

Negotiating Transitional Justice

A Strategic Framework

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This Strategic Framework was developed during the *9th Meeting on Negotiations for Resistance and Liberation Movements (RLMs) in Transition* entitled *Transitional Justice and the Role of Victims in Peace Negotiations* held in October 2017, in Berlin. It provides an overview of some of the most frequent challenges RLMs face when negotiating justice and dealing with questions of victim participation. At the same time, this overview intends to offer a strategic framework for readers to address these challenges in light of comparative best practices and lessons-learned in order to support an informed understanding and strategy making of conflict actors in negotiating transitional justice.

Accountability, redress for victims and fostering reconciliation - these three demands represent the foundations of transitional justice in peace processes. Starting in the 1990s, the realisation that by ignoring mass atrocities, war crimes and severe human rights violations, they may endanger the sustainability of peace agreements has shaped the outlines of peace negotiations from El Salvador and Sierra Leone to Aceh, Indonesia. Since then, experts, scholars and practitioners have devoted increasing attention to transitional justice and the role of victims in peace negotiations, including the crucial questions of when, how and at what stage to integrate the search for justice and reconciliation into the process. The nexus between transitional justice and peace negotiations is marked by a core dilemma: ending the culture of impunity by strengthening the inclusion of the needs, interests and concerns of victims into peace processes is seen as a prerequisite to restoring trust in war-torn societies and promoting sustainable peace and reconciliation. At the same time, ending violence regularly implies negotiating with those who are responsible for gross human rights violations and who sit in positions of significant power. Finding a constructive and meaningful approach to the complex questions of transitional justice in a given context has thus become a key condition for tangible negotiation outcomes that reflect the need for both peace and justice.

Addressing and mitigating the challenges of negotiating transitional justice while at the same time allowing for the meaningful inclusion of the perspectives, needs and interests of the victims of a conflict remains of paramount importance to effective and viable peace processes in the long-run.

Questions that need to be carefully addressed in this context are, for instance:

- ≡ What are the main caveats to negotiating justice in post-war arenas?
- ≡ At which stage of a negotiation process should questions related to transitional justice be tackled?
- ≡ How do questions of transitional justice affect other thematic areas in negotiations between the conflict parties?
- ≡ What are the specific challenges for RLMs dealing with transitional justice in peace negotiations?
- ≡ What is the role of victims in peace negotiations?
- ≡ What specific tools of justice are needed in a given context and how do they affect the implementation of agreements?

Taking up and reflecting on these and other questions, we hope to provide readers with insights into how critical issues pertaining to transitional justice and the role of victims can be critically addressed and thereby, contribute to more effective conflict transformation processes.

As one major output of our annual Meetings on Negotiations, our strategic frameworks are practical tools providing a structured and comprehensive overview of different themes related to political negotiations.

These papers are based on the input and discussion among all meeting participants and are enriched through additional desk research and literature reviews. Recognising that each conflict scenario and negotiation situation is unique, the aim of these frameworks is not to provide a blueprint solution but to present ideas and lessons-learned from different international contexts that can be helpful for developing authentic and case-by-case approaches to the challenges of negotiation.

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Transitional Justice: Key aspects

Transitional justice What is it?

- Since the 1990s, the concept and application of transitional justice in countries emerging from long periods of conflict and repression has gained increasing popularity. Reflecting the growing awareness that mass atrocities, war crimes and severe human rights violations cannot be ignored and that they endanger the durability of peace, transitional justice has become an integral part of settling peace agreements.
- Transitional justice refers to the **different ways in which countries and their societies address and deal with massive human rights violations** in transitional arenas.
- As an approach to addressing impunity after conflicts, transitional justice marks an attempt to offer the most meaningful justice possible in a given political situation when regular justice systems are unable or unwilling to provide adequate responses.
- Accountability, redress for victims** and **long-term reconciliation** represent the key principles and normative foundation of transitional justice in peace processes. According to the United Nations' definition, transitional justice in peace processes describes, "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to **ensure accountability, serve justice and achieve reconciliation.**"¹
- Unlike distributive or restorative justice, transitional justice is not a specific form of justice but refers to a **broad array of judicial and non-judicial measures** by which countries address impunity, gross human rights violations and the underlying root causes of the conflict. Rule of law reforms also play a key role where regular justice systems are no longer intact or independent, or they simply lack the capacities needed to function.
- Transitional justice arises in two constellations:
 - As a matter of **post-conflict justice** in the context of armed conflict; or
 - In the aftermath of far-reaching political transitions, as a way of dealing with past abuses committed by dictatorships or authoritarian regimes **in the political transition** towards democracy.

