

TRANSITIONAL JUSTICE AND PEACE NEGOTIATIONS WITH A GENDER LENS



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THE PURPOSE OF THE GENDER BRIEFING SERIES

This brief is part of a Gender Briefing Series to support women's meaningful participation and the integration of gender perspectives in peace processes that aim to end violent intra-state conflict.

The key target audience is women, gender equality advocates and others engaged in peace processes, who wish to influence negotiations with a view to: (a) addressing the particular experiences of women during conflict, and (b) achieving lasting peace process outcomes that will improve women's lives and the lives of those around them.

Using a comparative approach, the briefs:

- Establish the importance of the issue from a gender equality perspective and the importance of women's meaningful engagement for effectively addressing it.
- Identify key issues with reference to the inclusion of women and their gender-related and gender-specific dimensions.
- Suggest ways of influencing change in peace processes, including identifying possible entry points and overcoming tensions with competing strategies.
- Highlight through examples how integrating gender perspectives in peace agreements not only benefits women, but also helps diversify perspectives and proposed solutions, thereby contributing more generally to progress in peace processes for all.
- Provide quantitative and qualitative data from peace agreements, using examples from across the world as evidence and inspiration for action.

- Offer analysis that provides for principled approaches to inclusion – grounded in international legal standards – with an indication of how these can be linked to pragmatic political arguments.

Too often, formal peace negotiations approach women's meaningful participation and gender equality as a secondary and apolitical concern to 'stopping the war'. Arguments are often made that the need for political pragmatism to end the conflict must singularly prevail. Yet both concerns are inextricably linked to one another for sustainable peace. The approach of these briefs supports engagement in peace processes rooted in the principle of gender equality, while recognizing that provisions designed to achieve equality in any context will be negotiated politically in practice. To influence change, women will need to influence a range of actors, including those who may not see gender equality as central. Women themselves will also have diverse political views and perspectives. The briefs therefore offer comparative analysis, examples and framing questions to support women and others to develop proposals suitable to their own context, rather than prescribing any one approach.

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PART I: WHAT IS TRANSITIONAL JUSTICE?

Introduction

The term ‘transitional justice’ is used to describe a vast array of initiatives which all attempt in some way to address atrocities of the past. Transitional justice refers to the range of mechanisms used to achieve redress for human rights violations and violence, and is often used in repressive regimes or countries recovering from conflict to address widespread abuse. Such mechanisms are important tools for securing justice for individual human rights violations and crimes, including sexual and gender-based violence. They can also address the context of inequality and injustice that gives rise to conflict, thereby transforming the very structures of inequality that underpin this violence.

Transitional justice efforts can include one or a combination of the following initiatives:

- Trials and forms of prosecution
- Truth-seeking processes
- Local community restorative justice processes
- Mechanisms providing for forgiveness and reconciliation on personal, inter-communal and national level
- Vetting of civil servants responsible for human rights abuses, and removing them from political office or armed forces
- Memorializing initiatives (building of memorials, museums, creating official mourning days, etc.)
- Reparations programmes
- Other efforts to guarantee non-recurrence, such as institutional reforms

These measures aim for a range of outcomes, such as:

- Providing for accountability for key perpetrators in the conflict;
- Improving social understanding of the conflict and the systems that sustained and embedded it, to help prevent recurrence;
- Pointing the way to, or enacting institutional reforms to avoid the repetition of crimes;
- Education for the future, including reforming school curricula;
- Providing reparation for victims and their families; and
- Providing a measure of inter-personal, inter-communal and national reconciliation.

What is the role of transitional justice in peace processes?

Peace processes seldom produce mechanisms to deal with the past as part of a coherent plan for a broad integrated vision of accountability, rule of law or reconciliation. When transitional justice mechanisms emerge from a peace process, it is usually in a piecemeal fashion, and in response to practical problems that arise during negotiations. For example, vetting may be provided as part of a restructuring of the army and an attempt to integrate non-state armed actors in state armed forces. Similarly, amnesty may be agreed to enable political actors in exile to return and participate in talks, or to encourage combatants to disarm, or because the warring parties demand it as a condition of a peace agreement.

While measures can be provided separately, they can also be provided in one ‘holistic’ mechanism, or packages of mechanisms, depending on the context. Indeed, sometimes a holistic mechanism could be provided for well after the peace negotiations have ended. It is important to note that discussions about transitional justice and efforts to deal with the past often take place over several decades. In addition, discussions initiated at peace processes typically impact on transitional justice debates and the measures produced well into the future beyond the peace negotiations.

Why might women be concerned to influence transitional justice in peace processes?

Transitional justice mechanisms provide a measure of accountability, and women who have experienced human rights violations and conflict-related atrocities may seek justice and guarantees of non-repetition. Given the wider societal aims pursued by transitional justice (such as reparation, reconstruction, accountability), women will also have reasons to engage in and influence transitional justice besides wanting to make it gender-sensitive or transformative of gender relations. **Diverse women's groups should be part of the debate, and not expected to speak as one voice with a single agenda.** Women may wish to ensure that transitional justice provisions respond to women's unique experiences of conflict and address their different needs.

Transitional justice mechanisms can present an opportunity to reflect on the gender dynamics of the conflict, its violence and its specific impact on women. Specifically, transitional justice efforts can respond to the gendered consequences of violence and seize the opportunity to improve gender dynamics on three fronts:

1. Redressing the full range of human rights violations women experienced during the conflict.

Transitional justice efforts can respond to the structural and specific consequences of women's rights violations, including conflict-related sexual and gender-based violence, and social, cultural and economic rights violations. They can also offer opportunities to understand and address other gendered experiences of conflict, including harms relating to sexual orientation and gender identity. Further, an intersectional approach – which considers how gender, age, socio-economic status and other aspects of identity impact on one's experience of harm – allows transitional justice mechanisms to respond to the unique ways in which discrimination and inequality shape an individual's experiences of conflict or harm.

2. Understanding and addressing the root causes of conflict, including gender inequality.

Transitional justice mechanisms often provide one of the few opportunities in a peace process for public deliberation over the causes and consequences of conflict, and offer a form of public accountability. Women may seek to publicly re-frame understandings of what the conflict was about and ensure

that useful recommendations and outcomes of transitional justice mechanisms are followed up. Transitional justice mechanisms may provide an entry point in peace processes to address wider gender matters that have been ignored in the rest of the transition, with a view to improving equality and the status of women in the future. For example, some feminists have advocated for using transitional justice mechanisms to address socio-economic inequality, the position of women prior to and during the conflict, and to underline the continuity of gender-based violence after the conflict.

3. Women can play an important role in peace processes by actively contributing to ensuring the gender-sensitivity of any suggested transitional justice measures.

In some cases, transitional justice measures can affect women negatively, for example by reinforcing gender stereotypes, dealing inappropriately with issues such as sexual violence, or even institutionalizing new forms of hardship or unfairness for women. Women's involvement in negotiating the establishment of transitional justice mechanisms, alongside the implementation of policies within these mechanisms to ensure their gender-sensitivity, is important to advancing, rather than limiting, women's status and equality.

How transitional justice is addressed in peace processes: An overview

Peace processes are built around compromise between the actors at the centre of the conflict, but often also attempt to address wider social needs. Decisions over what type of transitional justice should be provided, when within the process, and in what form, involve the need to balance stability, accountability, and non-repetition.

How to achieve this balance will be very different in different contexts. Any agreement on transitional justice will be shaped by: the patterns and scale of violations; the balance of power between parties to the conflict at its end; and the effectiveness and direction of domestic and international pressure for accountability in the particular conflict.

This brief addresses how aspects of the past tend to get dealt with at different stages of a peace process, and the challenges for women's engagement and gender-sensitive outcomes at each stage. **The purpose is to help identify entry points for effective engagement,**

in part by understanding the relationship between the desire for accountability, and the ups and downs of peace negotiations. While standards for accountability apply even within ongoing conflicts, this Brief focuses on the opportunities for transitional justice in situations where some sort of peace or transition process is emerging or established.

