated by the military and led by a small, well-educated and ideologically-driven elite. By 1979 most of them were either dead, imprisoned, or in exile. The remaining exiled leaders continued the ideological battle and from 1986 to 1989 hundreds of GAM members underwent military training in Libya (Schulze, 2004, p. 4). This made a "comeback" possible and GAM moved entered into a new era of fighting for the independence of Aceh.

The second phase was characterized by trained fighters with elaborate command structures who intensified GAM's military power and strike capability. GAM was able to hurt the Indonesian military forces and successfully pursue guerrilla warfare techniques, which quickly led to a serious escalation of the conflict. More specifically, the Indonesian military took control over Aceh by declaring the region to be a Military Operations Zone (DOM). This gave the military effective control over the province, similarly to Papua, and allowed it to operate more or less without limitations. The DOM era lasted right up to the collapse of Soeharto in May 1998 and was characterized by series of grave human rights abuse (AI, 2004, p. 4). Moreover, the DOM period has been described as "shock therapy" and as a systematic "campaign of terror designed to strike fear in the population" (Kell, 1995, p. 74). GAM had almost been eliminated as a threat in Aceh by the early 1990. However, the exiled leadership, located in Sweden, along with many Acehese refugees and commanders made it possible for GAM to survive as an organization (Schulze, 2004, p.5). The military strategy against GAM backfired as the DOM era only involved more people in the fight against the central government. Due to the widespread and systematic use of violence more Acehese were willing to take up arms. This factor greatly contributed to GAM's survival throughout the 1990s.

The third phase of GAM resistance was shaped by Soeharto's fall from power. Immediately after the end of Soeharto's reign it was widely believed that a renewed push for independence would show results in the era of *reformasi*. However, despite mass protests and a renewed political engagement for independence, state security forces responded violently. In addition, the international community also failed to negotiate a peace agreement during

this period and it was not until the aftermath of the 2004 tsunami which allowed for genuine negotiations between GAM and Jakarta (Aguswandi and Zunzer, 2008, p. 6).

The fourth, and present, phase includes the milestone signing of the MoU in August 2005. It was negotiated through the former Finnish President, Martti Ahtisaari and his Crisis Management Initiative (CMI), and a new chapter in Acehnese history begun. The content of the MoU shall be examined below, as it represents a major achievement of *reformasi* politics and a hallmark to intra-state conflict resolution. Furthermore, the Law on the Governing of Aceh (LoGA) was passed by the Indonesian Parliament in 2006 and has become a symbol of progress since the MoU. However, this thesis will also show that some important aspects of transitional justice within the MoU and the LoGA have not been fulfilled and remain obstacles to sustainable peace in the region.

4.1.2. The cessation of violence

The MoU was signed August 15 2005. As a symbol of peace between the Indonesian government and a separatist group, it was a milestone achievement in the era of *reformasi*. More importantly, it ended a 30 year old conflict that claimed thousands of lives. The tsunami on December 26, 2004, contributed to a more cooperative and violence was finally ended with support from the international community. Martti Ahtisaari led intense negotiations rapidly progressing through the winter and spring of 2005 deriving at the signing of the agreement. Furthermore, the MoU not only ended the conflict, but the parties agreed to a demilitarization of Aceh and to establish ‘self-government’ in order to meet a number of GAM’s political goals without encroaching on Indonesia’s territorial integrity (Kingsbury, 2005, p. 73). However, factors, other than humanitarian post-disaster cooperation, pressured both the GAM and the GoI to agree to participation in talks, and eventually on a cessation of hostilities within a broad peace agreement. Arguably, three overarching factors led to the initiation of a negotiation process, but also to its final outcome.

First, GAM’s position changed since martial law had been declared in May 2003, which saw the birth of the largest military operation in Indonesia’s history (Morfit, 2007, p. 114). More specifically, the TNI greatly increased their pressure on GAM in the field after the first failed attempts of peace negotiations in 2000 and 2001 under President Abdurrahman Wahid, despite a brief pause in violent hostilities, and later under President Megawati in 2002. The latter stages of the negotiations collapsed in their entirety on May 18th 2003 and martial law was declared the following day (Schulze, 2004, p. 44/45). In the first six months of *Operasi Terpadu* the military claimed to have killed 1,106 rebels, arrested 1,544, forced

504 others to surrender and seized approximately 30 percent of GAM's weaponry. The TNI believed they had reduced GAM's strength by 55 percent during that time, even though key GAM commanders were not captured or killed (Sukma, 2004, p. 25). Consequently, the TNI pursued a ruthless tactic, with unlimited force, throughout Aceh to hunt down any suspected GAM members. Numerous witness accounts outline the use of summary executions of civilians suspected of being GAM members, but also abductions that led to killings, forced disappearances and other physical abuse (HRW, 2003, p. 18). Moreover, young men were targeted by the military and often shot on suspicion alone, despite dressed in civilian clothing and possessing no firearms or any other equipment associated with GAM. By late 2004, the GAM military command was on the defensive with field commanders experiencing difficulties and reportedly looking for an exit strategy – much of GAM's fighting ability had been destroyed (Schulze, 2006, p. 247). In addition, the TNI pressure on the ground led to internal disagreements between field commanders and the ideological leaders in exile in regards to their military strike capability (ICG, 2005, p. 4). Sofyan Djalil, one of the GoI negotiators during the Helsinki talks even claimed that GAM was militarily defeated by 2005 and that the tsunami "gave GAM a face-saving reason to accept the realities of military defeat" (Morfit as cited in Braithwaite et. al., 2010, p. 367). When Jusuf Kalla became Vice-President in 2004 he began scripting a plan for peace in Aceh. Previously, from within the Megawati government, Kalla had initiated contact with the Finnish businessman Juha Christensen, who again brought in Martti Ahtisaari and his CMI (ICG, 2005, p. 2). Thus, Kalla developed political means by which the conflict could be approached, parallel to a massive military effort to crush GAM's fighting capability, which both led to changes within GAM. Moreover, these elements joined together in shaping a reason for GAM and the GoI to approach negotiations with Ahtisaari in early 2005.

The second major factor that led to negotiations and ultimately to the MoU itself was the effects of the tsunami. In essence, it created an unprecedented level of international attention for Aceh as a region. Internationalization of the conflict had been one of GAM's major strategies for some time, much in comparison with many Papuan elements, and this was utilized to aid negotiations. However, the internationalization of the conflict was a double-edged sword for both GAM and the GoI. GAM experienced its exiled leaders charged with accounts of terrorism in Sweden and as a result "tamed" GAM's activities in Indonesia. GAM was linked to the label "territorial terrorist" and by mid-2003 NGO reports were used to discredit the GAM leadership by implying "possible links" between GAM and the well

known Islamic terrorist group *Jema'ah Islamiyah*⁹ (Davies, 2006, p. 230). In other words, the GAM leadership realized that if the armed struggle did not cease, they would lose the support of the international community and risk being labelled as terrorists (Braithwaite et. al., 2010, p. 361). On the other hand, the GoI received increased attention and support in the wake of the tsunami, but feared “another East-Timor” by internationalizing the conflict in Aceh. In general, the government had been paranoid about any international involvement in domestic affairs, as it is with the Papuan conflict, in light of Timor-Leste gaining independence in 1999. Another crucial, effect of the tsunami, which the GAM leadership shared with the GoI was the knowledge that cooperation was highly necessary in order to ensure the millions of dollars in humanitarian assistance promised by the international community, led by the US (Braithwaite et. al., 2010, p. 367). Both sides knew that continuing the violence could risk losing the funds, hence forcing them to engage in negotiations.

Third, once negotiations were underway Ahtisaari's negotiation technique became a means by which the parties were pressured into finding an agreement within a short time span. His personal and tough approach characterized by the philosophy of ‘nothing is agreed until everything is agreed’, influenced by the aforementioned factors, pushed both parties towards the MoU. Specifically, Ahtisaari insisted on not focusing on details, but on one major issue – ending the use of violence. In addition, he forbade the talks to be overshadowed by GAM's overarching goal of independence from Indonesia, as nothing productive could come of it. On the one hand, this approach focused both parties to look at the larger picture of violence versus no violence and it made it possible for the five rounds of negotiations to pass quickly to the end stage. All rounds of talk were held between January 21st to July 17th, 2005, before the signing of the MoU on August 15th, which symbolized the pace and the intensity of the negotiations (Morfit, 2007, p. 116). It has been argued focusing on the large picture and producing a minimalist settlement was the only way for GAM and the GoI to agree on anything. In essence, Ahtisaari did not intend for the MoU to cover every single issue, but rather stand as a beginning of a new relationship. On the other hand, Ahtisaari's negotiations philosophy led to an agreement lacking in details and with ample room for interpretation by both parties. Mechanisms of transitional justice included in the MoU have been widely interpreted and a complete lack of agreement regarding the ‘true’ meaning of several provisions has jeopardized the implementation process. Without GAM changing as a result of

⁹ Jema'ah Islamiyah was behind the first Bali bombing in 2002, killing 202 civilians, but also several other bombings in Jakarta, targeting international hotels and the Australian Embassy, as well as the second Bali bombing in 2005.

immense pressure from the TNI, along with Kalla's initiative in government, as well as the "tsunami factor", Ahtisaari's negotiations technique may very well not have fared as it did.

4.1.3. The Memorandum of Understanding and mechanisms of transitional justice

The MoU addressed issues of governance and political freedoms, as well as security and decommissioning of arms. These have been the most widely discussed elements of the agreement. First, when the comprehensive LoGA was passed in the Indonesian Parliament in 2006, Aceh gained a 'special autonomy' status and many vital provisions of the agreement were fulfilled. LoGA gave Aceh the right to determine several aspects of policy-making, as well as the option to establish local political parties and hold elections. Its importance cannot be understated as it has had far-reaching consequences for the Acehnese. For example, Aceh is now the only province in Indonesia to have introduced Syari'ah courts of law (Chapter XVIII) as well as allocating most of the revenue of natural resources back to the region. Second, the MoU established Aceh Monitoring Mission (AMM), which was a civilian mission within the European Security and Defence Policy of the European Union (EU). As an unprecedented mission by the EU in Asia, its mandate was far-reaching and trailblazing. Article 2.2 directs the AMM to monitor and facilitate for the implementation of many of the short-term goals set out in the MoU (Council Joint Action 2005/643/CFSP, 9 September 2005).

Although such security issues were crucial for preventing violent clashes other justice matters, such as HRC and TRC which has been used all over the world to engage in sustainable peacebuilding, were inherently minimalist in the MoU. However, to a large degree the issues of amnesty and combat reintegration received more attention.

4.2. Implementing transitional justice in Aceh: gaps and challenges

Implementation of transitional justice mechanisms has been a mixed experience. Some areas covered in the MoU have progressed, whereas others have been stagnant or even gone steps in the wrong direction. It is vital to analyze the post-MoU period as lessons may be learned for other Indonesian conflicts, such as in Papua. First, an evaluation of the gaps and challenges in setting up a HRC is appropriate as an important tool of transitional justice. Second, a similar discussion of the creation of a TRC as a truth-seeking initiative agreed upon in the MoU shall be analyzed. The third section shall examine the implementation of reparations and reintegration of victims and ex-combatants. Last, an investigation of

institutional reform, especially in the security sector, in the post-conflict environment deserves attention as a possible template for Papua.

4.2.1. A Human Rights Court for Aceh

As mentioned before, the MoU became a minimalist document and Article 2.2 is the most vivid testament to just that. It merely confirms the future establishment of a HRC for Aceh. Several disagreements and challenges have been raised in the post-MoU environment and no prosecutions for the crimes committed in Aceh have been held. Furthermore, three major issues have led to a severe gap in the implementation of HRC for Aceh. These are the issues of retroactivity, the pre-existing national legal framework, and political willingness are key obstacles.

First, the issue of retroactivity became an immediate concern for GAM after signing the MoU. Nur Djuli, the GAM head negotiator, stated that the court would definitely have retroactive authority, thus it could rule on past human rights abuses (as cited in Aspinall, 2007, p. 27). On the other hand, GoI officials instantly countered by deflecting the entire question, arguably, for the sake of the peace agreement. The official sentiment in Jakarta was that a process of prosecutions could endanger the peace process and that focus should be on the future. Echoing such sentiments, Martti Ahtisaari, stated that a human rights court in Aceh would not act retroactively (Tempo Magazine, 23.08.2005). Ahtisaari continued to exclusively focus on the future by stating a year later that it was more important to create a mechanism for preventing future human rights violations than the accountability of past abuses (Tempo Magazine, 23.08.2006). At the international level, this approach finds resonance in international criminal law, as prosecutions, as a preventative mechanism, is regarded as almost meaningless because such human rights violations cannot be committed again as the conflict is over, and the threat of prosecutions has little or no deterrent effect (Kaleck, 2007 , p. 39). However, in the case of Indonesia, prosecuting human rights perpetrators in Aceh would set an example for not only other intra-state conflicts, but also contribute to Indonesia's international reputation as an emerging democracy. The issue of retroactive distribution of justice was further complicated by the passing of LoGA in 2006. Article 228(1) outlines the role of a HRC for Aceh:

To investigate, prosecute, rule on, and resolve cases of human rights violations that **that take place subsequent to the enactment of this Law**, a Human Rights Court shall be established in Aceh (emphasis added).

Hence, the LoGA moves beyond the discussion in the wake of the MoU by including crimes committed only after the Law's enforcement by the DPR.

Second, a theoretical fulfilment of the basic requirement, envisioned by Article 2.2 of the MoU, can be found within Indonesia's legal framework, specifically in Law 26 on Human Rights Courts of 2000. In essence, this mechanism is supposed to enable the investigation and prosecution of gross human rights violations defined as crimes against humanity and genocide. The Law also provides for the creation of four permanent regional human rights courts in Jakarta, Surabaya, Makassar, and Medan by September 2003. The HRC for Medan would cover North Sumatra, including Aceh. However, this regional court has held no trials to date and is unlikely to do so in the near future (Cunliffe et. al., 2009, p. 21). This court could only prosecute crimes committed after the Law's passing, thus after November 2000 (ICTJ & KontraS, 2011, p. 38). In the case of Aceh this would cover the period of *Operasi Terpadu* discussed earlier in this chapter. Additionally, Article 43 of the same law states that gross violations of human rights occurring prior the Law coming into force shall be tried by an ad hoc HRC. However, two ad hoc courts have been created in order to prosecute alleged crimes, occurring before 2000, in Timor-Leste and in Tanjung Priok, respectively (ICTJ & KontraS, 2011, p. 46-48). The trials heard in the Ad Hoc Court for Timor-Leste have been described as an "overall failure to provide credible accountability" and even labelled as "intended to fail" (Cohen, 2003, p. vii). Besides, both ad hoc trials have shown that the Indonesian judiciary appears reluctant and incapable of prosecuting high-ranking military officials (Clarke et. al., 2008, p. 34).

