TRANSITIONAL JUSTICE IN PEACE PROCESSES

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This paper has been prepared to inform the consideration of a revised guidance note of the Secretary-General on the United Nations approach to transitional justice, as part of a broad exercise. The paper, however, reflects the views of the author and does not necessarily reflect the views of the United Nations, including its funds, programmes and other subsidiary organs, or of the financial donors to the exercise. It should not be considered as a United Nations document and is not an official record of the United Nations. The exercise has received financial support from, inter alia, the Federal Department of Foreign Affairs of Switzerland.

CONTENT

Executive summary

The subject of justice and accountability raises significant challenges in peace mediation contexts, as well as in the implementation phase following a peace agreement. These challenges usually cannot be avoided and simply must be worked through. However, there are steps that the United Nations can take so that its staff and representatives are in a stronger position to plan, to respond to the substantive questions that arise and to better coordinate with each other.

This paper sets out some of these challenges, and offers both policy and strategy ideas for addressing them. The paper offers, in part:

FURTHER CLARITY ON UNITED NATIONS POLICY:

- Although the guidance from the Secretary-General pertaining to amnesties is well established, there remains some level of misunderstanding, which has led to implementation challenges in certain contexts. An aide-memoire on the United Nations amnesty policy would offer further clarity.

- This paper also suggests minimum qualities for an effective truth commission. United Nations staff who confront weak or politicized commissions or language in a peace agreement that calls into question a commission's credibility could turn to such parameters for guidance.

A CALL FOR BETTER COORDINATION BY THE UNITED NATIONS:

- At the country level, transitional justice programmes are often developed independently from each other, with no coordination or knowledge of similar efforts by others. Because transitional justice involves so many parts of the United Nations, this paper recommends that the senior United Nations official in each country context, such as the Special Representative of the Secretary-General or Resident Coordinator, could provide overall leadership on this issue.

- There is also a coordination gap at the Headquarters level. A light structure to facilitate information sharing and encourage collaboration would help.

A RECOMMENDATION FOR A STRATEGIC, CONTEXT-SPECIFIC APPROACH:

- Advance strategic planning, grounded in the context of each country and emphasizing a creative approach, is critical to finding a resolution to the challenges in any mediation context. Those struggling with these questions could benefit from innovative ideas and comparative examples. Engaging victims in a peace process should be a particular priority.

Introduction

This paper is aimed at understanding how the United Nations has engaged in transitional justice in the context of peace processes, where the challenges have been, and what might be improved.

There are, of course, numerous challenges. The paper focuses especially on those issues that have been highlighted in numerous consultations with United Nations and non-United Nations colleagues, both at Headquarters and in the field.

Part of the difficulty of this issue is that it brings together two different fields of work, each with different cultures or operating frameworks. **Those who work in the field of human rights or transitional justice may be unfamiliar with the practice and principles of peace negotiations. Likewise, most practitioners in peace mediation do not know the details and best practice in relation to transitional justice.** These differences are natural and should be expected. However, addressing transitional justice in the context of a peace process requires both an appreciation of the substance and careful attention to process. In any typical peace process context, the challenges that are the focus of a human rights professional (such as the specific transitional justice elements that could be included in an agreement) are different from the challenges foreseen by mediators, such as: How should the negotiating parties be prepared so that they will be ready to discuss this issue, and when is the right moment in the agenda?

While operating under different frameworks, the two perspectives do not necessarily clash. **Designing a mediation plan is always highly context specific. While honouring the principles and international standards, transitional justice should also be flexible and firmly rooted in the local context**. Finding workable solutions is in the interests of both human rights and peace.

This paper recognizes that "transitional justice" is not always the best term to use in every context. It can be misunderstood, most significantly by local actors such as victims and parties to peace talks. For transitional justice experts, there is a risk of considering only the four classic pillars of transitional justice, rather than encouraging a broad and open reflection on how best to address the issue of past crimes, and in a manner that is rooted locally.[1] This

1 The four classic pillars of transitional justice are criminal prosecutions, truth seeking, reparations and various forms of reform and prevention, sometimes referred to as guarantees of non-repetition.

paper uses "transitional justice" as the term of art, but recognizes that other terms may be used in specific contexts as appropriate.

This paper assumes that "peace processes" extend beyond a period of direct peace negotiations. **The core tension of addressing justice for serious human rights and humanitarian law violations may be most evident during peace talks, but the specifics of many peace agreements continue to be negotiated and refined during the period of implementation, when details must be set out and, sometimes, legislation prepared.** There may also be a considerable period following the signing of an agreement when peace is not yet fully assured: ceasefire arrangements must be put in place, armed groups demobilized, tensions between communities addressed, and new political or security structures established. Even where the United Nations is not a central actor in the formal peace negotiations, it is common for the United Nations to be more deeply engaged following a peace agreement, during a transition period that may last for many years. This usually includes assisting with implementation and further political and legal negotiations on a range of transitional justice measures.

The period before official peace negotiations begin, when it may not be clear if and when there will be talks, is also important for transitional justice planning. There are a range of preparatory measures that United Nations officials should consider, and these are included in the overall strategy suggested below.

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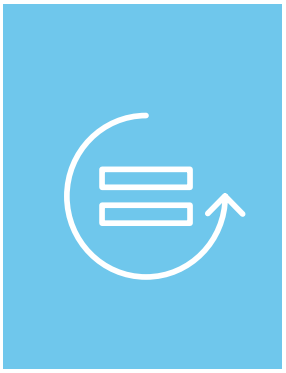
A. Background to the United Nations policy



There are a number of reasons why the United Nations is frequently engaged in transitional justice matters. **In peacemaking or peacebuilding contexts, transitional justice is often perceived to be part of the solution to endemic conflict and widespread impunity.** Local partners may request United Nations assistance to confront these issues, be this from civil society, a national human rights commission or the Government. If peace negotiations are planned, the combatants are usually sensitive to their legal vulnerability, while victims and rights advocates are pressing for justice. It is rare for a peace process not to grapple with this critical tension, and the United Nations can help. Even without these local factors, United Nations officials typically see transitional justice as an important part of a broader peacebuilding and prevention strategy, and thus a core element of their overall mandate. Meanwhile, perhaps reflecting some of these same dynamics, the Security Council is increasingly likely to explicitly direct United Nations missions to assist local actors on issues of transitional justice.[2]

This United Nations engagement on the issue has matured significantly since the field of transitional justice began to develop in the 1990s. The Secretary-General of the United Nations first established policies on transitional justice for United Nations representatives working in peace negotiation contexts in 1999. In the preceding years, the United Nations had responded to these issues in an ad hoc and inconsistent manner.

Questions of accountability emerged in the peace negotiations for El Salvador in 1991 and for Guatemala in the early 1990s, both being contexts where the United Nations served as the lead mediator.[3] In both cases, the United Nations discouraged any amnesty that would cover serious crimes, and it supported proposals for truth commissions and victim reparations. However, there was no general guidance from Headquarters providing an institutional policy on these questions, leaving it to the good judgment of the United Nations mediators.

2 Security Council Report, *Transitional Justice: What Role for the UN Security Council?* research report (New York, 27 October 2022). 3 For details of how the peace negotiations grappled with issues of accountability in El Salvador, see Priscilla Hayner, *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict* (New York, Routledge, 2018), pp. 29–31 and 42–43; regarding Guatemala, see pp. 31–32.

In the same years, in other contexts, the United Nations responded to the issue very differently. During political negotiations in Haiti in 1993 and 1994, United Nations officials helped to draft a broad and unrestricted amnesty, and they are said to have pressured national leaders to adopt it.[4] In Sierra Leone in 1996, a peace agreement was signed that included a blanket amnesty. It received no opposition from the United Nations representative or other international participants in the talks, who saw the amnesty as necessary and uncontroversial.[5] This particular peace agreement did not hold long, however, for reasons unconnected to the amnesty.

