



A FIELD OF DILEMMAS

Managing Transitional Justice
in Peace Processes

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Introduction



With notable major exceptions, most of the world's conflicts that continue to exact untold human suffering and destruction are of an intra-State nature. Often triggered by domestic political grievances and failures to construct sufficiently inclusive societies, they seldom remain purely domestic, and acquire significant external dimensions. The groups that challenge the State are diverse: they range from ideologically inspired militant groups, such as jihadists, to more economically predatory and criminal entities. Whatever motivates the resort to violence, its humanitarian and other adverse impacts and costs, for both current and future generations, are incalculable. Regrettably, these conflicts are almost always accompanied by serious violations of human rights and international humanitarian law. Conflicts invariably compound and are in turn exacerbated by other global crises, including pandemics, the climate emergency and the economic stress that faces many countries. A desire to address this cumulation of adverse impacts animates modern peacemaking. **Peace processes – understood as systematic efforts and spaces for peacefully addressing the grievances that drive conflict – typically begin with the exploration of dialogue on the key issues that divide the parties.** They continue, often

in a non-linear manner, until agreements are reached and ultimately implemented. If the process fails to yield agreements that sufficiently address core grievances, the cycle of exploration begins again. Today's negotiators often seek to address the structural injustices that may constitute the root causes of a conflict as well as other violations that might have emerged during the conflict. This represents the transitional justice question in peace processes.

This paper highlights that **the peace process is in fact an important, albeit atypical, arena for policymaking, generally and in relation to transitional justice.** Recognizing this reality should engender a more rigorous approach to the decision-making processes, including a greater emphasis on local, national and regional contexts. Such an approach might help in avoiding some of the pitfalls of the tendency to adopt formulaic prescriptions for transitional justice. Sound policymaking simply cannot afford to gloss over complexity or to ignore constraints represented by the conflict context. In terms of goals, **both peacemaking and transitional justice are concerned with how to move a society beyond conflict towards transformed political or social relations.** Both fields thus

involve an endeavour to achieve certain policy goals associated with more stable, cohesive and inclusive societies while seeking to reflect values and principles. They are also – or at least ought to be – intensely realistic, recognizing the need to overcome or circumnavigate a range of obstacles and to work within the constraints facing fragile and fractured societies to achieve what is possible. As political projects aimed at catalysing transitions in constrained circumstances, peace processes pursue both principled and pragmatic outcomes. **Negotiating transitional justice entails engagement with the tensions inherent in peacemaking as well as a complex subject matter, in which there are high stakes for society, particularly victims.**

Theories and practices of transitional justice have not stood still since the field first emerged, as some States sought to manage transitions from authoritarian rule towards democracy. **Transitional justice was thus conceived of as an approach to addressing the dilemmas and challenges associated with overcoming legacies of widespread violations while at the same time catalysing effective transitions.** Today, transitional justice is a globally endorsed approach, increasingly applied in a range of different conflict situations, and even in settings where no transition is under way. Its measures, which include (criminal) justice, truth-telling, reparations and the strengthening of rule of law institutions and other measures to prevent future violations (guarantees of non-recurrence), now feature on the agenda of peace processes. While these elements reflect normative commitments, within a peace process, they are approached through a conflict resolution lens. When conflict parties sit down to negotiate, they often

need to grapple with the implications of (a) large-scale violations (which challenge ordinary capacities of criminal justice); and (b) the manifest fragility and constraints that the conflict-affected society faces (as manifested in political or institutional weaknesses, including through resource deficits, and in weak or polarized political leadership, including the absence of organized civic society). They will therefore need a deep grasp of several complex issues, including (i) the concepts and goals of transitional justice; (ii) the potential processes and mechanisms that can deliver those goals and the challenges associated with those mechanisms; and (iii) the latitude they possess to choose and tailor appropriate responses to fit their needs in light of the constraints they face.

This paper examines how the concept of transitional justice is understood, misunderstood, introduced, contested and managed within peace processes. It underscores the point that, in peace processes, there is a need to maintain an approach to transitional justice that is decidedly Janus-faced: **looking at the past to acknowledge and honour victims and to confront difficult histories, while looking to the future to transcend the past and to achieve a transformative transition from conflict.** It emphasizes the need to take seriously the central dilemmas of transitional justice: how to address violations credibly, in constrained circumstances, with the aim of achieving transition and sustaining peace.

Through this lens, the paper reflects on the approach and practice of the United Nations and other regional, national, local and international actors that support and accompany peace processes, and it offers some sug-

gestions for the consideration of the United Nations (parts A and F). In parts B and C, the paper highlights the need for effective planning and management of peace processes, informed by a deep understanding of the conflict context and underpinned by continual analysis. Where the parties' capacities for addressing the range of issues is deficient, it considers ways in which facilitators can assist to bridge knowledge gaps and mitigate asymmetries that might undermine the quality of negotiations and outcomes. Drawing from experiences in diverse contexts, it illustrates the challenges of

promoting a forward-looking approach to transitional justice. Part D identifies some of the substantive issues that illustrate the dilemmas and complexities of transitional justice. These include the vexed question of how to deal with demands for leniency, the need to take account of non-State transitional justice actors, the place of reconciliation, the pursuit of inclusion and gender-responsiveness, and the centrality of victims. In Part F, some suggestions are proffered for strengthening the support offered by the United Nations for transitional justice in peace processes.



A. The United Nations and peace processes



In line with the Charter of the United Nations, the United Nations promotes peace and security, human rights and development as its core functions (art. 1). In its response to conflict, it often promotes peace processes that encapsulate the pursuit of all the above goals. This occurs through a range of institutions, including the agencies, funds, programmes, regional architectures, country teams and missions and other coordination mechanisms.¹ Often in partnership with other entities, the United Nations assists conflict parties and key stakeholders to reach agreements that prevent, manage or resolve conflict through mediation² and other facilitation³ efforts, including good offices. It also assists parties to implement agreements and build peace and resilience in fractured societies. This long and broad reach places the United Nations in a strong position to lead and support peacemaking and peacebuilding efforts across a range of conflict-affected contexts, and to accompany peace processes from their inception, through negotiations, to the implementation of outcomes.