At the early stages of peace negotiations, where parties are attempting to get to the negotiating table, security issues and confidence-building measures are dealt with as a priority. Elements of the past will need to be addressed (aside from any commitment to transitional justice as such) because they are relevant to whether, and on what basis, the parties will enter a talks process aimed at ending the conflict. For example, amnesties may be used to provide an incentive for armed groups to put down their weapons and enter talks. An agenda for institutional reform may be introduced to persuade warring parties that they stand to gain from a political process more than on the battlefield. Victims will seek confidence-building measures as assurance that the process can deliver change. Importantly, although these measures are seldom part of a comprehensive

transitional justice approach, they begin to shape how the past will be dealt with at later stages of the peace process if it moves forward.

If and when the peace process progresses, there are likely to be further pressures to address issues of accountability and non-repetition as substantive issues which need to be dealt with in their own right. Addressing these will require careful thought so as not to destabilize the peace process. Although the most precise transitional justice decisions tend to come at the later stages of a peace process, throughout the process, transitional justice measures will be agreed both within the peace talks and peace agreements, and often also outside of peace agreements implemented through executive orders, or as a matter of policy decision.

Interestingly, a review of peace agreements from 1990 to 2016, revealed very few examples of any sort of gender approach in dealing with the past at this stage of a peace process (see box below). The gender-sensitivity of transitional justice provisions is weak in comparison with existing debates and policy awareness on this matter.

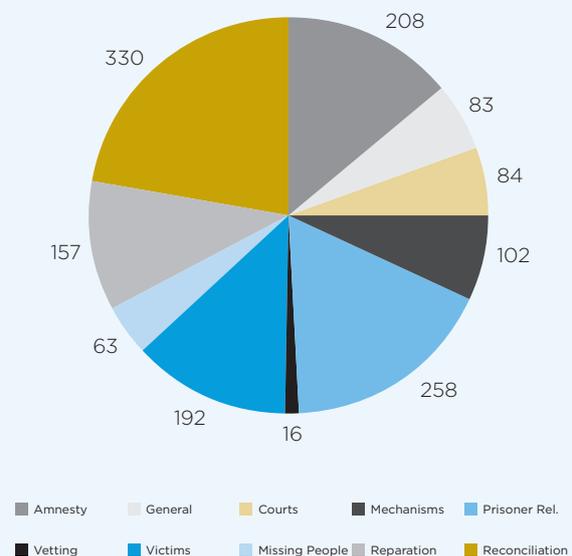
FIGURE 1
Number of Provisions by Category

Out of 1520 peace agreements, 757 agreements (50%) address transitional justice matters.

This includes a total of 1493 provisions that deal with transitional justice across various categories: reconciliation (22%), prisoners' release (17%), amnesty and sanctions relief (14%), victims (13%), reparations (11%), establishment of mechanisms (7%), courts and judicial accountability (6%), general commitments or call to deal with the past (6%), missing people (4%), and vetting (1%).

Out of these 1493 provisions, only 46 agreements include gender-specific transitional justice provisions (3%).

(Source: PA-X Peace Agreements Database. www.peaceagreements.org)



PART II: A GENDER AND WOMEN'S RIGHTS ANALYSIS OF TRANSITIONAL JUSTICE IN PEACE AGREEMENTS

Transitional justice matters are addressed at all stages of peace negotiations. It can be useful to understand when and how elements of the past tend to get addressed at different stages of a process. In particular, understanding how transitional justice is sequenced within a peace process can be useful to identify entry points for women, and help generate ideas as to how to use these to advance gender equality.

This section discusses transitional justice measures at different stages of a peace process, illustrating the main trends in topics under discussion, based on a review of peace processes and agreements. It also offers framing questions for consideration by women and gender advocates seeking to engage with peace processes, to assist in developing strategies for their own needs and context.

Earlier stages: Pre-negotiation and ceasefire agreements

The earlier stages of peace processes include pre-negotiation and ceasefire agreements. This phase aims to:

- agree on the principles and/or agenda of the overall process;
- put in place conditions for putting down weapons, with the aim of being able to move to negotiate core issues of the peace process; and
- get parties to decide on confidence-building measures that might help build trust for the process to move forward.

While past crimes and human rights violations are seldom comprehensively dealt with, the most

critical issues relating to the past often do arise in peace processes, in ways that shape whether and how transitional justice debates take hold. **It can be important to try to secure some early commitments, at least in principle, to accountability.** Here, recourse to legal standards (see further, Appendix B) can be useful. Under international law, amnesty cannot be granted for genocide, crimes against humanity, torture and other gross violations of international human rights law (see further, [ICRC Amnesty factsheet](#)). More recent legal standards, for example in international criminal law, have been shaped by feminist activism, so that they are now more capable of addressing gender-specific crimes. For instance, the Rome Statute of the International Criminal Court 1998 recognized “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity (Article 7, 1.g.). The inclusion of such gender-specific crimes – and, as a result, the exclusion of these crimes from eligibility for amnesty – is a historic success in international criminal law.

Below are some examples of broader language used to convey the importance of gender-sensitive provisions adopted at the earlier stages of a peace process.

Colombia, Agreement on security guarantees and the fight against criminal organisations, 23 June 2016.

The State will take measures to ensure clarification of the paramilitary phenomenon, to prevent its repetition and ensure the dismantling of criminal organisations responsible for killings, massacres, and systematic gender-based violence.

Colombia, Joint Report of the Dialogue Table between the Government and the Revolutionary Armed Forces of Colombia - People's Army, 04 June 2015.

Differential impacts and particular individual conditions on the basis of sex, gender, age, ethnicity or disability, and those of the populations or sectors in vulnerable conditions or particularly affected by the conflict, among others. Special attention will be afforded to victimization suffered by women.... The human and social impact of the conflict on society, including its impact on economic, social, cultural and environmental rights, and the differentiated forms in which the conflict affected women, children, adolescents, youth and senior citizens, people with disabilities, indigenous people, peasant communities, Afro-Colombian, black, "palenquera" and "raizal" populations, LGBTI population, displaced and exiled people, human rights advocates, union members, journalists, farmers, merchants and businesspeople, among others.

Democratic Republic of Congo, Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23, 12 December 2013.

The Government shall ensure that prosecutions for war crimes, genocide, crimes against humanity, sexual violence and recruitment of child soldiers are initiated against any presumed author thereof.

Sudan/Darfur, Doha Document for Peace in Darfur (DDPD), 31 May 2011.

That all children, boys and girls, who are accused of crimes against international law after being unlawfully recruited by armed forces or armed groups are considered primarily as victims of violations against international law and not as alleged perpetrators.

Across all stages, provisions calling for 'reconciliation' are the most recurrent past-focused references. These provisions call for: tackling societal legacies of violence at different levels; enhancing understanding across divided communities; reducing resentment among belligerents and people supporting them; and improving sentiment of 'unity' and inclusion at a national level. Even after excluding cases when the term 'reconciliation' is used as a synonym for peace, 330 provisions remain. However, most of these contain weak and rhetorical commitments for reconciliation, rather than substantive measures providing for action of some sort. (For further interest, all these provisions are available on PA-X Peace Agreements Database, <https://www.peaceagreements.org/>).

The most substantive commitments at earlier stages are related to prisoners' release, followed by issues related to support for victims and amnesty. Often, pre-negotiation 'talks about talks' are highly secret and inaccessible to all but the main political-military leaders. These are frequently men, and indeed there has been little focus on how women can influence these early stage negotiations.

The 'past-focused' provisions of pre-negotiation peace agreements bear out the lack of gender perspective: between 1990 and 2016, out of 429 provisions dealing with the past at the earlier stages of a peace process, only nine have any reference to gender. These nine provisions address the priority release of women detainees, referring to women as victims of violence, as mothers of missing people; and they call for specific attention, support, or reparation for widows and single mothers. In sum, they tend to address women as victims.

FIGURE 2

Peace agreement provision on 'the past' at the early pre-negotiation stages of peace processes



To explore how particular issues are dealt with, and what their gender implications are, the following address provision for 1) the release of prisoners, 2) return of missing persons, and 3) amnesty and accountability.