Finally, finding the political will to create a HRC for Aceh is undoubtedly the hardest criteria for any human rights prosecution in Indonesia. The existence of a national, and local, legal or judicial framework is not enough for a genuine attempt at functioning mechanisms of transitional justice. More importantly, the lack of political determination for accountability of past abuses is then reflected in legislation, as amply demonstrated in the LoGA (ICTJ, 2010b, p. 1).

4.2.2. A Truth and Reconciliation Commission for Aceh

Due to the intrinsic challenges of creating a HRC for Aceh, or for existing institutions to be used for prosecutions gross violations of human rights in the past, a TRC has been seen as a more realistic alternative. A TRC for Aceh would politically cost the GoI less than a HRC and could also lead a reconciliatory process and bring closure to victims. However, a TRC should not just be seen as an alternative to prosecutions, but a mechanism with an abundance

of advantages to a society in transition and in a post-conflict environment. In Aceh there is also a widening gap between theory and practice regarding the creation of a TRC as a requirement of the MoU and LoGA. Since the establishment of the LoGA, the debate over a TRC has concerned legal technicalities, which has continued to block its creation.

Article 229(1) of LoGA states that a TRC for Aceh “shall constitute an inseparable part of the Truth and Reconciliation Commission”. In essence, this provision has caused considerable difficulties as it refers to a national legal framework for a TRC in Indonesia. Besides, the MoU remained open to interpretation, but confirmed a TRC to be established by the “Indonesian TRC with the task of formulating and determining reconciliation measures” (Art. 2.3). At the time of LoGA’s enactment, Article 229(1) referred to Law 27 of 2004 regarding a national TRC, thus incorporating the Acehese conflict into a national reconciliation project (Cunliffe et. al., 2009, p. 21). This could have been an important platform in order to recognize the Acehese conflict as being a concern to the greater Indonesian nation, but also to reconfirm Aceh’s commitment as an inseparable part of the Republic. However, the Constitutional Court controversially annulled the Law in late 2006, as discussed in Chapter II.

Two issues unfolded rapidly due to this setback and have affected the entire peace process. Firstly, the relationship between Jakarta and Aceh diverged as a result. Hostile and unhappy center-periphery relations was one of the Acehese grievances from the outset and in the wake of the peace agreement it was essential to constructively build on this new-found potential for a sustainable relationship. Secondly, a new bill for a national TRC has yet to be debated in Parliament as, at the time of writing, a draft has recently been approved by the Ministry for Law and Human Rights. The slow progress of a new TRC law has had profound effects on the possibility of for a TRC for Aceh, thus reflecting an inability to fully implement the requirements of the MoU.

Two solutions have been proposed by civil society organizations and legal experts who claim that a TRC can still be established. Initially, elements of Acehese civil society argued that the provincial government in Aceh should establish a local TRC, as they are technically allowed too under provincial legislation, rather than wait for a new national law (Aspinall, 2007a, p. 29). This concept has the advantages of time and political ease, but a local TRC would most likely lack the power to subpoena high-ranking officials, but more importantly, it would not have the backing of Jakarta, thus severely disrupting and further damaging Aceh-Jakarta relations (Cunliffe et.al., 2009, p. 21). Secondly, doubts have been raised regarding the requirement that a TRC for Aceh must follow the establishment of a national TRC. As

mentioned above, Article 229(1) states that a TRC for Aceh is an “inseparable part” of the national TRC. However, this rather vague wording has led legal experts to claim that an Acehese TRC could be established outside the scope of the national commission as this provision refers to how the two commissions should be administered (ICTJ, 2010b, p.1; Clarke et. al., 2008, p. 30). Nevertheless, this interpretation has neither been accepted by Jakarta, nor by the regional administration in Aceh. Moreover, truth-seeking initiatives in Aceh through a TRC have not developed and it is another blow to the transitional justice implementation process briefly outlined in the MoU and in LoGA. As the ICTJ highlights; “a systematic and independent truth-seeking process may provide a good starting point for urgently needed transitional justice mechanisms (Clarke et.al., 2008, p. 31).

4.2.3. Reintegration and Reparations – an asymmetrical relationship

This heading suggests a dysfunctional and negative relationship between the concept of reintegration of ex-combatants and that of reparations. Arguably, reintegration is one of the most successful post-MoU aspects in Aceh along with the decommissioning of arms and GAM’s demobilization. However, the MoU is drafted in a confusing and misconceiving manner, muddling the differences between reintegration and reparations. They are not the same thing and should not be, although the MoU has, more or less, integrated the issue of reparations with that of reintegration. For example, article 3.2.3. states:

GoI and the authorities of Aceh will take measures to assist persons who have participated in GAM activities to facilitate their reintegration into the civil society. These measures include economic facilitation to former combatants, pardoned political prisoners and affected civilians. A Reintegration Fund under the administration of the authorities of Aceh will be established.

Reparations, as a mechanism of transitional justice, remains vital for the larger project of building a sustainable peace where victims feel they have been respected and compensated for past human rights abuse. Conversely, a reintegration in Aceh has focused on ex-combatants as means of keeping peace. Even though this is also an important project it should not be confused with reparations and victims’ rights and needs. In order for reparations in Aceh to be analyzed, it must first be separated from the issue of reintegration.

The term ‘reintegration’ is a problematic one when applied to the conflict in Aceh for many GAM members as it implies that they were somehow alienated from society in Aceh during the conflict (ICG, 2007a, p. 8). However, in this context the term shall be applied as a means to describe the process of demilitarizing former GAM fighters in light of the conflict’s

abrupt end. Furthermore, economic reintegration of GAM ex-combatants was one of the key promises outlined in the MoU and further elaborated upon in the LoGA. This was to further cement the peace process, but also a way for GAM to keep its cohesiveness in times of peace – something they had never experienced. Essentially, preserving a united group of ex-combatants was crucial in preparation for the elections as mandated by LoGA in 2006 (Aguswandi & Zunzer, 2008, p. 18). Article 3.2.5(a) of the Helsinki agreement states that “all combatants will receive an allocation of suitable farm land, employment or, in the case of incapacity to work, adequate social security” and the AMM was given the authority to supervise its implementation. Two elements shaped the core of the reintegration program; employment and cash transfers.

Initially, the BRA was in charge of distributing funds to ex-combatants, but also to victims. The issues of victim reparations shall be discussed below. In addition, a body called Aceh Transitional Committee (KPA) was established to organize former GAM guerrillas (Aspinall, 2007a, p. 22). In terms of employment, a World Bank study showed that a whole 75 percent of GAM ex-combatants were without a job by March 2006, six months after the signing of the Helsinki MoU (World Bank, 2006a, p. 3). Despite this challenge in the wake of the peace agreement, GAM ex-fighters found work within a couple of years. In essence, a “predatory peace economy” existed, where GAM contractors provided all kinds of employment, legal and illegal, for former GAM guerrillas (Aspinall cited in Braithwaite et. al., 2010, p. 381). Despite this general trend in employment rates, another challenge arose after the 2006 elections as GAM ex-combatants became a dominant source of extortion, violent crime and resource extraction (ICG, 2007a, p. 4-8).

Closely linked to the issue of employment was that of cash transfers to ex-combatants. Due to the minimalism of the MoU it was unclear how social security, as cash payments, should be distributed and who would be eligible for it. Essentially, confusion also arose regarding the reason for these payments as GAM members often saw it as a means of compensation for losses encountered during the conflict and an essential entitlement they had under the MoU, whereas GoI saw such payments as a “supporting long-term livelihood development” (ICG, 2007a, p. 9). Another challenge created by the MoU was the estimated number of fighting GAM members. Article 4.2 states a total of 3,000 fighters, but the actual number was probably close to 15,000, including a larger support network. Thus, it became untenable for GAM to only distribute cash payments directly to 3,000 members and the funds were eventually distributed to KPA commanders for further hand-outs to their local fighters, although each combatant only ended up with insignificant amounts (Braithwaite et. al., 2010,

p. 382). The matter was further complicated when GAM refused to disclose the names of 3,000 members in case the peace broke down and these lists could potentially be turned into hit lists by government security forces. At last, the issue was solved by handing the lists over to the AMM for protection and a final payment was made to each of the ex-combatants of around \$2,500 (Braithwaite, et. al., 2010, p. 383).

The BRA was mandated by the GoI to distribute funds and coordinate assistance programs with donors. Hence, the BRA became the vantage point for any reparation program in Aceh. Its initial experience was rather disappointing and the agency had to rethink its strategy in terms of victim reparations. As the peace agreement had left the definition of a victim of the conflict very broad, the BRA immediately felt the effects of this provision once it attempted to manage individually-submitted proposals from victim projects (Barron et. al., 2009, p. 2). By July 2006, 48,485 funding applications had been submitted, covering almost 500,000 individuals, to the BRA for consideration. To reiterate, the MoU stated that “all civilians who have suffered a demonstrable loss due to the conflict” shall receive “adequate social security”. Thus, this extremely high number of applications merely reflected the impact which the conflict has had on the society as a whole and that it left almost no one untouched. However, the BRA did not have the capacity to handle this number of applications and shut down the entire assistance program. It opted for using a community-based approach instead, founded on a pre-existing program established by the GoI and the World Bank called, Kecamatan (Sub-district) Development Program (KDP)¹⁰ (Morel, et. al., 2009, p. 2). Basically, funds were distributed directly to villages after a cycle of village meetings and proposal writing had been completed. In principle, this would meet victims’ needs as they could decide on what the village needed together. However, the funds were often spent on projects of infrastructural nature and anyone in the village was eligible to submit a proposal. Collective reparation is not a new aspect of reparations, but the BRA-KDP program blurred the lines between the individual and the collective as individuals were able to apply funding for projects benefiting the collective. In turn, this contributed to the general confusion regarding the purpose and targets of the program as a means of victim reparations. Furthermore, the BRA-KDP partnership attempted to distribute funds evenly, thus areas with

¹⁰ The KDP was an initiative launched in 1998, between the GoI and the World Bank, in the aftermath of the Asian financial crisis in order to support the poorest villages throughout Indonesia. Over three phases, between 1998 and 2007, the program channelled over \$1.4 billion of World Bank loans and grants as well as national government funds to 33,500 poor villages. Block grants of \$60,000 to \$170,000 were provided to each sub-district and were later used for almost anything in the poorest villages within each sub-district. Yet another, and more comprehensive, umbrella program was launched in 2008, covering all of Indonesia (70,000 communities). Source: Morel et. al., 2009, p. 3.

high intensity conflict should receive proportionately more than villages with low intensity conflict. Prior to the establishment of the BRA-KDP program, a criteria for conflict victim status was developed by the BRA, as it was not defined in the MoU. The following categories defined a conflict victim in Aceh as of February 2006 and made those individuals eligible for compensation or social assistance (Morel et. al., 2009, p. 12):

- Widows/widowers and children of individuals deceased because of the conflict;
- Relatives of individuals who disappeared as a result of the conflict;
- Individuals whose house was damaged, destroyed or burned because of the conflict;
- Individuals whose properties were damaged, destroyed or disappeared as a result of the conflict;
- Individuals who were displaced as a result of the conflict;
- Individuals who were physically disabled or mutilated as a result of the conflict;
- Individuals who suffered psychological trauma because of the conflict;
- Individuals who were physically injured;
- Individuals who lost their source of income because of the conflict.

Note the absence of individuals who were victims of sexual violence. The BRA-KDP program allocated approximately \$21.7 million to 1,724 villages, covering an area with the population of 1.1 million, about one-third of the total population in Aceh at the time (Barron et. al., 2009, p. 2). Importantly, the program was shut down, in August 2007, before its completion on the grounds that it did not focus on individuals and especially on the victims' needs. As the reparations program did not focus on individual payments this made the differentiation between conflict victims through categorization, as shown above, obsolete. World Bank analysis supports this conclusion, as conflict victims generally fared no better than non-conflict individuals within the targeted communities. The World Bank could not prove that the program had been a success in meeting victims' needs as it equally benefitted persons not considered victims. It was not unsurprising to find this result as the program made no distinction within each village or community on who were conflict victims and who were not. In addition, no prior assessment of the particular needs of the victims had been carried out and victims even reported that their projects had not been selected for implementation, in comparison to non-conflict victims (Barron et. al., 2009, p. 67).

At this point it is worth noting a word of caution regarding the term 'compensation' as to 'social/economic assistance' in Indonesia. The MoU uses the word compensation in article 3.2.5, but members of Acehnese civil society were wary of the term because the Indonesian equivalent (*ganti rugi*) implies a successful outcome of a legal process, thus a formal

settlement (Aspinall, 2007a, p. 24). In simple terms, to the Acehnese, the MoU does not describe monetary compensation as they know and it should be supplementary to other mechanisms of transitional justice, such as truth inquiries and prosecutions. Once the BRA-KDP program was ended, focus was restored to provide individual payments that would classify as monetary compensation, and not just economic assistance. Furthermore, in Islamic law and history, *diyāt*¹¹ was known as a peaceful substitute for vengeance where the killer would be obliged for a payment to the victim's family. The custom of *diyāt* was an alternative of applying the law of just retaliation, known as *qisas* in the Quran, which allows "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal to equal" although it should only be the result of a legal process. The Quran (Bell, 1960) specifies:

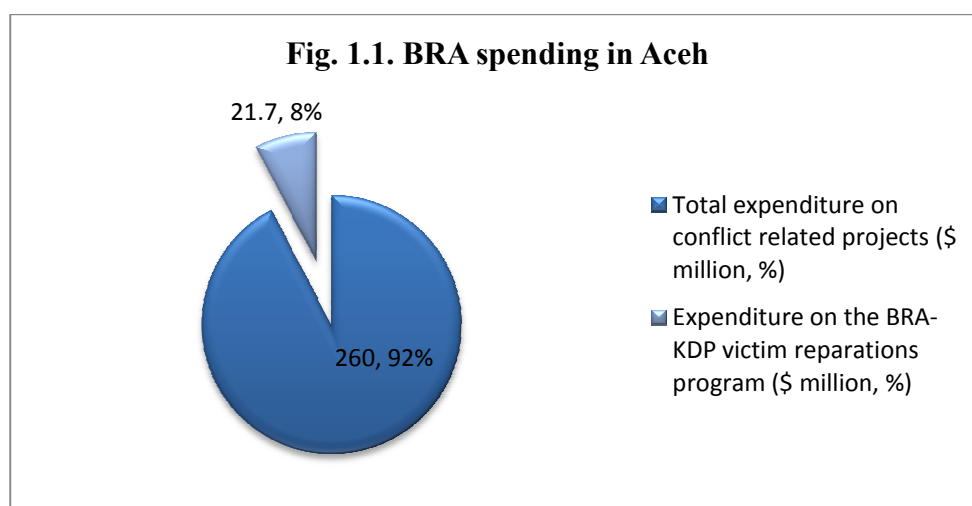
O ye who have believed, **retaliation in the matter of the slain** is prescribed to you, the free for the free, the slave for the slave, the female for the female; so if anyone is **forgiven** anything by his brother, let him follow (it) with what is reputable, and **pay with kindness** (emphasis added, 2: 173).

