

Master Thesis
Human Geography, master specialisation:
Conflicts, Territories, and Identities
Radboud University, Nijmegen

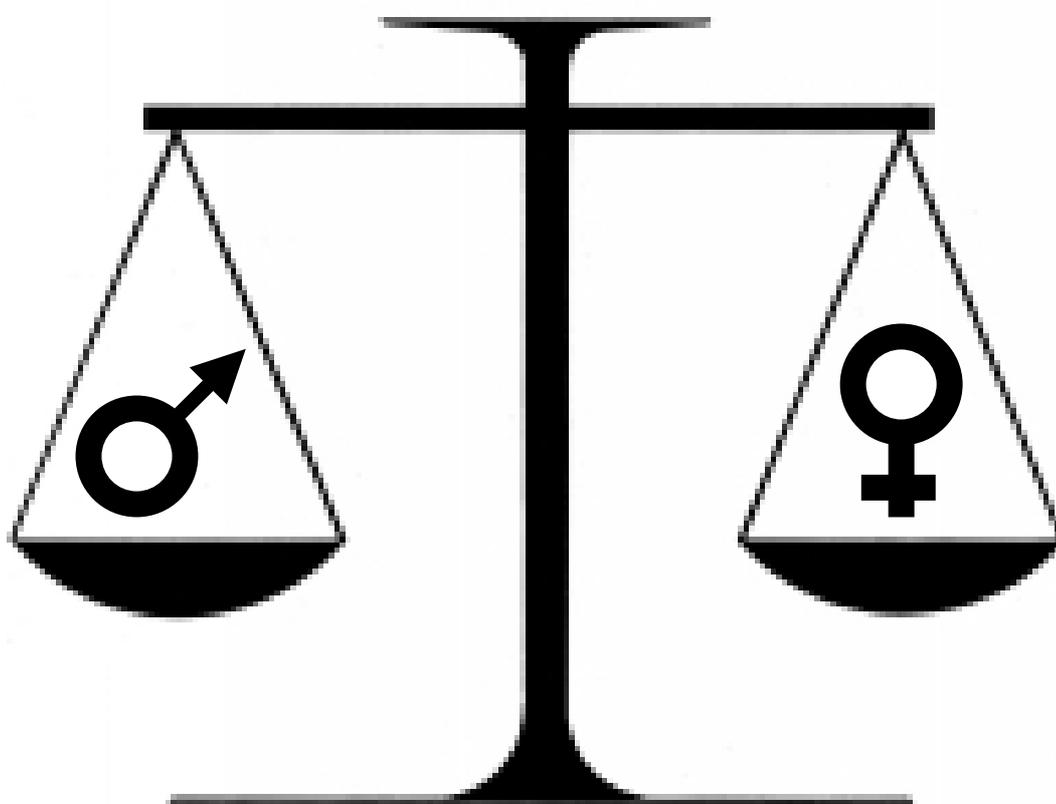
Thesis supervisor: Dr. W. Verkoren

Student: S. Bloemberg, s0826626

Title: Gender and Transitional Justice: A (Wo)Men's Issue

Gender and Transitional Justice:

A (Wo)Men's Issue



Samareh Bloemberg

Preface

This thesis has been written as part of the master specialisation programme Conflicts, Territories, and Identities of Human Geography at the Radboud University of Nijmegen. While the master's programme introduced many interesting subjects, it was the elective course 'Systematische Rechtsfilosofie; transitierecht' (Systematic Philosophy of Law; transitional justice) that greatly contributed to my interest in the subject of transitional justice. Because of this, I would like to thank drs. Dirk Venema who taught this course with much enthusiasm and has given me valuable advice on how to approach transitional justice from a philosophy of law perspective. Even after the course on transitional justice had come to an end, drs. Venema showed interest in my master thesis and provided me with useful information and articles. For this I owe him much thanks.

Furthermore, my thanks goes out to drs. Willemijn Verkoren, my thesis supervisor. Even though not everything went according to plan in the beginning stages of writing this thesis, she kept a supportive attitude at a time when I needed it most. Moreover, drs. Verkoren's quick response at all times and her constructive criticism has greatly contributed to the quality of this paper.

Last but certainly not least, I would like to thank my parents. The process of writing this master thesis has not been easy for me and without the encouragement of my parents it would have been much harder for me to finish it. I would sincerely like to thank them for their support and understanding during this last couple of months.

The process of writing this master thesis has been a challenging, though educative experience. Not only have I gained much insight into the subjects of transitional justice and gender, it has also been a great personal learning experience. Especially for the latter, I would not trade this last half a year for anything.

Enjoy!

Samareh Bloemberg, February 2010.

Table of Contents

1. INTRODUCTION	1
2. TRANSITIONAL JUSTICE	6
<u>2.1 Historical Perspective</u>	6
<u>2.2 What's in a Name?</u>	6
<u>2.3 Positioning Transitional Justice in Research and Literature</u>	8
3. TRANSITIONAL JUSTICE MECHANISMS	13
3.1 Criminal Tribunals	16
3.1.1 <i>Ad Hoc International Tribunals</i>	16
3.1.2 <i>The International Criminal Court</i>	17
3.1.3 <i>National/Domestic Courts</i>	19
3.1.4 <i>Hybrid Courts</i>	21
3.2 Restorative Transitional Justice Mechanisms	22
3.2.1 <i>Truth and Reconciliation Commissions</i>	22
3.2.2 <i>Reparation</i>	25
3.2.3 <i>Documentation</i>	27
3.2.4 <i>Disarmament, Demobilisation and Reintegration (DDR)</i>	27
3.3 Traditional Transitional Justice Mechanisms	29
3.4 Concluding Remarks on Transitional Justice Mechanisms	32
4. GENDER	34
<u>4.1 Introducing the Term Gender</u>	34
<u>4.2 Gender and Transitional Justice Research</u>	37
<u>4.3 Women, Conflict and Transitions to 'Peace'</u>	39
4.3.1 <i>Women as victims in conflict</i>	40
4.3.2 <i>Women as perpetrators in conflict</i>	42
4.3.4 <i>Changing Gender Roles</i>	44
4.3.5 <i>Concluding Remarks Gender and Conflict</i>	46
5. GENDER-SENSITIVITY OF TRANSITIONAL JUSTICE MECHANISMS	48
<u>5.1 How to Define Gender-Sensitivity</u>	48
<u>5.2 Gender-Sensitivity in Theory</u>	52

5.2.1 Gender-Sensitivity in Transitional Justice' Statutes.....	52
5.3 Gender-Sensitivity in Practice.....	58
5.3.1 Gender-Sensitivity and Internal Structures of Transitional Justice Mechanisms.....	58
5.3.2 From Structure to Procedures.....	61
5.3.3 Gender and Victims in Transitional Justice	64
5.3.4 Victim and Reparations	70
5.3.5 Gender and Perpetrators in Transitional Justice	72
5.3.6 Gender-sensitivity and Documentation of Justice	76
5.4 Chapter Conclusion: Gender-sensitivity in Transitional Justice Mechanisms.....	78
6. CONCLUSION: HOW GENDER-SENSITIVE ARE TRANSITIONAL JUSTICE MECHANISMS?	81
7. REFERENCES	86
8. EXECUTIVE SUMMARY	94

1. Introduction

Studies which focus on conflicts, politics, human rights and international relations are under continuous development. New theories and understandings of the world surrounding us emerge because the world is continuously changing. One of the research developments regarding conflicts and human rights in the last few decades has been the emergence of a field called 'transitional justice'. Though already used in the aftermath of the Second World War, transitional justice has only recently gained more attention by researchers and still seems to be shaping itself as an independent field of study. Another world-wide change with regard to the studies of conflicts, international relations, and human rights has been the increase in focus on women's rights and women's participation - specifically at political levels - from the 1990's onward (Reilly 2007, 161). This increased emphasis on including women in political decision-making and gaining knowledge of consequences of certain policies for women in comparison to men has been extensively addressed by feminist researchers in the last years.¹ Though often focussing on women and their rights, this field also stresses the importance of understanding societal differences between the position of men and women and may, therefore, in many cases be labelled as gender-studies.² Both being relatively new fields of study, theory combining transitional justice with gender research is still in its developmental stage. Researchers who have made efforts to link gender to transitional justice in the last few years are Reilly (2007), Bell and O'Rourke (2007), Rooney (2007) and Bell, Campbell and Aoláin (2007).

There are two main reasons used in literature to emphasise the importance of linking the subject of gender to transitional justice. A first and often used reason mentioned in literature for why gender is important for the field of transitional justice is that women are often unequally represented in decision-making levels such as in peace negotiations, which consequently provides for an unequal position of women in all levels of post-conflict societies. Authors such as Bell et al. (2004, 320-322), Rooney (2007, 173), and Bell and O'Rourke (2007, 25) argue that this under-representation, together with a male understanding of conflict and violence (Bell et al. 2004, 320) should be reversed in all mechanisms that deal with conflict and transitional or post-conflict situations, including in transitional justice. According to them, including gender into transitional justice would help to redirect the male domination in conflict and peacebuilding decision-making functions.

¹ Take for example Minu and Rohr (2009), Prugl (2009), UK Secretariat (1995), Moser (2005), and Chiwara and Karadenizli (2008)

² Gender studies is more focussed on the way in which masculinity and femininity are structured and what effect this has on the daily lives of women and men, opposed to the term 'women's studies' which implicates a strong focus on women, disregarding the structures of masculinity. In general however the terms, gender studies and women's studies are used interchangeably; see EBSCOhost Women's Studies International database which includes many articles with a gender (femininity and masculinity) approach.

Another argument in favour of linking gender to transitional justice regards the possible “opportunity for social transformation”(ICTJ website, 2009) in transitional societies. In the view of Tabak (working draft, 30):

“Transitional justice does more than just seek justice for human rights abuses of the past. It necessarily implicates the social elements, actors and norms that brought about the violations in the first place. Therefore, transitional justice has the potential to rebuild a society, which has its necessary implications for gender roles”.

From a feminist point of view, this quote from Tabak implies that transitional justice will have the responsibility to address gender-inequality and notions of femininity and masculinity that consider femininity as less worthy than masculinity during the potential process of rebuilding a society. Transitional justice then becomes an apparatus for changing and improving the social position of women. This potential of transitional justice is also recognised by the International Center for Transitional Justice (ICTJ website, 2009) and by Bell and O’Rourke (2007, 43) who both use this argument to defend the connection between transitional justice and gender. However, a question that rises in this case, is whether redefining gender roles within transitional societies should be a target for transitional justice in the first place. The goal of improving the social position of women (ICTJ website 2009: Bell and O’Rourke 2007, 43-44) may be too idealistic in a stage where transitional justice still struggles to reach its main goals³ in transitional societies. From a less feminist point of view, transitional justice at least has the opportunity to support changes to existing gender roles which have been under pressure during the conflict - like the masculine stereotype of the warrior and the feminine stereotype that portrays women only as victims (as will be shown later in chapter four) - or the opportunity to make sure the changed gender roles during the conflict are not reversed after the conflict has come to an end.⁴ As will be shown throughout the following chapters, this thesis takes on this last, less feminist, point of view.

While these two above-mentioned arguments for connecting gender to transitional justice are the ones mostly used in literature, this thesis wants to introduce a third reason for combining the two fields of study. Gender and gender-relations are of a constant influence on the lives of men and women; they do not only define their behavioural boundaries and experiences in peace but also in conflict situations (El Bushra and Lopez 1993; Pankhurst 2003). Consequently these behavioural boundaries also influence women and men’s access to justice and reconciliation. Since transitional justice aims to address all people involved in past conflict – as will be shown in the following chapters - it should be aware of these gender boundaries and gender relations between men and women in the (post-) conflict

³ These main goals will be addressed in chapter 2.

⁴ See also chapter four.

situation in order to successfully reach its goal. While the first two arguments for including an understanding of gender in transitional justice are mostly concerned with the collective goals of including more women at decision-making levels and improving the social position of women, this latter argument focuses mostly on the individual men and women and their experiences of conflict and peace; all women and men experience conflict, so they all need to be addressed by transitional justice.

From all this we may conclude that gender *should* not only *be* important to transitional justice as it heavily influences peoples experiences in conflict and their eventual experiences with the transitional justice mechanisms, but that gender actually *is* important to transitional justice as it is one of the ingredients to make a transitional justice mechanisms successful in reaching its goal. In order to better understand the notion of gender and its impact on women and men in conflict and post-conflict situation, this will be thoroughly addressed in chapter four of this thesis.

This thesis follows up on the arguments that gender is important to transitional justice, by addressing gender's relation to transitional justice with regard to specific transitional justice mechanisms such as the International Criminal Court (ICC), Truth and Reconciliation Commissions (TRC's), Disarmament, Demobilisation and Reintegration (DDR) processes, and traditional transitional justice mechanisms. This way, it wants to contribute to a further understanding of the relationship between gender and transitional justice, with a specific focus on the efforts made by transitional justice mechanisms to address and be aware of the notion of gender. Questions that arise from the proposed connection between gender and transitional justice are; 'Are transitional justice mechanisms sensitive to the issue of gender?' and, if so, 'How do transitional justice mechanisms address the notion of gender?'. Keeping in mind the possibility that different transitional justice mechanisms may have different levels of sensitivity towards gender and may have different ways of coping with the issue, these questions have been intertwined to form the main research question of this thesis: 'How gender-sensitive are transitional justice mechanisms?'.

In order to find an answer to this research question, this thesis will first touch upon the subjects of transitional justice and gender separately, after which it is possible to combine the two notions. First, the subject of transitional justice will be addressed in general, after which the separate mechanisms of transitional justice are introduced. After this, the notion of gender is researched, particularly in connection to conflicts and human rights. Having addressed gender and transitional justice individually, the two are combined to define characteristics of gender-sensitive transitional justice mechanisms. Next, I discuss how transitional justice mechanisms have dealt with the subject of gender so far –or in other words – how gender-sensitive these mechanisms actually are.

This thesis takes the approach of theory-oriented research.⁵ It focuses on the theory that has combined gender and transitional justice up till now, and which, as noted before, is still largely in its developmental phase. This developmental stage means, that there is still room for this theory to be tested, adjusted and further developed. Because of this, the approach of theory-oriented research in this thesis will combine ‘theory-testing research’ and ‘theory-developing research’. According to Verschuren and Doorewaard (1999, 35), theory-testing research tests existing theories against different cases, and possibly adjusts the theory if the cases show a flaw in the theory. This approach asks questions such as; “which aspects in existing [theory on gender and transitional justice] are internally contradictory or inconsistent [when testing the theory against case studies]?” (ibidem, 35). Note, however, that this thesis will not only use case studies to test the existing theory on gender and transitional justice but will, for the better part, use the case studies to research how far that theory is already used in practice. Verschuren and Doorewaard (ibidem) argue that theory-developing research may be used to develop an entire new theory or, like in this case, to develop and improve parts of a relatively new theory (ibidem, 34). Therefore, this approach derives theory from existing cases and by combining other theories. Moreover, it focuses on questions such as; “what are the blind spots in the theory?”. Much of the theory on gender and transitional justice up till now has focussed a great deal on bettering the position of women in transitional justice.⁶ This while the definition of gender as a subject of research goes beyond a sole focus on women; it includes both femininity and masculinity which together define the notion of gender in a certain time, culture, and country. From a theory-developing approach, the broad definition of gender within gender and transitional justice-theory may be considered a blind spot. From a theory-testing approach, the cases may show an inconsistency between the definition of gender in gender-theory and how it is applied in practice. Overall, this thesis therefore has the objective of further developing and exploring the theory on gender and transitional justice with special focus on the broader definition of gender.

The research method of this thesis has been desk research. Its sources are solely research articles from different fields of study which have been carefully read and compared for the gathering of information and arguments, and the eventual drawing of conclusions. The fields that have been researched by this thesis are those of transitional justice, conflict studies, gender studies, law and international relations. As will be shown, the subject of gender and transitional justice –whether combined or as separate subjects - has linkages with all these fields. Drawing from all these fields of study will bring a more elaborate understanding of the complexity of the research subject and will contribute to substantive arguments on the linkages between gender and transitional justice. Research in the form of desk research has the advantage of covering a broad subject, in this case, many different transitional justice

⁵ For an elaborate explanation of theory-oriented versus practice-oriented research see Verschuren and Doorewaard (1999, 29-44).

⁶ Take for example; Rooney (2007), Bell and O’Rourke (2007), Reilly (2007).

mechanism and the broad theory on gender. The connected disadvantage of this type of research is, on the other hand, that the researcher is not able to go much into detail on specific mechanisms. It wants to further develop and explore the theory on gender and transitional justice which in the end, may provide a start for more specific theoretical and empirical research on the gender sensitivity of specific transitional justice methods.

Stimulating further – empirical - research is also part of the scientific relevance of this thesis, in providing a further opening for gender research on specific transitional justice mechanisms and stimulating such research. As both research on transitional justice and on gender is relatively new, and combining the two research subjects is even more in its developing phase, this thesis wants to contribute to the further development of research combining gender and transitional justice.

In order to give a clear and cohesive argument this thesis has been divided into three main sections; transitional justice, gender, and the two fields combined.

The first chapters will focus on transitional justice. Chapter 2 will deal with the origin and framework of transitional justice after which chapter 3 will introduce several different transitional justice mechanisms. The goal of this chapter is to present an overview of transitional justice mechanisms and how these are used in past and contemporary transitions. Overall, chapters 2 and 3 will try to provide the reader with a thorough understanding of the field of transitional justice; in theory and in practice. With chapter 4 this thesis introduces the subject of gender and how this term is used and misinterpreted in conflict study research. Section 4.2 explains what viewpoint on gender is used in this thesis; considering gender a relational issue between constructions of masculinity and femininity, while acknowledging that stereotypes of femininity and women have wrongfully influenced much gender research. This chapter also brings forward the importance of understanding the gender stereotype of women in conflict while performing gender research and, therefore, addresses this in chapter 4.3 and its subsections. Chapter 5 and its subsections will give the reader insight into the gender-sensitivity of transitional justice mechanisms. In the first section of chapter 5 the characteristics of gender-sensitivity in transitional justice mechanisms are defined, in close connection to the previous chapters on gender and transitional justice. After this, the chapter will continue with comparing these characteristics to the characteristics of the different transitional justice mechanisms. Several issues in which gender-sensitivity of transitional justice mechanisms may show itself; like the internal structure of the mechanism (5.3.1), how they deal with victims (5.3.3) and with perpetrators (5.3.5) and the eventual documentation by the mechanisms (5.3.6), will be addressed after which chapter 6 will draw the eventual conclusions and will provide an answer to the main research question of this thesis; “How gender-sensitive are transitional justice mechanisms?”.

2. Transitional Justice

2.1 Historical Perspective

Though it is argued by Elster (2004) that transitional justice originates from the early days of democracy in ancient Greece, most research agrees that the Nuremberg and Tokyo tribunals after the Second World War were the first instance of what nowadays is called transitional justice.⁷ The Nuremberg Tribunal and the International Military Tribunal for the Far East, where Nazi and Japanese military and political leaders were held accountable for the mass human rights violations they had committed during the war, however, only focussed on one possible approach to transitional justice; that of retributive justice. Moreover, in the years that followed, no specific attention was given to the subject of transitional justice.⁸

The real rise and development of the field of transitional justice, therefore, only occurred in the late 1980s and early 1990s (ICTJ website, 2009). It was this period that became the stage for several political transitions in states located in either Latin-America or Eastern Europe (ibidem, 2009). According to Bell, Campbell and Aoláin (2007, 82) the political transitions that occurred in these states, and mostly involved the transition from authoritarian rule to more democratic forms of government, brought new views and new meanings to the field of transitional justice “as a response to the systematic human rights violations” carried out by the former repressive regimes. No longer did transitional justice merely focus on retributive justice but study and practice also introduced the truth commission format, which focussed on restorative justice.

In comparison to other fields of study, transitional justice may be considered relatively new and undisclosed. Though in the last twenty years many more mechanisms of transitional justice have been identified and the many possibilities and contradictions within the field have been elaborated on by researchers, there still remains enough space for the field to develop itself.⁹

2.2 What’s in a Name?

When searching for the correct definition of the term transitional justice one may find that though there are similarities it is difficult to find one specific definition used by more than one researcher. Moreover, the definition of transitional justice used by the former United Nations Secretary General Kofi Annan in 2004 has also not been taken over by research after that time. The in 2004 first used definition of transitional justice by the then Secretary General is as followed:

⁷ Take for example; Teitel (2000), Bell et al. (2004) and Anderlini et al. (2004).

⁸ The literature on transitional justice sees a rise from the 1980s onwards, which stands in line with the development of its practical application during the same period.

⁹ For a more extensive overview of the history of transitional justice see; Teitel (2003) “Transitional justice Genealogy”.

“the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large scale abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms...” (UN Secretary-General 2004, 4)

What differs between this description of transitional justice and others is that the above-mentioned definition does not include either the word or a clear explanation of the word ‘transition’. Most other definitions like that of Anderlini et al. (2004), Quinn (2005) and Crocker (2009) explicitly mention a transition away from conflict or authoritarian rule.¹⁰ The choice of the UN to solely touch upon ‘transition’ with the words “legacy of large scale abuses” could possibly be explained by the critique on the democratic undertone of the term transitional justice. As Lundy and McGovern (2008, 273) note the term transition within the field of transitional justice is most often associated with a specific and according to them “limited conception of democratisation and democracy based on liberal and essentially Western formulations of democracy”. An explanation of transitional justice as a transition away from authoritarian rule, and (implicitly) towards democracy - the International Centre for Transitional Justice even directly refers to transitional justice as promoting democracy (ICTJ website, 2009)¹¹ - implies that human rights violations do not occur in democratic states (ibidem, 273). As this may be regarded a rather biased suggestion by non-Western societies it seems politically correct of the UN definition to not explicitly define the word ‘transition’.

While the reasons behind the UN’s definition of transitional justice are therefore understandable, it is unfortunate that it refrains from capturing the meaning of the word transition. It is specifically this word that shows the complexity of the entire field of study. A society on the verge of change will experience more difficulties than any other society dealing with past experiences. Societies in transition are less stable because the governmental and institutional structures are not always in place or are part of the legacy of the previous conflict, which make them unfit to deal with human rights abuses. Moreover, these transitional countries often not only face political and societal problems but also economic and security issues.

Analysing the different definitions of transitional justice makes one conclude that there is also a large difference in the description of the specific goals and functions of transitional justice, with the

¹⁰ Anderlini et al. (2004) describe transitional justice as: “the short term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a societies transition away from conflict or authoritarian rule”.

¹¹ The definition used by the ICTJ is as followed: “Transitional Justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy” (ICTJ website, 2009).

exception, however, of the goal to address past human rights violations.¹² There is disagreement over the longer-term aims of transitional justice, ranging from the promotion of democracy (ICTJ, 2009), the development of sustainable peace (Anderlini et al. 2004, 1; Quinn 2005, 1), restoration of the rule of law (Lundy and McGovern 2008, 267), providing for closure, healing, justice, and a historical record (Anderlini et al. 2004, 1), prevention of future human rights violations (Call 2004, 101), and mentioned by most researchers; reconciliation. Since there can be noticed an overlap between many of the above-mentioned goals, this thesis will combine the goals of transitional justice in the terms ‘justice’ and ‘reconciliation’. ‘Justice’ which includes closure, healing and addressing former human rights violations, and reconciliation, which supports development of peace. By solely mentioning justice and reconciliation as the goals of transitional justice, this thesis does not only capture the multiple goals of transitional justice in two words, but it also refrains from taking a stance in the democracy-debate; whether democracy is, or should be, a goal of transitional justice.¹³

This discussion leads to the use of the following definition of transitional justice in this thesis:

Transitional justice is a combination of processes and mechanisms to address past human rights violations in societies which are experiencing a transition away from the oppression and/or conflict which has caused these violations to occur. The goal of the process of transitional justice is to find justice and reconciliation for all people in the transitioning society who have played a role, either as victim, bystander, or as perpetrator of the human rights violations.

2.3 Positioning Transitional Justice in Research and Literature

As noted before, the field of study surrounding transitional justice has been in the developmental stage for the last two decades. During this period it has positioned itself within the fields of human relations, international relations, law and conflict studies. The following section will position transitional justice within this wider research while arguing that though it can be connected to them all, transitional justice may be regarded a specific framework of study on its own.

The first notion of research to which transitional justice can be connected is that of ‘law’. The development or verification of global human rights, which are firmly settled in law, is intrinsically

¹² This shows that all authors that have tried to define transitional justice at least agree that people are entitled to fundamental human rights, and that a violation of these rights need to be addressed.

¹³ Refraining from this discussion also comes forward in the fact that the definition of transitional justice used by this thesis notes a ‘transition away from the oppression and conflict’ but does not state whereto such a transition may lead. The definition leaves open the possibility that this may or may not be a democracy.

connected to transitional justice. Were it not for the laws which point out universal human rights, there would be no foundation for official transitional justice mechanisms such as criminal courts to operate from. Transitional justice needs this legal basis for it to be effective at least through official mechanisms. As the website of the ICTJ exemplifies, part of the legal basis for transitional justice originates from the case *Velasquez Rodriguez versus Honduras*, in 1988. The ruling in this case identifies four responsibilities for states regarding human rights. These refer to the responsibility to prevent and investigate human rights violations, take sanctions against perpetrators of these violations and repair victims of human rights violations (ICTJ website, 2009). Other international legal policies to which transitional justice strongly subscribes its relationship with law are the Geneva Conventions and the Joinet Principles of 1997 (Anderlini et al. 2004, 11).

Besides the fact that transitional justice basis its existence on multiple laws, it is also connected to the 'rule of law'. In this case the 'rule of law' is seen as the responsibility of all people and structures in a state to abide by the laws of that state.¹⁴ As Bell, Campbell and Aolain (2007, 83) point out, the UN Secretary-General has, in 2004, recognised an organic relationship between transitional justice and the rule of law. Though these authors are of the opinion that the presumed connection between the rule of law and transitional justice is problematic at some points (ibidem, 83-84),¹⁵ there does seem to be a logical linkage between the two. Without the existence of the rule of law which poses that all people must follow the laws in a country, transitional justice which addresses the violations of laws will not have a basis for existence. Looking for the supposed improbabilities of connecting transitional justice to the rule of law – as pointed out by Bell et al. (2004) – one finds that transitional justice may even better be connected to philosophy of law. Philosophy of law, which focuses on the questions of 'What is the rule of law?' and 'What is justice or justifiable?', especially relates to transitional justice since the transition between one rule of law to the other brings forward many discrepancies, even further complicating these questions. One well-known debate on these discrepancies of predecessor law and 'new' law within philosophy of law is that of Hart versus Fuller. This debate which is positioned in post-Second World War scenery, tackles the question whether the previous rule of law, in which the human rights violations have occurred and were not condemned, is still valid as a means of defence – even when immoral – in the new 'law and order'.¹⁶ This Hart vs. Fuller debate exemplifies just one of the philosophical or moral difficulties of justice in transition, linking the field of transitional justice to that of philosophy of law.

¹⁴ "For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards" (UN Secretary-General 2004).

¹⁵ Bell, Campbell and Aolain (2004, 83) refer to the difficulty of connecting transitional justice to the rule of law, since this raises the question; "which concept of the rule of law? – and in particular whether a formal (procedural) or substantive (value-based) emphasis is to be preferred".

¹⁶ "The central issue for the post-war German courts was whether to accept defences that relied on Nazi law" (Teitel 2000, 13). For more information on the Hart-Fuller debate see Teitel (2000).

Besides its most obvious connection to theories of law, transitional justice is also linked to the academic study of conflicts. First of all, a past situation of human rights abuse which transitional justice tries to address may easily be associated with some sort of conflict. Either that the abuse is a consequence of “the pursuit of incompatible goals [or the use of incompatible means] by different groups” (Ramsbotham et al. 2005, 27)¹⁷ or that the abuse is conflicting in itself, namely because it stands in opposite to the international (moral) laws of behaviour.¹⁸ Secondly, the past usage of transitional justice mechanisms has often dealt with transitions from conflict to post-conflict situations, take for example; former Yugoslavia, Rwanda and Cambodia. This, therefore, makes it of the utmost importance to gain knowledge on conflicts when one wants to address the subject of transitional justice.