By the late 1990s, it became clear that the United Nations lacked any clear policy on these issues. Many felt that **the principles of the Charter of the United Nations, fundamental human rights standards and respect for international law should put the United Nations at the forefront of promoting accountability for serious crimes, as well as defending the rights of victims in accordance with international law and standards.** A process of reflection beginning in 1998 resulted in the release of the **first guidance note from the Secretary-General in 1999**. These guidelines, updated and re-released in 2006, are known in particular for clarifying the United Nations policy towards amnesty, but they also address a number of other transitional justice issues that may arise in peace negotiations.[6] The guidance note was intended for internal reference by United Nations representatives and was not made public.

The official position of the Secretary-General on core transitional justice issues has remained relatively constant since 1999. However, the range of challenges that the United Nations has confronted has only broadened and deepened over these decades. United Nations staff describe the highly fraught nature of these issues, outlining numerous areas they have found difficult and calling for more and better examples of successful United Nations engagement elsewhere.

Although the United Nations sometimes holds a lead mediation role, most recently in Libya, the Syrian Arab Republic and Yemen, as well as in El Salvador and Guatemala as described above, the United Nations often acts in a support capacity, providing expertise and assistance to other entities that are in the lead. Regional and sub-regional organizations have served as mediator or facilitator in many recent contexts. The United Nations is usually present but may have less influence over the agenda or the outcome. In Darfur and in the Central African Republic, South Sudan, the Sudan and Ukraine, for example, very difficult talks led by regional bodies have addressed issues of past crimes in a sometimes incomplete manner, and to varying degrees of satisfaction in relation to best practice. However, the United Nations may help by making international standards and principles clear, feeding in ideas and reacting to proposals as they emerge. The views of the United Nations may be given more weight especially where it is expected to help implement outcome agreements.

4 Ian Martin, "Haiti: International Force or National Compromise?" *Journal of Latin American Studies,* vol. 31 (1999), p. 733. 5 The Sierra Leone case is described in detail in Hayner, *The Peacemaker's Paradox*, pp. 32–34 and 129–144. 6 "Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution", distributed to United Nations representatives by the Secretary-General in 1999, updated in 2006.

B. Existing United Nations guidance on transitional justice in peace processes: addressing gaps

Many United Nations officials are aware of the overall guidance on transitional justice, which has been set out in a number of documents. The annex to this paper lists many of these, including guidance and reports from the Secretary-General in 1999, 2004, 2006, 2010 and 2011. There is also United Nations guidance specifically for those working in the arena of peace mediation, published in 2012, which includes a section on these issues.[7]

The Office of the United Nations High Commissioner for Human Rights (OHCHR) released a series of thematic papers, referred to as "rule-of-law tools for post-conflict States", beginning in 2006, which set out best practice and recommended approaches on core transitional justice themes, including truth commissions, vetting, amnesty and reparations.[8] These continue to be useful reference points, in particular for assisting ongoing national initiatives, although they are not specifically focused on the political complexities that emerge in peace processes.

Despite this general awareness of United Nations policy, **there remain some misunderstandings** as well as **significant gaps**. First, even the best-known, most specific policy (that the United Nations will not support an amnesty for international crimes) has been interpreted and implemented differently in different contexts, as described further below.

Second, even where United Nations policy is relatively clear, there is little available in the form of clear operational guidance. The Office of Legal Affairs, OHCHR and other offices have provided specific recommendations or taken clear policy decisions from Headquarters in relation to many country contexts, generally at the request of United Nations leadership in-country. However, **more specific guidance could be helpful to allow better planning and to strengthen the ability of United Nations representatives to engage more actively when issues or proposals first emerge.**

Third, there are a number of difficult issues on which guidance seems to be missing or unknown, either because staff are not aware of relevant documents or because the United Nations has never set out specific direction on these subjects. There is, in fact, **useful guidance**

7 "Guidance for effective mediation" was issued as an annex to the report of the Secretary-General on "Strengthening the role of mediation in the peaceful resolution of disputes, conflict prevention and resolution", A/66/811, 25 June 2012. 8 OHCHR, Rule-of-law tools for post-conflict states, available at: www.ohchr.org/en/publications?field_subject_target_id[755]=755&created[min]=&created[max]=&sort_bef_combine=field_published_date_value_DESC.

in existing United Nations documents on some aspects of transitional justice that should be more widely known. Many of those interviewed said that they were not aware of all United Nations guidance documents on this issue – even if they were generally aware of the core principles – and they suggested that a **centralized collection** would be useful. The list (and links) provided in the annex to this paper represent an attempt to begin to address this need.[9]

These gaps in current guidance make it difficult for the United Nations to facilitate a coherent approach across the system. Like peacebuilding more broadly, **transitional justice requires** an analytical and programmatic lens that goes beyond that of any one agency. It **requires high-quality conflict analysis, context specificity, gender awareness and innovation** – and all of this must be rooted in consistent United Nations policy that is well understood by all relevant entities.

The reference to "United Nations policy" in this paper generally refers to that of the Secretary-General, rather than the Security Council, the General Assembly or the Human Rights Council. In fact, the Security Council has given its support to non-impunity, and specifically to avoiding amnesty and seeking accountability for certain crimes, but this has usually been


UN Photo/Yutaka Nagata

in specific country contexts or specific thematic areas.[10] The Security Council has been the most explicit and consistent in reference to accountability for gender-based crimes.[11] Because these issues are better worked out by those at the country level, Security Council resolutions providing general direction for United Nations staff to support transitional justice in any specific country context are usually more helpful than those that try to set out details on the best approach.[12]

9 As set out in the annex, United Nations guidance documents relating to transitional justice in peace processes have been released by the Secretary-General, the Mediation Support Unit, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), OHCHR, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (in numerous thematic reports), several independent United Nations experts and the Special Representative of the Secretary-General for Children and Armed Conflict. Some of these documents are focused primarily on specific challenges of implementing transitional justice, i.e. they are not specific to a peace process. Together, they provide a range of useful ideas and direction on policy and practice. 10 According to the Security Council Report, the Security Council's current divisions and national interests have significantly reduced its support for individual criminal accountability, as compared to the past. See Security Council Report, *The Rule of Law: Retreat from Accountability* (New York, 23 December 2019). 11 In a number of resolutions on women, peace and security, the Security Council has made specific reference to the need for crimes of sexual violence to be excluded from amnesty provisions. For example, Security Council resolution 2467 (2019) "*calls upon* parties to conflict to ensure that ceasefire and peace agreements contain provisions that stipulate sexual violence in conflict and post-conflict situations as a prohibited act ... and *stresses the need* for the exclusion of sexual violence crimes from amnesty and immunity provisions in the context of conflict resolution processes". 12 The role of and recommendations for the Security Council are assessed in Rebecca Brubaker (ed.), *The UN Security Council and Transitional Justice* (New York, United Nations University, Centre for Policy Research, March 2021). This report draws from a collection of case studies covering Afghanistan, Colombia, the Democratic Republic of the Congo, Rwanda and South Sudan. Available at: https://collections.unu.edu/eserv/UNU:7965/UNU_TransitionalJustice_FINAL_WEB.pdf. See similar recommendations in Security Council Report, *Transitional Justice: What Role for the UN Security Council?* research report (New York, 27 October 2022).

C. Transitional justice in peace processes: plan and strategy

1. *HOW AND WHY TO CONSIDER TRANSITIONAL JUSTICE: PRINCIPLES AND STRATEGIES*

The challenges that emerge in a peace process pertain to process as much as to the substance of transitional justice.