The United Nations takes a strong normative approach to transitional justice that emphasizes comprehensiveness, accountability for violations, victim-centredness, context-specificity, and a strong gender lens.⁴ Transitional justice is always considered in local contexts, and others invariably bring different perspectives, depending on local and regional factors including legal traditions. In addition to domestically driven initiatives, transitional justice is increasingly promoted by external actors, including multilateral entities and other States. Partners such as the African Union, the European Union and several States have adopted policies on transitional justice, some with distinctive inflections.⁵ A range of non-governmental international organizations that promote transitional justice, including leading human rights actors, do so through a human rights lens and principally as part of the fight against impunity. In this complex setting, the normative and peacemaking roles of the United Nations enjoin the organization to promote conceptual coherence and effective partnerships in support of peacemaking efforts at

¹ Including the Global Focal Point for the Rule of Law, which has supported rule of law initiatives in several conflict-affected contexts, including the Central African Republic, the Democratic Republic of the Congo, Guinea-Bissau, Mali and South Sudan. ² Mediation is defined as “a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements.” “United Nations guidance for effective mediation” (New York, 2012), p. 4. ³ This paper uses “facilitation” and “facilitator” generically to include all third-party assistance at the various stages of a peace process. ⁴ Updated set of principles for the protection and promotion of human rights through action to combat impunity (2005); 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 (2006). ⁵ See, for example, the African Union Transitional Justice Policy Framework, 2019.

all stages of the process, from original design to final implementation.

Perhaps the strongest comparative advantage, and the most effective contribution the United Nations can make towards a peace process – whether it is in the lead or not – is to bring to bear the insights and understandings it can uniquely draw from both its conceptual work and its often deep knowledge of local, national, regional and international contexts. From their work, United Nations entities gain granular understanding of national contexts, including the capacities of institutions, and can provide parties or facilitators with accurate assessments. Even prior to the peace process, United Nations entities often assist national actors to develop transitional justice policies that sometimes anticipate the needs and challenges of future peace processes. The United Nations has been active in support of transitional justice negotiations over many years in diverse settings around the world. In several contexts where it has an in-country presence, the Office of the United Nations High Commissioner for Human Rights has led engagement with communities on questions of transitional justice. United Nations peacekeeping missions in Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Libya, Mali, South Sudan and other countries have worked to support transitional justice and reconciliation initiatives. Through their civil affairs capacities, United Nations missions often support community-level engagements and develop a deep understanding of local contexts, although this is not always systematically drawn upon to support transitional justice policymaking or negotiations.

Similarly, the United Nations Development Programme has sometimes initiated support for the implementation of national transitional justice initiatives. Its long-term presence in a country can give it opportunities, as in Colombia, to invest in peacebuilding and in the strengthening of civil society so that it may engage effectively in transitional justice processes and promote resilience. In response to a growing refugee challenge, the Office of the United Nations High Commissioner for Refugees (UNHCR) has facilitated the participation of refugees in transitional justice processes, including by ensuring their representation or inputs into peace processes, as in the case of the South Sudan revitalization negotiations.⁶ On questions of gender, the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) provides a strong lead on transitional justice and regularly deploys gender expertise to support the analysis and enhancement of gender-sensitive approaches within peace processes. UN-Women has extended its expertise to many peace processes and negotiations globally.

At various stages of a peace process, from inception to implementation, the United Nations can marshal its considerable programmatic and technical capacities and partnerships to support negotiations on transitional justice. Its advice and guidance is globally influential, and comes with responsibilities to maintain the efficacy of transitional justice in contributing to peacemaking, the vindication of rights and the building of more cohesive societies in constrained circumstances.

⁶ UNHCR facilitated the participation of refugees in the negotiations of the High-Level Revitalization Forum in Addis Ababa in 2017 and 2018.

B. Preparedness



1. PEACEMAKING CONTEXTS

Peace processes are spaces of political contestation often characterized by high polarization and mistrust. They can also be crowded spaces, in which different national and external actors actively seek to shape the outcomes, some exerting immense pressures on the parties, including through the threat of sanctions. They are often tense environments, where the parties are focused on protecting their interests, although not all participants will bring sufficient or uniform grounding in the issues under consideration. These multiple deficits of trust, objectivity, ownership and expertise can affect the nature and quality of decision-making, and they can place heavy demands on the parties and facilitators to plan and manage the process effectively in order to achieve successful outcomes. **A sound strategy should lay the groundwork for negotiations to engage with complex and dynamic realities so as to nurture participatory and inclusive processes that produce effective responses to the violence and violations.**

2. STRATEGIES FOR NEGOTIATING TRANSITIONAL JUSTICE

A sound strategy for the conduct of negotiations will enhance preparedness, planning, the management of the process and the prospects of reaching high-quality agreements on transitional justice. United Nations mediators and facilitators are guided by the policies of the organization, including any general⁷ or specific guidance on different aspects of transitional justice.⁸ The African Union, the European Union and some States have also developed policies and guidance on transitional justice for use by their mandated facilitators and member States to inform mediation and facilitation support. **A dedicated strategy on transitional justice should facilitate serious engagement with the complexity of the subject matter in order to yield high-quality agreements.** Such strategies should be based on a sound grasp of the issues and should facilitate the participation of key stakeholders, particularly women and victims.

⁷ This includes “United Nations guidance for effective mediation” (June 2012). ⁸ Including United Nations, “Guidance note of the Secretary-General: reparations for conflict-related sexual violence” (June 2014).

Such a strategy should aim to achieve coherence by promoting the goals of transitional justice across the various issues under deliberation. Thus, negotiations on ceasefires or cessation of hostilities, **justice sector reforms, resource allocation and the demobilization and reintegration of combatants are all potentially relevant to transitional justice goals, broadly conceived**. In the negotiations leading to the 2018 Revitalized Agreement on the Resolution of the Conflict in South Sudan, provisions on strengthening justice institutions, including the establishment of a Constitutional Court, and the equitable management of national resources, were contained in chapters of the agreement on aspects other than transitional justice.