Justice in processes of transition

The political conditions, social and cultural traditions, as well as the legacy of past crimes are only some of the contextual factors that shape the outlines of potential principles and application of transitional justice. Knowing the context is key to successfully negotiating the aims of transitional justice and implementing respective provisions. With the redress and acknowledgment of violations and preventing future atrocities at the core of transitional justice in peace processes, the following elements are some of the most common denominators for practiced transitional justice:²

- Establishing or reforming **accountable social and political institutions** (courts, police, ministries, or the army) in the post-war arena to restore the society's confidence.
- Allowing the most affected and/or vulnerable parts of society, in particular women and marginalized groups, to **access and participate in the pursuit of justice.**
- Institutionalising the quest for justice, trust and reconciliation by **restoring the rule of law** in conflict-affected societies.
- Facilitating durable peace processes with peace dividends for the entire society by **addressing the underlying causes** of injustice and **fostering reconciliation**



¹ See United Nations (2010). Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

² See International Center for Transitional Justice (2009). What is Transitional Justice? Available at: <http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

Transitional Justice in Peace Processes: Key aspects

The four pillars of transitional justice

From the negotiation of a political settlement until its implementation, transitional justice refers to a comprehensive approach towards providing the most meaningful justice possible in the given political conditions. Depending on these conditions as well as on the nature of crimes committed, transitional justice should attempt to confront impunity, seek effective redress for victims and prevent future atrocities. Consequently, transitional justice encompasses different tools that build on four main pillars, which are closely interlinked in peace process:

1. Criminal and legal prosecutions

- » Calls for judicial prosecution of those considered responsible for gross human rights violations or war crimes often represent one of the core demands of conflict actors.
- » While softer means of prosecution may entail commissions of inquiry with the mandate to investigate crimes and recommend a framework for prosecution (see truth-seeking, below), criminal prosecution can also involve special tribunals, prosecutors or public courts and hearings.
- » International means of prosecution, such as by the International Criminal Court (ICC), can accompany the processes but, as the ICC does not operate under the influence of negotiating parties or mediators, may subtend some of the parties' agreements.

2. Truth Seeking

- » Truth-seeking mechanisms represent a more victim-centred, non-judicial approach that looks at the broad patterns of past crimes in order to investigate what kinds of repressions, human rights violations and crimes have occurred, and how.
- » Truth seeking via commissions or other bodies can provide a much-needed safe space for victims and survivors to speak out, report and make their perspectives on the conflict heard.
- » Truth commissions often entail documentation and investigation of specific cases and situations in past conflicts in order to identify the key drivers of events, as well as the actions/practices that fuelled crimes and the violation of human rights.
- » At the end of a truth-seeking process, commissions often provide reports with recommendations on how to implement measures of reconciliation, reparation or institutional reform, including for instance the vetting of political positions.

3. Reparations

- » Reparations can be understood as a means to acknowledge the legal obligation of a state or group, to repair the consequences of violations by monetary or ideational means, including socio-economic programmes or commemoration initiatives.
- » Programmes for victim reparation often need to mitigate the difficulties of balancing compensation or reparation for victims as, in the majority of cases, the number of victims exceeds the material means for compensation in post-war contexts.
- » Therefore, symbolic reparations or community based reparations such as public apologies, war crime memorials, renaming public spaces, and rebuilding the most affected communities can be meaningful ways to navigate this balance by endorsing justice by way of recognition and foster reconciliation



4. Institutional Reforms

- » The promise of preventing future violations of rights from occurring is one of the cornerstones of transitional justice efforts. To this end, post-war countries must often undergo processes of institutional and constitutional reform.
- » The main targets of reform measures are the police, the judiciary, and civil and military intelligence institutions, and as a first step, often entail the vetting of members of the government, armed forces, military and police who may have been involved in human rights abuses.
- » Programmes of Disarmament, Demobilization and Reintegration (DDR) or Security Sector Reform (SSR) represent some of the most frequently used tools of institutional reform that are also closely linked to broader justice reforms.

