



PEACE NEGOTIATIONS  
POST-CONFLICT CONSTITUTIONS  
WAR CRIMES PROSECUTION

# WHAT IS TRANSITIONAL JUSTICE?

**Legal Memorandum**

Prepared by the

**Public International Law & Policy Group**

**Confidential**

## **WHAT IS TRANSITIONAL JUSTICE?**

### **Executive Summary**

The purpose of this memorandum is to provide an overview of transitional justice mechanisms. The abuses of former regimes in Latin America and Eastern Europe led to the development of transitional justice in the 1980s and 1990s as a way to address past systematic abuses. Transitional justice is the process of responding to past human rights violations through a variety of mechanisms to ensure accountability, achieve reconciliation, re-establish the rule of law, and prevent repetition of human rights abuse.

Transitional justice mechanisms include prosecutions, truth-seeking, reparations, and institutional reform. States can utilize national consultations with victims, affected communities, and the public generally to determine the needs of the victims and the aims of the transitional justice process. This is fundamental to deciding the types of transitional justice mechanisms to establish. A state can complement these national consultations with an analysis of the successes and failures of other states' transitional justice processes to decide the best mix of mechanisms to adapt to that state's unique situation.

First, prosecution mechanisms include domestic prosecutions, international or hybrid tribunals, the International Criminal Court, and traditional prosecutions, which all promote accountability but may not all fully address the needs of victims. Second, mechanisms for truth-seeking, such as truth commissions, commissions of inquiry, fact-finding missions, and providing access to official archives, focus on creating a historical record to prevent denial and assist victims come to terms with the past. Third, restitution, compensation, rehabilitation, satisfaction and memorialization are all forms of reparations for victims of serious crimes. Lastly, institutional reform through security sector reform, lustration, vetting, establishment of legal frameworks, oversight, and disarmament, demobilization, and reintegration, contributes to re-establishing the rule of law to prevent recurrence of serious human rights abuses.

Combining those various mechanisms and considering certain cross-cutting issues such as gender justice, children, other vulnerable groups, amnesty vs. accountability, and truth vs. justice contribute to ensuring transitional justice strategies are adapted to local needs.

## TABLE OF CONTENTS

<b>Statement of Purpose</b>	1
<b>Introduction</b>	1
<b>Transitional Justice Mechanisms</b>	2
<i>Prosecutions</i>	2
Domestic Prosecutions	3
International Tribunals and Hybrid Tribunals	3
International Criminal Court	4
Non-State Justice	4
<i>Truth Seeking</i>	5
Truth Commissions	5
Commissions of Inquiry and Fact-Finding Missions	6
Access to Official Archives	7
<i>Reparations</i>	7
Restitution	8
Compensation	8
Rehabilitation	9
Satisfaction and Memorialization	9
<i>Institutional Reform</i>	11
Security Sector Reform	11
Lustration	11
Vetting	12
Establishment of a Legal Framework	13
Oversight	13
Disarmament, Demobilization, and Reintegration	14
<b>Transitional Justice Issues</b>	15
<i>Gender Justice</i>	15
<i>Children</i>	15
<i>Other Vulnerable Groups</i>	16
<i>Amnesty vs. Accountability</i>	16
<i>Truth vs. Justice</i>	18
<b>Conclusion</b>	20
<b>About the Public International Law &amp; Policy Group</b>	21

## TRANSITIONAL JUSTICE OVERVIEW

### Statement of Purpose

The purpose of this memorandum is to provide an overview of transitional justice mechanisms.

### Introduction

The human rights violations committed by former regimes in Latin America and Eastern Europe led to the development of transitional justice in the 1980s and 1990s as a way to address past systematic abuses.<sup>1</sup> Transitional justice aims to promote reform and reconciliation, prevent future conflicts, strengthen democracy, and establish the rule of law.<sup>2</sup> To accomplish these aims, transitional justice incorporates both judicial and non-judicial mechanisms in the form of prosecutions, truth-seeking, reparations, and institutional reform.<sup>3</sup> When creating a transitional justice strategy, states may consider issues relating to women, children, and other vulnerable groups, as well as the existing debates between amnesty and accountability, and more generally between truth and justice.

As universal instruments on human rights and humanitarian law have multiplied, states now must provide to their citizens the right to justice and the right to truth.<sup>4</sup> Transitional justice is the process of responding to past human rights violations by recognizing victims and promoting peace, reconciliation, and democracy.<sup>5</sup> When focusing on victims and the unique local transitional context, transitional justice assists states in preventing future conflicts by dealing with past

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<sup>1</sup> United Nations Peacebuilding Commission, *What is Transitional Justice?*, 1 (Feb. 20, 2008), available at [http://www.un.org/en/peacebuilding/pdf/doc\\_wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf).

<sup>2</sup> Office of the High Commissioner for Human Rights, *Democratic Republic of Congo 1993 – 2003*, 1 (2010), available at [http://www.ohchr.org/Documents/Countries/ZR/FS-8\\_Transitional\\_Justice\\_FINAL.pdf](http://www.ohchr.org/Documents/Countries/ZR/FS-8_Transitional_Justice_FINAL.pdf).

<sup>3</sup> U.N. Secretary-General, *Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice*, 2 (March 2010), available at [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf); Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (Apr. 12, 2007), available at [http://nepal.ohchr.org/en/resources/publications/TJ%20brochure\\_E.pdf](http://nepal.ohchr.org/en/resources/publications/TJ%20brochure_E.pdf).

<sup>4</sup> U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 3-4 (Mar. 2010); see also Juan Mendez, Lou Henkin, *Transitional Justice, and the Prevention of Genocide*, 38 COLUMBIA HUMAN RIGHTS LAW REVIEW 477, 480 (2007); U.N. High Commissioner for Human Rights, *Study on the Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, paras. 4-24, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.4/2006/91](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2006/91).

<sup>5</sup> International Center for Transitional Justice, *What is Transitional Justice?*, 1 (2009), available at <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>; see also Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (Apr. 12, 2007).

abuses to “ensure accountability, serve justice, and achieve reconciliation.”<sup>6</sup> Because transitional justice encompasses numerous mechanisms, states may combine judicial and non-judicial processes to design an overall system that will be adapted to their specific situation and efficiently address past abuses.<sup>7</sup>

## Types of Transitional Justice Mechanisms

Transitional justice mechanisms include prosecutions, truth-seeking, reparations, and institutional reform.<sup>8</sup> States can utilize national consultations with victims, affected communities, and the public generally to determine the needs of the victims and the aims of the transitional justice process.<sup>9</sup> This is fundamental to deciding the types of transitional justice mechanisms to establish. A state can complement these national consultations with an analysis of the successes and failures of other states’ transitional justice processes to decide the best mix of mechanisms to adapt to that state’s unique situation.<sup>10</sup> Although various combinations are possible when designing and implementing a transitional justice system, states have an obligation to comply with applicable international legal standards.<sup>11</sup>

### *Prosecutions*

Prosecutions involve investigations and judicial proceedings against alleged perpetrators of grave violations of international human rights law, international humanitarian law, and international criminal law.<sup>12</sup> Prosecutions can target all alleged perpetrators or focus on high-level individuals who are responsible for

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<sup>6</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, paras. 8, 50, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>7</sup> George Kasapas, *An Introduction to the Concept of Transitional Justice: Western Balkans and E.U. Conditionality*, UNISCI, 10 (Oct. 2008), available at <http://www.ucm.es/info/unisci/revistas/UNISCI%20DP%2018%20-%20KASAPAS.pdf>; see also Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, *THE JUSTICE BALANCE: WHEN TRANSITIONAL JUSTICE IMPROVES HUMAN RIGHTS AND DEMOCRACY* 1, 6 (2010), available at [http://bookstore.usip.org/resrcs/frontm/1601270534\\_intro.pdf](http://bookstore.usip.org/resrcs/frontm/1601270534_intro.pdf).

