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TRANSITIONAL JUSTICE AND TREATMENT OF REFUGEE RETURNEES SUSPECTED OF CRIMINAL OFFENCES: EAST TIMOR AND BEYOND

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TRANSITIONAL JUSTICE AND TREATMENT OF REFUGEE RETURNEES SUSPECTED OF CRIMINAL OFFENCES: EAST TIMOR AND BEYOND

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Abstract

This Working Paper examines the issue of transitional justice measures for returning refugees who have committed crimes during the conflict era. It begins this examination by outlining generally the contributions and challenges that returning refugees present for post-conflict reconstruction. From these general observations, it turns to outline the specific policy adopted for this particular group by East Timor and drawing on the lessons from this experience, proceeds to identify three overarching factors (identification of refugee caseload; conceptualization of the relationship between refugee return and truth, justice and reconciliation; and division of institutional responsibilities) that a state should take into account when designing such transitional strategies. After addressing these issues of policy design, the Working Paper looks at factors affecting implementation of transitional justice strategies, specifically in relation to securing information flows to returning refugees; the nature of appropriate screening practices; and factors influencing participation of returning refugees in truth and reconciliation mechanisms.

I. Introduction

There is a growing body of literature on the transitional justice strategies that post-conflict societies should adopt to either build, or re-build, their economic, social and political orders. In this literature, one issue is almost completely untouched: the design of transitional justice measures for refugee returnees who have committed crimes during the conflict era. This paper makes a modest attempt to begin to fill this gap by first identifying the contributions and challenges that refugee returnees, and in particular those whom have committed crimes, present for state reconstruction efforts (Section II). Section III then briefly outlines the attempts of one transitional society, East Timor, to design appropriate policies for the treatment of refugee returnees suspected of criminal acts, before turning in Section IV to a consideration of the general factors that a state must take into account when formulating its transitional justice strategies for this particular group. Section IV specifies three such factors that must be taken into account in the planning stage: identification of refugee caseload; determination of the relationship between refugee return and justice, truth and reconciliation; and assignment of institutional responsibilities. In relation to each factor, this paper attempts to draw on the lessons from East Timor to provide general guidance on both good and bad practices in designing frameworks for refugee returnees suspected of committing crimes. Finally, Section V looks at the question of how to implement such policies once designed. In considering how to make these transitional justice strategies work, this paper again draws on the experiences of East Timor to examine questions concerning the provision of information to returnee refugees; appropriate screening practices and additional factors which may hinder the participation of refugees in truth and reconciliation processes.

II. Refugee returnees and post-conflict societies: contributions and challenges

Returning refugee populations have the capacity to simultaneously contribute to, and challenge, post-conflict societies.[1] An appreciation of the *contribution* of returnee refugees to transitional societies has variously informed the contents of peace plans;[2] the allocation of international aid to post-conflict communities;[3] the design of transitional justice mechanisms at both the national and international level;[4] and the general framework of United Nations' peace-building activities.[5]

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[1] See generally Sarah Petrin, *Refugee Return and state reconstruction: a comparative analysis*, UNHCR Working Paper No. 66, Aug. 2002, 5–8 (outlining both "challenges" and "contributions" offered by returnee refugees).

[2] *See e.g.* in the Sierra Leone context, the Conakry Peace Plan (1997) which called for *inter alia*, the return of refugees and displaced persons: Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 30 DENV. J. INT'L L. & POL'Y 325, 351 (2002); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, ftnote 240 (2001) (noting that the Dayton Accords call upon parties to grant amnesty to any "returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict").

[3] *See e.g.* Tanya Domenica Bosi, *Post-Conflict Reconstruction: The United Nations' Involvement in Afghanistan,* 19 N.Y.L. SCH. J. HUM. RTS. 819, 820 (2003) (noting that one of the focus areas of international aid to Afghanistan is the return and repatriation of refugees).

[4] *See* Todd Howland & William Calathes, *The UN International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135, 143 (1998) (tracing comments of states around the formation of the International Criminal Tribunal for Rwanda (ICTR) and recording that Russia defined the task of

The benefits of refugee return for post-conflict societies take a number of forms. First, the desire to bring back a refugee population, and in particular those whom have committed crimes, can push a state toward strengthening its institutional machinery so as to make coming home both a desirable and feasible option. This link between refugee return and state-building, or indeed state-rebuilding, is put at its highest in the definition of state-building as "…efforts by the international community to construct or fortify societies riven by crisis in order to…encourage the repatriation and reintegration of refugees."[6] Indeed, it is true that a state cannot begin to move forward when a substantial proportion of its population remains outside its borders.[7] However, state building does not stop when refugees are brought back within these borders; nor are returning refugees merely passive recipients of state building efforts. On a slightly prosaic, but nonetheless important level, returning refugee populations are important physical resources for state development.[8] Significantly they are also symbolic resources for state development; their return signifies confidence in the state's reconstruction effort,[9] which in turn bestows a legitimacy on the state that galvanizes both domestic and international actors to continue to support transition. As well as this "validation" of the state, returning refugees also serve an important function in stabilizing post-conflict political, social and economic orders. In part this function is a negative one; by coming back returnees who have committed crimes are removed from border camps where they may have joined or been coerced to join activities designed to destabilize the state. This notion that refugees present less of a security threat when within borders has consciously informed refugee return policies in transitional societies such as East Timor.[10] In this respect, the way that transitional societies think about the relationship between security and refugees inverts dominant refugee and security narratives in non-transitional

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the ICTR to include the return of refugees, while New Zealand emphasised that fair trials at the ICTR would encourage refugee return); Bosi, *supra* note 3, at 822-3 (2003) (describing one of the functions of the Bonn Agreement's Special Independent Commission for the Convening of the Emergency Loya Jirga as being to specify criteria for allocating seats to the Afghan refugees living in Iran, Pakistan and elsewhere, and Afghans from the diaspora). Note however that these transitional justice mechanisms are not always fully cognizant of the concerns of returning refugees: *see* Laura R. Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L. J. 287, 295 (2003) (outlining that the limitation of the territorial jurisdiction of the Sierra Leone Special Court to Sierra Leone denies recourse to refugees who have suffered abuses by Sierra Leonean actors outside the country); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 AUT LAW & CONTEMP. PROBS. 9, ftnote 49 (1996) (highlighting that holding prosecutions of rape in the former Yugoslavia in the Netherlands is problematic as "victims may be refugees in different countries").