Transitional Justice in Peace Processes: Challenges and Potentials

The need for a comprehensive and holistic approach

Transitional justice is not a panacea for peace and requires a holistic and balanced approach in peace processes that combines and links the four pillars of prosecution, truth seeking, reparation and institutional reform. If not carefully designed, tailored to the context and agreed-upon by all relevant actors, transitional justice may in fact put the delicate balance in post-war societies at risk. With conflicts being complex, context-dependent and multi-faceted, there is no definitive model for navigating the parties' demands, interests and concerns around transitional justice. In order to make negotiations on transitional justice meaningful and effective, negotiating parties need to develop an informed understanding of the key challenges and trade-offs linked to transitional justice provisions in a post-war context; understanding the ways that these challenges might affect a holistic approach to negotiations is crucial.

- » Justice systems in post-war arenas are often very weak or heavily politicized which is why **impartial prosecution represents an enormous challenge for public institutions**. Some actors may even promote victors justice or revanchist prosecution. To strengthen the capacity of legal institutions, criminal prosecutions need to be linked to effective judicial (and institutional) reforms, complementary (or alternative) means of justice, and internal as well as external support structures.
- » On the other hand, it is important to embed **truth-seeking** efforts in a legal and normative framework of judicial initiatives such as compensation for victims or institutional reform. Without these, there is a real risk of truth-seeking measures being perceived as talking shops or fig leaves for a peace process that fails to address more substantive questions of justice.³
- » **Reparation programmes need to be closely linked to other tools and programmes of justice** if they are not to be (mis)perceived as one-time pay-outs for victims.
- » Finally, institutional reforms need to build on a solid foundation of participatory measures and tools, such as truth-seeking and public hearings, in order to make them effective and inclusive in addressing the genuine needs, interests and concerns of victims.

In confronting impunity, seeking fair and effective redress, and preventing recurrence of violence, transitional justice should not follow the logic of routine application of normative standards; instead, transitional justice should be tailored with a careful and conscious appreciation of the context in which it will operate. As part of a holistic approach, it is important to scrutinize if, where, and how transitional justice interacts and overlaps with other initiatives in a peace process, including DDR, SSR and the broader transformative agenda.

Examples



Questions relating to transitional justice played a key role both before and after the multi-party negotiations in **South Africa** (1990-1993). During the talks between the African National Congress (ANC) and the Apartheid government in Pretoria, issues relating to the legal prosecution of former perpetrators, truth seeking and reconciliation, reparation for affected communities as well as broader issues around the transformation of justice, political and social institutions were among the main points of contention. With the release of Nelson Mandela, seen as one of the main trust-building steps in the process of the talks, negotiations between the two main conflict parties led to an agreement that the Truth and Reconciliation Commission (TRC), mandated in 1995, would take up these questions. Based on its final report, the TRC authorized a highly contested "*amnesty for truth*" law, which has partly been interpreted as a buy-in for former National Party leaders to the political transition. Although the peace process in South Africa is often viewed as a success story, the road to justice has largely excluded victims. Even now, decades later, the most important forms of prosecution and reparations have not been implemented.



The civil wars experienced by **Liberia** between 1989 and 2003, remain some of the deadliest conflicts on the African continent with over 200,000 conflict-related deaths. The Comprehensive Peace Agreements (CPA), agreed upon by the main parties in Accra in 2003, paved the way for a roadmap to peaceful political transition, including initiatives to promote meaningful justice, which are seen as key contributions to the country's relatively fast transformation after over 15 years of civil war. Based on the CPA, two main components of transitional justice, truth seeking and security sector reform, have been codified and implemented. The Truth and Reconciliation Commission (TRC) conducted far-reaching investigations, collecting tens of thousands of statements and testimonies, distilled in a final report in 2009. While the transitional justice process in Liberia has constantly suffered from insufficient means of implementation, both truth seeking and security sector reform have produced tangible dividends for the peace process: the Liberian army was completely demobilized and reformed, and the police and other national security agencies vetted and retrained.

³ See International Center for Transitional Justice (2009) *ibid*.