Within the entire field of conflict studies, transitional justice may be connected to the broad category of ‘conflict resolution’. In the second edition of their book *Contemporary Conflict Resolution*, Ramsbotham, Woodhouse and Miall (2005, 29) extensively address the development of conflict resolution since, and in relation to, the end of the Cold War. The authors define conflict resolution as the process of addressing the sources of conflict (ibidem 29), in order to achieve a more peaceful situation. This encompasses all efforts surrounding the transition from a conflict situation to a stable post-conflict peace, which makes it include the terms ‘peacebuilding’,¹⁹ ‘post-war reconstruction’,²⁰ and ‘reconciliation’. When aligning the term peacebuilding to transitional justice, one automatically crosses the ‘peace versus justice dilemma’. This supposed dilemma which questions whether there can be peace without justice, is of great importance to the study of transitional justice because it touches upon the relationship between the transition from conflict to peace and the possibility and responsibility to seek justice. One example of this dilemma is the supposed responsibility of the international community to try war criminals which may stand in contrast with promises of amnesty during peace-talks or in peace-agreements. Here the question is; will war criminals, in the form of members of government or guerrilla leaders, be willing to come to a peace accord when they know the amnesty within the accord cannot keep them from being prosecuted by an institution such as the ICC? Though the peace-versus justice dilemma does not directly refer to gender in combination with transitional justice and will not be used further in this context, it is in some cases a relevant dilemma for mechanisms such as truth and reconciliation commissions which may give conditional amnesties and will therefore come back in the chapter on several transitional justice mechanisms. As for post-

¹⁷ The definition of ‘conflict’ used by Ramsbotham et al. (2005).

¹⁸ Not only does human rights abuse stand opposite to the widely accepted human rights, it is also conflicting with the international moral but unwritten rules of behaviour.

¹⁹ The term ‘peacebuilding’ is used here as both “addressing structural issues and long-term relationships between conflictants” in order to overcome deeply-rooted sources of conflict (Ramsbotham et al. 2005, 30) as well as in the most literal term; building peace.

²⁰ Post-war reconstruction stands for the efforts to reconstruct a nation’s social-, political-, legal- and other structures to prevent the re-emergence of conflict.

war reconstruction, transitional justice relates to the reconstruction of a nation's law and order sector (ibidem 205). Since it has been the failure of the former law and order structure to stop or punish human rights abuse, a reconstruction (and reform) of the law and order sector of a nation is most important for it to be able to address the human rights violations in the post-conflict/ post-repressive period. With these law and order reconstructions, also the faith in, and respect for, the rule of law – which people might have lost because of impunity during the conflict or repressive period – may be restored. Finally, we come to the concept of reconciliation. Reconciliation, as defined by Hamber and Kelly (2004, 4) is the “process of addressing conflictual and fractured relationships”. This process includes several different activities and may only be a voluntary process (ibidem, 4).²¹ Reconciliation is considered to be “the ultimate goal of conflict resolution” by Ramsbotham et al. (ibidem 231). Reconciling the conflicting parties is, therefore, regarded to be the final step towards a stable peace. When looking back at the definition of transitional justice that will be used in this research it shows that reconciliation between the people involved in past human rights violations is one of the functions of transitional justice. Though this shows the two notions to be inter-connected it is unjust to argue, as done by Ramsbotham et al. (ibidem 237-242), that transitional justice mechanisms are merely “alternative paths to reconciliation”.²² As has been shown above, the objective of transitional justice is not only restricted to reconciliation. Transitional justice applies to rebuilding formal justice institutions in a society while at the same time addressing this society's notion of justice and injustice, as the latter may possibly be distorted by the experiences of conflict and violence. It addresses formal and informal settings and is of importance to people on the local, regional and international levels of society after conflict. As it includes rebuilding structures, retributive and reconciling measures it cannot possibly be placed solely under the heading of ‘reconciliation’ but should be linked with conflict studies in many more ways.

The final field of study which will - briefly - be linked to that of transitional justice in this section is that of international relations. In a globalised world as we live in today, one nation's national politics are certainly influenced by international actors and international politics through international relations. Organs such as the NATO and the UN are, or at least try to be, of a constant influence on the situation in the world. Internal conflicts become internationalised for a variety of reasons. In the case of Rwanda, this occurred after the genocide had caused around 800,000 people to die, in Yugoslavia the international attention was drawn during the civil war and ethnic cleansing. In both cases, however, it was under extreme international influence that the transitional justice mechanisms to deal

²¹ This so-called ‘working definition’ of reconciliation is based by the authors on a range of existing definitions. For more information on how this ‘working definition’ was formed see Hamber and Kelly (2004).

²² In Ramsbotham et al. (2005) transitional justice mechanisms such as, truth commissions and criminal tribunals are headed under the section of ‘alternative paths to reconciliation’ which proposes that their end-function is providing for reconciliation.

with those atrocities were put into place.²³ Transitional justice should not be seen merely as part of national politics of countries in transition. Moral and financial support for many transitional justice mechanisms comes from the international community,²⁴ linking their existence to international politics and relations.

What this section has tried to show, is that the field of transitional justice has so many linkages with different - though related - fields of study that it cannot be placed under the heading of one of these fields of study. Transitional justice is so complex a notion, that it must be considered a full and worthy framework of study on its own, which includes understandings of law, conflicts and human rights.

²³ See chapter on transitional justice mechanisms.

²⁴ See chapter on transitional justice mechanisms: ICC, ICTY, ICTR and Hybrid Courts.

3. Transitional Justice Mechanisms

In order to better understand the term transitional justice it is of importance to be introduced to the practical appliance of transitional justice in contemporary societies. Though the previous chapter has already referred to the fact that transitional justice comprehends much more than formal and informal mechanisms to seek justice, it are transitional justice mechanisms such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the South African Truth and Reconciliation Commission that are most recognisable to the overall public and receive most attention in current research. The research question of this thesis, moreover, also lays emphasis on these visible transitional justice mechanisms, which makes it important to understand the different mechanisms and their individual characteristics. Therefore, the following chapter will introduce transitional justice mechanisms in general and analyse the difference between retributive and restorative justice, after which it will go into several transitional justice mechanisms individually, by briefly addressing their history, their theory and their practice. As there exist many transitional justice mechanisms, this research is unable to introduce them all in the following section. Instead, a selection is made to include the most used and most known mechanisms.

Following the definition of transitional justice used in this thesis and explained in the previous chapter, transitional justice mechanism are ‘tools to address past human rights violations in societies which are in a transition away from the structure which has caused these violations to occur’. These mechanisms aim to support the quest towards justice and/or reconciliation for all people in the transitional society.

As aforementioned, the first instances of what currently is regarded to be transitional justice were the Nuremberg and Tokyo international tribunals. Later on, it were the transitions in South-America that came to introduce the notion of truth and reconciliation commissions,²⁵ a term nowadays mostly associated with South-Africa. Even though besides truth commissions and international trials there are also other transitional justice mechanisms such as traditional justice and reconciliation mechanisms,²⁶ memorials, historical recording, and reparations, it are these two mechanisms of transitional justice which seem most addressed in research and papers on transitional justice. The reason for this may be that of all the mechanisms these two transitional justice mechanisms seem most clearly to embody two different, by some referred to as contradicting, notions of justice. Namely, that of retributive justice and that of restorative justice.

²⁵ One of the first truth commissions was installed in Bolivia in 1982. This was called the ‘Comision Nacional de Desaparecidos’ (Simpson 2007, 94). Other truth commissions have been in Chile, Argentina and El-Salvador (Simpson 2007, 90 and 92).

²⁶ See Quinn (2005) working paper on ‘The Role of Informal Mechanisms in Transitional Justice’.

International as well as national or semi-national trials base their existence on retributive justice. The idea behind retributive justice is that one must be punished one way or another for the violations one has committed in the past. Perpetrators of violence, of human rights abuse, or any other violations of the national and international laws should always be held accountable for their deeds. Because of this, the most important and underlying function of retributive justice is to “counter a culture of impunity”(Anderlini et al. 2004, 2).²⁷ The general idea is that when perpetrators are not punished for their actions, future perpetrators will not hesitate to commit crimes as they are convinced they will get away with it. Moreover, in the view of retributive transitional justice mechanisms, ‘justice’ is unconditionally linked to ‘punishment’. According to Robinson (2003, 489) and Anderlini et al. (2004, 2), besides punishment, trials also have a function of facilitating reconciliation through ascribing individual guilt, providing people with a sense of justice which accommodates reconciliation by stopping an endless cycle of revenge, by removing the possibility of perpetrators to come to power again, and by providing a clear boundary between the past and the future.

Restorative justice, according to Anderlini et al. (2004, 2), “is a process through which all those affected by an offence [...] collectively deal with the consequences”.²⁸ It, therefore, focuses not on punishment but places emphasis on the healing of wounds and rebuilding of relationships (ibidem 2). Evident for restorative justice are the terms; truth-telling, forgiveness, acknowledgement and reconciliation. One of the most known restorative transitional justice mechanisms includes this terminology in its name; ‘truth and reconciliation commission (TRC)’.²⁹ The vision behind restorative justice is that a society dealing with past human rights violations must work together - victims, families of victims, perpetrators and possible bystanders (though in most cases everyone is effected and plays a role in such happenings, one way or the other) – in order to find out the causes and consequences of the atrocities and let the country overcome its past and prepare for a peaceful future. Goals of restorative justice are “integrating all affected parties, resolving the original conflict, healing the pain of the victims [...], and preventing future wrongdoing”(Anderlini et al. 2004, 2). Though often also associated with the term ‘amnesty’,³⁰ it must be noted that amnesty is not a fixed tool used by all restorative transitional justice mechanisms. In some cases, such as in the South African TRC,³¹ it has been used but this example should not be seen as a blueprint example for restorative justice.

²⁷ For more information on this ‘climate of impunity’ see Shraga and Zacklin 1996, 502.

²⁸ This stands in agreement with the description of restorative justice of Tony Marshall, quoted in Llewellyn and Howse (1999) as followed; “Restorative justice is a process whereby all the parties with stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (372-372).

²⁹ For a further explanation on Truth and econcilliation Commissions see further in this chapter.

³⁰ See, for example, Llewellyn and Howse (1999).

³¹ The South African TRC was able to give amnesty to human rights violators in exchange for telling the truth at the commission. In the end, up to 850 amnesties were granted (Gibson 2005, 344).

Proponents of restorative justice regard retributive justice to be backward-looking –because of its focus on punishment - instead of a future investment to which the term restorative justice is more often connected (Teitel 2000, 30). Some arguments against the retributive form of transitional justice emphasise that systems of retributive justice are so focussed on addressing what has happened in the past, that they disregard the consequences this could have for the future, especially when it comes to reconciliation; according to Llewellyn and Howse (1999, 357) retributive mechanisms “isolate and alienate the perpetrator from society” while this group also needs to be included in the reconciliation process, especially in civil wars that have produced a large number of civilian perpetrators and victims at the same time. In contrast to retributive justice, restorative justice is more forward-looking; aimed at “reintegrative measures that build or re-build social bonds”(ibidem, 357). These alleged differences between the two forms of reaching justice are used by Llewellyn and Howse (1999) to discuss whether restorative and retributive justice mechanisms are contradictory or not.³² In a way it is true that retributive justice and restorative justice are contradictory since they adhere to a different viewpoint. According to retributive justice, punishment is necessary for justice to occur and according to restorative justice this is not always the case. This, however, should not mean that the two cannot be used together in the same post-conflict situation. As noted by the International Centre for Transitional Justice (ICTJ) experience has shown that transitional justice is most effective when a combination of restorative and retributive justice is sought through the use of several mechanisms (ICTJ website 2009). In that case, for example, restorative justice may have a more direct influence on a society than retributive justice in the form of an international criminal court, since it has the opportunity to reach more people; more people can tell their story and more people can be reconciled with the past events,³³ while retributive justice can stimulate prosecution of the most influential leaders which have caused the conflict and violations to occur, in order to fight impunity.

This thesis will not go further into the possibly endless discussion of whether restorative and retributive justice mechanisms are contradictory or not or whether the one is better than the other. It is, however, important to keep in mind, while explaining the different transitional justice mechanisms, to which understanding of justice they can be subscribed.

³² For an extensive discussion on the alleged contradictions and commonalities between retributive and restorative justice, especially with stress on truth and reconciliation commissions and international tribunals see Llewellyn and Howe (1999).

³³ As noted later on, international and even national tribunals lack the capacity to deal with more than a small number of perpetrators and victims of past human rights abuses.

3.1 Criminal Tribunals

Criminal trials and tribunals, which focus on retributive justice, can take many forms. Nowadays one can distinguish three types of criminal justice focussing on transitional societies, namely; national or domestic trials, international tribunals (either ad hoc or the International Criminal Court), and hybrid courts.

3.1.1 Ad Hoc International Tribunals

In the beginning years of the 1990s, extreme human rights offences, specifically in the form of genocide, brought a shock to the international community that had no fixed mechanism to deal with the perpetrators of such occurrences of violence. After the Tokyo and Nuremberg tribunals in the aftermath of the Second World War, international tribunals were not used for a number of decades. The genocide in the former Yugoslavia and in Rwanda, however, brought new feelings of responsibility to the international community, to try the perpetrators of these acts in a “new Nuremberg”(PICT ICTY 2009, par 2). This resulted in the establishment of ad hoc international tribunals.

As the name itself already says, these tribunals set up on an ad hoc basis as a consequence of extreme human rights violations. Because of this, ad hoc tribunals only have jurisdiction over crimes that have occurred in a specific time span or from a specific time when the atrocities have been planned and have occurred. For the first ad hoc international tribunal, the International Tribunal for the Former Yugoslavia (ICTY) this time is from 1991 onwards (ICTY Statute 2009, 9.1), and for the International Criminal Tribunal for Rwanda (ICTR), this is 1 January 1994 and 31 December 1994 (ICTR Statute 2007, 1). Moreover, the ad hoc nature of these tribunals also results in the fact that their “life span [...] is linked to the restoration and maintenance of international peace and security in the territories [to which their jurisdiction applies]”(PICT ICTY 2009, par 6). These tribunals will be dissolved when the United Nations Security Council decides that the “peace and security” have been returned to the territory (ibidem, par 6). The reason why such ad hoc tribunals are titled international tribunals is because they have received their legitimacy and owe their entire existence to the United Nations. These tribunals have risen out of several UN Security Council resolutions and are financially and politically dependent on this organ. More specific, the ICTY and ICTR are “subsidiary organs of the Security Council”(ibidem, par 6) and are, therefore, based on international law and exist of a wide variety of international staff. Their place of settlement depends on the safety and stability in the country where the atrocities have taken place and, even more, of the international political considerations. For the ICTY, this meant a seat in The Hague, and for the ICTR it meant Arusha, in Tanzania.

The practice of installing ad hoc tribunals in the case of the former Yugoslavia and Rwanda has strongly contributed to the formation of the International Criminal Court, which will be dealt with later on in this section. The ICTY has especially been important in the development of the ICC. This for the fact that it was formed while the conflict in the former Yugoslavia was still continuing. By redressing human rights violations of an ongoing conflict the ICTY made a significant effort to contribute to bringing such mass human rights violations to a halt, like the ICC aims to do for conflicts in the present and future. In other words, the ICC will try to make future ad hoc tribunals unnecessary.

Criticisms of the ICTY and the ICTR not only relate to the criticism of retributive justice. Critics have also found fault with the international foundation of these mechanisms does not give enough support and responsibility to the “local” population as these international tribunals are mostly settled abroad and work with international staff (Dickenson 2003). More about these arguments against international courts can be read in the following section on the International Criminal Court, which has faced similar criticism.

3.1.2 The International Criminal Court

After years of preparation the International Criminal Court (ICC) on July 1st, 2002, became the first permanently established international tool to address human rights violations around the globe. Many events and efforts which can be traced back even to the beginning of the 20th century have contributed to the eventual establishment of the ICC.³⁴ The first draft Statute of the ICC dates back to 1952 (Schabas 2001, 8). The eventual Statute to which the ICC ascribes its legitimacy is referred to as the Rome Statute.³⁵ This fifty-seven pages long document carefully states the structure, jurisdiction and applicable law of the court. Moreover, it clearly indicates the possibility of states to withdraw from the Statute. Though the Rome Statute had initially been signed by 139 countries, there are currently a hundred countries that have ratified the Statute (CICC 2009). Missing from this list are politically powerful states such as Russia, China and the United States, of which the United States even withdrew its signature from the Rome Statute during the leadership of Bush (ibidem). While in these last cases there are clearly political objections to ratifying the statute of the ICC, according to the Coalition for the International Criminal Court (CICC 2009), many have not yet ratified the statute because of a lack of education on international law and the Court itself. This coalition has, therefore, set up programmes to inform these countries of the ICC.

Both Robinson (2003, 482) and Call (2004, 104) emphasise the establishment of the ICC to be an international attempt to end a culture of impunity which had been mostly existent up to the end of the Cold War. The preamble to the Rome Statute (2000) specifically reads: “[a]ffirming that the most

³⁴ The Versailles Treaty and the Treaty of Sevres, see Schabas (2001, 3-6).

³⁵ For the full Rome Statute see appendix 1.

serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured” and “[d]etermined to put an end to impunity for the perpetrators of these crimes”, hereby placing careful emphasis on this specific goal of the ICC. From a more practical perspective, according to Call (2004, 104), the eventual establishment of the ICC may also be regarded as a reaction to and solution for the past need to form ad hoc tribunals after serious violations of human rights. With the establishment of the ICC, human rights violations may be addressed as soon as they appear, without the direct necessity of setting up separate ad hoc tribunals.³⁶ Besides placing accountability for human rights violations on the centre stage of international law, one of the most important contributions of the ICC to global society today is that of underlining the widely accepted moral of global human rights. The Rome Statute reemphasises several global human rights such as “the right to life, liberty and security of person”(UDHR 1948, art. 3) and the rights to be free of inhuman treatment (ibidem, art. 5). Moreover, it is hoped that the ICC will help remove dangerous leaders from their power, provides victims with a sense of justice and closure on the “cycle of vengeance”, and gives victims an opportunity to speak (Robinson 2003, 489; Llewellyn and Howse 1999, 359-365). Finally, one of the main objectives of the ICC is to contribute to the prevention of human rights violations in the future (Rome Statute 2000, preamble; Llewellyn and Howse 1999, 364-365).

In practice, the first seven years of its existence have, as many argue, shown the ICC to have several pitfalls. One of the most heard comments on the ICC is that its existence endangers the possibility of coming to peace agreements with warring parties who have been involved in “the most serious crimes of international concern” (Rome statute 2000, preamble). Since parties often demand full amnesty as one of the major conditions for a peace agreement, and the statute of the ICC which relies on accountability stands opposite to the possibility of full amnesty in any case of grave human rights abuse,³⁷ it could be argued that the existence of the ICC may be troublesome for building peace on several occasions. Take for example the case of Northern Uganda, where the indictment of Lord’s Resistance Army (LRA) leadership by the ICC is argued to undermine the peace process in that area as amnesty is one of the demands of the LRA to cease fire and reach a peace agreement (ICTJ 2007, 15-16). Another argument against the existence of the ICC which is, as mentioned before, a common argument against any court not seated in the country where the atrocities have occurred, is the lack of legitimacy with relevance to local populations (Dickinson 2003, 301-303). Seated in The Hague – though the Rome Statute (2000, art. 3) allows for the court to sit elsewhere if desirable – the ICC has until now been situated far from the states or regions where the atrocities have occurred. Moreover, the

³⁶ Note the use of the word ‘direct’. It may be necessary to set up a separate court afterwards if the atrocities involve so much perpetrators that the ICC does not have the capacity to deal with them all.

³⁷ As Walsh (2008) notes, the ICC does have jurisdiction over perpetrators of war crimes which have been granted amnesty, since amnesty may be seen as “an unwillingness to prosecute thereby triggering the ICC’s jurisdiction” (49). For a further discussion on this issue see Chesterman (2004, 154-182)

court consists solely of international judges and prosecutors, which distances it even further from the local populations who have experienced the atrocities first hand. These populations may not feel involved in this part of the transitional justice process also because communicating the events of the trials in the ICC to the local population could be problematic, as will also count for the communication of the community to the international court .

With respect to post-conflict peacebuilding and –development, two other problems of the structure of the ICC are identified by Dickinson (2003). Firstly, since the ICC, like the ad hoc tribunals, is seated abroad and consists solely of international staff it does not contribute in any way to capacity-building in the transitional society (ibidem, 303-304). No domestic judges and prosecutors are trained to deal with the most serious human rights violations. Secondly the ICC also fails to support “the application and development of substantive norms criminalising mass atrocities in transitional countries” (ibidem, 304-305). Which should be regarded an important development in case of any future occurrences of these violations.

The final general comment on the ICC, which again also counts for ad hoc tribunals, is that the ICC merely has the capacity to bring a small number of the most responsible leaders to trial and to hear not more than a specific number of witnesses. This could therefore, never fully give closure to entire populations that have been victims of human rights violations. Moreover, since according to Llewellyn and Howse (1999, 364) even these limited witnesses are steered towards stating facts and refraining from mentioning their feelings and showing their emotions, the ICC will not even give them full closure .³⁸ This underlines the argument of the International Centre for Transitional Justice that no transitional justice mechanisms can operate on its own but always needs to be combined with other mechanisms in order to fully address past human rights violations in a transitional society (ICTJ website 2009).

3.1.3 National/Domestic Courts

When speaking of domestic courts in this section, this paper narrows this definition to those domestic/national courts which are set up during a transitional phase of a country in order to deal with specific human rights violations that have occurred in a certain period of time. Such domestic courts are free from international involvement except for a minor advisory role played by international actors in some cases (Dougherty 2008, 22).³⁹ Domestic courts do not differ much from other transitional courts such as the international (ad hoc) tribunals in the way they operate. Such courts also follow the procedures of investigation, prosecution and sentencing, with prosecutors, lawyers and judges included in the process. The differences that do exist between domestic and international courts lie in

³⁸ As was noted in the chapter on Transitional Justice in general to be one of the objectives of transitional justice.

³⁹ In the case of the Iraqi High Tribunal the court was “advised primarily by the ‘Regime Crimes Liaison Office’ which was ‘staffed largely by individuals seconded by the US department of Justice’ (ICTJ 2006, 4 in Bloemberg 2009, 4).

the composition of the court, and the laws to which the court derives its jurisdiction and bases its sentencing.⁴⁰

The latest example of the instalment of a fully domestic court as transitional justice mechanism may be that of the Iraqi High Tribunal in 2005. This national court, installed to prosecute those involved in the human rights violations from 17 July 1968 and the 1st of May 2003 (IHCCL 2005, 2), was the one to sentence Saddam Hussein to be hanged to death for his involvement in Dujail.⁴¹

As with all transitional justice mechanisms there are also arguments for and against the establishment of fully domestic courts. Notably, the most important argument in favour of national courts is that they provide for domestic ownership. Having the court situated in the transitional country itself and having little or no international involvement, the legitimacy of such a court in the eyes of the population could be greater than in the case of an international court which is placed thousands of miles away and only makes use of international staff. This, however, always depends on the position and legitimacy of the successor government that has made the decision of establishing such a court, which brings us to the following argument against domestic courts: A domestic court may possibly be less objective in its rulings and procedures than an international court that has to oblige to the international legal standards. In the case of the Iraqi High Tribunal, it was mostly the Sunni population that was not convinced of the legitimacy and objectivity of the domestic court, as it was established by a transitional government with less Sunni representatives than Kurd and Shi'ite representatives. As argued in Bloemberg (2009, 5), the Iraqi High Tribunal has indeed failed to be an objective and independent transitional justice mechanism as it bowed for government pressure⁴² and did not live up to international standards. Besides possible successor government pressure, a fully domestic court may also face problems with the occurrence of a so called 'brain drain' after (civil) war. This 'brain drain', which evidently means the emigration – voluntary or not - of educated people to foreign countries during the war, often has the consequence that there is not enough capable or experienced personnel for a domestic court to operate correctly. In the case of Iraq, the judges of the domestic court also lacked sufficient experience in the procedures surrounding trials of such a large scale (Dougherty 2008, 23). Finally, a possible argument against domestic courts may be that not only their procedures but also their domestic penal code does not live up to the international standards. This counts for the inclusion of the death penalty in the domestic penal code of some countries. The death penalty is not

⁴⁰ Whether this are international laws or national laws.

⁴¹ For more information on the Dujail trial and the inconsistencies of this trial, its sentencing and the issue of justice see; Bloemberg (2009).

⁴² As can be read in (Bloemberg 2009, 5): "Human Rights Watch's Report of the Dujail trial (2006, 83) explicitly notes that it was this pressure from the Iraqi government to move to a fast trial and conviction which had led to some evidentiary gaps with regard to 'evidence necessary to prove intent, knowledge and criminal responsibility on the part of the defendants' in the trial. Though the investigative judge of the IHT had expressed these problems and its want for more time to investigate it was because of 'intense political pressure' that the trial was ruled to proceed (ibidem, 83). Moreover, according to Dougherty (2008, 20), political pressure had also lead to the discharge of several judges who were seen too benign towards the defendants".

accepted in fully international courts or in hybrid courts (*ibidem*, 24) but was used as a sentence in the Dujail trial of the Iraqi High Tribunal.

Another example of a domestic court, besides the Iraqi High Tribunal is the national Gacaca court system in Rwanda. As this is, however, a court system based on a traditional system, it will be explained in the section on traditional transitional justice mechanisms.

3.1.4 Hybrid Courts

Hybrid courts are a combination of two sorts of courts, namely a combination of a domestic/national court and an international court. This mechanism of transitional justice which combines domestic law with international accepted standards of law (Dickinson 2003, 295) has according to Dickinson (2003, 295) not received as much attention as all other forms of transitional justice such as the ICC, ad hoc tribunals and Truth and Reconciliation Commissions. As the author argues, this has to do with the fact that it is not fully accepted either by advocates of domestic ownership of war tribunals nor by advocates of fully international justice because of its hybrid structure (*ibidem*, 296).

A Hybrid Court is situated in the domestic country and is structured to combine both domestic and international judges, investigators, prosecutors and other staff. According to the Project on International Courts and Tribunals (PICT), “as with all other existing international criminal bodies, the UN played a key role in [the] creation [of all existing hybrid courts]” (PICT Hybrid 2009, par 4). This project further notes hybrid courts to be ad hoc institutions, which are brought into existence after a specific situation of human rights abuse and may be resolved after peace and stability has returned to a certain area (*ibidem*, par 4). Hence, hybrid courts have much in common with ad hoc international tribunals.

There can be multiple reasons for the establishment of a hybrid mechanism. First of all, it is a solution to conflict-torn countries where the national judicial system has come to fall apart and where domestic judges and lawyers are only available in scarce numbers (Dickinson 2003, 297). Here the combination of foreign and domestic staff of a Hybrid Court will address the scarcity of domestic judges and lawyers, as international tribunals also do, but at the same time the hybrid court addresses the issue of legitimacy by also involving local actors into its structure. Moreover, by involving local actors into its structure, a hybrid court also contributes to capacity-building in the post-conflict country. Hence, through their structure Hybrid Courts have the benefit of addressing possible problems of legitimacy and capacity-building earlier identified as disadvantages of the International Criminal Tribunal and ad hoc tribunals. A second reason for establishing a Hybrid Court instead of a national tribunal, as described by Dickinson, is “the fear for retaliation” of a fully domestic court and accompanying staff (*ibidem*, 299). A Hybrid Court could in this case support a more fair and objective ruling than a fully domestic court. Though it could be argued, that a hybrid court brings together the best of both worlds,

the hybrid structure also brings forward several uncertainties; in what way is it international, and in what way is a hybrid court a domestic court? With regard to the issue of applicable law, questions that arise are; in how far is the applicable law derived from a country's domestic law, and to what extent is it based on international laws. Here a right balance should be sought or otherwise the hybrid court could seem illegitimate in the eyes of domestic actors or in the eyes of international actors. A similar balance between international and domestic should be sought in the composition of the staff of the hybrid court. By creating such a balance, the hybrid court will contribute to capacity-building while creating a solution for the brain-brain of the post-war country. In the end the creation of a good balance within the hybrid structure will bring together the best characteristics of international and domestic courts or tribunals. The 'good' characteristics of an international court, such as well-trained staff, sufficient funding, and a wide international recognition, together with the 'good' characteristics of domestic courts, such as capacity-building, and the local legitimacy of the court. However, a less balanced hybrid court could be vulnerable to the earlier mentioned weaknesses of international and national courts.

Up to this point, there have been four retributive mechanism of transitional justice that may be placed under the heading of a hybrid court. These are the 'Crimes Panels of the District Court of Dili', the "'Regulation 64" Panels in the Courts of Kosovo', the 'Special Court for Sierra Leone', and the 'Extraordinary Chambers in the Courts of Cambodia' (PICT Hybrid 2009, par 2).

3.2 Restorative Transitional Justice Mechanisms

After having introduced several transitional justice mechanisms that base their existence on retributive justice, the following section will address transitional justice mechanisms that are of a more restorative nature. These mechanisms place emphasis on reconciliation and the rebuilding of war-torn societies with (almost) all actors that have been involved in the conflict. The next section, firstly, brings forward the idea of truth and reconciliation commissions, after which reparation and documentation are dealt with. This section will end with Disarmament, Demobilisation and Reintegration (DDR) programmes.

3.2.1 Truth and Reconciliation Commissions

Concluding from their numbers – almost two dozen since 1974 (Pankhurst 2008, 10) - Truth and Reconciliation Commissions (TRCs) seem to be a most popular mechanism of transitional societies to

deal with past human rights violations. While the first TRCs were active in South-America,⁴³ the most known TRC of the last decades is that of South Africa⁴⁴.