[5] See e.g. Fen Osler Hampson, Symposium: Making Peace Agreement Work: The Implementation and Enforcement of Peace Agreement Between Sovereign and Intermediate Sovereign, 30 CORNELL INT'L L.J. 701, 702 (1997) (noting that in his Agenda for Peace, former UN Secretary General Boutros Boutros-Ghali includes repatriating refugees in the definition of peacebuilding). See further Juma, supra note 2, at 374 (identifying refugee assistance as one facet of the UN contribution to ending disputes).

[6] See ARTHUR HELTON, THE PRICE OF INDIFFERENCE: REFUGEES AND HUMANITARIAN ACTION IN THE NEW CENTURY 30 (2002) cited in Petrin, *supra* note 1, at 1.

[7] *Id.* at 5 (stating that a "State cannot achieve legitimacy when a significant proportion of its population remains outside the territory it controls…"); Chris Dolan, Judith Large & Naoko Obi, *Evaluation of UNHCR's repatriation and reintegration programme in East Timor*, 1999–2003, EPAU/2004/02, Feb. 2004 at 60 (noting the belief in East Timor that "nation-building could not really take place while a substantial proportion of the population remained outside the country").

[8] Petrin, *supra* note 1, at 5.

[9] *Id.*

[10] Dolan, Large & Obi, *supra* note 7, at 9.

countries such as Australia, which rely on portrayals of refugees as destabilizing threats to domestic order to keep refugees firmly outside of the state's borders.

This is not to say that the return of refugees, and particularly those who have committed crimes, will always be harmonious and smooth.[11] Indeed, turning to the *challenges* that returnee populations present to post-conflict societies, it is clear that states face key problems in facilitating, managing and absorbing returnee populations, particularly in the case of erratic patterns and pace of return, and where international pressure forces premature receipt of returning refugees.[12] Insufficiently managed return can also result in internal displacement.[13] Such displacement and/or secondary movements undermine the extent to which the well-being of returnees can be monitored and also affects the ability of returnees to partake in local community reconciliation mechanisms (to be discussed further below in Section V). However, these latter challenges only kick in once the preliminary, and maybe even prime, challenge has been met: designing transitional strategies that will get refugees to come back to the state from which they have sought refuge in the first place. The next section of this paper outlines how East Timor sought to meet this particular challenge, before turning in Section IV to outline some of the general considerations that apply in designing such strategies.

III. The East Timor Model Explained

A. Introduction

On 25 March, 2002 the Second Transitional Government and the United Nations Transitional Administration in East Timor (UNTAET) issued its four-page *Policy on Justice and Return Procedures in East Timor* (hereinafter *Policy on Justice and Return*) for returning refugees suspected of committing crimes in 1999.[14] The document records the policy that has been applied since the referendum violence of September 1999.[15] Before detailing the processes that will apply for returnees who committed a crime in 1999, the *Policy on Justice and Return* sets out a number of important observations and principles. The first of these concerns the basis for the policy. In the Introduction to the *Policy on Justice and Return* it is noted that the UN and Transitional Government of East Timor is "keen to promote the return of refugees."[16] A key step in achieving this objective is to provide clear explanation of procedural guidelines to counter misinformation and inform returning refugees of justice procedures.[17] Second, the *Policy on*

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[11] This is the case even where the return may be temporary: *see e.g.* Brett Dakin, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska: Human Rights in a Multi-Ethnic Bosnia*, 15 HARV. HUM. RTS. J. 245, 261 (2002) (outlining the events surrounding the reconstruction of the Ferhadija Mosque in March 2001, in which hundreds of Muslim refugees were bussed in for the effort, but were disrupted by a crowd of 3000 to 4000 Bosnian Serb demonstrators who threw objects at the visiting refugees and set alight refugees' prayer rugs).
[12] Petrin, *supra* note 1, at 5.
[13] *Id.*
[14] The *Policy on Justice and Return* acknowledges that there are many factors influencing return (listing access to pensions; aid packages for returnees; overall economic situation; and justice procedures for those suspected of committing crimes in 1999) and explicitly focuses only on the issue of justice procedures.
[15] UN Transitional Administration in East Timor, *East Timor issues policy paper on refugee returns*, 25 Mar. 2002, *available at:* www.reliefweb.int/w/rwb.nsf/0/f6c542fad1901ad685256b87005d0cea?OpenDocument.
[16] *Id.*
[17] *Id.*

Justice and Return articulates the freedom of choice of returning refugees in both strong and broad terms:

> All refugees are free to decide whether or not to return home. No matter why they chose to leave East Timor, they are welcome back. This includes people who committed crimes in 1999. Most refugees did not commit such crimes.

Thirdly, the *Policy on Justice and Return* conceptualizes the link between justice and peace and reconciliation in the following terms:

> The leadership and people of East Timor are truly committed to peace and reconciliation, but this can only be fully achieved if those suspected of having committed a serious crime are brought to justice.