Negotiating Transitional Justice: Key Considerations

During peace negotiations, questions of justice and accountability for past crimes can be a central point of contention for parties who only want to engage in negotiations if they receive guarantees (or amnesties) that allow them to secure positions of power in the post-war status-quo. A core dilemma is that **justice and negotiations are two things that do not necessarily go together** and follow distinct logics of interaction:⁴

- » In contrast to negotiations, which entail independent and dynamic processes for finding compromises mutually agreed upon by the parties, justice is something that actors feel entitled to, often referring to absolute legal claims; this, by default, limits the space for compromises.
- » While any meaningful system of transitional justice needs to broaden direct or indirect participation to marginalized voices and their respective interests, peace negotiations are traditionally limited to an exclusive arena accessible only to the main conflict parties. Negotiating justice thus needs to bridge the gap between being effective and inclusive in order to produce tangible agreements that reflect the needs of broader society.



- » Experiences from post-conflict arenas in Uganda, South Sudan and Mali have highlighted the fact that limited participation by the most-affected actors (and the inclusion of their perspectives) in the negotiating arena remains the key challenge to making transitional justice truly inclusive and effective. This in turn, **negatively affects the long-term implementation of peace accords.**
- » Addressing transitional justice in peace negotiations has increasingly proven to be important for the durability of peace processes as it provides opportunities for long-term reconciliation in post-war societies.

The majority of recent peace agreements entail provisions on the role of transitional justice. However, many peace processes still fail to include meaningful and context-sensitive ways to ensure that justice and accountability are addressed in the post-war arena, thus limiting the durability of the peace process and any tangible peace dividends for society as a whole.

Empirical evidence from years of qualitative and quantitative research shows that:

- » In conflicts where claims of injustice are key conflict issues for broader societal groups, peace processes that do not provide the space for addressing these justice issues generally limit the opportunities for restoring the rule of law, which remains a key component of post-war stability.⁵
- » In the framework of political, social and economic exclusion, lack of access to justice systems remains one of the core drivers for conflict mobilisation, particularly in protracted conflicts with repeated cycles of violence.
- » Particularly for states in transition towards democracy, not addressing the justice system that is perceived as being dysfunctional, politicized or arbitrary increases the risk of further disenfranchisement and polarization of broader segments in society.

What about amnesties?⁶

- » According to international law, serious international crimes such as crimes against humanity, war crimes, and genocide cannot be the subject of amnesties in the post-war context.
- » The Rome Statute of the ICC rejects the application of amnesties for serious international crimes and requires its signatories and the United Nations not to support parties and processes that agree to such provisions.
- » Beyond the legal dimension, empirical evidence suggests that negotiations that are able to balance spaces for retributive (criminal prosecution) and non-retributive forms of justice are associated with more durable peace dividends than those having an exclusive focus on amnesties. The latter tends to destabilize the balance in arenas of transition.

⁴ Based on a panel contribution of Mark Freeman on October 27 2018 at the Berghof Foundation.

⁵ See Lynn Wagner and Daniel Druckman (2017). Drivers of Durable Peace: The Role of Justice in Negotiating Civil War Termination, in. Group Decision and Negotiation. Vol 26(1). 45-67.

⁶ For a more comprehensive dealing with the question of amnesties in peace negotiations, see Priscilla Hayner (2009). Negotiating Justice. Guidance for Mediators. Available at: http://www.ichrp.org/files/reports/22/128_report_en.pdf and <https://ecpr.eu/Filestore/PaperProposal/6e3e3742-d3fb-405e-aa53-56d810f1b4b2.pdf>

Reconciling enabling and constraining factors during negotiations while at the same time approaching sensitive questions of transitional justice can be a crucial challenge for RLMs. Many RLMs draw their membership from highly diverse and heterogeneous constituencies, bringing together the combatants from the armed wings of the movement as well as political/human rights activists. Therefore, it is not unlikely that the understanding that members have about whether and how transitional justice should be dealt with, may diverge significantly. For negotiators from RLMs, the following considerations may support an informed approach to tackling some of the main challenges:

Advocating for and initiating reforms

- » Measures such as an independent process of internal investigation of crimes can strengthen the capacity of RLMs to meaningfully mitigate the challenges of future truth seeking and investigation processes against their own group.
- » By initiating internal processes, non-state actors may later be in a stronger position to present themselves as credible advocates for justice and reconciliation in the peace process, paving the way for international support.
- » At the same time, meaningful engagement in internal truth seeking and reconciliatory dialogue represents a cornerstone for the transformation of RLMs into non-violent political actors, allowing them to reconcile interests of their constituencies, including human rights movements.