TRCs are focussed on restorative justice instead of the focus of criminal tribunals on retributive justice. The overall thought behind this type of transitional justice mechanisms seems to be that all individuals and groups of individuals involved in a situation of immense human rights violations are in need of closure. This closure will not be reached only by the use of retributive justice, since focus there is laid fully on punishment of the perpetrators instead of healing the wounds of the victims and healing the wounds between different social/ ethnic groups within one society.

As Dal Secco (2008, 68) notes, TRCs may vary in their institutional formats and specifics but have certain characteristics in common. TRCs address a specific period of the past (from one specific date to the other), they exist temporarily and usually not much longer than two years, and finally, TRCs are non-judicial and derive their authority and power from the state (ibidem; Pankhurst 2008). As for the main goals of TRCs these often include:

- Making a full account of the truth surrounding the human rights violations
- Recognising the occurrences of these violations
- Giving victims the opportunity to speak out
- Condemning perpetrators
- Promoting reconciliation
- Investigating the causes of the conflict or violations
- Recommending institutional reforms and reparations⁴⁵

While Pankhurst (2008, 11) includes a final accomplishment of TRCs to be “[t]o contribute to justice and accountability” this is a point that not everyone agrees upon. More specifically; it is the restorative way of addressing this issue of justice that some critics state to be a weakness of TRCs. Justice within the construct of a Truth Commission is seen as “acknowledgement and dialogue” (ibidem, 11), in other words; restorative, instead of retributive. As stated by Llewellyn and Howse (1999, 356) the failure to include retributive justice in the structure of TRCs makes these mechanisms to be seen by some as an “uneasy compromise with justice”; these critics believe punishment and justice are intrinsically connected and by removing punishment, as done by TRCs, true justice will not be done. Overall, this argument against TRCs may be regarded an argument against fully restorative mechanisms in general, but would especially count for TRCs which grant themselves the responsibility of providing conditional amnesties.⁴⁶ In those cases perpetrators of human rights

⁴³ Bolivia, Argentina and Chile (Simpson 2007, 90-94).

⁴⁴ The South African Truth and Reconciliation Commission, also referred to as the TRC, came into being in 1995 and issued its final report on 29 October 1998 (Gibson 2002, 542).

⁴⁵ See amongst others; Anderlini et al. (2004), Pankhurst (2008), Crocker (2009), and Dal Secco (2008).

⁴⁶ Chesterman (2004, 157-158) remarks: “the linkage between truth and amnesty is epitomized by the South African [TRC]”. Conditions for amnesty were that the offence was committed between the 1st of March 1960 and the 11th of May 1994, that the act was politically associated with the conflicts of the past and that all facts surrounding the offence were revealed by the perpetrator in front of the Commission”.

violations can be offered amnesty, protecting them from prosecution, in return for a full testimony on, and apology for, the violations the perpetrator has committed. The argument would be that this does not do enough justice to the victims.⁴⁷ A specific argument against TRCs exemplified by Gibson (2005, 342) is that the truth that TRCs produce is “far from truthful”. Here, the issue of ‘relative truth’ comes forward. It may be argued that truth is always subjective, and the stories that are presented at TRCs will never be a fully objective and factual representation of what has really occurred in the past.

In short a TRC works as followed: After a mandate for the TRC is settled the commission starts its work with the collection of testimonies by as many people that have been involved in the conflict or oppression as possible. The collection of these oral testimonies may bring forward some logistic problems. In order to give as much people as possible the opportunity to speak, local and regional offices of TRCs may be set up in different areas, keeping in mind the travel difficulties of people in a post-conflict or post-oppression country. For example, in Peru “the TRC visited 530 districts in 137 provinces in every department of Peru” and established twelve local offices next to its central office in the capital of Peru; Lima (Peru Support Group 2004, 11). The number of testimonies heard or read⁴⁸ by TRCs may add up to thousands; or even 17,000 in the case of Peru (ibidem, 11). In some cases the testimonies of perpetrators may be judged by an amnesty commission within the TRC that may provide amnesty in trade for truth and apology, but as said before, this is not a general characteristic of TRCs. Besides the testimonies a TRC also collects information by going through documents that were released before and during the conflict. With all this information and testimonials at hand, a commission is able to research the background and causes of the conflict, make sure these are documented, and provide recommendations for the post-conflict reconciliation within a country in a final report.

The basis for TRCs can be partially ascribed to the Joinet Principles of 1997. The Joinet principles, named after the author of the UN report on “the impunity of perpetrators of human rights violations” (Joinet 1997, introduction-A) that calls for the adoption by the UN of a set of principles that protect and promote human rights by acting against impunity, state the right to have knowledge of the truth, find justice, and receive reparations (Anderlini et. al 2004, 11). Here “the right to know” does not only count for the victim of human rights abuse or the direct relative of the victim, but must be seen, according to the Principles, as a collective right (Joinet 1997, 1.A). It are the Joinet Principles,

⁴⁷ Gibson (2005, 342) notes one of the most mentioned defects of TRCs to be; “the denial of justice in the Faustian bargain trading amnesty for peace”. For an extensive analysis of advantages and disadvantages of Truth and Reconciliation Commissions see Crocker (2009).

⁴⁸ TRCs may also receive written testimonies of people that are not able to travel to the TRC’s offices. See for example; Rodolfo (1994) who examines the Salvadorian TRC and its more than a 1000 written and oral testimonies.

therefore, that have prepared the ground for the right of TRCs to try to provide a collective narrative of the truth.

While TRCs especially focus on finding the truth and creating a just historical narrative of the past, as mentioned above, one of the tasks which TRCs have given themselves throughout the years is recommending reparations. Though reparations - either in the form of restitution or apology - are a form of transitional justice on their own, they commonly derive from advice of TRCs or Special Tribunals in their final reports. It are the results of the investigation of these Commissions or Tribunals that often a basis for reparation processes.

3.2.2 Reparation

From the advice in the final reports of TRCs may be concluded that reparations are considered an important tool of transitional justice. The final report of the South African TRC stresses that the South African government should “accept responsibility for reparations” as they are especially important in combination with the use of amnesty for perpetrators (TRC 1998, Volume 5, 170 in Gibson 2002, 542), while the Liberian TRC states: “Reparation is a desirable and appropriate mechanism to redress the gross violations of human rights [, ...] to help restore their human dignity, foster healing and closure as well as justice and genuine reconciliation” (Liberian TRC 2009, 3), and the TRC in Chile has also emphasised the need for (moral) reparations (Teitel 2000, 126).

The first thing that comes to mind while thinking of reparation is financial or material restitution; money or goods to compensate for ones losses during the war. In the past, this type of transitional justice had been introduced in inter-state conflicts such as that between Italy and the Austrian Hungarian Monarchy in the beginning of the Twentieth Century,⁴⁹ but was later also used in intrastate conflicts or transitional societies moving from communisms to democracy, such as in 1989 in Czechoslovakia (David and Choi Yuk-ping 2005). In the latter case, political prisoners were given payments to compensate their loss of salary and sufferings during their imprisonment - a fixed amount of money was given for each month of ones imprisonment - , while families of murdered prisoners were also given financial reparations (ibidem, 399). Furthermore, people who had been forced to leave their jobs during the former regime were in many cases allowed to reoccupy their former positions (ibidem, 399).

Financial reparation of victims and their families is not regarded by all to be a justifiable means of transitional justice. Some claim that the transfer of money may be regarded as a settlement by the perpetrators who could be convinced their debt is literally ‘paid’ and the right of victims to justice will be concluded, while others claim such payments are disrespectful to the deceased victims – regarding

⁴⁹ The American Journal of International Law (1920) shows the official document of an agreement between several states regarding the financial reparations surrounding the reclamation of Italian territory from the Austrian Hungarian Monarchy.

it to be ‘blood money’ (David and Choi Yuk-ping 2005, 403).⁵⁰ People who do believe in financial reparations emphasise the money is merely meant to be symbolic. “Monetary compensation” is a way of acknowledging the sufferings of victims during the conflict (ibidem, 404).

Besides the possibility of providing for financial reparations to victims and families of victims of human rights violations, there is also the possibility of providing ‘moral reparations’. These moral reparations which aim at “repair[ing] the shame and humiliation previously inflicted on victims and [restoring] their reputation and equal status in the public eye”(Teitel 2000, 126-127) are not merely focussed on the individual harm of victims but on entire communities; to make them understand the misconceptions and wrongful actions of the past authorities and signal a transition to successor policy (ibidem, 126). These moral reparations, therefore, do not only restore the dignity of the victims and their families, but also aim at improving the public moral. An example of such moral reparation has been the reaction of the then new Chilean government after the advice of the countries TRC. Here the moral reparation expressed itself in a recital of the names of people that had been ‘disappeared’⁵¹ “in a national public address [... as] apology to the victims of governmental wrongdoing” (ibidem 126).

The final form of reparation that will be mentioned in this section is that of reparative labour. In this form of reparation, the perpetrator of human rights abuse is sanctioned to provide some sort of labour to the victim or its community. In an article by Fisher (1946), it is described how labour reparation played a role in the aftermath of the Second World War. As the author describes, it was common for the ‘victors’ of the war to use German prisoners as free labour workers to help rebuild their countries (Fisher 1946, 313-315).⁵² Though reparation in the form of labour has never since been used in such large numbers, it occurs on some occasions. Especially traditional transitional justice mechanisms have often stimulated perpetrators to pay reparations in any way – including the possibility of labour – to the victim or family of the victim they have harmed.⁵³

In the end, whether they are financial, moral or of another sort, reparations are a common used tool of transitional justice. Even though reparations should not be seen as independent mechanisms on their own, as reparation programmes often derive from the advice of transitional justice mechanisms such as truth and reconciliation commissions, they do play an important part in reconciliation and transition processes.

⁵⁰ David and Choi Yuk-ping (2005, 403) use the following example; “some Mothers of Plaza de Mayo, whose sons disappeared during Argentinean military rule, refused to accept financial compensation on the ground that it would diminish their claims for truth and justice”.

⁵¹ These political prisoners were arrested and subsequently murdered under the military junta.

⁵² Fisher (1946, 314) makes mention of The Soviet Republic, France, England and Belgium having German prisoners of war working as reparative labourers. Moreover, according to Fisher, “the British Minister of Agriculture and Fisheries, Tom Williams, disclosed to the House of Commons on April 8, 1946, that his government had 111,000 German and 35,000 Italian prisoners of war working and intended to increase the total to at least 200,000 before the end of 1946”.

⁵³ See section on traditional transitional justice mechanisms.

3.2.3 Documentation

Documentation is in most cases not a transitional justice mechanism on its own but rather a form of transitional justice that plays a part in transitional justice mechanisms. Institutes such as TRCs or (inter)national tribunals make sure their investigations and final conclusions are documented and in the former case, these are even presented to the wider public in a final report. Such a document not only shows a summarised record of the atrocities that have occurred –providing a form of justice through acknowledgement - but also shows how the conflict came into being; what the underlying sources of the conflict or reasons for the atrocities have been. When it becomes clear what the causes of the problems have been it may be easier to prevent such conflicts in the future. This shows documentation not only to be important for transitional justice but also for future conflict prevention. Documentation is important for the historical record of the atrocities. Without a historical record, victims may get the feeling their sufferings are not truly acknowledged. Moreover, if such a record is not put into place, it will be easier for (political) trouble makers to deny the occurrences of human right abuse.⁵⁴ That such a historical record does not per se have to derive from a TRC is exemplified by Human Rights Watch (2006, 3), who notes establishing a historical record of the sufferings of people during Saddam’s rule to be one of the important functions of the Iraqi High Tribunal. Closely tied to a historical record is the collective memory of a country. By stating the facts of the atrocities and the causes of the atrocities in a historical record, the people in a country are all familiarised with a specific version of the truth that is created by tribunals, TRCs or other mechanisms, and are stimulated to accept this version of the truth about their country’s past.⁵⁵ This collective memory again makes it more difficult for people to deny the past (Gibson 2005, 353), and though the truth that has derived from transitional justice mechanisms – such as the South African TRC - “is not necessarily an official sanctioned truth [, it is] an amalgamation of ideas about the past with which all [people in a country] must at least content”(ibidem, 353). Moreover, as noted by Gibson (ibidem, 355) the South African TRC has, through its historical record, stimulated racial groups to accept a collective memory in which the past is multifaceted and not ‘black or white’. This makes documentation not only an important part of/ tool for transitional justice, but makes it also relevant to future peace keeping and conflict prevention.

3.2.4 Disarmament, Demobilisation and Reintegration (DDR)

Even though Disarmament, Demobilisation and Reintegration (DDR) processes are a complex and individual subject of study by themselves, they can arguably also be seen as part of the transitional

⁵⁴ Even though the excessive documentation of the Holocaust has not refrained the Iranian President Ahmadinedjad to argue the Holocaust has never occurred.

⁵⁵ As stated by Gibson (2005, 353); “a collective memory is an accepted version of the truth about the country’s past”.

justice spectrum, and therefore, need not to be overlooked in this section. It is especially reintegration that is of grave importance to transitional justice since it supports justice and reconciliation in (local) communities. What is evident, however, is that a good reintegration process is dependent on the success of disarmament and demobilisation.

DDR processes consist of three subsequent stages;

1. Disarmament: Taking weapons away from soldiers, either on a voluntary basis, in exchange for food or other products, or coercively (Schroeder 2005, 3). This extracts the soldiers directly from the war-ground, making sure they do not have the means to fight any longer. With disarmament the chances for stability in a certain region become more probable as there are less weapons in circulation to reignite the violence. Disarmament provides a foundation for the demobilisation and reintegration phases as combatants without the possession of weapons are more inclined to take on and accept a different path for the future.

2. Demobilisation: “[T]he process of transforming the soldiers from combatants to ex-combatants, which involves bringing them together to encampment sites where they are disarmed, given tools and training, and discharged” (ibidem, 3-4). In these camps the former combatants are not only trained to be able to take on a specific profession after they are reintegrated back into society, but even more – and according to El Amani (2003, 28) “one of DDR’s most important functions” – the former (guerrilla) fighters are educated in the way conflict has changed their societies and their former communities (ibidem, 28). It is at this point where ex-combatants learn they have to adapt to the new situation in order to be able to finally reintegrate into society again.

3. Reintegration: The process of allowing and assisting the ex-combatant to become a part of the civilian community again (ibidem, 4), whether this is their old community or a totally different one. The reintegration process does not only involve former combatants but is also of relevance to the receiving communities. It are also the communities that are in need of training and education in order for them to understand the importance of allowing former combatants to reintegrate into their living environment. In other words, the communities need to be “sensitised” to the return of former warriors (Salomons 2005, 31). By educating and assisting both parties during the reintegration phase – making them understand the reasons and consequences of the conflict for both parties – understanding and reconciliation between the parties is stimulated. As transitional justice is a tool to come to terms with the past and provide for justice *and* reconciliation in the future, it is the reintegration phase of DDR programmes that fits transitional justice efforts best.

This section has given a short explanation of DDR programmes while mainly using (a variation of) the term ‘ex-combatant’. While the disarmament phase of DDR does specifically target former combatants, since these members of (ir)regular armies are the ones in possession of weaponry, the demobilisation and reintegration phases of DDR are also relevant to members of (ir)regular armies that have had other functions than that of a warrior. Merely linking the term ‘ex-combatant’ to DDR

programmes is therefore incorrect, as it excludes people that have worked as cooks, as sexual slaves, or have contributed to the army in any other way and are just as distanced from the countries society as the ex-combatants. That this is a common mistake made while constructing and revising DDR programmes will be shown later on in the section on gender-sensitivity and perpetrators in transitional justice.

3.3 Traditional Transitional Justice Mechanisms

The final mechanism, or better said collection of mechanisms, which is of importance to mention in this section is the traditional transitional justice mechanism. For the direction of this thesis it is important to introduce the possibility of having traditional mechanisms for the following reason: Traditional transitional justice mechanisms are brought into practice at the local community level (Anderlini et al. 2004, 7). They are bottom-up structures⁵⁶ that focus on the consequences of the former conflict on a specific community. As they are formed and practiced on a community basis they are likely to directly reach more people of such communities (including women) compared to larger transitional justice mechanisms such as tribunals or truth and reconciliation commissions, that are fixed in larger cities and do not have the capacity to address every (minor) incident that occurred in (rural) communities during the conflict or oppression. It is partly because of the latter that institutions such as the World Bank and the UN Security Council have noted the importance of traditional transitional justice mechanisms (Quinn 2005, 17) and that “traditional [...] mechanisms are increasingly used [...] as complementary or alternative process to international or national systems”(Anderlini et al. 2004, 7). Moreover, traditional mechanisms according to Anderlini et al. (2004, 7); “may lessen the burden on the formal system, offer familiarity and legitimacy to the population and contribute to reconciliation and reconstruction”.

As traditions are as specific to societies as DNA to a person it is difficult to specify on the methods of traditional transitional justice mechanisms in general. However, as Quinn (2005, 10) concludes traditional values between different societies and groups do not differ that much which translates itself into common goals for traditional transitional justice mechanisms. Generally these goals constitute the thought that a perpetrator needs education and healing which should be provided by the community as it is their common responsibility and the only way for also the victim to start the healing process (ibidem, 10-11). In contrast to non-traditional mechanisms which may be divided between retributive and restorative justice, traditional systems try to use a combination of retributive and restorative measures (ibidem, 14), though retributive justice is generally still used as a last resort.

⁵⁶ According to Quinn (2005, 20), traditional mechanism “generally involve bottom-up participation”.

It is Brock-Utne (2004) who explains the African traditional judicial mechanisms in the context of the African philosophy of *ubuntu*. The author describes how the traditional value of *ubuntu* forms the foundational difference between (modern) Western justice systems and traditional African justice systems. Brock-Utne (ibidem, 1,5) notes the contrast between the “individualistic Western of ‘Cogito, ergo sum’- I think, therefore I am” and the African philosophy of *ubuntu* – “I am human because I belong, I participate, I share”.⁵⁷ *Ubuntu* finds its origin in “the Xhosa expression 'Umuntu ngumuntu ngabanye bantu' (People are people through other people) [and] connotes humaneness caring and community”(Graybill 2004, 1118). The general thought is that people and their communities are intrinsically connected and that whatever happens to the individual is relevant to the entire community and the other way around (ibidem). In the context of conflict, however big or small, the *ubuntu* philosophy:

“sheds light on the importance of peacemaking through principles of reciprocity and a sense of shared destiny between peoples. It provides a value system for giving and receiving forgiveness. It provides a rationale for sacrificing or letting go of the desire to take revenge for past wrongs”(Brock-Utne 2004, 5).

Keeping *ubuntu* in mind, it is easier to understand why traditional transitional justice mechanisms in Africa seem to focus on restorative justice, using retributive justice in the form of arbitration only as a last resort.

One of the most known traditional transitional justice mechanism is the African judicial system of Mato Oput of the Acholi in Northern Uganda. This mechanism that according to Brock-Utne (2004, 8) stems forth of the *ubuntu* philosophy, literally means “drinking the herb of the Oput tree”(Brock-Utne 2001, 4) and finishes with a ceremony in which the perpetrator comes together with the (family of the) victim to drink the herb as a symbol of reconciliation (ibidem, 4). In this case the bitterness of the herb is a symbol for all the bitterness that has existed in the minds of the parties involved and drinking it will make those thoughts to disappear (ibidem, 4). According to Brock-Utne (2004, 8) this symbolic gesture follows a process in which perpetrators acknowledge their actions, show sorrow for their actions, ask forgiveness, and provide for compensation/reparation of their actions. These reparations may be in the form of financial or labour reparations. In other words, Mato Oput provides a way of asking and giving forgiveness and moving on as a community.⁵⁸

⁵⁷ Another common translation of *ubuntu* is; “I am because we are” (Graybill, 2004, 1119).

⁵⁸ For more examples of African traditional judicial systems that rely on the *ubuntu* philosophy see Brock-Utne (2004)

While Mato Oput has been used up till now on a local level, efforts to include the system as a national traditional justice mechanisms have not succeeded up till now,⁵⁹ partly because the Acholi are merely one of the dozens of different ethnic groups living in Northern Uganda and “Acholi rituals do not apply to other affected groups in the north such as the Langi or Iteso”(ICTJ 2007, 18). For the other part, the efforts to nationalise Mato Oput have been held back by contesters that argue that such a system based only on restorative beliefs may cause impunity. As research by the ICTJ has shown it is the wish of more than 60% of the population of Northern Uganda that the leaders of the LRA who have caused and ordered most human rights abuses during the conflict are punished instead of forgiven and reintegrated. This wish, together with the interest LRA leadership has to participate in local transitional justice mechanisms and thereby avoid prosecution and imprisonment by the ICC, makes the nationalisation of Mato Oput in Northern Uganda most unlikely (ibidem, 17).

It is in Rwanda that a traditional transitional justice mechanisms has been transformed to become a national system of transitional justice after the horrific Rwandan genocide that occurred between April and June 1994. The genocide had killed 800,000 Tutsi and moderate Hutus (Corey and Joireman 2004, 73) while it left 130,000 people imprisoned because of accusations of contributing to the genocide (Tiemessen 2004, 58). As the genocide had specifically targeted the judiciary,⁶⁰ the national court system of Rwanda was almost totally destroyed (ibidem, 59). This made it extremely difficult for the national courts, once some personnel had been put into place, to try the more than a hundred thousand prisoners in an acceptable period of time; by 2004, the national courts had tried a little more than 5,000 people, which would mean another 200 years before all the prisoners would have stood trial (Corey and Joireman 2004, 81). The Rwandan government saw the intensity of this problem and, therefore, established an alternative Gacaca court system in June 2002 (ibidem, 82), to complement the national Rwandan court system. Gacaca means “judgement or justice on the grass”⁶¹ and implies a “pragmatic and community based approach” (Tiemessen 2004, 60). The system has derived from a pre-colonial traditional system in which disputes regarding land rights, marriage and inheritance rights, and petty theft, were dealt with in a meeting of elders together with the conflicting parties. The disputes would be settled with the agreement of both parties and would have as goal to restore the communal order and reintegrate the causer of the dispute into that community (ibidem, 61). The entire process would depend on voluntary participation of the victim and perpetrator (Corey and Joireman 2004, 82). Today’s nationalised Gacaca system, according to Corey and Joireman (2004, 82), differs in several ways from the pre-colonial system; the mechanisms does not depend on voluntary

⁵⁹ Acholi religious and traditional leaders have made several efforts to present Mato Oput as an alternative to the International Criminal Court when it comes to dealing with the leadership of the Lord’s Resistance Army (ICTJ 2007, 17).

⁶⁰ As cited in Corey and Joireman (2004, 81), Amnesty International estimated that after the genocide there were only ten lawyers left in Rwanda.

⁶¹ While Corey and Joireman (2004, 82) use the translation ‘justice on the grass’, Tiemessen (2004, 60) refers to ‘judgement on the grass’.

participation, it is used for disputes/human rights violations from outside the local community and the possible punishments for perpetrators follow government guidelines. These punishments may range from “life in prison to community service and reintegration” (Tiemessen, 2004, 61). Since the informally trained judges are respected community members of genocide-affected communities, all those present at the ‘meeting’ are allowed to speak up, and testimonies without physical evidence are enough for the judges to come to a decision, the system – with its approximately 10,000 courts - does stay true to the grass root justice of the traditional Gacaca system (Corey and Joireman 2004, 81-83). Moreover, the main goal of the system is reconciliation and depending on the accusation, Gacaca judges may decide on compensation for the victims and reintegration of the perpetrator (Tiemessen 2004, 62). In the end, one may conclude the current Gacaca court system in Rwanda to be, a national transitional justice system with influences of the past Gacaca local and traditional system – which combines retributive (punishments that include imprisonment) with restorative (reintegration of perpetrators and reconciliation) measures.

The traditional transitional justice mechanisms described in the last paragraphs have and do not only function during times of transition. As they are judicial mechanisms that have dealt with local disputes in some form or another for hundreds of years, they must be understood as permanent traditional judicial mechanism that may play a part – or in the case of Gacaca be reinvented - as traditional transitional mechanisms in times of transition.

3.4 Concluding Remarks on Transitional Justice Mechanisms

This last chapter has given an overview of the most used transitional justice systems of the last decades. Furthermore, this chapter has tried to explain the difference between transitional justice mechanisms based on retributive justice and transitional justice mechanisms based on restorative justice. Though these two types of justice mechanisms differ in their understanding of what justice should include, they can both be used besides each other, or even combined as in Gacaca, in the same transitional society. Moreover, the latter example of Gacaca also shows that traditional values and methods of transitional justice may be combined with contemporary models of transitional justice.

The fact that there are so many different transitional justice mechanisms can be linked to the existence of so many different societies in transition. As no society in transition is the same there have been established many different methods and mechanisms of transitional justice in order to suit this variety of societies. Looking at it from the other way around, with the presence of so many mechanisms, every society in transition should choose its own combination of - retributive and restorative - transitional justice mechanisms (ICTJ website 2009) to suit its specific situation.

Having introduced the subject of transitional justice and many of the methods that are used to strive for transitional justice, the next section of this thesis will focus on the issue of gender and in what way gender is of any relevance to transitional justice.

4. Gender

The following chapters will introduce the notion of gender in this thesis. First the meaning of the word gender is explained briefly in general and afterwards with reference to the usage in this thesis. The development of the concept in relation to conflict studies will, furthermore, be addressed, after which the thesis will deal with the specific circumstances of women in conflict in comparison to men in the same situation. It is of the highest importance – also for gender research on transitional justice - to understand the different roles women can take in conflict as in literature and politics this is most often wrongly limited to the role of victim, a one-sided view which also finds its way into post-conflict peacebuilding efforts.

4.1 Introducing the Term Gender

While looking up the term gender in any ordinary dictionary,⁶² one finds the word to be defined simply as one person's sex; either male or female. With reference to gender as a subject of extensive research, the notion is defined however much more elaborately, as “the *perceptions* of appropriate behaviour, appearance and attitude for women and men that arise from social and cultural expectations” (El Amani 2003, 6, emphasis added). The latter definition of gender moves away from the biological and natural differences between the two sexes, to gender becoming a social construction of people themselves. Gender is, therefore, not the difference between male and female, but the difference between social perceptions of femininity and masculinity. It is the social and societal meaning of gender which is invaluable to researchers of all kinds of fields of study, including conflict studies, because, when regarding gender as a constructed notion, instead of a fixed biological difference, subjects such as gender inequality may have a better chance of being successfully addressed. Unlike biological differences, social constructions may possibly be reconstructed, providing an opportunity for a better gender-equal society when gender is regarded a social construction instead of a natural given.

Though gender research obviously must include both research on men and masculinity, as well as research on women and femininity, will it be able to compare perceptions of appropriate behaviour and differences in social positions between the two sexes, much gender research wrongly focuses solely on the rights and opportunities of women. This mostly applies to feminist research that deals with the subordinate position of women in domestic, social and political life and which accepts stereotypes that label women and girls as victims and men and boys as wrongdoers (El Amani 2003, 6). However, as also shown by El Amani (2003), United Nations Security Council Resolution 1325

⁶² In this case the Collins Cobuild, Advanced Learner's English Dictionary is used.

Women Peace and Security (UNSCR 1325) exemplifies that even the United Nations are partial to women in their definition of gender. UNSCR 1325 was passed by the UN Security Council on the 31st of October in the year 2000, to emphasise the role of women in conflict situations. In short UNSCR 1325 stresses the effects of conflict on women and notes the importance of women being allowed to involve themselves in peacebuilding efforts at the decision-making level. The adoption of 1325 is seen by many women's organisations as the first step towards recognition of the position of women in conflict and peace. Though using the term elaborately, according to El Amani, UNSCR 1325 is not clear in its definition of gender since the term is "interchangeably used with 'women and girls'"(ibidem, 24).⁶³

The focus of much research on women while investigating gender comes from the understanding of the subordinate position of women in many - if not all - sections of society. It is a well-known viewpoint that in every aspect of society, whether Western or non-Western, gender relations show large inequalities between women and men (Pankhurst 2003, 166), men having generally more opportunities, more rights and receiving more respect. With regard to civil and governmental policies this creates an environment where men are the rule, and women form the exception. If men are the rule, including in transitional justice mechanisms, it would be logical to focus on the position of women - as the exception - while performing research on gender-awareness, as the UN has done itself in the past. The danger of this way of addressing gender inequality is, however, the possibility that one soon forgets to recognise gender as the social construction of appropriate behaviour for men and women, and falls back to gender as being the biological difference between male and female. While the biological differences between men and women are indeed interesting subjects of research for some areas, it is mostly the constructed difference which is relevant to gender relations and gender inequality, and should be addressed in research on gender-awareness. Women are not deemed less worthy, for example, than men in patriarchal societies because of biological facts. This ideology of men being more important than women has once been constructed, just as the thoughts that women are the bearers of a certain culture and by attacking them one can destroy an entire ethnic population, or thoughts that men are solely the perpetrators and women the victims of conflict.⁶⁴ Focussing on gender as a constructed notion will not only provide a better understanding of gender relations, but it also creates the possibility for gender relations to be reconstructed and to possibly provide for a more gender-equal society. A focus on gender as a biological difference, by contrast, only reemphasises the genetic difference between men and women and may sooner focus solely on improving the position of women without addressing the position of men. A biological approach will therefore try to fix the problem of gender-inequality while refusing to pay attention to the source of the problem: unfairly constructed notions of appropriate behaviour for men and women. How gender as a construction

⁶³ According to Oosterveld (2005), the United Nations, prior to the Rome Statute, had largely left the term 'gender' undefined because it is such a complex notion to find agreement upon of all the member-states (66).