<sup>8</sup> Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (Apr. 12, 2007).

<sup>9</sup> Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 9 (Mar. 2010); see also International Center for Transitional Justice, *What is Transitional Justice?*, 2 (2009).

<sup>10</sup> International Center for Transitional Justice, *What is Transitional Justice?*, 1 (2009); see also Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 2 (Apr. 12, 2007)

<sup>11</sup> Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 2 (Mar. 2010).

<sup>12</sup> United Nations Disarmament, Demobilization, and Reintegration Resource Center, *Integrated Disarmament, Demobilization, and Reintegration Standards 6.20 Transitional Justice and DDR*, 3 (Dec. 2009), available at <http://www.unddr.org/iddrs/06/20.php>.

ordering the violations or controlling those who committed serious abuses.<sup>13</sup> Whatever criminal justice option states opt for, prosecutions need to be conducted in compliance with standards of procedural fairness to avoid challenges to their legitimacy.<sup>14</sup> Possible mechanisms for prosecutions include domestic criminal procedures, international or hybrid tribunals (which combine both international and national elements), the International Criminal Court (ICC), and non-state prosecutions.

### Domestic Prosecutions

States have an international legal obligation to end impunity and to prosecute individuals responsible for serious human rights abuses.<sup>15</sup> As a result, the primary responsibility of holding those accountable for such violations, including international crimes such as genocide and crimes against humanity, lies with state courts.<sup>16</sup> The challenges faced by many states in transition conducting domestic prosecutions include a lack of institutional capacity, of political will or political coordination, and of a relevant legal framework.<sup>17</sup> Since many domestic systems are fragile during transitions, investigations are often limited in scope and focus on those regarded as most responsible for past gross human rights violations.<sup>18</sup>

### International Tribunals or Hybrid Tribunals

International tribunals or hybrid tribunals are temporary institutions set up to deliver justice and conduct fair trials when domestic systems are unable or unwilling to investigate or prosecute those responsible for human rights violations.<sup>19</sup> The U.N. Security Council created *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, which are composed of international judges who apply international law. Hybrid tribunals, such as the Special Court for Sierra Leone, have a mixed composition of international and

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<sup>13</sup> United Nations Disarmament, Demobilization, and Reintegration Resource Center, *Integrated Disarmament, Demobilization, and Reintegration Standards 6.20 Transitional Justice and DDR*, 3 (Dec. 2009).

<sup>14</sup> Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 7 (Mar. 2010).

<sup>15</sup> Security Council, *Statement by the President of the Security Council*, 1-2, U.N. Doc. S/PRST/2006/28 (June 22, 2006).

<sup>16</sup> Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (Apr. 12, 2007).

<sup>17</sup> Cecile Aptel, *Session 7: Transitional Justice and Domestic Justice Systems*, UNITED NATIONS CONSULTATIVE CONFERENCE ON INTERNATIONAL CRIMINAL JUSTICE, 2 (Sept. 9, 2009), available at <http://www.internationalcriminaljustice.net/experience/papers/session7.pdf>.

<sup>18</sup> International Center for Transitional Justice, *What is Transitional Justice?*, 3 (2009).

<sup>19</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 40, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

national judges, and apply both international and national law.<sup>20</sup> As such, hybrid tribunals strive to enhance ownership of the criminal process by the people affected while offering the heightened capacity and impartiality of international tribunals.<sup>21</sup> However, the features of such tribunals vary considerably from one state to another, and only support the transitional justice process if they are specifically designed for the particular national context.<sup>22</sup> Although hybrid tribunals remain an option of transitional justice design, the creation of the International Criminal Court (ICC) since the establishment of the *ad hoc* tribunals renders the option of an *ad hoc* tribunal less relevant.

### International Criminal Court

The International Criminal Court is the only permanent international institution empowered to conduct investigations or initiate prosecutions for international crimes. The ICC is a court of limited jurisdiction. The principle of complementarity only permits the ICC to prosecute when a state is unwilling or unable to do so domestically, since states have the primary responsibility to prosecute.<sup>23</sup> Additionally, the ICC may only intervene with regard to crimes committed after July 1, 2002, when the Rome Statute that created it came into force.<sup>24</sup> Further, ICC jurisdiction is restricted to international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression.<sup>25</sup> The ICC is intended to complement domestic prosecutions and other transitional justice mechanisms by providing a forum to prosecute those most responsible for the most heinous crimes.

### Non-State Justice

Non-state justice mechanisms, sometimes referred to as traditional justice, incorporate indigenous and customary practices into the transitional justice process.<sup>26</sup> For instance, *gacaca* courts, local community courts inspired by the Rwandan traditional courts, emerged as a traditional mechanism to assist Rwanda's national courts with trials of the 130,000 people imprisoned following the

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<sup>20</sup> Sarah M. H. Nouwen, 'Hybrid Courts': *The Hybrid Category of a New Type of International Criminal Courts*, 2 *UTRECHT LAW REVIEW* 190, 190-191 (Dec. 2006).

<sup>21</sup> Sarah M. H. Nouwen, 'Hybrid Courts': *The Hybrid Category of a New Type of International Criminal Courts*, 2 *UTRECHT LAW REVIEW* 190, 191, 206 (Dec. 2006).

<sup>22</sup> Sarah M. H. Nouwen, 'Hybrid Courts': *The Hybrid Category of a New Type of International Criminal Courts*, 2 *UTRECHT LAW REVIEW* 190, 214 (Dec. 2006).

<sup>23</sup> *Rome Statute of the International Criminal Court* art. 17 (1998), available at [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute%28e%29.pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute%28e%29.pdf); see also Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (Apr. 12, 2007).

<sup>24</sup> *Rome Statute of the International Criminal Court* art. 11 (1998).

<sup>25</sup> *Rome Statute of the International Criminal Court* art. 5 (1998).

<sup>26</sup> Luc Huyse and Mark Salter, *TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES* 3 (2008).

Rwandan genocide.<sup>27</sup> The United Nations Secretary-General emphasized the vital role of “indigenous and informal traditions for administering justice or settling disputes,” while conforming with international law to ensure the inclusion of all groups in the justice process.<sup>28</sup> Nonetheless, non-state trials may not be adequate in ethnically or religiously diverse states because each group may develop its own prosecutorial system, which may result in unequal treatment.<sup>29</sup>

While criminal prosecutions contribute to ensuring accountability and ending the culture of impunity that often exists in post-conflict states, they tend to focus on high-level individuals and ignore a great number of perpetrators.<sup>30</sup> As a result, even if traditional justice may provide some support, complementary mechanisms are most often necessary.

### *Truth-Seeking*

Truth-seeking is the process of investigating past human rights violations to determine what happened, why it happened, and to what effect in order to prevent future abuses.<sup>31</sup> Victims of gross human rights violations have an internationally recognized right to the truth.<sup>32</sup> Mechanisms for truth-seeking are truth commissions, commissions of inquiry, fact-finding missions, and providing access to official archives.

### Truth Commissions

Truth commissions are either non-judicial or quasi-judicial bodies that investigate past abuses to establish the truth of the violations and to publish a final report that can make policy recommendations, disseminate victims’ voices, and

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<sup>27</sup> Luc Huyse and Mark Salter, TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 37 (2008).