As noted above, the fields of peace mediation and transitional justice are both focused on process and on substance, but there is perhaps a difference in emphasis: **peace mediation is intensely focused on process**; successful mediation is usually built on careful planning, analysis of the conflict dynamics and an assessment of a wide range of options for style, location, timing, participants and, ultimately, the agenda of possible talks.[13] United Nations guidance on mediation focuses on the principles of preparedness, impartiality, consent, inclusivity and national ownership, as well as providing flexibility for each national context.[14] Of course, **key substantive issues are likely to frame the talks** when they begin – which may include the **mechanics of a ceasefire, disarmament, demobilization and reintegration, changes to constitutional and governance structures, security sector reform and other issues.**

Transitional justice practitioners emphasize procedural matters such as consultation processes, victim inclusion and independent selection procedures when establishing new commissions, for instance, but they place **greater emphasis on the substance of transitional justice, identifying the needs and the possible approaches to supporting justice and accountability, building the capacity of local partners** and responding to specific challenges where justice may be compromised.

Needless to say, if a mediator fails to consider how and when to broach sensitive issues, or to understand the interests and preoccupations of the negotiating parties and other stakeholders, then the issues themselves will not be well served. This is certainly true in relation to transitional justice.

There follow several suggested principles or strategies that may assist United Nations representatives when issues of justice and impunity can be seen on the horizon of a peace process. Following this, four common challenges are described, with suggestions of how they can be better understood and addressed. The paper will close by addressing specific tran-

13 A Field of Dilemmas: Managing Transitional Justice in Peace Processes, Barney Afako, available at: https://www.ohchr.org/en/documents/tools-and-resources/guidance-note-secretary-general-transitional-justice-strategic-tool. 14 See "United Nations Guidance for Effective Mediation" for an overview of these elements.

sitional justice issues, such as the United Nations policy on amnesty and how to respond to a compromised truth commission.

a. Addressing justice will strengthen a peace process

United Nations policy and many United Nations public statements insist that there is no competition, and there should be no compromise, between obtaining peace and achieving justice. United Nations policymakers and mediation professionals understand that this ideal principle looks very different in practice, however. Tensions usually exist, especially if senior representatives of the negotiating parties believe they are personally at risk of being prosecuted. In many contexts it is a major challenge to find a path to peace in a manner that fully respects the demand for justice, and confronting this issue may even put the talks at risk.

For those United Nations officials who do not understand transitional justice well, or who assume that political realities make accountability near-impossible in a particular context, the issue of justice might be assumed to be an impediment to reaching a peace deal. Officials may view peacemaking as a top priority in order to stop the violence as soon as possible and prevent further victims.

In one recent case, visiting senior United Nations officials who were not deeply familiar with the context discouraged any serious treatment of justice for fear of damaging the political negotiations. This was a misreading of the peace process. They were correct that the issue made a successful peace process more difficult, but the conflict parties themselves insisted on clarity as to what their legal and political future would hold, wanting to understand the legal risks and establish what their options might be. This is often true, making it unrealistic and undesirable to try to avoid the subject. In addition, victims and rights advocates often press for justice, bringing well-deserved public and media attention to the issue.

Once agreed, the transitional justice components of a peace agreement may well be seen as critical to holding the peace together. In Colombia, the Security Council and the Secretary-General saw transitional justice as sitting at the heart of the agreement: it allowed for the laying-down of arms and reintegration, and provided a guarantee of justice in relation to the International Criminal Court and the international community. Visits to the country by both the Security Council and the Secretary-General included meetings with the core transitional justice bodies: the Special Jurisdiction for Peace, the Truth Commission and the special unit to search for the disappeared. In numerous press statements, the Security Council repeatedly called for the full implementation of all aspects of the agreement. For example, a press statement in January 2020 concluded: "The members of the Security Council welcomed continued progress by the three components of the Integral System for Truth, Justice, Reparation, and Non-repetition, with the participation of victims. They reaffirmed their full support for the critical role of these components in the peace process and stressed the need for them to be able to work independently and autonomously" (SC/14081). This high-level support from the United Nations was especially important in the face of the sustained attack on these transitional justice bodies by the political right in Colombia.

b. Envisioning a strategic, context-specific approach

Transitional justice issues are always contentious in peace talks. Passions run high, including on the part of victims and from the resistance and self-interest of the conflict parties. On a practical level, it is rarely self-evident what specific measures would best address victims' needs, criminal accountability and reforms. The options are legally and politically complex.

Transitional justice should be approached as a comprehensive strategy, beginning with an identification of the objectives and challenges, not a list of activities or a checklist of mechanisms. Context analysis is key, as is creative, context-specific brainstorming. Any programmatic road map should recognize that conditions will evolve and change: successful first initiatives can open the way for other actions, and the views of victims and others may evolve with time. Possibilities may also open up as political powers shift. The dynamics at the end of a conflict will be different several years later, when many transitional justice initiatives may still be under way.

United Nations officials who have recognized these challenges in advance will have proactively initiated a process of strategic assessment, planning and brainstorming even before peace negotiations have begun. Such actions have allowed the United Nations to prepare itself in relation to open legal or other substantive issues where advance research is needed. This is not to displace the lead taken by national actors. Rather, the United Nations has engaged national stakeholders in such advance planning, broadening involvement and input beyond the immediate conflict parties right from the start. The ideas that emerge from such strategic forecasting can be presented to the negotiating parties when the time is right.

United Nations officials may also find such strategizing helpful for their own programme planning, especially where transitional justice is floundering or is still dormant. Staff in some contexts have called for specialist assistance from United Nations Headquarters in brainstorming possible paths and creative interventions.

In the Central African Republic, the Deputy Special Representative of the Secretary-General for Political Affairs in the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) invited a member of the Standby Team of Senior Mediation Advisers in the Department of Political and Peacebuilding Affairs to help assess a difficult set of challenges and to set out specific programmatic options. This took place before it was clear that there would be a national peace process that engaged all armed groups. OHCHR had already led a mapping project in the Central African Republic several years earlier, setting out specific transitional justice proposals in some detail.[15] The later assessment by the Mission tried to address the issues specifically in relation to a peace process, including as to how insurgents could be demobilized and reintegrated while any accusations against them were addressed.

Likewise, in Afghanistan, the Human Rights Service of the United Nations Assistance Mission in Afghanistan (UNAMA) engaged the Standby Team of the Department of Political and Peacebuilding Affairs to help the Mission

15 See www.ohchr.org/en/countries/africa/2017-car-mapping-report.

identify likely transitional justice challenges in the context of anticipated peace talks, and to provide advice on how UNAMA could prepare. This set the stage for technical assistance to national partners well before the 2020 peace process began, and it identified legal and policy questions for UNAMA to clarify in advance of talks.

c. Including victims

The importance of broader inclusion in peace processes has received more attention in recent years. Among those who have not been sufficiently heard in the course of many peace negotiations have been the victims of the war.

The peace talks in **Colombia** committed to a victim-centred process at an early stage, and the parties then agreed to **visits by victim delegations, who would speak directly to the negotiators.** The parties asked the United Nations Resident Coordinator to work with the National University of Colombia and the Catholic Church to identify victims and to coordinate these visits. **These victim testimonies were seen as extremely important to the process, and the role of the United Nations was central.** There are inherent tensions in taking on the role of selecting representative victims, as the conflict parties may disagree with the characterization of who constitutes a victim. Despite these pressures, the United Nations was well placed to play this role in Colombia, given its recognition as a neutral party, and perhaps also because it did not play a central role in the facilitation of the talks themselves. In the selection of the 60 victims who visited the peace table in Havana, the United Nations and its partners balanced a range of factors, including gender, ethnic or regional representation, and what group or entity was presumed to be responsible for the event.