A *diyāt* program was initially launched by the Governor of Aceh in 2002, focusing on the widows of conflict victims, but later branched out by the BRA to support orphans and other surviving family members after the MoU established. Aceh was already in its early stages of implementing *Syari'ah* law and *diyāt* payments were a way of explicitly ensuring compensation through a traditional mechanism of transitional justice.

Traditionally, the *diyāt* was set at around 100 camels for the death of an individual, but nowadays a monetary value is calculated by the courts (Wasti, 2009, p. 13). In Aceh, the *diyāt*, of around \$300, was paid on an annual basis to individuals who had lost someone close during the 30-year long conflict. Importantly, this was the closest the BRA came to a reparations program distributed on an individual basis. By June 2007, approximately 20,000 *diyāt* payments had been made, but victims still felt cheated as they used the Islamic language of compensation, although it was not a result of a legal process of justice and they felt the amount was too small to call it represent the true meaning of compensation (Clarke et. al., 2008, p. 23). Importantly, both *diyāt* and *ganti rugi* are supposed to be results of legal processes and an official settlement for the complainants. However, this has never been achieved for the victims of Aceh thus leave reparations incomplete.

¹¹ The English translation of *diyāt* is often 'blood money' although in some countries this has a negative connotation and I deliberately steer away from using that term myself to avoid any prejudice. In simple terms, it is seen as a fine that is paid to the next of kin of someone who has been murdered.

This discussion has distinguished between reintegration of ex-combatants and reparations of conflict victims, which has not been a clear divide neither the MoU, nor in its implementation phase. However, it is not to say that no reparations program has been created, although the BRA-KDP program with the World Bank had questionable success in meeting the needs of the victims. The pattern has thus been to provide victims with economic assistance without pursuing other mechanisms of transitional justice, such as truth-seeking initiatives and prosecutions. Although the BRA claimed individual monetary compensation to conflict victims had been distributed through the *diyat* payments, local human rights professionals fear they have served as a path to impunity, as families often believe they have been given monetary compensation for their loss (Aspinall, 2007a, p. 26). Finally, the *diyat* payments, which represented the only victim reparations program for individuals, were only a tiny fraction of the \$260 million the BRA had spent by September 2007 on 120 conflict-related projects mostly associated with ex-combatants (Clark et. al., 2008, p. 17). International donors, such as Japan and the International Migration Fund funded a number of reintegration programs. However, they also focused on ex-combatants which somewhat overlap with BRA programs. The chart below shows the relatively insignificant amount the BRA spent on its reparations program in comparison to their total conflict related spending by September 2007:



4.2.4. Other mechanisms related to transitional justice in Aceh

Other mechanisms include institutional reform in the shape of political reform, decommissioning and demobilization, as well as reformation of the security sector in order for sustainable peace to emerge. First, the MoU called upon political reform to be carried out through elections and a greater expansion was seen in the LoGA in 2006. Although a full analysis of LoGA is outside the span of this thesis, it is important to note that it enabled

greater political participation by the formation of local political parties, but also by allowing GAM to transform itself into a transitional political entity (Clarke et. al., 2008, p. 36). The KPA became the political body of GAM and KPA/GAM won a landslide victory in the 2006 elections. However, despite this development, former GAM leaders are faced with the challenge of committing to the daily running of government and administration. The MoU enabled the GAM elite to trade calls for independence with a new chance to compete for power through democratic elections (Aspinall, 2007b, p. 1). Moreover, the agenda of political reform became a vital tool for change, which aided other mechanisms, such as the process of decommissioning of arms in GAM and the demobilization of guerrilla forces and non-organic TNI troops.

Relocating non-organic police and TNI personnel¹² was another important issue and a condition of GAM's agreement to peace as much as the GoI required GAM to decommission all arms and demobilize its warriors. The Helsinki MoU required GAM to demobilize 3,000 combatants and decommission all of its weaponry, but also hand over 840 arms for destruction. It further stipulated that the process shall be completed by December 2005. The importance of this process cannot be underestimated as it created the very foundations for the peace itself and it would be the first commitment test of both parties. The AMM, being in charge of weapons collection and TNI troop movement monitoring, were responsible for the acquiring a minimum of 210 weapons every month between September and December. Simultaneously, they would oversee that the TNI and the police began withdrawing at a steady rate of around 8,000 men each month (Merikallio, 2006, p. 163). Although the process of disarmament was a relatively simple task, there was a lot of tension between GAM and the military as both sides were suspicious of each other, unsurprisingly after three decades of intense warfare. Nevertheless, by the December 21, 2005, 840 weapons¹³ had been surrendered and the Indonesian security forces, including the police and TNI, had withdrawn 31,681 non-organic soldiers from Aceh (AMM, 2006).

In general, the AMM was a comprehensible success, especially in manoeuvring within the tense post-MoU environment and achieving their goals without compromising their neutrality or endangering the peace process itself. However, the MoU was mandated to monitor the implementation of human rights situation and mechanisms, such as the

¹² 'Non-organic' security personnel refers to additional troops stationed in Aceh, but not needed to be there in order to perform their ordinary duties, i.e. external defence for the military and enforcing the rule of law for the police. This was a major problem in Aceh and remains a crucial issue in Papua as the military are present with overwhelming force.

¹³ Initially, 1018 arms were surrendered by GAM, but 178 were disqualified to count as weapons, as they were often home-made or very old arms that had been rebuilt by the fighters themselves.

establishment of a TRC and HRC in Aceh. Although they have been criticized for not pressuring the GoI on these transitional justice mechanisms, it was a way by which the AMM kept this manoeuvrability. Kirsten Schulze recalls a senior AMM official saying that “if we had gone in in 2005 and said that we will focus on human rights we would have been finished” (Schulze, 2007, p. 8). As human rights issues had been a thorn in the side of the GoI and its military forces since the atrocities in Timor-Leste in 1999 and had put Indonesia in a negative international light, it was perhaps a wise strategy of the AMM. Nonetheless, the AMM was perhaps the only organ, due to its neutral status and international backbone, that could have pushed through the creation of justice mechanisms in the name of accountability and reconciliation in the wake of the peace agreement.

4.3. Lessons learned for Papua, Indonesia and beyond?

Even though the conflict in Aceh is unique in many aspects there are lessons to be learned, positive and negative, regarding peace, peace building, and transitional justice mechanisms. Parallels are often drawn between the conflict in Papua and the troubles in Aceh as they are both peripheral provinces that have sought independence from Indonesia. Although the differences between the two outweigh their similarities, principles of peace building and transitional justice mechanisms used in Aceh can support an eventual peace dialogue in Papua. In essence, a Papuan peace dialogue can especially learn from the Acehese peace process within three main areas. The issues of actors’ roles, the national political and legal framework and victims’ needs all had strengths and weaknesses in the process of implementing mechanisms of transitional justice as part of the larger project of building sustainable peace.

However, there are especially two factors that separate the conflict in Aceh from that of Papua and other Indonesian conflicts. Firstly, the influence of the tsunami in December 2004 had a tremendous impact on the willingness of the parties to truly believe in peace. The tsunami factor shall not be underestimated as it became parallel to the conflict and took more lives in a few hours than the 30 years of fighting. Importantly, it put the conflict into perspective for both GAM and the GoI, despite earlier foundations for peace had been made. In addition, the tsunami changed the reparations process as there was a degree of intermixing between transitional justice mechanisms and other conflict related activities. This affected the implementation process and new approaches for conflict-related projects were called upon. The second factor is related to the degree of violence. Prior to the peace talks, GAM had been a real threat to the Indonesian security forces, despite their relatively low numbers and poor

arsenal, and the GoI could not afford to continue the spiral of violence. Furthermore, GAM could not continue such an intensive level of fighting that had been seen under martial law in 2003. In terms of other Indonesian conflicts and especially Papua, this is a major difference. In Papua, the TNI can live with the sporadic fighting from the OPM and it is first and foremost, the Papuans who are in dire need to break the current cycle and organize themselves into comprehensible actors in order to commit to a dialogue. Thus, these two factors injected more substance into the peace process and provided unprecedented willingness between the parties to reach a liveable agreement.

4.3.1. Actors and their multifunctional roles

The Aceh peace process has highlighted several different elements in regards to national and international actors. The involvement of international actors, individuals as well as states, and national actors, officials as well as institutions, has sketched positive and negative lessons for other conflicts in Indonesia. They shall be discussed in order to understand the importance of mapping actors and their multidimensional roles in building peace and applying tools of transitional justice.

When talking to Papuan student activists they always expressed a strong hope for a third party, or an international actor, to intervene in the Papuan conflict. They strongly believe that a foreign state can bend the will of the GoI and take the moral high ground and ensure protection of human rights and implementation of justice. Moreover, they always referred to Aceh and Timor-Leste as examples of an international actor, or a larger international community, taking action on the people's behalf (Interview with Papuan students, 06.06.2011). Echoing such sentiments, the International Parliamentarians for West Papua (IPWP) established in 2008, have called for the UN to intervene in the conflict and "to put in place arrangements for the free exercise of that right [to self-determination]" (IPWP Website). On the other hand, powerful international actors such as the US, Australia, the UN, or Association of Southeast Asian Nations (ASEAN) were not among the most central players in the peace process in Aceh (Braithwaite et. al., 2010, p. 418). Importantly, the initiative from CMI, led by Ahtisaari, was officially not the Finnish state acting, but rather a private initiative led by a former head of a small Nordic state, although funding to the peace process came from Finland and the EU. Edward Aspinall highlights that the ability of international actors to achieve an ideal outcome was indeed very limited in Aceh as they were perceived to lack political leverage on sensitive issues and they were hesitant to test the limits of their influence (Aspinall, 2007a, p. 36). This lesson is important to bring to an eventual

Papuan peace dialogue as powerful actors may “lose” some of its power and willingness to act because the stakes are too high in the case of failure.

Nonetheless, the involvement of a foreign individual in Aceh, Martti Ahtisaari, was a clear sign that both parties wanted peace. Ahtisaari’s negotiations technique is regarded as one of the most important facilitating factors for peace. He focused on the greater picture and saw the MoU as a platform for a wider process of building a long-term, sustainable peace (Merikallio, 2006, p. 135). Although such a technique left several elements of the agreement open for wide interpretation, it was a way to formally end the conflict. The lesson to be learned is not to cram a peace agreement in details, while still agreeing on mechanisms of implementation. Someone asked Ahtisaari how he could balance between such unequal parties as the GoI and GAM. He replied, “I don’t balance at all, all I do is to try to see a solution with which both parties can live” (Merikallio, 2006, p. 136). In Papua, a similar mindset must be adopted in any peace dialogue and a mediator, foreign or Indonesian must be present as neutral ground in which both parties feel they can work with. The case of Aceh has showed how important a solid peace agreement is for the further cementation of peace.

Another lesson to be learned from Aceh is simplifying the roles of the domestic parties in conflict as another vital step for peace building to be productive and in order for mechanisms of transitional justice to be included in the peace dialogue and subsequent agreement. Based on the experience in Aceh, if all factions of both parties in question take part in a dialogue, disagreements will quickly be found over the most sensitive issues, such as mechanisms of transitional justice. In terms of Papua, this will be a great challenge to be overcome. One of the most difficult issues for Papuans is to stand united around a common set of goals and aspirations, as the recent Peace Conference in July 2011 proved (see ICG, 2011). However, a peace process with a narrow set of stakeholders might be highly efficient for an agreement to be reached, even though this could change in the implementation period when a broader spectrum of actors should be involved. John Braithwaite explains this well (Braithwaite, et. al., 2010, p. 416):

It could be that an optimal peace process narrows the parties as much as they need to be to get a timely and workable agreement. A post-agreement broadening of participation in hammering out the details of the peace is then needed to improve it, to widen commitment to it and socialisation of its obligations.

In regards to domestic actors, the role of the President cannot be underestimated. In Aceh, President SBY, and his Vice-President Jusuf Kalla, played a vital role as government

initiators. Political willingness for a peace dialogue is absolutely crucial in a country where the Presidency is extremely powerful and a piece of legislation is often dependent on the President for implementation. However, this also means that without the President's support for a peace process, the conflict is left to its own demise. Thus, a peace process, and the implementation of justice mechanisms, very much depends on the will of the President, to implement necessary mechanisms.

Lastly, but importantly, the Papuan independence organization, OPM, is a very different actor to GAM. GAM presented a far greater threat to the TNI and the central government than OPM has ever done. Consequently, the level of violence in Aceh remains unmatched any other place in Indonesia, thus being the focus of any peace negotiations. This difference may be determinant to a dialogue process in Papua and for the participation of a transitional justice framework. Due to the far lower levels of violence in Papua other factors will dominate the dialogue and mechanisms of transitional justice can play a greater role in an eventual peace agreement (Interview with Dr. Edward Aspinall, 14.10.2011).

Conclusively, the peace process in Aceh has shown how a variety of actors, international as well as national, have both contributed positively and negatively to peace process itself and the post-MoU implementation phase. Other Indonesian conflicts, and perhaps beyond, can draw lessons from the dynamics of the international community as well as their interactions with key domestic players. In terms of Papua, it is not necessarily preferable to direct resources and efforts towards including a powerful international actor such as the US and the UN as it may overshadow various conflict characteristics and shift focus away from the most sensitive political issues, such as the establishment of a HRC and a TRC.

4.3.2. National institutional frameworks

There are both strengths and weaknesses to be found in regards to national institutional frameworks that can generate understanding in other Indonesian conflicts, such as in Papua.

On the one hand, the MoU relied on existing national legislation, also needed in its implementation, such as the provision of a TRC (although this is still debated). The MoU, and the consequent LoGA, made a TRC for Aceh reliant on an Indonesian TRC, but once that law was annulled, the foundation for a TRC in Aceh was torn apart. More specifically, this caused a serious gap in the implementation of transitional justice mechanisms by making an Acehese TRC dependent on a national institution. The national human rights agenda from the central government has proved to lack efficiency and to a large extent, be utterly

dysfunctional. Aspinall puts it well: “the good intentions embodied in the Helsinki MoU have tended to become absorbed and blunted by the dominant national system” (2007a, p. 36). Due to a long history of hostile center-periphery relations between Aceh and Jakarta, the Acehese government is hesitant to push the GoI in matters of justice and accountability. In addition, most of the funding going to the BRA, which carries the so-called ‘reintegration process’ arrives from Jakarta. Frictions with Jakarta has been centered around the implementation of the MoU, as GAM has attempted to push the central government on issues of human rights, the role of the TNI, and reintegration (ICG, 2007, p. 14).