⁶⁴ These subjects are more elaborately explained in section 4.3.

relates to the experiences of men and women in conflict, will be more elaborately addressed in section 4.3.

With the introduction of the strategy of ‘gender mainstreaming’ which originates from the Beijing Platform for Action of 1995 (United Nations 2002, V),⁶⁵ an effort was made to change the ultimate focus on women and their position within much gender research and international (UN-) policies. Gender mainstreaming is a strategy which has the ultimate goal of reaching gender equality by “assessing the implications *for women and men* of any planned action, including legislation, policies or programmes in all areas and at all levels”(UN 2002, 1 emphasis added). Though gender mainstreaming recognises broad patterns of inequality of women the strategy distances itself from earlier gender strategies which merely focussed on targeting women (ibidem, 9). Gender mainstreaming has been developed by rethinking these previous strategies of emphasising solely on women because it recognises that “inequality between women and men [is] a relational issue and that inequalities [are] not going to be resolved through a focus only on women” (ibidem, 9). This is in agreement with the thoughts of Kronsell (2006) who stresses that masculinity and femininity, and subsequently their unequal social positions, cannot exist without complementary constructions of one and another. Meaning that only by defining masculinity can one construct a notion of femininity and, therefore, when one wants to change the social construction - and consequently the position of - femininity, the social construction of masculinity and its status and position also needs to be addressed. The two are interconnected as such, that it is necessary to address gender in this two-fold way. In practice gender mainstreaming means investigating the impacts of certain policies on both women and men in order to understand where the differences lie and where the potential of narrowing the gender gaps possibly find themselves (UN 2002, 13). Gender mainstreaming, therefore, is neither gender-neutral nor feminist in its approach; it recognises differences between the position of men and women while researching both genders instead of focussing solely on females.

What must be noted here is that though gender-mainstreaming has been a popular term for the United Nations’ organs and their policies ever since the Beijing Platform for Action of 1995, UNSCR 1325 exemplifies the difficulty the UN still has with using a definition of gender which applies to social constructions of masculinity and femininity, while searching for equal rights for men and women. UNSCR 1325 is reluctant to speak of making the effort to involve the male gender in the process of equal rights and more opportunities for women and girls, not to speak of the importance to change perceptions of both genders in order to create equal rights. For the most part, UNSCR 1325 places emphasis on the importance to recognise the special circumstances of women and girls in conflict, and to address the subsequent needs of women and girls in the post-conflict peacebuilding process. Furthermore, the resolution is often referred to in the context of giving more power to women at the

⁶⁵ The Beijing Platform for Action from the Fourth United Nations World Conference on Women in Beijing 1995.

decision-making level of politics because it speaks of “reaffirming the role of women in the prevention and resolution of conflicts [...] and the need to increase their role in decision-making with regard to conflict prevention and resolution”(UNSCR 1325, 1).⁶⁶ Though the resolution emphasises differences between the position of men and women, it does not mention the need to work on both the social construction of femininity and masculinity in order to address these differences, but merely speaks of women, and women (as the female race, not as feminine construction) only. Regarding the definition of gender explained in the beginning of this chapter, UNSCR 1325 can, therefore, be seen as a step back from gender-mainstreaming.

As can be concluded from this section, the term ‘gender’ is not consistently used as “the perceptions of appropriate behaviour, appearance and attitude for women and men that arise from social and cultural expectations” (El Amani 2003, 6), but is often used as merely a synonym for male and female. What has been emphasised here, is that in order to conduct gender research, one must not lose sight of the full definition of ‘gender’ because this could lead to a sole focus on women and as noted; “inequality between women and men [is] a relational issue and [...] inequalities [are] not going to be resolved through a focus only on women” (UN 2002, 9). The same would automatically also count for gender-research with regard to transitional justice.

4.2 Gender and Transitional Justice Research

According to Tabak (working draft), there are three ways in which gender is linked to transitional justice by researchers. First, there is the fully gender-neutral approach. This approach does not recognise any specific position of women in warfare. Any violence aimed at women will be seen as equal to any other violence during conflict (Tabak working draft, 6). The latter is exactly what the second span of researchers is concerned with. The feminist-approach they adhere to is focussed on the special needs of women in and after conflict, with special attention for the issue of gender-based (often sexual) violence (ibidem 6). The final and, according to Tabak, most recent development in theoretical research on gender and transitional justice is one that focuses on the gender bias in both before-mentioned schools of thought. This approach deals with examining the effect of conflict on both men and women and what effect gender stereotypes have on conflict. Moreover, this newest approach to combining the issue of gender with transitional justice “attempts to complicate how the notion of ‘truth’ is understood, the presumption of ‘women as victims’, and the impact of gender on men” (ibidem 7). It can be regarded as a critique but also as a combination of the gender-neutral and fully-feminist approach, since it is gender-neutral in a way that it focuses on men and women in its research

⁶⁶ As will be shown later on in this thesis, gender equality and gender-sensitivity in transitional justice mechanisms is often confused with equal numbers of women and men at the decision-making or working level.

while at the same time recognising women's special position without creating a stereotype of this special position. This last approach to combining gender with transitional justice may be connected to the afore-mentioned gender-mainstreaming approach.

This thesis strongly acknowledges the need for gender research to recognise social perceptions of both women and men as both femininity as well as masculinity. Furthermore, it adheres to the third approach of "theoretical intersections between gender theory and transitional justice" described by Tabak (working draft, 6-8), which focuses on gender biases and stereotypes from a constructivist point of view, while combining gender-neutrality within its research with acknowledgement of women's unequal position. It is the objective of this thesis to approach the subject of gender in a way which is fair to the definition of gender being a relational and constructed issue, thus critically approaching research that uses the term gender-sensitivity interchangeably with women's issues. As noted before, a sole focus on women will not do justice to the relationship between masculinity and femininity. Therefore, while researching how transitional justice mechanisms have dealt with the subject of gender, this thesis will focus on the existent constructions of femininity and masculinity in studies on conflict and oppression, and how these constructions influence experiences of men and women in conflict/oppressive or post conflict/oppressive societies. After this, it will be looked at the possible influence of these stereotypes on different transitional justice mechanisms to find out if the mechanisms have been able to look beyond these constructed notions and have been truly gender-sensitive and aware.

As will unfold itself in the following chapters, most attempts to introduce gender-sensitivity into transitional justice mechanisms have again addressed merely the position of women instead of focussing on both social constructions of femininity and masculinity. This reflects a growing attention in the literature for the special position of women in conflict. In the following sections, the main findings of this literature will be portrayed, thereby unavoidably replicating some of the bias in this literature towards women's issues rather than gender constructions. However, the female and male stereotypes which are inevitably connected to the subject of women and conflict will be kept in mind throughout the text. Overall, this thesis aims to take on a gender-neutral approach which is aware of the unequal position of women, while keeping a critical view on research and legislation that considers gender-sensitivity and women's rights as the same thing.

4.3 Women, Conflict and Transitions to 'Peace'

The following section will focus on the ways women are affected by contemporary conflict, with special focus on the true experiences of women in conflict and how these are structured into female and consequently male stereotypes. It starts by explaining the change in warfare which has led to different role patterns and experiences for men and women in conflict, after which this section will show how conflict can have, and mostly has, the effect of changing gender-roles within a society. Finally, this section will deal with the consequences of people's experiences and roles during the conflict for the transition and upcoming peacetime.

As mentioned in the general introduction of this thesis, an increasing focus on women's rights and women's participation in political decision-making dates from the 1990's onwards (Reilly 2007, 161). Besides to the rise of feminism in general, this heightened interest in women and in gender relations in the field of conflictstudies may arguably be linked to the change in conflicts and wars after the Cold War.

Violent conflicts started or continued after the Cold War are generally termed 'New Wars'.⁶⁷ As Di John (2008, 3) notes contemporary conflicts are explained to be different from old wars "in their method of warfare, their causes and their financing". One of the most distinct features of new wars, however, is the fact that they are intrastate conflicts in contrast to the old inter- and extrastate conflicts. According to the Human Security Report of 2003 after the Cold War intrastate conflicts have risen to come to account for 95% of all conflicts on the planet (ibidem, 23). These can be civil wars between, for example, different ethnic groups, different political groups or between guerrilla warriors and governments. Since contemporary conflicts are no longer fought on specific battle-fields but are fought within cities and people's living communities, civilians become not only indirect victims of the conflict but also direct victims of the violence surrounding them.⁶⁸ This direct involvement of civilians is also a consequence of the immense trade and availability of small but lethal weaponry. By having the means to fight people are more likely to get involved in the direct violence of the conflict (either in defence or as an attack). The implications of these 'new' types of warfare have been immense, especially for women. Women and young girls have become specific targets in new wars prone to sexual violence. According to Münkler the sexual abuse of women and children has become a weapon against the male enemy to stress their failure to protect the women in their community (Münkler paraphrased in Brzoska 2004, 111). Though sexual violence has always been present in conflicts

⁶⁷ For an elaborate discussion on the term 'New Wars' see Kaldor (1999). There Kaldor argues "new wars could be understood only in the context of political, economic, military and cultural globalisation" (Di John 2008, 25).

⁶⁸ This should not be mistaken with an increase in battle-deaths. This number has overall decreased since the Cold War (HSR 2003, 29).

(ibidem, 111), the fact that it has been used not as an individual gain but as a means of destructing entire populations⁶⁹ cannot but have a large impact on women's experience of violent conflict.

Not only are women more involved in contemporary conflicts as victims of abuse, new wars give women more opportunities to be involved in paramilitary or rebel groups, even as fighters. This is in utter contrast to the old wars where women's involvement was merely restricted to nursing and fabricating weapons since the interstate wars were fought between the militaries. Overall, the change of warfare after the end of the Cold War has possibly contributed to the interest of researchers to focus more on gender relations in the context of conflicts and international relations. In the end, this change of warfare and consequently the change of women and men's experiences in conflict also gives recognition to research, including this thesis, which focuses on gender-sensitivity and transitional justice.

4.3.1 Women as victims in conflict

It is a regularly made statement that women and children are the ones that suffer the most in conflict.⁷⁰ Hereby, one should not merely think of cases of direct violence but also at cases of indirect violence and suffering which are a consequence of the conflict. With reference to indirect violence or suffering, whichever one wants to call it, one should think of (internal) displacements, disintegration of communities and less access to food and shelter (El Bushra and Lopez 1993, 6). According to UNHCR statistics over the year 2008, around 50 percent off the then 42 million "forcibly displaced persons"⁷¹ worldwide were women and girls and 44 percent were children below 18 years-old (UNHCR 2009, 2, 13-14).⁷² These instances of indirect violence also make women more prone to direct violence. Without protective communities, shelter and resources women are less able to protect themselves from instances of direct violence and become even more vulnerable than they already were. Whether on the road or within IDP- or refugee camps, women live in constant threat of becoming a victim of direct - often sexual - violence.

Though 'sexual violence' is mostly used in the context of women in conflict situations one must place sexual violence within the wider term of 'gender-based' or 'gender-related' violence. Gender-based violence is "violence, sexual or otherwise, which plays on gender norms and gender exclusions to break people down both physically and psychologically"(El Amani 2003, 16). El Bushra and Lopez (1993, 1) add to this definition by arguing that gender-based violence mostly develops in patriarchal societies where a large power imbalance between women and men exists. In such cases, women are

⁶⁹ The use of sexual violence in this context will be further discussed in this thesis.

⁷⁰ Take for example Bell and O'Rourke (2007, 25) who state that "women suffer disproportionately from armed conflict".

⁷¹ This number includes refugees, IDPs and asylum seekers.

⁷² According to the Women's Refugee Commission's fact sheet (2009) this adds up to, 4 out of 5 displaced in the world being "women, children and young people".

often seen as the bearers of culture and the symbols of a specific ethnicity; they are mothers to their own families and also mothers of the entire community. The women in such patriarchal societies are not only regarded property of their husbands or fathers but properties of the entire male community (Manjoo 2008, 137-138). Inflicting violent acts upon these women, most often in the form of rape, therefore, is used to humiliate entire communities or even ethnic populations as done in Uganda, Burma and Bosnia (ibidem, 6). Women are raped not only for the sexual pleasure of the perpetrator, but to humiliate the victim, her possible husband, and the community for failing to protect her. Furthermore, these women are raped to possibly impregnate them with a child from another ethnic background, herewith undermining women's role as bearers of their culture. Such sexual violence is inflicted upon the women often in front of their families and communities and even young girls who have not even reached their adolescence by far are having to face rape during conflict. Women are forced to watch their own daughters getting gang-raped but also the elderly women are not safe from this harm.⁷³ Finally, while speaking of gender-based violence, it must be stressed that men are not only indirectly affected by this sort of warfare through humiliation of their masculinity when their wives are sexually abused. Men too are direct victims of gender-based violence through sexual abuse, torture and mutilation (El Amani 2006, 18). The TRC of Sierra Leone reported of 299 cases of sexual abuse against men during the conflict (Dal Secco 2008, 83). As Byrne (1996, 36) specifies, however, there is overall very little documentation of sexual abuse of men, which can be because of the large social taboo against these atrocities. These men are often aware of the strong social consequences that arise when their communities are informed these men have been sexually abused. Therefore, such atrocities are often hidden by the victims and their families, which again may contribute to the stereotype of women being the only direct victims of gender-based violence during conflict, and men being merely perpetrators in conflict.

Unfortunately the terrible experience of rape or other forms of sexual abuse against women does not only have permanent physical and emotional/psychological consequences, but women victims of such forms of violence also have to deal with other consequences such as HIV/Aids, unwanted pregnancies⁷⁴ and rural culture which does not accept rape victims back into the community (Byrne 1996, 36 and El Amani 2003, 17). Even after violent conflict has reached an end, women who have been physically attacked continue to be victims of their own situation. Younger unmarried women may find it very hard, maybe impossible, to find a marriage partner after it has become known they have been sexually abused during conflict. These women, living in patriarchal societies, are considered impure and are therefore unwanted marriage partners. If they have been abducted during conflict, women and younger girls can, moreover, be considered as traitors by their former communities (Byrne 1996, 36).

⁷³ Examples of these sufferings can be found in dozens of books and articles including in Nowrojee 2008, 107-136.

⁷⁴ "Estimates of rape pregnancies in warfare include 20-50,000 Bosnian women in 1993 and around 5,000 women in Rwanda in 1994" (El-Bushra and Mukarubuga 1995, 17)

Sexual abuse is not the only form of physical violence women are to cope with during conflict but is often the one type of violence that is emphasised on by many researchers. Because of this strong focus on sexual abuse of women, other instances of violence that affect women, like “the loss of property” and non-sexual abuse are often forgotten and may “limit the understanding of the many experiences of women in war and conflict”(Anderlini et al. 2004, 1). Therefore, it is important to acknowledge that women also suffer in many other ways from conflict than solely in the form of sexual abuse or, as stated in the next section, may even be perpetrators of violence in conflict themselves.

The abuse women have to cope with during conflict does not only derive from outside forces. Conflict also brings heightened numbers of personal or domestic abuse against women (El- Bushra and Lopez 1993, 7). This also counts for the transitional period away from conflict. Women often face a continuation of violence or even an increase in personal violence, rape and other forms of sexual violence right after conflict (Pankhurst 2008, 3 and Pankhurst 2003, 161).

From the wide array of literature it is difficult to find consensus on whether there are more male or more female war-related deaths in contemporary conflicts. Pankhurst (2008, 2-3) exposes her readers to several arguments for and against the statement of women facing the biggest casualties in contemporary conflicts while Byrne (1996, 32) argues exclusively that men “make up the majority of casualties in situations of conflict” as they are “often those primarily targeted”. In the end, whether men or women are the largest victims in conflict, this section has shown that it has been widely recognised that women are often targeted by sexual abuse in order to disgrace and destroy entire communities and that focus on these sexual sufferings have made researcher to pay less attention to other sufferings of women during conflict, while gender based violence in the form of sexual abuse against men is still given much lesser attention by researchers. These observations contribute to the argument that victim stereotypes do exist in, and are kept alive by, conflict study research.

4.3.2 Women as perpetrators in conflict

Besides being victims, women can also play a contrasting role in conflict. Quoting El Bushra and Mukarubuga (1995, 16); “it is over-simplistic to assume that men are the perpetrators of war while women are its peace-loving victims”. In many cases, women too make a contribution to the atrocities in conflict; cases in Rwanda show women are able to participate even in acts of genocide (African Rights paraphrased in Byrne 1996, 33).⁷⁵ In this case the division of male and female roles becomes of less value by severely strong divisions of ethnic groups. Since, as noted before, women are the ones responsible for passing on cultural identities of sometimes extreme nationalism to their children, they are actually often the ones to exacerbate and motivate violent ethnic conflict (Pankhurst 2003, 158). One severe example of a women as perpetrator is the case of Pauline Nyiramasuhuko in Rwanda, playing a role in the sexual abuse of other women (with a different ethnicity). This former Minister of

⁷⁵ “In Rwanda, approximately 3,000 women (out of more than 10,000 people accused nationwide) are awaiting or have been tried as perpetrators of genocide”(Anderlini et al. 2004, 10).

Family and Women's Affairs had been "accused of inciting and overseeing the mass rape of the women of the town of Butare in 1994"(Tabak working draft, 15). In other situations, women have been active members of paramilitary groups, guerrillas, or so-called 'liberation armies' like for example in Colombia. The FARC (Fuerzas Armadas Revolucionarias de Colombia), one of Colombia's most prominent leftist guerrilla group, supposedly has a percentage of women that goes up to fifty percent (ibidem, 20-21).

Women may take on several roles in fighting forces, ranging from cooks, sexual slaves, to labour force or combatant (Bouta 2005, 7). For the most part, women active in guerrilla forces fulfil tasks such as cooking, cleaning, nursing, and performing sexual favours (ibidem) which may possibly relate to the cross-cutting patriarchal values that are taken along by men from their regular society when they enter or form a guerrilla group. Though women performing other tasks than fighting may also be given some basic military training – in the case of the LRA this counted for nearly all girls (Coulter et al. 2008, 10) – only a minor percentage is primarily active as combatant. For the LRA this percentage is around twelve percent (ibidem),⁷⁶ in diverse armies in Sierra Leone this was between ten and thirty percent (ibidem, 12), and for the Tigrean People's Liberation Front (TPLF) in Ethiopia female fighters constituted up to one third of all their combatants (ibidem, 14). Of all these female fighters very few end up at the commander position, but this is not totally uncommon. In the FARC women can become "comandantes" within the organisation (Tabak working draft, 20-21), and the Liberian Civil War has produced several notorious female commanders like Martina Johnson of the Patriotic Front of Liberia (NPFL), Ruth 'Attila' Milton of the Liberia Peace Council (LPC) and 'Black Diamond' of Liberians United for Reconciliation and Democracy (LURD) (Coulter et al. 2008, 14). Overall, however, most women active in guerrilla groups are not involved as fighters but as domestic workers, sex slaves or labour forces.

The motives of women to become active in guerrilla groups often brings forward the argument that these women are victims of their own situation and in many cases have no choice whether to join guerrilla forces or not. As Tabak (working draft) argues, in many cases the conflict itself has lead the women to destruction. Tabak uses the example of Colombian women who have been victims of extreme (sexual) violence and economic and political problems. These women come to have a choice between continuing to be a victim of abuse or taking up arms and joining 'the enemy' where they are still likely to become victims of sexual violence (ibidem, 19-40). In other cases younger girls are kidnapped and brainwashed in such a way that they accept the liberation army's ideology and even fight against their own communities. This, however, is not only a dilemma of women perpetrators of violence. The same counts for (young) male members of a lot of guerrilla groups who may also have felt they did not have any other choice but to take up arms in the conflict. The argument that female

⁷⁶According to research around 12% of the girls that had been active in the LRA stated their primary role to be combatant while for 49% this was not their primary but their secondary role (Coulter et al. 2008, 10).

combatants are in the end victims of conflict is, therefore, inappropriate to use in many cases as it is a dilemma regarding most fighters in civil wars.

Being the opposite of the female stereotype in a patriarchal society, female combatants face extreme hardship for the role they have taken, not only during the conflict but also after the violent conflict has come to an end. Firstly, given the patriarchal structure of regular and irregular armies women in guerrilla groups and government forces have to prove even more than men in the same position that they are worthy combatants.⁷⁷ Secondly, female combatants which are caught by the antagonist group are punished even more than the male combatants for their role in the conflict. El Amani (2003, 19-20), for example, portrays the experiences of one of those women who did not fulfil the female stereotype and was, therefore, tortured in extreme worse ways than her male counterparts when arrested by the Guatemalan dictatorship. During the transitional phase away from conflict, during the Disarmament, Demobilisation and Reintegration (DDR) phase, or during the conflict when women step out of guerrilla forces because of pregnancies,⁷⁸ former women combatants face enormous difficulty to be accepted back in their old communities. These women are discriminated against after they return because they have gone against the traditional perceptions of gender roles accepted in that community (Tabak working draft, 34). This discrimination is also used against the majority women that have been active in other ways, instead of combatant, in guerrilla groups. The very fact that they have been part of a militant group, makes it difficult for them to be accepted back into their old communities; especially in the case of younger girls that have been abducted and have lived as the 'wives' of guerrilla commanders.⁷⁹ All of the above underlines El Amani's (2003, 12) argument that; "[w]hether in their traditional [...] capacity as wives and mothers, or in their roles as aggressors and supporters of conflict, women continue to experience discrimination, due to the unequal power structures that govern their relationships with men". What has been also shown in this section, however, is that women too may be perpetrators of violence in conflict; women are not only victims of conflict.

4.3.4 Changing Gender Roles

Nobody will ever contest the fact that conflict brings immense changes to a society. Conflict distorts the lives of men and women in such a way that their gender roles, meaning the tasks and status that is associated with men and women, change from what they were before the conflict had started. As men are still the majority of warriors in conflict it are mostly they who leave their families to fight in the war of join guerrilla groups. Moreover, there are many cases in which men have been abducted on an

⁷⁷ See for example Kronsell (2006, 124) who addresses gender roles in the army.

⁷⁸ In many factions women combatants are not permitted to have children. In Uganda and Colombia women who became pregnant left their guerrilla factions to avoid abortion (Tabak working draft 33-34).

⁷⁹ For the same reasons as other victims of sexual abuse in times of conflict and oppression, as mentioned in the section of women as victims of conflict.

immensely large scale or where men are the primary targets of genocide.⁸⁰ This leaves women responsible for taking care of the family which is left behind. Women are forced by these circumstances to rise from their original gender role as ‘baby-maker’ and cook, to becoming the one who earns the money to survive and becoming the actual head of the household. Women start to work on the land, trade, set up small businesses and in some cases women need to sell their bodies in order for their families to survive (Djibrine Sy 1993, El Amani 2003). One example of this has been the situation of women in Chad during the civil war which started in 1979. Chadian society had always been strongly patriarchal and most women lived in seclusion having the tasks of staying at home, raising children, and taking care of household chores. When the men were started to be kidnapped, disappeared or when they had to live in exile, the women in Chad were left to take care of their entire families. Because they had no other choice women stepped out of their seclusion and started to work in all possible ways, such as setting up trading businesses and taking care of the production of goods (Djibrine Sy 1993, 10-12). Because the men were not around, women became able to change their original and severely limited gender-role to a wider gender-role which offered them much more possibilities and freedom in daily life. What happened in Chad was that after the war had ended, the changed-gender roles kept their value and the women kept on being able to participate as respected individuals in society. The changed gender-role has made it possible for women in Chad to be valued even if they are not married or not able to have children (ibidem, 12). It is, however, not always the case, like in Chad, that changed gender-roles are accepted and remain existent after a conflict has come to an end. As stressed by Tabak (working draft, 9) “[d]uring conflict, women have consistently adopted greater responsibility when men leave to fight, and may in fact feel that their circumstances have improved [, however, f]or some of these women, the end of the conflict brings a return to the expected gender roles, and even retribution for women who have defied gender stereotypes”. The latter can be linked to the possible increase of domestic but also communal violence in the aftermath of the conflict. Pankhurst (2003, 161) notes that on a regular basis public outbursts of protest and accompanied violence occur against women who have stepped out of the traditional gender-role to become economically independent and be educated beyond the limits set up by the rural community. This exemplifies that “[t]hough women’s role in protecting and maintaining the family is magnified in war, to the extent that they may take over many of men’s functions, they mostly retain their subordinate position in power structures” (El-Bushra and Mukarubuga 1995, 17) and remain to be seen as less worthy than men after the conflict has come to an end.

⁸⁰ In Peru, during the 20 years of instability, 80 percent of the people that were killed were men (Peru Support Group 2004, 6). During the fall of Srebrenica, women and girls were separated from the (young and older) men that were killed and thrown into mass graves.

4.3.5 Concluding Remarks Gender and Conflict

The previous sections on gender have shown what the term gender really comprises and in what ways gender relations are affected by warfare. Moreover, it has countered some gender-stereotypes by arguing that women are more than just victims of violent conflict and men too may be victims of conflict instead of solely the perpetrators. The reason for focussing especially on feminine stereotypes in the last sections has been because it are often these female stereotypes that – wrongfully - take a leading role in the inclusion of gender in post-conflict peacebuilding and reconstruction processes, including in transitional justice mechanisms, as will be shown in the next chapter of this thesis.

The definition of gender adhered to by this thesis is that of gender being the perceptions of appropriate behaviour for men and women. These perceptions are of great influence on the daily lives of men and women, who are expected to fit these standardised constructions by the same community of people that has formulated these in the first place. In patriarchal, rural communities people do tend to follow these constructed formats of appropriate behaviour, but as shown before, conflict negatively influences the possibility of men and women to stay loyal to the gender-stereotypes. Gender-relations may shift and change because of war and may be, reformed into new constructions or pushed back into old patriarchal norms after the end of the conflict. Moreover, gender influences the way in which men and women experience war. Addressing gender norms and relations has become an intrinsic part of war-making in contemporary conflict, with gender-based violence as its foremost example. Overall, it can be argued that gender perceptions can change because of conflict, that conflict influences gender and gender-relations and the possibility of men and women to stick with these pre-settled constructs, and that conflicting parties actually use gender as a tool for weakening the enemy.

Building on the arguments that gender influences and is influenced by war-making, the post-conflict processes that deal with the rebuilding of societies and the reestablishment of peace consequently need to take this notion of gender into account while preparing their post-conflict programmes. Gender plays an important part in the way men and women experience conflict and the way they are allowed to deal with their conflict situation; while it has been shown that men and women may be able to take similar roles of victim and perpetrator, the boundaries that are tied to femininity and masculinity indeed have the consequence that women and men do experience conflict in different ways. Any post-conflict process which has the goal of making people come to terms with the past atrocities that have occurred and bringing justice and reconciliation, should at least be aware of the influence gender has had on conflict and of the influence conflict has had on gender, will it want to be able to reach its goal for both men and women in the post-conflict society. An awareness of gender and the influence gender has on men and women in conflict situations and after conflict situations will bring about an understanding that these differences may be in need of a different approach to find justice and reconciliation. As transitional justice is aimed at providing justice for *all* that have been part of the

conflict it is only logical that it should be aware and act on the differences in the way people – whether young or old, educated or non-educated, lower or higher class, and male or female - have experienced the conflict situation.

5. Gender-Sensitivity of Transitional Justice Mechanisms

After having thoroughly introduced the notions of transitional justice (mechanisms) and gender, and the idea of combining the two fields of study, this thesis has come to the point where it will research the gender-sensitiveness of the transitional justice mechanisms that were mentioned in the first part of this thesis. Firstly, this chapter will introduce, drawing on chapter two on transitional justice mechanisms and chapter four on gender, some possible characteristics of gender-sensitive transitional justice mechanisms. In other words, what aspects would contribute to gender-sensitivity as defined in the last chapter?. This will provide a background against which existing transitional justice mechanisms may be evaluated. I have chosen not to address the transitional justice mechanisms individually, but to address gender-sensitivity through the use of several topics – like, for example, the treatment of witnesses, the internal structure, the statute, and the treatment of gender-based crimes – which are all relevant to multiple transitional justice mechanisms. This way repetition will be avoided and more than one mechanism of transitional justice will be addressed at the same time. As the amount of existing research on each transitional justice mechanism, especially when combined with the subject of gender, varies much, this chapter will not be able to discuss all gender-sensitivity characteristics equally when it comes to the different transitional justice mechanisms. It does, however, try to address a fair share of retributive and restorative mechanisms. Furthermore, the chapter will make a distinction between the gender-sensitivity of transitional justice mechanisms in theory – in the statute – and the gender-sensitivity in practice. It is expected that there may be differences between statutes and practice when it comes to gender-sensitivity.

