

Front-Line Justice

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ABSTRACT

The article proposes a model for rapidly re-establishing a functioning justice system in societies shattered by crisis. The front-line justice system is based on the quick deployment of “justice shelters” in communities, in which trained local jurists give legal information and

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advice, and local judges issue emergency safeguard orders and mediate disputes between parties. The mandate of the justice shelters is broad, and comprises civil, family, and administrative as well as criminal matters. The shelters are designed to rebuild confidence in the administration of justice by addressing all the justice needs of the local population, rather than limiting themselves to criminal matters or transitional justice issues. As such, the front-line justice system builds on other initiatives, particularly those growing out of the United Nations Brahimi Report, and offers a way to address emergency justice issues, but also to move forward towards the re-establishment of working and accepted permanent institutions of justice.

INTRODUCTION

Where do we begin rebuilding societies that are so utterly shattered that virtually nothing of civil society remains? How can lofty ideals like the rule of law, democracy, accountability, reconciliation, and justice be realized when hunger, disease, and indiscriminate killing make even daily survival difficult? How, in short, can we bring justice concerns to the front lines where the need is most acute, but the danger most intense?

The crises brought on by warfare, ethnic conflict, political instability, or natural disasters play themselves out in a number of different registers simultaneously. Television images of horrific humanitarian disasters—famine, disease, mass killings, displaced populations—are but the most visible effects of conditions that also have strong political, cultural, legal, and economic repercussions. The situation at the front lines presents particularly serious problems at the level of justice, ranging from a populace locked in cycles of anger, distrust, recrimination, and hopelessness, to officials unwilling or unable to act, to severe shortages of resources and personnel. Because of these particular challenges, justice at the front lines requires thinking in new ways about the nature of justice institutions, their role in societies in transition, and how they can, or should, be rebuilt.

If we begin at the symbolic level, it is useful to put aside the image of justice as a majestic citadel, imposing and forbidding, grounded in the past but promising the future, and replace it temporarily with a humble shelter—the gathering place for a local community and very much rooted in the present. If the citadel of justice represents the Western ideal of the rule of law, a goal to be worked towards in the long term, the justice

shelter represents the immediate practical reality of justice in a society in crisis, a working expedient as a first step toward grander ambitions.

This image of the justice shelter is central to the front-line justice system presented here. While its scale is far more modest than the citadel, to be sure, it is a symbol defined by two more important characteristics. First, it represents local justice, which brings together local communities to seek and dispense justice through participation in and acceptance of the front-line justice system.¹ Second, its timeframe is the present, with justice as participatory, immediate, and available, rather than retrospective or forward-looking to an idealistic future. In short, the justice shelter represents *present* justice as lived by its community: justice as tactile, engaged, and local. The justice shelter underscores the importance in the immediate post-crisis period of dealing with the present by means of community, of providing a way to address the urgent legal problems affecting the lives of the populace, which arise both from the crisis itself as well as from the ordinary course of people's lives.

The front-line justice system we propose is a rapidly deployable core of essential legal dispute-resolution mechanisms designed to restore a working framework of legality in societies where there is nothing else. Its point of departure is the recognition that, although periods of crisis create extraordinary problems for the society that has endured them, individuals and communities continue to experience their own no less urgent problems at the same time. A post-crisis justice intervention must, therefore, address both the extraordinary and the ordinary; a return to normalcy requires no less.

To this end, we propose setting up within stricken societies an emergency hybrid justice system ("front-line justice") comprising three wings: informational justice, safeguard justice, and mediational justice. The function of the front-line justice system is to create as rapidly as possible an institution to assess and administer the immediate emergency justice needs of the local population—in short, to triage the situation and to provide trained and capable personnel to deal with problems as they are revealed. In the informational justice area, local jurists will be available to evaluate citizens' legal problems: the jurists will themselves deal with simpler matters of legal information or advice, while referring more complex matters to other personnel in the justice shelter. The

1. By "local" here and below we mean two things. First, local justice and local actors contrast with international imports. Second, local justice means community-based justice, serving a limited area, administered by and for community members, and rooted in indigenous traditions.

safeguard justice area will comprise judges empowered to issue safeguard orders, such as injunctions, in urgent cases to protect the rights and persons of citizens. The mediational justice area will offer trained mediators drawn from the local population to resolve citizens' disputes in a voluntary and participatory process that will tap and encourage the conflict-resolution capacity of the local community. In all three areas, international experts (judges, jurists, legal academics) will be present to serve as resource personnel and to help train local justice officials—but the system itself is to be locally run.

The front-line justice system thus provides an immediate means of protecting the population and preventing abuses of power and other forms of self-help during the period of turmoil, when institutions are paralyzed and can no longer play their role as guardians of legality. In the long term, however, the front-line justice system—particularly its informational justice and mediational justice wings—will serve as the bridge between the emergency rebuilding phase of the initiative and permanent institutions of justice. Though front-line justice is an emergency justice system, it is built on the belief that healing and empowerment are community goals to be achieved by community initiatives.

In what follows we will present the front-line justice system and situate it within the existing literature on post-conflict reconstruction. In Part I, we will examine why a flexible, mediation-oriented model of reconstructive justice is needed. We will survey some of the other proposals along these lines, in particular the recommendations of the United Nations Brahimi Report of 2000² and the growing literature on “justice packages” that it inspired. We will argue that such interventions need to be conceived more broadly than the limits of the concept of transitional justice allow. In Part II, we will present our model of the front-line justice system, outlining its main features and showing how it fits into a more broadly based reconstruction initiative. In particular, we will argue that a mediation-based system addresses the needs for flexibility and acceptability essential to the success of a post-crisis justice initiative. Part III will discuss several issues and concerns regarding reconstructive justice, such as the goals envisaged for the intervention, justice concerns, and cultural concerns. These issues present particular challenges in the design and implementation of a post-crisis justice

2. See *infra* note 11.

system, and how they are resolved can have a decisive influence on whether the initiative succeeds or fails in the long term.

I. CONCEPTUALIZING POST-CRISIS JUSTICE INTERVENTIONS

Time is of the essence in post-crisis intervention, since delays and indecisiveness allow problems to worsen and spread. This is true of all aspects of a situation: even in the realm of justice rebuilding, which on its surface would appear to be less time sensitive than issues of survival or security, delays can mean that abuses and injustices become ingrained, and failure to act can allow complacency and despair to take root. Poorly planned or heavy-handed intervention can sometimes be worse than none at all, however, since it can solidify resistance by giving obstructionist elements within the society a clear target for their hostility. A justice initiative, therefore, must balance rapid response with careful and thoughtful planning. It is crucial that any intervention be conceptualized as to what it can and cannot achieve, as to how it will fit into the existing society, and as to how it will contribute to fundamentally reshaping that society.

The humanitarian, cultural, and political crises at the end of the twentieth century and beginning of the twenty-first have spawned a great deal of research into how international interventions can help rebuild shattered legal systems and restore (or implement) the rule of law, so as to begin a process of sustainable peace-building. A wide variety of terms has been used to describe these interventions, including transitional justice,³ post-conflict reconstruction,⁴ post-conflict governance,⁵

3. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002); Mark Freeman, *Transitional Justice: Fundamental Goals and Unavoidable Complications*, 28 MANITOBA L.J. 113 (2000).

4. This term is particularly associated with the Center for Strategic and International Studies. See Center for Strategic and International Studies & Association of the United States Army, *Post-Conflict Reconstruction: Task Framework* (2002), available at <http://www.csis.org/media/csis/pubs/framework.pdf> (last visited Feb. 15, 2007) [hereinafter CSIS, *Task Framework*]; see also Scott Feil, *Building Better Foundations: Security in Postconflict Reconstruction*, 25 WASH. Q. 97 (2002); John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25 WASH. Q. 85 (2002); Jacob S. Kreilkamp, Note, *U.N. Postconflict Reconstruction*, 35 N.Y.U.J. INT'L L. & POL. 619 (2003); Hansjoerg Strohmeyer, Comment, *Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor*, 24 U.N.S.W. L.J. 171 (2001) [hereinafter Strohmeyer, *Policing the Peace*].

5. Peter Finell, *Contemporary Challenges for Post-Conflict Governance and Civilian Crisis*

reconstructive justice,⁶ reconciliation,⁷ *jus post bellum*,⁸ transformative justice,⁹ and post-conflict peace-building.¹⁰ These terms are not interchangeable, as each has different nuances and emphases, but taken together they describe a cluster of related concepts that apply to (re)establishing justice and the rule of law in the wake of unrest, whether its causes be political, social, military, or natural in origin.

In what follows, we survey some of these proposals for emergency legal intervention in the immediate post-crisis period and assess their strengths, as well as some of their conceptual shortcomings. This will serve as background to help situate the front-line justice system that we introduce in the next part.

A. *United Nations Proposals*

Of prime importance as a spur to further work in this area is the 2000 report of the Panel on United Nations Peace Operations, chaired by Lakhdar Brahimi, which has generated a great deal of commentary.¹¹ The Brahimi Report undertook a review of the procedures and goals of U.N. peace operations in the wake of experiences in Kosovo and East Timor. Among the issues the report recognized was the problem of determining and applying the applicable law in the short term by transitional civil administrations, especially where local justice capacity was severely diminished or non-existent. To this end, the panel recommended the

Management: A Study of the Protection of Minority Groups and the Re-Building of the Judiciary in Post-Conflict Societies (2002), http://www.abo.fi/institut/imr/norfa/peter2_contemporary.pdf (last visited Feb. 15, 2007).

6. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355 (2002).

7. See generally JOHN PAUL LEDERACH, BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES (1997); Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2002); Michèle Flournoy & Michael Pan, *Dealing with Demons: Justice and Reconciliation*, 25 WASH. Q. 111 (2002); Jodi Halpern & Harvey M. Weinstein, *Rehumanizing the Other: Empathy and Reconciliation*, 26 HUM. RTS. Q. 561 (2004).

8. Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285 (2005).