On the other hand, positive aspects of involving the national institutional framework can be understood for future conflict resolution and peace building exercises in Indonesia. Although the MoU calls for the creation of a HRC, it would theoretically be possible for cases between 2000 and 2005, to be tried in the permanent Human Rights Court in Medan. Furthermore, such a gateway to accountability and justice has not been pursued in the post-MoU period. As the MoU was a minimalist document, intended to be a platform for further consolidation of the peace through justice mechanisms by its creators, the current national institutional system should be utilized in order to attempt to close the gap that has enabled impunity to continue in Aceh.

4.3.3. Victims – left vulnerable and hurt

Victims should be at the center of any peacebuilding exercise and a definite key to implementing mechanisms of transitional justice in a post-conflict environment. As discussed earlier, the 2005 MoU mandates the creation of a TRC and HRC for Aceh, both victim-centered tools of transitional justice and vital for ending impunity but also for reconciliatory purposes. Despite such provisions, victims of the conflict in Aceh have lost out in post-MoU implementation process. While both formal parties to the agreement, GAM and the GoI, were pleased with focusing on DDR, victims were left stranded without an effective or victim-centered reparations program targeting the specific needs of individual victims and thereafter a community-based reparations program, funding village development projects to one third of the Aceh population. *Diyat* payments used the language of traditional Islamic criminal law, but victims felt that its implementation was not compensation as it was not a result of a legal process or truth-seeking initiatives (Clarke et. al., 2008, p. 23; p. 31). In essence, reparations, or rather reintegration strategies have left vulnerable victims marginalized and economic reintegration assistance to ex-combatants has been overemphasized. Moreover, the list of

issues in regards to victims is long, but three issues stand out as lessons to be learned for other conflicts and as direct sources of negligence of victims needs in Aceh.

First, separating victims reparations from reintegration of ex-combatants in Aceh would have enabled victims' greater ownership and transparency of their rights in the post-MoU environment. The MoU itself triggered confusion between the roles of reintegration and victim reparations where ex-combatants gained greater focus. Notwithstanding the importance of ensuring the reintegration of ex-fighters to cement the peace, the GoI is also responsible for victims. Ahtisaari was confident that the MoU was a platform for a deeper peacebuilding process and a stepping stone to end impunity and ensure accountability. However, the content of the Helsinki agreement was the fundamental source of any peacebuilding initiatives in Aceh; hence an unclear mandate to meet victims' needs on paper has had a direct affect on post-MoU programming. This is something a peace dialogue in Papua can learn from and in the future event of a final agreement.

Second, the lack of information collection and statement-taking of victims is yet another lesson to be learned, which has had far-reaching consequences for victims and for the peace process in Aceh. More specifically, the BRA never systematically collected information regarding the number of victims or harm suffered (Clarke et. al., 2008, p. 27). Furthermore, this had a profound effect on the entire reparations program as it was never targeting victims directly and it did not know what victim needs truly meant. The development based, community approach only differentiated amounts of funding according to the intensity of the conflict in an entire area. Keep in mind, the community-based program, BRA-KDP, achieved little success in meeting victims' needs and improving their lives (Barron et. al., 2009, p. 67). Also, a systematic mapping of victims would not only enable the BRA to tailor program specifically to meet victim's needs, but could also be used as preparatory work for a TRC. In addition, BRA's victim categories did not include individuals subjected to sexual violence. Although NGOs have reported gender-based and conflict-related cases of violence, including numerous cases of rape, these individuals, mostly women, were not regarded as victims of the conflict (UNFPA, 2005, p. 8/9). This has marginalized an entire victims group from the outset. Moreover, this is a fallacy that cannot be allowed to repeat itself in Papua or other conflict areas as systematic use of sexual violence as a strategy of warfare.

Finally, a lesson to be learned and which has not only affected Aceh, but the entire process of *reformasi* in Indonesia, is not to underestimate the victims crave to know the truth about past abuses. It is not enough to focus on economic assistance for victims without

initiating a parallel process of seeking the truth. A HRC is politically challenging to a peace and reconciliation process, but a TRC needs to be established in order to enable victims to process feelings of injustice. The specifics of a TRC has been discussed earlier, as has its justifications, but its continued absence in Aceh is a vital reminder for other conflicts in Indonesia to outline its specifics in detail at an early stage of a peacebuilding process.

5. Transitional Justice in Papua – A Framework for Truth and Reconciliation

The following chapter will outline a framework for using transitional justice mechanisms to support a peace and reconciliatory dialogue in Papua. The chapter will focus on the justifications of a truth and reconciliation commission, the potential use of amnesties, victim identification and reparations, as well as the challenge of criminal accountability for gross violations of human rights in Papua. A detailed analysis and discussion of a TRC for Papua will remain a focal point as it remains a strong mechanism of transitional justice with an opportunity to support a comprehensive Jakarta-Papua dialogue for sustainable peace and change.

5.1. A Truth and Reconciliation Commission in Papua

The 2001 Special Autonomy Law for Papua, or OTSUS, was designed to resolve Papuan difficulties through political, economic, social and cultural autonomy, but also to reaffirm its unquestionable loyalty to the Republic of Indonesia. After immense pressure from the most hostile autonomous provinces, Aceh and Papua, the Indonesian assembly directed that special autonomy laws were to be created. This motivated the Papuan Governor, Jaap Soloassa, to establish a small team of local elites to draft a Special Autonomy Law for Papua. Yet, Jakarta drafted its own version and the provincial draft was heavily watered down by the Ministry of Home Affairs before submitted to parliament for debate (McGibbon, 2003, p. 198). Nevertheless, by giving more autonomy for Papua, it was hoped it would calm calls for independence and strengthen the support for the GoI. Among the highlights of OTSUS was more room for indigenous Papuans in local government, a huge budget that represented Papua's large revenue from natural resource extraction, administrative reform, and human rights. Chapter XII of OTSUS elaborates on the provisions of human rights for Papua. Not only shall human rights be "enforced, improved, protected and respected" throughout the province of Papua, but Article 45 and 46 demands a TRC as well a HRC to be formed. Furthermore, it verifies the tasks for the Commission:

- a. To classify the history of Papua and to stabilize the unity and integrity of the nation within the Unitary State of the Republic of Indonesia.
- b. To formulate and determine reconciliation measures.

Notably, none of the provisions outlined in Chapter XII have been fulfilled. The mandate clearly reflects the underlying Papuan grievance regarding the past and history discussed at

the outset of this thesis. OTSUS is also supported by other national legislation such as Law 39 of 1999 on human rights in general and Law 26 of 1999 on human rights courts. In regards to truth-seeking initiatives, OTSUS was complemented by Law 27 of 2004 on which required the establishment of a national truth commission. However, this was annulled by the Constitutional Court in December 2006 after human rights NGOs demanded a judicial review of the following three provisions that failed to adhere to the principles of human rights (ICTJ & KontraS, 2011, p. 30):

- a. The power of the TRC to recommend amnesties for perpetrators of serious crimes.
- b. That cases addressed by the TRC could not be prosecuted in the court.
- c. The requirement that victims would only receive compensation if the perpetrator of the crimes against them was given amnesty.

The Court recognized that the prerequisite of granting amnesties to perpetrators prior to granting reparations to the victims was unconstitutional. Instead of amending the Law on the aforementioned provisions, the Court decided to annul it in its entirety claiming it was no longer valid. In other words, the Court violated the *non-ultra petita* principle recognized in the laws of procedure, which limits the process of judicial review to the subject which was raised by the petitioners. This is a well-known principle within international law as well¹⁴. ELSAM, a well-respected Indonesian NGO, also argues that the Court's decision was a violation of Law 24 of 2003, or the Constitutional Court Act, which does not support the Constitutional Court in making any decisions on any matters exceeding the petition (ELSAM, 2007, p. 17). This was a major setback for the overall truth-seeking initiatives in Indonesia and a replacement for Law 27 has not been enacted at the time of writing. Nonetheless, a TRC in Papua does not need to wait for the passing of a national legislation on a truth commission. OTSUS provides the legal basis for its establishment and finding the truth falls within the mandate of OTSUS Article 46. The details and the schematics of a future truth commission for Papua shall be elaborated upon below. Despite the legal promises of national legislation regarding truth-seeking and human rights none have been realized and the lack of state accountability has continued throughout the post-Soeharto period. More specifically, OTSUS and other human rights legislation are legal justifications from the national perspective on non-judicial truth-finding and reconciliation in Papua. There have been glimpses of incidental truth-seeking projects in Papua. Former President Megawati

¹⁴ See *Asylum Judgment, I.C.J. Reports 1950* for an affirmation of the *non-ultra petitia* principle in international law.

established a National Investigation Commission through Presidential Decree 10/2002 in order to investigate the assassination of the Presidium Council leader Theys Eluay. However, the Commission was led by former security sector personnel and was not regarded as “credible or independent” (AI, 2002, p. 15). Nevertheless, the Commission found six military officials responsible for the murder, but claimed they acted in personal capacity and that gross human rights violations did not occur (ICTJ & KontraS, 2011, p. 20). Other issues raised in OTSUS include the creation of a Special Autonomy Fund to secure the basic means for an improved welfare system and the “Papuanization” of the bureaucracy (Widjojo et. al., 2010, p. 178). In essence, more revenue from the natural resource industry in Papua should go back to the provincial government and the Papuan people. However, the greatly increased budget which arrived with the Special Autonomy status has caused more problems that in it has solved. Allegations of serious corruption and misuse of the funds by Papuan officials, complemented by the lack of assistance and supervision from Jakarta, has contributed to the stained reputation of OTSUS.

There are several problematic aspects of OTSUS, as it can hardly be sustained as it stands today. Firstly, President Megawati initially divided Papua into three Provinces of West Papua, Papua, and Central Papua. Unofficially, the partition was an attempt by Megawati to split the independence movement and to further enrich certain Jakarta-friendly individuals through resource extraction projects (ICG, 2003, p. 7). The Constitutional Court deemed the partition unconstitutional, but the Provincial government of West Papua had already been created, hence it was controversially allowed to stand. In simple terms, since 2003 Papua and West Papua make up the whole former Dutch West Guinea (Stockmann, 2004, p. 1; HRW, 2007a, p. 14). However, the division of the land of Papua was against OTSUS provisions and occurred after OTSUS was created, thus posing a legal conundrum. Importantly, a TRC and other mechanisms of transitional justice must include both the province of West Papua and the province of Papua, as they have a shared history and human rights violations took place in both places. OTSUS has very little popular support as shown by the symbolical July 2010 “hand-back” of the Law to the GoI (The Papuan People’s Coalition for Truth, 12.01.2011). Hence, an updated version of the current legislation should be proposed within a Jakarta-Papua dialogue, but with the full participation of Papuan civil society.

5.1.1. Truth and Reconciliation Commission in Papua: A framework

Transitional justice mechanisms around the world are difficult to compare because every country has its unique history, people and dynamics. The composition and work of previous

TRCs may guide a future TRC in Papua. Moreover, issues can be divided into that of *mandate and structure, operational responsibilities, relationship to victims and witnesses, and liaison to NGOs*. These issues shall now be discussed in detail in order to create a greater understanding of the complexity surrounding TRCs and what it would mean for truth-seeking in Papua. The TRCs in South Africa, Guatemala, El Salvador, Timor-Leste and Argentina will be used as reference points as well as the Indonesia-Timor-Leste CTF.

5.1.2.1. A question of credibility: mandate and commissioners

Article 46 of OTSUS demands a TRC to be established by Presidential Decree after a proposal from the Governor of Papua, in order to outline the Commission's composition and structure as well as its powers and financing. The mandate and structure of a TRC for Papua are essential features that may decide the fate of the commission. More specifically, the structure of the commission, such as the number of commissioners and by which method they are selected and appointed, can be determinant to the commission's credibility. Should there be any public participation? Should the commission consist of only Papuans and/or other Indonesians, only foreigners, or a mixture of all? Should they be experts on Papuan issues or should they be completely new to the issues in Papua to secure impartiality? Who should chair the TRC? These are all important questions that need to be answered with great consideration from Jakarta, but also from Papua. In order to aid this process it is useful to examine what has proved effective in other TRCs around the world. Although a template is impossible to create, some 'lessons' have been learned.

A comprehensive evaluation regarding the structure of the TRC must be a priority in Jakarta and in Papua. The most important and immediate aspect of any TRC is its commissioners. The selection of commissioners, and especially the chairman, is imperative for political reasons, but also for the daily functioning of the commission. An odd number of commissioners have always been the norm and the commission is usually more effective if the number is kept low. Most importantly, the process by which the commissioners are selected can have a profound impact on public opinion of the TRC, but also for other segments of society that will be affected by the TRC's inquiries. It has proved effective to engage the public in various manners to create a more elaborate selection process, rather than pure presidential appointments (Hayner, 2011, p. 212). The TRC for South Africa was revolutionary in certain aspects. For example, the TRC candidates were first nominated by the public before being exposed to a rigid selection process and with a final approval by President Mandela. Article 7(2)(b) of the Act, which established the commission in South

Africa, calls for the commissioners to be “fit and proper persons who are impartial and who do not have a high political profile” and only two commissioners could be non-South African citizens. In comparison, the Historical Rectification Commission for Guatemala consisted of a mixture of foreign and domestic commissioners, whereas the TRC for El Salvador consisted of foreigners only. Furthermore, the Guatemalan TRC even had a chairman appointed by the UN Secretary-General (Buergenthal, 1994; Quinn & Freeman, 2003). The question regarding foreign or domestic commissioners is remarkably context specific. For example, in the case of El Salvador, it was deemed necessary none of the commissioners were to be Salvadorian nationals, thus being less inclined to divulge sensitive information to parties affected by the TRC inquires (Buergenthal, 1994, p. 542). In terms of a TRC in Papua, such a commission structure is highly unlikely and not preferable. Although foreign staff members should be allowed, due to expertise on Papuan issues, the commissioners should be citizens of the Republic of Indonesia. In essence, international commissioners would internationalize a domestic project beyond the interests of the GoI. The challenge for the President would be to confirm an impartial commission that both Jakarta and Papua can accept. A similar selection process to that of South Africa would be preferable because the public need to feel a close relationship to the TRC from its outset. OTSUS does not direct the Government on the matter of commission structure, but a Presidential decree should encompass such issues. Moreover, the makeup of the commission needs to be balanced and the principle of neutrality or impartiality is possibly the most important challenge for the creation of TRC for Papua.