<sup>28</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 36, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>29</sup> Luc Huyse and Mark Salter, TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 182-183 (2008).

<sup>30</sup> International Center for Transitional Justice, *Criminal Justice*, available at <http://ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited Nov. 14, 2011).

<sup>31</sup> International Center for Transitional Justice and KontraS, *Derailed Transitional Justice in Indonesia Since the Fall of Soeharto*, 9, 17 (Mar. 2011), available at [http://ictj.org/sites/default/files/ICTJ-KontraS-Indonesia-Derailed-Report-2011-English\\_0.pdf](http://ictj.org/sites/default/files/ICTJ-KontraS-Indonesia-Derailed-Report-2011-English_0.pdf); see also Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 8 (Mar. 2010).

<sup>32</sup> Human Rights Council Resolution 12/12, paras. 1-4, preamble, U.N. Doc. A/HRC/12/12 (Oct. 12, 2009); see also U.N. High Commissioner for Human Rights, *Study on the Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, paras. 4-24, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006).



serve as a historical record.<sup>33</sup> Truth commissions, unlike national courts, are not subject to established international norms governing their creation, functioning, and powers.<sup>34</sup>

Nonetheless, the experience of over forty truth commissions over the last three decades has allowed for the identification of general principles and best practices.<sup>35</sup> Effective truth commissions need to be independent and impartial, complement other transitional justice mechanisms, empower victims, and remain flexible to adapt to changing circumstances.<sup>36</sup> Depending on the objective pursued, truth commissions allow for both the victims to tell their story and the perpetrators to admit the crimes they committed to promote forgiveness and reconciliation. In South Africa, for instance, the Truth and Reconciliation Commission received testimonies of perpetrators in exchange for amnesty, which allowed the inclusion of those individuals in the transition towards a democratic society.<sup>37</sup> Truth commissions typically issue recommendations to government authorities, generally in a final report, on means to prevent repetition of human rights abuses.<sup>38</sup>

### Commissions of Inquiry and Fact-Finding Missions

Similar to truth commissions, commissions of inquiry and fact-finding missions investigate past human rights abuses to discover the truth, but follow narrower mandates.<sup>39</sup> This mandate usually focuses on a particular event, category, or time period.<sup>40</sup> For instance, the United Nations Fact-Finding Mission on the Gaza Conflict was restricted to investigating violations of international human

<sup>33</sup> International Center for Transitional Justice, *Truth Commissions*, 1 (2008), available at <http://ictj.org/sites/default/files/ICTJ-Global-Truth-Commissions-2008-English.pdf>; see also Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 8 (Mar. 2010); United Nations Disarmament, Demobilization, and Reintegration Resource Center, *Integrated Disarmament, Demobilization, and Reintegration Standards 6.20 Transitional Justice and DDR*, 3 (Dec. 2009), available at [http://www.unddr.org/iddrs/06/download/IDDRS\\_620.pdf](http://www.unddr.org/iddrs/06/download/IDDRS_620.pdf).

<sup>34</sup> Office of the U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, 1 (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>.

<sup>35</sup> Office of the U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, 1 (2006); International Center for Transitional Justice, *Essential Best Practices for Truth Commissions* (Dec. 2009), available at [http://www.iccnw.org/documents/ICTJ\\_SDN\\_briefing\\_AUPD-TJRC.pdf](http://www.iccnw.org/documents/ICTJ_SDN_briefing_AUPD-TJRC.pdf); International Center for Transitional Justice, *Truth and Memory*, available at <http://ictj.org/our-work/transitional-justice-issues/truth-and-memory> (last visited Nov. 14, 2011).

<sup>36</sup> International Center for Transitional Justice, *Truth Commissions*, 1, 2 (2008).

<sup>37</sup> Leigh A. Payne, *In Search for Remorse: Confessions by Perpetrators of Past State Violence*, 1 (Mar. 8, 2004), available at [http://www.brandeis.edu/ethics/pdfs/internationaljustice/otheractivities/JAC\\_Payne.pdf](http://www.brandeis.edu/ethics/pdfs/internationaljustice/otheractivities/JAC_Payne.pdf).

<sup>38</sup> International Center for Transitional Justice, *Essential Best Practices for Truth Commissions*, 2, 5 (Dec. 2009).

<sup>39</sup> Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 8 (Mar. 2010).

<sup>40</sup> Jane Alexander, *A Scoping of Transitional Justice and Poverty Reduction*, 32 (Jan. 2003), available at <http://www.gsdrc.org/docs/open/SSAJ56.pdf>; see also Office of the High Commissioner of Human Rights in Nepal, *What is Transitional Justice?*, 1 (Apr. 12, 2007).

rights and international humanitarian law violations “in Gaza during the period from 27 December 2008 and 18 January 2009.”<sup>41</sup> While such mechanisms are particularly useful to establish the truth, a restrictive mandate may also result in overlooking certain abuses. In Sri Lanka, for instance, the United Nations expresses serious concerns over the mandate of the three Commissions of Inquiry into the Involuntary Removal or Disappearances of Persons, which was limited not only in terms of geographic and temporal scope, but also as to the types of human rights violations under review.<sup>42</sup>

### Access to Official Archives

The right to know includes the preservation of and access to official archives.<sup>43</sup> Access to official archives needs to be facilitated for victims, people related to the victims, as well as implicated persons requesting documentation to support their defense.<sup>44</sup> This transitional justice mechanism has two components. First, state authorities have to allow for an open access to documents already archived.<sup>45</sup> Second, because in most cases there is a lack of functional archive system, state authorities often need to establish one. This is especially essential to ensure that the historical record of past abuses produced by other transitional justice processes, such as criminal trials and truth commissions, is preserved to prevent denial and repetition of serious crimes.<sup>46</sup>

### *Reparations*

The purpose of reparations is to “redress gross and systematic human rights violations” and violations of international humanitarian law.<sup>47</sup> Reparations directly emphasize providing recognition to victims to build trust amongst citizens and with

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<sup>41</sup> United Nations Fact-Finding Mission on Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, para. 1, delivered to the General Assembly, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

<sup>42</sup> United States Institute of Peace, *Commissions of Inquiry: Sri Lanka*, available at <http://www.usip.org/publications/commissions-inquiry-sri-lanka> (last visited Nov. 14, 2011).

<sup>43</sup> Commission of Human Rights, The Administration of Justice and the Human Rights of Detainees, para. 17, 18, principle 4, delivered to the Economic and Social Council, E/CN.4/Sub.2/1997/20/Rev.1, (Oct. 2, 1997).

<sup>44</sup> Commission of Human Rights, The Administration of Justice and the Human Rights of Detainees, para. 17, 18, principle 14, delivered to the Economic and Social Council, E/CN.4/Sub.2/1997/20/Rev.1, (Oct. 2, 1997).

<sup>45</sup> United Nations Peacebuilding Commission, *What is Transitional Justice?*, 1 (Feb. 20, 2008), available at [http://www.un.org/en/peacebuilding/pdf/doc\\_wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf).

<sup>46</sup> International Center for Transitional Justice, *Truth and Memory*; see also Open Society Justice Initiative, *Legacy: Completing the Work of the Special Court for Sierra Leone*, 10 (Nov. 1, 2011), available at [http://www.soros.org/initiatives/justice/articles\\_publications/publications/scsl-legacy-20111101/legacy-scsl-20111101.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/scsl-legacy-20111101/legacy-scsl-20111101.pdf).