9. Daly, *supra* note 7.

10. Ivan Simonovic, *Post-Conflict Peace Building: The New Trends*, 31 INT'L J. LEGAL INFO. 251 (2003); Wendy Lambourne, *Post-Conflict Peacebuilding: Meeting Human Needs for Justice and Reconciliation* (2003), <http://www.peacestudiesjournal.org.uk/docs/PostConflictPeacebuilding.pdf> (last visited Feb. 15, 2007).

11. Chairman of the Panel, *Report of the Panel on United Nations Peace Operations, delivered to the Security Council and the General Assembly*, U.N. Doc. S/2000/809, A/55/305 (Aug. 21, 2000), available at http://www.un.org/peace/reports/peace_operations/docs/a_55_305.pdf (last visited Feb. 15, 2007) [hereinafter Brahimi Report].

adoption of “interim legal codes” or “justice packages” containing the essentials of substantive criminal law and procedure, which international interveners could apply immediately, thereby avoiding the long start-up delays associated with learning a foreign legal system.¹² Such codes would contain “the basics of both law and procedure to enable an operation to apply due process using international jurists and internationally agreed standards in the case of such crimes as murder, rape, arson, kidnapping, and aggravated assault.” Property law was explicitly excluded, though the codes would cover crimes against property.¹³

Several months later, however, a study commissioned by the U.N. Secretary-General expressed doubts about the feasibility of creating a single code that could apply prospectively to all interventions given the significant differences in substantive criminal law in different countries. The Secretary-General’s report instead recommended concentrating on a model code of criminal procedure, while taking into account international instruments regarding human rights, torture, and children’s rights.¹⁴ More recently, and along the same lines, at the end of 2003 the United Nations Department of Peacekeeping Operations issued its *Handbook on United Nations Multidimensional Peacekeeping Operations*, which questioned whether any law brought and, in essence, imposed by foreign interveners could ever function effectively:

The question of which law to apply is essentially a political issue that cannot be resolved by a peacekeeping mission. Agreement among the parties as to the applicable law is an important first step in judicial and rule of law reform.... The emergent legal code should be recognized and seen to be legitimate by the local population or it will not be sustainable and the local judiciary may not be able to enforce it.¹⁵

12. *Id.* ¶¶ 79–82.

13. *Id.* ¶ 82.

14. The Secretary-General, *Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations*, ¶¶ 31–32, delivered to the General Assembly, U.N. Doc. S/2000/1081, A/55/502 (Oct. 20, 2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/741/43/PDF/N0074143.pdf> (last visited Feb. 15, 2007).

15. U.N. Dep’t of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, 97 (Dec. 2003), available at <http://pbpu.unlb.org/pbpu/library/Handbook%20on%20UN%20PKOs.pdf> (last visited Feb. 15, 2007) [hereinafter *Peacekeeping Handbook*].

These twin problems of substantive content and local acceptability continue to be an important focus of research into the resolution of justice problems during post-crisis reconstruction.

The most recent contribution by the U.N. defining the terms of post-conflict justice rebuilding is the Secretary-General's August 2004 report on transitional justice and the rule of law, which emphasizes the need for dynamic linkage between short-term interventions and long-term justice-rebuilding projects.¹⁶ In particular, the report moves beyond the preliminary groundwork laid by the Brahimi Report to stress the fundamental importance of cooperation with local elements in any peace-building intervention, rather than the simple imposition of an international model and abstract ideals. Though its emphasis is on transitional justice issues (criminal accountability, truth telling, vetting the public service, reparations) as a foundation for fostering the rule of law in the long term, the report makes two key suggestions that move debate forward in important ways. First, it acknowledges the importance of creating a strategy capable of dealing not just with criminal matters, but also with civil, administrative, and other problems.¹⁷ Second, it looks beyond adjudication as the universal model of dispute resolution, arguing that "indigenous and informal traditions for administering justice or settling disputes" should be fostered and used.¹⁸ These are important contributions to the debate, which the present front-line justice system takes up and carries still further.

B. Other Proposals

Various scholars have picked up on these U.N. reports and have proposed more concrete strategies for justice rebuilding.¹⁹ All agree that it

16. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf> (last visited Feb. 15, 2007) [hereinafter *Report on the Rule of Law*]. Since this report, the Secretary-General has followed up with a report on the implementation and integration of rule of law and transitional justice support throughout the U.N. See The Secretary-General, *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law*, U.N. Doc. S/2006/980 (Dec. 14, 2006), available at <http://documents.dd.-ny.un.org/doc/UNDOC/GEN/N06/661/01/pdf/N0666101.pdf> (last visited Feb. 15, 2007).

17. *Report on the Rule of Law*, *supra* note 16, ¶ 35.

18. *Id.* ¶ 36.

19. See, e.g., Hansjoerg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L. L. 46 (2001) [hereinafter Strohmeyer, *Collapse*]; Strohmeyer, *Policing the Peace*, *supra* note 4; see also Ralph Zacklin, *United Nations Management of Legal Issues*, in THE RULE OF LAW ON PEACE OPERATIONS: A

is essential to address justice issues head-on, and not to treat them simply as the by-product of security or democracy interventions. The rule of law does not automatically reappear once a crisis ends and a sufficient degree of security is achieved; any intervention must take positive and concrete action both to remedy existing problems and to lay foundations for future growth.

Hansjoerg Strohmeyer, in assessing the lessons learned from the U.N. missions in Kosovo and East Timor, has argued that immediate attention to justice issues is so crucial that “the quick deployment of units of military lawyers...can fill the vacuum until the United Nations is staffed and able to take over what is ultimately a civilian responsibility.”²⁰ To minimize this phase, since its military nature—however necessary it may be—limits its palatability, Strohmeyer recommends the drafting of a U.N. “quick-start package” containing the essentials of substantive criminal law and criminal procedure.²¹ Finally, in considering the lessons from East Timor, Strohmeyer notes that:

Alternative methods and traditional dispute resolution mechanisms are indispensable. On the other hand, traditional or alternative forms of dispute settlement should not simply become a means of covering up for a lack of access to the ordinary justice system. To this end, UNTAET [United Nations Transitional Administration in East Timor] must further explore the use of mobile courts, regular out-of-court days, and the establishment of “justices of the peace” in remote communities.²²

Strohmeyer’s proposal, based as it is on the empirical experience of particular missions, underscores the urgency of short-term intervention and the need for creative solutions to the problem of stabilizing a situation as quickly as possible. What weakens his proposal, however, is its almost exclusive emphasis on criminal matters and on stabilizing and securing the situation, which brings into question how useful this proposal will be as a foundation for moving forward. The same concern applies to many of the other proposals for justice interventions as well.

“CHALLENGES OF PEACE OPERATIONS” PROJECT CONFERENCE 115 (Jessica Howard & Bruce Oswald eds., 2002), available at <http://www.apcml.org/RuleofLawbookfinal.pdf> (last visited Feb. 15, 2007); Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L. L. 76 (2002).

20. Strohmeyer, *Collapse*, *supra* note 19, at 61.

21. *Id.* at 62–63; *cf.* Strohmeyer, *Policing the Peace*, *supra* note 4, at 181.

22. Strohmeyer, *Policing the Peace*, *supra* note 4, at 179–80.

Mark Plunkett has made important contributions to the role that outside intervention, and “justice packages” in particular, might play in rebuilding the rule of law in post-crisis societies. Rebuilding, for Plunkett, begins with “the delivery of specific designer-planned and implemented peace operation justice packages using the two combined techniques of (a) an enforcement model...; and (b) a negotiation model.”²³ Plunkett’s enforcement model aims at the immediate restoration of a measure of security and stability by quickly implementing a criminal justice system. His negotiation model looks ahead by initiating consultation with local elements for the purpose of inculcating values of justice and accountability.²⁴ In contrast to the direction the U.N. has been moving in recently, Plunkett’s justice packages are “off-the-shelf” model codes of criminal law and procedure.²⁵ Off-the-shelf need not mean one-size-fits-all, however. It is essential that these packages be tailored to the specific context of the society emerging from crisis:

Each package has to be individually designed to meet the criminal justice needs of a particular people, such as to win their confidence.... A justice package incorporates the generic nuts and bolts of law and order restoration, as well as local social and cultural dynamics for its acceptance by the population.²⁶

This cultural sensitivity is crucial to the success of the intervention; as Plunkett notes, “[t]he aim of a justice package is to create a social compact, whereby the people of the country recently in conflict voluntarily agree to a system of law and order. A successful justice package brings about their cooperation.”²⁷

Similarly, the Center for Strategic and International Studies (CSIS) and its affiliated scholars have also studied the implementation of interim justice systems in post-crisis societies. Chief among their recommendations is the need for integrated post-crisis interventions, rather than a piecemeal approach: “Post-conflict reconstruction requires integrated security and social, economic, and political development

23. Mark Plunkett, *Rebuilding the Rule of Law*, in FROM CIVIL STRIFE TO CIVIL SOCIETY: CIVIL AND MILITARY RESPONSIBILITIES IN DISRUPTED STATES 207, 208 (William Maley, Charles Sampford & Ramesh Thakur eds., 2003), available at <http://www.unu.edu/unupress/media%7E/civilstrife.pdf> (last visited Feb. 15, 2007).

24. *Id.* at 213–24.

25. *Id.* at 215.

26. Mark Plunkett, *Reestablishing Law and Order in Peace-Maintenance*, in THE POLITICS OF PEACE-MAINTENANCE 61, 68 (Jarat Chopra ed., 1998).