OTSUS briefly outlines the broader mandate of a TRC for Papua as to assert the history of Papua. As discussed earlier, the acknowledgment of Papua’s past and its history with Indonesia is of crucial importance. Furthermore, due to the lack of transparency and the denial of Jakarta to acknowledge the truth has made historical rectification a priority for generations of Papuans. However, the central government would never join a dialogue for peace if a TRC were to investigate the Act of Free Choice as they know it delegitimizes Indonesia’s historical claim to Papua. The true function of a TRC should be to investigate the numerous human rights violations that have taken place during Soeharto’s reign. The GoI is left to determine the reconciliation measures. Reconciliation is also one of the purposes with a TRC, but its relationship to the truth has often been perceived as negative. However, hearing the truth should be the primary function of the Commission, although it might jeopardize national reconciliation in the short run. Moreover, this may play a pivotal role in Indonesia, because reconciliation between Papua and Jakarta is an essential part of dialogue

and a sustainable peace. Yet another reason for the impossibility for a TRC to investigate the Act would be the potential damage it would do to a parallel reconciliatory process. All parties must be able to accept the truth and simultaneously further a reconciliatory process. Insightfully, Thomas Buergenthal, of the El Salvadorian TRC, offers a different aspect on the relationship between truth and reconciliation worth a remark. He emphasizes the significance of truth and suggests that without it, national reconciliation is extremely difficult. He also argues that the truth is a necessary facilitator for reconciliation (Buergenthal, 1994, p. 544):

A nation has to confront its past by acknowledging the wrongs that have been committed in its name before it can successfully embark on the arduous task of cementing the trust between former adversaries and their respective sympathizers. One cannot hope to achieve this objective by sweeping the truth under the rug of national consciousness, by telling the victims or their next of kin that nothing happened, or by asking them not to tell their particular story.

Buergenthal's experience in El Salvador was also shared by others in the TRC for South Africa. A general perception that the requirements of justice conflict with that of national reconciliation was widespread in South Africa. However, such an idea is based on an artificial assumption of the meaning of reconciliation. Acknowledging the past and recognizing the truth to achieve justice is the "true life-blood of reconciliation" (Asmal et. al., 1997, p. 14). Thus, it becomes self-defeating to limit the space for truth about past abuses in the name of reconciliation because the truth itself is an instrumental pillar to a reconciliatory process. Nevertheless, one must consider the political climate and the willingness of the political elite to sanction a TRC for Papua. It would be considerably easier for Jakarta to accept a TRC if it focused on the investigation of grave human rights abuse during Soeharto, whereas an official inquiry into Indonesia's claim on Papua through the Act in 1969 would question the very foundations of the Republic. It is obvious that the President would be more than unwilling to accommodate such a process.

Consequently, a TRC for Papua needs a more detailed mandate than what OTSUS currently presents. Ideally, the ToR (Terms of Reference) should be introduced and passed through Parliament. Even though a Presidential Decree will outline the basic powers and tasks, selection process of commissioners, and financial considerations a parliamentary Law would be preferable for the detailed outline of the ToR such as the South African Promotion of National Unity and Reconciliation Act 34 of 1995. Failure to create a sufficient and proficient mandate may jeopardize the credibility of the commission and endanger the entire process. The GoI was criticized for an inadequate mandate through the bilateral CTF for the

atrocities in Timor-Leste in 1999. Although the ToR were not the only concern, a solid mandate was a prerequisite for international support for the truth-seeking initiative. For example, the ToR for the CTF failed to categorize different crimes of various gravity levels. This caused a withdrawal of support for the commission, and from the UN in particular, because perpetrators of crimes against humanity could potentially receive amnesty (Von Braun, 2005). Although this would be a political challenge for the ruling elite, it would show that Indonesia is ready for permanent and systemic change with a wish to reconcile the nation.

5.1.2.2. Modus operandi: procedural challenges

Any TRC is faced with everyday operational challenges and not everything can be planned. However, it is still possible to anticipate a number of issues that a TRC for Papua has to evaluate. Testimonies and hearings have to be considered along with an appropriate method for data collection and processing. Even though such matters may seem trivial with a lack of sophistication they are extremely significant and the success of the TRC may depend on them. Generally speaking, TRCs are emotionally and morally complex, not to mention politically, with national and international scrutiny from a variety of stake-holders. This requires an extraordinary role to be played by the commissioners and their staff. In essence, a TRC for Papua would be under constant pressure before its investigations had even started. Indigenous Papuans would have extremely high expectations for the truth to be heard and accepted by the GoI and for the victims, or their families, to initiate a process of closure. Likewise, the GoI would be over-sensitive of a process in which a national ‘witch-hunt’ was avoided and calls for separation from the Republic at all cost. A TRC must expect to function and live within such an environment for the duration of the commission and be able to handle the pressure through solid decision-making. Thus, the intense and constant national and international examination makes methodological and conceptual details fundamentally important and cannot be underestimated. Although the political, economic and socio-cultural climate in Papua requires a tailor-made solution, the success and failure of previous TRCs can contribute to a greater understanding of how a TRC for Papua could operate.

One vital feature of TRCs has always been the hearings, even though some commissions have opted for closed sessions and testimonies. It is unconceivable that a TRC for Papua would opt for anything but open hearings. However, due to the large time span the TRC has to cover, from the early 1960s up to the fall of Soeharto in 1998, there are potentially thousands whose testimony must be heard. Due to a limited budget it might not be

feasible for every hearing to be public and televised, but a considerable number of testimonies can still be aired. In South Africa, the commission took the testimonies of over 21,000 victims and witnesses of which 2000 appeared in public hearings. Furthermore, the South African TRC received astonishing amounts of attention from the media and subsequently the public (Hayner, 2011, p. 28). The media attention is an important factor that justifies public hearings, even though a TRC must have an understanding with broadcasting stations of what content is to be shared with the public. Victims and witnesses must be protected in fear of reprisals from the military or other forces hostile to the TRC. Security has often been the concern regarding public hearings. In Sri Lanka the commission decided to opt for closed doors after victims appeared to have received genuine death threats (Hayner, 2011, p. 220). Due to the restricted access for journalists in Papua over the previous decades, limited coverage has been given in national and international media. Thus, public hearings with substantial media attention would play a dual role for the TRC in Papua. First, public hearings would serve as a form of ‘naming and shaming’ of the perpetrators and stand as a testament to the extensive *reformasi* and democratization processes since the fall of Soeharto. Indonesia would show the world how far it has come in dealing with the past and live up to ‘unity in diversity’. Second, public hearings and their media coverage would raise awareness about Papua throughout Indonesia. Such an educational purpose could play a crucial role in eliminating common stereotypes and engage the public in the truth-seeking process. There is a great lack of knowledge regarding the extent of human rights abuse during Soeharto’s regime, thus a public truth commission for Papua could be the first step towards national acknowledgment and even reconciliation. Third, public hearings could actually be used as an additional route to truth. Arguably, the media pressure might induce perpetrators to admit to their actions. On the other hand, witnesses and victims, in particular, must be protected from intimidation and “re-victimization”. The relationship between the TRC and the victims will be discussed below.

On the other hand, the CTF between Indonesia and Timor-Leste proved that public hearings may harm the entire truth-seeking process by allowing perpetrators to publically deny their actions and claim complete innocence without any serious legal opposition (Hirst, 2008, p. 25). This shows that it is not merely enough to decide whether to conduct public hearings or not. The mandate, through the ToR, should outline the detailed purpose for holding public hearings. In addition, once the purpose has been established, in light of the ToR, the commission is left to work out how such public hearings should be conducted. The

commission must resolve the issue of who is to be selected for participation in such hearings and in what capacity (victim, perpetrator, observer, psychologist, public etc.). In addition, the commission must be able to guarantee the participants' safety and provide psychological support for victims. This is further elaborated upon in the next section. If the sole purpose is public attention, the commissioners may decide to pursue a different hearing process than if it was a pure truth-seeking initiative. For example, the 2000 victims and witnesses heard in the South African TRC had already submitted their testimonies and the hearings were primarily about public attention and acknowledgment.

Other more practical issues that played important roles in several TRCs include the difficulty of geography and staffing considerations. As for the TRC in Papua, it is very probable that these particular issues will also be of concern. First, geography played a major role in the TRC for Guatemala and South Africa. In both cases, the commission decided to divide the work into regional offices, which allowed them to focus on particular communities and gain insight that would have proven difficult from one centralized location (Quinn & Freeman, 2003, p.1132). Although Papua is not a country in itself, such as South Africa or Guatemala, it is a large territory, but yet not densely inhabited. Thus, for that very reason, Papua is huge compared to its population and the habitat makes travel challenging. If victims and witnesses were to gather for testimonies in one location many people would have to walk for days, if not weeks, which could seriously compromise the entire process. In addition, the victims would be marginalized again by having to leave their home for days and possibly lose their jobs to take part in the truth-seeking process. This would be unacceptable and such pragmatic issues must be planned for. Due to budget restraints, providing all victims and witnesses with air transport could also be problematic. As a result, establishing local offices would be of great assistance. Second, staffing the commission have shown to be a challenge in most TRCs as they reflect budget restraints, but also the political willingness towards the TRC. For example, the TRC in El Salvador was staffed by non-"biased", non-Salvadoran nationals, but never going beyond 25 staffers, whereas some African TRCs have relied heavily on the sole work of the commissioners. However, Latin American TRCs have experienced a depth of staff with various expertise including human rights specialists, lawyers, forensic anthropologists, and social workers (Hayner, 1994, p. 644). Depending on financial restrictions, the most appropriate direction for the TRC in Papua would be to allow a range of staff, national and international, from various specialist fields in order to paint a genuine picture of past abuses by drawing on expert knowledge of Papua. However, potential

staffers should go through a rigorous recruitment process to ensure professionals from various Indonesian and non-Indonesian groups. Furthermore, the TRC for Papua should establish a liaison team to engage with the military and ensure them that a fair and transparent truth-seeking process can take place.

5.1.2.3. Relationship to victims and witnesses

TRCs and their relationship to victims and witnesses is perhaps the most essential for the reputation and integrity of any commission. Although the language surrounding truth-seeking initiatives is filled with familiar terms such as ‘victim’ and ‘perpetrator’, a TRC must be clear on the definition of a victim. In Indonesia, identifying victims has not been a pain free endeavour. Post-conflict Aceh is a true testament to just that. More specifically, the MoU, which ended the longstanding conflict failed to identify victims in any more detail than anyone who “suffered” from the conflict. Such a broad definition could potentially encompass everyone in Aceh as very few had not endured any suffering over the years. Consequently, the BRA established 14 categories of victimhood, ranging from loss of property and the death of a family member to permanent disability and death. Thus, the definition of victimhood will play a major role for a TRC for Papua and its outcome may permanently affect Papuans’ perception of the TRC and any reparations process. Questions regarding what kind of suffering shall be encompassed in the definition of a ‘victim’ in Papua must be discussed at depth as it can sincerely complicate claims of compensation and jeopardize the TRC’s relationship to the people before it has begun (Garcia-Godos, 2008, p. 122/3).

The truth is imperative, but not at the cost of losing victim support for the project. It is pivotal that victims and victims’ groups support the process. However, truth and memory will be exhausting for the majority of victims and survivors, but which will also reflect on the TRC itself, especially for staff taking statements and listening to their stories. Subsequently, the relationship between the TRC for Papua and the victims and witnesses will be complex and there is no template that is guaranteed to work. Pain and sorrow as well as trauma and memory are processed differently, often depending on the culture characteristics. Thus, it is a delicate relationship that is much needed, but which requires preparation and a readiness for the unknown. Building on previous experiences in Timor-Leste, South Africa and Guatemala various tools can be deployed to try to avoid a re-victimization process that can leave victims with deeper scars than before they participated in hearings. In Timor-Leste a Victim Support Division was established to provide assistance to victims during the truth-seeking processes,

such as the public hearings and the taking of statements (ICTJ, February 2010, p. 6). Similar measures were introduced in South Africa a few years earlier. Victims often feel the need to tell their story to an official organ such as a TRC, even though as Priscilla Hayner points out, it is not always clear why victims and witnesses do come forward. She further explains that for victims it is crucial to tell their story no matter if a TRC exists or not. However, truth commissions, through hearings, can offer a safe environment for victims to do so and with officials completely focused on one individual story (Hayner, 2011, p. 147/148). Although many victims and witnesses have a strong wish to tell their story it can be a severely traumatic experience to reopen the past by confronting every detail. Psychologist Brendan Hamber explains that “past traumas do not simply pass or disappear with the passage of time” (1995, p. 3). Importantly, he also emphasizes that the creation of a TRC in itself is not enough and it may risk reopening forces which it may not control unless parallel support mechanisms are established. Victims and witnesses are likely to feel extremely strong emotions of bitterness, anger and revenge if psychological assistance does not complement their participation in the TRC (Hamber, 1995, p. 7). However, in the case of South Africa, additional psychological support services were not mentioned in the terms of reference and thus it became an issue of debate and a question of allocation of responsibility. The mandate for a TRC in Papua must include such provisions. Hamber outlines four key areas of psychological services aimed at ensuring the needs of victims and witnesses. Firstly, the TRC must build networks with organizations that can provide psychological services and support for victims and witnesses. Secondly, the TRC must ensure psychological support services related to the implications of the actual story-telling process. This is especially important regarding public hearings. Thirdly, the complexities and limitation of the statement-taking process must be evaluated as it is one of the pillars of the entire truth-seeking process. Fourthly, support and psychological training for TRC staff must be considered as staff can often experience traumatisations themselves (Hamber, 1998, p. 15). The TRC for Papua needs to build on experiences from other TRCs as similar emotions are likely to be found throughout much of Papua as well. For example, if allegations of Papuans being buried alive by security forces in the 1970s are true, there will be a number of people suffering from trauma. Family of victims and witnesses, but possibly also soldiers forced to commit such deeds. By initiating such support schemes the TRC for Papua can also build trust amongst Papuans to develop a proactive and solid relationship to victims and witnesses of grave human rights abuse. To ease the financial and operational burden of the TRC, the newly established Witness and Victim Protection Agency (LPSK) should take on support role for

victims and witnesses in Papua in terms of their protection from intimidation. It is imperative that victims and witnesses, who have to relive traumatic events in the TRC, will not also be intimidated by forces opposing the TRC. However, the LPSK has struggled with real institutional support represented by a weak mandate and insufficient resources, even though this is changing (ICTJ & KontraS, 2011, p. 60/61).

Thus, any relationship between a TRC and victims and witnesses will be instrumental to not only the healing of the victims themselves, or the success of the truth-seeking process, but also to the sustainability of any peace or conflict resolution.