Unsplash/Abdulai Sayni

In addition, national consultations in various forms can gather public input on critical issues. The United Nations has found useful ways to support such national consultations. The Resident Coordinator in Colombia helped organize regional forums during the peace talks at the request of the parties. After the peace agreement was signed, OHCHR Colombia organized dozens of local consultations between communities and the new transitional justice institutions shortly after these bodies were established. Its network of regional offices put OHCHR in a strong position to organize these meetings. In Afghanistan, UNAMA contributed to early planning by national entities, such as the Afghan Independent Human Rights Commission and civil society organizations, to consider various models of inclusion in the forthcoming peace negotiations, including direct consultations both with victims and with the broader public.

In Sierra Leone in 1999, human rights officers from the United Nations mission facilitated a brainstorming of stakeholders on questions ranging from amnesty to truth seeking in the months before the official peace negotiations began. This dovetailed with an extensive public survey on these issues, which served as an important reference point during the talks. Together, these two processes allowed the United Nations and other participants in the peace talks to promote specific ideas supported by victim communities.

2. *OTHER CHALLENGES*

There are other contextual factors that can fundamentally affect the resolution to such issues, and they generally make it more difficult. Being aware of these dynamics may help a mediation team or United Nations staff to plan and strategize, and to facilitate the path forward.

a. Minimal national experience with transitional justice

Representatives of the United Nations should keep it in mind that, in most countries, stakeholders who are negotiating or implementing a peace agreement or otherwise designing a national transitional justice policy will have had little experience with transitional justice. Transitional justice concepts may be new to national partners, and certainly the specifics on what exactly their policy options may be. Many United Nations staff stress the **need for public education on these issues, both before and after a peace agreement or other transition.**

This is a particular challenge in the context of active peace negotiations, where the negotiating parties themselves are likely to require a much better understanding in order to settle on progressive, appropriate and legally sound language. This can be difficult, depending on the structure and duration of the negotiations and on how open the parties are to studying these ideas. They may make false assumptions, rely too heavily on models from elsewhere, or jump too quickly to agreeing on what seem to be the least contentious ideas, but without the appropriate structures or commitments to make them workable. For those outside the talks who are advocating for justice (whether they are national or international actors), it is generally not helpful to try to insert generic transitional justice components that do not result from a true process of reflection while carefully shaping international lessons to the realities of the country.[16]

Taking into account the dynamics of the negotiations, a mediator or facilitator must balance the need for in-depth policy discussions by the parties with the alternative approach of preserving space using more general language, allowing for points to be set out in greater detail once a peace agreement is in place.[17] Of course, aspects of this latter approach will not be acceptable in contexts where the parties seek clear legal security. In any case, while operating in contexts where national actors may not at first have enough information or expertise to set out complex policy proposals, the United Nations should be careful not to impose or to be perceived as imposing solutions. Rather, encouraging a longer process of national consideration is likely to lead to a much more productive outcome.

Whether during or after peace negotiations, **the United Nations should prioritize giving support to independent national institutions** that can lead the educational and planning work on transitional justice. **The contribution of civil society will be crucial to the successful work of transitional justice initiatives,** and these organizations can and should take a central position in the public sensitization

16 The agreement in South Sudan could be considered a negative example: the detailed transitional justice chapter seemed quite out of place, and it clearly did not ultimately have the support of the parties that signed the deal (although it was not the United Nations that drafted it). 17 For example, the 2014 peace agreement between the Government of the Philippines and the Moro Islamic Liberation Front did not attempt to resolve these issues. Instead, the agreement established the Transitional Justice and Reconciliation Commission to consider what policies or transitional justice mechanisms should follow.

work, too. National human rights institutions can also play a critical role. In Afghanistan, UNAMA has supported national human rights organizations and the Afghan Independent Human Rights Commission to plan and engage on transitional justice, before and during the talks that began in 2020, by providing training and other technical assistance.

b. International standards and national ownership

The United Nations operates under the general principles of justice and international law, as specified in its Charter.[18] There are some areas of transitional justice where United Nations policy sets clear restrictions. These "red lines" are relatively few in number, however, and even here the operational implications allow room for variation in how a United Nations representative may respond if proposals emerge.[19] There is a much larger area of transitional justice programming for which national flexibility and innovation is not only permitted but should be encouraged. Outside of the limitations established by international standards, **the United Nations should prioritize the principle of national ownership, encouraging locally conceived policy responses that are supported by a broad range of society. A transitional justice plan that does not emerge from and reflect the needs of the society is unlikely to be successful**. The outcome has been strongest where the United Nations and others have worked to draw on and strengthen the capacities of national actors.[20]

The United Nations has sometimes struggled to find the appropriate line between setting out firm prescriptions and promoting flexibility. This may be compounded by a mistaken idea that transitional justice is comprised of a set menu of options, rather than an inherently flexible and expansive range of possible approaches that will and should look different in each national context. Those who come to transitional justice from a legal perspective are likely to be more familiar with a rules-based approach – not only with clear parameters of right and wrong but also with established institutional options to obtain justice (including through the criminal justice system). Working in the area of transitional justice will require a different approach.

As noted above, even the term **"transitional justice"** may not always be appropriate or helpful, as it **can be easily misunderstood.** In some places, such as the Central African Republic, the public has understood "transitional justice" to include only non-judicial measures, excluding prosecutions. In Afghanistan, by contrast, political leaders and much of the public have perceived "transitional justice" as referring primarily to criminal justice.[21] In Mexico, some victims or activists see the term as academic and disconnected from the realities of local communities.[22] Rather than trying to change the

18 Article 1, paragraph 1 of the Charter of the United Nations states that the United Nations will work "in conformity with the principles of justice and international law". 19 The "red line" policy that is most familiar is that pertaining to amnesty for international crimes; in addition, there are clear restrictions on United Nations staff engaging with persons under an International Criminal Court arrest warrant (both of which are addressed below). There are other policies that are largely implicit within broader policy documents: for example, not supporting a truth commission comprised of well-known perpetrators of human rights crimes, or a reparations policy that is unjust or unfair. 20 The unique arrangements and powers of the Commission for Reception, Truth and Reconciliation in East Timor is a good example of this. International experts worked with the United Nations Integrated Mission in Timor-Leste to support the conceptualization of this model by Timorese. The commission combined local reintegration processes with community-based work programmes for accused perpetrators returning home. 21 In Afghanistan and the Central African Republic, this was made clear to the author in numerous meetings with representatives of the Government, civil society and others in both countries. 22 According to a United Nations official working in Mexico.

public perception of the meaning of transitional justice, it is better to support national stakeholders to identify a better term that captures their vision of victim-focused justice and reconciliation. Many in Afghanistan are now using the term "victim-centred justice" or, alternatively, "victim-centred peace" in place of "transitional justice". Elsewhere, "post-conflict justice", "victims' rights" or other terminology has been used.[23]

c. *How the International Criminal Court may affect peace talks*

Pursuant to the Relationship Agreement between the United Nations and the International Criminal Court, the United Nations cooperates with the Court, which has been active in many contexts where there has been conflict and where peace processes are under way. United Nations-assisted courts and tribunals have also been established regarding certain specific situations. Some of these were in contexts where a peace agreement had just been concluded and remained fragile, or where there was a hope that peace talks would soon follow (such as in Sierra Leone and in the former Yugoslavia, respectively).

How should United Nations personnel understand this seemingly overlapping policy agenda, and can it be seen as contradictory to simultaneously push for a negotiated peace while supporting prosecutorial efforts that might alienate those who would be critical to successful negotiations?

Where the International Criminal Court or another international or hybrid court has jurisdiction, a peace process may be affected in a number of ways. The existence of such a court is likely to change the calculations of the conflict parties. It may be evident that criminal accountability is no longer a subject that national actors alone can resolve in any mutually agreeable manner as they may choose. If a peace agreement suggests some form of impunity, especially for those most responsible for serious crimes, then an international prosecutor could be ready to step in. Even in contexts where there is no international or hybrid court with jurisdiction, there are now several examples of United Nations investigatory bodies that have been established to collect and preserve criminal evidence for a future trial – in whichever court a trial may be possible.