B. Returning refugees: "lesser crimes" and "serious crimes"

The processes that apply to a person who committed a crime during 1999 are broadly divided into two categories: those applicable to refugees who committed "lesser crimes" (Part A) and those applicable to refugees who committed "serious crimes" (Parts B, C and D). Refugees who committed "lesser crimes" prior to 25 October 1999 and who return to their village are eligible to participate in the community reconciliation process facilitated by the Commission for Reception, Truth and Reconciliation. The *Policy on Justice and Return* does not define what constitutes a "lesser crime" but provides the following non-exhaustive list by way of guidance "…isolated incidents of looting, house-burning or minor assault." Once a refugee who has committed a "lesser crime" decides to return, the onus is on the returnee to contact the Commission for Reception, Truth and Reconciliation; submit a written statement; participate in a hearing and "probably undertake" an act of community reconciliation (such as "…re-building the house of the victim or paying compensation for loss of livestock…") as devised by a panel comprised of a Regional Commissioner and local community leaders.

A separate set of procedures applies to those who have committed a "serious crime"[18] and "want to return to East Timor for good." Such returning refugees are channelled through the criminal justice system, in particular the Serious Crimes Unit and the Special Panels for Serious Crimes at the Dili District Court. The timing and means by which a suspected person is so channelled depends on the status of investigations against them. The *Policy on Justice and Return* identifies three different arrest scenarios: if an indictment has been filed and an arrest warrant obtained; if there is no indictment, but an arrest warrant has been obtained; and if there is no indictment or arrest warrant. In the case of the first two scenarios, a person is liable to arrest if they enter the jurisdiction of East Timor (including in "Go and See" visits as outlined in Part C),[19] except where they are participating in a United Nations High Commissioner for Refugees (UNHCR)-

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[18] A "serious crime" is defined to include "…acts such as murder, torture, sexual offences and large-scale crimes (e.g. organised destruction of property) committed between 1 January and 25 October 1999 as well as other Crimes Against Humanity."

[19] The *Policy on Justice and Return* sets out the conditions of a "Go and See" visit as follows: the visit must have been arranged and facilitated by UNHCR and UNHCR must have provided to "all relevant UN and Government agencies" 48 hours notice of the visit.

facilitated Reconciliation Meeting at or near the border (Part D).[20] The third scenario—where there is no indictment or arrest—is the most uncertain for returning refugees. On the one hand, the *Policy on Justice and Return* clarifies that it will be "extremely rare" for a suspect to be arrested without a warrant, and that this will only occur if "there is a risk that a suspect may flee, tamper with evidence or endanger public safety." However, the *Policy on Justice and Return* also carves out another scenario in which arrest may take place post-return:

> If there is currently no indictment or arrest warrant against an individual who is nevertheless suspected of committing serious crimes, investigations by *the SCU will continue until such time as enough evidence is compiled for an indictment to be filed.* The arrest warrant would not usually be obtained until the investigation is complete. At *that stage (which may be several months later) the suspect may be arrested.*[21]

These three different arrest scenarios can be summarized as follows:

	Entry into Jurisdiction of East Timor through "Go and See" Visits	Entry into Jurisdiction of East Timor through UNHCR-facilitated Reconciliation Meeting at or near the border	Entry into Jurisdiction of East Timor through neither "Go and See" Visits nor UNHCR-facilitated Reconciliation Meeting at or near the border
Indictment filed and arrest warrant obtained against person suspected of "serious crimes"	ü	û (unless departs the notified venue for the meeting)	ü
No indictment, but arrest warrant obtained against person suspected of "serious crimes"	ü	û (unless departs the notified venue for the meeting)	ü
No indictment or arrest warrant against person suspected of "serious crimes"	û (although such persons will not be exempt from arrest in the future should	û	û (unless there is a risk that a suspect may flee, tamper with evident or endanger public

[20] Part D provides that "No one suspected of committing serious crimes will be arrested whilst travelling to, attending or travelling from a reconciliation meeting at or near the border, provided the reconciliation meeting is facilitated by UNHCR and takes place within a secure and define venue, on a weekday during daylight hours." UNHCR must provide 48 hours notice of the meeting and refugees intending to attend the meeting must carry identification and remain in the specified venue. If there is an arrest warrant for the refugee and the refugee departs the notified venue then that refugee is liable to arrest.

[21] Emphasis added.

	they choose to return for good)		safety; or where an arrest warrant is obtained at a later stage on completion of investigation)

ü = Liable to arrest û = Not liable to arrest

In addition to identifying these different arrest scenarios, the *Policy on Justice and Return* sets out procedures concerning lists of indictments and arrest warrants; location of arrest; review hearings following arrest; and detention or release on bail. In relation to the lists of indictments and arrest warrants, the *Policy on Justice and Return* provides that the Serious Crimes Unit will keep a list of persons against whom there is an indictment and a separate list of persons against whom there is an arrest warrant. Both of these lists are to be made available to UNHCR, who "may inform all people who are on these two lists of their status, in case concerned refugees want to have access to this information prior to making the decision on whether or not to voluntarily repatriate." Under the *Policy on Justice and Return*, UNTAET is enjoined to arrange for "appropriate circulation of the indictment list," although there is no definition of what constitutes "appropriate circulation" in this context. It is also worth noting that on the face of the *Policy* there are no means by which returning refugees can proactively and independently seek access to the information regarding their indictment or arrest status—the *Policy on Justice and Return* relies on UNHCR and UNTAET as conduits for this information. On the location of arrest, the *Policy on Justice and Return* stipulates the general rule that arrests be made in the suspect's home community, taking into account "the sensitivities of the situation and the local conditions." At the point of arrest, the suspect's rights must be "fully respected and explained to him/her by the Civpol/ETPS." Apart from the usual set of rights accompanying arrest (e.g. the right to remain silent), the *Policy on Justice and Return* secures the right to have a lawyer appointed and paid for. At the Review Hearing to take place within 72 hours of arrest, the suspect is represented by a lawyer and the Investigating Judge again informs the returned refugee of their rights. This Review Hearing is for the Investigating Judge to decide whether the suspect will be detained, released or released on bail with conditions; the *Policy on Justice and Return* confirms that in most cases, the prosecutor will seek release of suspects under conditional bail until the commencement of trial.