5.1.2.4. Liaison with NGOs and civil society organizations

NGOs are essential to the establishment and the structure of a TRC. A TRC for Papua will need the support from national and international NGOs. National NGOs are crucial for the image of the TRC as a credible and sincere truth-seeking initiative to cement among Papuans and Indonesians in general. Broadly speaking, the establishment of numerous NGOs with a variety of different agendas is one of the most important developments in Papua in the post-Soeharto era. They often focus on very specific issues, from illegal logging and fishing to human rights violations and education, working closely with local communities to gain their trust and understanding. Moreover, NGOs can affect the process in which the TRC is born, but also the parameters shaping the commission. Due to the sensitive nature of the TRC's tasks, NGOs possess a certain kind of political leverage over the GoI. In essence, the relentless and continuous efforts of a multitude of NGOs throughout Indonesia have played a pivotal role in the period of *reformasi*. On the one hand, NGOs in Papua and elsewhere can serve three major functions of lobbying, knowledge sharing, and public trust-building to strengthen the TRC for Papua. On the other hand, other TRCs have experienced factors which caused frictions and difficulties that could potentially undermine the efforts of the TRC. For example, in Argentina, the NGO, Mothers of the Plaza de Mayo, asked their members not to give their testimonies before the TRC and continued to oppose cooperation with the commission throughout its lifetime (Crenzel, 2008, p. 180; Hayner, 2011, p. 225). The array of roles and functions of civil society organizations deserves a further elaboration.

Lobbying is one of the most relevant functions of any NGO throughout the world. However, it can play a unique role in the conceptualization of a TRC because governments realize that they are dependent on the support and cooperation from civil society for a successful outcome. In particular, NGOs can use lobbying and public pressure to shape the mandate, structure and powers of the commission itself prior to its actual establishment.

Important and often dividing issues, like amnesty powers are often challenged by NGOs to ensure a comprehensive and effective TRC (Hayner, 2011, p. 224). Arguably, NGOs will continue the long-term reconciliation process after the TRC has finished its final report and thus playing a key role in the establishment of a sustainable peace. In South Africa, NGOs were instrumental to the lobbying of a legislative debate surrounding the TRC mandate and participated in the drafting process. Furthermore, the government was forced to cooperate with the NGOs, but which led to a productive exchange of ideas regarding the final legislation of the TRC. Workshops and conferences were organized that facilitated a broader civil society input regarding a fairly complex issue, determinant to the future of the South African TRC (Van der Merwe, Dewhirst & Hamber, 1999, p. 76). In addition to affecting the legal debate surrounding the mandate, NGOs can shed greater light and transparency on the process of selecting commissioners. The truth commission in Timor-Leste, CAVR, contained a majority of the commissioners with extensive NGO or civil society backgrounds whereas in South Africa NGOs designed the selection process and had significant influence on the participation of the public (ICTJ & GCDD, 2004, p. 15). As established above, finding the right selection process and consequently suitable commissioners is not an easy task, but can be extremely decisive for the credibility of the TRC. In Papua, the Foker LSM Papua (The Cooperation Forum for Papuan NGOs) is a NGO representing 18 NGOs throughout the land of Papua with a variety of interests and local community connections.¹⁵ It is the largest network of NGOs in Papua and could play an important role in the TRC creation process as they have been engaged in the revival of a Jakarta-Papua dialogue focused on human rights. Due to the limited capacity and resources of individual NGOs a coalition is useful to bring different representatives together to share the same platform. Moreover, such a network may work as a clearinghouse for information and resources-sharing (ICTJ & GCDD, 2004, p. 16). Finally, NGO lobbying is an important tool to exhaust in relation to the establishment of the TRC, but which should continue throughout the duration of the commission.

NGOs also possess expert knowledge of human rights situations and have often collected information of alleged abuses. Human rights professionals often have an intrinsic insight into local conditions and often years of experience of unacknowledged abuses. In addition, other think-tanks and civil society organizations have often specialized knowledge and in-depth understanding about the complexities of a region, country or specific issue. In regards to Papua, there are a number of foreign and domestic experts in activist and academic

¹⁵ See <http://fokerlsmpapua.net> for more details about Foker LSM Papua.

organizations who can aid the process of establishing a TRC for Papua. At present, but also in the past, several NGOs have documented serious human rights violations in Papua. Although military archives have been impossible to access, data has been collected by NGOs like Tapol, focusing on abuses from the 1980s and 90s.¹⁶ In addition, other NGOs, such as Elsham Papua and various faith-based organizations have collected detailed reports of mass killings from the 1970s up to the fall of Soeharto in 1998 (as outlined in Asgart, 2003, p. 544/545). However, such reports are very difficult to verify without forensic investigations and official military records. Moreover, NGOs would play an important role in sharing such documentation to the TRC for Papua as a preliminary knowledge base to be followed up. In other TRCs, information gathered by NGOs has indicated patterns of violence and human rights violations, which can be of great assistance to the commission in its initial stages. In Chile, data collected on disappearances were handed over to their commission and served as a starting point for investigations (ICTJ & GCDD, 2004, p. 20). Additionally, NGOs submitted information to their respective TRCs in Guatemala, South African and El Salvador even though governments often consider NGOs to be biased against the alleged perpetrator group (Hayner, 2011, p. 225). Without a doubt, NGOs will play an active role in the conceptualization and development of the TRC for Papua if they believe it is a serious government truth-seeking initiative. At the time of writing, several of the NGOs mentioned above are working on shaping a Jakarta-Papua dialogue, but also civil alternative mechanisms (Interview with Sri Wahyuningroem, 14.10.2011).

Finally, one of the main functions NGOs can fulfil in relation to a TRC is that of creating viable and trusting relationships. Firstly, NGOs can create a bridging relationship between the public and the TRC. A local grassroot NGO often has considerable support within a specific community. Moreover, citizens living in these communities may need to be convinced of the sincerity of a TRC as they either may have lived without knowing the truth or may be highly sceptical to the credibility and seriousness of such a commission. In Indonesia, truth-seeking has officially been on the agenda since human rights were incorporated into the legal system after the fall of Soeharto, although its potential has not been fully utilized. Thus, citizens may look upon a TRC for Papua as an empty promise, but a local NGO may help establish a more positive and hopeful view of the TRC. For example, in El Salvador Buergenthal highlights that the average Salvadorian had no reason to believe that

¹⁶ See Carmel Budiardjo & Liem Soei Liong. *West Papua: An Obliteration of a People* (London: TAPOL, 1988) for further evaluation of serious human rights abuse allegations.

the TRC would pursue an honest and serious investigation (1994, p. 513). Based on Indonesia's track record, a similar assumption can be made in Indonesia. Furthermore, Indonesians outside Papua may also think a TRC may be unnecessary and would only obstruct attempts to forge national reconciliation after Soeharto. Secondly, and perhaps most importantly, NGOs often possess unique and special bonds with victims and victims' groups, which may prove invaluable for the credibility of the TRC as it relies on a solid relationship to victims. Victims, or their next of kin, are at the heart of a truth-seeking process and often highly sceptical of a new government initiative as many have struggled for recognition for decades. National NGOs in Indonesia, such as KontraS, and local Papuan NGOs who have established close relationships with victims and possible witnesses have an important role to play. Moreover, the TRC needs to ensure the cooperation of a spectrum of NGOs and civil society organizations because they are essential to the public support of the commission and may prove invaluable to its work. In addition, a TRC for Papua must understand that NGOs will continue to work with all the key actors and evaluate its impact after the TRC have published its final report (ICTJ & GCDD, 2004, p. 35). Essentially, NGOs and a TRC for Papua will have a mutually responsible relationship, which must continue throughout the duration of the commission.

Although NGOs and the TRCs for Papua have the potential to create a positive relationship, other TRCs have experienced strenuous relations with NGOs and obstacles must be anticipated. In El Salvador, the commissioners found that local human rights organizations had not prepared to assist the TRC and thus their participation was not particularly useful to the commission (Buergenthal, 1994, p. 513). In comparison, several NGOs were prepared to aid the TRC in South Africa, but did not coordinate with the commission who was reluctant to work too closely with them in fear of breaking their principle of impartiality. Additionally, the TRC employed many key personnel from NGOs, which affected their capacity to effectively cooperate with the TRC for some time (Van der Merwe et.al., 1999, p. 68/69). These experiences prove how important it is for the TRC to outline their relationship with NGOs prior to the commencement of the commission's work. Unless the TRC and NGOs can find a balanced working relationship this may jeopardize the long-term process of reconciliation where NGOs carry on the work of rebuilding society (Van der Merwe et.al., 1999, p. 77). NGOs who promote the creation of truth-seeking mechanism in Papua should outline their expectations, but also responsibilities in relation to a TRC in order to utilize the full potential of such a vital tool of transitional justice.

5.2. Amnesties

As discussed in Chapter 2, the use of amnesties has come to be a frequent tool of transitional justice processes. However, the discussion surrounding the application of amnesties has especially been founded in the potential damaging effect it might have if applied to perpetrators of serious crimes such as genocide, crimes against humanity and war crimes. In essence, truth commissions may be granted the power to distribute amnesties on the grounds of full cooperation from the perpetrator. This is a highly contentious issue, which has also played a role in the public dialogue regarding transitional justice mechanisms in Indonesia. Moreover, it challenges key actors to deliberate the essential relationship between truth and justice, which lies at the core of transitional justice, and to establish its equilibrium.

Precisely due these difficult factors regarding the use of amnesties in such a manner, this section shall elaborate an alternative use of conditional amnesties in the land of Papua, in order to support a dialogue and a sustainable peace. Amnesties may be used in several ways, but it is important that they can be justified and can complement other mechanisms of transitional justice such as criminal accountability and truth-seeking initiatives. More specifically, amnesties can be used to clear the names of persons unlawfully imprisoned, but also to protect ex-combatants as it was used the 2005 peace agreement in Aceh. The imprisonment of political activists in Papua is a major obstacle for any Jakarta-Papua dialogue and such a process would depend on the release of the prisoners. This would be an enormous trust-building exercise in order for the central government to show its sincerity in a dialogue. Such a show of goodwill could only be met, as I see it, by a consequent demobilization process of the OPM, but also of the TNI in Papua leaving only non-organic troops for the external defence of the province. In fact, demobilizing the TNI is a priority and there are signs of willingness to trade OPM disarmament for a drastic reduction in TNI troops (Interview with Rhida Saleh, 08.06.2011). Moreover, this would significantly aid the diffusion of today's *status quo* and dramatically lower the risk of an escalation of violence.

5.2.1. Political prisoners in Papua

Before a more detailed evaluation of such use of amnesties it is appropriate to outline the story regarding political prisoners in Papua. This is a crucial exercise in order to understand this as an obstacle to a peace dialogue, but also as a grave human rights violation in itself. The unlawful imprisonment of Papuans fuels the already mistrustful relationship between Jakarta and Papua and it has motivated the OPM to continue their armed resistance to Indonesian rule.

Due to the strict control exercised by the security forces and the difficulty of accessing information for foreigners it is unknown how many individuals have been imprisoned for peaceful activities. However, it is certain that this is a well rehearsed strategy and which happens on a regular basis in Papua. AI estimates that around 90 individuals are unlawfully imprisoned in Papua (The Jakarta Post, 10.12.2011). HRW, along with AI and Tapol have attempted to map and expose the issue of political prisoners in Indonesia, but with specific focus on Papua. Officially, the Indonesian government remains firm that no political prisoners exist in Papua at all. As late as in mid-December 2011, Coordinating Minister for Political, Legal, and Security Affairs, Djoko Suyanto, denied the existence of political prisoners and claimed that “only criminals” were incarcerated after meeting with AI (Primanita, 12.12.2011). However, Tapol highlights a leaked internal government document titled “List of Political Prisoners Across Papua”, which lists 25 Papuans imprisoned for treason or related offenses (Budiardjo, 14.12.2011). Thus, the issue of unlawfully imprisoned persons is determinant to any future Jakarta-Papua dialogue and the situation cannot be solved until they have been released. The case of Filep Karma shall be briefly outlined as he arguably remains the most well-known political prisoner in Indonesia as he currently serves a 15 year sentence for peaceful expression of his opinions.

The 51-year old civil servant, Filep Karma, was arrested on December 2, 2004, and faced charges of “conspiracy to rebel with the intent to cause disintegration of the Republic of Indonesia and to cause social unrest” along with other minor charges of the Indonesian Criminal Code after he was found associating with a crowd who raised the Papuan flag, the Morning Star, the day before. This occurred following the gathering of hundreds of students rejecting the special autonomy law for Papua and claiming Papuan independence from Indonesia. However, witnesses claim that the raising of the Morning Star was a spontaneous act of the masses, but nevertheless it triggered a violent response from the police who started firing into the crowd (HRW, 2007b, p. 19-22). Karma claimed to have organized a meet on December 1 to celebrate, not to discuss secessionism from Indonesia. Following a farce of a trial, Karma received 15 years imprisonment on May 26, 2005. Although the prosecutor had pushed for five years, the judges claimed that the lack of mitigating factors and due to Karma’s lack of remorse, he was declared “hostile” to the State and that his actions were aimed at destroying the integrity of Indonesia (HRW, 2007b, p. 29). Karma was arrested along with Yusak Pakage who received 10 years imprisonment for his involvement in the flag-raising. He was given a lower sentence due to his lack of previous crimes.

5.2.2. Amnesties as a means of individual rectification and stabilizing force

Amnesties have multiple functions, even within the field of transitional justice. However, and as mentioned earlier, the discussion has often been focused on the allocation of amnesties in that uphold and protect a culture of impunity, often in relation to the work of truth commission. For this reason, it has often been regarded as a highly controversial mechanism of transitional justice, claimed to forgo justice for the sake of truth. Thus, the major question is whom do amnesties protect? Louise Mallinder clearly differentiates between different categories in which an amnesty may be granted. This section is concerned with the how amnesties can be used to aid non-violent political prisoners, but also ex-combatants in Papua. Mallinder defines the use of amnesties for the first category of non-violent prisoners as ‘amnesty as reparation’ (2008, p.64).

Reparative amnesties for non-violent political prisoners may be a sustainable solution in Papua and increase the prospects of sustainable peace although the central government must first acknowledge the issue of unlawfully detained persons. Furthermore, it is beneficial not to look upon amnesties for non-violent political prisoners as a mere pardon. A more comprehensive process needs to be attached to the action as their punishment is not only withdrawn, but the prisoners also rehabilitated and their convictions wiped from their records. More specifically, the government may imply through the granting of such amnesties that the criminal proceedings by which the prisoners was sentenced were unfair (Mallinder, 2008, p. 65). Politically speaking, granting such amnesties of reparation would be far easier for Jakarta as they would gain credibility and enjoy somewhat newfound trust amongst Papuans as well as international applaud, without issuing a public and official apology. More importantly, it would also restore the dignity and lives of the individuals involved, such as Felipe Karma. Amnesties are often a result of negotiated agreements or in relation to a transition of power. In Indonesia the transition was initiated in 1998, but a negotiated agreement has not come about in Papua. However, as a part of a peace dialogue such an amnesty could be justified as supporting the stabilization of communication between Jakarta and Papua.

