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Transitional Justice &
Dealing with the Past

GUIDANCE PAPER

FriEnt

The Working Group on Development and Peace (FriEnt) is an association of seven German governmental and non-governmental organisations working in the field of development cooperation and peace building. FriEnt fosters joint learning amongst its members, provides information, capacity building, and advice and supports networking and co-operation.

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Preface

How do societies emerging from war come to terms with their recent violent past? How can people and communities who are deeply divided and traumatised by war and gross human rights violations regain trust in their fellow citizens and state institutions? How can they achieve a sense of security and economic stability, rebuild a system of shared values, participatory political structures and an inclusive identity? How can a past that is marked by violence be overcome, and a common future shaped? The peaceful transformation of post-conflict societies is undoubtedly a long and complex process, which ultimately has to involve all layers and structures of a society. However, experience gained over past decades has shown that restoring justice and the rule of law, truth-seeking mechanisms and the development of new social relationships are central to this process. The Nuremberg Tribunal, the Truth Commissions in Chile, Argentina and South Africa, the reparations to former forced labour worker of the NS regime, and the reform of the police and the military in Bosnia and Herzegovina are examples of this type of measure. Since the mid 1990s, such measures are referred to as "transitional justice" mechanisms.

The transitional justice concept, with its various mechanisms, offers practical starting points for the planning of measures in peace oriented development work. In particular, it enables state and civil society actors to link and ensure complementarity between their various activities. The point in time and the form and combination of mechanisms that can be applied in a given country will depend on the specific context. For development and peace organisations, this raises questions about their own role, choice of partners, and the design and timing of activities, etc.

The first part of the FriEnt Guidance Paper explains terminology and concepts of relevance to transitional justice. It identifies key challenges and issues arising for development and peace organisations.

The second part offers guidelines for staff working in development and peace organisations with an initial frame of reference for the design of projects/programmes that fit in with the transitional justice concept. It provides key questions for context analysis and the planning of individual transitional justice mechanisms, refers to earlier experiences and gives practical tips.

Part I

The Concept

1. Truth and Justice in Post-Conflict Societies

War and repressive rule deeply affect the social fabric of a society. For the majority of people – especially refugees, victims of torture and war crimes, and the relatives of the missing – the violence experienced does not only belong to the past; it continues to have an effect and is part of the present. In many cases, the basis of social relationships has been completely destroyed, shattering people's trust in others. Very often, violence and relentless propaganda have overturned the value system and entrenched enemy images. This leads to the development of exclusive group identities and mutually exclusive "truths" about the war, resulting in a strong victim identity and the negation or emergence of taboos surrounding war crimes committed by one's own group. In this way, the "war in people's heads" continues, obstructing the rebuilding of trust and social relationships.

At state level too, the past is often still very present: in many cases, those responsible for war and violence (still) hold positions of authority, blocking major reform processes and creating a culture of impunity. Public institutions are often in disarray and may not – or may no longer – be able to perform their protective and regulatory functions. Indeed, given the nature and extent of the atrocities committed, even a well-functioning judicial system would be overwhelmed by the scale of the task of bringing war criminals to justice.

Against this background, affected societies and external actors are confronted with the challenge of supporting processes which seek to break through the ongoing effects of the social reality that has been created by the war. At individual level, new prospects have to be opened up for those living with injury and loss; at broader social and political levels, structures must be created which facilitate the development of a new peaceful coexistence within society.

The key elements of this process are:

- The restoration of justice and rule of law, especially for victims of violence

- Truth-seeking, and

- The development of new social relationships.

Peace, reconciliation, the democratisation of formerly repressive regimes and the guarantee of non-repetition of human rights violations are the long-term goals of this process. In this context, alongside the term "transitional justice", the concepts of "dealing with the past" and "reconciliation" are often applied as well. There is a strong conceptual link between these fields, and the measures applied in each may also overlap.

Alongside the restoration of justice through criminal prosecution and other mechanisms, truth-seeking efforts and public acknowledgement of past abuses play a key role. The latter in particular is assumed to have a healing and peace building effect. Establishing the facts and identifying the actors as well as the structures responsible for crimes is also intended to have a preventive effect: learning lessons from the past may help to prevent a relapse into the old structures and patterns of behaviour which allowed violence to be used as a means of "managing" conflict. Additionally, creating shared memories in divided societies is important in order to bridge the old lines of conflict.