27. *Id.*

efforts, not separate tracks that do not converge.”²⁸ As in Plunkett’s proposals, local input is crucial, and “indigenous actors should have the primary responsibility and should play central roles throughout the reconstruction process, since it is indeed their own future that hangs in the balance.”²⁹ A reconstruction process moves forward in stages, however, and, in the initial emergency response, international interveners will play the crucial role until local capacity is rebuilt.³⁰ To facilitate the reconstruction process, CSIS strategy has been to advocate the deployment of “transitional justice packages”—conceptualized more broadly than simple model codes—to provide “justice and reconciliation” by addressing both immediate security needs and transitional justice issues.³¹

All of these proposals recognize the need for specific measures to address the often contradictory requirements of speedy implementation, local participation (or at least local acceptance), and flexibility. Clearly, in the immediate post-crisis emergency period, security and stability remain tenuous, and, for this reason, long-term objectives need to be balanced against the short-term realities of the situation. Any initiative will need to take this into account and seek a pragmatic strategy. The proposals just outlined, however, though promising in many ways, have important conceptual limitations that restrict their potential effectiveness.³² These limitations derive from a primarily retrospective orientation, as well as the basic reliance of each on the paradigm of transitional justice, which leads to an overemphasis on criminal justice issues to the exclusion of civil matters. We believe that a successful post-crisis justice initiative must move beyond the conceptual and political limitations inherent in the transitional justice paradigm.

C. *Emergency Justice vs. Transitional Justice*

One of the problems with post-crisis justice interventions is that the extraordinary nature of the crisis to which they respond tends to lead to an emphasis on the extraordinary problems arising from that crisis. In our

28. Johanna Mendelson-Forman & Michael Pan, Discussion Paper, Post-Conflict Rapid Civilian Response 1 (2002) (on file with authors).

29. CSIS, *Task Framework*, *supra* note 4, at 2.

30. *Id.* at 2; Flournoy & Pan, *supra* note 7, at 113.

31. CSIS, *Task Framework*, *supra* note 4, at 3, 8; Flournoy & Pan, *supra* note 7, at 113–14; Mendelson-Forman & Pan, *supra* note 28, at 2.

32. An excellent critique of the literature on post-crisis rebuilding is RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR (2002) (especially ch. 3).

opinion, a successful initiative needs to look beyond the conceptual limits of criminal and transitional justice in order to approach rebuilding globally, grabbing both with the ordinary, as well as the extraordinary. A normally functioning legal system deals with present, future, and past, and plays various roles simultaneously: justice can be coordinative, facilitative, aspirational, and distributive, as well as remedial and retributive.³³ The teleology of a post-crisis justice model has an important influence on the shape the intervention will take, its acceptance by the local population, and how it will function in practice. An initiative premised on the need to correct past wrongs will look very different from one based on the demands of the present. Transitional justice is one way to conceptualize the rebuilding of a justice system, but it is not the only way, nor necessarily the best way, in many circumstances.

In a sense, all justice is transitional in that it seeks to move from a situation of rupture to one of closure, regardless of whether it tries to achieve this through punishment, prohibition, reconciliation, coordination, compensation, or declaration. In the literature on post-crisis intervention, however, “transitional justice” has taken on a focused meaning, namely the use of justice mechanisms—ranging from domestic or international criminal law to truth and reconciliation commissions—to deal with the mess left over from a crisis.³⁴ As Ruti Teitel, one of its foremost theorists, has defined it, transitional justice is “the conception of

33. *Cf. id.* at 5–11 (outlining three interdependent definitions of justice: legal justice or the rule of law, rectificatory justice, and distributional justice).

34. For theoretical discussions, see TEITEL, *supra* note 3, at 213–28; Aukerman, *supra* note 3, at 44–47; Freeman, *supra* note 3, at 114–16; Martin Krygier, *Transitional Questions About the Rule of Law: Why, What, and How?*, 28 E. CENT. EUR. 1 (2001); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004); Ruti G. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2011–15 (1997); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69–70 (2003) [hereinafter Teitel, *Genealogy*]; Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT’L L.J. 893, 893–94 (2003) [hereinafter Teitel, *New Era*]; Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT’L L.J. 837 (2005). Among case studies on transitional justice, see generally Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT’L L. 371 (2001); Colm Campbell & Fionnuala Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT’L L.J. 871 (2003); Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT’L L. & POL’Y 23 (2002); Matthew Draper, *Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia*, 40 COLUM. J. TRANSNAT’L L. 391 (2002); Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT’L L. 47 (2004); Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172 (2005).

justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”³⁵

Transitional justice, in this view, is extraordinary justice adapted to the particular needs of extraordinary times of flux or tension, situations in which the usual rules (including the rule of law) cannot, or should not, apply. As Teitel argues (though this thesis has by no means been unchallenged³⁶):

Transitions imply paradigm shifts in the conception of justice; thus, law’s function is deeply and inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law.³⁷

Law in such a situation becomes “hyper-politicized,”³⁸ working as a political force to undermine the status quo (which tends to be complicit in the crisis) in order to help establish a new order. As Teitel puts it, “[w]hat emerges is a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalizing change.”³⁹

Not all theorists of transitional justice would characterize its mission so expansively, of course,⁴⁰ but the theme of “desperate times require desperate measures” runs through the transitional justice literature. The pervasive influence of the transitional justice model is such that proposals for emergency justice interventions tend to be conceptualized in its terms: that is, as extraordinary in nature and with an implicit teleology, namely the restoration (or creation, as the case may be) of democratic institutions and the rule of law. This has the effect of both overly narrowing and, at the same time, overly broadening the ambitions of such interventions: on the one hand, the focus on the extraordinary nature of the situation leads to a narrow overemphasis on security and high-profile criminal matters,

35. Teitel, *Genealogy*, *supra* note 34, at 69.

36. See Krygier, *supra* note 34, at 27–28; Posner & Vermeule, *supra* note 34.

37. TEITEL, *supra* note 3, at 6.

38. *Id.* at 25.

39. *Id.* at 213.

40. The recent report of the U.N. Secretary-General represents a baseline position for transitional justice, *Report on the Rule of Law*, *supra* note 16; see also Freeman, *supra* note 3.

while, on the other hand, their implicit teleology leads to an idealistic rhetoric of democracy and justice that, in most cases, is so broad as to be hopelessly unrealistic in practice.⁴¹

As already noted, however, there have been numerous critiques of this conceptualization of transitional justice as extraordinary, even revolutionary, justice. Eric Posner and Adrian Vermeule, for example, argue against the extraordinary nature of transitional justice. They see regime changes as lying at the end of a broad continuum of transitions, and argue that regime changes should be analyzed in the context of the many minor and ordinary transitions that regularly occur within stable democracies.⁴² Erin Daly, for her part, rejects the implicit top-down nature of the transition paradigm, which she argues stands at odds with the fundamental goal of justice rebuilding, namely reconciliation. What is needed, she argues, is the transformation of post-crisis society, which implies a more organic process that implicates local elements in the rebuilding process.⁴³ Finally, Thomas Carothers casts doubt on the entire teleology of the transitional justice paradigm. He argues that the assumption that transition necessarily must mean transition to democracy fails to take into account the empirical reality that the majority of states undergoing post-crisis transition stabilize in a gray area, which is neither dictatorship nor fledgling democracy. The danger in positing Western-style democracy as the only acceptable endpoint is conceptual oversimplification, which can lead to failure: “The continued use of the transition paradigm constitutes a dangerous habit of trying to impose a simplistic and often incorrect conceptual order on an empirical tableau of considerable complexity.”⁴⁴

Behind the critiques of transitional justice are not just differences of terminology or implementation, but rather a fundamentally different view of the rule of law and its role in reconstruction. One of the crucial questions is thus exactly *to what* the transition is leading. As Teitel points out, transition is a normative process, which posits a particular endpoint (generally a functioning democracy) and shapes responses so as to achieve it.⁴⁵ This, of course, brings up issues of cultural difference, even

41. Cf. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998).

42. Posner & Vermeule, *supra* note 34, at 163.

43. Daly, *supra* note 7, at 77–78.

44. Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5, 15 (2002), available at <http://www.journalofdemocracy.org/articles/gratis/Carothers-13-1.pdf> (last visited Feb. 15, 2007).

45. TEITEL, *supra* note 3, at 5.

colonialism, that we discuss below. Here, it is important to note that interventions conceptualized along the lines of transitional justice will have very different objectives (and, consequently, a very different orientation) than those conceptualized in other ways. Martin Krygier grasps this difference when he argues that moving from viewing the rule of law in static terms as a recipe for democracy to seeing it in dynamic terms as a value or a process is a crucial first step in designing a reconstruction process that includes and empowers local actors.⁴⁶ For Krygier, the crucial time frame is the present, which he views as “not simply an empty but active space between past and future.”⁴⁷

In other words, justice building is much more complicated than simply inscribing the values of democracy and the rule of law on a *tabula rasa*: it requires a value-laden negotiation with and within the local community. The crucial point is that, while the terms and procedure of this negotiation can be determined in advance, its result cannot be. Justice in the post-crisis context is thus more of a procedural than a substantive issue:⁴⁸ the interveners’ task is to set up a framework of institutions within which rebuilding will take place, not to present local actors with a goal and lead them to it step-by-step. Conceptualizing the problem as process rather than product in this way shifts attention away from grievance (the past) or teleology (the future) towards the specific present needs of identifiable individuals. Though international intervention is necessary to provide guidance, this guidance must always take the form of dialogue rather than lecture.

The front-line justice system seeks to build on the insights and experience of these proposals and initiatives. In particular, we propose ways to step away from the limitations of a primarily retrospective view of the role of law in post-crisis reconstruction. As an emergency justice proposal—a concept broader than transitional justice—front-line justice envisages a more broadly conceived initiative that concentrates on the present (though its influence extends back into the past, as well as forward into the future). While transitional justice aims at establishing or reinforcing the rule of law by dealing with the mess left over from the previous regime, front-line justice aims rather at restoring a functional present-day justice system that will deal not only with justice problems at

46. Krygier, *supra* note 34, at 31–32.

47. *Id.* at 28.

48. Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 336, 339 (Erik G. Jensen & Thomas C. Heller eds., 2003).

the level of society as a whole (human rights abuses, crimes against humanity, war crimes, lustration, and so on), but also with the ordinary problems of justice on an individual level that arise because of, or in spite of, crisis. People's lives and their legal conflicts do not cease during conflict; justice rebuilding must deal both with issues raised by the crisis *and* with everyday issues that continue to arise despite the existence of the crisis.