Preparation and capacity building

- » Lead negotiators need to prepare the relevant group stakeholders within their movements for engaging in the demanding long-term process of dealing with the legacy of armed conflicts vis-à-vis both their own and their adversaries' role in severe human rights violations.
- » RLMs' core constituencies may have diverging interests, the movements need to develop an understanding and a strategy of how and when to deal with conflicting positions related to transitional justice in negotiations.
- » The effective negotiation of transitional justice builds on a foundation of shared internal definition and expectations as well as a mutual understanding of justice and the related key objectives of the peace process based on a thorough assessment of core demands from grassroots members, communal leaders and leadership.

- » Public consultations or informal dialogues with other parties can be useful for mapping the demands for accountability, which may arise from different groups throughout the peace process and can inform a strategic approach.
- » The preparatory stage should also focus on clarifying which resources (human, ideational or financial) may be needed to prepare for and process negotiations on transitional justice and whether and to what extent external support will be required.

Navigate the international framework of transitional justice

- » The international framework conditions (enabling factors as well as possible limitations) need to be known, shared and communicated among RLM key stakeholders as a basis for viable internal decision-making.
- » It is crucial to raise awareness that crimes against humanity, war crimes, genocide or gross violations of human rights cannot be subject to amnesties and that any amnesties granted would have no effect in countries where universal jurisdiction is used to prosecute these crimes or before international courts such as the ICC.
- » Beyond the legal implications, the question of amnesties needs to be put in context for the RLM negotiators. A focus on amnesty provisions during the negotiation process may lead to a severe loss of credibility for negotiating actors (governments or RLMs) in the process of political transformation and may close the door for external support.

Integrated approach of negotiating justice

- » While the skills and capacities of negotiating teams are an important consideration, a meaningful approach to transitional justice in peace negotiations requires permanent information management and coordination with internal key stakeholders.
- » Continuous dialogue with key interest groups, such as informal elites and armed constituencies, needs to address possible limitations and concerns about transitional justice before sensitive issues (criminal prosecution, vetting, truth seeking) are exposed to the outside world.
- » Mitigating and anticipating these moments of contention well in advance can prevent friction that may arise within the movement due to unclear expectation management. In fact, in a best-case scenario, the foreshadowing of issues may support RLMs to broaden consensus and engage meaningfully with affected communities.
- » Support from external parties and former conflict actors who have undergone these transitions from internal preparation to negotiating issues of justice can help to inform strategy making and awareness raising among constituencies.

From Negotiating to Implementing Justice

Challenges of implementation

The transition from negotiating to implementing transitional justice is characterized by a variety of challenges. Wherever negotiation processes fail to spell out a clear understanding of how, when and based on what resources the transitional justice measures in a peace agreement should materialize, the risk of incomplete (or manipulated) implementation arises. The consequences of this may be detrimental to the long-term viability of peace processes and may jeopardize the remaining foundations of trust and reconciliation between parties and societal groups; these factors, therefore, need to be taken into account when codifying transitional justice.

Frequent challenges for implementing justice provisions in peace processes:

- » Vague wording in the codification of justice provisions, such as truth-seeking or reparation programmes where parties fail to define the responsibilities, timelines, affected groups or communities.
- » The inability (or lack of willingness) of parties to provide tangible perspectives for post-war justice due to a lack of implementation milestones, verification or evaluation mechanisms and missing security guarantees for affected/targeted groups.
- » Failure to adequately address power asymmetries between negotiating parties that are linked to a respective capacity gap (particularly for non-state actors) in navigating the justice arena and responding to accountability.
- » Key challenges related to the reconversion of armed actors, such as the possibility of intra-party splits, are not anticipated or taken into account in the negotiation process
- » Justice measures are not fully negotiated, neglect local context realities and serve as a standard procedure to fulfil the minimal criteria for international recognition of a peace agreement.
- » Key questions relating to truth telling, memorization and dealing with the past are not based on a common understanding of conflict parties or do not correspond to the perspectives of broader social groups.
- » Poor management of expectations can create serious challenges to the long-term implementation of justice and reconciliation measures, if the foreseen mechanisms in the peace accords do not correspond with the financial, institutional and human resource situation of the post-war arena.