"Reconciliation" is identified as a key objective but often remains diffuse in practice. As the term has strong Christian connotations, its intercultural applicability, especially in situations of extreme violence, is highly controversial. As a result, there is a growing trend, in the international literature and discourse, to view reconciliation as a process that facilitates the restoration of social relationships on the basis of fundamental values such as human dignity, respect, and the right to physical and psychological integrity. This set of values must be considered from the outset in post-conflict processes.

2. Transitional Justice Mechanisms

Against this background, a range of mechanisms have been developed which address the various elements outlined above and involve different actors.

Criminal Justice

International law obliges states and the international community to prosecute war crimes, crimes against humanity and human rights violations. The prosecution of war crimes can take place at national and international level. The United Nations, for example, has established the International Criminal Tribunals for the Former Yugoslavia and Rwanda. In some countries, national courts are prosecuting war crimes. However, very often in the aftermath of war and violence, the national justice system has been considerably weakened and lacks public confidence. As a response to these conditions, the model of mixed domestic-international courts has been developed (e.g. Sierra Leone, Kosovo). Complementing national trials, the newly established International Criminal Court (ICC) also prosecutes war crimes.

Transitional Justice
"Transitional Justice is a package of judicial and non-judicial responses to human rights violations, implemented by either government officials or non-governmental advocates or both, after a period of violence or repression when a society is confronted with the difficult legacy of the past."

Truth-Seeking Processes

Official truth commissions are now the best-known form of truth-seeking. In most cases, they are based on peace agreements or a negotiated compromise with the elite of a formerly repressive system. In the past – especially in the Latin American context – truth commissions were set up as an alternative to the criminal prosecution of alleged perpetrators. Today, they operate as a complement to judicial processes. Truth commissions provide for the formal acknowledgement, documentation and analysis of human rights abuses. Truth commissions set up by civil society actors (e.g. REHMI in Guatemala), documentation, education and public relations work and the establishment of memorial sites, are other elements of truth-seeking processes.

Reparation

International and national law provides for the granting of reparation to victims of violence and obliges states to redress citizens whose rights were violated. However, the range of measures does not only encompass material compensation, the payment of reparations or the provision of services; it also involves

symbolic acts such as the acknowledgement of the injustices that have been committed, apologies, the establishment of memorial sites or the introduction of memorial days. Reparations can be granted on an individual or collective basis.

Reform of Public Institutions

Here, the focus is on reforming the political system (e.g. new constitution, power-sharing mechanisms), the judicial system and security forces (the police, intelligence services and the military). The reforms of the latter are intended to (re-)establish the rule of law and the state's monopoly on the use of force, and promote democratic control of these institutions.

Lustration processes – i.e. dismissal from office or screening as part of the recruitment process - are closely linked with the reform of public institutions, the purpose being to ensure that persons responsible for human rights abuses and/or crimes against humanity are barred from holding public office. The denazification processes in Germany and the dismissals of police officers and judges in Bosnia, along with screening as part of the recruitment process, are examples of lustration.

Traditional Conflict Resolution Mechanisms

For some years, there has been a growing trend towards recourse to traditional conflict resolution mechanisms. This applies especially in situations in which national institutions are almost non-existent or overstretched. A much-discussed example are the gacaca courts in Rwanda, a reworking of the traditional community conflict resolution system, which have been established to investigate and resolve cases of individuals implicated in crimes committed during the genocide in Rwanda in 1994. In East Timor, too, the Truth Commission used traditional forms of conflict resolution on a local level to reintegrate perpetrators into their communities.

3. Dilemmas

The transitional justice approaches that are based on truth and justice do not necessarily facilitate trust-building or lead to the restoration of social relationships, however. Nor do they automatically create an inclusive culture of remembrance or, indeed, promote peace and reconciliation. In most cases, the political context makes it very difficult to achieve the desired values of peace, truth and justice simultaneously. Very often, when peace agreements are concluded or during the transition from a formerly repressive regime to a democratic system, the decision is taken against truth-finding or the criminal prosecution of perpetrators – ostensibly "for the sake of peace". Tension thus arises between the different values, resulting in conflicting goals and agendas.