<sup>47</sup> Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 10 (2008), available at <http://ictj.org/sites/default/files/UNHCHR-Global-Reparations-Programmes-2008-English.pdf>.

the state.<sup>48</sup> States' duty to provide reparations for harm suffered is enshrined in several international instruments.<sup>49</sup> Types of reparations include restitution, compensation, rehabilitation, and satisfaction and memorialization. States can offer both individual and collective reparations.<sup>50</sup>

### Restitution

Restitution seeks to restore victims to the same position they were in before suffering violations of human rights or international humanitarian law.<sup>51</sup> Types of restitution include the return of property, restoration of liberty, restoration of citizenship, and reinstatement in former employment.<sup>52</sup> Restitution programs are most useful in states where serious human rights and humanitarian law violations included dispossessions, forced displacement, or governmental discriminatory policies.<sup>53</sup> For instance, the Czech government required that all property confiscated after 1948 and before 1990 during the communist period be returned to its owners.<sup>54</sup> To properly address the need of victims for redress, restitution programs also have to be offered on an equal basis to all victims.<sup>55</sup> State practice suggests that an exceptional administrative mass claims procedure supported by a judicial appeal procedure similar to the Bosnian restitution program best guarantees such equality.<sup>56</sup>

### Compensation

Financial compensation for gross violations of human rights and international humanitarian law is recommended for economically assessable damage such as physical or mental harm, costs incurred for legal and medical assistance, and material damages.<sup>57</sup> State practice suggests that compensation by itself is not an adequate transitional justice mechanism, and may be perceived as a

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<sup>48</sup> Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 2 (2008); see also United Nations Disarmament, Demobilization, and Reintegration Resource Center, *Integrated Disarmament, Demobilization, and Reintegration Standards 6.20 Transitional Justice and DDR*, 3 (Dec. 2009).

<sup>49</sup> *Universal Declaration of Human Rights* art. 8 (1948); see also *International Covenant on Civil and Political Rights* art. 2 (1966); *Rome Statute of the International Criminal Court* arts. 75 (1998).

<sup>50</sup> Economic and Social Council Resolution 2005/30, para. 13, U.N. Doc. E/RES/2005/30 (Jul. 30 2005).

<sup>51</sup> Economic and Social Council Resolution 2005/30, para. 19, U.N. Doc. E/RES/2005/30 (Jul. 30 2005).

<sup>52</sup> Economic and Social Council Resolution 2005/30, para. 21, U.N. Doc. E/RES/2005/30 (Jul. 30 2005).

<sup>53</sup> International Center for Transitional Justice, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, 48 (May 2007), available at [http://www.lobkovi.cz/Rest\\_Pub\\_07.pdf](http://www.lobkovi.cz/Rest_Pub_07.pdf).

<sup>54</sup> Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARVARD LAW REVIEW 762, 784 (2009).

<sup>55</sup> International Center for Transitional Justice, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, 51 (May 2007).

<sup>56</sup> International Center for Transitional Justice, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, 51 (May 2007).

<sup>57</sup> Economic and Social Council Resolution 2005/30, para. 20, U.N. Doc. E/RES/2005/30 (Jul. 25, 2005).

means to silence victims.<sup>58</sup> Morocco's Independent Arbitration Commission, for instance, received applications and dispensed compensation to 3,700 victims of disappearances and arbitrary detentions.<sup>59</sup> This commission nevertheless faced extensive criticism due to its inability to lead any truth-telling process or identify perpetrators, and its compensatory power was limited to certain kind of abuses.<sup>60</sup>

### Rehabilitation

Rehabilitation reparations incorporate medical and psychological care, legal services, and social services.<sup>61</sup> Providing medical services to victims of serious human rights abuses may contribute significantly to the transition process by assisting with mental and physical healing.<sup>62</sup> However, post-conflict states often lack the necessary structure to provide quality services and to deal with the particular mental traumas suffered by victims of gross violations of human rights and humanitarian law.<sup>63</sup> Consequently, an effective rehabilitation program requires a financial commitment of the state, collaboration with civil society organizations, as well as a collective approach to promote community healing and prevent repetition.<sup>64</sup>

### Satisfaction and Memorialization

Satisfaction includes a variety of measures ranging from ending violations to symbolic reparations such as commemorations, sanctions, and public apologies.<sup>65</sup> Satisfaction aims at promoting victim recognition, which contributes to the making of a historical record of past abuses and can help victims come to terms with the past.<sup>66</sup> Apologies are particularly relevant when state authorities are responsible for the human rights abuses committed, as in Canada, where the government

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<sup>58</sup> Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 12 (2008).

<sup>59</sup> Human Rights Watch, *Morocco's Truth Commission: Honoring Past Victims During an Uncertain Present*, 10 (Nov. 2005), available at <http://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>.

<sup>60</sup> Human Rights Watch, *Morocco's Truth Commission: Honoring Past Victims During an Uncertain Present*, 10-11 (Nov. 2005).

<sup>61</sup> Economic and Social Council Resolution 2005/30, para. 21, U.N. Doc. E/RES/2005/30 (Jul. 25, 2005).

<sup>62</sup> Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 24 (2008).

<sup>63</sup> Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 24-25 (2008).

<sup>64</sup> Redress, *Rehabilitation as a Form of Reparation: Opportunities and Challenges*, 4 (Sept. 2010), available at [http://www.redress.org/downloads/publications/Report\\_of\\_the\\_Expert\\_Seminar\\_on\\_Rehabilitation\\_October\\_2010.pdf](http://www.redress.org/downloads/publications/Report_of_the_Expert_Seminar_on_Rehabilitation_October_2010.pdf).

<sup>65</sup> Economic and Social Council Resolution 2005/30, para. 22, U.N. Doc. E/RES/2005/30 (Jul. 25, 2005).

<sup>66</sup> Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 23 (2008).

presented a public apology to the Canadian Aboriginal population for the treatment they received in Indian Residential Schools.<sup>67</sup>

Memorialization is also a type of satisfaction reparation.<sup>68</sup> Memorialization honors victims of past human rights abuse through the creation of monuments, museums, memorials, and/or the adoption of days of remembrance to promote social recovery, transform national identity, preserve history, and educate the public.<sup>69</sup> States may preserve the memory of past crimes and honor victims by transforming sites of past crimes into memorials or official buildings, such as the creation of memorials at mass graves and the conversion of Tuol Sleng Secret Prison (S-21) into a museum commemorating the victims of the Khmer Rouge in Cambodia.<sup>70</sup> Instances of state practice demonstrate the importance of including civil society organizations in memorialization initiatives to promote a collective memory. Indeed, the South African District Six Museum and the Argentinean Memoria Aberta are often considered successful memorials and are both the result of local organizations and communities' efforts.<sup>71</sup> Further, memorialization initiatives are more likely to prevent resurgence of violence and human rights violations when they incorporate an education component, as in South Africa where the educational program of the District Six Museum has disseminated knowledge on the Apartheid era and fostered reflection on underlying issues of identity and dispossession.<sup>72</sup>

Reparations are an essential tool of transitional justice for post-conflict states. The variety of mechanisms available enables states to address different types of human rights violations. Regardless of the method implemented, reparations are more likely to serve justice when combined with other processes

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<sup>67</sup> Office of the Prime Minister of Canada, *Prime Minister Harper Offers Full Apology on Behalf of Canadians for the Indian Residential Schools System*, June 11, 2008, available at <http://pm.gc.ca/eng/media.asp?id=2149>; see also Facing History and Ourselves, *How Important is an Apology?*, available at <http://tj.facinghistory.org/reading/when-leaders-apologize> (last visited Nov. 15, 2011).