Release of prisoners as an important confidence-building measure

The release of prisoners, often a key pre-negotiation stage confidence-building measure, takes different forms depending on the nature of the conflict, and the context in which detention happened, including its legal and political basis. Prisoner release provisions are often wrapped up with amnesty processes and attempt to build confidence between parties. They may be understood by one side in the conflict to be centrally concerned with justice issues. They are especially closely bound to the question of amnesty when criminal charges are involved. Prisoner release can be important to enabling talks – for example, in South Africa at the start of the peace process, key leaders in the ANC, including Nelson Mandela, were in prison. Wider prisoner release can also build confidence between fighting parties. It can demonstrate the good will of authorities to deal with consequences of the past and provide an incentive for armed groups to join the peace negotiations.

To achieve prisoner release, peace agreements often identify homogeneous groups or sub-groups of prisoners to be released, such as members of armed groups,

members of the military of the other party (particularly in the case of interstate conflicts), or civilians. Examples in the boxes below illustrate with reference to agreements from Afghanistan and Bosnia Herzegovina. Another important distinction is whether people have been detained after being condemned following a proper judicial procedure, detained illegally, or without any charge or case against them, or as 'prisoners of war'. In many conflict environments, there will not always be a clear divide between these categories. The impartiality of criminal law, the role of the police, and the prosecution and judicial system, are likely to be contentious issues between the parties to the conflict.

Early stage agreements often provide for the immediate release of political prisoners, although with different levels of detail. Many agreements provide that prisoner release will be undertaken by or in collaboration with the International Committee of the Red Cross, and regularly include a timeline for the release process. Agreements also often call for the creation of lists of detained prisoners or contain an actual listing of groups of people or even the names of individuals that should be released. In some instances, special institutions or mechanisms are established to organize the release of prisoners. The definition and differentiation of categories of prisoners can also impact the actual process of release – some agreements clearly state that only prisoners who have not been accused or convicted of serious crimes can be released.

[Afghanistan, Agreement between the Islamic Republic of Afghanistan and Hizb-e-Islami, 29 September 2016.](#)

Specifies that: “a list of individuals to be released shall be established; such list shall not include individuals who committed criminal crimes, and those who have claims filed against them.”

The agreement also requires commitments that release prisoners would not join an armed group, and guarantees for the security of the released prisoners.

[Bosnia and Herzegovina/Yugoslavia \(former\), Agreement on the release and transfer of prisoners, 1 October 1992.](#)

All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law [...] will be unilaterally and unconditionally released.

This provision implies that the individuals who have been imprisoned, who have not been charged with serious war crimes, will de facto be amnestied. The agreement also stipulates that even prisoners who will not be released under this provision will be entitled to “benefit from the [relevant] judicial guarantees...”.

A small number of peace agreements have made reference to women or gender in prisoner release provisions. The majority ask for the release of women to be prioritized. A smaller number of agreements call for specific attention and further prioritization of pregnant and lactating women or nursing mothers, as illustrated by the examples below from Israel/Palestine, Sudan and Uganda.

[Israel/Palestine, Annex VII, Release of Palestinian Prisoners and Detainees, Israeli-Palestinian Interim Agreement on The West Bank and the Gaza Strip \(Oslo II\), 28 September 1995.](#)

Defines several categories of prisoner, and three different stages to implement the release:

1. The first stage involves the release of all female detainees and prisoners, persons who have served more than two thirds of their sentence; detainees imprisoned (or charged) for security offenses not involving fatality or serious injury or convicted (or charged) of non-security criminal offenses; and citizens of Arab countries being held in Israel pending implementation of orders for their deportation.
2. The second stage involves consideration of the following categories for the release of prisoners: aged 50 years and above; under 18 years of age; who have been imprisoned for 10 years or more; who are sick and unhealthy.
3. The third stage consists of the actual release of people identified in the second stage.

[Sudan, Darfur Peace Agreement, 05 May 2006.](#)

Provides for the release of “all boys and girls associated with armed forces and groups”.

[Uganda, Agreement on Disarmament, Demobilization and Reintegration, 29 February 2008.](#)

Seeks to “ensure the earliest release and repatriation to Uganda of pregnant and lactating women along with all children under 18 years of age”.

Questions for women

- Are women imprisoned in relation to the conflict? Are these women prisoners being considered for release? Are their specific needs being considered in the terms of the release?
- How do any proposals to release prisoners impact on the question of redress of past injustices, including violations of women's rights?
- Which proposals may lead to a pattern of impunity for conflict-related offences, including sexual and gender-based violence? Could these provisions be curtailed in any way?
- Do the conflict time frames and political prisoner definition address all sides to the conflict equally? If not, what are the implications for different groups of women prisoners?
- What provisions of support are in place for released prisoners, and for their families? What forms of protection from domestic violence are in place?

Granting amnesty, reconciling accountability

The granting of amnesty (exemption from prosecution or punishment) for serious crimes has long been understood to be in opposition to international law and human rights principles. In fact, contemporary international law and international policy calls for the prohibition of amnesty laws for the most serious crimes. For example, the United Nations' position: "Amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violation" (Office of the United Nations High Commissioner for Human Rights, 2009, page 11).¹

In practice, amnesties have been extensively used as an incentive to put down weapons, to integrate armed actors into negotiations, and/or for initiating institutional reforms of security services. This section summarizes how the granting of amnesty is addressed in peace agreements and then expands on how these provisions are related to accountability measures. **The practice demonstrates that the two dimensions of transitional justice – amnesty and accountability - are not necessarily as antagonistic as they might appear.**

Various forms of amnesty are negotiated in peace processes. Amnesty provisions establish the modalities related to the actual granting of amnesty and pardon, or the staying or stopping of prosecution. Peace agreements often also provide for relief of other sanctions that are not strictly criminal law sanctions, such as the removal of political opponents from blacklist (see below Myanmar, 2013); writing off exorbitant loans (see below Nepal, 2008); taking back into their respective services, civil servants and agents of the State who left these services for political reasons (Niger/Azawad, [Accord de N'Djaména entre le Gouvernement de la République du Niger et le Front Démocratique pour le Renouveau \(FDR\)](#), 21 August 1998.)

[Myanmar, 12-Point Agreement of Union Peace-making work committee and the All Burma Students' Democratic Front \(ABSDF\) Union-level Peace Talks, 10 August 2013.](#)

To hold continued discussions on the removal of ABSDF members from the blacklist and the cancelation of the charged members in accord with the law.

[Nepal, Agreement between the GoN and Rastriya Haliya Mukti Samaj Mahasangha, 5 September 2008.](#)

The GoN shall formally declare liberation of Haliya [peasants], along with the writing off of loans of families of Haliya, transferred from generation to generation.

Peace agreement amnesties mostly address two questions: who should be amnestied; and what types of crimes can be amnestied? Many agreements grant amnesty using very broad statements (see Chad below), leaving most of the technical and political decisions for later stages of the process.

[Chad, Accord de paix entre le gouvernement de la République de Tchad et le Mouvement National \(MN\), 25 July 2009.](#)

Delivers “a general amnesty for all civilian and military members of the National Movement”.

This amnesty provision forbids the application of the amnesty for “persons who have committed offences under common law”.

Other agreements include more specific definitions of the group that should be amnestied - as the following examples from Algeria and Colombia illustrate.

[Algeria, Project de charte pour la paix et la réconciliation nationale, 14 August 2005.](#)

- “... all individuals who cease fighting and turn in their weapons”.
- “...any wanted individuals, in the country or abroad, who give themselves up voluntarily to the competent Algerian authorities”.
- “...all individuals involved in terrorism support networks who decide to declare their activities to the competent Algerian authorities”.
- “...all individuals charged with contempt of court, other than those involved in group killings, rape or attacks using explosives in public places”.