Justice

A strong focus on criminal justice, with the establishment of either national or international tribunals, should not obscure the fact that comprehensive justice cannot be achieved by prosecution alone in the context of genocide. But if recourse to traditional conflict resolution mechanisms is opted for, as in Rwanda,

issues of compliance with basic procedural standards arise – such as the presumption of innocence, the collection of evidence, witness protection, etc.

The relationship between international ad hoc tribunals, which are extremely well-resourced, and the national justice systems, which generally lack the essential infrastructure in the aftermath of violent conflict, is another point of concern. What's more, in deeply fragmented societies, one group may regard the criminal justice approach as "victors' justice". This often hampers the process of dealing with and acknowledging one's own responsibility or guilt.

Another significant factor is that war crimes tribunals mainly focus on perpetrators; at present, few adequate mechanisms have been established for due participation of victims in the process as well as long-term psychosocial support of victims and witnesses. Consideration must also be given to the fact that victims, especially women, are often doubly marginalised and that social constraints or the sheer demands of survival may take precedence over any legal reckoning with the past.

Ultimately, then, the question which always remains is this: what is justice? How can it be defined, and who is defining it: external actors, political elites, or victims' groups too?

| **Justice for Victims?** |
| "No one doubts that raped women would like to see the perpetrators brought to justice. But for Congolese women, the reality is very different (...) The criminal prosecution of perpetrators [can easily] become a punishment for the suffering women themselves – for in situations in which a rape becomes public knowledge and results in social ostracism, women will do their utmost, out of desperation, to keep their experiences secret (...) even if their tormentor goes unpunished as a result." |

Truth

Not the least due to the many dilemmas associated with retributive justice, truth-seeking mechanisms have gained in importance over the last few years. These are directed towards some form of restorative justice. But here too, numerous challenges arise.

| **Truth...** |
| "People feel that what came out of the Truth and Reconciliation Commission (in South Africa) was not the whole truth, they think there's still more truth to be known and some feel that the TRC favoured a few individuals." |

The key issue, in this context, is that in these often highly fragmented societies, there is no such thing as one "truth", but many, often conflicting truths. Just as war crimes tribunals may be perceived as "victors' justice" and thus obstruct the society's reckoning with responsibility, truth-seeking processes in divided societies can also widen the divisions between communities and make it difficult to build closer relationships between them. And just as the definition of justice depends on each community's specific experiences, needs and values, different actors with different interests will shape memorialisation and truth-seeking processes in their own ways as well. Whose memories and whose truth apply? How can a shared process of remembrance be created in this situation?

It is generally assumed that the systematic analysis, documentation and publication of human rights violations – which is what truth com-

| **...and Remembrance?** |
| "There is always the danger that the dominant political party will put resources into memorialising its particular narrative of the past (...) I think that needs to be contested (...) I think the tendency has been to memorialise certain great people that invariably mean great men." |

missions seek to achieve – have a peace building effect. However, experience in Latin American countries has shown that where there is a lack of political will, a limited mandate and an absence of or inadequate follow-up mechanisms, truth commissions may cause frustration, retraumatisation, a hierarchisation of victims, and a culture of impunity. Finally, it is essential to consider that public truth-seeking or admissions of guilt may conflict with local traditions of achieving reconciliation through "silence", as the example of Sierra Leone shows.

So how, when and to what extent does "truth" serve society's interests? And when can "forgetting" also contribute to peaceful conflict transformation and reconciliation? These questions often remain unresolved.

Part II

Guidelines

1. Where to start?

When planning transitional justice measures, the first question which arises is this: which general conditions are in place, and how much scope for action is there to implement appropriate measures? The choices made – whether they involve lobbying for specific legislation, strengthening victims' groups or human rights organisations, or supporting specific transitional justice mechanisms – must therefore be based first and foremost on a careful analysis of the context. This provides the foundation on which objectives and activities can then be formulated, partners and beneficiaries identified, and the opportunities and risks clarified more precisely.

As the first step, four aspects should be examined in more detail:

1) The conflict itself and the way in which it was ended;

2) The role of political elites, state institutions and civil society;

3) Victim and perpetrator groups;

4) The role of international actors during the conflict and in the peace process.

1.1. The Conflict Context

The conflict context crucially determines the basic parameters for social restitution after war and repressive rule – and thus the framework for transitional justice measures. The following must be considered:

- The type of conflict and forms of violence deployed: this determines which population groups are particularly affected and the extent to which the experience of violence continues to reverberate throughout society.