In terms of outcomes, a sound strategy will reflect goals that are both aspirational and realistic. Aspirationally, **the strategy should, among other things, seek to restore or strengthen the rule of law and renew institutions, engendering civic trust and social cohesion, including through the engagement of victims and affected communities in relevant processes, while aiming for a more inclusive society in which women's needs and contributions are elevated**. Realism, on the other hand, acknowledges the **critical limitations of national and local systems in responding to violations and achieving the fullest aims of transitional justice**. A strategy is informed and underpinned by sound analysis and appreciation of the conflict context and dynamics.

3. CONFLICT ANALYSIS

A systematic and continual appreciation of all aspects of the conflict, including the history, drivers, actors, issues and dynamics, as well as of the positions of the parties, is indispens-

able for the effective management of a peace process. Analysis deepens understanding of the conflict context, and it helps prevent the adoption of inappropriate options. Although negotiating parties and facilitators may not rely on a single formal text of analysis, they will nevertheless come into the dialogue with clear objectives and strategies as well as positions on transitional justice. For facilitators, a robust analysis helps to shape engagement with the ideas and positions of the parties and to prepare for alternative or bridging proposals. **Analysis relevant to transitional justice should include the nature of the violations and their impacts, going beyond the obvious and emblematic and including structural inequalities**. This contributes to a holistic response to violations, encompassing political, social and economic dimensions.

Because transitional justice has significant legal content, it is necessary to have **a clear grasp of the legal issues, including the national and applicable regional and international legal and policy frameworks and their potential contribution and deficiencies**. Sound analysis should consider how transitional justice principles have been applied in different contexts. Analysis also grounds the processes in national realities and should include evaluations of capacities and the potential of national systems, which are sometimes exaggerated or ignored. Beyond the formal systems, analysis should thus consider and evaluate the contribution that other complementary systems and non-formal mechanisms and processes can make towards transitional justice goals. It should also include consideration of the way that complementary systems address questions of gender and inclusion. Knowledgeable interlocutors can deepen



UN Photo/Herve Sereffo

understanding of the national context. Their evaluations of both formal and complementary mechanisms can provide invaluable insights and can inform decisions on adaptations or the development of new institutions.

Given the dynamic nature of conflict contexts, the analysis should endeavour to keep pace with changes, including in the development of the conflict, and with the views and positions of parties and stakeholders. Furthermore, transitional justice needs to be grounded in the experiences and needs of the affected society and victims, whose views should be actively sought and considered. This will enhance the quality of the negotiations and the legitimacy of outcomes. Although ascertaining the views of victims and stakeholders is demanding, facilitators can rely on other intermediaries, including national and international organizations. As far as possible, parties and facilitators should endeavour to interact directly with victims.

4. DEVELOPING NARRATIVES ON TRANSITIONAL JUSTICE

Based on their assessment of the context and dynamics, facilitators should assist the parties to develop a narrative about the peace process and the transitional justice negotiations that signals the direction of travel, articulating the goals and aspirations of the process. A formulation that highlights the **transformative contributions transitional justice can make to social repair, reconciliation and the attainment of justice** can reassure stakeholders and can help to mobilize broader understanding and support from a range of national and external interlocutors. This can help parties in their efforts to engage their constituencies to secure support for the process and any transitional justice outcomes. Leaders who sign up to transitional justice measures need to carry other leaders and their con-

stituencies with them; otherwise, groups can fracture, as has been seen in several contexts. In El Salvador, vetting decisions caused tensions and a split in the Farabundo Martí National Liberation Front following the Chapultepec Accord of 1992.

While a narrative is not the same as a communication strategy, it provides and socializes a language with which to describe the process and can prevent negative perceptions taking root. In fraught negotiation environments, it can replace denunciatory language with more positive discourses of solidarity and collective aspirations for a fairer, more just, cohesive and democratic society. **Moving away from threatening justice or truth as punishment and exposure, a narrative can instead emphasize accountability as an expression of responsibility and leadership and can underscore the value of truth as solidarity and a contribution to reconciliation and healing.** Narratives can also help to articulate the dilemmas and

challenges associated with addressing the legacies of conflict. At their best, they can elevate the imagination of the parties and move the conversation beyond transactional or purely partisan preoccupations and framings, instead telling a story of the collective and inclusive search for transformation. While some aspects of the narrative can be reflected in the text, narratives principally help to focus the attention of the parties towards the pursuit of common goals and provide reassurance to other stakeholders. In many negotiations, facilitators and negotiators spend a considerable time considering how best to frame what the process aims to achieve. In the negotiations in Colombia, the parties did not use the term “transitional justice” and simply framed those elements under the rubric of victims. In negotiations with the Lord’s Resistance Army in Uganda, the parties did not reference transitional justice, and instead referred to accountability and reconciliation, with a strong narrative on the efficacy of national proceedings.⁹



UN Photo/Stuart Price

⁹ Uganda, Agreement on Accountability and Reconciliation, 2007.

C. Managing transitional justice negotiations



1. GRAPPLING WITH INTERNAL PRESSURES

Deliberations on transitional justice are often tense, because the parties may have serious concerns that transitional justice measures might undermine their political standing and capacity to contribute to a post-conflict dispensation. Conflict parties may therefore insist on as much clarity as possible on how their interests, including the personal liberty of key leaders, will be concretely affected by any measures that are adopted. Such **demands for legal certainty and legal guarantees are an expression of the tensions and dilemmas at the heart of transitional justice negotiations.** The success of peace processes can depend on the very individuals who might become the target of retributive measures. A failure to sufficiently acknowledge and engage with these concerns will complicate the prospects of resolution and may hamper the exploration of viable alternatives for accountability and other transitional justice measures. These are difficult issues which should not be rushed, and they might need to be introduced in smaller settings or explored through trusted intermediaries before they are ventilated in open sessions. In some cases, the consideration of these issues might need to remain confidential

for as long as possible. This links to the discussion on narratives: if a party can point to a positive contribution it will make or to some political gain achieved through the negotiations, this is more likely to represent an incentive for engagement.