[Colombia, Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 24 November 2016.](#)

The long Final Agreement in Colombia, 2016, includes a 22-page section on ‘Amnesty’ in its appendix. This text defines what types of crime are understood as political crimes, hence defining who can be granted amnesty. The list involves politically-motivated crimes, including for example:

- the seizure of aircraft, where it is not associated with hijacking/kidnapping
- breaking and entering of other people’s homes
- unlawful violation of communications
- unlawful violation of communications or correspondence of an official nature
- unlawful use of communications networks
- damage to third party property
- personal falsehood
- material falsehood in a public document
- unlawful use of uniforms and badges
- possession and manufacture of hazardous substances or objects
- disturbance of democratic contests
- constraining voters
- violence against a public official
- escape and espionage

Other agreements provide details relating to pragmatic steps to implement an amnesty, for example, provision for the legislative adoption of an amnesty law; or the delimitation of dates covered by amnesty provisions (e.g. Democratic Republic of Congo, [Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23](#), 12 December 2013); and what happens if guarantees are not respected (e.g. Indonesia/Aceh, [Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement \(Helsinki MOU\)](#), 15 August 2005).

When defining who can benefit from the granting of amnesty, and for what crimes, peace agreements also state or indicate what type of crimes cannot be amnestied. For example, 31 agreements provide simultaneously for amnesty and judicial accountability measures. While these types of measures provide for

a balancing of amnesty and accountability, sometimes amnesties also reflect the unfairness of past judicial processes and aim to undo the negative consequences of legal forms of past oppression.

Depending on the political context, punishment and sanctions may be understood to be unfair, and there will not necessarily be a clear-cut line between ‘the unjustly detained’ and the ‘justly detained’. In many cases, however, negotiating both accountability and impunity ultimately requires some trade-offs if the society is to move forward in the pursuit of peace. **The pro and cons of such provisions must be addressed and discussed through the different stages of the peace processes, with close attention to the ways in which any trade-off may lead to broad impunity for those who have committed serious international crimes.**

How exactly to balance different elements of transitional justice is beyond the scope of this report, although some framing questions are offered below for women to consider. The [Belfast Guidelines on Amnesty and Accountability](#) provide more comprehensive and useful guidance for how to ensure that amnesty remains linked to accountability.

Questions for women

- Does the amnesty provision run counter to the key accountability demands for violations against women?
- Keeping in mind the demands of women for justice, and the constraints of international law around amnesties, how can requirements of accountability and stability best be balanced? Which offenses or categories of suspected perpetrators are eligible for amnesty? Are sexual and gender-based crimes included under the amnesty provision?
- Which non-judicial transitional justice mechanisms might be included in the peace agreement alongside the amnesty?
- What will the timeline and process be for specifying the amnesty? Will women participate in public consultations around these questions? Will the amnesty be transparently provided in law, and in ways that women can engage with? Who will administer the amnesty, and with what gender implications?

Responding to specific needs: Provisions related to missing persons

Peace agreement provisions frequently address missing persons. These provisions have the potential to contribute towards confidence-building between the parties to the conflict, and may be critical to women who are often unable to move on emotionally, financially and legally without some sort of confirmation that a missing person is dead, and/or the return of a body (see further, Dewhurst and Kapur, 2015).

Missing persons’ provisions tend to call for listing and finding people who disappeared during the conflict, although all vary in the degree of detail. Specific provisions include: to give access to mass graves to the other party; to return dead bodies; to organize the reburial of dead bodies; and/or to grant compensation to the successors of disappeared. Some agreements directly refer to mass graves and dead bodies. In other cases, the fate of persons disappeared is unknown and hence needs to be clarified. Examples from Algeria, Bosnia and Herzegovina, and Solomon Islands illustrate.

Algeria, [Project de charte pour la paix et la réconciliation nationale, 14 August 2005](#).

The agreement affirms: “The Algerian people are reminded that the missing persons dossier has been under consideration by the State for at least a decade and is being closely examined in order to deal with it appropriately. They are also aware that the drama of these missing persons is a consequence of the scourge of terrorism which has afflicted Algeria. And they confirm that in many cases these disappearances are the result of the criminal activity of bloodthirsty terrorists who take the lives of everyone into their own hands, whether Algerian or foreign. The sovereign Algerian people firmly reject all claims that the State is directly responsible for these disappearances. They consider that the reprehensible acts of certain state agents, which have been sanctioned by the judicial authorities each time they have occurred, cannot be used as a pretext for

discrediting the law enforcement authorities, most of whom discharge their national duties with the help of the people. It is in this spirit that the Algerian people support the following measures to bring the missing persons' dossier to a definitive conclusion.

- Firstly: The State is responsible for all persons missing in the context of the national tragedy and will take all necessary measures to solve these cases.
- Secondly: The State will take all necessary measures to enable the missing persons' successors to overcome this terrible ordeal.
- Thirdly: Missing persons are considered to be victims of the national tragedy, and their successors are entitled to compensation."

[Bosnia and Herzegovina/Yugoslavia, General Framework Agreement for Peace in Bosnia and Herzegovina \(Dayton Peace Agreement\), 21 November 1995.](#)

Stipulates "in those cases where places of burial, whether individual or mass, are known as a matter of record, and graves are actually found to exist, each Party shall permit graves registration personnel of the other Parties to enter, within a mutually agreed period of time, for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased, prisoners".

[Bosnia and Herzegovina/Yugoslavia \(former\), Conclusions of the Peace Implementation Conference held at Lancaster House \(London Conference\), 09 December 1995.](#)

The former Yugoslavian states commit to the "full cooperation [...] over [...] the provision of information about the fate of persons unaccounted for".

[Solomon Islands, Townsville Peace Agreement, 15 October 2000.](#)

Sets a timeframe of 90 days for when "the IFM and MEF shall locate, identify and allow remains of any persons known to be killed during the course of the crisis to be retrieved by their relatives".

It further indicates: "Custom means of reconciliation and compensation may be agreed to between concerned persons and communities in connection with killing of persons during the course of the crisis."

Some local agreements in the South Sudanese conflict provide an example of provisions related to missing persons with stronger gender dimensions. The agreements list the name of people based on their gender, and refer to girls who have been married in captivity. The last provision (6) indicates strong consideration for the vulnerability of women and girls held captive during the conflict, and attempts to grant some autonomy to women by giving them some options over major life decisions. However, the agreement also illustrates the ways in which discriminatory laws and customs can limit women's agency – for e.g. the provision where the natural father gets to choose whether he would redeem his children or not (and hence let them go with their mother or not).

[Sudan, Dinka Nuer West Bank Peace Council Communication, 30 September 1999.](#)

Specifically identifies these different steps to respond to situations in which young women and girls have been married in captivity:

1. As soon as they are identified they shall be asked by their parents/relatives if they want to remain with their husbands.
2. If a woman declares that she wants to remain with her husband, than the bride wealth must be collected and presented to her parents/relatives.
3. If she desires to return to her parents/relatives she is to be repatriated.

4. If there are children of the marriage, the natural father may choose to redeem the children according to Dinka/Nuer traditions.
5. If the father refuses to redeem the children, the mother is free to leave with them.
6. If a woman is married to or held by a soldier on the SPLA side, a letter should be sent to Commander Salva Kiir Mayardit, Chief of General Staff of SPLA, so that the girl is able to state before her parents/relatives whether she wants to remain with her soldier-husband or return to her family. If a woman is married to or held by a soldier on the UDSF side, a letter should be sent to Commander Elijah Hon Tap, Chief of Staff of SSDF, so that the girl is able to state before her parents/relatives whether she wants to remain with her soldier-husband or return to her family.
 - If she wants to return to her parents, then she must go.
 - Whether she has a single child or several, the natural father may choose to redeem the children, according to the custom of the Dinka/Nuer.
 - If the father refuses to redeem the children, the mother is free to leave with them.

Questions for women

- What provisions, including socio-economic provisions, would be important for women family members of the missing? For female heads of households?
- Is there a provision for family members to be consulted about processes for return or burial of bodies and reporting?
- What types of legal certainty do women family members of the missing need, for example capacity to use bank accounts, have death certificates, or clarify pension and inheritance issues?