Reconversion and Transitional Justice: Challenges for RLMs



The Chapultepec Accords, settled in 1992 between the El Salvadoran military government and the Farabundo Martí National Liberation Front (FMLN), paved the way for a comprehensive roadmap for peace in El Salvador. The core elements of the accord included the reduction of the El Salvadoran armed forces, the dissolution of the National Guard and the National Police as well as a complete demobilization of the FMLN. The process was closely linked to measures of transitional justice including the vetting of former combatants in their transition to political positions using the reports of the Truth Commission that was led by UN-appointed international commissioners. While the report of the truth commission *From Madness to Hope* confirmed that the vast majority of war crimes could be attributed to the El Salvadoran armed forces and FMLN cadres were only accountable for around 5% of incidents, the results led to immense friction within the movement. Eventually, the possibility that former FMLN combatants who were accused of human rights violations would be prevented from running for public office led to internal splits between the movement's main factions, disenfranchisement of the FMLN human rights wing and an unfavourable stance vis-a-vis the commission's report. The party's inability to deal with and anticipate these internal frictions, is seen as a crucial factor behind the split in the movement and had the effect of limiting the general implementation of transitional justice measures in El Salvador. For some former leaders of the FMLN's armed struggle, the reported human right violations were seen and interpreted as the "price for peace";⁷ moreover, they viewed the FMLN's human rights banner as a growing liability for the leadership of different armed groups within the FMLN. The case illustrates that a shared understanding, joint objectives and a resilient roadmap of how to mitigate sensitive questions on transitional justice is a pre-condition for sustaining the cohesion of armed movements during the process of reconversion. The structure of the FMLN, consisting of five sub-groups, as well as the question of how to deal with crimes committed by their own movement were hardly taken into account throughout the peace process.

⁷ For a comprehensive picture on the nexus of reconversion and transitional justice in El Salvador see Ralph Sprenkels (2005). *The Price of Peace. The Human Rights Movement in Post-War El Salvador*. Cuadernos del Cedla. Centre for Latin American Studies and Documentation. Amsterdam.

Understanding Challenges of Implementing Transitional Justice

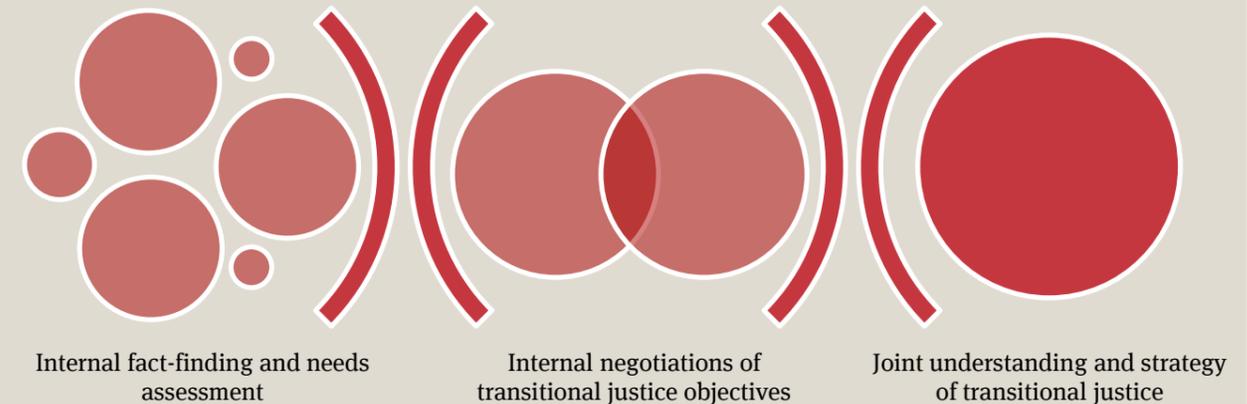
Negotiating justice: An incremental approach

For negotiating parties, RLM and government actors alike, navigating the field of transitional justice in an effective and sensitive way, requires adopting an **incremental approach to process design** taking into account the potential challenges of implementation. Through this step-by-step approach, the more contentious questions related to accountability, institutional reform and redress for victims may first be distilled as part of an internal working consensus and cross-checked with influential societal groups before being exposed during official negotiations.