This de facto threat can have the positive impact of forcing the negotiating parties to find a national arrangement for justice that satisfies its legal obligations. The engagement by the International Criminal Court had this effect in Colombia, narrowing the parties' options and taking any suggestion of blanket amnesty off the table.

The watchful eye of an international prosecutor may affect the plans for peace negotiations even before they begin. The parties may choose a location for talks where they feel secure, which may be in a non-State party to the International Criminal Court, to avoid any possible enforcement of an arrest warrant from the

23 Traditionally, "dealing with the past" has also been used as a synonym for transitional justice. There is also the more descriptive "dealing with the legacy of mass violations". This puts the focus on the impact of past crimes, which may be perceived as a narrower lens, less focused on forward-looking preventive measures.

Court. For similar reasons, the parties might choose a facilitator or mediator who would not feel beholden to the International Criminal Court. The existence of an international court can also affect who attends the talks, if leaders fear legal vulnerability. During the talks between Uganda and the Lord's Resistance Army (LRA), which were held in Southern Sudan from 2006 to 2008, LRA leader Joseph Kony clearly understood that he was at risk, in view of the International Criminal Court's outstanding warrant for his arrest, and he stayed far from the peace table. When trusted visitors came to see him, he peppered them with questions about the intentions of the Government in relation to the Court.

Where the implementation of a peace agreement is shaky, robust prosecutions can put the process back on track. In Sierra Leone, the Government turned to the United Nations for help to create the Special Court for Sierra Leone less than a year after the signing of the Lomé Peace Agreement. This provided a structure to hold the former rebel leader Foday Sankoh to account after he broke from the deal. With his removal, the implementation of the peace agreement slowly came back in line.

It is possible that the United Nations Security Council's careful use of its deferral power (granted under article 16 of the Rome Statute of the International Criminal Court) could strengthen both peace and justice. Where national actors need time to establish national justice mechanisms, allowing a year to do so (as allowed by such a deferral) may be wise. This was considered by members of the Security Council in relation to Uganda before Joseph Kony and the LRA walked away from the final peace deal.

The United Nations cannot predict in advance how an international court might affect a peace process, or vice versa. Rather, it is important to recognize that there is likely to be an impact, to identify possible scenarios and to prepare as much as possible.

One area where the United Nations has established clear policy is in respect to its own relationship to persons accused of serious crimes. After questions emerged concerning ongoing contact between United Nations staff and indictees of the International Criminal Court, the United Nations set out to establish clear guidance. It states that contacts between United Nations officials and those subject to International Criminal Court arrest warrants should be limited to that which is "strictly required for carrying out essential United Nations mandated activities."[24]

d. *Coordination within the United Nations*

Many United Nations staff have expressed frustration at the lack of coordination or even communication between the different parts of the United Nations system that touch on issues of transitional justice in their programming or advocacy work, both at Headquarters and in the field. The breadth of the subject matter naturally engages a wide range

24 A/67/828-S/2013/210, 8 April 2013, annex: "Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court."

of United Nations entities. In peace process contexts the reach is even broader, since those who have to grapple with questions of justice for serious crimes include not only human rights and legal professionals but also those focused on the political process, demobilization, security sector reform and a range of other areas.

It is not a surprise, therefore, that **many parts of the United Nations may be directly engaged in aspects of transitional justice programming,** although the sheer number of United Nations agencies, funds and programmes, as well as the different parts of the Secretariat that may be directly engaged in this programming, can be surprising. They include OHCHR, the Office of Legal Affairs, the Department of Peace Operations (in particular the Office of Rule of Law and Security Institutions), the Department of Political and Peacebuilding Affairs (including its Peacebuilding Support Office and Mediation Support Unit), the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the United Nations Development Programme (UNDP), the United Nations Population Fund, the United Nations Children's Fund, the Food and Agriculture Organization of the United Nations, the International Organization for Migration, the United Nations Office on Drugs and Crime (UNODC), and the United Nations Educational, Scientific and Cultural Organization.[25]

The Secretary-General has taken important decisions on specific transitional justice processes, reports regularly to the Security Council on transitional justice through United Nations mission reports, and sets broad institutional policy on transitional justice. The Security Council and the Human Rights Council review, comment on and decide on mandates for missions, investigative commissions, special rapporteurs and other mechanisms that include transitional justice elements. The General Assembly has given its support to important resolutions on transitional justice issues, although it tends to be less directly engaged in these policy issues than the Security Council, the Human Rights Council or the Secretary-General. The United Nations Peacebuilding Fund provides significant financial support for reconciliation and transitional justice.[26]

This broad engagement by the United Nations system is overall very positive. Each entity has a different role and brings different strengths. They should be aware of others' work, however, and ideally they should have a **joined-up overall strategy.**

Coordination at the country level

The **difficulty** cited by United Nations officials in many offices and missions is not the fact of broad engagement on the subject; rather, **a lack of coordination can result in dispersed programmes and policy decisions that may overlap or even be in contradiction with each other.**

In some country contexts, United Nations entities have recognized this problem and have found useful means to facilitate collaboration.

25 The Trust Fund for Sustaining Peace in Colombia (originally the United Nations Post-Conflict Multi-Partner Trust Fund for Colombia) has provided support to 23 United Nations entities for work on issues concerning victims and transitional justice. 26 A recent thematic review by the Peacebuilding Fund reported that the Fund had awarded almost $40 million over five years to nine United Nations agencies, funds and programmes, and to several civil society organizations, in support of transitional justice. See Salif Nimanga, "Thematic review: PBF-supported projects on transitional justice" (United Nations Secretary-General's Peacebuilding Fund, 28 April 2020).

In **Sri Lanka, 16 United Nations entities were working in some way on transitional justice, with minimal collaboration between them in programming or identifying priorities.** In his visit to the country, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence identified this as a problem and suggested a **joint meeting**. The resulting conference provided the first opportunity to strategize jointly. In the absence of a lead agency, the Special Rapporteur served as facilitator. The 16 entities continued to meet to discuss their transitional justice strategies on an annual basis. Unfortunately, when a new Government entered office in Sri Lanka and looked less favourably on transitional justice, some parts of the United Nations moved away from transitional justice work in the country, and these annual meetings have reportedly stopped. The most recent meeting was in 2019.

In the **Western Balkans,** the United Nations has developed an **action plan on sustaining peace through trust building, dialogue and reconciliation, which is overseen by an inter-agency task force.** A transitional justice scoping study has been undertaken jointly by OHCHR and the Department of Political and Peacebuilding Affairs, with the intention to inform the implementation of this action plan. Observers describe this as "an innovative initiative to increase collaboration across the UN system, address the root causes of conflicts, and de-escalate tensions across the region."[27]

The Trust Fund for Sustaining Peace in Colombia (originally the United Nations Post-Conflict Multi-Partner Trust Fund for Colombia) has played a critical role in supporting the setting up of national institutions emerging from the peace accord. Its requirement that funding recipients work in partnership with each other has led to much greater cooperation between the various United Nations entities engaged in this arena.

Some aspects of this issue might also be addressed at a **structural level. The United Nations Support Mission in Libya was created with a section on Human Rights, Transitional Justice and the Rule of Law.** This helped to avoid tension or miscommunication between the various related areas of work within the mission.