2. MANAGING THE PRESSURES ASSOCIATED WITH TRANSITIONAL JUSTICE

Maintaining the parties' space for negotiation within the peace process is key and underlines the concept of a voluntary process, within which dilemmas and realities should be honestly confronted, thinking challenged and new approaches considered. It is instructive that, in the **negotiations in Colombia that ended in 2016, an innovative approach was taken to dealing with the past without the direct involvement of mediators and with greater reliance on advisers and softer forms of facilitation.** This might suggest that mediation of transitional justice has become increasingly directive, with a tendency to resort to formulaic responses, thus limiting the potential for adaptation and new approaches to dilemmas. Managing these internal pressures is key to the success of negotiations.

As interest in ending conflict and addressing serious violations has increased, peace

processes are now subject to various external pressures on transitional justice issues, including strong advocacy by national and international entities. These interventions can heighten the climate of tension in the peace process and affect the nature or course of the deliberations. In some cases, international tribunals and courts, including the International Criminal Court, may already be involved in the situation when the peace process is initiated. In situations such as the Central African Republic, Colombia, the Democratic Republic of the Congo, Kenya, Libya, the Sudan, Uganda and Venezuela, negotiations have taken place simultaneously with International Criminal Court interest in the country. Complications have arisen when arrest warrants are issued, as was illustrated starkly in the situation of Uganda and the Sudan, where the Lord's Resistance Army leaders were the subjects of indictments that complicated their capacity to negotiate and their willingness to respect final agreements. In the Sudan, the earlier negotiations on Darfur (from 2010) involved consideration of transitional justice issues but did not reference the International Criminal Court. It was only after the fall of the Al-Bashir regime that the Darfur track of the Juba Peace Agreement dealt with the issue in 2020. The issue of whether to cooperate with the International Criminal Court continues to be a bone of contention.

Other international interventions, including sanctions by the Security Council and investigations by the Human Rights Council, regional institutions or even States are often triggered during or before peace processes are instituted. They invariably shape the discourse on transitional justice, particularly when high-profile individuals and entities

are targeted. While pressures cannot be ignored, oversensitivity to internal or external pressures can distort the dynamics of the negotiations and create false and unnecessary dilemmas. Even if parties appear to acquiesce to external demands, they are likely to backslide from apparent commitments that have been reached under the weight of pressure. Transitional justice requires a deliberative approach in which the parties genuinely internalize the choices open to them, and facilitators need to pace the peace process and protect the space for serious engagement with the issues from rushed demands.

3. VICTIM ENGAGEMENT

Victims occupy a central place in the conception of transitional justice, as their needs provide the principal rationale for the key measures of accountability, truth recovery, reparations and guarantees of non-recurrence. Their attitudes are critical to the success of any reconciliation project. **As victims are members of society with specific experiences of harm, enlisting and respecting their insights and their contributions towards the goals of peacemaking and the recovery of society is a critical expression of solidarity.** However, while the priority to be accorded to victims can be catalytic for the quality of the process, it is not without its challenges. In a politically contested environment, the definitional question of who counts as a victim can be controversial, as each party might seek to advance the perceived interests of its constituencies and privilege the experiences of certain victims. To protect the dignity of victims and other participants, these issues should be managed sensitively. Here, preparation is key: participants in these engage-

ments and interactions should be identified and matched carefully to the issues; timing and the choice of format for the engagements should be appropriate.

Although the selection and identification of victims can be challenging, particularly when dealing with large numbers of victims, as part of a **victim-centred approach**, peace processes should nevertheless promote their **direct and indirect participation**. The **experiences of women victims** should be given **special consideration** and their particular needs fully taken into account. In the peace process for Liberia in Accra in 2003, victims were part of the government delegation and participated directly in the talks. In other contexts, facilitators and parties have made arrangements for victims to participate as observers or special envoys, with the opportunity to make presentations and interact with the parties, as in the negotiations in Colombia, when victims were invited to Havana for the talks. As part of their preparations, mediators can establish formal or informal mechanisms and practices to engage victims systematically on a range of issues affecting their interests.

4. RECOGNIZING AND MITIGATING ASYMMETRY

Although peace processes should ideally reflect and maintain a level playing field in which the equality of participation is assured, **parties seldom bring equal capacities and experience to the negotiation**. Imbalances are common, and they are compounded where, as in transitional justice, the subject matter is complex. In some cases, parties may not be familiar or comfortable with written analysis or abstract ideas and might

be more comfortable with oral processes. Non-State actors are more likely to be less conversant with some aspects of policy-making with which State actors and other stakeholders might be more familiar. While such differences are part of the normal dynamics of peace processes, they can affect the quality of the deliberations and the prospects for progress, and they may hence require mitigation. Imbalances may extend to the implementation stage, when they might be accentuated, particularly if a non-State actor changes its organizational identity through demobilization or the dissolution of a party after the negotiations, and it thus loses its capacity to protect its interests. **At all stages, each peace process needs to be managed in a manner that mitigates asymmetries and respects the standing and needs of the parties.**

5. INCLUSION AND PARTICIPATION

Inclusive processes are a core value of peacemaking, reflecting understandings that processes that are inclusive are inherently fair, that they are enriched by the views of others and that they are more likely to garner broader support and be implemented. Sharply attuned to protecting and advancing their core interests and vision, parties are often protective of their negotiating space and may be wary of the political agendas other actors might bring into the process. Indeed, at key points, particularly while the process is taking root, negotiations often require complete confidentiality, or interactions may need to be limited. Illustrating the positive benefits of greater participation of women and other groups is crucial to allaying parties' concerns. **Interactions among**

the parties and between parties and other stakeholders, including victims, enhance the quality of agreements by deepening mutual understanding of the issues, including the challenges and opportunities of the national context. It adds to the sense of **ownership and the legitimacy of the process** when other stakeholders feel that they have contributed to the deliberations and outcomes. In this sense, the peace process foreshadows and marks the beginnings of genuine interactions and acknowledgements about the past, as well as explorations of tailored transitional justice measures.