IV. Preliminary steps: refugee caseload, transitional justice mechanisms and institutional responsibilities

A. Refugee returnee composition and caseload

The first step in designing transitional justice measures to receive refugee returnees who have committed crimes is to have a clear picture of the composition of the refugee caseload. In undertaking this exercise, it is not enough to simply divide the refugee population into "perpetrators" and non-perpetrators[22] and then to set about designing a "justice and return" policy with only the former group in mind. The first reason why such an approach is insufficient is that it assumes that those who have committed crimes and those who have not committed crimes can be easily divided into two recognizable and distinct groups. This is simply not the case. In transitional societies that have seen multiple acts of individual and collective violence, it takes time to investigate and put together a coherent record of past atrocities. Much of the legwork on this process takes place during the very transitional justice mechanisms in which returning refugees will partake on their return, such that to definitively apply labels of "perpetrator" and "non-perpetrator" whilst refugees are still outside of their country of origin may be both premature and misleading. The *Policy on Justice and Return* recognizes this when (as identified above) it reserves the possibility for later arrest of a returned refugee for whom there was neither an arrest warrant nor indictment at the time of their return.

Secondly, dividing a refugee population into "perpetrators" and "non-perpetrators" ignores the extent to which "perpetrators" may themselves also have been victims of violence. To ignore the sometimes blurry line between perpetrator and victim status can result in the design of inappropriately punitive transitional justice mechanisms that either deter refugees from return to their country of origin or should they return, perpetuate their unfair treatment at the hands of the state. Neither outcome bodes well for the interests of state-building and reconstruction identified in Section II of this paper.

Thirdly, a focus on the distinction between "perpetrators" and "non-perpetrators" can erase distinctions within the perpetrator class. The *Policy on Justice and Return* attempts to avoid this trap by dividing up "perpetrators" according to the seriousness of the crime committed. In principle this is a good approach. It allows, for example, for a better projection of return incentives and patterns on the understanding that those who have done little wrong will require less incentives to return more quickly, whereas those who have greater to reason to fear return will stay longer in camps and require greater assurances about the transitional mechanisms which they will face.[23] It also enables better design of transitional justice mechanisms; if, for example, it is determined that the majority of returnee refugees have committed minor offences and will participate in truth and reconciliation (as opposed to justice) processes, then greater resources and funding can be devoted to the former. However, to be even more effective, future such policies for transitional societies should have a clearer and more comprehensive list of the categories of crime that will be used to make such divisions, whilst still being mindful of the

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[22] This appears to have been the approach adopted by UNHCR in East Timor where it was assumed that the refugee camp population consisted of militias and those who were being kept in the camps against their will: see Dolan, Large & Obi, *supra* note 7, at 4.
[23] *Id.* at 17.

inherent limits of such an exercise prior to the participation of the returnees in reconciliation and justice measures.

Fourth, conceiving of a refugee population as consisting of those who have committed crimes and those who have not, ignores the connections that exist between the two groups. Specifically, refugee populations also contain family members and other associates of "perpetrators." This is important to recognize because the decision of a "perpetrator" to return home will be influenced not only by what they think will happen to them, but also by what return will mean for those close to them, particularly as regards restitution of their property.[24]

Further, designing a policy on return and justice with only "perpetrators" in mind ignores the extent to which other members of the refugee population will look to how "perpetrators" are being dealt with when making their own choice about whether or not to return. If it is perceived by other elements of the refugee population that the policy of the state toward those who have committed crimes is too lenient, or alternatively too harsh, then their own return may be discouraged.

B. Determining the relationship between refugee return, justice, truth and reconciliation

Every post-conflict society faces particular challenges in striking the appropriate balance between the "truth" and justice mechanisms it will use to facilitate its transition. In facing these challenges, states are cognizant of, and guided by, the increasing consensus that neither a purely "truth" or "justice" approach is sufficient and that instead both approaches are necessary for effective transition.[25] This consensus is a good starting point, but it can sometimes obscure the extent to which hard choices have to be made regarding the substance and sequencing of non-judicial and judicial mechanisms.[26] These hard choices are particularly manifest around questions of refugee returnee policy. On the one hand, the significant contribution that returning

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[24] See Timothy Cornell & Lance Salisbury, *The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia & Herzegovina,* 35 CORNELL INT'L L.J. 389, 391 (2002) (noting the importance of putting in place civil justice mechanisms, particularly those relating to property).

[25] See e.g. Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L. L. & POL. 485, 491 (1996). The inadequacy of solely relying on trial mechanisms is demonstrated by the experience of the International Criminal Tribunal for the Former Yugoslavia, where despite the number of criminal prosecutions, public and victim concerns remain unmet: *see e.g.* Marieke Wierda et al, The International Center for Transitional Justice, *Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone* (June 24, 2002) *available at* http://www.ictj.org/downloads/TRCSpecialCourt.pdf at 3.