II. THE FRONT-LINE JUSTICE SYSTEM

The system of front-line justice proposed here grows out of these previous proposals and the concerns they raise, but focuses on different issues and objectives. As we have seen, in international interventions of this kind, the ends envisaged play an important role in the ultimate chances of success or failure of the plan. Overly ambitious aims—often couched in terms of establishing democracy or instituting the rule of law—are laudable but hardly realistic in a society shattered by humanitarian crisis, endemic corruption, and recrimination. The immediate goal of front-line justice is more modest: to restore the basics of a functioning and just legal system as rapidly as possible, but in such a way as to build organically on indigenous institutions and values, rather than replacing them—a sort of step-by-step judicial restorative process. A successful application of the front-line justice system will, we believe, have longer-term effects, such as fostering security and providing a foundation for stabilizing and strengthening the rule of law. These broader goals are best achieved, however, by first creating a stable and just environment for rebuilding to take place, rather than by intervening with a complex, and often foreign, rule-of-law program specifically and explicitly designed to bring about a lasting Western-style liberal democracy. In short, it is our opinion that a limited, focused, and realistic short-term program can, if carefully planned, have important long-term effects.

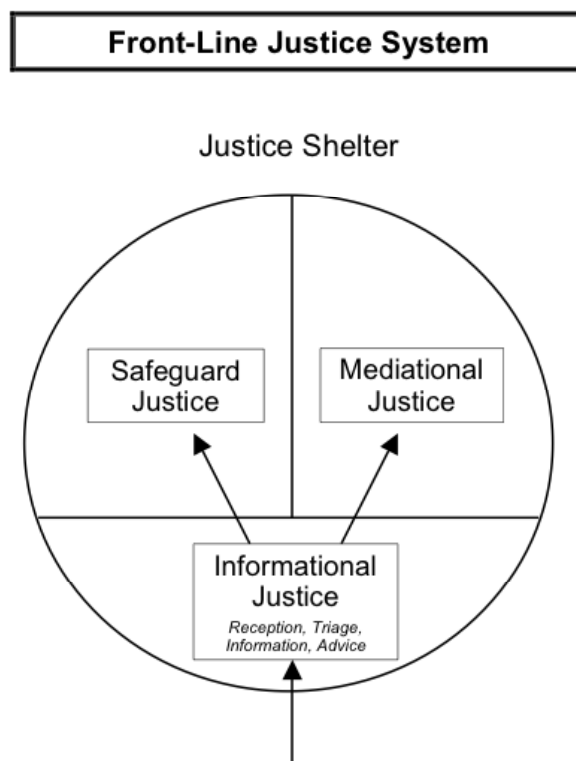
Limiting and focusing the ends of an intervention does not, however, mean limiting the scope or substance of the proposal. Conceptualizing the task of an intervention too narrowly will be just as fatal to its success as conceptualizing it too broadly. Front-line justice looks beyond issues of immediate short-term security, and, consequently, is not limited to criminal justice. Moreover, front-line justice is not a transitional justice program, and so is not just retrospective and not merely envisaged for extraordinary issues. Security is clearly important: without an end to lawlessness, moving forward is impossible. However, the purpose of

post-crisis intervention cannot be limited to restoration of security and retrospective settling of problems that arose during the crisis. This has the effect of tying the initiative to the past, and thereby linking it to the same ways of thinking that resulted in the crisis in the first place.

Front-line justice takes as its point of departure the observation that legal conflicts of all kinds continue to arise during, and immediately after, times of crisis. An intervention must look both to settling past injustices *and* to re-establishing legal normalcy, or else risk becoming lost in the retribution of the past. Normalcy means not just dealing with the extraordinary, but also restoring a system that will deal with the ordinary as well. While recognizing the need for accountability and closure regarding the past, we believe that the immediate post-crisis period also urgently requires justice strategies and institutions that can be deployed as one of the tools to help stabilize and normalize post-crisis society, in order to get people to see justice as a normal part of their lives. Front-line justice is thus distinct from transitional justice, but is at the same time distinct from the humanitarian interventions designed to meet the immediate subsistence, medical, and social needs of those whose lives and livelihoods have been catastrophically altered by the crisis. It operates alongside both international criminal tribunals and international humanitarian relief agencies; it does not aim to do everything, but rather to do a particular thing—rebuilding the justice system—well. Reconstructing a society ravaged by crisis is a huge undertaking that involves interventions and local initiatives in many different sectors at the same time: government, the economy, culture, social institutions, as well as the law. Rebuilding a justice system both affects, and benefits from, successes in other areas; in all these sectors, it is crucial that the ordinary and the extraordinary be dealt with together.

Front-line justice comprises three distinct, yet complementary, parts: informational justice, safeguard justice, and mediational justice. All will be housed in the same justice shelter, where citizens can seek immediate measures to deal with the urgent justice needs within each local community. Figure 1 depicts the system graphically.

FIGURE 1



Like an emergency medical outpost, each justice shelter will be a large, visible, and centrally located tent, which can be put up overnight and, if need be, taken down and moved just as quickly. The justice shelters represent the immediate emergency response to a post-crisis situation: a kind of judicial Red Cross, their work should be done within about two years. The three parts of the front-line justice system operate in harmony: their respective roles are different, though complementary, and together they provide communities with a full range of essential legal services. In the earliest emergency phase of an initiative, safeguard justice and informational justice will dominate the legal system. As the situation stabilizes, however, mediational justice will play an increasingly larger role, while informational justice will remain the point of entry for citizens seeking legal help. It should be noted as well that front-line justice works *alongside* whatever broader criminal justice initiatives (like international

criminal or human rights tribunals) are in place, so that any war crimes or human rights violations uncovered by the front-line justice system would be referred to the proper authorities.

A crisis stretches and tears the fabric not just of the state, but also of local communities, neighborhoods, and households. Problems arise at each of these levels, but international responses tend to be clustered at the state and regional level. The justice shelters of the front-line justice system aim primarily at the neighborhood and household level, the grassroots of disorder that are, simultaneously, the grassroots of hope. The point is to create institutions that require minimum resources, that are owned and run by local communities so that they can begin collectively resolving their conflicts and rebuilding their system of justice.⁴⁹ The following specifics indicate the scope of the mandate of the front-line justice system more clearly.

A. *Informational Justice*

Upon entering a justice shelter, the citizen seeking justice will be met by a trained jurist, who will triage the situation and determine what recourse is appropriate. This is not simply a welcome desk, however, and the people staffing this area are not simply receptionists. Rather, the informational justice area is the initial point of entry into the front-line justice system and is equipped to provide quick help for many problems.

The jurists—they might be lawyers, legal advisors, even notaries, depending on the local terminology—will first perform triage on the matters brought before them. Situations of crisis bring in their wake many different kinds of problems of a legal nature, which require different kinds of institutions to address them. Of the myriad legal issues that might be brought to the justice shelters, three broad categories are apparent. First, there are the problems directly deriving from the crisis itself, such as mass killings or sexual abuses, torture, and forced expulsion of individuals or expropriation of their property. Where these

49. The *gacaca* courts set up in Rwanda after the genocide present an analogous initiative, but one with significant differences. Cf. Daly, *supra*, note 6, at 373; Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004). Among the large literature on the Rwandan *gacaca* initiative, see Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235 (2001); Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31 (2002); L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385 (2003).

primarily represent problems of domestic or international criminal or humanitarian law—the traditional domain of transitional justice—they will be beyond the competence of a justice shelter, and so the triage jurist will refer these matters to whatever centralized authorities are set up to deal with questions of transitional justice, such as international criminal tribunals. Where such cases primarily engage local matters, however, such as property questions, a justice shelter could appropriately render justice.

Second, there are the problems that derive indirectly from the crisis, as when the breakdown of civil society leads certain elements within the community to use the crisis, or the subsequent continuing disorder, as an opportunity for lawbreaking of various kinds. These are, by contrast, clearly within the mandate of the front-line justice system. Since such activity would rarely be of a scope that would engage international norms, it makes sense to deal with these problems locally, rather than centrally. Local treatment also has the added benefit of removing a substantial volume of cases from the already taxed international or central tribunals.

Finally, there are the ordinary justice problems that continue to arise despite the crisis, but whose resolution is impractical or impossible due to the ineffectiveness or destruction of justice institutions. These will, generally, be the largest number of cases and will include domestic matters, civil matters, neighborhood conflicts, criminal offenses (excepting those engaging war crimes or other international norms), and administrative matters. These cases would ordinarily be handled by civil courts or mediation programs. In the absence of such recourses, however, justice shelters are perfectly situated to handle these sorts of cases. Moreover, speedy and effective handling of these comparatively simple matters will help build the foundation of trust and confidence necessary to begin to restore legitimacy to the justice system.

For the matters within the mandate of the front-line justice system, the triage jurist will proceed to identify those that are most urgent and that require immediate protective measures or safeguard orders; those that are less pressing and that would be amenable to mediation; and those that simply require legal information or specific and focused legal advice. The first two categories will be assigned to the safeguard justice and mediational justice areas, respectively; the third category will be dealt with in the informational justice area.

Aside from this triage role, the jurists in the informational justice area will serve as general community legal resource personnel. Informational

justice will thus resemble the *maisons de justice et du droit* found in France,⁵⁰ the *maisons de justice* in Quebec City, Canada,⁵¹ or, perhaps, the legal aid clinics found in the United States. The jurists will be able to provide citizens with summary evaluation of legal situations, as well as basic advice on their rights and obligations, such as property transfers, contract interpretation, help with the formalities relating to births and deaths, and the like. In practice, this may in many cases turn out to be the bulk of the work of the front-line justice system; each situation will be distinct, and front-line justice can adapt to meet the needs of the society in question. In any case, informational justice will provide both a crucial means of re-establishing a degree of normalcy in the administration of justice, and a bridge linking the emergency phase of a justice intervention with the permanent institutions toward which the intervention is working.