Later stages: Framework and implementation agreements

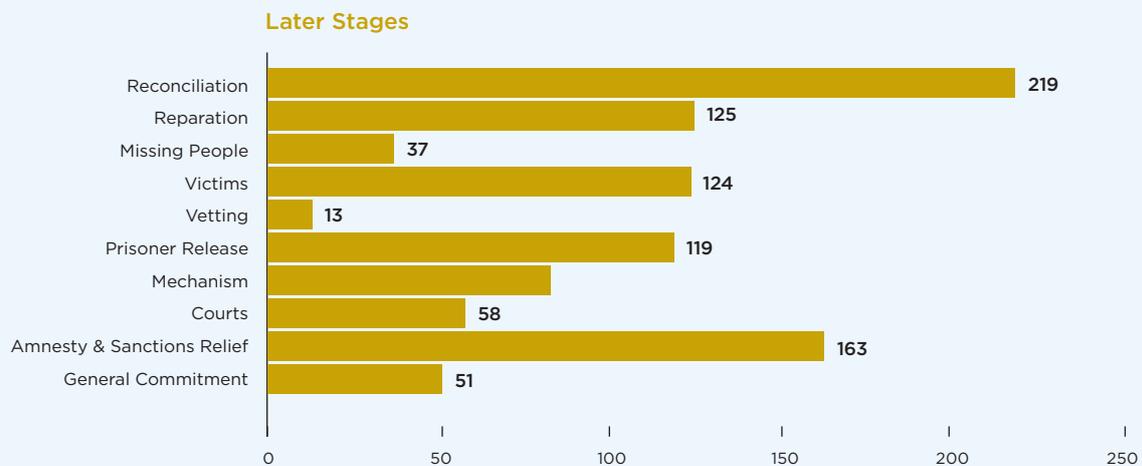
Once the parties agree to negotiate, and the key direction of the peace processes has been committed to, the process enters a phase in which parties address the substantive issues to resolve the conflict. As regards transitional justice, the modalities of amnesty and the release of prisoners continue to be addressed. However, these issues often become linked to more substantive demands as to how the past should be dealt with, and the search for more comprehensive ways to deal with the dilemmas it raises. A range of mechanisms are often under discussion, as set out in the introduction of this Brief.

This section addresses in greater detail the two most frequent categories provided at these later stages of peace processes, namely transitional justice ‘past-focused’ mechanisms (such as truth commissions or similar) and reparations programmes. Once these major commitments are agreed upon, the final stage of peace processes – the implementation phase – may further address how transitional justice efforts should be implemented. Implementation agreements often supplement the earlier agreement or revise it to address log-jams in the process. These agreements may repeat commitments, define more detailed timelines or implementing modalities, and/or renegotiate previously agreed elements – sometimes providing for more accountability, and other times allowing further impunity.

Out of the 992 peace agreement provisions addressing transitional justice matters at the framework/implementation stages of negotiations, only 37 provisions address gender in some form (4 per cent). Here again, many of these provisions refer to women as victims of conflict and widows, or provide for special protection for women within the mandate of established mechanisms. Several peace agreements move beyond treatment of women as victims and call for women’s participation in the policy design or in the implementation of core transitional justice mechanisms. While the full mandates of the measures which emerge may remedy any lack of attention to gender, making a link between gender and transitional justice in the peace agreement can be an important first step.

FIGURE 3

Number of agreements dealing with different aspects of transitional justice



Note that 'mechanism' refers to a body to deal with the past, such as a truth commission or similar, other than courts. For a full explanation of how these aspects of transitional justice were coded see www.peaceagreements.org.

Non-judicial mechanisms for transitional justice

Most of the transitional justice mechanisms established in peace agreements are meant to operate as non-judicial or quasi-judicial investigative and truth-telling bodies. Out of the 102 peace agreements providing for a transitional justice mechanism (combining all the peace process stages), 44 provide for a truth-seeking institution and 26 for an inquiry commission (Jamar, forthcoming). These include special inquiry commissions, and truth and reconciliation commissions, to account for specific sets of crimes committed during a defined period or political events – this category does not include courts and prosecutions.² These peace agreements define their mandate, the period, the events, and the type of crimes to be investigated, as well as the duration of their mandate (or permanent establishment – e.g. ombudsperson offices that are also mandated to deal with crimes of the past). Some agreements also define the composition of the transitional justice bodies with different levels of detail – from a list of criteria to be followed through the appointment of commissioners to the naming of already appointed commissioners (see example from Cote D'Ivoire). Several mechanisms can be put in place through one peace process, each of which can emphasize a set of issues – in the case of Burundi for example, the [Arusha Peace Agreement](#) provided for vetting provisions, a Truth

and Reconciliation Commission, a Judicial Commission of Inquiry, forms of partial amnesty, and national and regional Observatories on genocide and related crimes in the Great Lakes region. The Commission established in Bahrain provides another example (see box below on page 15).

Cote d'Ivoire, [Linah-Marcoussis Agreement](#), 23 January 2003.

The Government of National Reconciliation will call for the establishment **of an international board of enquiry** to investigate and establish the facts throughout the national territory in order to identify cases of serious violations of human rights and international humanitarian law since 19 September 2002. [...] Based on the report by the international board of enquiry, the Government of National Reconciliation will determine which cases should be brought to justice in order to put an end to impunity. The Round Table particularly condemns the actions of the 'death squads' and those giving them orders as well as those carrying out summary executions throughout the country, and considers that those guilty of and those aiding and abetting these acts must be brought to justice before an international criminal jurisdiction.

Colombia, Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 24 November 2016.

The Commission's mandate will be to elucidate and promote the recognition of:

- Practices and deeds constituting serious human rights violations and serious infringements of international humanitarian law (IHL), in particular those reflecting patterns or on a mass scale, which took place in the course of the conflict, as well as the complexity of the territorial contexts and dynamics where these happened.
- The collective responsibilities – of the state, including those of the Government and the other public authorities, of the FARC-EP, of the paramilitaries, as well as those of any other group, organisation or institution, domestic or international, that took part in the conflict in any way – for the practices and deeds referred to in the preceding paragraph. The human and social impact of the conflict on society, including its impact on economic, social, cultural and environmental rights, and the different ways in which the conflict affected women, children, adolescents, youths and the elderly, persons on the basis of their religion, opinions or beliefs, persons with disabilities, indigenous peoples, rural communities, the Afro-Colombian, black, palenquero and raizal communities, the Roma community, the LGBTI community, displaced and exiled persons, human rights advocates, trade unionists, journalists, farmers, ranchers, traders and businessmen and -women, inter alia.
- The impact of the conflict on the exercise of politics and the operation of democracy as a whole, including the impact on political and social parties and movements, particularly those in opposition.
- The impact of the conflict on those who directly took part in it as combatants, and on their families and surroundings.
- The historical context, the origins and multiple causes of the conflict, taking into account as input, inter alia, the reports of the Historical Commission of the Conflict and its Victims.
- The factors and conditions that facilitated or contributed to the longevity of the conflict, taking into account as input, inter alia, the reports of the Historical Commission of the Conflict and its Victims.
- The development of the conflict, particularly the acts of the state, guerrillas, paramilitary groups, and the involvement of different sectors of society.
- The phenomenon of paramilitarism, including its causes, origins and forms of expression; the organisation thereof and the various forms of cooperation with paramilitaries, including funding; and the impact of paramilitary acts on the conflict.
- Displacement and dispossession of land during the conflict and the consequences thereof.
- The relationship between conflict and crops used for illicit purposes, the production and selling of illicit drugs and money laundering associated with drug trafficking.
- Processes for strengthening the social fabric in communities and individual or collective experiences of resilience.
- Positive changes in organisations and institutions over the course of the conflict.