Flexibility in determining the formats and modes of engagement and participation in the process allows for interactions between the parties and other stakeholders to develop incrementally and in formal and less formal settings that allow for more frank exchanges and better understandings of the different perspectives. Although managing inclusive processes is procedurally more complex and resource intensive, there are now experiences from various peace processes from which to draw inspiration on how to achieve meaningful, dignified and effective participation by other stakeholders and victims without undermining the prospects of progress and while encouraging acceptance of outcomes. **With careful preparation and participant selection, inclusive practices can contribute to the quality of transitional justice choices by enlisting the views of victims and other stakeholders on how best to overcome the dilemmas and challenges of addressing violations.**¹⁰

6. GENDER CONSIDERATIONS

As in the broader negotiations, addressing questions of gender in transitional justice negotiations requires a **gender-responsive approach** across all issues under consideration. Accordingly, to integrate gender considerations across the breadth of issues, parties and mediators will need to engage with the values and principles of gender equality and the realities of the adverse differential impacts of conflicts and related violations on women. For many, this will be a steep learning curve in overcoming resistance or indifference to gender issues. Although not all issues relevant to gender and transitional justice can be addressed in the requisite breadth and depth during negotiations, the peace process should mark the beginnings of genuine efforts to identify and engage with the challenge of how to realize a fairer society in which the experiences and contribution of women are equally prioritized and the differential impacts of violations such as forced displacement, enforced disappearance and crimes of starvation are appropriately addressed.

Beyond the participation of women in the peace process, creative and effective ways of engaging the parties and stakeholders on gender issues should be explored. Moreover, **the substance of any agreement should reflect gender awareness and should seek to ensure the participation of women in the implementation of transitional justice measures,** including truth-telling processes and reparations, which should be tailored

¹⁰ See also United Nations, Department of Political Affairs, “[Guidance on Gender and Inclusive Mediation Strategies](#)” (2017).

to meet the needs of women. It is crucial to introduce principles and specific provisions in the text that guarantee women's participation and to apply a gender lens if these issues are not to be lost at the implementation stage. The existing normative frameworks for women and peace and security, building on Security Council resolutions 1325 (2000) and 2122 (2013),¹¹ stress the **need for gender-responsiveness across transitional justice interventions, including in criminal justice, truth seeking and reparations and alternative, non-judicial mechanisms, as well as in the design and mandating of institutions.** Gender-responsiveness also includes the notions of mainstreaming, anticipating and addressing barriers to women's access and participation, and improving conflict parties' and facilitators' grasp of relevant gender issues.

Appropriate analysis should support understanding of structural impediments, including gender-biased and patriarchal systems and hierarchies. **The effective and meaningful participation of women in all aspects of peacemaking, and the duty to end impunity for sexual violence and to ensure that transitional justice measures address the full range of violations and abuses of women's human rights, are key obligations to bear in mind.** In terms of reparations, even before formal determinations are made, survivors' requirements for support, practical assistance and services should be anticipated – including health care and trauma counselling – and urgent steps should be taken to make such provisions available. Apart from

violations against women, the implications of masculinities and the disproportionate role that men play in conflict is increasingly acknowledged, including the reality that men can become victims of sexual violence. Although there is considerable resistance and defensiveness to be overcome, particularly in relation to conflict-related sexual violence, and while difficult conversations need to be had about these violations, facilitators should endeavour to assist parties to overcome misunderstandings and reservations about addressing gender issues and should seek to identify innovative ways of engaging conflict parties on these sensitive issues. **Ensuring that women and other victims have safe spaces to engage on these issues and to contribute to the identification of responses, including reparations, is critical.**

7. MANAGING EXPERTS

To enhance their capacity to engage with complex policy issues effectively, parties will need to increase their familiarity with the concepts relevant to transitional justice. Peace processes and facilitators often draw additional knowledge from experts and other resource persons, particularly those familiar with the conflict context and others who bring comparative knowledge and experience of implementing transitional justice measures in other contexts. To protect the integrity and quality of the deliberations, the provision of advice needs to be carefully managed. Experts are often self-selected and may have certain preferences or knowledge gaps, par-

¹¹ See also United Nations, "Guidance note of the Secretary-General: reparations for conflict-related sexual violence" (June 2014).

ticularly in relation to national contexts. **This calls for careful identification of suitable resource persons possessing different areas of knowledge, including on local systems and contexts.** Advisors should understand the dynamics and rules of engagement of the peace process and respect the parties' agency as negotiators and their right to make their own informed choices. Advisors should always act with integrity – not avoiding inconvenient realities, but acknowledging the challenges associated with certain measures. Scrupulously impartial, they should avoid giving any impression that they promote any side's preferences. Where they lack relevant expertise, they should indicate this.

Effective advice should not seek to provide answers to parties; rather, it should equip

negotiators to make their own informed judgments after weighing up the options and anticipating the consequences. Facilitators should endeavour to protect the negotiating prerogatives of the parties and avoid overwhelming them with advice that they might not be ready to digest and take on board. Instead, parties should be allowed to evolve and deepen their understanding incrementally and systematically, beginning with less sensitive and more accessible issues. Although the normative aspect of transitional justice may tend to encourage a more prescriptive approach, facilitators should strenuously protect the parties' and stakeholders' agency and prerogatives to interrogate, to negotiate and to reach transitional justice choices for themselves in the light of the constraints under which they operate.



D. Navigating substantive issues and dilemmas



Insofar as transitional justice seeks to examine the conduct of powerful actors, to interrogate the structures of society, to address violations including discrimination and marginalization and to promote visions and narratives of the future, it is an inescapably political project, and indeed may be perceived as such by conflict parties. If transitional justice is accepted to be both a normative and problem-solving approach, then the constraints, challenges and consequences associated with its application must be thoroughly engaged in the peace process. Otherwise, transitional justice will begin to lose its essence and efficacy in conflict resolution settings. It is an undoubtedly complex field of policy, with which negotiators unfamiliar with its concepts might need time to grapple. As noted in the preceding discussion, an understanding of transitional justice as a holistic, transformative and forward-looking yet principled project can give coherence to efforts to apply its principles in conflict contexts. This section highlights a non-exhaustive set of substantive issues that pose dilemmas or that have proved to be challenging in managing the agenda of transitional justice negotiations.