- The way in which the conflict was ended: this defines the overall political and institutional parameters.

- Cultural and emotional aspects: these strongly influence the acceptance and effectiveness of individual transitional justice mechanisms.

> **Caution when Applying Models!**
>
> Transitional justice mechanisms cannot be duplicated at random in different contexts. If the prerequisites and parameters for a specific measure are not in place, the concept may be discredited for years and may block processes and put people at risk.

Each of these factors can be broken down into detailed questions. The following key questions provide an initial frame of reference:

> **Key Questions**
>
> - Was the conflict conducted along ethnic and/or religious lines, or did the violence mainly emanate from a repressive regime? Was the violence overt or "concealed"? Was it limited in time and/or to specific regions?
> - Did the conflict have a regional or inter-state dimension?
> - Are transitional justice mechanisms envisaged in the peace treaty or as part of a democratization process? Which measures have been formulated and/or may already have been implemented in this context – or are being blocked?
> - Which basic values in the affected country must be considered when dealing with the past and in the restoration of justice?
> - Which traditional reconciliation and reintegration mechanisms exist in the communities themselves? What is their role? Do they harmonise or conflict with the measures being promoted by the international community?

The answers given during the assessment phase to these questions indicate:

- Which specific challenges arise, as a result of the conflict, for the design of transitional justice mechanisms: the more widespread and protracted the conflict, the more fragmented society is likely to be, making it more difficult to establish a truth commission at national level, for example. In some cases, it may only be possible to proceed on a step-by-step basis and integrate local truth-seeking processes into a national process at a later stage.

- Which specific groups of actors, geographical regions or localities, due to their specific involvement in the conflict, require special attention, and how measures can be devised to take appropriate account of these aspects.

- Whether peace treaties envisage various transitional justice mechanisms, or whether processes must be initiated in order to allow the prosecution of war crimes, for example, at a later date.

> **Tip**
>
> Analytical studies are available for most conflicts, providing information about the dynamics, regional differences in the conduct of violence, key actors and root causes as well as core problems leading to conflict. Peace treaties and their key provisions can be accessed at INCORE (www.incore.ulst.ac.uk/) and Conciliation Resources (www.c-r.org/), for example.

- Whether and how traditional conflict resolution and reconciliation mechanisms can be integrated into the design of transitional justice mechanisms at national level, or whether, for example, they can be deployed in selected regions or at local level in a way which complements national processes.

1.2.   The Role of State and Civil Society

As transitional justice mechanisms are intended to bring about change in the political and social system, they inevitably become the focus of different (power-) political interests. When and by whom transitional justice mechanisms are initiated and how they are developed further will crucially depend on state and civil society actors. The following must be considered:

- The political elite: this will determine the extent to which there is any will to undertake political reforms.

- Capacities and competences of state institutions: these are essential for the implementation of mechanisms and further reforms.

- The strength of civil society actors and the understanding of their role: this also crucially determines the development and dynamics of the processes.

In most cases, the political and military elites responsible for war and human rights violations remain in power or establish themselves in positions of authority, blocking reform processes and promoting a culture of impunity, despite the fact that many peace treaties provide for reforms, constitutional amendments and individual transitional justice mechanisms. However, even in cases where there is a voluntary handover of power following elections, certain state sectors, notably the security and justice

> **Transitional Justice in Guatemala**
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> In Guatemala, 36 years of civil war ended in 1996 with the signing of peace agreements which provided for wide-ranging reforms and various transitional justice measures. However, the implementation of the reforms stagnated within a few years. The continuity of elites and the concentration of political and economic power are still restricting the scope for democratic reforms. Hence, the root causes of the protracted civil war have not yet been overcome.

sector, continue to be dominated by old forces. This means that there are only *gradual variations* in the *continuity or discontinuity* of elites, which nonetheless crucially determine the available scope to develop and implement transitional justice mechanisms.

In order to (re-) vitalise the civilian dimension in politics and society – especially participation in decision-making processes, assertion and enforcement of rights, and non-violent conflict resolution – an independent parliament and civil society actors are essential. If there is no political will for truth-seeking and the restoration of justice, parties, civil society organisations and interest groups can establish the conditions that are important for such processes at a later stage. For example, they can propose legislation, document human rights violations, create safe spaces for "story telling" or provide support to victims' groups.