<sup>68</sup> Economic and Social Council Resolution 2005/30, para. 22, U.N. Doc. E/RES/2005/30 (Jul. 30 2005).

<sup>69</sup> Judy Barsalou and Victoria Baxter, *The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice*, UNITED STATES INSTITUTE OF PEACE, 4, 5 (Jan. 2007), available at <http://www.usip.org/files/resources/srs5.pdf>. see also International Center for Transitional Justice, *What is Transitional Justice?*, 1 (2009).

<sup>70</sup> Scott Worden and Rachel Ray Steele, *Telling the Story: Documentation Lessons for Afghanistan from the Cambodian Experience*, 10 (Dec. 2008), available at [http://www.usip.org/files/resources/USIP\\_1208\\_2.PDF](http://www.usip.org/files/resources/USIP_1208_2.PDF); see also Tuol Sleng Museum of Genocide, *Tuol Sleng Secret Prison*, available at <http://www.tuolsleng.com>.

<sup>71</sup> Judy Barsalou and Victoria Baxter, *The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice*, UNITED STATES INSTITUTE OF PEACE, 14 (Jan. 2007).

<sup>72</sup> Judy Barsalou and Victoria Baxter, *The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice*, UNITED STATES INSTITUTE OF PEACE, 9 (Jan. 2007); see also District Six Museum, *Public Education*, available at <http://districtsix.co.za/> (last visited Nov. 15, 2011).

that allow for truth-telling and accountability, to avoid being perceived as a means to silence victims.<sup>73</sup>

### *Institutional Reform*

Institutional reform is the process of transforming institutions, such as the police, judiciary, military, and intelligence agencies, into accountable, effective, and fair public service institutions that promote peace and the rule of law.<sup>74</sup> Mechanisms of institutional reform include security sector reform (SSR), lustration, vetting, the establishment of new legal frameworks, oversight, and disarmament, demobilization, and reintegration (DDR).

### Security Sector Reform

Security sector reform seeks to transform a state's security system by building effective and accountable institutions that respect human rights and the rule of law through a process of assessment, review, implementation, monitoring, and evaluation.<sup>75</sup> The aim of a transitional justice approach to SSR is to reform abusive state security institutions by “addressing the past record of the institution, as well as by holding individual perpetrators to account.”<sup>76</sup> This approach employs building integrity, establishing accountability, strengthening legitimacy, and empowering citizens.<sup>77</sup> SSR can also contribute to preventing repetition and promoting reconciliation. In Kosovo, for instance, the training of police officers on international human rights law laid down the foundation for the development of the rule of law while the inclusion of ethnic minorities such as Kosovo Serbs in the recruitment of the new police force contributed to easing ethnic tensions.<sup>78</sup>

### Lustration

Lustration legislation excludes former high-ranking officials, secret police officials, and collaborators from participating in a new administration, and allows

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<sup>73</sup> International Center for Transitional Justice, *Reparations*, available at <http://ictj.org/our-work/transitional-justice-issues/reparations> (last visited Nov. 15, 2011).

<sup>74</sup> United Nations Disarmament, Demobilization, and Reintegration Resource Center, *Integrated Disarmament, Demobilization, and Reintegration Standards 6.20 Transitional Justice and DDR*, 3 (Dec. 2009); see also International Center for Transitional Justice, *What is Transitional Justice?*, 1 (2009).

<sup>75</sup> Secretary-General, *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform*, para 17, delivered to Security Council and General Assembly, U.N. Doc. S/2008/39 (Jan. 23, 2008); see also Melanne A. Civic and Michael Miklaucic, MONOPOLY OF FORCE THE NEXUS OF DDR AND SSR XX (2011).

<sup>76</sup> Laura Davis, *Transitional Justice and Security Sector Reform*, INITIATIVE FOR PEACEBUILDING, 12 (June 2009), available at [http://www.initiativeforpeacebuilding.eu/pdf/Transitional\\_Justice\\_and\\_Security\\_System\\_Reform.pdf](http://www.initiativeforpeacebuilding.eu/pdf/Transitional_Justice_and_Security_System_Reform.pdf).

<sup>77</sup> Laura Davis, *Transitional Justice and Security Sector Reform*, INITIATIVE FOR PEACEBUILDING, 12 (June 2009).

<sup>78</sup> Katy A. Crossly-Frolick, Oya Dursun-Ozkanca, *Transitional Justice and Security Sector Reform: The Role of the EU and Other Multilateral Institutions in Building Kosovo's Police Force*, 12 (2011), available at [http://euce.org/eusa/2011/papers/12i\\_dursun-ozkanca.pdf](http://euce.org/eusa/2011/papers/12i_dursun-ozkanca.pdf).

for criminal proceedings against them.<sup>79</sup> Lustration involves screening and terminating the employment of individuals linked to an abusive regime.<sup>80</sup> Although lustration can help restore trust of the public in state authorities,<sup>81</sup> some experts note that lustration legislation is contrary to international law because it applies punishment without due process and a fair trial.<sup>82</sup> The Czech Republic's strict lustration legislation for instance placed restrictions on people elected, appointed, or assigned to many areas including the offices of the government, the higher military ranks, the security services, and the media.<sup>83</sup> The international community was generally critical of this legislation, believing that permitting prosecutions on the sole ground of affiliation to former communist authorities violated international human rights standards.<sup>84</sup>

### Vetting

Vetting is the process of determining an individual's suitability for public service by analyzing the individual's adherence to human rights and professional standards.<sup>85</sup> Similar to lustration, vetting is a type of institutional reform that focuses on personnel rather than the institutions.<sup>86</sup> Vetting seeks to exclude individuals from public office who are responsible for human rights violations or serious infractions of professional standards to transform and legitimize public institutions, establish civic trust, and abolish structures that allowed human rights abuses to occur.<sup>87</sup> Unlike practices such as lustration that seek to purge former regime officials from occupying posts, vetting focuses on individual conduct and incorporates due process safeguards such as the right to reasonable notice of the

<sup>79</sup> Nadya Nedelsky, *Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia*, 33 THEORY AND SOCIETY 65, 65 (2004) ; Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW AND CONTEMPORARY PROBLEMS 181 (1996).

<sup>80</sup> Dana Michael Hollywood, *The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and their Applicability to Post-Saddam Iraq*, 31 BROOKLYN JOURNAL OF INTERNATIONAL LAW 59, 95 (2007).

<sup>81</sup> Monika Nalepa, *Lustration as a Trust-Building Mechanism? Transitional Justice in Poland*, 5 (Sept. 2011), available at

[http://www.nd.edu/~mnalepa/index\\_files/13%20Lustration%20as%20a%20trust%20building%20mechanism.pdf](http://www.nd.edu/~mnalepa/index_files/13%20Lustration%20as%20a%20trust%20building%20mechanism.pdf).

<sup>82</sup> Juan Mendez, TAKING A STAND: THE EVOLUTION OF HUMAN RIGHTS 151 (2011).

<sup>83</sup> *Act No. 451/1991* art. 1 (Czech Republic, 1991), available in Neil J. Kritz, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 312 (1995).

<sup>84</sup> Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW AND CONTEMPORARY PROBLEMS 181, 182 (1996).

<sup>85</sup> Bureau for Crisis Prevention and Recovery, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, UNITED NATIONS DEVELOPMENT PROGRAMME, 9 (2006), available at

[http://www.undp.org/cpr/documents/jssr/trans\\_justice/Vetting\\_Public\\_Employees\\_in\\_Post-Conflict\\_Settings.pdf](http://www.undp.org/cpr/documents/jssr/trans_justice/Vetting_Public_Employees_in_Post-Conflict_Settings.pdf).