1. MAKING SENSE OF A VICTIM-CENTRED APPROACH

Victims are at the heart of transitional justice endeavours, and this should be reflected in the approach to the substance of the negotiations. While parties may bring different ideas about victimhood and might resist definitions that they perceive to be either too individualized or too collective, **an agreement on transitional justice should ensure recognition and acknowledgement of the broad class of victims and types of harm that need to be addressed.** For instance, structural violations including systemic discrimination and other injustices that affect significant sections of the population, and other violations of the past, should not be overshadowed by more recent and egregious violations. The peace process provides an opportunity for determining how the multiple manifestations of harm should be addressed. Transitional justice should not engender a sense of unfairness. In relation to reparations, the discussions should explore a range of options including individual, collective and symbolic reparations. Realism demands that questions about the capacity of the society to respond fully to victims are confronted and options considered in a sensitive man-

ner. When victims and survivors are a part of a processes in which constraints about resourcing are recognized, this will lend greater legitimacy to the final choices.

2. GRAPPLING WITH RECONCILIATION

Understandings of reconciliation are diverse, embracing multiple dimensions including political, national, social and individual dimensions. Reconciliation is often understood as both a goal and a process, **and as entailing the building or rebuilding of relationships and trust at the interpersonal, social and political levels, based on the repair of wrongs including systemic violations.** Central to reconciliation is the idea of acknowledgement, together with the desire to construct fairer and transformed relationships. In diverse conflict contexts, peace processes have acknowledged the role of local and national reconciliation endeavours, but meanings and emphases differ and should be understood in local, national and regional contexts. Where it is understood and valued, **reconciliation can provide a rationale for peacemaking, and it can help achieve social repair and the restoration of relationships, especially where its processes engage with victims' and communities' expectations, address their needs, contribute to greater understanding and help remedy underlying grievances.** Context-specific reconciliation processes and mechanisms can contribute to the goals of accountability, truth-telling and forms of reparation.

The United Nations has emphasized that transitional justice measures serve the goals of justice and of achieving reconciliation. However, in the iteration of concrete measures and the goals of transitional justice, reconciliation is often missing, and societies that have been left fractured

and polarized by conflict cry out for processes that can help to rebuild social capital. Although some might invoke the language of reconciliation to circumvent questions of accountability, criminal justice, truth-telling or reparation, **the extent to which reconciliation processes will contribute to social repair, non-recurrence and the prevention of a return to conflict will depend on the extent to which the processes credibly address the past and participants are perceived as genuine.** Reconciliation is sometimes misunderstood as forgiveness or forgetting, but it does not connote amnesia; rather, it entails a difficult reckoning with the true circumstances and causes of the fracture of relationships. Acknowledgement of wrongdoing is essential for reconciliation if it is to replace negative relationships with mutual dependency, respect and trust. Such processes need to be nurtured patiently, **and where conflict has pitted communities against each other, community-level reconciliation processes can help to restore relations in a way that more official narratives and efforts at political reconciliation might not.**

Peace processes and agreements are both symbols and catalysts of political and social reconciliation, and the degree to which these ends are achieved will depend heavily on the way the process is managed and how its goals and objectives are understood. As already noted, the peace process can begin to foreshadow and even deliver on some of the goals of transitional justice, and this might include reconciliation. Third parties, who might be less conversant with local notions of reconciliation, should be careful not to discount the relevance of narratives or processes of reconciliation, or to import understandings that might make more sense in other contexts. **Contexts in which reconciliation approaches can make a positive contribution**

include the integration of individuals, the return of displaced persons and refugees and, among political entities, acts of political rapprochement.

Within the peace process, facilitators who seek to understand the meanings, goals and processes of reconciliation in the local and national contexts are more likely to assist the parties to identify the mechanisms of reconciliation at the individual, community and national levels that can contribute to social repair.

3. STATE-CENTRIC APPROACHES

The notion that transitional justice is primarily a response of the State is challenged by the realities. In fact, other actors including civic and international entities can and do actively contribute to the goals of transitional justice. For instance, the State cannot instigate certain processes of reconciliation where the rift is between communities or individuals; other entities might be more appropriate interlocutors in such cases. In many societies, community institutions, including customary laws and traditions, promote acts of social repair, acknowledgement, rehabilitation and healing, to assist individuals to reintegrate after participation in hostilities or to repair relations between communities. Moreover, individuals often have recourse to non-State institutions, which may enjoy greater legitimacy than the State.

Conceptions of transitional justice that focus exclusively on the obligations of the State are therefore likely to overlook the contributions of other institutions and processes towards positive transitional justice goals. Civic organizations, religious and traditional institutions and other actors have sometimes launched initiatives that mitigate the deficiencies of peace agreements or national

transitional justice policies, as in Guatemala, where the Catholic Church promoted the establishment of the unofficial Project for the Recovery of Historical Memory as an unofficial truth recovery entity. Elsewhere, particularly in Africa, traditional institutions have been adapted or appropriated to promote accountability and healing mechanisms, as in the case of *gacaca* in Mozambique, Rwanda, the Sudan (Darfur) and northern Uganda among other places.

In other circumstances, the State might lack the capacity and legitimacy to lead transitional justice interventions, and it must first renew its legitimacy and reinforce its capacities before it can credibly assert a lead role. Social and political fragmentation might also mean that a centralized State does not enjoy the monopoly of provision of solutions to transitional justice needs. **For transitional justice discourse and practice, acknowledging that the State might not be the only transitional justice actor will require a shift towards recognizing the important contributions that other entities make, in particular to repairing the past and rebuilding social capital.**

4. CHALLENGES AND LIMITATIONS OF IMPLEMENTATION

A peace process does not finish with negotiations; it continues into the implementation phase, when it often remains fragile and must be protected from collapse. In any case, not all accords will deliver full democratic outcomes: national systems might remain authoritarian, illiberal or polarized, at least in part. The quest for transition will therefore continue, and the implementation phase might be characterized by delay, non-implementation or the selective implementation of transitional justice measures. In Burundi, South Sudan and the Sudan, key

aspects of agreements on transitional justice, particularly criminal justice mechanisms, have remained unimplemented owing to continuing resistance. While external pressure or other political calculations had yielded initial signatures, the political will to implement the commitments was missing.