[26] Most recently these hard choices have been made in the Sierra Leone context in attempting to forge a relationship between the Sierra Leone Special Court and the Truth and Reconciliation Commission. For an overview of the complexities of determining the relationship between these mechanisms in this context, *see e.g.* Human Rights Watch, *Policy Paper on the Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission* (Apr. 18, 2002) at http://www.hrw.org/press/2002/04/sierraleoneTRC0418.htm; Office of the Attorney General and Ministry of Justice Special Court Task Force, *Briefing Paper on the Relationship between the Special Court and the Truth and Reconciliation Commission, Legal Analysis and Policy Considerations of the Government of Sierra Leone for the Special Court Planning Mission* (Jan. 17-18 2002) at http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/SLGovTRC_SpCt_Relationship.doc; Williams Schabas, *The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS Q. 1035 (2003).

refugees make to post-conflict societies (as discussed above in Section II) points toward preference being given to the imperatives of reconciliation. In the context of refugees who have committed crimes, this means designing return and transitional justice policies that encourage mass return by primarily directing offenders back into the community and not the criminal justice system. In contrast, preference for a justice model would require that those who have committed crimes be tried for them, lest impunity and non-observance of the rule of law dictate the foundations of the new post-conflict order.[27] Rarely though are the choices laid out in such stark terms; reconciliation will not be achieved if the population to which refugees return harbor discontent over the failure of refugees to be punished for heinous crimes and justice procedures will sit unused if refugees choose not to exercise their right to return in light of the harsh sanctions that would result.[28]

In part, the answer to this dilemma lies in the approach in the *Policy on Justice and Return* of distinguishing between returning refugees on the basis of the seriousness of crimes committed. Under this approach, as outlined above in Section III, those who have committed "lesser crimes" (and whose return is therefore less likely to be contested by the community) partake in local reconciliation processes, whereas those who have committed "serious crimes" (and are therefore seen to be deserving of harsher punishment) are dealt with via the criminal justice system. But where the niceties of this compromise fall down, and where it fell down in East Timor,[29] is when the justice system to deal with serious offenders is not yet in place. In this scenario, the push for reconciliation continues to encourage the return of refugees who have committed serious crimes (including Crimes Against Humanity) but the lack of judicial machinery means that these members are sent into a (potentially hostile) community until prosecution takes place at a much later date.[30] Once again, in this scenario, neither the imperatives of truth and reconciliation or justice are truly achieved. If a state decides that it wants to encourage the mass return of refugees, including those who have committed crimes, then it must ensure that it has a strong conceptual and practical framework for mediating the inevitable tensions between return, reconciliation and justice that will result.

C. Clarifications of institutional responsibilities and relationships

Post-conflict societies are hotbeds of institutional activity and growth. Managing these institutions in their relations vis-à-vis one another and vis-à-vis the local population is an important part of any transitional justice strategy. In designing this strategy, two particular questions must be addressed: the relationship between UN agencies working in the society; and the relationship between these UN agencies and indigenous or domestic processes.

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[27] For an example of this position see Suzannah Linton, C*ambodia, East Timor and Sierra Leone: Experiments in International Justice*, CRIM. L. FORUM, 12: 185-246, 244 (2001) (noting that "Criminal justice is a question of legal obligation and the politics of reconciliation must not dictate investigative and prosecutorial strategy"). *See further* Dolan, Large & Obi, *supra* note 7, at 87.

[28] See Dolan, Large & Obi, *supra* note 7, at 89 (noting that it would not have been possible to bring people to trial if they stayed in East Timor, such that the "…only hope for justice lay in bringing excludable elements back to East Timor, where there would be the possibility of them being brought to trial through a properly functioning Serious Crimes Unit.").

[29] *Id.* at 88.

[30] As described by a former UNHCR staff member cited in *id.* at 89: "Killers were received back on condition that there would be a justice process later (and so that in the immediate sense they could help dig the fields)…"

The first challenge in this area of refugee return policy is to maximize co-ordination and coherency between UN agencies. This internal consistency is needed to enhance the legitimacy of the UN in the eyes of the local population and to instil confidence that reconstruction will not be *ad hoc* and piecemeal. Indeed, it is this lack of fissure that serves as an important demarcation between the conflict and post-conflict order. It is also necessary to avoid duplication of (often scant) resources and conversely, to ensure that protection gaps do not result in the flurried rush to observe mandates and implement programs. In practice, however, this uniformity of UN action has been difficult to achieve. This disjointedness, and at times outright conflict, between agencies can be seen in relation to the question of repatriation of those refugees who have committed crimes.

Specifically, the East Timor situation demonstrates that divisions can be expected to crop up around the key question of which former militias (or other offenders) and their families/followers meet the excludability threshold.[31] In East Timor, tensions on this particular issue proliferated between three main bodies: the peace-keeping forces, the Serious Crimes Unit and UNHCR.[32] The key source of these tensions was the pressure from UNTAET (and in particular the UNTAET Chief of Staff) to maximize returns. This pressure manifested itself in various forms, including the adoption of a "very aggressive approach to reconciliation meetings with high profile militia leaders" and through non-execution of arrest warrants issued by the Serious Crimes Unit against key militia leaders due to informal agreements between the General Prosecutor and Chief of Staff who was attempting to negotiate the return of those same persons.[33] This approach was not well-received by the peace-keeping forces, who were "not sympathetic to the Chief of Staff's approach and at times expressed exasperation and anger at repatriations."[34] The Chief of Staff's approach also put UNHCR in a particularly difficult situation. On paper, the policy position of UNHCR was relatively clear. There was an acknowledgement that UNHCR would likely be called upon to participate in return movements of militia leaders who were clearly excludable and UNCHR staff members were "therefore requested to refrain from participating in any meetings/negotiations with these persons."[35] At the same time however, UNHCR had an expressed commitment to facilitating the return of those non-excludable persons who may be supporters/followers of excludable elements.[36] The combined effect of these two policy positions was as follows:

[31] A person is excluded from refugee status under the *Convention Relating to the Status of Refugees* 1951 when they come within Article 1(F) of the Convention, which provides as follows: The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a refugee; and (c) He has been guilty of acts contrary to the purposes and principles of the United Nations. On the challenges relating to excludability in East Timor see further *id.*, at 80.
[32] Dolan, Large & Obi, *supra* note 7, at 80, 81.
[33] *Id.* at 81.
[34] *Id.* at 80.
[35] Memorandum drawn up by UNHCR Geneva's Bureau for Asia and the Pacific in November 2000 cited in *id.* at 88.
[36] *Id.*