B. *Safeguard Justice*

In the first few days and weeks post-crisis, immediate, critical justice measures are needed to safeguard and protect the lives and property of the vulnerable. Ensuring that the situation does not deteriorate is, of course, an aspect of post-conflict security, but to conceptualize it strictly as a policing issue is to miss its importance. Beginning the process of justice rebuilding requires more than mere absence of want and threats, though both are fundamental. Restoring justice institutions, and public confidence in them, also requires immediate positive steps to correct severe problems quickly and decisively.

To this end, each justice shelter will include a safeguard justice area, in which a judge will exercise whatever summary or emergency jurisdiction local law provides. Of necessity, safeguard justice must be summary: the fragile state of justice requires severe measures. This might include *habeas corpus*, interim release, injunctions, and the like. The *référé* regime that exists in France and in other systems that follow the French model provides one example of such summary emergency proceedings,⁵²

50. Information on the *maisons de justice et du droit* can be found at <http://www.justice.gouv.fr/justorg/justorg8.htm> (last visited Feb. 15, 2007). See also Adam Crawford, *Justice de Proximité—The Growth of ‘Houses of Justice’ and Victim/Offender Mediation in France: A Very UnFrench Legal Response?*, 9 SOC. & LEGAL STUD. 29 (2000).

51. For a description of this pilot program in the Quebec City area, see Quebec Ministry of Justice, Press Release, “Le Ministre Jutras procède à l’inauguration officielle de la Maison de justice de Québec” (Jan. 30, 2003), <http://communiqués.gouv.qc.ca/gouvqc/communiqués/GPQF/Janvier2003/30/c4986.html> (last visited Feb. 16, 2007).

52. See generally CHARLES DEBBASCH & FRÉDÉRIC COLIN, *DROIT ADMINISTRATIF* 674–92 (7th ed. 2004); OLIVIER GOHIN, *CONTENTIEUX ADMINISTRATIF* 293–323 (3d ed. 2002).

and another can be found in the system of safeguard orders in the Canadian province of Quebec.⁵³ The essential characteristic of safeguard justice is that the orders will be issued rapidly, will be valid for a short period of time (but renewable), and will be immediately executory. For this last reason, it is crucial that the justice shelters be supported by local law enforcement officials specifically assigned to and trained for this role, to allow execution of safeguard orders or judgments rendered on provisional matters. Experience has shown that, even in situations where law and order has broken down completely, there always remain some individuals who can be relied upon to help with enforcement.

The safeguard judges will, wherever possible, be domestic judicial actors experienced in local law: district or county judges, magistrates, justices of the peace, whoever has the required jurisdiction or capacity in the place in question and for the matter at issue. Front-line justice aims at community empowerment, so it is essential that justice be done by domestic actors, with international supervision to avoid corruption, cronyism, or replication of a discredited regime. Only in the most unusual circumstances—in societies emerging from sudden genocide, for example—will it be impossible to rely on local officials.

Safeguard justice represents the truly urgent aspect of emergency justice rebuilding. As order is restored, there will be less and less of a call for this aspect of the front-line justice system. Even in the earliest days, however, not all matters that must be dealt with will be of an urgency to warrant a safeguard order. For these matters—important, though not urgent—front-line justice includes a system of mediational justice.

C. *Mediational Justice*

The mediational justice area of the justice shelters will offer citizens a consensual, voluntary system of mediation as a powerful and effective tool to resolve a wide variety of legal conflicts. Its particular appeal is twofold: it is free of charge to the parties, and it offers the chance for

53. See, e.g., QUEBEC C. CIV. P., R.S.Q. c. C-25, s. 46:

The courts and judges have all the powers necessary for the exercise of their jurisdiction.

They may, at any time and in all matters, whether in first instance or in appeal, issue orders to safeguard the rights of the parties, for such time and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, issue injunctions or reprimands, suppress writings or declare them libelous, and make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.

rapid resolution of their problem. The triage jurist will identify those cases amenable to mediation and will encourage the parties to avail themselves of this form of dispute resolution. Where possible, mediational justice should be described and explained in terms of traditional dispute-resolution mechanisms familiar to the local community: mediational justice is flexible, and can easily adopt local cultural traditions, so as not to evoke bewilderment or encounter culturally based resistance.⁵⁴

Mediational justice will be undertaken by local members of civil society who have credibility and who have been carefully trained in mediation techniques by international resource personnel. It is crucial that the system be operational at the very moment the judicial institutions of the country cease to play their role: this allows a quick restoration of a functioning system to deal with the ordinary justice needs of the populace. To facilitate this, training will be based on the intensive methods already tested and perfected in the context of the Quebec judicial mediation program. By using an already available training model, implementation of an effective mediational justice program will be greatly facilitated and start-up time reduced.⁵⁵ Depending on the availability of suitable personnel, mediations may also be conducted by suitably trained judges, magistrates, or justices of the peace. The ultimate goal is to establish an effective system of judicial mediation that will continue to operate after the front-line justice phase has ended.

The parties consenting to mediational justice will meet with the mediator in order to work out an immediate solution to their problem. Flexibility is the key: the parties control the process, and any settlement

54. See also discussion *infra* Section III.C.

55. The Canadian province of Quebec is the first jurisdiction to develop a fully integrated system of voluntary judicial mediation throughout its judicial system. From its beginnings in 1997 at the Quebec Court of Appeal, the system now includes the vast majority of courts and administrative tribunals and gives litigants the option to choose to mediate their dispute—whether at first instance or on appeal—before a trained judge-mediator, at no extra cost to the parties. Most types of cases can be mediated; most common are civil and commercial cases, family disputes, and administrative matters, but other matters have been successfully mediated as well, and Quebec has recently instituted a program of mediation in criminal matters that allows the prosecution and the defense to agree to joint recommendations which are then presented to the judge. On the Quebec system, see Louise Otis & Eric H. Reiter, *Judicial Mediation in Quebec*, in GLOBAL TRENDS IN MEDIATION 107 (Nadja Alexander ed., 2d ed. 2006); Louise Otis, *La Conciliation Judiciaire à la Cour d'Appel du Québec*, 1 REVUE DE PRÉVENTION ET RÈGLEMENT DES DIFFÉRENDS 1 (2003); Louise Otis, *La Justice Conciliatoire: L'envers du Lent Droit*, 3 ÉTHIQUE PUBLIQUE: REVUE INTERNATIONALE D'ÉTHIQUE SOCIÉTALE ET GOUVERNEMENTALE 63 (2001); Louise Otis, *The Conciliation Service Program of the Court of Appeal of Québec*, 11 WORLD ARB. & MEDIATION REP. 80 (2000).

reached is up to them—the mediator is trained to facilitate negotiation and to keep the process on track, not to impose a solution. Generally, a single session of three to four hours will suffice to resolve the majority of disputes, though more complex matters (such as those implicating the community more broadly or involving several parties engaged in overlapping disputes) can take longer.

Mediational justice is thus a rapidly deployable means of restoring a functioning system of ordinary justice, through which local communities can have their justice needs met. Its benefits are also long term, however, and continue long after the emergency response phase of justice rebuilding has ended. By establishing alternative modes of dispute resolution at the outset, the state equips itself with a powerful tool that can serve as the core of permanent locally controlled justice institutions based on the informational justice, and especially the mediational justice, components of the front-line justice system.

In the long term, mediational justice can adapt and take various forms depending on the resources and needs of the society in question, changing form as the justice system is rebuilt. Initially, as part of the justice shelters, mediational justice is locally oriented, with mediators coming from the communities in question and serving the justice needs of the local population. This serves to continue the foundation-building essential to nurturing the rule of law by focusing energies at the local level, where acceptance and legitimacy are strongest. Eventually, as confidence in the ideal of the rule of law increases, and as a formal adjudicative justice system is rebuilt, a system of judicial mediation can be integrated into it. This brings to the centralized court system some of the strengths and legitimacy of the locally based initiatives, while maintaining the flexibility and links to indigenous forms of dispute resolution characteristic of the front-line justice system.⁵⁶

A mediation-based system has a variety of strengths that make it a particularly useful tool in post-crisis rebuilding. First, it is relatively more flexible and less procedurally intensive than adjudication. This allows it to avoid a major sticking point of the various proposals involving “justice packages,” all of which are based primarily on an adjudicative model: namely, the delay in establishing, understanding, and applying the domestic law of the country in question.⁵⁷ Delay is the enemy of

56. Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L. L. 64, 66 (2001).

57. Cf. Bruce M. Oswald, *Model Codes for Criminal Justice and Peace Operations: Some*

rebuilding. Since mediation is based, where possible, on indigenous modes of dispute resolution, start-up times are shorter, as locals familiar with these traditions, rather than imported jurists, will be used.⁵⁸ Similarly, since mediation is substance- rather than procedure-intensive, it moves more quickly than adjudication, and so makes more efficient use of scarce judicial resources.

Second, since the underlying model of justice in mediation is based on cooperation and reconciliation, rather than adversarial competition, it tends to mesh better with the indigenous dispute-resolution mechanisms found in many non-Western societies.⁵⁹ As Jeremy Sarkin and Erin Daly write about Africa:

The notion of reconciliation has been a part of African systems of dispute resolution for centuries. In these traditions, the restoration of balance, rather than punishment of the guilty, is the main focus of law enforcement. The group, not the individual, has been the traditional unit of African society. Consequently, legal proceedings are community affairs in which a central aim is to reconcile the disputing parties, to restore harmonious relationships within the community, and to compensate the victims. Mediation of conflicts within the community aims at reconciliation instead of punishment. These proceedings focus more on the relationship between the parties than the actual event complained of because the underlying objective is to restore harmony within the community.⁶⁰

Moreover, by recasting dispute resolution in win-win terms rather than as a winner-take-all competition, mediation moves away from the adversarial mindset that generates and characterizes crisis.

Legal Issues, 9 J. CONFLICT & SECURITY L. 253, 260–61 (2004); *Peacekeeping Handbook*, *supra* note 15, at 97.

58. See generally Day, *supra* note 49; Kimberly A. Klock, *Resolution of Domestic Disputes Through Extra-Judicial Mechanisms in the United States and Asia: Neighborhood Justice Centers, the Panchayat, and the Mahalla*, 15 TEMP. INT'L & COMP. L.J. 275 (2001).