5.1 How to Define Gender-Sensitivity

Concluding from the chapter on transitional justice, there are two major objectives that are relevant to transitional justice mechanisms. Firstly, the mechanisms aim to address all human rights violations that have occurred during the conflict or oppression, and secondly, the mechanisms aim to provide reconciliation and justice for all that have been involved in the conflict or oppression. While it has been shown that there have been established many different mechanisms of transitional justice with different (retributive or restorative) approaches, these transitional justice mechanisms are all aimed towards the same objectives of addressing all human rights violations and addressing all people involved in the conflict. Chapter four on gender has shown that gender is both of influence on the violations that occur during conflict, and on the relationship and position of men and women in and after conflict. An effort by transitional justice to include gender should, therefore, take notice of this influence of gender on the experiences of conflict will it be able to reach its own objectives. While this

statement reiterates the importance of linking the field of gender to that of transitional justice, it also provides a guideline for characteristics of gender-sensitive transitional justice mechanisms.

A first and most relevant characteristic of gender-sensitive transitional justice mechanisms described by this thesis is that mechanisms should be aware of and act on the fact that gender includes more than the physical difference between men and women, but represents the social constructions of femininity and masculinity. Important in this case is that a gender-sensitive transitional justice mechanisms should be aware of common stereotypes that derive from these gender constructions and which may provide for societal problems for women and men in post-conflict situations. They should look beyond the stereotypes that women are merely victims of conflict and oppression and that men are solely the perpetrators, as these are actually gendered constructions themselves. In other words, gender-sensitive transitional justice mechanisms should be aware of the gender traps they too may fall in and, for example, should pay attention to male victims and female perpetrators.

The attention to constructions of masculinity and femininity may present itself in different ways in transitional justice mechanisms. Foremost, a gender-sensitive transitional justice mechanisms should acknowledge the fact that in contemporary warfare gender constructions and gender relations are deliberately targeted in the process of weakening the enemy.⁸¹ For example, women are often targeted in patriarchal societies to weaken entire ethnic communities with the belief that women are the bearers of a culture. With the aim of addressing all human rights violations, gender-sensitive transitional justice mechanisms should include a focus on gender-based violence. In practice, attention to this issue may present itself in a general attention of transitional justice mechanisms to gender-based crimes in their mandates and practices; for example, by addressing gendered violence as a specific topic for investigation and documentation. Note again in this case, that gender-based violence – according to the wider social constructive definition of gender - comprehends much more than only sexual violence and a true gender-sensitive mechanism would, therefore, address multiple forms of gender-based violence in its mandate and practices.

Another way in which attention towards gender constructions may come forward in transitional justice mechanisms regards victim witnesses. An understanding that gender constructions (in patriarchal societies) greatly influence the social position of victims of conflict may, for example, present itself in the rules and procedures for taking testimonies at tribunals and TRCs. As noted in chapter four, female and male victims of gender-based violence, mostly in the form of sexual violence, face a lot of difficulties when coming forward as victims of these crimes. These victims are subjected to shame and may be rejected by their communities. A gender-sensitive transitional justice mechanisms would assist victims of conflict to tell their story and at the same time protect them from the social shame of coming forward as victims of violence. A gender-sensitive transitional justice could, therefore, allow

⁸¹ As explained in chapter four.

women to tell their story in 'women friendly' surroundings and allow all victims – women *and* men - to testify in closed sessions. Moreover, staff of the transitional justice mechanism could receive training on how to best approach female and male victims of gender-based violence.

One final example of how gender-sensitive transitional justice mechanisms may address gender as the social constructions of masculinity and femininity relates to the stereotype of men being the only perpetrators of violence or contributors to guerrilla forces. A gender-sensitive mechanism will acknowledge that women may also contribute to fighting forces and that these women, therefore, also need to be addressed in DDR programmes. Furthermore, being gender-sensitive towards gender constructions may also present itself in transitional justice mechanisms by paying attention to the different roles women and men may take on in guerrilla forces. Not everyone is allowed to fight or carry a weapon in guerrilla forces, but may still be in need for demobilisation and reintegration after the conflict or oppression has come to an end.

Besides the above-mentioned social-constructive approach to gender-sensitive characteristics of transitional justice mechanisms there is one other characteristic of gender-sensitivity which is relevant to mention here but has a more feminist character. As pointed out in chapter four, women, and not only men, play a large role in conflict and oppression, hereby taking on different roles such as victim, perpetrator, activist and caretaker. Considering that women play a role in conflict or oppressive societies it will be logical if women are also allowed to play a role in the transitional society. Research has shown, however, that this is not the case. Women are underrepresented in top-down processes of peacebuilding, especially at the decision-making levels (Rooney 2007, 174-177). There are two ways in which gender-sensitivity could be formulated regarding this issue. From a social constructivist point of view, a gender-sensitivity approach would ask the question *why* women are less involved in peacebuilding programmes and if this has something to do with the social perceptions of the female gender. If it turns out, for example, that women are seen as less capable to function as peacebuilders in post-conflict mechanisms, a gender-sensitive measure should try to alter this gender-perception in order to allow more female involvement. Here a difficulty rises; are transitional justice mechanisms capable of changing these perceptions and how can they accomplish this? Redefining the deeply-rooted social constructed views on men and women would most likely take generations and measures that go beyond the rules and procedures of a transitional justice mechanism. Therefore, the second possible - and arguably easier - gender-sensitive measure that can be introduced is simply the inclusion of more women in post-conflict or post-oppression processes. This gender-sensitive characteristic is more feminist in its approach since it mostly looks at women in the biological sense, and not as a social construction. Though this thesis takes on a more gender-neutral approach, there are a few reasons why participation of women is researched as a gender-sensitive mechanism in this thesis. Firstly, women play a variety of roles in conflict and, therefore, need to be included in post-conflict peacebuilding efforts in different ways. The stereotype of a woman as a helpless creature in

and after conflict or oppression can be reversed if women are allowed to step up at important decision-making functions. Furthermore, including women may be a first necessary step towards gender-sensitivity in transitional justice mechanisms' structures since changing gender-perceptions may be too difficult a task for transitional justice. Lastly, as will also be shown in the coming sections, many transitional justice mechanisms and researchers indeed link gender-sensitivity to the number of women involved, which makes it at least to be a relevant subject to research. Bell et al. (2004, 320-322), Rooney (2007, 173), and Bell and O'Rourke (2007, 25) stress the importance of including gender into transitional justice to redirect the male domination in conflict and peacebuilding's decision-making functions. It is the joint opinion of these researchers that women are unequally represented in decision-making levels such as in peace negotiations which consequently provides for an unequal position of women in all levels of post-conflict societies. This under representation should be reversed in all mechanisms that deal with conflict and transitional or post-conflict situations, including in transitional justice. [0]These authors define an inclusion of gender in the field of transitional justice, as an inclusion of more women in transitional justice in order to have more equal representation of women and men, and a better protection of the rights and special circumstances of women in transitional and post-conflict situations (ibidem). As will be emphasised later on in this chapter, however, this view by Bell et al. (2007), Rooney (2007) and Bell and O'Rourke (2007) includes a faulty assumption. Gender-sensitivity in the 'structure' of a transitional justice mechanism should not automatically be tied to a more gender-sensitive 'process' of the mechanism. In other words, more female involvement in the structure should not be considered to consequently cause more attention to gender in the daily operations of the mechanisms. Section 5.3.2 will address this argument in more detail.

In the end the gender-sensitivity of a transitional justice mechanism starts with the idea that gender is an important issue to keep in mind during the transitional justice process. Without this first basis, a transitional justice mechanism cannot become gender-sensitive or gender-aware at all. After being convinced of this one point, a transitional justice mechanism may extend its gender-sensitivity by addressing gender as a constructed notion and understanding that the mechanism itself may also unconsciously follow these gender constructions. In practice this may first present itself in the attention given by transitional justice mechanisms to gender-based violence; including this type of violence – sexual and non-sexual - as a separate issue to research and document on. Other ways in which gender-sensitivity towards the social constructed notion of gender may show itself are measures to protect victim witnesses and measures to address both women and male members of guerrilla groups in DDR programmes. A final gender-sensitive characteristic that relies more on a feminist view, but is used much in practice, is including women in transitional justice structures. Whether and how different transitional justice mechanisms have assumed these characteristics of gender-sensitivity can be read in the following sections.

5.2 Gender-Sensitivity in Theory

5.2.1 Gender-Sensitivity in Transitional Justice' Statutes

This section will begin by analysing the statutes of several transitional justice mechanisms in search of gender sensitivity - even though this excludes truly traditional transitional justice mechanisms which usually do not have formal statutes. A statute does not only state on which grounds a transitional justice mechanism has authority, but it also clearly states guidelines for how a mechanism should operate and to what issues it should give special attention. Hence, one may note that a statute is the first place where gender-sensitivity would become visible.

Drawing from the section that has defined gender-sensitive characteristics of transitional justice mechanisms, one of the first visible expressions of gender-sensitivity in transitional justice mechanisms' statutes will be an awareness of the importance to include female as well as male staff in the mechanisms. As noted before, including female staff in transitional justice mechanisms does not so much follow the wider social constructive understanding of gender but borders closely to a feminist view.

When comparing the statutes of the ICC, the ICTY and the ICTR, one finds that only the Rome Statute of the ICC notes the importance of having "a fair representation of female and male judges" (Rome Statute 2000, art 36 a.iii). Neither the statute of the ICTR⁸² nor the statute of the ICTY⁸³ makes mention of the sex of permanent or ad litem judges, prosecutors of the court. On the other hand, according to Walsh (2008, 45), the ICTY and ICTR are required to take into account the gender of their staff when it comes to the Victims and Witness Unit. In these cases the courts are obligated to specifically consider appointing qualified women.⁸⁴ In other words, women are given preference over men with the same qualifications. Because of this, the latter two may also be considered gender-aware like the ICC when it comes to female gender involvement, but arguably, as also argued by Walsh (2008, 45), in a more biased manner; as if female staff need only to be included in transitional justice mechanisms when it comes to organs that deal with the victims of conflict. The Rome Statute seems to take a realistic view in its statement since it refrains from using the words 'equal representation'. By using the term 'fair representation' it remains politically correct in addressing the gender issue, but also remains realistic since equal representation may not always be possible or desirable.⁸⁵ This use of the term 'fair gender representation' may also be found in the guidelines for the staff of the Sierra

⁸² Statute of the International Criminal Court of Rwanda, United Nations, 2007

⁸³ Updated Statute of the International Criminal Court for the former Yugoslavia, United Nations, 2009. (Not an official document but a compilation based on original UN resolutions).

⁸⁴ Walsh refers to rule 34 of the Rules of Procedure and Evidence of the ICTY and ICTR.

⁸⁵ There must also be looked at the qualifications of the candidates, accepting only the best qualified. Furthermore, in some cases it is merely impossible to have equal representation; for example, with an uneven number of judges.

Leonean TRC (Dal Secco 2008, 80) but is on the other hand not used in the case of the Liberian TRC mandate. The mandate of the Liberian TRC explicitly notes that at least four of the in total nine commissioners of the TRC need to be women (TRC Liberia Mandate 2005, V.7), stating a fixed number of women instead of using a term like 'fair representation' which in the end can be interpreted in various ways. The mandate of the Commission on Reception, Truth and Reconciliation in Timor Leste (CAVR) has not aimed as high as the Liberian TRC by setting the minimum of female commissioners (in the national commission and in regional commissions) at thirty percent (UNTAET 2001, 11.1; 4.1).

This section shows that many mandates include guidelines for the number of women transitional justice mechanisms ought to include in their structures. Notably, however, these mandates do not specify whether the female staff should be local women that have experienced the conflict at first hand or whether these are well-established international judges. A difference in practice may exist in this case between international tribunals which would lean towards the latter, and national or local mechanisms such as the nationalised Gacaca system, which would more likely include local women.

Another possible gender-sensitive characteristic of transitional justice mechanisms pointed out in section 5.1 is the attention given to gender-based violence. While chapter four has explained that gender-based violence includes any type of violence (sexual or not) aimed to weaken the enemy by manipulating gender norms and gender roles, a first look at gender-sensitive efforts of transitional justice statutes again shows a tendency towards addressing sexual violence. According to Bell and O'Rourke (2007, 26) "efforts to 'add gender' to transitional justice have been most prominent with respect to the legal treatment of sexual violence in conflict". This is for a large part a consequence of years of lobbying by feminist/women's organisations for the recognition of sexual violence (against women) as a crime against humanity (O'Rourke 2000, 284). From the statutes of several transitional justice mechanisms can be drawn that they have answered to this feminist call of placing sexual violence amongst the worst crimes against humanity. As will be shown however, the strong focus on sexual violence by women's organisations may also have contributed to the neglect of other forms of gender-based violence by many of these mechanisms.

In the past, sexual violence was considered a crime which only affected women's honour,⁸⁶ not acknowledging sexual violence as a 'grave breach' of the Geneva Conventions (Bedont and Hall-Martinez 1999, 70).⁸⁷ To be specific, the Fourth Geneva Convention has written in its 27th article that "women shall be protected against 'any attack on their honor, in particular, rape, enforced prostitution, or any form of sexual assault'"(ibidem, 71 original spelling). By referring to these instances in the context of only the honour of the female race, the impact and use of sexual violence in conflict had

⁸⁶ Note that this definition does not recognise the possibility of sexual violence against men.

⁸⁷ "Grave breach crimes are those crimes that are so horrible that their commission is deemed a concern to the international community as a whole"(Bedont and Hall-Martinez 1999, 70). Hence, it may be compared to the 'crimes against humanity' but in legal terms is not the same.

been highly underestimated, and misplaced in the past, causing their “underinvestigation and underprosecution”(ibidem, 71). As stated by Bedont and Hall-Martinez (1999, 71), it is the statute of the ICTY that shows some improvement in recognising sexual gender based violence – in the form of rape - as a crime against humanity (ICTY Statute 2009, 5g). However, the ICTY statute still fails to acknowledge sexual violence as a grave breach and includes a limited definition of sexual violence, merely referring to the term ‘rape’ as a crime against humanity. This way it disregards all other forms of sexual gender-based violence. A definition on what the term ‘rape’ comprises is, furthermore, not present in the statute, giving the possibility to use the term as narrow or broad as one wants. The same characteristics regarding the issue of sexual violence count for the statute of the ICTR. The ICTR statute also includes rape as a crime against humanity (ICTR Statute 2007, 3g), but fails to define other forms of sexual violence, or name the subject as a grave breach of the Geneva Conventions.⁸⁸ Finally, what has been a large step towards placing sexual gender-based violence amongst the worst war crimes in international tribunals, is the definition of genocide used by both the ICTY, ICTR and the ICC statute. In theory, the definition of genocide in these statutes does give room to sexual or gender based violence, since one of the characteristics of genocide may be “causing serious bodily or mental harm to members of the group” (ICTY Statute 2009, 4:2b, ICTR Statute 2007, 2:2b).

Looking at the goal to include gender-based violence in the statutes of transitional justice mechanisms, the Rome Statute of the ICC is considered by some, like Bedont and Hall-Martinez (1999), a large improvement from the previous international tribunals. First of all, the Rome Statute has adopted a more elaborate understanding of sexual violence, including rape but also other forms of sexual violence such as “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” (Rome Statute 2000, 7:1g). Secondly, this definition of sexual violence is considered to be not only a crime against humanity, but also a war crime, and a grave breach of the Geneva Conventions (ibidem 7:1, 8:2, 8:2b.xxii). This allows instances of sexual violence during conflict to be prosecuted amongst the worst crimes.

In the case of the traditional transitional justice mechanism of Gacaca, used in a national effort to apply transitional justice in Rwanda, it is worth noting that the legislation for the Gacaca courts does not allow any of these courts to address cases of sexual torture or violence. The perpetrators of sexual violence are placed under the heading of the worst – category 1 – perpetrators during the Rwandan conflict, which includes “planners, instigators, leaders of the genocide and those who committed acts of sexual torture or violence”(Corey and Joireman 2004, 82). These perpetrators are by law not allowed to be handled by Gacaca courts. Gacaca courts, depending if they are provincial or confined to a certain district may only address ‘category 2’ or ‘category 3’ crimes.⁸⁹ This all stresses that the Rwandan government has recognised the seriousness of sexual crimes during the genocide and the

⁸⁸ The Statute of the ICTR also places rape and enforced prostitution under the heading of “outrages upon personal dignity” (ICTR Statute 2007, 4e) as a violation of the Geneva Conventions.

⁸⁹ Corey and Joireman (2004, 82): “Category 2 includes participators and conspirators in intentional murders [and c]ategory 3 is designed for those guilty of serious assaults”.

importance of these crimes to be addressed in court where the judges have received more than a few weeks of training.

As for the mandates of the first Truth and Reconciliation Commissions, like that of Argentina and Chile, these did not include gender based violence – sexual or otherwise - at all (Nesiah 2006a, 1). They could be considered as fully gender neutral or gender-unaware as it were. The newer generation of TRCs, on the other hand, such as Haiti and Sierra Leone, did specifically include gender violence (in the form of sexual violence) into their mandates, with the goal of better investigating these crimes (ibidem, 2). An exception in these younger generation of TRCs has been the CAVR. While section 5.3 will show that CAVR used a wide definition of gender-based violence in practice – also researching the gender-aspects of economic and social harm - its mandate does not specifically mention gender-based (sexual) violence.

The special attention to sexual violence in transitional justice mechanisms' mandates and statutes does not solely present itself in the jurisdiction of the structures but also comes forward in the protection of victims and witnesses. Though witness protection can also be of importance to cases which do not include sexual violence, some of these measures by transitional justice mandates may be interpreted as efforts to specifically address cases of sexual violence. These witness protection measures may vary from possibilities for in-camera proceedings⁹⁰ and (other) possibilities for anonymity, to women only hearings. In-camera proceedings and women only hearings are set up to allow people to speak more openly about their experiences. This seems especially relevant to experiences of sexual abuse, since women and men in patriarchal societies may feel socially threatened to reveal these sufferings. In-camera sessions may provide for more anonymity for male and female witnesses in this case and women only hearings may provide for a more comfortable environment for women to tell their stories. The fact that protection of victims and witnesses is stated in both the two ad hoc tribunals of the former Yugoslavia and Rwanda, and in the Rome Statute,⁹¹ exemplifies the attention the subject has been given by retributive transitional justice mechanisms. Groundbreaking, according to Bedont and Hall-Martinez (1999, 72), were, however, not the possibilities for anonymity in the statutes of the ICTY and ICTR, but rather the articles regarding evidence in prosecutions including sexual violence. These articles emphasised that neither 'consent' nor the "prior sexual conduct of the victim" (with minor exceptions) was allowed as a defence tactic (ibidem, 72). As the latter can mortify victims once more on the stand and in front of their communities - since these communities are influenced by

⁹⁰ In-camera proceedings are court sessions which are not open to the public and the press and, therefore, provide for a more anonymous and less exposed environment. The term means 'in chambers' in Latin and are used in non-conflict situations for cases which are in need of discretion; such as adoption cases, domestic abuse cases and cases that deal with "homeland security issues" (Lectric Law Library).

⁹¹ ICTR Statute (2007 21), ICTY Statute (2009 22), Rome Statute (2000, 68).

constructions of gender⁹² - including such an article in a transitional justice mechanisms' statute gives the impression that the mechanism is indeed gender-sensitive when it comes to the position of victims and witnesses. Truth and Reconciliation Commissions such as the Liberian TRC and the CAVR have included the same sort of efforts as the previously mentioned international tribunals – including in-camera hearings and women only hearings - to provide for witness protection in their mandate, showing special understanding for the position of women and children (TRC Liberia Mandate, 2005, VII, VII.26.n – o ; UNTAET 2001, 16.4 , 36.3). Notably, the CAVR states that these witness protection measures are relevant “in particular, but not limited to, [cases] where the crime involves sexual or gender violence”(UNTAET 2001, 36.3), hereby stressing the connection between these measures and (sexual) gender-based violence.

The section above has shown that sexual violence has become integrated (explicitly or implicitly) in several parts of the statutes of transitional justice mechanisms during the last one and a half decade. There are, however, a few problems with this strong focus on sexual violence when it comes to the effort of including a wider definition of gender-sensitivity in the statutes of transitional justice mechanisms.

First of all, the strong focus on sexual violence as a result of the efforts of many feminist and women's organisations, unconsciously steers towards the stereotype idea that only women are victims of these gender-based crimes. Women's organisations have mostly focussed on the female victims of these crimes⁹³ and the transitional justice mechanisms seem to have followed the same path. An example of this are the women only hearings that have been included by tribunals and TRCs. These efforts are aimed at helping women come forward in cases of (sexual) abuse. But what about the male victims of sexual gender based violence? Though in-camera hearings may also be relevant to them, no specific measures have been taken to target these men. As written before, gender-sensitivity should comprehend much more than a greater interest in the position of women as victims in war. True gender-sensitivity would mean paying attention to the constructions of femininity and masculinity and, because of this, paying attention to the unconscious link between sexual violence and women –while men too are victims of sexual violence. Transitional justice mechanisms that are aware of this unconscious link, may be inclined to specifically mention the possibility of sexual abuse against men in their definition on sexual violence. Another effort may be to include measures to educate male victims on the possibilities of anonymity for witnesses at trials and TRCs.

A second problem caused by the immense focus on sexual violence is that women are too often merely seen as victims of sexual violence in conflict, disregarding all other sufferings they may have experienced. As stressed by Anderlini et al (2004, 1), a full understanding of the sufferings women

⁹² Constructions of gender that do not allow women to have sexual contact (even if it is forced upon them) outside of a marriage or constructions of gender that have created a taboo on the victims of male-rape.

⁹³ Women's organisations cannot be blamed for this, since women are in most cases the ones to suffer from sexual abuse, but they have, therefore, contributed to a narrow definition of gender-based violence.

experience in violent conflict is compromised by too much emphasis on “sex-based crimes”.⁹⁴ Hereby, sexual violence covers up all other sufferings women have experienced during war, and reduces them to “sexual beings alone” (Nesiah 2006b, 10). Economic and social sufferings of women are not addressed, while these may cause just as much difficulties for women in conflict as sexual violence. Moreover, policy-makers often come to consider it to be sufficient to pay attention to sexual violence (against women) when regarding the issue of gender. O’Rourke (2000, 284) suggests the following trend of reasoning for policymakers of transitional justice mechanism; “recognition by transitional justice mechanisms of rape in wartime has marked the end of the conversation about gender and conflict: ‘We recognise crimes of sexual violence. We therefore have a gender-friendly truth commission/local/domestic/international/hybrid (delete as appropriate) transitional justice mechanism’”. As a consequence other, equally important issues of gender in conflict and post-conflict situations, like the changing gender roles and economic and social position of men and women, are not attended to. These economic and social consequences should also be investigated and reported on by transitional justice mechanisms since they are part of the human rights violations and may have played a large role in the warfare tactics during the conflict. This section has shown that the mandates of transitional justice mechanisms have not included any rules on the importance of investigating socio-economic gender violence. However, that addressing this issue is neither an impossible nor an unimportant objective for transitional justice mechanisms in practice will be shown with the example of the CAVR in Timor Leste later on in this thesis.

Statutes and mandates are merely the theoretical guidelines for transitional justice mechanisms. Whether these guidelines are sufficiently lived up to, only practice can tell. A statute which does not addresses gender-differences might in practice become gender-sensitive, and the other way around. Nesiah (2006b, 2) uses the example of Truth and Reconciliation Commissions. The author notes that, while in Haiti, Sierra Leone and Timor-Leste the mandates were specifically gender-sensitive and, consequently, gender violence was used as a specific topic for investigation, the TRCs of “Guatemala, South Africa and Peru also paid particular attention to gender, even though their mandates were formally gender-neutral” (ibidem, 2). Therefore, the following sections of this chapter will look into the transitional justice mechanisms in practice, researching the gender-sensitivity in their daily routine.

⁹⁴ See also Nesiah 2006b, 9: The fact that mandates mostly define human rights violations as “bodily injuries” makes the term one-dimensional and fails to capture the complexity of gender-based crimes.

5.3 Gender-Sensitivity in Practice

5.3.1 Gender-Sensitivity and Internal Structures of Transitional Justice Mechanisms

Though this thesis has explained that the inclusion of women in transitional justice mechanisms is quite a narrow understanding of a gender-sensitive characteristic, it has also argued it may be a first necessary step towards gender-sensitivity in transitional justice mechanisms' structures. The issue of gender is on several occasions included in statutes by emphasising the importance of a fair representation of female and male staff. This section will research how structures of transitional justice mechanisms have addressed this characteristic and if this stands in line with their possible mandates and statutes or not. What must be kept in mind while reading the following section, however, is that, contrary to some other research, this thesis regards gender-sensitivity of the structure of the transitional justice mechanism to be a separate issue from gender-awareness of the mechanisms' practices. In other words, a - close to - equal number of women and men in the mechanism should not be linked to a better awareness of gender in the daily proceedings of these mechanisms. Furthermore, more male staff, especially in the high positions, should not be linked to less sensitivity towards gender-differences in practice. This issue will be dealt in more detail in section 5.3.2.

One of the institutions that execute research on gender and justice, with a sole focus on the International Criminal Court (ICC), is the 'Women's Initiatives for Gender Justice' (WIGJ). In its yearly 'Gender Report Card' WIGJ reports its observations on the percentage of male and female staff working at the ICC in The Hague, hereby specifying the percentages of men and women in different sections of the court. On a first look, the Gender Report Card of 2008 gives the overall picture that the division in labour between men and women in the ICC is relatively equal or close to equal. The headings "overall staff" and "overall professional posts" show almost an equal division between men and women; namely that of 52% male against 48% female (WIGJ 2008, 10). A more close look, however, shows the female staff to be mostly settled in less powerful positions than the male staff. The divide between men and women in the relatively more important "Legal Council" and as "Professional Investigators" is, for example; 80% male against 20% female and 92% male against 8 % female (ibidem 14-15). Finally, what can be observed from Gender Report Card of 2008 on the ICC is that seven out of the seventeen judges of the ICC are female (ibidem 10). Though this is not an equal divide between male and female judges, the percentage of 41% female judges can be regarded a 'fair representation' and a large improvement in relation to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). According to UNIFEM up to 2004 "of the fourteen permanent judges of the [ICTY and ICTR] no more than three at one time have been women" (UNIFEM in Anderlini et al. 2004, 4). Currently, the ICTY only has one permanent female judge (against 15 male judges), namely Judge Andresia Vaz (ICTY 2009), and

the ICTR has three, of which one is also judge Vaz (ICTR 2009). These numbers stand in line with the mandates of these two international tribunals which, as mentioned before, include no guidelines for a gender balance with regard to the judges of the courts. Moreover, the fact that Judge Andresia Vaz works both for the ICTY and the ICTR shows that these international transitional justice mechanisms have less regard for local female involvement. Their interpretation of UNSCR 1325 is to involve women in general into transitional justice mechanisms, not specifically women that have experienced the conflict at first hand.

When it comes to traditional transitional justice mechanisms women are less involved in the structures compared to the international and more modern mechanisms. Anderlini et al (2004, 8) notes that, though “it is difficult to generalise over traditional justice because it varies by region, country and even community, [...] women [overall do] tend to be absent as decision-makers, judges, or prosecutors”. Furthermore, as Quinn (working paper, 14) exemplifies, retributive traditional transitional justice mechanisms often involve the perpetrators and victims to present themselves in front of “a panel of wise or powerful men”. That these almost never include women is a consequence of the patriarchal culture that is overwhelmingly present in many rural societies. On the other hand, one example shows that traditional transitional justice mechanisms may also be pushed to change on gaining more female involvement in their structure. In Rwanda, the traditional Gacaca courts did not allow any female judges in the past. When these courts were re-established, however, to deal with the crimes of genocide that occurred in 1994, the traditional format of not allowing any female judges was changed and women judges became 35% of the number of judges in the courts (Anderlini et al. 2004, 8).⁹⁵ This stood equal to the position of women in Rwanda at that time. Since the Rwandan genocide, women had taken over the responsibility “for the livelihood and stability of their communit[ies, as they became] the heads of tens of thousands of households and the producers of up to 70% of the country’s agricultural output” (Tiemessen 2004, 64). Regarding the community basis of the Gacaca system it was a logical choice to admit local women into the internal structure of the system. This shows a contrast between the Gacaca system and the aforementioned international tribunals. While the international tribunals mostly focus on including educated and established women in their structures, the Gacaca system educated local women so they could play a part in the transitional justice mechanism.