Women and men who testify in front of transitional justice bodies will require special protections in terms of the procedures and processes of participation when addressing stigmatizing experiences in a trial or truth commission. **It is important to take security risks seriously and continually reassess security guarantees for women and other victims who will take part in the processes and provide potentially dangerous information.** Measures can include:

- separate waiting rooms so victims do not have to be confronted by perpetrators;
- keeping venues and times of hearings confidential;
- defining procedures that protect witnesses and victims (e.g. camera hearings, no direct confrontation with perpetrators during the actual hearing, protection of victims in judicial rules related to defence strategies); and
- long-term support (guarantees of anonymity in outreach activities, reporting, and providing psychosocial support).³

[Bahrain, Royal Order No.28 of 2011, Establishing an Independent Commission to Investigate and Report on the Events Which Occurred in Bahrain in February/March 2011, 29 June 2011.](#)

Example of output of independent inquiry mechanism:

The Commission's final report, to be submitted to His Majesty no later than 30 October 2011, shall be made public in its entirety. The Commission's report shall contain, inter alia, the following:

1. A complete narrative of the events that occurred during February and March, 2011.
2. The context for these events.
3. Whether during these events there have been violations of international human rights norms by any participants during the events or in the interaction between the public and the government.
4. A description of any acts of violence that have occurred including the nature of the acts, how they occurred, who the actors were and what consequences derived therefrom, in particular at the Salmaniya Hospital and the GCC Roundabout.
5. Instances of alleged police brutality and alleged violence by protestors and/or demonstrators against police and others, including foreigners.
6. The circumstances and appropriateness of arrests and detentions.
7. Examination of allegations of disappearances or torture.
8. Ascertain whether there was any media harassment, whether audiovisual or written, against participants in demonstrations and public protests.
9. Examination of alleged unlawful demolition of religious structures.
10. Ascertain any involvement of foreign forces and foreign actors in the events.

In order to be as transformative as possible, transitional mechanisms should also promote the active participation of women. These few examples below illustrate how a gender approach and participation of women groups have been integrated into the implementation of transitional justice mechanisms.

[Colombia, Joint Report of the Dialogue Table between the Government and the Revolutionary Armed Forces of Colombia - People's Army, 04 June 2015.](#)

Ensure the cross-cutting nature of the gender approach throughout the entire scope of the work of the Commission, by creating a gender task force in charge of contributing with the tasks for preparing specific technical, research, and gender audiences, among others. This task force will not be the only one addressing the topic, but it should bear the responsibility for reviewing the methodologies in order to ensure that all the Commission's instruments include a gender approach, and for coordination purposes with women's and LGBTI organizations. The foregoing, without prejudice to the necessary autonomy of the Commission in determining its structure and working methodology.

[Yemen, National Dialogue Conference Outcomes Document, 25 January 2014.](#)

The National Reconciliation and Transitional Justice Working Group [shall develop] special measures to ensure equity for women during conflict and disputes and violation and consultations with women to identify their priorities in transitional justice mechanisms. [...] ... 81. The Commission shall consist of at least 11 members and no more than 15 members. It shall reflect at least 30% representation of women, 50% for the South and 50% for the North.

Courts and judicial prosecutions

Despite important calls for judicial accountability in peace and transitional justice processes, provision for courts are not as frequent as provision for non-judicial mechanisms, and frequently made in rhetorical rather than substantive terms. Out of the 84 peace agreements providing for forms of judicial accountability, 52 include weak commitments, and 27 entail substantive commitments to deal with judicial accountability in national and international courts. There are only 5 peace agreements with strong commitments to deal

with judicial accountability in national court that include detailed modalities.

Questions around courts have been at the centre of transitional justice debates for decades. What is the ideal trade-off between stability and accountability? What are the actual benefits for victims, wider society, and democratic process? Defenders of the judicial approach praise the capacity of such mechanisms to establish individual responsibilities, provide for justice and deter future violence. However, judicial initiatives are faced by important challenges, particularly during peace processes, but also in the longer term. Trials are usually restricted to the most serious crimes, since it is not always possible to prosecute all suspected individuals because of the high numbers of cases. Furthermore, the criminal responsibility of incumbent political and judicial actors, and the lack of independence of judicial institutions, have been listed as potential obstacles to impartial justice.

While these debates continue to be navigated within and after peace processes, peace agreements do include the following type of provisions:

- 20 agreements comment on the possibility to take public actions in existing judicial structures;
- four commit to bring perpetrators to justice within existing national courts;
- two agreements establish special national jurisdictions; and
- four agreements provide for hybrid (national and international) Courts.

Except the International Criminal Tribunal for Burundi — which was never implemented — no international judicial system has been established within peace agreements. The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Criminal Court in Sierra Leone were founded **through UN resolutions** rather than in the text of peace agreements. That being said, 14 peace agreements commit the signing parties to collaborate, refer cases to, and extradite perpetrators to international Courts.

Very few examples have included reference to gender in provisions related to Courts and judicial accountability. These are included below:

Colombia, Agreement on the Victims of Conflict, 15 December 2015.

The Special Jurisdiction for Peace (SJP) is designed to be the justice component of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (CSTJRN). The CSTJRN in its functioning should focus on making an end to impunity. Its primary aim is to satisfy the right of the victims to justice and offer truth to the Colombian society and thereby contribute to a sustainable peace. The SJP is a special jurisdiction to carry out judicial functions autonomously, primarily regarding serious breaches of International Human Rights Law or International Humanitarian Law. Among the basic principles guiding **the SJP holds a strong focus on women and child victims**, as well as other vulnerable groups (poor, disabled, indigenous or elderly people). The SJP is a special jurisdiction to carry out judicial functions autonomously, primarily regarding serious breaches of International Human Rights Law or International Humanitarian Law. Therefore, its legal reference frameworks mainly include International Human Rights Law (IHRL) and International Humanitarian Law (IHL).

The Peace Tribunal will be divided in different sections and consist of experienced Colombian judges (in addition to four foreign judges who will act in the sections in the event that they are requested). **The Court must be formed with criteria of gender equity and respect for ethnic and cultural diversity.** A first section will be designed to issue sentences in cases where there has been acknowledgment of truth and responsibility. For the other cases, there will be a second section, while a third will deal with the review of sentences. It will also have a section for appeal. After the Peace Tribunal has finished its tasks, a mechanism will be established for the creation of a section whose main task will be to ensure stability and effectiveness in the resolutions and sentences. The final sentences issued by the Peace Tribunal will be sent immediately to the Commission for the Clarification of Truth, Coexistence and Non-repetition. All the sentences of the Peace Tribunal will become res judicata when they are final and their immutability will be ensured.

[Uganda, Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008.](#)

A special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict. [...]

8. The special division of the High Court shall have a registry dedicated to the work of the division and in particular, **shall make arrangements to facilitate the protection and participation of witnesses, victims, women and children.** [...]

13. Investigations shall:

- a. Seek to identify individuals who are alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians;
- b. Reflect the broad pattern of serious crimes and violations committed during the conflict;
- c. Give particular attention to crimes and violations against women and children. committed during the conflict.

[Colombia, Agreement on the Victims of Conflict, 'Comprehensive System for Truth, Justice, Reparation and Non-repetition, including the Special Jurisdiction for Peace; and Commitment on Human Rights, 15 December 2015.](#)

Article 40:

The following will not be subject to amnesty or pardon or equivalent benefits: crimes against humanity, genocide, serious war crimes, the taking of hostages or other severe deprivation of freedom, torture, extrajudicial executions, enforced disappearance, **rape and other forms of sexual violence**, child abduction, forced displacement, in addition to the recruitment of minors in accordance with the Rome Statute.

The amnesty law, will established which conducts, classified by national legislation, are not eligible for amnesty, as far as they correspond to the above.

The law will specify the scope of these conducts in accordance with the provisions of the Roma Statute, International Human Rights Law and International Humanitarian Law.

Article 67:

The unit of investigation and prosecution will be made up of a sufficient number of highly qualified legal professionals in the field of investigation and prosecution, and should include experts in various branches of law, with emphasis on

knowledge of International Humanitarian Law and Human Rights. It must have a forensic technical research team, which may have international support, particularly in the field of exhumation and identification of the remains of missing persons. **It will be formed according to criteria of gender equity and respect for ethnic and cultural diversity, and the members shall be chosen by a selection process which has the confidence of Colombian society and the different sectors that make it up.**

The Unit will have a special investigation team for cases of sexual violence. Acts of sexual violence will be dealt with in accordance with the special provisions on evidence in the field included in the Rome Statute.

The Unit may request other competent bodies of the State or human rights organizations and victims, to report with regard to the facts on which they do not have enough information.