<sup>86</sup> Office of the U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States, Vetting: An Operational Framework*, 3-4 (2006), available at

<http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>.

<sup>87</sup> Bureau for Crisis Prevention and Recovery, *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, UNITED NATIONS DEVELOPMENT PROGRAMME, 9 (2006).

case, the right to contest, and the right to appeal.<sup>88</sup> As such, vetting can be a critical element of transitional justice as it ensures accountability while promoting democratic values and building institutions able to investigate past crimes and prevent recurrence of serious human rights abuses.<sup>89</sup>

### Establishment of a Legal Framework

Establishing a new legal framework that incorporates international human rights law, protects women, children, and other vulnerable groups, and provides redress for civil claims and disputes is critical for preventing future conflict.<sup>90</sup> Kenya's adoption of a new constitution was part of creating a legal framework setting a new foundation for democracy and the rule of law.<sup>91</sup> Similarly, the ratification of international conventions, such as the Rome Statute on the ICC and the Convention on the Elimination of all forms of Discrimination Against Women, can improve the protection of human rights and signal a break from the country's past history.<sup>92</sup>

### Oversight

Establishing bodies to oversee state institutions that are accountable to civilian governance is an essential part of institutional reform.<sup>93</sup> Experts particularly emphasize the role of civilian oversight of security forces in states where the police and armed forces took part in the commission of serious crimes as a means to prevent the recurrence of such crimes.<sup>94</sup> For instance, the El Salvador peace agreements established oversight by creating legislative assembly supervision, an Armed Forces General Inspectorate, armed forces courts, and a human rights ombudsperson.<sup>95</sup> Incorporating detailed measures of oversight in the

<sup>88</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 52, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>89</sup> International Center for Transitional Justice and KontraS, *Derailed Transitional Justice in Indonesia Since the Fall of Soeharto*, 6 (Mar. 2011), available at [http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English\\_0.pdf](http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf).

<sup>90</sup> United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, paras. 35 (Aug. 2004).

<sup>91</sup> Migai Akech, *Institutional Reform in the New Constitution of Kenya*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 14-16 (Oct. 2010), available at <http://ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>.

<sup>92</sup> International Center for Transitional Justice, *Institutional Reform*, (2011), available at <http://ictj.org/our-work/transitional-justice-issues/institutional-reform>; Global Justice Center, *Global Justice Now: Investing in Women Leaders as Key Players in Transitional Democracies*, 2-3, available at <http://www.globaljusticecenter.net/publications/Global-Justice-Now.pdf> (last visited Nov. 15, 2011).

<sup>93</sup> International Center for Transitional Justice, *Institutional Reform*, (2011).

<sup>94</sup> International Center for Transitional Justice and KontraS, *Derailed Transitional Justice in Indonesia Since the Fall of Soeharto*, 6 (Mar. 2011).

<sup>95</sup> International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements*, 24 (2006), available at [http://www.ichrp.org/files/reports/22/128\\_report\\_en.pdf](http://www.ichrp.org/files/reports/22/128_report_en.pdf); Andrew J. Goldsmith, Colleen Lewis, CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY, AND HUMAN RIGHTS 238 (2000).



peace agreements furthered the overall peace process, promoted human rights and the rule of law, and improved the credibility of state authorities.<sup>96</sup>

### Disarmament, Demobilization, and Reintegration

The United Nations supports an integrated approach to DDR and transitional justice as both processes seek to build trust, prevent future violence, and achieve peace and reconciliation.<sup>97</sup> DDR programs and transitional justice mechanisms are mutually reinforcing and may allow ex-combatants to reintegrate faster through access to truth commissions and the issuance of public apologies, may diminish the anger of victims and communities by providing reparations, and may individualize responsibility so that victims and communities do not believe that all ex-combatants committed violations.<sup>98</sup>

State practice suggests that, despite an inherent link between the two mechanisms, post-conflict states tend not to incorporate DDR into their transitional justice strategy and to conduct the two processes independently of each other.<sup>99</sup> This lack of institutional coordination most often limits the reach and impact of both DDR and transitional justice mechanism by separating victims and ex-combatants, letting ex-combatants avoid DDR by fear of prosecutions, or on the contrary allowing ex-combatants responsible for serious crimes to benefit from DDR.<sup>100</sup> To overcome those difficulties, states may notably make reintegration of ex-combatants conditional on their participation in the transitional justice process, organize information-sharing between DDR and transitional justice institutions, as well as sequence DDR and criminal prosecutions of lower-level combatants.<sup>101</sup>

## **Transitional Justice Issues**

<sup>96</sup> International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements*, 24-25 (2006); Andrew J. Goldsmith, Colleen Lewis, CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE, DEMOCRACY, AND HUMAN RIGHTS 240, 242 (2000).

<sup>97</sup> Ana Cutter Patel, Pablo de Grief, and Lars Waldorf, DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS 22-24 (2009).

<sup>98</sup> Ana Cutter Patel, Pablo de Grief, and Lars Waldorf, DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS 24 (2009).

<sup>99</sup> U.N. Office of the Special Advisor on Africa, *DDR and Transitional Justice: Transitional Justice and Disarmament, Demobilization, and Reintegration in Africa*, 5 (June 2007), available at <http://www.un.org/africa/osaa/speeches/ddr%20and%20tj%20in%20africa%20-%20english.pdf>.

<sup>100</sup> U.N. Office of the Special Advisor on Africa, *DDR and Transitional Justice: Transitional Justice and Disarmament, Demobilization, and Reintegration in Africa*, 5 (June 2007).

<sup>101</sup> U.N. Office of the Special Advisor on Africa, *DDR and Transitional Justice: Transitional Justice and Disarmament, Demobilization, and Reintegration in Africa*, 16 (June 2007); Governance and Social Development Resource Center, *Helpdesk Research Report: DDR and Transitional Justice*, 9-10 (Apr. 2011), available at <http://www.gsdrc.org/docs/open/HD761.pdf>.

When devising transitional justice strategies, states may consider a variety of related issues. These cross-cutting issues include gender justice, the protection of children and other vulnerable groups, amnesty vs. accountability, and truth vs. justice.

### *Gender Justice*

The United Nations promotes addressing sexual violence in transitional justice mechanisms and calls on states to incorporate gender issues into conflict resolution and transitional justice mechanisms. This includes increasing the number of women in transitional justice mechanisms and incorporating gender-based violence considerations into judicial reforms.<sup>102</sup> War crimes tribunals are more likely to embrace a gender perspective if their composition includes women judges and personnel, as in Burundi where the participation of women judges in traditional courts encouraged women victims to testify and led to an increased number of sexual violence cases heard.<sup>103</sup> Similarly, considering gender-based crimes specifically in the status or structure of tribunals will benefit transitional justice and promote women's rights.<sup>104</sup> For instance, 20 percent of the investigators for the Special Court for Sierra Leone focused on sexual gender-based violence.<sup>105</sup>

### *Children*

Children are often targets of gross violations of human rights and international humanitarian law such as torture, disappearances, killing, and recruitment into armed forces.<sup>106</sup> Accordingly, transitional justice mechanisms need to maintain a special focus on children.<sup>107</sup> This is best implemented by the creation of specific measures, such as child-friendly testimony procedures, and

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<sup>102</sup> Security Council Resolution 1325, paras. 1, 2, 4, 8, U.N. Doc. S/RES/1325 (Oct. 31, 2000); *see also* Security Council Resolution 1820, para. 4 U.N. Doc. S/RES/1820 (Jun. 19, 2008); Security Council Resolution 1888, paras. 1, 6, 16, U.N. Doc. S/RES/1888 (Sept. 30, 2009); Security Council Resolution 1889, paras. 6, 7, U.N. Doc. S/RES/1889 (Oct. 5, 2009).