As for the Truth and Reconciliation Commissions (TRCs), their male/female percentages in the structure of the transitional justice mechanism lie somewhat in between the ICC and the International Criminal Tribunals. The South African TRC had a division of five women judges against ten male judges, of which the women were all assigned to the ‘Rehabilitation Committee’, a committee with

⁹⁵ This re-establishment and reformation of the traditional gacaca courts was done nationally. This way the gacaca courts have become “highly regulated, national and involuntary” (Corey and Joireman 2004, 82) and have come to differ much from the traditional gacaca courts (ibidem, 82). Though it is used as an example of a traditional transitional justice mechanism in this thesis, one must keep in mind the public changes the government of Rwanda has made to it.

merely an advisory role (Anderlini et al. 2004, 9), the Commission in Haiti had two female judges against five male colleagues (USIP 2009), and the Peruvian TRC consisted of a total of twelve commissioners of which two were women (Peru Support Group 2004, 10). The TRCs that are the closest to the division of male and female judges in the ICC are the Truth and Reconciliation Commission of Sierra Leone with a total of seven judges of which three were female (USIP, 2009), and the Liberian TRC which was obligated to have at least four out of nine female commissioners according to its mandate (TRC Mandate Liberia 2005, V). What must be noted is that “of the 25 TRCs established worldwide two have been chaired by women: The UN Commission of Inquiry for East Timor and the Sri Lankan Commission on the Western and Southern Provinces” (Anderlini et al. 2004, 9).

When it comes to DDR processes it is difficult to find exact numbers of men and women involved in the design and implementation of these processes. Drawing from the recommendation of UNSCR 1325 to increase the role of women in decision-making positions of conflict and post-conflict programmes, which is also relevant to DDR programmes, it may be argued that the division of men and women in DDR programmes has room for improvement. According to El Amani (2003, 30), women are still “excluded” from high level and decision-making positions but, on the other hand, do tend to be substantially represented in other positions of the DDR structure. Furthermore, women mostly play a part through local women’s organisations and associations that try to stimulate women and men to take part in DDR programmes and sometimes assist the DDR programmes in their area (Escola de Cultura de Pau 2007, 23).

Overall the text above has shown that women are more and more included within the internal structures of modern transitional justice mechanisms. Relatively newer commissions and courts – take the ICC, CAVR and the Sierra Leonean TRC - seem to keep to their mandates which include more guidelines regarding the gender balance in the structure of the transitional justice mechanism. In case of the traditional transitional justice mechanisms, it is difficult to find information about the percentages of men and women involved. It is, however, argued that women are mostly absent from these mechanisms as a consequence of patriarchal values. This section has also pointed out there can be found a difference between mechanisms in involving local women and involving internationally highly-accomplished women in their structures. Mostly international mechanisms tend to disregard local women in the effort to include more female staff. This may for a part be caused by the fact that UNSCR 1325 does not specify on *which* women should be included in peacebuilding mechanisms. The resolution does not state whether these mechanisms should regard the difference between women that have experienced the conflict at first hand, and women that have not experienced the conflict themselves, but have been internationally active in peacebuilding for many years. As a consequence, international transitional justice mechanisms that try to gender-sensitise their internal structures also do not pay special attention to the background of these women.

5.3.2 From Structure to Procedures

The presence of female staff, and especially judicial staff, is not only associated with gender-sensitivity within the structure of the transitional justice mechanism, but also with the overall attention given to gender within these transitional justices mechanisms. An equal or at least representative number of women in a transitional justice mechanism' structure is considered by authors such as Anderlini et al. (2004) and Bedont and Hall-Martinez (1999) to be also a sign for gender-sensitivity within the mechanism's procedures and investigations. One of the arguments for this is that women pay more attention to gender-based crimes. As stated by Anderlini et al (2004, 9) it were the female judges in the ICTY which for the first time in an international process brought attention to gender issues during the draft of rules of procedure. These women judges brought more attention to the sensitivity of these issues by providing, amongst others, better witness protection and rules for evidence.⁹⁶ The author, furthermore, states that "as judges, women are in a position to affect change for women and contribute to a new perspective to cases in general. For example, in every ICTY case resulting in significant redress of sex-crimes (perpetrated against women *and* men), women judges were on the bench" (ibidem 9, emphasis added). The latter example shows that women may not only give more attention to the position of women in conflict situations but also to the position of men as victim of gender-based crimes. Bedont and Hall-Martinez (1999, 10) are even willing to go so far as stating that the shift to incorporating sexual violence in transitional justice prosecutions is the direct result of women participating at all levels in the ICTY and ICTR. Hence, they argue that it have only been women – and not men- that have fought for the rights of female (and in a minority, male) victims of sexual violence. Women should, consequently, be incorporated in transitional justice mechanisms with the foremost aim of protecting the rights of women and addressing gender-issues.

This is the point where this thesis does not agree with the above-mentioned authors.⁹⁷ Incorporating women into the structures of transitional justice mechanisms should not be considered equal to gender-sensitivity of the procedures in this mechanisms. It is, and should not be, the case that women only interest themselves in the rights and experiences of women and gender as an overall subject, and that men do not regard gender and sexual violence as an important notion to address. Hereby, the

⁹⁶ Bell and O'Rourke (2007, 27): "[T]he ICTY made significant changes to the rules of evidence, significantly limiting the extent to which consent could be presented as a defence to sexual assault, prohibiting evidence of a victim's past sexual conduct and removing the requirement of corroboration of a victim's testimony of sexual assault".

⁹⁷ Though not mentioned above, this must include also the author Dal Secco (2008) who solely includes examples of women that fight for women's rights and follows the same stereotypes as the authors mentioned in the former paragraph of this thesis.

stereotypes of femininity and masculinity⁹⁸ are again adhered to, and a prejudice on what gender incorporates is reiterated. Even though this thesis acknowledges that female staff in transitional justice mechanisms may make female victims feel less alienated and more welcome (Nesiah 2006b, 10) it emphasises that female staff do not equate to gender sensitivity. This thesis, therefore, agrees with Nesiah (2006b, 10-11), who stresses that:

“gender balance is not quotas [, ...] gender balance alone is an insufficient indicator of whether a commission will adequately address the human rights abuses women have suffered. [...] One cannot assume a homology between the gender of commissioners or staff members and their ability to empathise with women victims, or their sensitivity to a gendered analysis of political violence”.⁹⁹

Hence, for a solid analysis on gender-sensitivity within the procedures of transitional justice mechanisms, one must look beyond the quantitative analysis of the number of men and women involved in the structures¹⁰⁰ to the qualitative analysis of whether, or how these mechanisms incorporate staff which is known to gender studies and gender issues. Moreover, one may better look at the possible efforts to extend the knowledge of the staff in the field of gender. This latter may be in the form of gender-awareness training.

Gender-awareness training is targeted to make staff of transitional justice mechanisms aware of the influence gender has on the daily lives of people (including, how they should be approached during investigations and testimonies) and in what ways gender could possibly have had an influence on the experiences of men and women in the past conflict. According to Nesiah (2006b, 12) gender-awareness trainings should include a minimum of five thematic areas:

“(1) the history of gendered patterns of human rights abuse; (2) approaches to statement taking and data collection; (3) investigations sensitive to the particular complexities of gender abuse; (4) public hearings with women witnesses and hearings with men or women reporting on gendered or human rights abuses, including thematic hearings on the subject; and (5) final report writing” (Nesiah 2006b, 12).

⁹⁸ Stereotypes of women to be sensitive and emotional creatures, while men interest themselves in facts and unemotional subjects.

⁹⁹ Nesiah (2006b) is not the only author who challenges the assumption that a greater presence of women in all types of mechanisms and functions will automatically lead to a better gender awareness, a less masculine culture, or a better interest for women. See also Pankhurst (2003, 168), Tabak (working paper, 13), Rooney (2007, 176).

¹⁰⁰ Which does provide information on the gender-sensitivity of the structures themselves.

These five topics relate to the gender-sensitive characteristics pointed out in section 5.1 of this thesis. Firstly, training on the background of gendered patterns of human rights violations will provide the staff of transitional justice mechanisms with more insight into the causes and motives of gender-based violence. A better understanding of how gender-based violence develops and manifests itself in contemporary conflict could result in more attention in research and documentation to this type of violence by transitional justice mechanisms. Consequently, the mechanism will be more gender-sensitive. Topics 2, 3 and 4 all indirectly acknowledge that social gender constructions influence women's and men's lives. Women and men may have to be approached in different ways during data collection because of the – often patriarchal - gender relations in (rural) societies. An example may be that women only want to be interviewed by women, or that access to female witnesses is denied by male family members. Moreover, gender-based abuse should be understood in the context of this society; certain gender constructions may stimulate patterns of abuse. Finally, these three topics react to the difficulties male and female victims of gender-violence may experience when stepping forward as witnesses, as a consequence of gendered constructions. Overall, these training sessions emphasise the idea that 'understanding social gender constructions' is one gender-characteristic of transitional justice mechanisms. The topic of 'final report writing' also deals with the gender-sensitive characteristic of 'recognising gender as an important issue for transitional justice'. Staff of transitional justice mechanisms should be trained in ways to document on gender-based violence either as a separate chapter within the final report, or as a continuous theme within the report. If gender is addressed in the investigation and other processes of the transitional justice mechanism, but not in the documentation the gender-sensitivity of the mechanism will fade away. Documents provide an overview of the results of transitional justice mechanisms and may be read by generations of people. Therefore, gender-sensitivity in the documentation phase is essential. To conclude these training topics play a large part in the inclusion of gender-sensitivity in transitional justice mechanisms. They emphasise that gender is an important issue to deal with in all phases of transitional justice; the investigation phase, the taking of testimonies at tribunals and commissions, and the documentation phase.

Gender-awareness training can also be regarded a rather new part of transitional justice mechanisms, as the entire subject of gender is still relatively new to transitional justice. Gender awareness-training is often introduced top-down into transitional justice mechanisms and is, therefore, not an issue for more traditional transitional justice mechanisms. Even not in the Gacaca system, that was modernised in many ways to deal with the Rwandan Genocide, did the judges receive some sort of gender-awareness training.¹⁰¹ Mechanisms that do include training on gender issues as a tool to better inform

¹⁰¹ Corey and Joireman (2004, 83) specify the minimal training for judges of the nationalised Gacaca system, this includes brief legal training but not any form of gender training: "The judges are endowed with significant

their staff are some DDR programmes and TRCs, and the ICC. In the Democratic Republic of the Congo, the DDR programme's effort to 'gender-mainstream' itself included training for all its personnel, whether male or female, to "foster understanding of the issues in the same way that gender experts do" (Schroeder 2005, 12). Moreover, this specific DDR programme also included other trainings sessions on, for example, sexual exploitation with help of UNITAR, the UN Institute for Training and Research (ibidem, 12). While UNITAR is specified in developing training programmes, it is not only this organ within the UN that may provide gender-awareness training. In the case of the Sierra Leonean TRC gender-awareness training was provided by UNIFEM, together with a non-governmental organisation called the Urgent Action Fund for Women's Human Rights (Nesiah 2006, 12), and in Ghana training was provided by the "executive secretary" of the TRC (ibidem, 12).

In the opinion of Nesiah (2006b, 12) it is important to continue the gender-awareness trainings even after the first set-up of a transitional justice mechanism. This will keep the subject of gender fresh into the minds of the staff and will prevent the gender subject to fade away into the background (ibidem, 12). As an example of a TRC that has given special attention to the subject of gender in its statute and in practice, in Timor Leste that "initial orientation [of the gender field through gender-awareness training] was complemented by periodic training sessions that included participatory discussion forums" (ibidem, 12). Also the ICC seems to be aware of the importance of periodical gender-awareness training. The yearly report of Women's Initiatives for Gender Justice notes in 2008, that staff from the Victims and Witness Unit, and from the Office of the Prosecutor have attended several courses, lectures and seminars on subjects related to gender (WIGJ 2008, 23). Though, the report of WIGJ does not note any gender-awareness training of the judges of the ICC, the former does imply an effort from the ICC to keep their staff gender-aware.

To conclude; gender-awareness training is an important tool to create gender-sensitivity in transitional justice mechanisms. According to this section, there have been efforts in several transitional justice mechanisms to include gender-awareness training for their staff. Whether these efforts have been enough to address gender in the context of women and men as victims and perpetrators of conflict will become clear in the following sections of this thesis.

5.3.3 Gender and Victims in Transitional Justice

The chapter on gender and conflict pointed to the different experiences of men and women in violent conflict situations. Moreover, it showed the differences in sufferings of men and women in conflict to

responsibilities in order to arbitrate cases of collective violence. Many are illiterate peasants and lack legal experience, but all have submitted themselves to local elections and brief legal training to prepare them for the work ahead".

be often socially and culturally motivated. The fact that women and children are in most cases the ones to suffer most of sexual abuse, is a consequence of the social definition of females to be the bearers of culture and the property of men from a certain ethnicity. Moreover, as men often feel the duty to go to combat in order to defend their families and ideals - as part of the wide masculine gender expectations - it are those who assumably suffer the most as direct victims of guerrilla or government violence. This, however, does not mean that there are no cases of sexual abuse against males during violent conflict and that there are no instances of women's suffering other than from sexual violence. In order for any transitional justice mechanism to be gender-sensitive, it should be aware of the true *and* assumed differences of women's and men's experiences as victims in conflict. Because of this, the following section will look at the way in which these mechanisms of transitional justice address notions of gender while focussing on the victims of violent conflict.

Because gender-based violence plays an important part in conflict, the first section of this chapter has already defined 'paying attention to gender-based violence' as one of the thermometers of gender-sensitivity in transitional justice mechanisms. It added that gender-based violence includes sexual violence but should not be limited to this topic.

According to Anderlini et al (2004, 4) gender-based crimes, in the broad sense of the word, are in practice not as present as they should be in international and national tribunals and courts. This while, sexual violence has received more structural attention by these transitional justice mechanisms. The attention for these kinds of crimes has certainly grown throughout the years. The genocide in Rwanda, for example, has been a wake-up call for transitional justice mechanisms dealing with sexual violence. The wide scale gender-based sexual violence that had taken place in this country, through the rape of females of all ages, was detected nine months after the genocide when a baby-boom occurred of women that had been raped during the course of the genocide (Bell and O'Rourke 2007, 27). Since this event, transitional justice mechanisms including the ICC have made efforts to improve the investigation on sexual gender-based crimes during conflicts by, for example, involving experts in gender and gender violence in the investigation and prosecution teams (ibidem, 27). Furthermore, sexual violence has come to play a bigger part in judgements of international tribunals. By 2004, for example, "10% of the judgements of the ICTR contained rape convictions"(Nowrojee 2008, 109).

The paragraph above shortly indicates that retributive transitional justice mechanisms mostly address sexual violence when considering gender. According to Dal Secco (2008, 67) this also counts for TRCs, who have often placed a primary focus on sexual violence while investigating and reporting on gender-based crimes. One example Dal Secco refers to is the Sierra Leonean TRC. This TRC also placed much emphasis on investigating sexual gender-based crimes and, furthermore, implicitly argued that women were the ones to benefit from more attention to these crimes (ibidem, 80). Another example is the South African TRC. As will be shown in the section on reparation and documentation, this TRC also mostly focussed on sexual gender-based violence, overlooking other, equally important,

gender-based crimes. More examples of the increased focus on sexual gender-based violence by retributive and restorative transitional justice mechanisms will follow later in this chapter.

One exception in the focus of many transitional justice mechanisms on sexual violence has been the CAVR in Timor-Leste. Unlike the other mechanisms, the CAVR also included other forms of gender-based violence as a subject for research and documentation. Moreover, the CAVR has explicitly researched the motives and background of the gender-based violence. The National Public Hearing report on women and the conflict (CAVR 2003, 52) stresses that the “unequal power relations between men and women that existed in Timor-Leste¹⁰² before [and during] the conflict” contributed to the vulnerability of women to become victims of gendered violence. Women were seen as the property of men, which stimulated the strategy that (sexual) violence against women during the conflict was aimed to weaken the male resistance.¹⁰³ Moreover, the report shows that these constructed gender relationships in Timor-Leste’s society also caused women to be extremely vulnerable in socio-economic ways. Houses of women whose husbands had been arrested, fled or disappeared were often burned and their possessions stolen (ibidem, 39). Their social position as ‘single’ wives, moreover, led them to easily become victims of unwanted marriages, many times under pressure of their families and communities (ibidem, 25-26).¹⁰⁴ Another form of gender-based violence that was brought to light by the CAVR was the discriminatory basis of the Indonesian Family Planning Programme (KB) (ibidem, 47-49). This programme forced women and younger girls to take contraceptive pills and shots and only provided medicine against the side-effects of these shots and pills to Indonesians and not to Timorese. Notably, in its final report the CAVR tried to include both the experiences of women that had been brought to light in the national hearing on women and the conflict, and the violence against the Timorese men. ‘Chega!’¹⁰⁵ notes that men have suffered most from arbitrary detention, torture and ill-treatment during the conflict since they “were at the forefront of the conflict, fighting in the internal armed conflict and taking part in the armed Resistance and the clandestine networks during the occupation (CAVR 2005, 88). This exemplifies that though women’s issues were given much attention by the CAVR, the commission did stay aware that gender includes both the situation of men and women.

Chapter four showed that sexual violence against women - and men - is a large taboo in many, if not, most societies. This influences the ability of these women and men to come forward as victims of sexual violence. In quest for justice and gender-awareness of transitional justice mechanisms all violations which occurred during the conflict should be included in the investigation, including that of

¹⁰² This thesis uses the name Timor-Leste instead of East-Timor while referring to both the past and present situations out of respect for the people of Timor-Leste.

¹⁰³ Note that women were also involved in this resistance but to a lesser amount (WILPF 2003).

¹⁰⁴ Financial and social motives played a large role in this (CAVR 2005b, 25-26).

¹⁰⁵ The name of the final report of the CAVR, meaning “no more, stop, enough! (CAVR 2005, 6).

sexual violence. In order to reach this goal, witness statements of men and women are needed, and efforts to help these victims come forward are important.

International Criminal Tribunals, whether ad hoc or the ICC, are set up according to the rules and procedures of international law. In the case of hybrid tribunals this is a combination of international and national law, and for national courts these are unmistakably the national laws of a country. Whether international or national, these laws provide rights for the victims that testify at the courts but also for the accused. The accused receives the right and opportunity to defend him or herself. Part of this defence is the cross-examination of victim witnesses which have told their story at the court/tribunal. Sometimes victim-witnesses are subjected to hours and hours of cross-examination by the lawyers of the accused.¹⁰⁶ Though the previous chapter has showed that the rules of cross-examination have been adjusted in order to protect victims of gender-based violence against disrespectful defence tactics, practice shows these rules to be either insufficient or not lived up to well enough. During one of the cases at the ICTR, witness TA (victim of sexual violence during the Rwandan genocide) was subject to a cross-examination that lasted for a week and was filled with questions such as; “Did you touch the accused’s penis?” and “Were you injured in the process of being raped by nine men?”; and the implication that she could not have been raped since she had not washed herself that day, and would have smelled (Nowrojee 2008, 130). Furthermore, somewhere during the cross-examination of witness TA the judges of the ICTR burst out in laughter. An apology for such inappropriate behaviour has never been offered to the victim (ibidem, 130). This example underlines the statement by Llewelyn and Howse (1999, 364) that international (ad hoc) tribunals do not provide for an environment where victims can heartily express their feelings and emotions and be listened to with “respect and sympathy”; the victims are encouraged to stick with the facts and leave their emotions by the door (ibidem, 364).

As women *and* men are influenced by cultural restrictions, getting them to testify on gendered/sexual violence has shown itself to be a problem. Transitional justice mechanisms have addressed this issue in several ways; mostly focussing on women and constructions of femininity. Besides the efforts of transitional justice mechanism such as (inter)national courts and TRCs to hold in-camera hearings and protect the anonymity of the victims, which is both relevant to male and female victims, transitional justice mechanisms have also introduced thematic ‘women only’ hearings. These women only hearings have been set up since the public nature of trials and truth commissions offer limited protection to female witnesses and the rules and procedures to protect them have not always been used

¹⁰⁶ Nowrojee (2008, 130) gives the example of a prosecution lawyer who counted how many questions a rape victim was asked by the defence lawyers during her cross-examination; 1,194 questions.

to the fullest capacity (Anderlini et al 2004, 4).¹⁰⁷ As the word itself already describes, ‘women only hearings’ provide female victims with a safe and private women-friendly environment without the presence of men who may (unconsciously) bring shame to the victims of sexual violence.¹⁰⁸ Women’s hearings are part of a larger strategy of using thematic hearings to contribute to a better understanding of gender issues in TRCs (Nesiah 2006b, 26-27). They do not only pay attention to the individual stories but also regard the larger structural pattern of the violations during the conflict; are these merely individual cases of violence or should they be placed in the context of structural gendered violence (ibidem, 26)? By placing together (all) individual occurrences of violence – in this case violence inflicted upon women¹⁰⁹ – TRCs are able to find out the exact role that gendered violence has played in the conflict, as a side effect or a separate strategy of war. While both cases exemplify why gender violence remains an important issue, especially the latter case reemphasises the importance for transitional justice to address the issue of gender in a social constructive way. This because, as noted in chapter four, structural gender based violence relies heavily on the perceptions of femininity and masculinity.

Efforts to specifically address the problems male victims of sexual gender-based may have when coming forward as witnesses are difficult to find. Other than in-camera hearings and possibilities for anonymity, which are also relevant to female victims, no steps have been taken to explicitly address male victims of sexual violence.

One last tactic for gender-sensitiveness in dealing with victim witnesses, used in South Africa and by the CAVR - which stressed the need for a “gender-sensitive truth telling and evidence-giving process”(Dal Secco 2008, 72) - is the provision of preparatory workshops for witnesses from rural, but also other areas (Anderlini et al 2004, 5-6). There is, however, not much information on how this tactic has been practiced.

The use of all these strategies to help victims to come forward more easily and find out the full picture of gender-based violence, has been a mixed success. At the ICTY, where Bosnian women had been reluctant to step forward out of shame and fear for retaliation, the number of female witnesses increased after measures for a better protection of these women were taken (Anderlini et al. 2004, 10). They became to represent 21 percent of the total witnesses of the ICTY and often gave critical testimonies (ibidem, 10).¹¹⁰ At the South African TRC, this percentage was significantly higher, namely 52.9 percent (ibidem, 9) and the Peruvian CVR provided for 54 percent female witnesses (Dal

¹⁰⁷ Anderlini et al (2004, 4) uses the example of the ICTR that did provide for witness protection in its mandate, but where it was not brought into practice, especially in the beginning trials.

¹⁰⁸ The South African TRC had women-only hearings, instead of public hearings, chaired by female commissioners (Nesiah 2006b, 10).

¹⁰⁹ In the first place physically and mentally harming women. Though men may be the indirect targets and victims of these crimes.

¹¹⁰ Anderlini et al. (2004, 10): “In the words of an ICTY investigator, ‘Women often heard and saw things that men did not, including mass murder and rape’”.

Secco 2008, 72). Noteworthy here, however, is that these percentages do not automatically give an idea of the overall attention in testimonies to the subject of gendered violence against women. As noted by Nesiah (2006b, 17), experiences of the TRCs in Timor Lese, Guatemala, South Africa and Peru show that when women are inclined to take the stand they often will only disclose the sufferings of their loved ones and not their own.¹¹¹ Hence, overall it is argued that women still under-report gender-based sexual violence (Goldblatt and Meintjes 1998 in Pankhurst 2003) and that “many commissions have received far less testimony about sexual abuse than in the numbers or proportion that they suspected took place”(Mutua 2008, 5). Though it is hard to remove all fears and dangers of women to testify on gender violence, transitional justice mechanisms could still improve on this point. This is exemplified by Nowrojee (2008, 128-131), for example, who shows two major problems of the ICTR in dealing with female victims of sexual violence:¹¹² Firstly, the identities of supposed anonymous witnesses have been leaked out on many occasions, and secondly, the ICTR has been reluctant to protect the witnesses after the trial is over (ibidem, 128-131).

Women have, as may be concluded from this section, gained the most attention when it comes to gender-sensitivity in dealing with victims by transitional justice mechanisms. It is believed that female victims of sexual violence are the ones to face the biggest problems in testifying. While this thesis does not wish to contest the arguments that women are most likely to suffer from sexual abuse and that it is regarded shameful in much rural societies for a woman to have been raped, it finds that the situation of men that have been a victim of sexual violence is much underreported and underrepresented in the measures taken by transitional justice mechanisms to take gender relations into account for witness protection. According to Nesiah (2006b, 38) men hide experiences of sexual violence even more than women because in many societies there remains a social taboo on the subject of male-rape and other related violations. This taboo may be linked to the construction of masculinity in these societies where male-rape is automatically linked to homosexuality, and homosexuality is linked to immasculinity . Paying attention to this issue of constructed shame should because of this, be part of gender-awareness. The gender-sensitive measures taken by transitional justice mechanisms, however, show no special attention towards this subject. While transitional justice mechanisms pay attention to the social position of female witnesses, measures to meet the needs of male victims of sexual violence can hardly be found. Another issue regarding male witnesses, especially with regard to Truth and Reconciliation Commissions, is the general understanding that it is difficult for men to show their emotions. According to Anderlini et al. (2004, 9) in the South African TRC “it was accepted that

¹¹¹ Anderlini et al. (2004, 5) notes on this subject that; “while some researchers argue that women are exploited by this, as their own stories are overshadowed, new research on the SATRC indicated that in many cases women intentionally came to the TRC to tell the stories of their loved ones as a strategy to generate empathy and compassion with members of both sides of the conflict”.

¹¹² Nowrojee (2008, 128-132) explicitly notes ‘female witnesses’ in this case. The same problems with anonymity and witness protection, however, may count for male witnesses.

mothers could speak and cry on behalf of their children, whereas men were not as comfortable showing their emotions publicly”. If this was indeed the case, it would be in the interest of gender-sensitivity to provide these men with training, courses or other measures which allowed them to come forward more easily.

5.3.4 Victim and Reparations

Victims of a conflict are not only confronted with gender implications of possible testimonies they must give in front of TRCs or tribunals but also with gender implications for reparations that usually follow after trials and final reports of TRCs. What is especially relevant to the subject of gender-sensitivity when it comes to reparations is the way “sufferings” which give people the right to reparations are defined by (transitional justice) institutions that advise on what reparation programmes should look like. It is the definition of these “sufferings” that defines who are the victims of a conflict and who are, therefore, eligible for reparations. What comes to mind when linking the issue of gender and conflict to a possible definition of suffering, is that such a definition should include both the experiences of men and women in the conflict and be aware of the differences between the experiences of the two, if it wants to be gender-sensitive.

In the case of the South African TRC a reparations programme was recommended with a definition of suffering that did include the right for “relatives and dependants of victims” to receive financial reparations (ICTJ Website 2009). According to the International Center for Transitional Justice this was a gender-sensitive approach in the way that it also included women that suffered indirectly by the deaths of their husbands and sons¹¹³ besides the mostly male victims of the “gross human rights violations”(ibidem). For women that were victims of gender based violence in the form of sexual abuse, the definition of sufferings that were entitled to reparations “included assault to genitals and breasts, rape, beating leading to miscarriage, and sexual abuse” (ibidem), a possible inclination of sensitivity towards the experiences of women in conflict.¹¹⁴ However, that the latter is in fact a pitfall of transitional justice mechanisms to make an effort of gender-sensitivity is argued by Marin (2006, 4), who states that there are many authors who agree that women’s suffering is too often labelled with the term “sexual abuse” with the consequence that other forms of suffering are forgotten. A clear example in the case of the South African TRC used by the ICTJ (ICTJ website 2009) was that victims of crimes that had especially affected women during the Apartheid, such as inferior education and no

¹¹³ The ICTJ (ICTJ website 2009) does note that this, however, did not do justice to the sufferings of women whose men and sons were ‘merely’ tortured or imprisoned. According to the Center, these women also had faced many difficulties during the Apartheid and were in need of reparations too (ibidem).

¹¹⁴ Note that a wide definition of sexual abuse may also include the sufferings of men and boys in conflict, as described by the ICTJ in its section on Timor-Leste (ICTJ website 2009).

freedom of movement, were not entitled to reparations according to the reparation programme. This again shows that in many cases, gender-sensitivity is solely linked to the recognition of sexual violence against women by programme developers, while gender-based violence should also include socio-economic sufferings of men and women. As shown before, the CAVR in Timor-Leste did include measures to address gender-based violence in the wider definition of the term, but overall the CAVR seems to be an exception amongst the transitional justice mechanisms.