Despite these positive examples, the challenge remains significant. **Where transitional justice is controversial and especially where there is resistance from the Government, some parts of the United Nations may shy away from engagement, which may be viewed as too controversial by some agencies, funds or programmes that might work closely with the Government. This can result in disagreement within the United Nations on how and whether to support certain transitional justice initiatives.** The Government may push for United Nations support for a politically compromised national transitional justice institution, or alternatively it may try to hamper or put a stop to a credible accountability body. The United Nations will feel this pressure and will be at its weakest if there

27 As noted in Pushkar M. Sharma, "How has the UN Mission in Kosovo Delivered on Action for Peacekeeping?" International Peace Institute (IPI) Global Observatory, 22 January 2020.

is not a consistent, coordinated position in response. While all United Nations offices are certainly not expected to be actively engaged in national transitional justice initiatives, there would ideally be general agreement among all relevant agencies as to the overall position of the United Nations.

Such coordination should perhaps come from the senior United Nations official in each country context, such as the Special Representative of the Secretary-General or the Resident Coordinator. To date, such leadership has sometimes been lacking, which has allowed tensions to emerge between agencies of the United Nations and has resulted in mixed messages being sent to the Government, the public and other partners.

Coordination at the global level

There is a coordination gap at the Headquarters level. There is no official channel or process for regularly sharing information between all United Nations agencies or offices about planned or ongoing programming or advocacy on transitional justice. There is also no United Nations lead on transitional justice: this was designated to OHCHR for several years, but that changed in 2012, and there has been no institutional lead since.[28]

With no existing structure or network, information-sharing now takes place informally and on an ad hoc basis. Each agency or office undertakes planning in a way that is distinct from others, with no overarching strategy or agreed-upon policy in cases where difficult assessments must be made.

The United Nations may need to consider possible options to better communicate and coordinate on transitional justice issues at the global level. **The ideal structure could emphasize the sharing of information and positive collaboration where useful, but without aiming to limit or constrain programming or advocacy, and a heavily bureaucratic approach should be avoided.**

Coordination beyond the United Nations

Broader strategic coordination with others in the international community is advantageous and can be critical to provide effective support for national transitional justice programming. United Nations Member States often communicate regularly in country programming contexts, sometimes setting up a **group of friends on transitional justice**, which may be **chaired or co-chaired by the United Nations.** International non-governmental organisations can engage in places or at times when the United Nations is not able to do so, including in the preliminary stages of a peace process by reaching out to armed groups. All of these international actors grapple equally with difficult justice and accountability issues, and the United Nations should reach out to these partners to collaborate wherever possible.

28 Since 2012, an arrangement known as the Global Focal Point for the Rule of Law has advanced United Nations collaboration on activities related to police, justice and corrections. UNDP and the Department for Peace Operations jointly coordinate the initiative, working together with Global Focal Point partners OHCHR, the Office of the United Nations High Commissioner for Refugees, UNODC, UN-Women and the Executive Office of the Secretary-General to engage "under one umbrella" on these issues. This coordination structure sometimes touches on transitional justice, such as in relation to special courts or security sector reform, while retaining a criminal justice focus.

D. United Nations guidance on transitional justice issues

In addition to the above issues, most of which pertain more to process, there is a need for clarity on United Nations policy pertaining to specific elements of transitional justice. Two areas are addressed here:

1. *AMNESTY*

While the Secretary-General has maintained a consistent policy on amnesties for over 20 years, some confusion and misunderstanding remains. The Secretary-General's first stated guidance on amnesty, in 1999, said clearly that United Nations representatives should not give their support to amnesties for international crimes.[29] A report from the Secretary-General to the Security Council in 2004 on the rule of law and transitional justice in conflict and post-conflict societies reiterates this, recommending that the Security Council "reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes" (S/2004/616, para. 64 (c)). The Secretary-General's 2010 guidance note on transitional justice again states that "the United Nations cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights."[30]

Even if the United Nations is not asked to be a witness signatory, the Office of Legal Affairs has usually recommended that the United Nations clearly and publicly state its opposition to any far-reaching amnesty, to the extent that it may potentially extend to genocide, war crimes, crimes against humanity and gross violations of human rights.

In several other cases, United Nations officials have apparently interpreted the Secretary-General's policy more conservatively than required, strictly avoiding any United Nations association with a possible unacceptable future amnesty.

- In one case, a United Nations mission stop-ped advising the Government on its negotiations with an armed group after

29 The guidance from the Secretary-General first stated in 1999 (and re-confirmed in 2006) that the United Nations cannot condone amnesties regarding war crimes, crimes against humanity, genocide or gross violations of human rights, or foster those that violate relevant treaty obligations of the parties in this field. 30 "Guidance note of the Secretary-General: United Nations approach to transitional justice", March 2010.

the United Nations learned that the agreement was ultimately expected to include a broad amnesty. The United Nations officials involved in this process incorrectly believed that United Nations policy prohibited any association with a peace process that might include such an amnesty.

- In two other contexts, the United Nations decided to avoid any relationship with national mechanisms that might recommend an amnesty in the future. This was the United Nations position in relation to a truth commission and a disappearances commission in Nepal, as well as a truth commission jointly agreed between Indonesia and Timor-Leste. In both cases, there were also other concerns about the independence of the commissions or the motivation behind their creation, but the primary reason the United Nations provided for keeping its distance was that these bodies might recommend amnesties that could extend to international crimes.

- In the case of Nepal, there were stated limitations in the act creating the two commissions on how far any such recommended amnesties could reach, and the Supreme Court of Nepal had ruled that this must not include international crimes.[31] The position of OHCHR was that the act creating the relevant commission must be amended for "the United Nations to consider supporting the work of the two Commissions."[32] The international donor community followed the lead of the United Nations in denying support for the two commissions, and this hampered the work of civil society and victims groups that had chosen to engage with the commissions. Those who helped to set out the OHCHR position in Nepal believed that it reflected the policy of the Secretary-General, as stated in the 2010 guidance note on transitional justice.

- In reference to the Indonesia-Timor Leste Commission of Truth and Friendship, the spokesperson for the Secretary-General released a statement that barred United Nations officials from providing testimony or taking "any other steps that would support the work" of the commission, given the possibility that the commission might recommend amnesties.[33] In the end, this commission did not recommend any amnesties.

The United Nations officials with whom the author spoke and who were involved in some of these decisions were unaware of United Nations practice in other contexts (such as signing and helping to implement peace agreements that include an amnesty, with a clear disclaimer), which could have led them to a more nuanced position.

OHCHR took a similar position in reference to the truth commission in Kenya, which was proposed to have the power to recommend

31 The law that created the commissions in Nepal was not amended to reflect this Supreme Court decision, however. 32 OHCHR set out its position on the two commissions in Nepal in its "OHCHR technical note: the Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation, 2071 (2014)" and "Nepal: OHCHR position on UN support to the Commission on Investigation of Disappeared Persons and the Truth and Reconciliation Commission: 16 February 2016". The position was reconfirmed on 1 May 2020 in an OHCHR press statement. 33 Statement attributable to the spokesperson for the Secretary-General on the Indonesia-Timor Leste Commission of Truth and Friendship, 26 July 2007.

an amnesty, when the commission was in formation. OHCHR said that the United Nations rejected amnesties for gross human rights violations and was therefore "unable to provide support to institutions and mechanisms recommending or granting amnesties for gross human rights violations."[34]

In summary, the United Nations policy on amnesty is not clearly and consistently understood by United Nations officials. It is possible to state clear and robust opposition to any amnesty that might cover international crimes, while simultaneously supporting other parts of a peace agreement, other elements of a truth-seeking mechanism, or ongoing peace negotiations on other subject matters.