<sup>103</sup> Naha Valji, *A Window of Opportunity? Making Transitional Justice Work for Women*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, 10 (Sept. 2010), available at <http://www.humansecuritygateway.com/documents>.

<sup>104</sup> Naha Valji, *A Window of Opportunity? Making Transitional Justice Work for Women*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, 8 (Sept. 2010).

<sup>105</sup> Naha Valji, *A Window of Opportunity? Making Transitional Justice Work for Women*, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN, 8 (Sept. 2010).

<sup>106</sup> United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION XVII (2010).

<sup>107</sup> United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION 6-10 (2010).

their incorporation in the mandate of transitional justice institutions.<sup>108</sup> The mandate of Liberia's Truth and Reconciliation Commission (TRC), often cited as a model for child participation, provided for commissioners to be assigned to child-related issues.<sup>109</sup> The Liberian TRC also collaborated extensively with children's rights organizations like UNICEF.<sup>110</sup> Furthermore, children increasingly take part in violent conflicts and are thus concerned by transitional justice as perpetrators. However, child soldiers who were unlawfully recruited into armed forces are to be treated primarily as victims, not perpetrators.<sup>111</sup> The Liberian TRC, for instance, developed a set of guiding principles emphasizing the need to protect the best interests of children regardless of their roles.<sup>112</sup>

### *Other Vulnerable Groups*

In addition to ensuring vulnerable groups are included in transitional justice efforts, states need to ensure that transitional justice mechanisms do not lead to further victimization of vulnerable groups.<sup>113</sup> Minorities often require specific protection, especially in states emerging from ethnic conflicts.<sup>114</sup> Institutions participating in transitional justice are required to give particular attention to the local context to identify which groups are the most at risk. In Burundi, for instance, the United Nations identified individuals with albinism as a vulnerable group.<sup>115</sup>

### *Amnesty vs. Accountability*

Amnesty is granted in exceptional circumstances to remove the prospects or consequences of criminal prosecutions or civil actions for designated offenses

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<sup>108</sup> United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION 196 (2010); United Nations Children's Fund Innocenti Research Center, *Children and Transitional Justice* (Feb. 2010), available at <http://www.unicef-irc.org/knowledge-pages/Children-and-Transitional-Justice/>.

<sup>109</sup> United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION 197, 199 (2010).

<sup>110</sup> United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION 200 (2010).

<sup>111</sup> *Rome Statute of the International Criminal Court* art. 26 (1998). United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION 408 (2010).

<sup>112</sup> United Nations Children's Fund, CHILDREN AND TRANSITIONAL JUSTICE: TRUTHTELLING, ACCOUNTABILITY AND RECONCILIATION 202-203 (2010).

<sup>113</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, paras. 33, 36, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>114</sup> United Nations Rule of Law, *Transitional Justice*, available at [http://www.unrol.org/article.aspx?article\\_id=29](http://www.unrol.org/article.aspx?article_id=29) (last visited Nov. 16, 2011).

<sup>115</sup> Office of the High Commissioner for Human Rights, *OHCHR in Burundi (2010-2011)*, available at <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/BISummary20102011.aspx> (last visited Nov. 16, 2011).

committed during a specified period of time or event.<sup>116</sup> Amnesty laws bar prosecution for the individuals who fall within the amnesty's scope. These laws have been adopted in the past to appease tensions within the population and promote peace.<sup>117</sup> Amnesty laws are generally permissible when combined with other transitional justice mechanisms, except where international treaties or customary law mandate prosecution.<sup>118</sup> Impermissible amnesties are those that violate international law, such as those that cover genocide, crimes against humanity, war crimes, and gross violations of human rights.<sup>119</sup> Furthermore, according to international law and United Nations policy, amnesties that interfere with the right of victims to an effective remedy, or amnesties that restrict the right to know the truth regarding violations of human rights and international law, are also impermissible.<sup>120</sup>

Blanket amnesties are amnesties that “exempt broad categories of serious human rights offenders from prosecution and/or civil liability without beneficiaries’ having to satisfy preconditions” on an individual basis.<sup>121</sup> According to the United Nations Human Rights Committee’s interpretation of the International Covenant on Civil and Political Rights (ICCPR), blanket amnesty laws often violate the ICCPR because these amnesties deny the victims the right to a remedy.<sup>122</sup> The Special Representative of the U.N. Secretary-General in Sierra Leone notably objected to the amnesty provision contained in the Lomé Peace Agreement because the U.N. does not recognize amnesty for crimes that violate international law.<sup>123</sup>

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<sup>116</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 5-6 (2009), available at [http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf); see also Mark Freeman, *Amnesties and DDR Programs*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 1 (Feb. 2010), available at <http://ictj.org/sites/default/files/ICTJ-DDR-Amnesties-ResearchBrief-2010-English.pdf>.

<sup>117</sup> William Schabas, *Transitional Justice and the Norms of International Law*, 16 (Oct. 2011), available at [www.mediafire.com/?fhnu99a2eies399](http://www.mediafire.com/?fhnu99a2eies399).

<sup>118</sup> International Center for Transitional Justice, *Amnesty Must Not Equal Impunity*, 1 (2009), available at <https://ictj.org/sites/default/files/ICTJ-DRC-Amnesty-Facts-2009-English.pdf>.

<sup>119</sup> William Schabas, *Transitional Justice and the Norms of International Law*, 16 (Oct. 2011); see also Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 11-21 (2009).

<sup>120</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 11 (2009).

<sup>121</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 8 (2009).

<sup>122</sup> Juan E. Mendez, *Accountability for Past Abuses*, 19 HUMAN RIGHTS QUARTERLY 255, 259 (1997).

<sup>123</sup> U.N. High Commissioner on Human Rights, *Analytical Study on Human Rights and Transitional Justice*, para. 53, U.N. Doc.A/HRC/12/18 (Aug. 6, 2010).

Alternatively, conditional amnesties allow exemption of individuals from prosecutions if the individuals satisfy specified conditions.<sup>124</sup> Amnesties for minor violations in exchange for the turning over of weapons are generally deemed permissible.<sup>125</sup> However, conditional amnesties are impermissible when contrary to international law, such as South Africa's grant of amnesty to those who came forward and issued full and truthful statements because it included those individuals who had committed war crimes or crimes against humanity.<sup>126</sup> Even if a state chooses to provide an impermissible amnesty under international law, foreign states will still be able to prosecute individuals who committed offenses contrary to international law.<sup>127</sup>

De facto amnesty laws, or laws that effectively provide amnesty by preventing prosecutions, are also impermissible when the laws prevent prosecutions that are mandated by international law.<sup>128</sup> For instance, Afghanistan effectively created an impermissible blanket amnesty by placing the burden of proof for war crimes on the victim and by prohibiting state authorities from prosecuting war criminals.<sup>129</sup>

### *Truth vs. Justice*

Transitional justice mechanisms are generally seen as complementary rather than exclusive.<sup>130</sup> The development of truth commissions gave rise to a debate over the benefits of truth-seeking and truth-telling compared to the accountability fostered by criminal prosecutions.<sup>131</sup> However, experts assert that an effective transitional justice framework requires a multi-faceted process, rather than implementing only one transitional justice mechanism that seeks either truth or

<sup>124</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 43 (2009).