It is useful to distinguish between the justifications for handing out amnesties to ex-combatants as opposed to non-violent political prisoners as they have not engaged in violent activities. Thus, other justifications may be given for amnesties to be granted. This may not only be done for political reasons, but also for the purpose of reconciliation and peace. Although the level of violence in Papua is nowhere near the level in Aceh, a similar scheme

can be useful in order to hinder an escalation of violence, and fast-track the disarmament of OPM, and the demobilization of non-organic security forces. Mallinder also emphasizes that granting such amnesties could facilitate trust-building, symbolize the end of a violent struggle, and boost community confidence in a restoration of law and order (2008, p. 156). A dialogue between Jakarta and Papua may only achieve fruitful stability if the potential for violence has been minimized or even eliminated.

5.3. Victim identification and reparations

Victim reparation is an internationally recognized right. This thesis has previously discussed its legal and conceptual anchor in the *Basic Principles on the Right to Remedy and Reparation for Victims of Gross Violations (A/RES/60/147)*, adopted by the UNGA in 2006. The document is encompassing and has moved the boundaries of reparations in order to ensure greater compliance and to avoid states using loopholes and poorly formulated provisions as excuses for not recognizing victimhood. As previously discussed, Indonesia has never instigated a reparations program, let alone, identified victims of gross human rights violations of the past. It is a systemic feature that has been allowed to continue, despite the end of Soeharto's reign. Papua is no exception and victims have never been identified or acknowledged by the central government, despite reports of human rights abuse for the past 50 years. Furthermore, the pressure to identify and recognize victims in Papua has never been a realistic issue for Jakarta as it has been closely linked to the fight for independence by many Papuans and organizations such as the OPM. However, if the central government and Papuans are both sincere about a Jakarta-Papua dialogue and an end to hostilities, human rights victims must be acknowledged in due time. Due to the lack of comprehensive investigations, forensic and otherwise, the true extent of the violations that have occurred over half a century remains largely unknown to the outside world. In order for Papuans to trust the central government and feel they have suffered alongside other Indonesians under Soeharto it is essential for victims to be identified and a reparations program instigated. This section will attempt to identify the types of violations that have occurred over the years and that continue to occur, but also discuss allegations of genocide. More specifically, the term genocide has been used by some observers of the conflict in Papua, but it remains a highly controversial topic that needs clarification.

5.3.1. Victim identification

It is easy to think in a dichotomous manner when thinking of a victim. For most the dichotomy victim/perpetrator is common. This is not an erroneous train of thought, but when

evaluating of reparations within transitional justice, a perpetrator is not necessary for the identification of a victim. In essence, this is echoed by the *Basic Principles*, which states that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted (para. IV(9)). A victim is so in his or her own right, thus victim reparations do not have to be linked to criminal proceedings of the perpetrators.

Serious human rights abuse has been a continuous threat and occurrence in Papua since the 1960s. The central government has long pursued a security-centered approach to Papua and the province was closed to any outside observation. However, it has become clear that human rights abuses committed by the security forces has strengthened many Papuans' conviction that independence from Indonesia is the only viable option in order to live in peace. This has been supported by the former Governor of Papua who believed that the human rights abuse and violence has been the main reason for the Papuans support of an independence movement (Elisabeth as cited in Widjojo et. al., 2010, p. 165). The abuses conducted by the military include widespread murder, torture, abduction, among other things and have contributed to the polarization of anti-Indonesian sentiments and common support for the OPM (Chauvel & Nusa Bhkati, 2004 , p. 25). Complementary, Jemima Garcia-Godos explains that the most common types of violations in authoritarian regimes and armed conflict situations are murder, kidnapping, torture, forced disappearances, rape, sexual abuse, mutilation, forced draft, and displacement (2008, p. 122). In Papua most of these categories can be identified. Murder, forced disappearances, torture, mutilation, displacement, and rape have all been proven a regular occurrence. One source of such abuse has been the Freeport-McMoRan copper and gold mine in Timika. For example, human rights abuses happened in 1994 and 1995 when villagers protested against Freeport's use of traditional lands for mining (Chauvel & Nusa Bhakti, 2004, p. 24). The security forces have been paid handsomely by the mining giant for the protection of the mine and acted with complete disregard of human rights for decades. Additionally, Kopassus is responsible for burning down homes, displacing thousands of indigenous Papuans into the jungle. Consequently, John Wing estimated that 6393 people kept refuge in the jungle by the end of 2004 (2005, p. 19). These two incidents are mere examples in a prolonged history of violence, mainly carried out by the state apparatus towards indigenous Papuans. Importantly, the church network in Papua has been the most reliable and persistent source of information, which may prove pivotal for victim

reparations. They have collected witness accounts of abuses along with other supporting documents as well as recorded incidents over the years.

It was not until the 1980s, however, when political violence in Papua became internationally known. During Soeharto's reign military operations in Papua were aimed at terminating the OPM in the jungle, but also their urban support network. Consequently and due to the lack of accurate, verified information, the number of people killed is highly speculative, varying from around 100,000 up to 500,000¹⁷ (Widjojo et. al., 2010, p. 162). Therefore, it is also crucial that forensic investigations led by Komnas HAM are pursued in the future.

LIPI has identified three overarching waves of violence against the Papuan people since the early 1960s which may aid the categorization of human rights victims. Although Papua's historical background has been discussed in the previous chapter it is worth reiterating those cycles here. The first wave of violence, from 1961 to 1969, ranged from the informal Indonesian takeover of Papua in the early 60s to the build-up to the Act of Free Choice in 1969. Furthermore, the second wave of violence, from 1970 to 1977 focused on cementing Indonesia's presence in Papua and to eliminate any opposition in the wake of 'the Act'. Included in this period is the consolidation of Freeport's mining complex and the government's attempt to ensure its security. Finally, the third wave of violence from the end of the 1970s to Soeharto's fall in 1998 is dominated by the DOM era. This has often been recognized as the period where most human rights abuses occurred often in the form of large-scale internal displacement of refugees, but also killings and numerous disappearances (Widjojo et. al., 2010, p. 162/163). Moreover, these periods of prolonged and massive abuse has created a very high number of victims, thus defining victims and categorizing them is not an easy task. Throughout this period the OPM tried to fight back and was a source of violence as well, although with varying effect compared to the security forces. Most importantly, LIPI concludes that the combined experience of being victims of gross abuse by the military forces, but as well as by groups acting on behalf of the OPM has led to the development of a collective memory of suffering among the Papuan population (Widjojo et. al., 2010, p. 1964). This complicates a victim reparations process as a very high percentage of the population feel they have been affected by the conflict, but it also strengthens the justifications for pursuing a reparations program. A victim reparations framework shall be elaborated upon below.

¹⁷ Some publications have estimated around 500,000 Papuans killed in the conflict, but there is a wider agreement that approximately 100,000 deaths are more accurate. Due to the lack of verified statistics this number has often been exaggerated for political purposes.

5.3.2. Reparations

One of the most important lessons that could be learned from the implementation of transitional justice mechanisms in Aceh was that of victim reparations. As analyzed in Chapter 3, the attempt to pursue a reparations program largely failed due to a flawed approach to victim identification, lack of planning and structure of the eventual programs. This can be avoided in Papua by categorizing victims after international standards and avoiding generalizations in an eventual dialogue that may be misinterpreted. As mentioned above, much of Papuan hatred for the Indonesian state is due to the many human rights abuses committed over such a long period of time. Thus, a victim reparations program may prove pivotal for the reconciliation and mutual trust-building between the central government and Papua.

It is important that indigenous Papuans are able to participate in the process and feel a degree of ownership. Papua has often been a victim to policies set down by the central government without their consultation, but a reparations program needs the cooperation and trust of the communities in question. In addition, a reparations program in Papua must be tailored to the victims of this specific conflict. This entails choosing an appropriate form of reparations in order to rehabilitate and support each victim category. An easily identifiable group would be the non-violent unlawfully imprisoned persons discussed in the previous section regarding amnesties. A reparation method for such a group could be an official statement restoring their names and status, thus aiding their recovery and reintegration into society. An additional reparation method may be through monetary compensation for their unlawful incarceration or economic assistance to create more opportunities for employment and a decent standard of living. Although this is just one example, it highlights the necessity to attempt to map violations and identify victim groups in order for an encompassing reparations program to be developed.

5.3.3. Genocide?

Allegations of genocide have been prominent with Papuans in self-imposed exile, but also within some academic circles. As mentioned before, a paper written by a group of students from Yale University claims that genocide has been committed in Papua although evidence is lacking and factual mistakes have been made.¹⁸ In addition, the West Papua Project at Sydney

¹⁸ The Yale Law School report, for example, lists as an example of extrajudicial killings of Papuans by the Indonesian military “the October 2000 Wamena massacre that resulted in 32 deaths”. Most of the dead in that incident were migrants, killed by pro-independence Papuans in a riot that followed forcible removal by the police of an independence flag. It also makes mistakes on dates, population figures, and definition (ICG, 2006,

University, led by Peter King, has used the term in their analysis¹⁹. This use of the term ‘genocide’ is inappropriate until evidence that may support such a loaded term can be verified. However, it is understandable that it has been used in order to direct international attention to the gross human rights violations that have occurred in the land of Papua over the years. One example that has been associated with allegations of genocide is from West Biak villages in 1970 where 70 people were reported to have been buried alive. Sofian Asgart also reports that 3000 Dani people of Jayawijaya were killed by the military in 1977 with several also buried alive (2003, p. 544). Other targeted incidents include the 1984 murders of the Papuan academic Arnold Ap while in police custody. The NGO, Tapol, claim that at least 30,000 Papuans were killed prior to the Act of Free Choice in 1969, even though this figure is difficult to confirm (Scott & Tebay, 2005, p. 601). In addition, anti-cultural military campaigns such as *Operasi Koteka* (Penis Gourd Operation), which was aimed at the highland communities in order to force them to wear clothes and not the revealing *koteka*, increased local opposition to the TNI and strengthened support for the OPM throughout the New Order (Timmer, 2006, p. 1105). Although grave human rights abuses occurred during the Soeharto era allegations of genocide from various academic reports lack evidence and vivid errors have been reported by observers, thus risking a devaluation of the term ‘genocide’ in Indonesian society.

Another trend that has developed in the past decade is the use of the term ‘silent genocide’ or ‘slow motion genocide’ when describing the situation in Papua. This has mostly been used in reference to the massive migration programs which the Indonesian government has used in Papua since the 1960s. The programs have encouraged Indonesians of different ethnicities, especially the Javanese, to move to Papua with incentives to start businesses etc. Importantly, this has become a threat to the indigenous Papuans who are often marginalized and have often become urban minorities. More specifically, the Dutch recorded the Papuan population at around 700,000 in the 60s. The total population tripled from the 1970s to 2000 to about 2.2 million of which 1.5 million were indigenous Papuan (Wing & King, 2005, p. 15). Jon Elmslie has analyzed the Indonesian 2010 census to determine ethnic number for the land of Papua and he concludes that the indigenous Papuan population have become a minority representing only 48.7 % of the total population (Elmslie, 2010, p. 2). This is an

p. 8/9). See “Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control”, Yale Law School, but also King, P. & Wing, J., “Genocide in West Papua?” for allegations of genocide in Papua.

¹⁹ See Peter King. 2005. ‘Genocide in West Papua? The Role of the Indonesian state apparatus and a current needs assessment of the Papuan people’ (Centre for Peace and Conflict Studies, University of Sydney).

astounding number as it means indigenous Papuans have become a minority within four decades. Even more shocking is the projection for 2020 if the population growth continues at this rate. In essence, it would be non-indigenous Papuans would represent over 71 % of the total population, making ethnic Papuans a clear minority at a mere 29 % (Elmslie, 2010, p. 2). Even if this may not be labelled ‘genocide’ it is a worrying trend for the indigenous people of Papua as they are increasingly marginalized and the growth rate is unlikely to increase.

5.4. Criminal accountability for gross human rights violations in Papua

Criminal accountability in Papua for human rights violations is perhaps the greatest challenge and difficulty in implementing a transitional justice framework. It is also a mechanism that could never co-exist parallel to a dialogue between Jakarta and Papua as it would come at enormous political cost to Jakarta and destabilize any communication. However, this means that criminal impunity for gross human rights violations is allowed to continue. This section shall discuss the trends in Papua thus far regarding criminal accountability for the security forces, but also the responsibilities and roles of other actors, such as Multi-National Companies. Ideally, a HRC should be established as a part of a large framework of transitional justice, but Indonesia’s record since its transition to democracy has lacked political willingness. OTSUS contains the legal provisions for the establishment of a HRC, but in Indonesia that is never enough as political considerations, patronage networks, and the display of centralized power are all too important to the ruling elite. Thus, a HRC in Papua is not worth exploring any further as it remains a complete impossibility in order to achieve a fruitful dialogue and focus on mutual trust-building. Although there are no direct substitutes or alternatives to criminal proceedings for human rights crimes there are other steps that could be taken by the central government that would lower the risk of human rights abuse and violence committed by security forces. These shall also be touched upon below.

5.4.1. The role of security forces as human rights perpetrators

The prosecution of security forces for gross human rights abuses in Papua remains one of the most difficult challenges in Indonesia today. There is no other province where the police and the military has been allowed such extensive free reign and lack of scrutiny. Not only have influential Papuans been regularly assassinated or attacked violently over the years, but no accountability from mid- to high ranking officers have never been brought about. There has been a decrease in attacks since the fall of Soeharto, but they continue to occur. Besides the ‘regular’ police and military presence, whose number is kept secret, the Special Forces police

unit (Brimob) and Kopassus remain at the heart of most human rights violations committed in Papua. Brimob is a mobile police force, more paramilitary than regular police that have committed rapes, beatings, extrajudicial killings among other things, mostly justified as an anti-OPM measure (HRW, 2007a, p. 24). Kopassus soldiers have also been common perpetrators that are feared amongst Papuans. More specifically, Kopassus have been involved in Papua since the 1960s and reached their height in Papua during the 1990s, but attacks still continue. Their involvement in the 2001 assassination of Theys Eluay, a prominent Papuan political leader, symbolized their willingness to keep old tactics of the old regime. Although their sweeping operations often are a direct response to an OPM attack they make use of collective community punishment attacking civilians rather than chasing an OPM attack. It is also believed that several of the “OPM attacks” have been staged by the security forces themselves in order to justify new operations and raids against the Papuan population.