Broadest possible amnesty

Another area that does not seem to be understood by all United Nations staff is that **amnesties for certain lesser crimes or political offences – treason or rebellion, for example – are not prohibited and indeed are encouraged in international law.** The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), states that, "at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict" (art. 6 (5)). While this has been clarified to exclude war crimes or other grave crimes, the essential message remains. Indeed, the International Committee of the Red Cross (ICRC) notes that "the United Nations Security Council, United Nations General Assembly, United Nations Commission on Human Rights, NATO and the European Union have all encouraged the granting of amnesties to those who have merely participated in hostilities."[35]

In some cases, the messaging from the United Nations in the field has been simplified to stand against all amnesties of any kind. In the Central African Republic, the United Nations may have contributed to the widely held view in public opinion, and the uncompromising position of the Government, that no amnesty for rebel groups, of any kind, was acceptable. Certainly, some senior United Nations officials in the Central African Republic understood the distinction, but this may not have been discussed sufficiently with national partners. A more nuanced national conversation was missing – one that could have distinguished serious violations such as war crimes from those crimes that are essentially political in nature. This made the discussion on policy options, in the context of peace talks with the rebel groups, even more difficult.

The United Nations should assess whether relevant staff have a clear understanding of these distinctions. They may be unfamiliar with international humanitarian law, and they might also misunderstand the guidance of the Secretary-General to assume that that it applies to all amnesties. It would be helpful to provide clear guidance, especially for those staff who are likely to guide discussions in-country.

34 "Report from OHCHR fact-finding mission to Kenya, 6–28 February 2008", p. 17. 35 ICRC Advisory Service on International Humanitarian Law, "Amnesties and international humanitarian law: purpose and scope", July 2017.

United Nations officials could also be well served by an aide-memoire providing some preliminary operational guidance in relation to amnesties, which could then be further expanded upon for each country context, as needed.

2. TRUTH COMMISSIONS

Many peace accords have included an agreement to establish a truth commission (or another human rights investigative commission, which may go by a different name). Often, the peace agreement will provide overall parameters for the body, and this language can be critical in determining whether a credible commission will follow. Further specifics of the commission's mandate, powers and membership could be set out in later legislation.

The Government or the commission itself is likely to ask the international community to support the commission with both financial and technical assistance. However, **the criteria for assessing the quality and credibility of such a commission, and thus the degree of support that the United Nations may wish to provide, are not clear.** There may be important reasons for concern in relation to the credibility and independence of such a body, although there are often political imperatives for the United Nations to support such a key component of a peace agreement, even if it may be imperfect. **The lack of guidance on international standards has led to inconsistent practice by United Nations actors on the ground and risks unclear messaging as the United Nations responds to these bodies.** In some contexts – such as Burundi, as described below – there have been different views among members of the United Nations country team, with some believing the United Nations should provide support, despite significant difficulties, while others push for higher standards, thus holding back support for a "compromised" body.

There may be a **need for the United Nations to set out guidance to support the officials who must grapple with these questions.** A number of United Nations documents provide general direction in this regard, in particular from OHCHR and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. However, these indications of guidance are dispersed and not widely known about, and the various documents carry different levels of institutional authority.

The United Nations has provided extensive technical assistance to many truth commissions, which it has often perceived to be central to the consolidation of peace. The exceptions – where the United Nations has refused to support a national truth process – are more telling. As mentioned above, the decision by the United Nations not to support the commissions in Nepal and in Indonesia and Timor-Leste was, in both cases, based primarily on concern about a possible future recommendation for an amnesty.[36]

36 In Nepal, OHCHR was also concerned about a lack of firm guarantees for the commissions' independence and impartiality, and about other aspects where its terms of reference could have been stronger.

In Burundi, the United Nations Resident Coordinator struggled to respond to pressure from the Government to provide support for a politically compromised truth commission whose membership was seen as too close to the Government and whose terms of reference raised significant questions of credibility and impartiality.[37] OHCHR held the lead, and after considerable efforts to shore up more independence in the commission's membership and operations, along with some unsuccessful attempts to establish a previously agreed advisory committee that would include international members,[38] OHCHR ultimately advised against supporting the commission.[39] This decision resulted in turning back international funding of €2.3 million that the United Nations had lined up to support the commission.

In addition to questions of credibility, independence and membership, questions are often raised about a truth commission's relationship to criminal justice, as may be seen in the above-mentioned examples. It would be an error, however, to evaluate a truth commission only or even primarily on these grounds, and this point should be made clear in overall guidance. The purpose of such bodies is much broader and, arguably, an effective truth commission can have an equal or greater impact on society than a handful of prosecutions. In most cases, **a truth commission has much more contact with victims, as compared with prosecutions, and it will be designed to operate explicitly in a manner that is supportive of victims; it will undertake deep thematic research as well as case investigations; it may focus on community relations, seeking to support local reconciliation traditions; and it could recommend or even provide direct reparations for a broad pool of victims.** Above all, **these bodies emphasize prevention, usually concluding with extensive recommendations for reforms.** Most truth commissions recommend prosecutions and even turn over material to prosecutors. Very few have had any link to amnesties – and only one, in South Africa, could actually grant an amnesty for specific crimes.

Most truth commissions begin their work with many difficulties and struggle to organize their programming, and they usually need extensive assistance, guidance and good counsel. It is easy for them to make unintentional but significant errors, including those that put victims in danger or leave victim communities disappointed, or they may simply miss opportunities for a deeper investigation or to make a greater impact. **Support from the United Nations and others in the international community can be very important as a commission builds up its capacities and puts its procedures into place.** There are many examples of truth commissions that are quite weak when they begin, or where there are significant doubts as to their trajectory, although they may turn out to be refreshingly independent and critical to the political transition.

37 While the commission in Burundi was initially seen as having some independence, its membership (in particular its chairperson) changed over time, resulting in significant questions about its intentions and ability to operate in a politically neutral manner. 38 Such an advisory committee was included in the truth commission's founding law, but the Government quashed efforts to set it up. 39 See, for example, the concerns set out by the Special Rapporteur on transitional justice in "Preliminary observations and recommendations by Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Visit to Burundi (8-16 December 2014)", 16 December 2014. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15426&LangID=E.

It is important, therefore, that **United Nations officials evaluate not only the specific weaknesses of a commission's mandate or initial operations, but also the potential risks or lost opportunities if the United Nations chooses to withhold support.** This would lose the leverage and guidance that the United Nations can bring, which would be likely to result in a weaker exercise. Undertaking this balanced assessment is not easy.

Evaluating a truth commission: on what terms?

Among the most important elements of a successful truth commission are its independence, credibility and impartiality. This should be a reflection of the genuine political will by the national authorities for a robust and honest process. Useful parameters were first included in the Secretary-General's guidance to United Nations representatives in peace negotiations in 1999 (updated and re-released in 2006), which said that peace agreements:

> *"Should include a commitment to the commission's operational independence, a fair and consultative process in selecting its members, the publication of the commission's final report, and due consideration to be given to any recommendations that emerge from such a commission. Parties should also commit to providing full access to relevant documentation and other information to support the work of such a truth commission."*[40]

The updated anti-impunity principles submitted in 2004 by the United Nations independent expert Diane Orentlicher are also considered a core human rights reference point. They state that "commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence."[41] Other publications from OHCHR, special rapporteurs and expert commissions echo this principle.[42]

It is not self-evident what the standards should be in evaluating the intentions for a serious and independent inquiry, especially if genuine political will is suspect. **There is a danger that a truth commission might be created as a whitewash or cover-up.** On the other hand, commissions that are able to operate independently and that are given appropriate terms of reference have made significant contributions, even in the face of political resistance.

The United Nations undertook an in-depth assessment of the Lessons Learnt and Reconciliation Commission of Sri Lanka after this body was strongly criticized for lacking impartiality and failing to seriously address past crimes. The United Nations assessment set out a number of minimum standards for such an investigative body, and then compared the Lessons Learnt and Reconciliation Commission against these standards. The commission fell far short.