While strong implementation mechanisms are essential, the key to the implementation of commitments is not to be found solely in formal mechanisms; the degree to which national and local actors and citizens understand, support and champion transitional justice goals are critical guarantors and catalysts of implementation. In this regard, **political and civic actors and entities often emerge as leaders, champions and informal guarantors of transitional justice goals.** Beyond the formal oversight mechanisms, it is crucial to identify and nurture such leadership, as it contributes to deepening national ownership of the process.

5. TRANSBOUNDARY DIMENSIONS OF TRANSITIONAL JUSTICE

Apart from discounting other local and national interlocutors, the focus on States and national systems often fails to address the increasingly transboundary dimensions of intra-State conflicts. Today's conflicts create victims and involve perpetrators beyond the boundaries or nationalities of nation States. For example, jihadist groups move freely across the Sahel, the Horn of Africa and other parts of the world. The conflicts in Afghanistan, Libya, Syria and Yemen all have significant external dimensions relevant to transitional justice inquiry. The lim-

itations of States in addressing transboundary violations and their impacts have led parties and facilitators to avoid the subject of transitional justice outside national borders, with the exception of international or other criminal courts with extraterritorial or international jurisdiction. **To apply transitional justice measures across national borders will require architectures and capacities for cooperation that are often lacking, sometimes owing to the absence of political will.** Third States might not wish to acknowledge their own complicity in violations or a conflict. National systems may not be developed to the same degree, and there might be legal or practical impediments to exercising jurisdiction or the mandate of national transitional justice bodies outside the State or in relation to third-country nationals. These challenges require regional policies and arrangements. With the increase of transnational violations, the case for cooperation and architectures for transitional justice outside national borders is considerable.

6. ENGAGING WITH ACCOUNTABILITY

During peace processes, the question of exemptions from prosecution arises in relation to political crimes associated with resisting the State. Parties may also demand exemption from criminal proceedings in relation to other serious crimes committed in the course of the conflict. Sometimes, the State may adopt policies of amnesty in relation to "complex perpetrators", such as children or abducted persons who have committed offences while in captivity.¹² Discussions about leniency measures arise in peace processes because of the practical dilemma from

¹²This was in part the rationale for the Amnesty Act, 2000, in Uganda; the Agreement on Accountability and Reconciliation (Uganda, 2007) also exempted children from formal proceedings.

the inability of States to deal effectively with all perpetrators. The experience of Rwanda in the aftermath of the genocide is perhaps most clearly illustrative of the limits of criminal justice capacities: even when both national and international judicial institutions were involved in dealing with crimes, the scale of the offending was overwhelming and required adjustments to the approach, with the introduction of the complementary processes of the Gacaca Courts.

While the debate on this question has been framed in terms of the legality of amnesties, it is, for the most part, a discussion about alternative accountability measures. The United Nations position on amnesty is clear: it cannot condone or encourage amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights.¹³ In peace-process settings, this means that United Nations facilitators cannot witness agreements that extend amnesties for those crimes. While prosecutorial strategies and policies might focus on the “most responsible” perpetrators, this might still leave out a significant number of other perpetrators. The question then arises **what alternatives for accountability should apply to prevent the emergence of impunity gaps.**

To make sense of this dilemma, it is necessary to recognize that States have multiple obligations and objectives, including the protection of rights, the resolution of damaging conflicts and the restoration of stability. To demonstrate the legitimacy of leniency decisions, negotiations would need to clarify the purpose and scope of the measures, as well as the conditions (including the possi-

bility of revocation) under which individuals may benefit from such measures. The mode of adoption and the degree of support the measures enjoy also have a bearing upon the legitimacy of such measures.¹⁴ **In peace processes, alternative measures of accountability that avoid de facto amnesties through rigorous proceedings that are mindful of a victim’s rights to truth, justice and reparation are more likely to be found to be consistent with the international obligations of States.**

Facilitators and States will continue to grapple with these issues, and different peace processes will arrive at different answers. Some States have exempted children and abducted or coerced persons from criminal liability – either in practice or through formal agreements and arrangements – based on an understanding of their complex status as victim-perpetrators.¹⁵ Principled responses to these difficult issues will require more than mechanistic or template-based approaches. They should be explored iteratively and should be grounded in the national and other realities without prejudging the outcomes. Because the considerations are context-specific, it is possible that two States might properly reach different conclusions on how to address this question. Developing a narrative that explains the rationale and justification for introducing alternative or complementary accountability measures will contribute to their broader acceptance. A holistic narrative might affirm a commitment to accountability as a critical pillar of the recovery of the values and cohesion of the society. It might demonstrate vindication of the experiences of victims, and it may offer a forward-looking vision, which could include the strengthening of institutions of justice and the rule of law.

¹³ As re-affirmed in the “Guidance note of the Secretary-General: United Nations approach to transitional justice”, 2010. ¹⁴ See Transitional Justice Institute, University of Ulster, *The Belfast Guidelines on Amnesty and Accountability* (Belfast, 2013), which discusses the circumstances in which certain amnesties can be designed to be consistent with international law and human rights. ¹⁵ Uganda, Amnesty Act Cap. 254.