Not only the definition of suffering is a relevant characteristic of reparation programmes by which one may measure the gender-sensitivity. A different way to look at the gender sensitivity of reparation programmes is to regard the procedures of the programme. Do these procedures take into account the different social position and perceptions of these social positions of men and women? According to Marin (2006, 5), the experiences of South Africa and Timor-Leste have shown that linking the right to reparation to “the participation of men and women in truth telling mechanisms” deprives many women from the right to reparations; either because these women are hesitant to come forward because of the cultural taboo on being a victim of sexual abuse¹¹⁵ or because they are not aware of these regulations and think one male testimony from the head of the household is enough (ibidem, 5-6; ICTJ Website 2009). This is a clear example of how perceptions and cultural notions of gender-relations influence the accessibility of transitional justice mechanisms and what issues such a mechanism should address to become more gender-sensitive. Two efforts by the CAVR in Timor-Leste to address these problems that were caused by gender, were the “two year period in which other victims [– especially women –] were allowed to be identified that had not taken part in the truth telling mechanism”(ICTJ website 2009) and the quota that was set on 50 percent for the reparations to be received by women (Marin 2006, 6).

Another procedural issue that may have its effect on the gender-sensitivity of reparation programmes is the way in which financial reparations are provided to the victims. In South Africa, the female victims that were entitled to financial reparations were often not in the possession of a bank account and were given the opportunity to open an own bank account with assistance of the reparation programme or to have the money transferred to the bank account of a relative (ICTJ website 2009). Given the social position of women in the rural areas of South Africa, in many cases, the latter option, created a situation in which women no longer had true ownership of their reparation money and was therefore, not quite a gender-sensitive approach, while the former assistance to opening a bank account did show awareness of the reparation programme to gender relations (ICTJ website 2009). This issue of money and the gender balance in rural households when it comes to the control over money

¹¹⁵ Again this counts also for the men that are victims of sexual abuse. However, since in most cases it is a majority of women that suffer from that type of abuse, it is used by many authors such as Marin (2006) with reference to women.

resources will also come forward in the following section on DDR programmes which also provide for financial help to families of ex-combatants and the ex-combatants themselves.

5.3.5 Gender and Perpetrators in Transitional Justice

It is not the purpose of this section to find out whether male or female perpetrators of violence are punished a hundred percent equally when it comes to the violations they have committed during a conflict. Equal punishment of male and female perpetrators may indeed be influenced by gender constructions, with regard to the stereotypes of male perpetrators and female victims.¹¹⁶ However, examples such as that of Pauline Nyiramasuhuko in Rwanda¹¹⁷ and the fact that of the more approximately 10,000 people accused in Rwanda, at least 3,000 women have been accused or tried as perpetrators of genocide (Anderlini et al. 2004, 10), show that transitional justice mechanisms do tend to punish female perpetrators of violence. It is, however, beyond the scope of this thesis to research the exact numbers of male and female perpetrators that have been punished in comparison to the numbers of men and women that have acted as perpetrators in conflict. Therefore, it would like to focus on how these perpetrators of violence – which are not only soldiers but many civilians like in civil wars such as in the African continent – are assisted to demobilise and reintegrate through the so-called Disarmament, Demobilisation and Reintegration (DDR) programmes. In this case, emphasis is placed on restorative justice instead of retributive justice.

The ones who are influenced most by Disarmament, Demobilisation and Reintegration programmes are former combatants – or better said; former members or regular and irregular armies - , their families and dependants, and their home communities. These groups are all, directly or indirectly, effected by the efforts of DDR programmes which focus on bringing more safety and stability to a former-conflict area. When looking at the gender aspect in DDR processes, Heyzer (2003, 16) identifies three major trends which stand in connection to the groups of people most affected by DDR processes: Mainly, that “most DDR programmes are designed for male soldiers”; that DDR programmes often lack recognition of other roles of men and women taken on in (ir)regular armies; and that “the special needs of dependents of armed groups are not understood or adequately resourced”(ibidem, 16). The following sections will look into these trends together while also addressing the fact that war may change gender-relations in home communities to where the former members of (ir)regular armies are reintegrated in.

¹¹⁶ When men are seen as the sole perpetrators of conflict and women as merely the victims of conflict, a chance exists that transitional justice mechanisms have the tendency to focus on punishing men and refrain from punishing women.

¹¹⁷ See chapter 4.3.2 on women as perpetrators of violence.

UN Security Council Resolution 1325 explicitly notes the importance of all that are involved in the process of DDR programmes to become aware of gender differences when it comes to the need of male and female ex-combatants (UNSCR 1325, par. 13). This implicates that up to the year 2000, there was insufficient focus on the different needs of female and male ex-combatants in DDR programmes, and the following paragraphs will argue that even after the adoption of resolution 1325, this is still the case. Many DDR programmes aim their attention at male (young or older) ex-combatants, disregarding and underestimating the number of women and girls that are active in combat during conflict (UNICEF 2005, 53 in Park 2006, 323). These DDR programmes hold on to gendered stereotypes of women not being able or willing to fight as soldiers, picturing them merely ‘behind the kitchen counter’ as it were (ibidem 323). As noted by Bouta (2005, 10), “some DDR programmes do not target women at all” since the idea behind DDR is that it should increase the overall security; as women are not seen as direct dangers to the overall security they are often less addressed or not addressed at all. This failure of DDR programmes to acknowledge the existence and include needs of female ex-combatants in their work is also exemplified by El Amani (2003, 28) who quotes a Liberian women stating her concern about the gender insensitivity of DDR programmes in her country in the 90s:

“I know some [organisations] that deal with former combatant boys. They help to rehabilitate them, send them to school, help them to be engineers, teachers, whatever [they] want to be. They provide food, clothing, [and] medical facilities. But I don’t know of any kind of rehabilitation centres for women” (Bennett et al. 1995, 37 in El Amani 2003, 28).

The lack of attention for the existence of female combatants is already present during the planning period of DDR programmes. One of the steps in DDR programmes is often the placement of soldiers in special demobilisation camps. In these camps former warriors are taken out of their previous living environment and are given training that would make their eventual reintegration in society possible. The problems that occurs when female ex-combatants are placed in these camps, is that the demobilisation camps are not designed – and, therefore, not prepared – to address the specific needs of these women, such as (separate) sanitary supplies, bathing facilities and specific female healthcare, or security against sexual violence within the camps (Heyzer 2003, 9). This problem could easily be prevented during the preparation phase of the DDR programme. What is more, is that the minor interest of DDR programmes to the position of former female fighters provides for a vicious circle; the little focus on women contributes to the fact that women find it hard to identify themselves with DDR programmes, which makes them unable to benefit from the programme; and when women do not show themselves at DDR programmes it will be easy for DDR policy makers to overlook these women in the planning and implementation process. As stated by Farr (2005, 4), “experience shows

that women associated with combat groups, especially irregular forces, are reluctant to identify themselves as DDR processes begin and thus miss the opportunity to benefit from them [...] if they do not feel safe or welcomed in a DDR process, they are likely to ‘self-demobilize’—in other words, to disappear from view”.

Even though the involvement of women as combatants in conflict is often underestimated or even disregarded in DDR processes, there are examples of DDR programmes that have taken into account the existence of female fighters. In Eritrea where women made up to 30 percent of the guerrilla forces (Salomons 2005, 31), for example, female ex-combatants were provided with special programmes including training and day care centres (ibidem, 31) and did receive equal demobilisation grants (El Amani 2003, 28). Again, however, these demobilisation grants did not seem to understand gender differences between the combatants (ibidem 28). According to El Amani (ibidem, 29), there was no consideration of the different responsibilities of male and female ex-soldiers and the way in which the money would be spent. El Amani refers to the observation that, for example, single mothers would spend the money on the basic needs of their families and themselves, while men would invest the money in agriculture and trade. In the end the women would become impoverished again and the men would have something to live off (ibidem, 29). A gender aware demobilisation grant would keep this in mind while establishing the amounts of money available for men and women and could possibly provide education in spending tactics. The latter again shows that gender-sensitivity is more than just acknowledging the existence of women in conflict. Truly gender-sensitive DDR programmes also consider the changing gender-roles that may be a consequence of violent conflict. It is because of this, that the DDR programme in Rwanda is often noted as a gender aware programme. Here the DDR largely took place in demobilisation camps, where the ex-combatants would receive “re-integration training” including a “gender training” which informed the men of the changed gender-roles during the conflict and the new rights of women to inherit and own property (UNIFEM 2000 in El Amani 2003, 31), preparing them for the changed world they would become part of again. Their home-situation may be changed completely; their wives having taken over the role of breadwinners and be able to survive independently (El Amani 2003, 31). Training and educating the ex-fighters on these changed gender-roles would, eventually, smoothen the process of reintegration and would assumably also contribute to the lessening of domestic violence after reintegration of ex-fighters.¹¹⁸ This education of changed gender-roles as a consequence of conflict should, however, not primarily be focussed on the former fighters or (ir)regular armies. As the UN recognises, it are also the receiving communities which should be informed of the gendered dimensions in the conflict and post conflict period in order to keep the calm (El Amani 2003, 28). If this is not the case, and the receiving

¹¹⁸ As could be read in the chapter on Gender and Conflict there have been reports of domestic or even communal violence rising right after the end of a conflict, when women are punished for the supposed ‘non-feminine’ roles they have taken on during the conflict, and are expected to take on their previous roles as wife/nurturer/housekeeper. A better understanding through education of the effect of conflict on gender roles could possibly contribute to less domestic violence.

community is unwilling (because of little education) to accept the changed gender roles that have come to existence because of the conflict, it may occur that – especially- female ex-combatants are not accepted back into their former communities since “they had not kept to the patriarchal society structure” (Tabak working paper, 35). This was the case in Mozambique, where the DDR programme did not consider this scenario and gave no prior attention to the gender awareness of receiving communities (ibidem, 35).

DDR programmes aim at improving the overall security in a post-conflict country or area, in order to prevent the reoccurrence of conflict. One of the first objectives is, therefore, to decrease the number of weapons and soldiers. Much attention is then given to those fighters who literally hand-in their weapon in order to be allowed into the DDR programme. In these cases, such as in the Democratic Republic of the Congo (DRC), the receipt the former combatant is given after handing-in the weapon will be his ‘entrance fee’ into the DDR programme (Schreuder 2005, 18). In the case of the DRC DDR(RR)¹¹⁹ programme, that was largely run by CONADER, a weapon would be the proof of having taken part in an (ir)regular army, and without a weapon it would be difficult to become eligible for DDR support. This brings forward the following problem:

As was also brought forward in chapter four, Bouta (2005, 5-7) notes, that while the number of women involved in (ir)regular armies differs between one-tenth and one-third of the entire troops, women involved in those armies “tend to have four different roles; combatant, abductee, wife/dependent and support worker”. Compared to the men, women are mostly active as support workers and not directly involved in combat. They are cooks, messengers, sex slaves etc. and, because of this, do not carry a weapon (ibidem, 7). When it comes to DDR programmes such as in the DRC these former members of (ir)regular armies are not taken into account and miss the first opportunity at the disarmament level to be included and receive support.¹²⁰ These support workers do not have any weapons to prove their participation in the irregular army and to trade for a ‘DDR-ticket’. Like Schreuder (200, 18) emphasises, it is also difficult then to include these women - and men in the same situation - at the demobilisation process, because of the uncertainty of where, when and how to include them in there.

Sole focus on combatants in regular and irregular armies, results in the invisibility of the roles of women and girls in armed conflict (Schreuder 2005, 4). It is Farr (2005, 3) who is of opinion that “in planning DDR processes, program designers and implementers must address the needs of women ex-combatants as well as women who played other support roles”. That this is currently not the case is argued by Heyzer (2003, 17), stating that most DDR programmes forget to target girls [and boys] who have worked as sexual slaves and cooks, but merely focus on boys who fought in combat. In this respect DDR processes are not as gender-sensitive as they should be, and UNSCR 1325 contributes to

¹¹⁹ In the case of the DRC the DDR programme was complemented with Repatriation and Resettlement.

¹²⁰ Note that this also counts for the male support workers of regular and irregular armies and not just for the women.

this problematic focus of DDR on combatants by only noting DDR in relation to “ex-combatants” and not in relation to all ex-members of (ir)regular armies no matter what their function has been.

5.3.6 Gender-sensitivity and Documentation of Justice

One of the final subjects relevant to transitional justice mechanisms that may be influenced by, and can influence gender-sensitivity, is documentation. With documentation in this section is meant the (final) reports and records of the transitional justice mechanisms, such as the (final) reports of Truth and Reconciliation Commissions and the written verdicts of international, national or hybrid tribunals. There are two reasons for stating that documentation may both be influenced by the gender-sensitivity in other parts of the transitional justice mechanisms, and can influence the general gender-sensitivity of the transitional justice mechanisms itself. Firstly, the line of (in)attention in the other phases of the transitional justice process has a large chance of being prolonged in the documentation phase. Secondly, (no) awareness of gender and gender issues portrayed in the documentation will automatically contribute to a (less) gender-sensitive transitional justice mechanism. In the end, it is the documentation phase - as final phase of a transitional justice process - which has the ‘final word’ on the gender-sensitivity of the transitional justice mechanism. This section will briefly address the subject of documentation in combination with the issue of gender-sensitivity. Unfortunately it is beyond the reach of this thesis to investigate a representative number of documentation items in order to draw any fixed conclusions on the overall gender-sensitivity of documentation that has derived from transitional justice mechanisms. Therefore, this section will mostly focus on case-examples of documentation which show possible difficulties of combining gender-awareness with documentation by transitional justice mechanisms.

The introductory chapter on the different transitional justice mechanisms already showed that documentation is a tool for establishing a historical record and narrative. Nesiah (2006b, 32) adds that not only does documentation in the form of final reports extend the reach of a transitional justice mechanism into the future by establishing such a narrative, but it also has the effect of ‘distilling’ the mechanism’s work. A final report may choose how to review all the evidence and testimonies etcetera, how it is interpreted, and on what issues it places its focus or not. This, therefore also counts for the subject of gender. A final report may choose to place more emphasis on certain gendered aspects of the conflict than on others. An example of this is the story of a South African woman called Yvonne Khutwane, noted by Nesiah (2006b, 20), who had testified before the South African TRC on the many injustices she had suffered. These injustices included arrestment, confinement, imprisonment, torture, and also rape. It was the wish of Khutwane that her testimony would allow her children and grandchildren to understand the struggles she had been through and the strength she had shown during the Apartheid. In the final report of the TRC, however, only the experience of Khutwane’s rape was

presented, disregarding the many other sufferings she had been through and testified about in front of the TRC. According to Nesiah (*ibidem*, 20), the commissioners that had written the final report followed a gender agenda and found rape to be a big and gendered issue in the conflict. As rape testimonies were not flooding the TRC the commissioners found it useful to focus on the rape story in Khutwana's testimony. In this case the wish to address gender in the final report was wrongly translated to a focus on sexual abuse by the commissioners that drafted the final report. This shows that documentation may, even when it does address some gendered issues of a conflict, disregard to mention other important gendered aspects of the previous conflict. Another example of documentation that has not done justice to the research of a TRC is the final report of the Sierra Leonean TRC. While the data collection of the TRC had indicated a high number of male victims of sexual violence – 299 men against 187 women – “this result is not really discussed in the [final] report” where sexual violence is again mainly linked to young females (Dal Secco 1999, 83). Disregarding close to 300 male victims of sexual violence in the final report of the Sierra Leonean TRC refuels the stereotype that only women are victims in conflict and that men are only perpetrators.

According to Nesiah (2006b, 32), the subject of gendered human rights violations may best be addressed – according to a gender-sensitive approach - in final reports of truth commissions with the use of individual cases that present the underlying structure of these offences (*ibidem*, 32). This can be done by the insertion of a separate chapter on gender, like in the final report of the South African TRC, or there can be chosen to address gender in several sections of a final report, making gender a “cross-cutting theme throughout the report” like, for example, in the final reports of the Peruvian TRC and the TRC of Timor- Leste (*ibidem*, 33). In the final report of the CAVR, gender comes forward, explicitly or implicitly, in almost all sections. ‘Chega!’ not only refers to gender constructions and relations in its chapter on sexual violence, but also brings the issue forward in most other chapters including; ‘forced displacement and famine’, ‘violations of economic and social rights’, ‘recommendations’ and ‘victim support’ and in the conclusion of the TRC (CAVR 2005). ‘Chega!’ repeatedly refers to the social position of men and women in Timor-Leste, and how this has influenced both male and female experiences of conflict and the way in which type of warfare was used.

Whether used as a cross-cutting theme or mentioned merely in a separate chapter, the subject of gender within a final report of a TRC is also in some occasions used to define the limitations of a TRC. The chapter focussed on gender in the final report of the South African TRC, for example, noted its own limitations to fully address the subject of gender (*ibidem*, 33), and the conclusion of the Peruvian final report admitted that the data collection of the TRC had insufficiently targeted the gender issues of the conflict, recognising its own limitations to be gender-sensitive. (Peru Support Group 2004, 32).

Though documentation may be regarded one of the most important places where gender-sensitivity can present itself, this short section has shown it is not always the place where gender issues are

rightly addressed. However, even if this is the case, documentation may also be the place where this is admitted and future research for the influence of gender on the conflict or oppression may be stimulated.

5.4 Chapter Conclusion: Gender-sensitivity in Transitional Justice Mechanisms

This chapter started by identifying possible characteristics of gender-sensitive mechanisms. It stated that gender-sensitivity of a transitional justice mechanisms starts with the idea that gender is an important issue to keep in mind during the transitional justice process. Besides this first basic characteristic of gender-sensitivity, a transitional justice mechanism may extend its gender-sensitivity by defining gender as a constructed notion. In other words, understanding that masculinity and femininity are social constructions and that these constructions may also - unconsciously - influence transitional justice mechanisms themselves. This may present itself in gender-sensitive characteristics such as; addressing gender based violence in the mechanism's research and documentation, measures to assist and protect male and female victim witnesses, and paying attention to both male and female perpetrators of violence. One final gender-sensitive characteristic defined by this chapter is including women in transitional justice structures. After defining them, this chapter has compared these characteristics to the mandates and the practices of transitional justice mechanisms.

The section on mandates first showed that mandates of transitional justice mechanisms have included guidelines for involving more women in their structures. This has been stimulated by international women's rights activists and by the UN through, for example, UNSCR 1325. These mandates, however, - as a possible consequence of UNSCR 1325 - do not specify whether the women in their structures should originate from the conflict area or not. Secondly, the section on mandates showed that recognising gender-based violence as an important subject of research is addressed by transitional justice mandates mostly in the context of sexual gender-based violence against women. This strong focus on sexual violence against women, instead of the wider subject of gender-based violence, may have two major consequences in practice; male victims of sexual violence are ignored, and female victims of other sorts of gender-based violence are disregarded. The section on gender-sensitivity in transitional justice mandates ended with the conclusion that true gender-sensitivity of transitional justice mechanism can only be measured if one looks at the transitional justice mechanisms in practice. Gender-neutral mandates and statutes may be altered to more gender-aware practices and the other way around. Moreover, victims, families of victims and perpetrators of human rights violations are subjected to the consequences of gender-sensitivity in practice and not to gender-sensitivity in theory. From the viewpoint that transitional justice is aimed at providing justice and reconciliation for these people, gender-sensitivity of transitional justice mechanisms should be measured at the practical application of rules and procedures.

The practices of transitional justice mechanisms firstly show that the mechanisms mostly follow their mandates when it comes to more female involvement in the mechanisms' structure. The international mechanisms, furthermore, do not focus on including women from the conflict area but on established female actors in the international field of law and international relations. More traditional mechanisms, on the other hand, tend to have less female involvement because of patriarchal values, while the nationalised traditional Gacaca system has introduced high numbers of local female involvement. After comparing female involvement in different transitional justice mechanisms, this chapter followed with a discussion on the possible consequences these women may have on the gender-sensitivity in transitional justice procedures. Though some authors argue women are more gender-sensitive than men, and including them will automatically result in a more gender-aware transitional justice mechanism, this thesis argues otherwise. Incorporating women into the structures of transitional justice mechanisms should not be considered equal to gender-sensitivity of the procedures in this mechanisms. Gender-sensitivity in transitional justice mechanisms procedures may, therefore, show itself in other ways; for example in gender-awareness training. This chapter has shown that multiple transitional justice mechanisms have incorporated gender-awareness training for their staff. Just like the mandates, this chapter has shown that in practice transitional justice mechanisms also focus much on sexual gender-based crimes, especially against women. This comes forward in judgements, investigations, documentation and reparations. While in some cases victims of sexual violence have had a right to reparations, victims of socio-economic sufferings have often been overlooked. Moreover, documentation has in some cases also narrowed down its focus on gender-based violence to one section on sexual violence. CAVR in Timor- Leste seems to be an exception in this case. This TRC addressed both sexual and socio-economic gender-based crimes in its practices and documentation, hereby accepting a wide definition of gender-based violence.

The section on gender-sensitivity of DDR programmes has shown that these programmes tend to follow gender-stereotypes, hereby disregarding a social constructive definition of gender. Many DDR programmes focus on male fighters of (ir)regular armies. It is often forgotten that women too may be active as combatants in conflict, and DDR programmes and camps are often not prepared for the specific (sanitary, healthcare) needs of women. Moreover, DDR programmes tend to forget girls and boys who have been active in (ir)regular armies as slaves, cooks, messengers etc. These men and women need also to be demobilised and reintegrated. DDR programmes that have been gender-sensitive according to the social constructive definition, such as in Eritrea and Rwanda, have addressed female fighters and included reintegration training on changed gender roles in society.

Overall, this chapter has shown that both in mandates and in practices, gender has been more and more recognised as an important subject for transitional justice mechanisms. Most of these transitional justice mechanisms, however, tend to follow a narrow understanding of gender. Concluding from this chapter, gender-sensitivity is too often linked to sexual violence (against women) and to the gender stereotypes of female victims of sexual violence and male perpetrators. The social constructive

definition of gender is often forgotten and instead many transitional justice mechanisms follow a narrow 'gendered' definition.

6. Conclusion: How Gender-Sensitive are Transitional Justice Mechanisms?

Drawing from the previous sections on gender-sensitivity in different aspects of transitional justice mechanisms, this concluding chapter will first try to provide an answer to the central research question: How gender-sensitive are transitional justice mechanisms? After this it will shortly point at the strengths and weaknesses of this research and present some recommendations for future research on this subject.

After having researched the notion of gender and its role in conflict and in peace, this thesis has been able to define possible characteristics of gender-sensitivity within transitional justice mechanisms. These characteristics derive from the efforts of transitional justice mechanisms to see gender as an important subject to include, and to understand the social constructive definition of gender and the way stereotypes may also influence the transitional justice mechanisms themselves. Characteristics that have been defined are; paying attention to sexual and non-sexual gender-based crimes, helping men and women to come forward as victims of (gender-based) crimes, and focussing on both male and female perpetrators of violence. One other characteristic is the involvement of female staff in transitional justice mechanisms. Chapter 5.3 indicated that practice also brings forward other gender-sensitive characteristics that have been used or should be used by transitional justice mechanisms. These have been the inclusion of gender-awareness training, including measures that aim at male victims of sexual gender-based violence, more focus on other forms of gender-based violence besides sexual violence, and understanding gender-roles within (ir)regular armies to improve DDR programmes.

From this research may be concluded that there is one major trend when it comes to the gender-sensitivity of transitional justice mechanisms; efforts to incorporate a gender perspective into transitional justice mechanisms are largely focussed on women and female stereotypes. While female involvement in the structure of transitional justice mechanisms is indeed pointed out as a gender-sensitive measure in this thesis, it seems that this is not always used for the right reasons. As described, sometimes including female staff in transitional justice mechanisms is seen as enough to qualify for the title 'gender-sensitive mechanism' by the mechanisms themselves. This derives from the viewpoint that female staff will automatically address gender-issues while their male counterparts will not. Transitional justice mechanisms that have included gender-awareness training seem to be aware of this false assumption and seem to agree to the fact that both male and female staff need to be trained to become gender-aware. However, regardless of this gender-awareness training used by several transitional justice mechanisms, this thesis shows that many efforts to be gender-sensitive still stick to gendered stereotypes of women as victims of sexual violence and as men as perpetrators of all sorts of violence. Too much focus is laid on sexual violence against women – both in procedures and

in final reports - that sexual violence against men, other types of gender-based violence against women and men, and the issue of women as perpetrators of violence or as members of guerrilla groups, do not receive the attention they deserve. Instead of being aware of gender-stereotypes that have a negative influence on transitional justice mechanisms' ability to be gender-sensitive in the broad sense of the word, this thesis shows that most transitional justice mechanisms follow these stereotypes. Their efforts to be gender-sensitive are, therefore, mostly limited to female-sensitivity in the case of sexual gender-based violence. One major exception in this case has been the CAVR in Timor-Leste. This TRC has addressed both sexual gender-based violence as well as socio-economic gender-based violence in its research and documentation. Furthermore, it has tried not to focus solely on the gender-based crimes against women, but has also identified types of violence aimed mostly at men. Therefore, the CAVR may be regarded the best example of a transitional justice mechanism that has been gender-sensitive according to the social constructive definition of the term.

While UNSCR 1325 is regarded by many women's organisations and gender-organisations as *the* tool to spread gender-awareness and gender-sensitivity, this thesis has shown that in some cases 1325 contributes to the limited understanding of gender in transitional justice mechanisms. UNSCR 1325 uses the term gender solely in context of women and more female involvement in peace processes. As shown by this thesis, gender is a relational issue that concerns both masculinity and femininity. While female involvement in a structure may be a first step towards gender-sensitivity in the structure, women need not be seen as the only ones who are willing and needed to involve themselves with the gender-issue. The subject of gender need not be seen as only concerning women but also men in conflict/oppressive and post-conflict/oppressive situations. Furthermore, UNSCR 1325 does not specify on the background of women that need to be allowed in peacebuilding mechanisms. This may have the consequence that in structures of international mechanisms, such as the International Tribunals, mainly highly-accomplished women are included who have not experienced the conflict themselves. This thesis has argued that women should be involved in transitional justice mechanisms because they play a large part in conflicts. A logical consequence would be that transitional justice mechanisms involve local women who have experienced the conflict in their structures. Since UNSCR 1325 does not specify on the nature of women that are to be involved it again gives a wrong example for *why* women need to be involved. UNSCR 1325 may be interpreted as a call for more women, no matter what their relation is to the conflict. This places too much emphasis on women in the biological sense and little emphasis on gender constructions of women in conflict and peace. Another issue brought forward in this thesis that signals that UNSCR 1325 should not be used as a sole guideline for gender-sensitivity in all peacebuilding processes is the fact that the resolution touches upon gender-awareness in the context of DDR only with reference to female combatants. While this thesis has shown that DDR processes should indeed attend to female combatants, it has also shown the majority

of women involved in armed forces have other tasks, and that it is this group of women that deserves more attention in DDR programmes.

Overall, this thesis has shown that some important steps have been taken towards gender-sensitivity by transitional justice mechanisms. The inclusion of more women in the structures of transitional justice mechanisms - though this still can use some attention – and placing gender-based violence amongst the worst crimes, have been a large move towards gender-sensitivity of transitional justice mechanisms and may have been the first necessary steps to take. To move forward from here and improve the gender-sensitivity of transitional justice mechanisms, however, a change must be made in the efforts of transitional justice mechanisms from being gender-sensitive with a limited understanding of gender and gender-issues, towards a broader understanding of gender as the perceptions of appropriate behaviour for women *and* men (such as done by the CAVR and in some DDR programmes). In practice this translates into the following points to focus on by transitional justice mechanisms in the future: First of all, transitional justice mechanisms should place more emphasis on researching socio-economic and other gender-based crimes besides sexual gender-based violence. These types of gender-based crimes are also a consequence of gender perceptions and gender relations in conflict societies, and may exacerbate the vulnerability of women towards other gender-based crimes.¹²¹ Overall, transitional justice mechanisms should not underestimate gender-based violence other than sexual violence and should pay more attention to these crimes in its investigations and documentation. Moreover, recognition for victims of these crimes in investigation and documentation will consequently lead to more gender-sensitive reparation programmes. A second issue for transitional justice mechanisms to pay more attention to is sexual violence against men. Research should stay open to the possibility of this type of gender-based violence against men during conflict, and documentation should not disregard large instances of sexual gender-based violence against men. This will contribute to changing the stereotypes of female victims and male perpetrators within transitional justice mechanisms. The latter also counts for DDR programmes. These programmes need to prepare their demobilisation camps for female combatants and need to develop ways to include members of (ir)regular armies that have had supportive, non-combatant, roles. One final subject transitional justice mechanisms should place more emphasis on if they aim towards a broader gender-sensitivity in the future is ‘training’. This starts with gender-sensitivity training for both male and female staff involved in transitional justice mechanisms. Herewith the false assumption that women are more gender-aware than men by nature will be set aside. Another part of training should be directed towards perpetrators and home-societies of perpetrators and victims of conflict. DDR programmes should include reintegration training that deals with the possible changed gender-roles in home communities. For example, the ex-combatants need to be educated about the renewed

¹²¹ For example, women that have seen their property destroyed and with a low economic position may become more vulnerable to forced prostitution and other forms of sexual exploitation.

possibilities of some women to be socially and economically independent. Moreover, home-communities need to be educated how to deal with former members of (ir)regular forces who are alienated from the (sometimes new) social values of a community.