40 "Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution", June 2006. 41 Diane Orentlicher, "Updated set of principles for the protection and promotion of human rights through action to combat impunity" (E/CN.4/2005/102/Add.1), principle 7. The United Nations Commission on Human Rights "took note with appreciation" of these updated principles in 2005. 42 These include OHCHR, "Rule-of-law tools for post-conflict States: Truth commissions" (New York and Geneva, 2006) and numerous reports from the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, including a call from the Special Rapporteur for international guidance on commission membership (see A/HRC/24/42). See also United Nations, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011). Available via securitycouncilreport.org.

The criteria offered by this exercise provide a useful reference point.[43]

Another useful model is the structure and accreditation process established for national human rights institutions such as human rights commissions. While national human rights institutions are permanent bodies rather than short-term inquiries, such as a truth commission, they confront similar questions around impartiality and independence, and they depend on gaining national and international credibility to carry out their work. **In 1993, the General Assembly adopted the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles),** setting out best-practice standards and expectations for national human rights institutions. The Paris Principles set out the criteria according to which each institution is evaluated, by way of a now well-established accreditation process, which considers each body's mandate and competence, autonomy from the Government, independence, pluralism, and whether it has adequate resources and sufficient powers of investigation.[44]

These criteria are strikingly similar to the core qualities sought in a truth commission, and they offer a possible model. It could be useful to consider both the text of the Paris Principles and the procedure for accreditation of national human rights institutions as a starting point for an approach to evaluating truth commissions, while making appropriate adjustments. For example, the assessment evaluates whether a national human rights institution "is able to carry out its mandate effectively and without interference" and whether it can "demonstrate independence in practice". It would not be realistic to establish an accreditation process for time-limited truth commissions, but the principles could be set out for the United Nations (and other partners to a truth commission) to use as the starting point for an assessment.

In peace process contexts, the first point at which the United Nations might evaluate the quality and credibility of a proposed truth commission is in a draft peace agreement. Some elements – such as independence and impartiality – should be seen as a prerequisite for support from the United Nations. Indeed, the United Nations should not be neutral on these aspects.

Clearer guidelines on the minimum qualities for a credible truth-seeking body would strengthen the position of the United Nations in peace negotiation contexts. Just as the United Nations now signals its opposition to sweeping amnesties, the same clarity in messaging should be provided in response to a compromised human rights inquiry. **An operational checklist of qualities could help in evaluating a truth commission and could give leverage to United Nations officials who may need to push for a more credible body.** The following elements are important either before a commission is created or as it undertakes its work:

43 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, pp. 80–96. 44 The peer-led accreditation process provides each national human rights institution with a status, or grade. Only those with "A status" are fully accredited for engagement in international institutions and receive full international support. The accreditation is managed by the Global Alliance of National Human Rights Institutions, working closely with OHCHR.

- **operational independence as reflected in membership, mandate and budgetary and staffing control;**
- **impartiality as reflected in the substantive focus of its mandate;**
- **a consultative procedure for the selection of commissioners;**
- **appropriate powers to facilitate serious inquiry and investigations;**
- **good-faith procedures for fair treatment of both victims and accused persons;**
- **an impartial process for drawing findings and recommendations;**
- **the power to release findings directly to the public, independent of government approval or control.**

This is not to suggest a red line or absolute prerequisites. Rather, if some of these elements are missing, this should be the beginning of a conversation to push for a stronger body, and to assess the good faith of the Government or the commissioners to incorporate best-practice standards for a strong and effective inquiry. As noted, many truth commissions improve in time, as long as these fundamental elements are strong.

3. OTHER TRANSITIONAL JUSTICE ISSUES

The range of issues in the field of transitional justice can be complex – legally, operationally and politically – and the traditional focus on criminal justice has perhaps obscured these other areas and hidden their fault lines. In some countries, the issue of reparations is much more prominent and controversial in peace negotiations than some other transitional justice issues.

The Secretary-General's 2006 guidance provides at least some direction, albeit minimal, on a range of issues that pertain to transitional justice, including vetting, reparations and disarmament, demobilization and reintegration. On vetting, for example, it states:

> *"Agreements pertaining to civilian security agencies and defence forces should take into account the possibility that members of rebel or State forces took part in serious violations of human rights or international humanitarian law. To lessen the possibility of civilian security agencies or defence forces perpetrating further abuses, and to engender trust and confidence from the population, persons responsible for such violations should be excluded from reconstructed security forces. Negotiators should thus encourage, where appropriate, a general provision in the agreement for an individualized screening or 'vetting' process, based on each individual's past record."*[45]

United Nations officials might not, of course, have a clear sense of the parameters and priorities of the United Nations in each area of transitional justice. In a similar vein to the suggested aide-memoire on amnesty and the ideas set out above on truth commissions, the United Nations should consider providing some overall guidance for those involved in peace processes on each on these areas of transitional justice.

45 "Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution", para. 13.

E. Going Forward

There is an inherent tension in any transitional justice programming, and in any guidance that the United Nations might provide to its officials. There is a need for some further direction, but not so much that practitioners feel constrained. In any country context, **the United Nations should inform and assist, but it should lean into the idea of national solutions, not international prescriptions.** First and foremost, United Nations officials should listen to national stakeholders and approach these issues with flexibility and creativity. There are some United Nations "red lines", and these should be clearly understood, but officials should avoid trying to resolve these challenges through universal recommendations.

Transitional justice always operates in deeply political contexts. The timing and reach of any initiative to confront past crimes and respond to victims is determined by the realities and possibilities at hand. This is never more true than during a political negotiation to end violent conflict. United Nations officials evaluating national transitional justice measures should do so with the same political sensibilities. What are the objectives, what are the constraints, where might a process lead, and what are possible routes forward that help to counter impunity and to advance justice, healing and victims' rights? This perspective makes it clear that it is rarely a black-and-white, right-or-wrong proposition.

Whether it is suggesting a specific strategic approach to transitional justice or responding to proposals from negotiating parties or from victim advocates, **the United Nations can guide, plant ideas and provide comparative examples as useful reference points.** Ultimately, these difficult decisions will have to be taken by national stakeholders.

UN Photo/Loey Felipe

Annex:

Significant United Nations reports and guidance on transitional justice

listed in chronological order

Compiled as an annex to "Transitional justice in peace processes: United Nations policy and challenges in practice" by Priscilla Hayner, 2023.

"Guidelines for United Nations representatives on certain aspects of negotiations for conflict resolution", distributed to United Nations representatives by the Secretary-General in 1999, updated in 2006.

"The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General", S/2004/616, 23 August 2004.

Diane Orentlicher (independent expert), **"Updated set of principles for the protection and promotion of human rights through action to combat impunity"** (E/CN.4/2005/102/Add.1), 2004. The United Nations Commission on Human Rights "took note with appreciation" of these updated principles in 2005.

General Assembly resolution 60/147, **"Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law",** also known as the Van Boven/Bassiouni principles, adopted by the General Assembly on 16 December 2005.

OHCHR "Rule-of-law tools for post-conflict States" (published from 2006 to 2009), including:

- **Truth commissions**
- **Amnesties**
- **Vetting: an operational framework**
- **Reparations programmes**
- **National consultation on transitional justice**
- **Prosecution initiatives**

"Guidance note of the Secretary-General: United Nations approach to transitional justice", March 2010.

"The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General", S/2011/634, 12 October 2011.

"International law and normative frameworks" in **"United Nations Guidance for Effective Mediation",** June 2012.

Identical letters dated 3 April 2013 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, A/67/828-S/2013/210, 8 April 2013, annex: "Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court".

"Best practices manual for United Nations-International Criminal Court cooperation", 26 September 2016.

Astrid Jamar and Christine Bell (University of Edinburgh), **"Transitional justice and peace negotiations with a gender lens"** (New York, UN-Women, October 2018).

United Nations, **Practical guidance for mediators to protect children in situations of armed conflict** (February 2020).

Reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (numerous, from 2012).

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