The accountability for human rights violation committed by Brimob officers and Kopassus soldiers and other security personnel has virtually been non-existent, despite Indonesia’s democratization process. For example, in 2003 seven junior Kopassus soldiers involved in the execution of Theys Eluay were found guilty of mistreatment and battery leading to Eluay’s death, but not for murder and they received two to three-and-a-half years sentences (HRW, 2009, p. 5). No commanding officers received any attention. Furthermore, in late 2010 a widely viewed YouTube video, depicting soldiers torturing a Papuan by burning his genitals and lacerating him with a knife, gained international attention. Subsequently, two low-level officers received eight months and ten months in jail from a military court for disobeying orders, not for torture and attempted murder (Ambarita et. al., 25.01.2011). By default, such a sentencing strategy protects superior officers who claim the soldiers acted on their own behalf, while the culture of impunity is allowed to continue.

As pushing for prosecutions of security forces for past human rights violations, at the time of writing, remains an utmost improbability, other actions can still be taken by the Indonesian government in order to reduce the risk of violence towards the Papuan people. Four measures should be taken in order to reform the role of the security forces in Papua besides the overall institutional reform of the military discussed earlier. Firstly and to reiterate, non-organic military troops need to be withdrawn from Papua. Although a simultaneous disarmament of the OPM would be a more viable option, an organic level, i.e. the level required to defend Papua in case of external threats, is more than enough. This has

been discussed previously, but it remains a key to the diffusion of the current situation. Secondly, all Kopassus personnel should be withdrawn as they have proved to be a constant source of human rights violations and fear throughout Papua, but especially close to their barracks. After the killing of Eluay they were ordered out of Papua by former President Megawati, but the Army Chief of Staff, Gen. Ryacudu, hailed the men as “Indonesian heroes” for killing a “rebel” (HRW, 2009, p. 5). Thus, they remain a mobile presence in Papua today. Thirdly, and importantly, the central government should ensure the complete end to police involvement in paramilitary and military activities and operations. Reforming the role of the police in Papua can be crucial mechanism of institutional reform that can aid a dialogue between Jakarta and Papua. If the police were only involved in police duties in order to protect the communities in Papua there would be a possibility of trust-building with local communities and aid stabilizing the relationship between security personnel and the people. At the top level the relationship between the police and civil society has improved since the fall of Soeharto as the police have distanced themselves from the military, both formally and informally, and a change in attitude has encouraged civil society organizations (ICTJ & KontraS, 2011, p. 76). Finally though, it is crucial that a substantial vetting program along with human rights education of remaining officers is instigated within the police in Papua. Such a procedure would be another step in the right direction in terms of trust-building amongst Papuan communities. A further elaboration of the implementation of a vetting program and human rights education is beyond the scope of this thesis.

5.4.2. Accountability of other actors

Despite this discussion of the accountability of security forces it is vital to acknowledge the lack of accountability amongst non-state actors such as MNCs. Papua is one of the most natural resource rich islands in the world, attractive to companies focusing on mining, natural gas extraction and logging. Natural resource extraction is a vital industry for Papuans as it has led to the creation of thousands of job for unskilled workers and in some areas companies have provided health services, education facilities and necessary infrastructure, making whole communities completely dependent on them. The US-based mining giant Freeport-McMoRan operates the Grasberg mining complex, the world’s largest gold mine and the third largest copper mine, in Timika, Papua. It has been in operation since the early 1970s and remains Indonesia’s largest taxpayer. However, it has also been a constant source of conflict over the

last decades. The OPM has attacked and killed mining workers while Freeport has hired the military and police to protect the mining complex with up to 5,000 soldiers.

In 2011, Imparsial, one of Indonesia's leading human rights organizations, unveiled payments of a total of \$ 14 million that year alone for 'protection money' that has bypassed the Ministry of Finance. Earlier in the fall of 2011 several Freeport workers were shot by the police while protesting against work conditions and low wage. The Indonesian Corruption Eradication Commission (KPK) has been urged by civil society organizations to launch a probe into Freeport's payments to the police as this remains a serious allegation of bribery and leaves Freeport implicit in serious human rights violations (The Jakarta Post, 07.11.2011). The story of natural resource extraction and the protection of human rights for indigenous people remains the same in Papua as in many other parts of the world and foreign investment in natural resources extraction and processing continues to expand. For example, the German company Ferrostaal AG has planned the investment of at least \$900 million in a petro-chemical production plant, with estimated production initiating in 2016 (Yulisman, 18.04.2011).

In order for non-state actors, such as Freeport, to contribute to the sustainable development of Papuan economy and society drastic steps must be taken and strict directives must be provided by the government. Freeport undoubtedly benefitted from almost three decades of Soeharto's authoritarian regime, but it has failed to transform itself into a transparent, accountable and caring employer for thousands of Papuans. Moreover, Freeport along with other MNCs establishing operations in Papua must follow the newly established United Nations Guidelines for Business and Human Rights (A/HRC/17/31) and enforced by the GoI.

6. Conclusion and the way forward

6.1. Summary of findings

This thesis has discussed transitional justice mechanisms in Indonesia in the post-Soeharto era. The fall of Soeharto in 1998 triggered a long-term transition, or *reformasi*, that has dominated Indonesian politics, but also Indonesians everyday lives for the past fourteen years. Moreover, the authoritarian past has left its mark upon Indonesia as a society and this developing democracy changed its course. However, remnants of the old regime remain and victims are still searching for past truths, justice, reparations and reform. Thus, this thesis has attempted to analyze to what extent transitional justice mechanisms have been implemented in post-Soeharto Indonesia and to examine their possible implications for a long term peace in Papua. In addition, I was hoping to uncover the underlying factors that could explain Indonesia's implementation pattern of justice mechanisms since the beginning of *reformasi*.

Chapter 3 uncovers Indonesia's experience with transitional justice mechanisms thus far. It is safe to conclude that transitional justice mechanisms have not been implemented in Indonesia in accordance to international standards. Despite insurmountable evidence of a national past riddled with serious human rights violations, no single individual has been held accountable for his or her actions. In similar fashion, there has been no national truth commission established and the GoI has not officially recognized past wrongdoings. Victims from all over Indonesia, who have suffered from crimes spanning over several decades, have neither been recognized nor compensated. Despite that Soeharto stepped down in 1998 the ruling elite remains largely unchanged leaving several key institutions to dictate their own reforms and avoiding encompassing vetting programs.

However, this does not mean that transitional justice mechanisms have not been part of the public agenda in Indonesia. Pressure from NGOs, the international community and prominent individuals has left its mark. As discussed in this thesis, Indonesia has developed comprehensive laws protecting human rights and legitimizing the implementation of transitional justice mechanisms. This remains a positive trend in Indonesia, but unfortunately implementation has been weak. In essence, the mere presence of human rights legislation does not necessarily translate into implementation and if a law were to be implemented it will most likely not be as intended or as directed. As the Indonesian political elite still relies heavily on far-stretching patronage networks for personal gain and power, this is also reflected in policy-making and implementation. Political willingness to confront the past in regards to human rights is not there as the elite have held on to power into the transition.

Prior to colonization 'Indonesia', as a nation or state, did not exist or represented a natural juncture for the people inhabiting the massive geographical area that represents the Republic today. This very fact is exhibited at the end of Chapter 3 and dominates the discussion on Aceh in Chapter 4. In the long-term this has led to several challenges to Indonesian sovereignty from provinces such as Timor-Leste, Aceh and Papua, all demanding independence. The GoI has responded with violence and repression in all three cases. Since Timor-Leste gained its independence in 1999 the GoI has remained paranoid of other attempts of separatism and international involvement. The conflict in Aceh has been resolved, but Papua remains instable and unpredictable featuring an array of actors.

Chapter 4 highlights the challenges for a successful implementation of transitional justice mechanism in Indonesia. Lessons learned from the Acehnese experience may prove important for Papua. Furthermore, it became apparent to me that the level of violence in Aceh had a significant impact on the peace negotiations and the resolution of the conflict. The high level of violence left other issues aside, such as those of transitional justice. In Papua the current level of violence is nowhere near that of Aceh in the early 2000s and I believe the GoI, including the TNI, does not feel the same necessity or haste to resolve the situation or reach a conclusion in Papua. However, this important difference to Aceh may allow other justice-related policies to be of focus in an eventual dialogue (Aspinall, 14.10.2011). For example, focus does not only have to be on ex-combatants, but on civilians affected. Moreover, I hope this may eventually give greater room for dialogue on transitional justice issues and mechanisms in Papua.

In Chapter 5 I attempt to create a "blueprint" for the possible use of transitional justice mechanisms in Papua within a greater dialogue between Papua and Jakarta. The framework created here is designed to support the ending of hostilities and not be a mere reaction to a future peace agreement. Using Aceh and its experience with transitional justice mechanisms I attempted to understand lessons discussed in the previous chapter. The issue of a wide spectrum of actors, relying on national legal frameworks and the challenges of establishing a solid victim reparations program were all issues found to hinder the creation of justice mechanisms in Aceh and stall progress despite a successful peace agreement. This may guide a future process of similar nature in Papua. In addition, I have also used previous international experiences, especially in regards to a truth commission for possible application in Papua. Chapter 5 is also written with current political realities in mind, thus focus has been adapted thereafter.

Despite the ability to create a guiding framework for Papua, based on conceptual experience with transitional justice and the study of Indonesia, it is not possible to create anything close to absolute answers. That would require far greater research and widespread consultations in Papua. Using transitional justice mechanisms as pre-emptive tools for sustainable peace have not been widely practised and I cannot truthfully say that it will be possible in Papua although I have a strong belief. There is an array of unknown factors which may hinder such mechanisms to be adapted, or even considered, in the province.

6.2. Implications of study

This thesis may have implications for Papua and Indonesia, but also for transitional justice as a field of study. These will be discussed in turn.

The prospects for dialogue that includes the implementation of transitional justice mechanisms in Papua may not be great as of today. As others, both LIPI and Father Neles Tebay, have stated before me – Papua needs an open, but structured dialogue with the GoI. A framework of transitional justice mechanisms may serve as guidance for a new relationship between the periphery and the center as they can be symbols of a Republic that promotes, protects and respects human rights and open wounds of the past. An implication of my study is that it can be a contribution to such a dialogue.

More specifically, I believe that a few lessons to be learned or understood in order to apply transitional justice mechanisms to Papua should focus on the formation of truth commission. A TRC for Papua, as demanded by OTSUS, could account for the past and refocus the aims of the Papuan people as a part of the Republic of Indonesia. A TRC could help to strengthen ties between Jakarta and Papua. Furthermore, efforts should also centered on the issue of political prisoners. Their release would be an immense trust-building exercise, increase willingness to pursue dialogue and deflate the potential for more violence. Moreover, as Aceh showed, continued repression only strengthens the resolve to oppose the GoI. Thirdly, identifying victims and creating an appropriate reparations program will be one of most significant steps towards a sustainable peace in Papua. Although initiated in Aceh, the GoI was not successful in meeting the needs of victims. It is not only vital for the victims themselves that such a process is managed well, but also for the Jakarta-Papua relationship. Finally, holding human rights perpetrators accountable is vital for the resurrection of the military as a protector of Indonesian society. Although human rights prosecutions in Papua may not be feasible in the short- to medium term, it may resurrect confidence in the judicial system in the long run.

At the time of writing, the UP4B has been set up by President SBY, but a Jakarta-Papua dialogue is still far away. Hopefully, a structured dialogue can be established. It needs to be a dialogue where matters of Papuans' human rights, among other issues, can be discussed without the fear of repercussions. The author is fully aware of the tremendous political willingness such an endeavour requires, but it is the only way forward as I see it. The Indonesian democracy project has succeeded in many ways, but the situation in Papua is still unclear as abuses continue to occur and the past remains unacknowledged. Hopefully, this study has shown a glimpse of what is attainable and how past errors can be avoided in Indonesia.

Stepping back from Papua, this study has implications for Indonesia as a whole. As Indonesia's, and Aceh's, experience with transitional justice implementation has been discussed, there is ample room for further improvement, which may result in justice, reparations for victims and healing for Indonesian society. Lessons can be learned from this study regarding the implementation of transitional justice mechanisms on the national level, but also from post-conflict Aceh. Firstly, the lack of political willingness has destroyed potential human rights prosecution at the national level and truth-seeking initiatives have been obstructed by the lack of appropriate legislation. In addition, the military has been allowed to reform itself and human rights perpetrators have not been vetted from public service. Despite vast legal development, the GoI has not managed to pursue wholesale reform after Soeharto stepped down due to the lack of political will. Complementing important work that is already being undertaken in Indonesia in regards to transitional justice, this study may find resonance with Indonesian civil society as the GoI has not yet been able to successfully manage the past. The process of *reformasi* may not complete until the GoI is willing to prosecute human rights perpetrators, instigate truth-seeking initiatives, administer victim reparations or reform key institutions. Hopefully, this thesis is an insightful addition to the mounting pressure which may results the GoI to change its course.

In addition, future research on Papua needs to be done. It is a region with relatively little focus as it was completely shut down for the outside world until recently. In terms of transitional justice, more research needs to be completed in regards to interviewing victims and key leaders for a deeper understanding of how a mechanism could be locally implemented. I sincerely hope this study may encourage other scholars or students to work on transitional justice issues in Papua. Lastly, I also hope this study may prove helpful for NGOs working on peace and prosperity for Papuans as it may shed a new light on the province.

Transitional justice is an ever-growing field throughout many parts of the world. 2011 was filled with nation-states experiencing a transition from authoritarianism. Countries such as Egypt, Libya and Tunisia, part of the so-called ‘Arab Spring’, are all interesting case studies of transition, but so are Afghanistan and other emerging democracies. Although it is unclear how their respective transitions will end, mechanisms of transitional justice are likely to be part of a stride towards democracy. All such states have experienced profound and long term human rights abuse leaving thousands of victims in their wake. Thus, it is a question of time when those societies are ready and equipped to deal with the past.

I have attempted to develop an understanding of transitional justice within a pre-emptive perspective of its implementation. The Indonesian experience in post-conflict Aceh showed the need to develop a framework of transitional justice mechanisms prior to the establishment of a peace agreement. Furthermore, it showed that an agreement lacking in detail and substance will naturally lead to a wide variety of interpretations. Aceh was another example of what could have been done differently. I believe the successful implementation of transitional justice mechanisms to be too important to lack a pre-emptive framework. A reactionary critique may be too late for as the moment of transition can disappear quickly. I hope future research of transitional justice will try to use this pre-emptive perspective in order to develop new roles for transitional justice mechanisms around the globe.

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