All of these characteristics transitional justice mechanisms can adapt to become more gender-sensitive in the broad sense of the word are focussed on understanding (changed) gender roles in post-conflict societies. Paying attention to socio-economic gender-based violence and providing training on changed gender-roles does not implicate that transitional justice mechanisms should bring changes themselves to the social constructions of gender.¹²² Changing gender constructions may be an impossible and therefore undesirable goal for transitional justice mechanisms, especially regarding patriarchal post-conflict societies. Therefore, this thesis argues that transitional justice mechanisms should adapt to the - possibly changed - gender constructions to become more effective mechanisms of providing justice and reconciliation for all that have been involved in the conflict. Notably, one possible way in which transitional justice mechanisms *may* positively influence gender constructions is involving more women (from post-conflict societies) into their mechanisms' structure. This may contribute to the view that women are important actors in conflict and in peace, but may only be effective in an international, Western environment. More traditional transitional justice mechanisms should not be pressured to these, for them unnatural, viewpoints.

This thesis has not only shown that transitional justice mechanisms should focus more on constructed gender-relations, but that this also counts for the theory which aims to combine transitional justice with gender. This theory should move away from a focus on gender as involving only women as victims of everything that surrounds them, to a focus on gender as a relational issue. As shown by this thesis, little literature on gender and transitional justice can be found that includes a social constructive definition on gender. One large reason for this small amount of literature may be the difficulty of researching gender from a social constructivist point of view. It is difficult to constantly be aware of the gender stereotypes that have been programmed into our minds and try to look beyond these stereotypes while doing research. In other words, how does one stay objective to the subject of gender, while our own understanding of gender and gender relations has been socially constructed into our minds from our childhood? This thesis, however, has tried to show that it is not impossible to research gender and transitional justice from a social constructivist point of view. For the most part it takes a critical view on one's own and other people's assumptions on the position of women and men. Therefore, future research on gender and transitional justice should constantly stay critical towards the way itself and others use the term gender in their research. Inevitably, this will also lead to a more critical analysis of gender-sensitivity of transitional justice mechanisms in the future.

¹²² This contradicts the quote from Tabak (working draft 30) used in the introduction of this thesis.

The purpose of this thesis has been to further develop and explore the theory that combines transitional justice and the subject of gender, with the objective to research the gender-sensitivity of transitional justice mechanisms. The information and theory used by this research to draw its conclusions has been limited but has been sufficient to show some large limitations of theory that combines gender and transitional justice and limitations of gender-sensitivity within transitional justice mechanisms. For a more elaborate and in-depth understanding of the gender-sensitivity of different transitional justice mechanisms, however, further and more specific research on separate mechanisms is needed. There is a limited amount of information available on transitional justice mechanisms, especially on more traditional mechanisms, in contrast to the more ‘popular’ mechanisms such as the ICTY, ICTR and the South African TRC on which there is much more information to find in the existing literature. This has had its consequences for this thesis; the information gathered on gender-sensitivity for this thesis has not been equal for all the transitional justice mechanisms introduced in the second chapter of this thesis. The conclusions that have been drawn are, therefore, non-specific and merely provide a general trend in mostly ‘western’ transitional justice mechanisms. Therefore, this thesis calls for more theoretical and especially empirical research¹²³ on the gender-sensitivity of individual transitional justice mechanisms with a view on gender that goes beyond the biological differences between men and women. This thesis has been able to bring forward an inconsistency in how gender is addressed by transitional justice mechanisms, and it is up to future research this topic more into depth, and to find and test possible solutions for a broad gender-sensitive approach of transitional justice mechanisms.

¹²³ Relating to the argument that true gender-sensitivity may only be measured in the practices of transitional justice mechanisms.

7. References

- Agreement Between the United States of America, Belgium, the British Empire, China, Cuba, France, Greece, Italy, Japan, Nicaragua, Panama, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam and the Czecho-Slovak State, with Regard to the Italian Reparation Payments. (1920, Oct.). *The American Journal of International Law*, 14, No. 4, Supplement: Official Documents, 349-352 retrieved from JSTOR:
<<http://www.jstor.org/stable/2212903>> on 16 December 2009. In text as: The American Journal for International Law (1920).
- Anderlini, S. N., Conoway, C. P. & Kays, L. (2004). *Transitional Justice and Reconciliation*. Retrieved from: <www.huntalternatives.org/download/49_transitional_justice.pdf> on 7 November 2008.
- Bedont, B. & Hall-Martinez, K. (1999). Ending Impunity for Gender Crimes under the International Criminal Court. Center for Reproductive Rights IN *The Brown Journal of World Affairs*, 6, Issue 1, 65-85.
- Bell, C., Campbell, C. & Aoláin, F. N. (2004). Justice Discourses in Transition. *Social & Legal Studies* 13, 305-328.
- Bell, C., Campbell, C. & Aoláin, F.N. (2007, Jun.). Transitional justice: (re)conceptualising the field. *International Journal of Law in Context*, 3, Issue 02, 81-88. doi: 0.1017/S1744552307002017
- Bell, C. & O'Rourke, C. (2007). Does Feminism Need a Theory of Transitional Justice? An Introductory Essay. *International Journal of Transitional Justice*, 1, 23-44.
- Bloemberg, S. (2009). *Transitional Justice in Iraq: Dujail, the IHT and the Death Penalty*. Paper for course on Transitional Justice, Law Faculty Radboud University Nijmegen.
- Bouta, T. (2005, March) *Gender and Disarmament, Demobilization and Integration*. Conflict Research Unit Netherlands Institute of International Relations: Clingendael. Retrieved from <http://www.ifor.org/WPP/Final_DDR_Gender_Report.pdf> on 2 August 2009.
- Brock-Utne, B. (2001). *Indigenous Conflict resolution in Africa*. Draft presented at the conference on indigenous solutions to conflicts. University of Oslo, Institute for Educational Research, Oslo 23-24 Feb. 2001. Retrieved from <http://www.africavenir.org/uploads/media/BrockUtneTradConflictResolution_02.pdf> on 2 Nov. 2009.
- Brock-Utne, B. (2004). Peace Research with a Diversity Perspective: a Look to Africa. *International Journal of peace Studies*.

- Brzoska, M. (2004, Jan.). 'New Wars' Discourse in Germany. *Journal of Peace Research*, 41, No. 1, 107-117.
- Byrne, B. (1996). *Towards a Gendered Understanding of Conflict*. IDS Bulletin. Section 2 Workbook/Readings/3. Retrieved from <www.genderandpeacekeeping.org/resources/3_Towards_a_Gendered_Understanding_of_Conflict.pdf> on 27 March 2009.
- Commission on Reception, Truth and Reconciliation in Timor Leste (CAVR). (2003, April). *Women and Conflict: National Public Hearing 28-29 April 2003*. Retrieved from <www.cavr-timorleste.org> on 28 January 2010.
- Commission on Reception, Truth and Reconciliation in Timor Leste (CAVR). (2005). *Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste: Executive Summary*. Retrieved from <www.cavr-timorleste.org> on 28 January 2010.
- Campbell, K. (2004). The Trauma of Justice: Sexual Violence, Crimes Against Humanity and The International Criminal Tribunal for the Former Yugoslavia. *Social & Legal Studies* 13, 329-350.
- Call, C. T. (2004). Is Transitional Justice Really Just? *The Brown Journal of World Affairs*, 11, Issue 1.
- Chiwara, L. & Karadenizli, M. (2008). *Mapping aid effectiveness and gender equality. Global findings and key messages*. Unifem. Retrieved from <<http://www.unifem.org/attachments/products/MappingAidEffectivenessAndGenderEquality.pdf>> on 12 August 2009.
- Coalition for the International Criminal Court. (2009). Website. <<http://www.iccnw.org/>>.
- Conaway, C. P. (2005). *Charting Progress: The Role of Women in Reconstruction and Stabilization Operations*. Companion Article to the Special Report. United States Institute of Peace; Working Group on the Role of Women in Reconstruction and Stabilization Operations. Retrieved from: <http://www.usip.org/pubs/specialreports/srs/srs3_companion.pdf> on 8 May 2009.
- Corey, A. & Joireman, S. F. (2004). Retributive Justice: The Gacaca Courts in Rwanda. *African Affairs*, 103, 73-89.
- Coulter, C., Persson, M., & Utas, M.. (2008). *Young Female Fighters in African Wars: Conflict and Its Consequences*. Uppsala: Nordic Africa Institute. Retrieved from <<http://www.nai.uu.se/publications/download.html/978-91-7106-627-5.pdf?id=25267>> on 10 January 2010.
- Crocker, D. A. (2009). Truth Commissions, Transitional Justice, and Civil Society. Forthcoming in R. I. Rotberg & D. Thompson (Eds.), *Truth v. Justice: The Moral Efficacy of Truth Commissions: South Africa and Beyond*. Princeton, Princeton University Press. Retrieved

- from <<http://www.publicpolicy.umd.edu/faculty/crocker/RotbergPaper.PDF>> on 8 June 2009.
- Dal Secco, A. (2008). Truth and Reconciliation Commissions and Gender Justice. In D. Pankhurst (Ed.), *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (pp 65-106). New York, Routledge.
- David, R. & Choi Yuk-ping, S. (2005). Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic. *Human Rights Quarterly*, 27, 392–435.
- Dickinson, L. A. (2003, Apr.). The Promise of Hybrid Courts. *The American Journal of International Law*, 97, No. 2, 295-310. Retrieved from <<http://www.jstor.org/stable/3100105>> on 3 August 2009.
- Djibrine Sy, A. (1993) Conflict and the women of Chad. In H. O'Connell (Ed.), *Women and Conflict* (pp 10-12). Oxford, Oxfam.
- Dougherty, B. K. (2008). *Searching for Transitional Justice in Iraq*. Retrieved from All Academic Research <http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/4/3/9/p254393_index.html> on 3 February 2009.
- El-Bushra, J., & Piza-Lopez, E. (1993) Gender-related violence: its scope and relevance. In H. O'Connell (Ed.), *Women and Conflict* (pp 1-9). Oxford, Oxfam.
- El-Bushra, J., & Mukarubuga, C. (1995). Women, war, and transition. In C. Sweetman (Ed.), *Societies in Transition* (pp 16-22). Oxford, Oxfam.
- Elster, J. (2004). *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge, Cambridge University Press.
- Escola de Cultura de Pau. (2007). *DDR 2008: Analysis of Disarmament, Demobilization, and Reintegration (DDR) programmes in the World during 2007*. Retrieved from <<http://www.peacewomen.org/resources/DDR/AnalysisDDR2007.pdf>> on 23 August 2009.
- Farr, V. A. (2005). *Gender-aware Disarmament, Demobilization and Reintegration (DDR): A Checklist*. New York, UNIFEM. Retrieved from <http://www.crin.org/docs/unifem_ddr_checklist.pdf> on 4 August 2009.
- Fisher, P. (1946, May). Reparation Labor--A Preliminary Analysis. *The Quarterly Journal of Economics*, 60, No. 3, 313-339.
- Gibson, J.L. (2002, July). Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa. *American Journal of Political Science*, 46, No. 3, 540-556.
- Gibson, J.L. (2005, Oct.). The Truth about Truth and Reconciliation in South Africa. *International Political Science Review / Revue internationale de science politique*, 26, No. 4, 341-361.
- Graybill L. (2004) Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods. *Third World Quarterly*, 25, No. 6, 1117-1130. Retrieved from <<http://www.jstor.org/stable/3993754>> on 13 January 2010.

- Greenberg, M. E. & Zuckerman, E. (2005, June). *The Gender Dimensions of Post-Conflict Reconstruction: The Challenges in Development Aid*. With contributions from Poe, J., and Xiaowen, L. Presented at “When Women Gain, So Does the World,” IWPR’s Eighth International Women’s Policy Research Conference, June 2005. Retrieved from <http://www.iwpr.org/pdf/05_proceedings/greenberg_marcia.pdf> on 2 August 2009.
- Hamber, B. & Kelly, G. (2004). *Reconciliation; a Working Definition*. Democratic Dialogue. Retrieved from <cain.ulst.ac.uk/dd/papers04recondef.pdf> on 15 January 2010.
- Heyzer, N. (2003). *Gender, Peace and Disarmament*. Disarmament forum 2003. Retrieved from <<http://www.unidir.ch/pdf/articles/pdf-art1993.pdf>> on 2 August 2009.
- Human Security Report. (2003). *Human Security Report 2003, Part 1*. 13-59. Retrieved from Reader “inleiding conflictstudies 2007” University of Utrecht. In text as; HSR (2003).
- Human Rights Watch. (2006). *Judging Dujail*. Retrieved from <<http://www.hrw.org/en/reports/2006/11/19/judging-dujail>> on 3 February 2009.
- International Center for Transitional Justice. (2009). Website. <<http://www.ictj.org>> In text as; ICTJ website (2009).
- International Center for Transitional Justice (May 2007). *Pursuing Justice in Ongoing Conflict: a discussion of current practice*. Prosecutions Program at ICTJ. Retrieved from <<http://www.ictj.org>> on 15 September 2009. In text as; ICTJ (2007).
- International Criminal Tribunal for the Former Yugoslavia. (2009) Website. <<http://www.icty.org>> In text as; ICTY (2009).
- International Criminal Tribunal for Rwanda. (2009) Website. <<http://ictr.org>> In text as; ICTR (2009).
- Iraqi High Criminal Court Law*. (2005). The Statute of the Iraqi Special Tribunal. Retrieved from <law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf> on 5 February 2009. In text as: IHCCCL 2005.
- Joint Principles. (1997, October, 2). *THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: Question of the impunity of perpetrators of human rights violations (civil and political) Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*. United Nations, Economic and Social Council, Distr. General. E/CN.4/Sub.2/1997/20/Rev.1. Retrieved from <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.sub.2.1997.20.Rev.1.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.sub.2.1997.20.Rev.1.En)> on 12 January 2010.
- Kaldor, M. (1999). *New and Old Wars: Organised Violence in a Global Era*. Cambridge, Polity Press.
- Koen, K. (2006). *Claiming space: Reconfiguring women’s roles in post-conflict situations*. ISS Paper 121.
- Kritz, N. J. Ed. (1995). *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*. Washington DC, United States Institute of Peace Press.

- Kronsell, A. (2006). Methods for studying silences: gender analysis in institutions of hegemonic masculinity. In B. A. Ackerly, M. Stern, & J. True (Eds.), *Feminist Methodologies for International Relations* (pp 108-128) Cambridge, Cambridge University Press.
- Llewellyn, J. & Howse, R. (1999). Institutions for Restorative Justice: The South African Truth and Reconciliation Commission. *The University of Toronto Law Journal*, 49, No. 3, 355-388.
- Lundy, P. & McGovern, M. (2008). Whose Justice? Rethinking Transitional Justice from the Bottom Up. *Journal of Law and Society*, 35, Issue 2, 265 – 292.
- Mamdani, M. (2002, Autumn –Winter). Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC). *Diacritics - Ethics*, 32, No. 3/4, 33-59.
- Manjoo, R. (2008). Gender Injustice and the South African Truth and Reconciliation Commission. In D. Pankhurst (Ed.), *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (pp 137-154). New York, Routledge.
- Marin, R. R. (2006, Feb. 7). *Gender and Reparations: Challenges and Opportunities*. Presentation held at the Open Society Institute Forum on Gender and Transitional Justice, 7 Feb. 2006. Retrieved from <www.ictj.org/static/Gender/0602.GenderReparations.eng.pdf> on 3 August 2009.
- MacEvoy, K. & MacGregor, L. (2008). Transitional Justice from Below: Grassroots Activism and the Struggle for Change. *Human Rights Law in Perspective*. Oxford, Hart.
- Minu, H. & Rohr, U. (2009, March). Engendering the climate-change negotiations: experiences, challenges, and steps forward. *Gender & Development*, 17, Issue 1, 19-32.
- Mertus, J. (2000). Truth in a box: The limits of justice through Judicial mechanisms. *The Politics of Memory: truth, healing and social justice* 142.
- Mertus, J. (2004). Shouting from the bottom of a well. *International Feminist Journal Politics*, 6, 110.
- Moser, C. (2005). *Gender mainstreaming since Beijing. A review of success and limitations in international institutions*. Oxfam. Retrieved from <http://www.oxfam.org.uk/what_we_do/resources/downloads/FOG_MGD_3.pdf> on 12 August 2009.
- Nesiah, V. (2006, Feb. 7). *Gender and Truth Commission Mandates*. Presentation held at the Open Society Institute Forum on Gender and Transitional Justice, 7 Feb. 2006. Retrieved from <www.ictj.org/static/Gender/0602.GenderTRC.eng.pdf> on 3 August 2009. In text as; Nesiah (2006a)
- Nesiah, V. (2006, Jul.). *Truth Commissions and Gender: Principles, Policies, and Procedures*. Gender Justice Series. International Centre for Transitional Justice. In text as; Nesiah (2006b).
- Nowrojee, B. (2008). "Your Justice Is Too Slow": Will the International Criminal Tribunal for Rwanda Fail Rwanda's Rape Victims? In D. Pankhurst (Ed.), *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (pp 107-136). New York, Routledge.

- Oosterveld, V. (2005). The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or back for International Criminal Justice? *Harvard Human Rights Journal*, 18, 55.
- O'Rourke, C. (2008). The Shifting Signifier of 'Community' in Transitional Justice: A Feminist Analysis. *Wisconsin Women's Law Journal*, Vol. 23, No. 2 & *Transitional Justice Institute Research Paper*, No. 09-03.
- Pankhurst, D. Ed. (2008). *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation*. New York, Routledge.
- Park, A. S. J. (2006). 'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone. *Social Legal Studies* 15, 315.
- Peru Support Group. (2004, Feb.). *Truth and Reconciliation: The Findings of Peru's Truth and Reconciliation Commission*. Retrieved from <http://www.perusupportgroup.org.uk/pdfs/TRC_booklet.pdf> on 13 November 2009.
- Project on International Courts and Tribunals. (2009). Website. On ICTY: <<http://www.pict-pcti.org/courts/ICTY.html>>, and on Hybrid Courts: <<http://www.pict-pcti.org/courts/hybrid.html>>.
- Prugl, E. (2009, June). Does Gender Mainstreaming Work? *International Feminist Journal of Politics*, 11, Issue 2, 174-195.
- Quinn, J. (2005). *The Role of Informal Mechanisms in Transitional Justice*. Retrieved from: <www.cpsa-acsp.ca/papers-2005/Quinn.pdf> on 7 November 2008.
- Ramsbotham, O., Woodhouse, T. & Miall, H. (2005). *Contemporary Conflict Resolution, The Prevention, Management and Transformation of Deadly Conflicts*. 2nd edn. 2006. Cambridge: Polity Press.
- Rawls, J. (2003). *A Theory of Justice*. Revised Edition. Massachusetts, The Belknap Press of Harvard University Press Cambridge.
- Reilly, N. (2007, Jun.). Seeking gender justice in post-conflict transitions: towards a transformative women's human rights approach. *International Journal of Law in Context*, 3, Issue 02, 155-172. doi: 10.1017/S1744552307002054
- Rodolfo, C. (1994). The Collapse of the Salvadorian State. *Journal of Third World Studies*, 11, 1.
- Rooney, E. (2007, Jun.). Engendering transitional justice: questions of absence and silence. *International Journal of Law in Context*, 3, Issue 02, 173-187. doi: 10.1017/S1744552307002066
- Salomons, D. (2005). Security: An Absolute Prerequisite. In G. Junne & W. Verkoren (Eds), *Postconflict Development: Meeting New Challenges*. (pp 19-42). Colorado: Lynne Rienner Publishers.
- Schabas, W. A. (2001). *An introduction to the International Criminal Court*. Cambridge, Cambridge University Press.

- Schroeder, E. (2005). *A Window of Opportunity in the Democratic Republic of the Congo: Incorporating a Gender Perspective in the Disarmament, Demobilization and Reintegration Process*. Peace, Conflict & Development. Retrieved from <http://www.iss.co.za/dynamic/administration/file_manager/file_links/WINDOWDRC.PDF?link_id=31&slink_id=256&link_type=12&slink_type=13&tmpl_id=3> on 2 August 2009.
- Simpson, K. (2007, June). Voices silenced, voices rediscovered: victims of violence and the reclamation of language in transitional societies. *International Journal of Law in Context*, 3, Issue 02, 89-103.
- Statute of the International Criminal Tribunal for Rwanda. (2007). United Nations. Retrieved from <<http://www.icttr.org>> on 14 September 2009.
- Sweetman, C. (1995). Editorial. *Societies in Transition*. Oxford, Oxfam
- Tabak, S. (working draft). *Women in Transition: Challenges of Transitional Justice and Female Combatants in Colombia*. Georgetown University Law Center, Washington. Presented at the Oxford Transitional Justice Research (OTJR) Conference 'Taking Stock of Transitional Justice' held in Oxford on 26-28 June 2009. Paper provided by drs. Venema (Law Faculty Radboud University Nijmegen) who attended the conference.
- Teitel, R. G. (2000). *Transitional Justice*. Oxford, Oxford University Press.
- Teitel, R. G. (2003). Transitional justice genealogy. *Harvard Human Rights Journal*, 16, No. 69-94.
- The Truth and Reconciliation Commission of Liberia (TRC). (2009, July, 1) *Final Report Volume I: Findings and Determinations – Summary of Preliminary Findings, Determinations and Recommendations*. Retrieved from <<https://www.trcofliberia.org/reports/final/final-report/trc-final-report-volume-1-summary>> on 11 November 2009
- The Universal Declaration of Human Rights. (1948, December, 10). United Nations. Retrieved from <<http://www.un.org/en/documents/udhr/>> on 2 December 2009. In text as: UDHR (1948).
- Tiemessen, A. E. (2004). After Arusha: Gacaca Justice in Post-Genocide Rwanda. *African Studies Quarterly*, 8, Issue 1, 57-76. Retrieved from <<http://www.africa.ufl.edu/asq/v8/v8i1a4.pdf>> on 16 August 2009.
- TRC Mandate Liberia. (2005, May 12). By the National Transitional Legislative Assembly. Retrieved from <<https://www.trcofliberia.org/about/trc-mandate>> on 13 November 2009.
- TRC South Africa. (2003, March, 21). *Truth and Reconciliation Commission of South Africa Report*. Retrieved from the website of the South African Government Information: <<http://www.info.gov.za/otherdocs/2003/trc/>> on 10 November 2009.
- UNHCR, The UN Refugee Agency. (2009, June, 16). *2008 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons*. Country data sheets. Retrieved from <www.unhcr.org/4a375c426.htm> on 20 December 2009.

- United Kingdom Commonwealth Secretariat; Women's and Youth Affairs Division (1995). *Working towards gender equality; Programme 1993-1995*. London, Commonwealth Secretariat. In text as: UK Secretariat (1995).
- United Nations Transitional Administration in East Timor (UNTAET). (2001, July 13). *Regulation nr. 2001, 10: On the establishment of a commission on reception, truth and reconciliation in East Timor*. Retrieved from <www.cavr-timorleste.org> on 28 January 2010.
- United States Institute of Peace. (2009) Website. <<http://www.usip.org/>> In text as; USIP (2009).
- UN Secretary-General. (2004). *The rule of law and transitional justice in conflict and post conflict societies*. UN Doc. S/2004/616. Retrieved from <www.un.org> on 12 February 2009.
- Updated Statute of the International Criminal Tribunal for the Former Yugoslavia. (2009). United Nations. Retrieved from <<http://www.icty.org>> on 14 September 2009.
- Verschuren, P. & Doorewaard, H. (1999). *Designing a Research Project*. Utrecht: Lemma.
- Walsh, M. (2008). Gendering International Justice: Progress and Pitfalls at International Criminal Tribunals. In D. Pankhurst (Ed.), *Gendered Peace: Women's Struggles for Post-War Justice and Reconciliation* (pp 31-64). New York, Routledge.
- Women's Refugee Commission (2009). *Fact Sheet*. Retrieved from <www.women'srefugeecommission.org> on 20 December 2009.
- Women's Initiatives for Gender Justice (WIGJ). (2008, December, 31). *Gender Report Card on the International Criminal Court 2008*. Retrieved from <<http://www.wigj.org>> on 23 August 2009.
- Women's International League for Peace and Freedom (WILPF). (2003, April, 28-29). *Commission on Reception, Truth and Reconciliation in Timor Leste (CAVR): Women and Conflict National Public Hearing*. Article retrieved from <<http://www.peacewomen.org/resources/Timor-Leste/timorlesteindex.html>> on 28 January 2010.

8. Executive Summary

Transitional justice mechanisms are set up in countries after an intense period of human rights violations that have occurred because of conflict in that country. These mechanisms are established in the transitional period of a country in conflict to a conflict in (relative) peace, whether this aligns with the transition from a dictatorship to democracy, or not. The instabilities and often a lack of institutional structure of a country in transition makes it a difficult task for transitional justice mechanisms to come to existence in the first place and to carry out their work in the second. Because of these possible problems and as no transition is the same, there have been developed several different ways of dealing with past human rights abuses throughout the last years that may be placed under the heading of transitional justice mechanisms. Examples of these mechanisms are; (inter)national tribunals, hybrid courts, truth and reconciliation commissions, and (semi-)traditional transitional justice mechanisms such as Mato Oput in Northern-Uganda and Gacaca in Rwanda. The wide variety of mechanisms and processes, and the many different issues and philosophical questions that surround the topic of transitional justice all make the field of transitional justice interesting for research. Moreover, the scope and development of the subject also brings forward that transitional justice has become a field of study on its own, with linkages to the fields of international relations, law, and conflict studies.

Another subject of international interest that has developed itself during the last decades is that of gender, often combined with the issue of women's rights. While it has been mainly feminist research that introduced the notion of gender – in the form of women's rights – to the international agenda, the international institutions such as the United Nations have taken over the concern regarding women's rights and women's participation at decision-making levels. In the beginning these developments were mostly aimed at bettering the position of women, through the use of more female involvement, but later research and policy was adjusted to the belief that gender imbalances could not be solved merely by addressing the position of women, and that men and their positions also needed to be dealt with in order to create a gender balance. More attention was given to the definition of gender as being the perceptions of appropriate behaviour for men and women and gender-mainstreaming became a tool to address gender issues in international policies.

It has been the objective of this thesis to combine the above-mentioned fields of study, of transitional justice and gender, into one research. Research that combines the two fields has been scarce up till now, but there is a rising interest in the combination of the two subjects and several authors have recommended there be done more research on this. In order to come to a full understanding of combining gender to transitional justice the connection between gender and conflict has to be addressed. Gender perceptions have a large influence on the division of roles in a conflict itself, and on how the conflict is seen by the outside world, including conflict stereotypes. Firstly, since women are in many societies regarded as the bearers of a culture, as property of that society, and as property of

the men, they have become a big target of sexual and other abuse, especially in ethnic conflicts. Moreover, the men in conflict countries are often the ones to first go into combat as they are seen as the country's warriors or are abducted first for the same reasons, leaving women behind to take care of their families. The fact that women may also be much involved in multiple ways in the fighting forces and that men too may be victims of abuse during a conflict, is, on the other hand, often forgotten, and when people consider the roles of men and women in conflict they are much fixed to stereotypes of men as warriors and women as victims. Transitional justice is most obviously connected to conflict because it deals with the atrocities, victims and perpetrators of a conflict. Because of this, transitional justice mechanisms also inevitably face the consequences of the relation between gender and conflict: The men and women that transitional justice mechanisms want to reach are influenced by gender, and gender is, therefore, an important issue to be taken into account by transitional justice mechanisms. When measuring gender-sensitivity of transitional justice mechanisms one should look mostly at the consequences of conflict and peace on gender and gender relations. Because women play a large part in conflict, women's participation in transitional justice mechanisms' structures may be considered a gender-sensitive characteristic. Furthermore, as gender-based violence has become a usual aspect of conflict and oppression, paying attention to this kind of violence may also be considered gender-sensitive. Moreover, a true gender-sensitive transitional justice mechanisms will translate the understanding of gender as a basis for stereotypes into measures that address not only the 'obvious' gender-sensitive issues such as sexual violence against women, but also issues such as sexual violence against men, and female members of guerrilla groups. From the relatively little information available on the measures taken by several transitional justice mechanisms to be gender-sensitive may be concluded, that though mechanisms have tried to include a gender understanding in their systems - by including more women in their structures, including sexual violence amongst the worst war crimes, including gender as an important subject in documentation, and addressing the difficulties of people coming forward to testify on gender-based violence - the gender issue is often still interpreted as a women's rights issue and follows the typical stereotype of women as victims and men as perpetrators. It cannot be denied that true efforts have been made towards a gender understanding, however, the progress that has been made to include gender in transitional justices strongly relates to gendered stereotypes and needs further attention to be attentive to the wider definition of gender as the perceptions of appropriate behaviour for women and men.