Throughout this incremental approach to negotiating justice, the following key considerations need to be taken into account:

- » Parties need to establish, develop and exchange their views on a joint understanding of justice as a principled and applicable concept, which goes beyond the friction between amnesties and prosecution.
- » Establishing an early focus on institutional reforms can create a tangible perspective (and anchor point) for the upcoming negotiation process and the tenuous situations that the negotiating teams might face, before approaching questions of prosecution.
- » Timing is key: If accountability issues are tabled too soon in the process, without the parties having built sufficient trust, the space for negotiating sensitive issues around accountability can be limited.
- » A sequenced approach in dealing with questions of accountability (especially with regard to amnesty and vetting provisions) can be helpful for building on positive momentum in later stages of the process.
- » Clear guiding principles, goals and strategic milestones are important conditions for effectively negotiating justice and defining a sufficiently detailed commitment by parties to ensure later implementation of agreed-upon measures.
- » While details, a timeline and specific deadlines for action are important, it is crucial to leave constructive space for public participation in co-shaping areas such as truth seeking or reparation as part of transitional justice, and incrementally increase the inclusivity of transitional justice in the peace processes.

Internal Process: Incremental approach to developing a joint understanding of justice



Negotiation process: trust building, consultations and establishing consensus



Participation of Victims in Shaping Transitional Justice

A victim-centred approach to Transitional justice

The long-term effectiveness and viability of transitional justice mechanisms depends significantly on their ability to provide inclusive pathways for the meaningful participation of affected societal groups. During the past decades, practitioners and experts have advocated for a more victim-centred approach at all stages of the peace process. According to the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, “none of the proclaimed goals of [transitional justice] can happen effectively with victims as the key without their meaningful participation”.⁸ Consequently, victim participation combines characteristics of both an approach aimed at providing meaningful justice in transitional contexts and the substantive principles behind it. Based on comparative insights on experiences made in past peace processes that included provisions on transitional justice such as in Colombia (2016), Sierra Leone (1999), Liberia (2003), Uganda (2008), it is important to differentiate between direct and indirect ways of including victims.

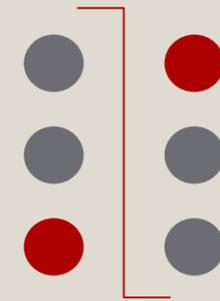
- ≡ The **direct participation of victims** in peace negotiations represents the most inclusive way of addressing the concerns and needs of victims during a peace process. Direct participation can take various forms and fulfil different objectives, ranging from full empowerment and collaboration during peace talks to victims providing regular or incidental input during certain rounds of the negotiation process.
- ≡ **Indirect victim participation** in peace talks is, by definition, less focussed on the direct integration of victims’ voices into the negotiations, thereby limiting the space and possible effects of shaping negotiation outcomes through direct exchange between interests, concerns and needs that are likely to be divergent. Nonetheless, indirect forms such as collaboration, observation or consultations may still provide meaningful input.

No “one size fits all” approach: Each context requires a different approach to allow for meaningful and yet conflict-sensitive participation that ensures buy-in from the broader society. While it is important to find the most direct way of broadening participation, some contexts remain highly polarized and may require indirect forms of victim participation to avoid fallouts for the broader peace process.

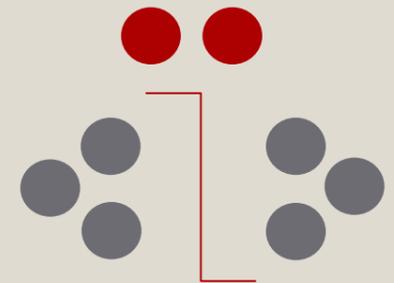
In the peace process between the government of **Colombia and the FARC**, victims participated as **special envoys** during the official negotiations. The method embodied the idea of endorsing the direct representation of victims’ voices and concerns as a distinct group with an interest in the codification of the peace accord. The key challenges of this method were related to the selection procedure.



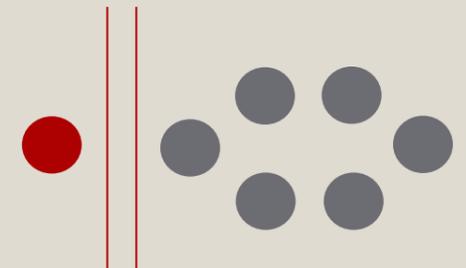
Direct victim participation can also be **part of negotiating team** setup as in the case of the **Accra talks in the Liberian process**. As part of this method, negotiating parties themselves nominate victim representatives as part of their delegation. While this option makes it difficult for independent organizations to inform the negotiations, victims from both negotiating teams can act as crucial bridge builders.