59. See generally Kevin Avruch & P.W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 131 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993); Bruce D. Bonta, *Conflict Resolution Among Peaceful Societies: The Culture of Peacefulness*, 33 J. PEACE RES. 403 (1996); David Kahane, *Dispute Resolution and the Politics of Cultural Generalization*, 19 NEGOTIATION J. 5 (2003).

60. Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 671–72 (2004).

Third, because of its participatory and cooperative nature, mediation can perform an important pedagogical function that is largely missing in a system based only on adjudication. The lessons learned in adjudication tend mainly to be limited to deterrence, which, in cases where it works at all, teaches the wrongdoer little more than that certain actions are punished, and so should be avoided. Mediation works differently. Because the disputants participate directly in the negotiation and resolution of their conflict, they take from the experience a first-hand lesson in conflict-resolution skills. This introduces a forward-looking, preventative element to a justice system, since the lessons learned in the process of mediation turn it into a kind of self-help tool for the resolution of future disputes.

Though mediation clearly has many advantages as a way to orient a justice-rebuilding initiative, not all conflicts are amenable to mediation, just as the justice shelters will not be equipped to deal with every matter that might come before them. Disputes involving violence (whether criminal or domestic), clear power imbalances between the parties, and the like, should generally be referred to adjudicative tribunals for resolution. Mediators must, therefore, work in tandem with other institutions of justice—both national and international—so as to create a gapless dispute-resolution system.

Mediational justice thus plays a distinct and essential role in long-term post-conflict justice rebuilding. It serves the interests of efficiency by maximizing conflict resolution capacity, it fosters acceptance of judicial rebuilding by minimizing the resistance that inevitably goes with an imposed and foreign justice system, and it promotes sustainability by making local communities stakeholders in the project.

* * *

Local control and community participation are the key features of the front-line justice system, with international interveners playing a resource or supervisory role, rather than a controlling one. Local control fosters acceptance, permits fine-tuning to the needs of the community, and ensures a measure of cultural applicability and sensitivity that might otherwise be lacking. Local actors know the situation, know the people, and often know many of the stories behind the problems. International supervision is desirable, however, both to ensure compliance with international norms of human rights, fair treatment, and the like, and also to prevent the situation from degenerating into biased retribution or vendetta. Moreover, the presence of international interveners contributes

strength to the initiative, since it shows the local community that the world is watching. Presence is crucial: the international community is there not to impose its will upon the locals, but to work with local personnel as supportive partners, providing resources, training, and consultative expertise, while leaving the running of the front-line justice system to the locals. The goal is a synergy, with each contributing strengths the other cannot: the locals supply legal and cultural knowledge, expertise in local traditions of dispute resolution, familiarity with the community, and legitimacy; the international interveners supply breadth of experience, general legal knowledge, expertise in international and humanitarian norms, as well as an evaluative distance allowing non-biased assessment and implementation. The issue is really one of empowerment: the international community intervenes so as to give the local community the means to work through the reconstruction process itself.

As embodiments of the local community, and thus privy to its stories and its testimony, the justice shelters of the front-line justice system are best placed to begin addressing both the extraordinary and the ordinary justice needs of the populace and so to begin the process of rebuilding the rule of law from the bottom up. A sense of unaccountability and hopelessness regarding any aspect of the justice system can lead to a worsening of disorder and subsequent problems of stability and legitimacy for a permanent legal order. The front-line justice system provides an initial measure to begin the rebuilding process, combining rapidity of deployment, flexibility, and public participation to create a climate of order and accountability that sends the message that the situation is under control at the local level.

III. ISSUES TO BE CONSIDERED IN FRONT-LINE JUSTICE

Numerous issues arise in conceptualizing any post-crisis justice intervention, and the answers reached have strong bearing on the scope of the intervention and how it proceeds.⁶¹ Three issues in particular—goals and values, juridical considerations, and cultural considerations—represent central and fundamental concerns that often pull in competing directions. All three interact and complement one another: goals, for example, depend on the cultural milieu in question, and the cultural context strongly affects the range of juridical considerations that is in

61. See generally Boon, *supra* note 8.

play. Analyzing front-line justice in the light of these concerns helps to underscore its unique potential to contribute to justice rebuilding.

A. *Goals and Values*

The overarching question in any intervention is the goals to which it is directed and the values it embodies. Casting an intervention in terms of reconciliation, for example, will lead to a different experience than casting it in terms of reconstruction; an intervention that seeks restoration of the rule of law as a pillar of democracy will proceed differently from one that works towards the rule of law as a way to achieve sustainable peace.

Perhaps the most frequent justification for post-crisis justice interventions is that they will lead to the re-establishment of the “rule of law.”⁶² The term is variously defined, but a common theme is accountability: fostering the rule of law means aiding in the development of “independent and effective judicial systems that can force officials to act within their legal authority.”⁶³ The rule of law thus plays a part in state reconstruction more generally, as a kind of shorthand expression of the justice ideals characteristic of a successful state, but defining it in such broad terms begs the questions of exactly which particular ideals the rule of law is to be understood as serving, and how these ideals are to be translated into practice.⁶⁴ Commentators have rightly criticized the fuzziness of what Erik Jensen has termed “thick” definitions of the rule of law,⁶⁵ which tend to view it as a panacea or “an elixir for countries in transition.”⁶⁶ A better way to look at the rule of law in a post-crisis context is to shift its emphasis from the national to the local level.⁶⁷ Casting reconstruction in this way puts the emphasis on establishing

62. See, e.g., Nina Lahoud, *Rule of Law Strategies for Peace Operations*, in THE RULE OF LAW ON PEACE OPERATIONS: A “CHALLENGES OF PEACE OPERATIONS” PROJECT CONFERENCE 127 (Jessica Howard & Bruce Oswald eds., 2002), available at <http://www.apcml.org/RuleofLawbook/final.pdf> (last visited Feb. 15, 2007); Plunkett, *supra* note 23.

63. Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT’L L. 86, 89 (2001); cf. Carothers, *supra* note 41, at 96–97; Jensen, *supra* note 48, at 338–39.

64. See generally Krygier, *supra* note 34, at 33.

65. Jensen, *supra* note 48, at 339.

66. MANI, *supra* note 32, at 53 (panacea); Carothers, *supra* note 41, at 99 (elixir).

67. For some examples of studies emphasizing the need to focus reconstruction on the local level, see Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002); Halpern & Weinstein, *supra* note 7; Jensen, *supra* note 48.

functioning, supported, and impartial legal institutions at the local level, which can see to the immediate justice needs of the population, and which can provide a foundation for further development once peace is more firmly established. Seen in this way, the rule of law becomes less a goal in its own right than a set of values—impartiality, accessibility, flexibility, accountability—around which to organize a justice system.⁶⁸ In the context of a post-crisis initiative, an ultimate goal of establishing the rule of law writ large is too distant to serve as a serious guide for an intervention. A short-term strategy of designing institutions like justice shelters that embody values relating to the rule of law is both realistic and essential to bringing about stable and sustainable reconstruction.

The same criticism about the attainability of ideals applies to another frequently espoused goal for post-crisis interventions: namely, political transformation and the establishment of democracy.⁶⁹ As we explain below, cultural factors often strongly limit the potential for success of any implantation of Western democratic ideals in places where they have little or no history. But, on a purely practical level, designing a working intervention strategy with such a broad and, frankly, vague goal is a daunting task, and one that has rarely been accomplished, if recent interventions are any guide.⁷⁰ Transition to a democratically elected, stable and accountable government is, of course, desirable; the problem is that this is seldom realistic as a primary goal, since a great deal of other more fundamental work must be done first.

Restoring justice to a shattered society requires more focused goals that relate to the needs of people, rather than populations.⁷¹ As we have argued already, for a society emerging from crisis the operative unit for rebuilding should be the community—perhaps even the neighborhood—rather than the state. Rebuilding is a bottom-up process: long-term success or failure depends on what happens locally, particularly in places

68. Cf. MANI, *supra* note 32, at 169–72 (advocating “incremental maximalism,” or a gradually implemented broad rule of law approach).

69. See, e.g., Draper, *supra* note 34; Sarkin & Daly, *supra* note 60, at 697–99; Teitel, *New Era*, *supra* note 34.

70. See Carothers, *supra* note 44, at 9 (“Of the nearly 100 countries considered as ‘transitional’ in recent years, only a relatively small number—probably fewer than 20—are clearly en route to becoming successful, well-functioning democracies or at least have made some democratic progress and still enjoy a positive dynamic of democratization.”)

71. Downsizing expectations about what interventions can do and designing programs with correspondingly realistic goals in mind is a dominant theme running through the empirical studies collected in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (Erik G. Jensen & Thomas C. Heller eds., 2003) (see especially Erik G. Jensen & Thomas C. Heller, *Introduction*, 1, 3; Thomas C. Heller, *An Immodest Postscript*, 382, 412–13).

where central authorities are non-existent or discredited. Three goals frequently addressed in the literature on post-crisis reconstruction speak specifically to this view of rebuilding: reconstruction, reconciliation, and protection of minorities. They should be seen as complementary aspects of any post-crisis initiative, rather than either-or options, as each contributes in distinct ways to building the foundation of a working justice system.