Before the signing of the agreement, the Parties shall decide on the number and nationality of the members of this unit.

[Sudan/Darfur, Ceasefire Agreement between the Government of Sudan and the LJM, 18 March 2010.](#)

In areas of GoS control, **the GoS police shall investigate all crimes, including those committed against women and children**, and ensure the prosecution of the perpetrators and the protection of the victims. The GoS agrees to give UNAMID unlimited access and information to monitor these activities.

[Democratic Republic of Congo, Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23, 12 December 2013.](#)

Given the atrocities and other massive violations of human rights perpetrated in the eastern Democratic Republic of Congo, and with a view to putting an end to impunity, the **Government shall ensure that prosecutions for war crimes, genocide, crimes against humanity, sexual violence** and recruitment of child soldiers are initiated against any presumed author thereof.

Reparations

In addition to truth-seeking and investigative mechanisms, reparations programmes are also often established to respond to victims' needs resulting from violations experienced during the conflict. These involve the state's obligation to provide reparation for violations of international human rights law and serious violations of international humanitarian law – including sexual and gender based violence, as well as human rights violations against women and girls. Reparations can be individual or communal, and include financial and material reparations such as monetary compensation, access to land, education

grants, access to health security, increased access to public services with new hospitals or new schools specifically designed for affected communities. Increasingly, symbolic reparations are also provided for in peace agreements. These address the less tangible consequences of the conflict, through for example the building of memorial sites, the organization of commemoration events, the creation of national commemoration days, and official apologies.

Increasingly, there is pressure for measures dealing with the past to engage more actively with structural socio-economic consequences of conflicts and move beyond solely judicial accountability for gender-based violence. Indeed, reparations programmes should pursue transformative effects for their recipients as much as possible.⁴ This requires rethinking the possible long-term positive impacts of reparations programmes, including redistributive effects, for women affected by the conflict economically. Reparations can also address the gendered consequences of forced migration; access to land and other economic resources for widows and orphans; and structural oppression towards women and LGBT communities prior to, during and after the conflict.

The Somalia example below illustrates how transitional justice reparation within a given community can focus on reparations, but also include patriarchal approaches to women.

[Somalia, Adadda Peace Agreement, 10 March 2007.](#)

This agreement provides for the “payment of one-hundred and twenty camels for each of the deceased persons from the Bah Ararsame; 50,000,000 Somali Shillings (So.sh) for funeral costs; \$1000 for the family of deceased; and one godobtir girl [girls for marriage] per deceased.”

The Yemen example below illustrates a gender-sensitive approach to reparations, and the Nicaragua example an alternative attempt in a peace agreement to deal with the economic consequences of conflict.

Yemen, National Dialogue Conference Outcomes Document, 25 January 2014.

The State shall care for victims of the armed disputes including women and children who have lost their head of household, other than the families of martyrs and the wounded, who were living on the low-income professions and handicrafts and whose income had been affected due to the events. The State shall continue to provide welfare for them until they have been able to forge a livelihood and improve their economic situation. For that purpose, the State shall work to enrol them in rehabilitation and vocational training programs and social security.

Nicaragua, The Managua Protocol on Disarmament, 30 May 1990.

The resistance is urged to submit immediately a list of widows and orphans, so that the Nicaraguan Social Security and Welfare Institute can include them in its budget and they can receive the monthly pensions to which they are entitled.

Questions for women

- What transitional justice mechanisms will be most useful at holistically addressing the full range of human rights violations women experienced during the conflict, including sexual and gender-based violence and socio-economic rights violations?
- How can transitional justice mechanisms be designed to address structural gender inequality and other root causes of conflict?
- Will the transitional justice measures both further the efforts to end conflict and advance gender equality and rule of law? How can a better balance be struck?
- How will future recommendations and commitments on transitional justice be monitored and implemented? How will women's participation in monitoring and implementation of future commitments be ensured?
- Will the mechanisms adequately protect and empower women who seek to engage with them? Are there provisions to negotiate policies to ensure gender-sensitivity in the future?
- Will there be adequate outreach and education to enable differently situated women to engage effectively with the transitional justice mechanism?

CONCLUSION

Establishing any transitional justice mechanism or framework is full of difficult challenges. While some parties affected by the conflict wish to see accountability for past abuses, the peace process will involve a level of compromise among those engaged in the conflict, which affects how the past is dealt with.

Simply put, the two main challenges of transitional justice lie in:

- The necessary trade-offs to achieve an equilibrium between stability and non-repetition; and
- The capacity to put in place institutional efforts that promote a long term transformative agenda beyond the implementation of transitional justice mechanisms themselves.

Some specific aims of transitional justice will easily assist the peace process. Others will require a measure of trade-off between what might be ideal, and what can realistically be achieved alongside retaining the commitments of armed actors to peace. Discussing what the conflict was about, what its consequences are, and how they should be addressed, can start to re-open conflict divisions. In addition, attempting to deal with the past often involves tensions between deeply divided groups who desire quite different outcomes from the transitional justice mechanism and the peace process itself.

However, women can help build constituencies able to emphasize that while in the short-term ending the conflict may appear to require a lot of flexibility in how accountability for the past is dealt with, in the longer term these issues are likely to require some clear mechanisms if a common political space is to be reconstructed.

Transitional justice is often institutionalized on the theory that by acknowledging suffering and abuses of power, it is possible to avoid repeating errors of the past and future atrocities may be deterred. Yet, at the same time, those who have experienced the conflict often look to transitional justice mechanisms to enable much deeper and transformative societal and institutional commitments firmly focused on the future, that go beyond mere technocratic implementation of measures agreed to.

It is essential that women be part of the debate and not expected to speak with one voice. Women's groups will not all have a unified position regarding accountability and dealing with the past. Transitional justice should therefore provide for a framework that can address structural issues of importance to women, while also dealing with the range of justice issues which the conflict has created in a way that does not undermine efforts to achieve peace.

A peace agreement provides one entry point for framing transitional justice measures. While the detailed and difficult deliberations will take place after the peace agreement, the pathways created by the peace agreement for how transitional justice is conceptualized, and the ways in which it treats issues of accountability and impunity, will often set the terms of the debate and shape the mechanisms which follow.

APPENDIX A: PEACE AGREEMENTS MENTIONED

- Afghanistan, Agreement between the Islamic Republic of Afghanistan and Hizb-e-Islami, 29 September 2016. <https://www.peaceagreements.org/view/1739>
- Algeria, Project de charte pour la paix et la réconciliation nationale, 14 August 2005. <https://www.peaceagreements.org/view/1595>
- Bahrain, Royal Order No.28 of 2011, Establishing an Independent Commission to Investigate and Report on the Events Which Occurred in Bahrain in February/March 2011, 29 June 2011. <https://www.peaceagreements.org/view/1414>
- Bosnia and Herzegovina/Yugoslavia (former), General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), 21 November 1995. <https://www.peaceagreements.org/view/389>
- Bosnia and Herzegovina/Yugoslavia (former), Conclusions of the Peace Implementation Conference held at Lancaster House (London Conference), 09 December 1995. <https://www.peaceagreements.org/view/1030>
- Bosnia and Herzegovina/Yugoslavia (former), Agreement on the release and transfer of prisoners, 01 October 1992. <https://www.peaceagreements.org/view/1610>
- Burundi, Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000. <https://www.peaceagreements.org/view/306>
- Chad, Accord de paix entre le gouvernement de la République du Chad et le mouvement national (MN), 25 July 2009. <https://www.peaceagreements.org/view/762>
- Colombia, Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 24 November 2016. <https://www.peaceagreements.org/masterdocument/1845>
- Colombia, Agreement on security guarantees and the fight against criminal organisations, 23 June 2016. <https://www.peaceagreements.org/masterdocument/1796>
- Colombia, Agreement on the Victims of Conflict, 'Comprehensive System for Truth, Justice, Reparation and Non-repetition, including the Special Jurisdiction for Peace; and Commitment on Human Rights, 15 December 2015. <https://www.peaceagreements.org/view/1547>
- Colombia, Joint Report of the Dialogue Table between the Government and the Revolutionary Armed Forces of Colombia - People's Army, 04 June 2015. <https://www.peaceagreements.org/view/1398>
- Cote d'Ivoire, Linas-Marcoussis Agreement, 23 January 2003. <https://www.peaceagreements.org/view/436>
- Democratic Republic of Congo, Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23, 12 December 2013. <https://www.peaceagreements.org/view/793>
- Indonesia/Aceh, Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement (Helsinki MOU), 15 August 2005. <https://www.peaceagreements.org/view/450>
- Israel/Palestine, Annex VII, Release of Palestinian Prisoners and Detainees, Israeli Palestinian Interim Agreement on The West Bank and the Gaza Strip (Oslo II), 28 September 1995. <https://www.peaceagreements.org/view/989>
- Myanmar, 12-Point Agreement of Union Peace-making work committee and the All Burma Students' Democratic Front (ABSDF) Union-level Peace Talks, 10 August 2013. <https://www.peaceagreements.org/view/1546>