Tip
Detailed mapping of actors helps to provide an overview of the social networks and relationships as well as divergent positions, interests and needs. This makes it easier to identify possible gaps and the opportunities and risks associated with a specific measure. In the mapping process, it is appropriate to combine desk studies with workshops at field level and to integrate as many different perspectives as possible.

Wars and authoritarian rule weaken civil society voices and the (re-)organisation of civil society on a lasting basis, however. Often, those who oppose nationalism, discrimination and violence are among the first victims, and after violent ethnopolitical conflicts in particular, the political parties and civil society reflect the deep divisions that exist between social groups.

Key Questions
• How much continuity is there in the political and administrative elite? Which groups within the political elite and the administration are open to transitional justice measures, and which are not? Why?
• What are the capacities of the state institutions? Do parallel power structures exist which emerged and became consolidated during the conflict? How strong was the state before the onset of the conflict?
• How are the party landscape and the parliamentary system evolving? Which role are the political parties and parliamentarians playing in the development of specific transitional justice mechanisms?
• Does the country have a well-established civil society tradition, or was it weak due to the specific political/social system (understanding of roles, level of organisation)?
• Are there any strong symbolic figures or institutions with integrity (e.g. religious bodies, trade unions)?
• To what extend civil society has been fragmented as a result of the previous armed conflict? Which forms of cooperation and which types of networks exist? Are there tensions/conflicts?

The answers given during the assessment phase to these questions indicate:

- Whether groups within the political and administrative elite are receptive to transitional justice mechanisms, and how this receptiveness can be used for the transitional justice processes.

- To what extent the implementation of transitional justice mechanisms must be linked to the strengthening of state institutions (capacities, competences, and infrastructure) and which steps are required here.

- Whether long-term measures to support civil society actors are required first of all, in order to establish the conditions for active participation in the design and implementation of transitional justice mechanisms. The weaker and more fragmented and indeed the more government-oriented the civil society, the more important it is to identify entry points, develop long-term partnerships, and not to overburden (or over-fund) civil society actors.

1.3. Take a Closer Look at Victims and Perpetrators

Groups that were especially affected by violence have a crucial role to play in dealing with the past and reconciliation processes. On the one hand, it is important to support the victims of human rights violations and war crimes, and their relatives, so as to restore their dignity, civil rights and a modicum of justice and thus enable them to participate in political and economic development. On the other hand, it is also important to offer ex-combatants not only economic support to facilitate their reintegration into civilian life, but also to consider ways of involving them in the peace and reconciliation process. And finally, in contexts such as Afghanistan, Bosnia or Rwanda, the number of perpetrators is so high as to be difficult to deal with even in a well functioning judicial system. In the analysis, the following aspects should therefore be considered:

> **Avoid Simple Categories!**
>
> The more complex and protracted a conflict, the more diverse the victim groups. The divisions between victims and perpetrators also become increasingly blurred. Victims become perpetrators and vice versa, making straightforward categorisation almost impossible. A careful analysis of the various victim groups and victim-perpetrator relationships is therefore crucially important in order to avoid any bias or hierarchisation of victims.

- The victim groups: due to their specific situations and experience of violence, they each have different needs and expectations of transitional justice mechanisms.

- The perpetrator groups: here, various approaches must be developed according to the severity of the crime, for in contexts of mass violence, solely judicial processes are likely to be inadequate.

> **Veterans for Peace**
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> The Inter-Faith Mediation Centre, founded by former militant religious youth activists from opposing sides in Nigeria, the strong engagement of Vietnam Veterans Against the War (VVAW) in the anti-landmine campaign or the War Veterans in Peace Building initiative in Croatia are some examples of ex-combatants drawing on their own, often traumatizing experience of war and actively working for peace. In doing so, they take risks, but they also enjoy considerable respect and can thus act as an important link to the community.