Reconstruction involves not just rebuilding physical infrastructure (although the importance of this should not be underestimated),⁷² but also restoring the political, legal, and social environment that will foster the growth of civil society.⁷³ As such, reconstruction can serve as an overarching and comprehensive goal for post-crisis rebuilding, but the ideal to which it speaks can also help orient the local initiatives. Reconstruction begins with the premise of destruction; its success depends on a frank and thorough assessment of the state of affairs. For this reason, reconstruction is naturally aimed at the local scene. Though frequently a nation is being reconstructed, rebuilding is the sum of local initiatives, and overall success depends on success at the local level. Of course, reconstruction in the justice context presupposes that there was something there to begin with that is worth salvaging and that can be built on. In many cases, rebuilding requires discarding the old and starting afresh with a new orientation. In such cases, there is a danger of a kind of ideological imperialism,⁷⁴ in which rebuilding is taken as an opportunity to impose foreign institutions and ideals, a subject to which we return

72. See the assessment of the situation in Rwanda and Sierra Leone in Chris Mburu, *Challenges Facing Legal and Judicial Reform in Post-Conflict Environments: Case Study from Rwanda and Sierra Leone* (2001) (working paper) (on file with authors):

The judiciary was one of the institutions that suffered the greatest destruction during the conflicts in Rwanda and Sierra Leone. Apart from the decimation of most qualified judges and magistrates due to the genocide, the judiciary in Rwanda suffered the physical destruction of its infrastructure and came out of the genocide period in need of a complete overhaul. Courthouses were destroyed, vital legal documents and case files were either looted or burned down together with the buildings. Magistrates' and judges' houses were destroyed and their vehicles plundered or stolen. As a result, one of the first priorities for the new government, apart from training a new crop of judges and magistrates, was to find ways of assisting what was left of the judiciary to get the very basic materials it needed to begin operating modestly.

73. See CSIS, *Task Framework*, *supra* note 4 (especially the four-part program: security, justice and reconciliation, social and economic well-being, and governance and participation). See also Hamre & Sullivan, *supra* note 4.

74. See Kreilkamp, *supra* note 4.

below. This underscores again how crucial it is to engage local communities in the reconstruction process.

Reconstruction as a guiding value places the emphasis on context: the institutions and structures necessary to restore order and civil society. Reconciliation, by contrast, approaches post-crisis rebuilding differently, by seeking to build relationships between people and so to mend the fabric of society.⁷⁵ As Wendy Lambourne writes, “rather than focusing on the political and legal aspects of peace agreements, truth commissions and criminal tribunals, we need to focus on the task of relationship-building and how that may be enhanced through these various processes.”⁷⁶ If reconstruction is a facilitative approach, conceived to restore the capacity for peace and the rule of law, reconciliation is restorative, conceived as “the coming together of things that once were united but have been torn asunder—a return to or recreation of the status quo ante, whether real or imagined.”⁷⁷ This suggests, as Jeremy Sarkin and Erin Daly point out,⁷⁸ that reconciliation is better seen as a process rather than as a goal; it describes the thousands of individual acts and incremental changes in outlook that must take place for rebuilding to occur. In some ways, this ideal of reconciliation, which looks towards forgiveness, might be seen to be in tension with justice, which tends to look towards punishment or accountability.⁷⁹ Justice too, however, can be seen as a process rather than a goal, which brings the two ideals into alignment as two aspects of the reorientation that must occur before successful rebuilding can take place.

Another value discussed in the literature on justice rebuilding, and one that pulls in a somewhat different direction than reconciliation and reconstruction, is the protection of minorities, rather than their forced assimilation or expulsion.⁸⁰ In the context of justice rebuilding, institutions set up in the short term *and* objectives sought in the long term need to address this concern, or else the society runs the risk of replicating its crisis because of the continued existence of tensions or hostilities within it. Likewise, a society that oppresses its minorities cannot be said to be just: the justice system in place needs to look out for

75. See Halpern & Weinstein, *supra* note 7; LEDERACH, *supra* note 7.

76. Lambourne, *supra* note 10, at 20.

77. Sarkin & Daly, *supra* note 60, at 665.

78. *Id.* at 671.

79. Donna Pankhurst, *Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace*, 20 *THIRD WORLD Q.* 239 (1999).

80. See Finell, *supra* note 5.

its most vulnerable members, both in terms of safeguarding their interests during the tense early days of rebuilding and in terms of designing institutions that neither explicitly nor systemically exclude certain elements of the population, such as ethnic or religious minorities, women, children, the elderly, or the disabled. This can, of course, lead to conflicts between the competing values of self-determination and inclusiveness; we explore this question in Section III.C below.

Finally, it is worth noting one further goal that lurks behind all of the others, serving as both a prerequisite and an end in itself: sustainable peace.⁸¹ Sustainability is both the most crucial and the most difficult challenge in peace building. It includes an institutional component, such as setting up conflict management resources, like courts, mediation programs, and the like, but this is not all. It also includes a mental element of confidence in the system and recognition of the importance of settling conflicts via the rule of law, rather than by hostility or extra-legal means. Part of this mental element is learning that conflict is not necessarily bad: some measure of conflict (of certain kinds, to be sure) is both inevitable and beneficial in a healthy and well-functioning society.⁸² Sustainable peace cannot be achieved by suppressing conflict, which quickly leads to repression of dissent, which gives way to increasingly acrimonious grievance. What is needed is the translation into practice of this distinction between healthy and unhealthy conflict, between the peaceful disagreements of healthy civil society and the rancorous self-interested grasping of an impending crisis. On the level of justice rebuilding, this means designing conflict-resolution institutions in order to keep conflict within manageable proportions and channeled towards constructive, rather than destructive, ends.

B. Juridical Considerations

Translating the general goals for a post-crisis justice-rebuilding initiative into a concrete intervention strategy poses a number of specific challenges from a legal point of view. Chief among these is distinguishing between projects that are possible and those that are too foreign for acceptance. This involves walking a number of fine lines: between desirable flexibility and undesirable vacillation or uncertainty,

81. See generally Neil J. Kritz, *The Rule of Law in the Post-Conflict Phase: Building a Stable Peace*, in *MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT* 587 (Chester A. Crocker et al. eds., 1996); Simonovic, *supra* note 10.

82. See GREGORY TILLET, *RESOLVING CONFLICT: A PRACTICAL APPROACH* 1–2 (1991).

between empowerment and supervision, between the pragmatic justice needs of local communities and the broader plans of the international community. A balance is crucial to prevent replication of the crisis situation and to promote sustainable development of a justice system.

Considerable attention has been given in the literature on reconstructive justice to the issue of applicable law.⁸³ Clearly, one of the principal challenges facing an emergency justice intervention is to establish precisely what body of law will be applied by whatever justice institutions are set up. Proposals based on “justice packages” and model codes, which, as we have seen, concentrate mainly on criminal justice, tend to rely most heavily on international law, since its claim is to be sufficiently universal as to be transportable anywhere.⁸⁴ Mark Plunkett, for example, notes that a U.N. “off-the-shelf” criminal code might draw its substance from such international instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Basic Principles on the Independence of the Judiciary.⁸⁵ For civil matters, interveners might similarly apply a skeleton of essential principles and procedures drawn from international initiatives such as the ALI/UNIDROIT Principles of Transnational Civil Procedure.⁸⁶

Leaving aside, for the moment, the general issue of the acceptability of the choice to import a body of law, rather than to apply local law, it should be noted that the importance of the problem of applicable law depends on how an intervention is characterized. Where justice rebuilding is based on an adjudicative model, determination of the applicable law will be a central problem. As we have seen, the massive criminal justice needs in post-crisis situations tend to impose an adjudicative model on potential interventions, which, in turn, suggests the need for model criminal codes to ensure fundamental justice and efficiency alike. While

83. See, e.g., Megan A. Fairlie, *Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code*, 18 AM. U. INT'L L. REV. 1059 (2003); Oswald, *supra* note 57; Plunkett, *supra* note 26.

84. This claim is, of course, not accepted by all, as the universalism/relativism debate in international human rights law illustrates. See generally ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VS. RELATIVISM* (1990); Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249 (1999).

85. Plunkett, *supra* note 26, at 69–70.

86. ALI/UNIDROIT, *ALI/UNIDROIT Principles of Transnational Civil Procedure*, <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> (last visited Feb. 15, 2007).

an adjudicative model may be appropriate for the criminal law, for civil and administrative matters, a mediational model is more suitable, as we argued above. The strength of a mediational model is that it depends much less on the specifics of substantive or procedural law than does an adjudicative system. Within the limits of certain peremptory norms (international human rights, public order), the parties are free to explore creative and unorthodox solutions. Moving away from an adjudicative model thus effectively sidesteps much of the applicable law debate.

Related to the applicable law issue is the problem of flexibility. A crucial element in any justice-rebuilding program is adaptability, as no one-size-fits-all intervention can do justice to the myriad legal problems and particularities in a post-crisis situation. As David Kahane notes, conceptualizing dispute resolution is a political process, which means that the interveners inevitably inscribe the resulting institutions and processes with a particular set of values.⁸⁷ Care must, therefore, be taken that assumptions about Western ideas of law or justice—that these ideals are universal or neutral, for example—not become necessary prerequisites for a post-crisis justice system. This goes back to the point made above about goals: rebuilding must be an organic process, proceeding out from the needs and values of the local community, rather than shaping local experience to a preconceived set of goals. Flexibility, in short, means taking careful account of the cultural situation and existing practices of the society in question, a subject we address in the next Section.

Finally, access to justice also presents significant challenges to a post-crisis justice initiative.⁸⁸ Planning an intervention requires recognition that certain systemic problems often predate a crisis: the pre-crisis justice system may itself not have been fully or adequately functioning. Moreover, it is in societies most at risk of crisis where access to justice problems are most acute, due to costs of justice, distance between justice institutions, or distrust and fear of authorities. Rebuilding initiatives can address this problem by keeping the focus on the local, rather than the national, scene. Human problems must be addressed on a human scale, with justice brought to the people.

C. *Cultural Considerations*

87. Kahane, *supra* note 59.

88. See, e.g., United Nations Development Programme, *Access to Justice: Practice Note* (2004), available at http://www.undp.org/governance/docs/Justice_PN_En.pdf (last visited Feb. 15, 2007).