> In short, UNHCR could help former militia members providing they were not excludable. To do so it had to draw nuanced distinctions which were perhaps not always evident to external observers, nor practically tenable given the family structures of returnees and the delays in getting the Serious Crimes Unit up and running and in a position to prosecute. There may thus in practice have been something of a grey area between the clearly excludable and the clearly non-excludable elements (especially where both categories could be found within one returnee household). Certainly there was a perception by non UNHCR personnel that the issue was being fudged, and that in helping to bring back the non-excludable "followers" of excludable militia leaders the pursuit of justice was being made yet more difficult.[37]

This perception that UNHCR was assisting in the return of people involved in the events of 1999[38] also prejudiced the standing of UNHCR with the local population, which in turn limited UNCHR's ability to partake in other reconstruction efforts.[39] What this example then demonstrates is that while the incentives for inter-agency co-operation may be strong, there must also be an effort to ensure that such co-operation does not come across as collusion. Thus, another adverse consequence of allowing UNTAET's political objectives to dictate the exercise of its protection mandate,[40] was that UNHCR thereby jeopardized its ability to meet the second key institutional challenge: maximizing co-operation between UN and indigenous or domestic processes.

This challenge is an important one for a number of reasons. First, questions concerning the legitimacy and credibility of actors and institutions abound in any transitional context, but most recently, these questions seem to be taking place around issues such as the viability of utilizing international mechanisms and actors versus "home-grown" institutions and national staff.[41] It is necessary to get away from this "us" versus "them" narrative; co-operation between international and national agencies is essential for local capacity-building and international processes lose relevance if they are not grounded in an appreciation of local tradition and practice. Moreover, often international and national processes will be dealing with substantially similar issues. In such circumstances, co-operation and co-ordination are desirable to avoid both wasted resources and the sending of potentially conflicting messages to the domestic population. This scope for overlap of functions is evident in the protection work of UNHCR and the Commission for Reception, Truth and Reconciliation in East Timor. In part this overlap derives from their respective mandates and functions. When the Commission for Reception, Truth and Reconciliation was set up it was seen as a means of encouraging refugee returns[42] and UNCHR is increasingly expanding its role in the return and reintegration of refugees from providing

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[37] *Id.* at 89.
[38] *Id.* at 6 (noting that despite an awareness of this perception at the highest levels, the perception was not successfully countered).
[39] *Id.* at 89.
[40] *Id.* at 8.
[41] *See e.g.* in relation to Sierra Leone, Stuart Beresford and AS Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT'L L. 635, 647 (2001).
[42] Taina Järvien, Finish Institute of International Affairs, *Human Rights and Post-Conflict Transitional Justice in East Timor,* UPI Working Papers 47, 56 (2004).

material assistance to promoting peaceful and positive interactions with local populations.[43] Indeed, in March 2004, the High Commissioner for Refugees, Mr. Rudd Lubbers, outlined to the Commission on Human Rights the expanded role that UNHCR is prepared to assume in post-conflict societies and detailed the value of transitional justice processes in the following terms:

> There is now a greater understanding than before of the important role of transitional justice strategies, both to deal with past violence and human rights abuses, as well as their recurrence. These include prosecuting perpetrators of war crimes and other human rights abuses, revealing the truth about past crimes, providing victims with reparations, vetting individuals, reforming abusive institutions and promoting reconciliation.

Some examples of this expanded role in East Timor include the fact that UNHCR ran a series of more than fifty Conflict Resolution Workshops in various villages in all the districts apart from Oecussi[44] and that in cases of retribution against refugee returnees, UNHCR protection and/or field staff organized open meetings with village chief, National Council of East Timorese Resistance (CNRT) leaders, sometimes Falintil (the former armed liberation movement), CivPol and UNTAET Human Rights Officers and the local population to discuss solutions to problems experienced. The significance of these meetings and their connection with reconciliatory processes is summarized as follows:

> Such meetings can be considered a contribution not just to peace-making but also to peace-building to the extent that they offered a small-scale foretaste of the important truth and reconciliation meetings to be established by the CAVR in the subsequent years.[45]

It is evident that there was some attempt to facilitate institutional exchange and co-operation between UNHCR and the Commission for Reception, Truth and Reconciliation. For example, to assist with local post-return reconciliation and reintegration, UNHCR offered logistical and advisory support to the Commission.[46] However, this institutional interaction could have been improved. In particular, the capacity of the Commission to deal with tensions between returnees and the local population[47] could have been better utilized to plug some of the logistical gaps that existed in UNHCR's returnee monitoring regime. Again, however, the extent to which this co-operation could take place without compromising the work of the Commission comes back to how the public views UN agencies, which in turn depends on how good a job the UN system does in co-ordinating and respecting the responsibilities of its own entities.

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[43] Peter van der Vaart, Head of the Legal Unit, UNHCR Brussels, Belgium *The Role of the UNHCR in Helping Refugees to Return to Post-Conflict Nations*, Post-Conflict Reconstruction: Nation or Statebuilding? Hague Conference, 22 May 2004. See also UNHCR News, *Look beyond humanitarian dimension for refugee solutions, Lubbers tells Human Rights Commission*, Mar. 16, 2004 *available at* http://www.reliefweb.int/w/rwb.nsf/o/38a107de919fe3ea85256e59006d7f8b?OpenDocument.
[44] Dolan, Large & Obi, *supra* note 7, at 33.
[45] *Id.* at 85.
[46] *Id.* at 87.
[47] See *id.* at 35 (noting that the Commission provided this useful role).