Nepal, Agreement between the GoN and Rastriya Haliya Mukti Samaj Mahasangha, 5 September 2008. <https://www.peaceagreements.org/view/1754>

Nicaragua, The Managua Protocol on Disarmament, 30 May 1990. <https://www.peaceagreements.org/view/578>

Niger/Azawad, Accord de N'Djaména entre le Gouvernement de la République du Niger et le Front Démocratique pour le Renouveau (FDR), 21 August 1998. <https://www.peaceagreements.org/view/1521/>

Somalia, Adadda Peace Agreement, 10 March 2017. <https://www.peaceagreements.org/view/1856>

Solomon Islands, The Townsville Peace Agreement, 15 October 2000. <https://www.peaceagreements.org/view/80>

Sudan, Darfur Peace Agreement, 05 May 2006. <https://www.peaceagreements.org/view/350>

Sudan, Dinka Nuer West Bank Peace Council Communication, 30 September 1999. <https://www.peaceagreements.org/view/1814>

Sudan/Darfur, Doha Document for Peace in Darfur (DDPD), 31 May 2011. <https://www.peaceagreements.org/view/853>

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Uganda, Agreement on Disarmament, Demobilization and Reintegration, 29 February 2008. <https://www.peaceagreements.org/view/685>

Uganda, Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008. <https://www.peaceagreements.org/view/667>

Yemen, National Dialogue Conference Outcomes Document, 25 January 2014. <https://www.peaceagreements.org/view/1400>

APPENDIX B: RESOURCES

Belfast Guidelines on Amnesty and Accountability:

https://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf.

International Committee of the Red Cross (ICRC), 2017. *Factsheet: Amnesties and International Humanitarian Law: Purpose and Scope*. Available at: [170545_amnesties_factsheet_october_2017_clean_en.pdf](https://www.icrc.org/eng/resources/documents/factsheet/170545_amnesties_factsheet_october_2017_clean_en.pdf).

International IDEA, Gender Quota Database: <http://www.idea.int/data-tools/data/gender-quotas/quotas>.

Language of Peace Tool: <https://www.languageofpeace.org/#/>.

PAM Peace Agreement Matrix: <https://peaceaccords.nd.edu/>.

PA-X Peace Agreements Database: www.peaceagreements.org.

UN Peacemaker: <https://peacemaker.un.org>.

Case study reports from gender and transitional justice specialized organizations

ICTJ Gender Reports

Dewhirst, P., and Kapur, A., 2015. *The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearance on Women*. International Center for Transitional Justice. Available at: <https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>.

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Impunity Watch - <https://www.impunitywatch.org/html/index.php> (Their online library provides a number of cases studies from Burundi, Guatemala and Kosovo).

E. Rooney, 2016. *Transitional Justice Grassroots Toolkit User's Guide*. Bridge of Hope. Available at: <http://thebridgeofhope.org.s115805.gridserver.com/wp-content/uploads/2016/04/transitional-justice-toolkit-users-guide-web..pdf>.

Swisspeace and Oxford Transitional Justice Network, 2013. *Transitional Justice Methods Manual: An Exchange on Researching and Assessing Transitional Justice*. Available at: http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/TJ_Methods_Manual_homepage.pdf.

ICAN's Gendered Transitional Justice Video, 2017. Available at: <https://www.youtube.com/watch?v=nAmWHdH0Doo>.

APPENDIX C: INTERNATIONAL INSTRUMENTS AND UN SECURITY COUNCIL RESOLUTIONS DEALING WITH TRANSITIONAL JUSTICE, VIOLENCE AND GENDER

Key International Instruments:

United Nations Charter

Universal Declaration of Human Rights

Convention on the Prevention and Punishment of the Crime of Genocide

International Convention on the Elimination of All Forms of Racial Discrimination

International Covenant on Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

International Convention for the Protection of All Persons from Enforced Disappearance

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

Geneva Convention relative to the Treatment of Prisoners of War

Geneva Convention relative to the Protection of Civilian Persons in Time of War

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Convention on the Elimination of All Forms of Discrimination against Women

Optional Protocol to the Convention on the Elimination of Discrimination against Women

Rome Statute of the International Criminal Court, 1998.

Principles:

Existing legal standards and practices regarding violence against women in three regional human rights systems and activities being undertaken by civil society regarding the normative gap in international human rights, 2015

CEDAW/C/GC/30, Committee on the Elimination of Discrimination against Women General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, 2013

Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHL and Serious Violations of IHL (A/Res/60/147), 2005

Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation

Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher (E/CN.4/2004/88), 2004

Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1), 1997

Key resolutions:

A/HRC/RES/21/15, Human rights and transitional justice (2012)

A/HRC/RES/21/15, Human rights and transitional justice (2012)

A/HRC/RES/18/7, Creation of the mandate of the Special Rapporteur (2011)

E/CN.4/RES/2005/70, Human rights and transitional justice (2005)

E/CN.4/RES/2005/81, Impunity (2005)

General Assembly Resolution, Right to truth (2014)

A/HRC/RES/15/5, Human Rights Council Resolution, Forensic genetics and human rights (2010)

Relevant Policy Reports:

UN Women, 2015. *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*. (See Chapter 5 – Toward an era of Transformative Justice.) Available at: [http://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20\(1\).pdf](http://www.peacewomen.org/sites/default/files/UNW-GLOBAL-STUDY-1325-2015%20(1).pdf).

United Nations, 2014. Guidance Note of the Secretary-General Reparations for Conflict-Related Sexual Violence. Available at: <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

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UN Women, 2012. *A Window of Opportunity: Making Transitional Justice Work for Women*. Available at: <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf>.

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ENDNOTES

- 1 For ongoing debates on this matter see for example: Mallinder, L., and McEvoy, K., "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-conflict Societies", *Contemporary Social Science* 6.1 (2011).
- 2 To see provisions related to courts and prosecutions in transitional justice frameworks provided for in peace agreements: <https://tinyurl.com/yqs52q2c>. See also UN Women, "A Window of Opportunity: Making Transitional Justice Work for Women", (2012), pp 6-9; Campbell, K., "The Gender of Transitional Justice: Law, Sexual Violence and The International Criminal Tribunal for The Former Yugoslavia", *International Journal of Transitional Justice*, (2007), Vol. 1.3; Oosterveld, V., "The Special Court for Sierra Leone's Consideration of Gender-based Violence: Contributing to Transitional Justice?", *Human Rights Review*, (2009), 10.1; Koomen, J., "Without These Women, the Tribunal Cannot Do Anything: The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda", *Signs: Journal of Women in Culture and Society*, (2013), 38.2.
- 3 For more details on gender recommendations for accountability mechanisms see for example UN Women, "A Window of Opportunity: Making Transitional Justice Work for Women", (2012), pp. 9-15; Nesiya, V., *et. al.*, "Truth Commissions and Gender: Principles, Policies, and Procedures", International Center for Transitional Justice, (2006).
- 4 See for example United Nations, "Guidance Note of the United Nations Secretary-General: Reparations for Conflict-related Sexual Violence", (2014). See also "Transformative Reparations for Sexual Violence Post-conflict: Prospects and Problems", *The International Journal of Human Rights*, (2017).

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