Any intervention, however well-designed or well-intended, is a highly charged political act, with the inherent and inescapable danger of encountering resentment, resistance, and ultimately rejection. As David Kahane writes:

While we cannot responsibly escape generalizing about cultural perspectives in understanding dispute resolution, such generalization takes place on a political terrain, and is itself a political act. So we need to see ourselves as engaged not in an effort to pinpoint the truth about cultures, but rather in a *politics* of cultural generalization when we theorize dispute resolution, or seek to intervene in disputes. The alternative is to ignore differences, and thereby to give implicit support to dominant cultures, which understand themselves as no culture, or every culture.⁸⁹

Furthermore, the lines of resistance that arise tend to crisscross, with the interests of local, regional, and national political authorities, religious and ethnic groups, and individuals all in complex and shifting states of tension with each other. Rebuilding a justice system thus requires a high degree of cultural sensitivity: to language, to indigenous attitudes towards law and dispute resolution, to local legal traditions and institutions, and to the role of religion and other values in law.⁹⁰ Erin Daly calls this “contextuality”: the need to tailor solutions to the specific needs of the society emerging from crisis.⁹¹ Whether an intervention is understood in transformative or restorative terms, these cultural issues set up *de facto* boundaries within which interveners must work. To an extent, these boundaries are negotiable and can be shifted or shaped over the medium and long term. In the short term, however, it is important that those planning a justice-rebuilding initiative understand the local cultural constraints and not work in ignorance or, worse, defiance of them.

The overarching issue is the risk that intervention will become a form of ideological imperialism or neo-colonialism. The danger here is that the need for immediate action will result in cultural impositions that will prove unacceptable to the local population and will have undesirable or

89. Kahane, *supra* note 59, at 12.

90. See generally KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* (1998); Avruch & Black, *supra* note 59; MANI, *supra* note 32; Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391 (2004); Day, *supra* note 49; Kahane, *supra* note 59; Mburu, *supra* note 72; Robert A. Rubinstein, *Cross-Cultural Considerations in Complex Peace Operations*, 19 NEGOTIATION J. 29 (2003).

91. Daly, *supra* note 7, at 77–78.

outright harmful effects in the long run.⁹² This is the dangerous side of the transition paradigm we critiqued above. The assumptions implicit in this model can easily suggest a value-laden transition from some benighted form of society to one based on Western ideals and institutions. It is important in post-crisis situations not to simplistically identify an entire culture with whatever abuses or shortcomings prevailed before or during the crisis. The job of a rebuilding initiative is not to modernize or Westernize, but to restore or implement culturally acceptable, workable, effective, and just legal institutions. Imposed or enforced justice rebuilding, when done without meaningful local consultation and participation, runs the risk not only of rejection, but also of perpetuating the very helplessness and injustices that the intervention is intended to remedy.

The crucial defense against this legal imperialism—which amounts to a form of paternalism—is the use of local actors in the rebuilding process.⁹³ As we argued above, this most effectively marshals expertise and helps ensure a degree of local acceptance, provided that international supervision is present to guard against bias or self-interested action. It is important to stress, however, that local actors do not simply mean nationals of the country in question. The operative divisions will likely be finer than that, and in some cases interveners from elsewhere in the afflicted country may be just as foreign as international interveners. Cultural sensitivity thus involves paying careful attention to the fissures and fault lines within society, since in the short term they can be insurmountable obstacles to effective action.

At the same time, however, certain ideals brought to a post-crisis situation by international interveners are by their nature non-negotiable limits that cannot be traded away in the name of cultural sensitivity or pragmatics. This applies, for example, to the human rights guarantees set out in international instruments, as well as prohibitions against war crimes, torture, and crimes against humanity. These core human values must be distinguished, however, from some of the ideals specific to liberal democracy that can appear (to those who live under them) to be neutral and universal, but that in fact enshrine the particular values of

92. See Kreilkamp, *supra* note 4.

93. This is a common theme in the literature on post-crisis reconstruction, though the details of how locals should be used vary. Compare Partnership Program on Peace Building and Rule of Law, Recommendations, Part III (n.d.), available at <http://www.pbpu.unlb.org/pbpu/library/Program%20on%20Peace%20-%20RoL%20Recommendations.pdf> (last visited Feb. 15, 2007), with CSIS, *Task Framework*, *supra* note 4, at 2, and Widner, *supra* note 56, at 65–66.

Western culture. Western democratic and voting ideals, notions about the adversarial airing of disputes, and many of the social and economic values inscribed in Western law, for example, may well be foreign to the society in question and provoke either bewilderment or outright resistance. Thorny questions of definition can arise, however, in drawing the line between non-negotiable universal human rights and desirable, but controversial, ambitions. The case of gender equity and the empowerment of women is a good example, as Western ideals may be unacceptable in a society where traditional gender roles claim their origin in religious precepts.⁹⁴ Justice rebuilding is a normative endeavor; as such, it comes into contact—or conflict—with other competing normative orders within the society. This necessitates delicate and sensitive balancing of value systems as an intervention stakes out a middle ground between the peremptory norms of international humanitarian law and the practical constraints of local culture. As Rama Mani writes:

If ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance, they may flounder, notwithstanding their assertions of universality. If these concepts are articulated internally, there must be some universal standard against which to evaluate them, to ensure that they do not entrench unjust principles or discriminate against weak groups under the guise of respect for traditional cultural values.⁹⁵

In the short term, performing this balancing act successfully requires careful evaluation of the structure of society as it emerges from crisis and the obstacles that this can present to the rebuilding process.

Cultural considerations must be evaluated dynamically, since it is the social context at the time of the intervention that counts, not the way things were before the crisis began. Any society emerging from a crisis situation will present certain endemic constraints that severely limit what rebuilding initiatives are possible. Corruption, for example, is a particularly troublesome problem. Though often cast as a security issue,⁹⁶

94. See United Nations Development Programme, *Gender Approaches in Conflict and Post-Conflict Situations* (2002), available at <http://www.undp.org/women/docs/gendermanualfinalBCPR.pdf> (last visited Feb. 15, 2007); United Nations, Department of Peacekeeping Operations, Peacekeeping Best Practices Unit, *Gender Resource Package for Peacekeeping Operations* (2004), <http://pbpu.unlb.org/pbpu/library/GRP%20Full%20Version.pdf> (last visited Feb. 15, 2007).

95. MANI, *supra* note 32, at 49.

96. See, e.g., Feil, *supra*, note 4, at 97–98; Plunkett, *supra* note 26, at 75.

the importance of controlling corruption is actually much broader. On the one hand, corruption contributes to the paralysis of society and its institutions, tying the hands of local actors and international interveners alike. On the other hand, corruption—whether carried over from the pre-crisis regime or newly arisen post-crisis—can tap into, and reinforce, endemic or traditional hostility to justice institutions, thus severely circumscribing the limits of what is possible. Such a situation argues strongly in favor of external intervention, but intervention of a kind that supports and empowers indigenous counterbalances to corruption, rather than paternalistic control.

In a similar way, public confidence in law and its institutions is itself a cultural consideration that must be evaluated dynamically. A lack of public confidence in institutions of justice or in the rule of law more generally can be the result of a long-standing culture of submissiveness, but it can also grow out of the specific short-term political or social situation that prevailed and precipitated the crisis. In many ways, the main obstacle facing a rebuilding initiative is convincing people to go against their own perceptions of their short-term self-interest, and instead to trust an intervention. This problem is particularly acute in societies where there is no history of the rule of law, where the judiciary or the legal system was perceived to be complicit in the crisis, or where the sense that justice is an ideal that translates into practice is missing. This lack of public confidence can take many forms, ranging from fear of those in authority, to a prevailing preference for lawlessness or self-help, to simple inertia and reluctance to open old wounds. Moreover, it should not be forgotten that individual or highly localized fears and constraints are, perhaps, the most significant forces eroding public confidence in rebuilding. Examples include individuals who fear intimidation or violence towards themselves, their families, or their witnesses, poverty or desperation leading to the buying and selling of testimony regarding offences, and the like. Such situations present continuing and significant obstacles to access to justice and must be dealt with at the local level.

Post-crisis situations create huge numbers of desperate people, and the long-term goal of collectively rebuilding civil society and the short-term demands of individual survival do not necessarily always mesh together. In designing and implementing a justice-rebuilding strategy, ideals are important, but, faced with near chaos, it is often difficult to justify the high road. Pragmatics or efficiency should not become justifications for paternalism, but, at the same time, idealism should not become a

straitjacket preventing action. Striking the proper balance requires sensitivity and creativity.

CONCLUSION

If we return to our symbols of the citadel of justice and the justice shelter, the preceding discussion now allows us to see more clearly precisely how the front-line justice system, as outlined here, brings a fundamentally new perspective to justice rebuilding. Both the citadel and the shelter are central institutions, but their points of reference are different, and this is crucial. The citadel symbolizes the court as a centralized institution at the national level, designed and intended to rise above factions and divisions to unite the state under a single rule of law. As such, however, the citadel depends for its legitimacy and its effectiveness on a national culture of justice and the rule of law, something that is missing or defective in a post-crisis situation. The justice shelter, by contrast, is a local institution, designed to pragmatically restore justice at the neighborhood or community level, without (for the moment) any explicit grander ambitions that might prove to be unworkable in the long run. Its design and intention recognize the reality of a post-crisis situation, in which divisions and hostilities prevent consensus, and dictate a return to the local level, at least for the time being. Rebuilding on a national scale requires the foundation of rebuilt households, neighborhoods, and communities; the fabric of society is repaired piece by piece. The justice shelter is local in more than its location or jurisdiction, however: it reflects the community it serves in its composition, its personnel, its procedure, its orientation, and, most importantly, its values. As such, it abandons (temporarily at least) the central national institutions of justice in favor of justice centered on the community, because it recognizes that in the particular situation at issue broadly-based institutions are unworkable, untrustworthy, or unreachable by the local population.

This shift from the national to the local—from the citadel of justice to the justice shelter—is the defining characteristic of front-line justice as an emergency justice intervention strategy. Its main strength in both the short term and the long term, however, is its reliance on mediation as the principal means of dispute resolution. Mediation provides the bridge between the short term and the long term, between the shelter and the citadel. By giving local actors a powerful tool with which to handle a wide range of both extraordinary and ordinary justice matters, front-line

justice helps restore the stability and confidence needed for the further growth of a healthy legal system.