V. Making transitional justice strategies work

A. Information and the refugee's decision to return

Having formulated a strategy for receiving refugees who have committed crimes the next step is to make such refugees familiar with its terms. In the absence of such information, those who have committed crimes will not likely return.[48] The most obvious way of providing this information is to publicly release a copy of the strategy. Indeed, this desire to provide information and to, in turn, encourage return lies behind the release of the *Policy on Justice and Return*:

> It is hoped that a clear articulation of the justice and return procedures will allow the refugees to make a clear, informed choice on whether or not to return, and reassure those guilty of committing serious crimes that they will have full rights to a free and fair trial if they return.[49]

However, to be effective, the information flow cannot begin and end with the publication of the relevant policy. In particular, the entity responsible for the design of the strategy should also put in place mechanisms to ensure the widespread dissemination of the policy in all local languages and in other (e.g. pictorial) forms. It should also organize information workshops, perhaps using community leaders or members of bodies such as truth and reconciliation commissions, to explain the policy and to answer questions that returning refugees have concerning its general tenets. UNHCR should not assume responsibility for the running of these workshops, but should be a key partner in determining whether, when and where such workshops should take place. Further, the transitional administration or its representatives should not be involved in giving advice on a returning refugee's particular situation. This is so because a returning refugee will not be full and frank about their concerns with a person who is a representative of the entity that will ultimately be responsible for deciding his/her fate. Nor, unfortunately, could it be guaranteed that the person giving the advice is operating in a political and/or moral vacuum when it comes to questions of justice and return. Instead, the transitional administration should make available, free of charge, the services of non-government affiliated lawyers to provide preliminary advice on the application of the policy to the individual concerned. This is particularly the case where, as in East Timor, the relevant policy draws distinctions based on the seriousness of the crime committed. In these cases, a refugee is entitled to have explained to him/her the difference between "lesser" and "serious" crimes and the various consequences that flow from this categorization (including for example, the different arrest scenarios applicable to their particular situation). The *Policy on Justice and Return* already provides for the services of a lawyer free of charge when a refugee returnee is arrested, but this is too late—the same service should be provided pre-return to ensure that the decision to return is truly free and informed.

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[48] Daniel Fitzpatrick, *Land Policy in post-conflict circumstances: some lessons from East Timor*, UNHCR Working Paper No. 58, Feb. 2002 at 7 (noting "Those who had committed relatively minor crimes of arson and looting also often wished to return but were unsure of what punishment awaited them").

[49] *See East Timor issues policy paper on refugee returns, supra* note 15; UNTAET Daily Briefing, *March refugee return hits highest level in two years*, 28 Mar. 2002 *available at* www.reliefweb.int/w/rwb.nsf/o/76b077ffc95d21a049356b8b0006950c?OpenDocument (noting that the policy release was designed to counter misinformation and provide returning refugees with an understanding of the justice structures in place in East Timor).

Should other entities (such as UNHCR) choose to run separate information campaigns to encourage return of those who have committed crimes, this should not be opposed, particularly given the wide exposure that UNHCR has to the refugee population. In the context of East Timor, UNHCR did run such information initiatives to sustain refugee return flows,[50] including Mass Information Campaigns,[51] "Go and See" Visits[52] and border reconciliation meetings. However, should such campaigns be pursued, it is important that all involved are cognizant of the political sensitivities of the activities undertaken. This awareness requires, for example, the development of clear and consistent policy and practice around the question of which refugees should be able to participate in reconciliation and information activities, such as border meetings and "Go and See" visits. In the context of East Timor, this question of who was eligible to participate vexed authorities between 2001 and 2003 and was the source of much inter-agency conflict.[53]

B. Information and the screening of refugee returnees

In addition to ensuring appropriate information systems are in place for refugees to decide whether they want to return, a state should ensure that its own information programming is capable of screening these returning refugees. This screening is important on a number of levels. First, screening becomes important in those instances where participation in pre-return reconciliation activities is contingent on a refugee's status. For example, in East Timor, participants in "Go and See" visits were meant to receive clearance from the UNTAET Serious Crimes Unit prior to attendance. However, that Unit's database of those suspected of serious crimes was not complete, with the result that "…certain leaders were brought on 'go and see' visits who should not have been, possibly contributing to a sense that justice would not be done and people could return with impunity."[54] Second, where a policy (such as that in East Timor) makes distinctions between refugee offenders, screening is necessary to be able to direct returnees into the particular transitional mechanism (i.e. "truth" or "justice") that is applicable to them on return. It is further incumbent on the state to ensure that the compiling of information databases and screening of refugees are undertaken by appropriate entities and in ways that maximize suitable inter-agency information sharing.[55] Both of these conditions should be observed to prevent abuse of returning refugees in the screening process. The need to articulate

[50] Dolan, Large & Obi, *supra* note 7, at 1 (noting that after initial mass returns in early 2000, refugee flows stemmed thereby requiring efforts to sustain levels of return).
[51] *See id.* at 18 (explaining that Mass Information Campaigns were designed to counter rumors and "disinformation" and to enable free and informed choice on the question of whether to return).
[52] *See further id.* at 18–19 (outlining the success rates of such visits and the political sensitivities that such visits entailed).
[53] *See further* Järvien, *supra* note 41 at 66 (charting the shift from border reconciliation meetings in 2001-2003 which focused on return of refugees, to those that took place in 2003, which focused on "reducing tension and promoting peace" and identifying tensions that arose concerning the issue of involvement of those who had been indicted for serious crimes).
[54] Dolan, Large & Obi, *supra* note 7, at 35.
[55] On the latter point, it is the case that in transitional societies many agencies may be undertaking similar activities, but under different names—e.g. when UNHCR attempts to apply the "exclusion" clause, it asks the same types of questions (e.g. relationship of person with Indonesian authorities and/or militias, and whether he or she had had any direct involvement in the violence of 1999: see *id.* at 48) that UNTAET and other authorities are asking in their own screening processes.