E. Concluding observations



Peace processes represent atypical sites of policymaking characterized by political contestations and the need to stop, prevent and respond to violations in circumstances where the State is fragile and has failed to render effective protection to the population. In this context, ideas about dealing with the past and overcoming conflict are fraught with tensions arising from the limitations and constraints the State faces and the imperative to end damaging conflict in a way that is principled, honours victims and seeks to secure a more stable and prosperous future. Delivering such outcomes requires a recognition that transitional justice cannot be a dilemma-free and formulaic response, where the same measures apply with equal relevance in every circumstance. The suggestion for the management of peace processes seeks to make sense of the different complexities that transitional justice negotiations must navigate so as to achieve agreements that will deliver transitions from conflict. Transitional justice is inextricably linked to the fate of the political settlement to which the peace process aspires. It cannot prosper when the peace process fails, and it must therefore contend with the lack of political will and the multiple fragilities of the society in which it is to be applied.

A balance of transformative aspiration with a heavy dose of realism can insulate peace pro-

cesses and agreements from faltering. Peace processes that have addressed transitional justice effectively have been spaces of scepticism, interrogation of ideas, and innovation. Negotiators and facilitators have often come under immense pressures from a normative standpoint to adopt certain measures in response to violations. Facilitators should therefore challenge parties and stakeholders to adapt, innovate and tailor measures to local and national specificities and capacities. Distilling the essentials of transitional justice as a programme that deals with the past, while at the same time seeking to transcend its legacies and build a fairer, more just society, grounding negotiations in the imperatives to meet the needs of victims and affected societies, can bring a focus to managing the inherent dilemmas of transitional justice, some of which have been outlined above. As an organization that promotes both peace and associated norms, the United Nations has obligations to respond to both conflict and violations, which converge in the way that the organization manages peace processes that engage transitional justice issues. The suggestions in Part F are intended to catalyse further reflection on these dilemmas and to sharpen further the response of the United Nations to conflict and its adverse impacts in challenging contexts.

F. Enhancing United Nations support for transitional justice in peace processes: suggestions



1. ON UNDERSTANDINGS OF TRANSITIONAL JUSTICE

Maintain and promote an approach that ensures that transitional justice is compliant with international obligations, is victim-centred, holistic and forward-looking and advances transition and transformation of the conflict, including by addressing root causes, thereby preventing a return to violence and violations.

Recognize and support peace processes as sites of policymaking, in which the parties and stakeholders can confront dilemmas around addressing the past and address the constraints of the conflict-affected society in a principled and innovative manner. Assist parties to deepen their understandings of transitional justice issues and to adapt measures to address the needs of the context.

Enhance and deepen understanding within the United Nations system of the contribution that reconciliation processes can make towards the goals of transitional justice and peacemaking (and vice versa), drawing on the organization's understanding of the country context, thereby assisting the parties and stakeholders to recover and revitalize the meaning of reconciliation, which

includes capacities for acknowledgement, political accommodation, social repair and other forms of reparation.

Recognize that, while the State is the principal transitional justice actor, other entities including communities, civic bodies and external actors can contribute significantly to the realization of key transitional justice goals, including in their support for peace processes and the implementation of relevant agreements. In this regard, encourage a deepened understanding of the contribution that non-State entities can play.

To prevent impunity gaps, encourage parties and facilitators to actively explore alternative and complementary mechanisms for ensuring accountability, including conditional amnesties and other leniency arrangements that are in line with international law and that serve the goals of transitional justice consistently with the rights and dignity of victims, while also contributing to stability and the implementation of any agreements to end the conflict.

Where conflicts and violations have transnational dimensions, promote cross-border, multi-State and regional initiatives and architectures to promote accountability, truth-telling and reparations, and the prevention of further violations.

2. ON SUPPORTING PEACE PROCESSES

Promote and facilitate a victim-centred approach, as well as meaningful opportunities for victims and survivors to engage directly and indirectly in the peace process and to express their views and concerns in a manner that protects their dignity and enhances the negotiations.

Strive to strengthen the collective capacities of the United Nations, including through its presence in conflict-affected contexts, to catalyse transitional justice at all stages of the peace process, from its inception to negotiations, and in the implementation of transitional justice agreements.

Ensure that United Nations facilitators continually improve their support for the negotiation of transitional justice issues, including by enhancing their own learning and understanding of transitional justice issues, drawing on a range of in-house resources, and through exposure to evolving ideas on transitional justice as well as the range of local, national and international contexts and practices.

Ensure that peace processes are supported by sound and agile strategies, promote coherence and synergies across all issues under consideration, maximize opportunities for social, institutional and economic responses that address the needs of victims, foster recovery, and encourage the prevention of violations.

Make use of the diverse capacities of the United Nations to analyse national and regional conflict contexts as relevant to transi-

tional justice issues, including the analytical expertise in the Mediation Support Unit, supporting conflict analysis and comprehensive stakeholder mapping to assist with effective process design and the development of a facilitation strategy for negotiations on transitional justice.

Drawing on established principles and guidance, promote gender-responsiveness in peace processes and agreements. Drawing on sound analysis, ensure the mainstreaming of gender issues while promoting and securing women's effective and meaningful participation in the negotiation and implementation of transitional justice measures.

Contribute to strengthening the capacity of the parties to negotiate gender issues and to overcome any misconceptions or resistance to gender issues, ensuring gender-responsive agreements that take full account of the differential impacts of the conflict and related violations on women.

Make use of the programming, knowledge and relationships of United Nations entities as relevant to the conflict context to promote effective participation by the range of stakeholders who can contribute to the peace process, through direct and indirect participation as appropriate.

Take steps to mitigate imbalances in the capacities of the parties to engage with transitional justice issues. Strategies could include ensuring adequate time for the negotiations, avoiding premature consideration of issues while introducing complex issues incrementally, shielding the process from inappropriate advice, and identifying appropriate op-

portunities for enhancing understanding of the issues, particularly in areas where parties might manifest knowledge gaps.

Recognize, encourage and seek to harness the role of national champions and leaders in promoting transitional justice, and encourage and nurture this leadership so that champions and leaders may act as guarantors and catalysts at all stages of the peace process, including in its implementation.

In identifying experts and resource persons to support the negotiations and engagements on transitional justice, ensure a broad mix of expertise, reflecting knowledge and experience going beyond legal expertise, and including resource persons who are familiar with non-formal and complementary mechanisms as well as questions of reconciliation.