<sup>125</sup> Juan Mendez, *TAKING A STAND: THE EVOLUTION OF HUMAN RIGHTS*, 159 (2011).

<sup>126</sup> Juan Mendez, *TAKING A STAND: THE EVOLUTION OF HUMAN RIGHTS*, 153-154 (2011); *see also* Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 33 (2009).

<sup>127</sup> *Prosecutor v. Furundzija*, Case No.IT-95-17/1-T, Judgment, para. 155 (Dec. 10, 1998), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; *see also* Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 29-30 (2009).

<sup>128</sup> Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 43 (2009).

<sup>129</sup> Afghanistan Independent Human Rights Commission, *Discussion Paper on Legality of Amnesties*, 6 (Feb. 21, 2010), available at <http://www.unhcr.org/refworld/publisher/AIHRC,,4bb31a5e2,0.html>; *see also* Emily Winterbotham, *The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges*, AFGHANISTAN RESEARCH AND EVALUATION UNIT, 8 (Apr. 2010), available at <http://www.unhcr.org/refworld/pdfid/4bc6ccb42.pdf>.

<sup>130</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 26, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>131</sup> Michal Ben-Josef Hirsch, *Ideational Change and the Emergence of the International Norm of Truth and Reconciliation Commissions*, 17-18 (July 2011), available at [http://web.mit.edu/polisci/people/gradstudents/papers/Hirsch\\_Ideational\\_Change\\_July\\_2011.pdf](http://web.mit.edu/polisci/people/gradstudents/papers/Hirsch_Ideational_Change_July_2011.pdf).

justice. A holistic approach to transitional justice that incorporates both truth and justice is preferable to a single-track approach.<sup>132</sup>

Criminal tribunals tend to focus on justice, and can help create public confidence in the government's ability and desire to condemn criminal behavior.<sup>133</sup> They provide victims with a measure of justice because victims are given the opportunity to see their perpetrators held accountable for their actions.<sup>134</sup> Despite their ability to ensure victims' justice, combat impunity of perpetrators, and contribute to the jurisprudence of international criminal law, criminal tribunals have many constraints with regard to truth-telling, which affect their ability to contribute to lasting peace and democracy.<sup>135</sup> For instance, Argentina's main focus on prosecution, although successful in addressing human rights violations, is seen as a partial failure because of the lack of pride of civil society in the outcome of the trials and the dissatisfaction of victims.<sup>136</sup>

Truth commissions address past human rights abuses and facilitate the transition of post-conflict societies.<sup>137</sup> The victim-centered approach inherent in truth commissions focuses on, *inter alia*, establishing a historical record of past abuses, fostering accountability, and recommending remedial action.<sup>138</sup> However, numerous factors can limit the potential benefits of truth. These limitations include weak civil society, political instability, and a weak or corrupt justice system.<sup>139</sup> The existence of a truth commission does not necessarily indicate a commitment to improving human rights policies.<sup>140</sup> Uganda's Commission of Inquiry into Violations of Human Rights was set up after Yoweri Museveni overthrew the

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<sup>132</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 26, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004); see also Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 6 (Mar. 2010).

<sup>133</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 39, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>134</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 39, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>135</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 38-48, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>136</sup> Carlos S. Nino, *Response: The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, in TRANSITIONAL JUSTICE HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES VOL. I, 417, 435 (Neil J. Kritz, ed., 1995).

<sup>137</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 50, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>138</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 50, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>139</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 51, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>140</sup> Priscilla B. Hayner, *Fifteen Truth Commissions – 1974-1993: A Comparative Study*, in TRANSITIONAL JUSTICE HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES VOL. I, 225, 259 (Neil J. Kritz, ed., 1995).

government of Milton Obote. Although given a broad mandate, the commission experienced financial constraints, which have impeded the publication of its findings.<sup>141</sup> The lack of publication has led civil society to believe that the commission was not meant to address human rights violations but rather was to serve a political function to legitimize the new government.<sup>142</sup>

Justice or truth alone cannot provide peace in post-conflict societies. Successful strategies require holistic approaches that incorporate individual prosecutions, truth-seeking, and other forms of transitional justice mechanisms.<sup>143</sup> For instance, Rwanda recognized the need to employ integrated and complementary transitional justice mechanisms, such as *gacaca* courts, the International Criminal Court for Rwanda, truth commissions, and commissions of inquiry to ensure effective rule of law and justice strategies.<sup>144</sup>

## Conclusion

Transitional justice allows post-conflict states to employ a range of mechanisms to ensure accountability of individuals who perpetrated serious crimes, achieve reconciliation, prevent future conflict, and set foundations for a lasting democracy. Over the last three decades, state practice demonstrates the advantage of designing a complex blend of transitional justice mechanisms and adopting a holistic approach that adapts these mechanisms to local needs.

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<sup>141</sup> Priscilla B. Hayner, *Fifteen Truth Commissions – 1974-1993: A Comparative Study*, in TRANSITIONAL JUSTICE HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES VOL. I, 225, 234 (Neil J. Kritz, ed., 1995).

<sup>142</sup> Priscilla B. Hayner, *Fifteen Truth Commissions – 1974-1993: A Comparative Study*, in TRANSITIONAL JUSTICE HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES VOL. I, 225, 234-35 (Neil J. Kritz, ed., 1995).

<sup>143</sup> Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, para. 26, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>144</sup> Lyn Graybill and Kimberly Lanegran, *Truth, Justice, and Reconciliation in Africa: Issues and Cases*, 8 AFRICAN STUDIES QUARTERLY 1, 8-9 (2004); United Institute of Peace, *Commission of Inquiry: Rwanda 93* (Jan. 1993), available at <http://www.usip.org/publications/commission-inquiry-rwanda-93>; United Institute of Peace, *Truth Commission: Rwanda 99* (Mar. 1999), available at <http://www.usip.org/publications/truth-commission-rwanda-99>.

## About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization, which operates as a global *pro bono* law firm providing free legal assistance to states, governments and groups negotiating and implementing peace agreements, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's four primary practice areas are:

- **Peace Negotiations**
- **Post-Conflict Constitution Drafting**
- **War Crimes Prosecutions**
- **Policy Planning**
- **Democracy and Governance**
- **Water Diplomacy**

To provide *pro bono* legal advice and policy formulation expertise, PILPG draws on the volunteer services of over sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on *pro bono* assistance from major international law firms including Baker & McKenzie; Covington & Burling; Curtis, Mallet-Prevost, Colt and Mosle; DLA Piper; Sullivan & Cromwell; Steptoe & Johnson; Milbank, Tweed, Hadley & McCloy; WilmerHale; Vinson & Elkins; and graduate international affairs and law students at American University and Case Western Reserve Schools of Law. Annually, PILPG is able to provide over \$10 million worth of *pro bono* international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance and its members often serve on the delegations of its clients during peace negotiations. To facilitate this assistance, PILPG is based in Washington, D.C. and has points of contact in New York City, Boston, Seattle, Cleveland, London, Paris, Rome, The Hague, Stockholm, Belfast, Krakow, Budapest, Zurich, Tbilisi, Kabul, and Nairobi.

PILPG was founded in London in 1995 and moved to Washington, DC in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. PILPG currently maintains an association with American University in Washington, DC, and Case Western Reserve University in Cleveland, Ohio. In July 1999, the United Nations granted official Non-Governmental Organization status to PILPG.

In January 2005, a half-dozen of PILPG's *pro bono* clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial *pro bono* legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."