these conditions is evidenced by the situation in East Timor where it has been recorded that CivPol and local UNTAET officials "permitted" screening of returning refugees by "irregular CNRT security groups," a practice that sometimes involved maltreatment and in once case stabbing and beating of a militia member.[56]

C. Additional factors influencing participation of returned refugees in truth and reconciliation processes

Outside of information concerns, there are a series of factors that need to be addressed to ensure that refugees properly partake in transitional justice mechanisms on return. The need, for example, for a functioning judiciary system has been mentioned elsewhere and will not be elaborated further in this section. Instead, this section outlines issues that will impact on the extent to which returnee refugees are effectively received by non-judicial mechanisms, such as truth and reconciliation commissions. The first consideration relates to the timing of return. To the greatest extent possible, emphasis should be placed on ensuring that truth and reconciliation processes are up and running before refugees exercise their right to return. In practice this may not present great problems: refugees suspected of committing crimes are not going to be in the initial phases of mass return and the time that it takes to convince them to return can be used to put in place the appropriate structures for reception. What may prove to be a greater challenge is ensuring that when such refugees do return, they return to their local communities in which reconciliatory activities are to take place. One way to try and ensure that this happens can be to make return to original areas a condition of return (this is the approach taken for example in the *Policy on Justice and Return*). However, this alone is not sufficient; the pattern of East Timor shows that as rates of return decrease, the complexity of secondary movement increases, thereby requiring more labor-intensive efforts on the part of relevant entities[57] to ensure that returning refugees do not simply return to major cities with significant economic activity.[58] Failure to control these complex patterns of secondary movement will also diminish the extent to which UNHCR and other bodies can reliably notify communities of the impending arrival of returnees. This notification process is important; communities are better able to integrate returnees into reconciliation activities when they have had to time to reflect in advance on the appropriate acts of reconciliation they would like the refugee to perform. One way to minimize secondary movement and to alert communities of a refugee's return would be to establish border transit centers to house refugees while communities are informed of anticipated returns.[59] This responsibility of notification should be shared among a number of entities, including local non-governmental organizations, as the experience in East Timor demonstrates that UNHCR may not always have the capacity to do this on their own.[60] These transit centers may also serve another important function of readying refugees for their own return. Recently returned refugees "have

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[56] Megan A. Fairlie, Affirming Brahimi: East Timor makes the case for a Model Criminal Code, 18 AM. U. INT'L L. REV. 1059, 1085,1087 (2003).
[57] Dolan, Large & Obi, *supra* note 7, at 19-20.
[58] *Fitzpatrick*, supra note 47, at 10, 12 (noting that the absence of a detailed policy on return in East Timor meant that refugees were simply asked where they would like to be returned, to which the common answer was Dili; the significant economic activity in Dili and the failure of UNTAET to provide incentives for return to original areas, meant that many refugees remained there).
[59] Dolan, Large & Obi, *supra* note 7, at 65 (noting that in East Timor, UNHCR and IOM run a transit center at the border while they notify communities of return).
[60] *Id.* at 49, 52.

no shared history or traditions"[61] and should not be expected to always return and reconcile in a seamless and safe manner. There may also be those returning refugees who may genuinely wish to return, but may not be completely ready to atone for their acts.[62] A strategy for funnelling returning refugees into reintegration and reconciliation processes will need to acknowledge and incorporate these complex realities and not overly idealize the return process.[63]

VI. Conclusion

The question of how to deal with refugee returnees suspected of committing crimes raises a number of issues that lie at the heart of the transitional challenge. At the outset, designing transitional strategies for this particular group requires governments to engage in a difficult and nuanced consideration of the challenges and contributions that returning refugees can make to the post-conflict order. Once a society makes the critical initial decision that they would prefer refugees within, rather than outside, their territory's borders, they then face a set of complex political, policy and practical challenges in formulating the transitional justice mechanisms into which returning refugees will be received. The steps in formulating such a plan can range from the more technical or mechanical considerations, such as ascertaining the composition of the refugee population and plotting institutional capacities and inter-play, to broader and overarching questions on the appropriate balance between truth, reconciliation and justice models. The design of such a transitional justice strategy must also be accompanied by a strong sense of how it will work in practice. To this end, mechanisms need to be put in place to ensure the accuracy of information flows; both *to* refugees to enable informed choice on whether or not to return, and *about* refugees to enable the state to make informed decisions about the eligibility of refugees to participate in transitional mechanisms. Other factors for which provision will need to be made include ensuring that return does not precede the establishment of transitional mechanisms; exercising control over refugee return movement so that refugees return to their local communities; and establishing means by which such communities can be reliably informed of the impending return of a refugee who has committed crimes. At every stage of these design and implementation processes, all relevant actors must strive to work in a co-ordinated and coherent manner, driven by an appreciation of the importance of returning refugees for the health of the post-conflict order, but also mindful of the difficult realities that return and repatriation present.

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[61] Erin Daly, Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda, 34 NYU J INT'L L & POL. 355, 381 (2002).

[62] Mark A. Drumbl, *Punishment, PostGenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1291 (2000) (citing conclusions of Gérard Prunier from his interviews of Hutu refugees returning to Rwanda that "Most of them still either deny the genocide ever happened or even insist that they, the Hutu, were its victims").

[63] *See generally* Daly, *supra* note 60, at 381 (arguing that raising questions about the extent to which people in transitional settings have a shared sense of history is necessary to "…acknowledge that the process of reintegration and reconstruction is complicated by shifts in the population of many communities and by their psychological make-up. (And) is, therefore, meant to caution against adopting the very appealing language of community rebuilding without taking into account the realities of the communities").