In the case of **Sierra Leone**, victims were included indirectly as **observers and advisors** during the peace negotiations (2003). Partly relying on the strong role of civil society and religious actors in facilitating the peace talks, grassroots victim organizations approached the delegations in a targeted way to inform their positioning and indirectly inform the negotiation dynamics as quasi-monitors.



In contrast to the aforementioned options, victim participation hardly played any role in informing the decision-making and negotiations during the **Juba talks (2008) on the Ugandan peace process**. While being excluded from any possible advisory or observer role, victims were only consulted through the **needs- and fact-finding** missions, which were eventually distilled in a report submitted to the delegations.



⁸ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, to the United Nations General Assembly (2012). UN Doc. a /HRC/ 21/46, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf

10 Key Take Aways

1. **Holistic approach to negotiating a multi-dimensional problem:**

Negotiating a path to meaningful justice needs to take into account trade-off relationships between legal instruments that make provision for prosecution, truth seeking, reparation and institutional reforms and link them to other portfolios of the negotiation process, including DDR, SSR and power-sharing arrangements.

2. **No “one size fits all” approach:**

Every provision must be carefully tailored to the context and reflect the nature of the conflict and the crimes committed. Reforming institutions, fostering reconciliation, restoring the rule of law and creating access to justice can only succeed if parties carefully mitigate the challenges of their environment based on a shared understanding. Exchanging experiences and ideas with peers and former conflict actors is an important means of doing this.

3. **“Go slow to go far”:**

Careful preparation is a *sine qua non* for negotiating transitional justice effectively. Before exposing unsettled positions in the arena of formal talks, parties need to engage in internal preparation and exchange to solidify the strategic objectives for the process that are to be shared with those constituencies that will be relevant for later implementation.

4. **Raise awareness and build trust**

Raising awareness of the potential and challenges of post-war justice among and between main parties is an integral part of any preparation process. For RLMs, negotiating justice is intrinsically linked to questions of political transformation, which require resilient internal information management and decision-making on topics such as vetting processes or the trade-offs linked to amnesties.

5. **Meaningful justice requires meaningful participation**

Transitional justice is an integral part of transforming post-war societies, fostering reconciliation and rebuilding trust. To fulfil this promise and avoid incomplete materialisation of peace accords, meaningful, yet conflict sensitive, participation of victims is key to making post-war justice inclusive and effective.

6. **Sequencing and timing**

Negotiating justice also requires a solid foundation of trust between parties. Issues related to criminal accountability should ideally be dealt with after parties have achieved significant milestones, including exchange of prisoners, enabling humanitarian access and/or agreeing on a statement of intent on justice-related questions. Timing these steps in the negotiation with external support for measures of political transformation or reparation can create a momentum for tackling the more sensitive issues later on.

7. **Managing expectations**

Creating a tangible and realistic perspective on what forms of retribution, legal accountability and institutional access can be expected and at what stage, is important. Implementation milestones should be defined ahead of time taking into account the available resources and constraints.

8. **Making use of justice traditions**

Each society has different means, ways and resources of dealing with past crimes and injustices. Under full respect of international law, traditional mechanisms of truth telling, dispute settlement and symbolic retribution can play a key role in promoting post-war justice and its benefits should be thoroughly examined.

9. **Engaging in an international framework**

Conflict parties will be required to adapt to an international framework of norms and laws of transitional justice. Knowing the limitations and potentials of this framework is a key factor for successful transformation.

10. **Reconversion and justice**

For RLMs, the success of political transformation, becoming a credible advocate for their movement in the peace process and broadening the political electorate in post-war arenas is intrinsically linked to the ability to genuinely deal with the crimes committed by its members.

Relevant publications & further reading

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- ≡ United Nations (2010). *Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.
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- ≡ Wagner, Lynn and Daniel Druckman (2017). *Drivers of Durable Peace: The Role of Justice in Negotiating Civil War Termination*, in: *Group Decision and Negotiation*. Vol 26(1). 45-67.



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