Although groups especially affected by violence should be key actors in any dealing with the past and reconciliation processes, their access to governments, civil society and international actors is often limited. There are many reasons for this. Marginalisation, a rural background or lack of education may obstruct their effective organisation, representation and participation in post-conflict societies. Furthermore, groups representing the interests of victims, relatives and veterans generally adopt uncompromising positions or are vulnerable to manipulation by radical parties, with the result that international actors often do not consider them as potential partners. Furthermore, locally based victims' and veterans' organisations generally do not come to the attention of international organisations, which tend to focus on non-governmental organisations in urban

centres, (often) emphasise the service character of NGOs and, furthermore, have in recent years prioritised the promotion of peace constituencies in particular. However, the failure to involve victims' and veterans' organisations raises issues concerning the legitimacy and ownership of peace building processes. The opportunities for dialogue with, and the constructive involvement of, these groups should therefore be explored and supported.

Key Questions
• Were large sections of the population affected by the violence? Was it targeted at specific groups (e.g. the political opposition, intellectual elite) or communities (e.g. indigenous people, minorities)? Can the divisions between victims and perpetrators be clearly identified, or are they blurred?
• How much relevance do victims/survivors attach to the various transitional justice mechanisms? What is the position of other population groups?
• Is there a risk that due to the narrow definitions adopted, partiality/bias or a high public profile, specific groups will be given preferential treatment? Which measures can be taken to counteract the hierarchisation of victims?
• How are the interests of various victim groups being represented? How do they fit into the political and civil society landscape? Where are conflicts occurring, and where is there cooperation?
• What is the role, level of organisation and interest representation of ex-combatants? How can a dialogue be established with them? Which opportunities exist for their constructive engagement?
• Which gender-specific needs and interests must be taken into account?

The answers given during the assessment phase to these questions indicate:

- Whether current analyses and measures take appropriate account of the various victim groups and their living conditions or whether, due to uniform categorisations, certain groups are not being addressed: if gaps are identified, they should be addressed by appropriately adapted measures.

- How much knowledge of various transitional justice mechanisms exists in the victim groups, and which expectations are linked to the various mechanisms: as far as possible, this should be considered when designing the various mechanisms or measures that accompany them.

- What are the needs of victims' and veterans' organisations in terms of information, training and support, in order to safeguard their representation in transitional justice processes: in this context, the existing entry points for dialogue on an equal footing with other civil society actors should also be identified, along with ways of supporting them.

Tip
A study about victim groups and the injustice that they have suffered (known as "victimization": physical and mental injury, material damage, flight and expulsion, loss of family members, denial of civil rights), their needs and attitudes towards various transitional justice mechanisms is essential and can be undertaken by several actors jointly. This analysis should always include an appraisal of the different impacts of violence on children and young people, men and women.

1.4. International Actors are Seldom Neutral

In recent years, the international community has played a key role in the planning and implementation of transitional justice mechanisms, notably the establishment of ad hoc international criminal tribunals (e.g. the International Criminal Tribunals for the Former Yugoslavia and Rwanda), the International Criminal Court (ICC) and numerous truth commissions. In this context, the underlying assumption frequently made by international actors is that they are not part of the conflict context. In reality, however, they are seldom neutral. Whether they act as mediators or power brokers in peace negotiations, as donors for reconstruction, development and peace building, as partners for civil society organisations – or else as former colonial powers or even as parties to the war/conflict with their own strategic interests: the international actors' role may be viewed in positive or negative terms by the population, and this has implications for their perceptions of the activities of state and civil society organisations as well. The following aspects should therefore be considered:

> **Challenging One's Own Assumptions!**
>
> International organisations frequently design activities based on their own experiences, values and assumptions about "peace" and "peace building". The extent to which these – often only implicit – assumptions are valid in the specific context and their practical implications must be appraised, thus enabling the organisations concerned to achieve greater clarity about their own role, objectives and the timing of measures.

- The role of international actors during the conflict and the peace process: this influences perceptions and therefore also the legitimacy and effectiveness of transitional justice mechanisms.

- Whether and how international state actors emphasise and encourage the partner governments' responsibility for transitional justice mechanisms: this influences the political framework and scope for action by civil society organisations.

- Whether and how international state and non-state actors help to build their civil society partner organisations' capacities for dealing with the past processes: this also influences their potentials and opportunities to impact on these processes.

> **Key Questions**
>
> - Which role did key international actors (governments, UN, EU, NATO) play during the conflict and in the peace process? Did they have a mediating role, or were they themselves parties to the conflict or were perceived as such by some sections of the population?
>
> - What impacts does this have in terms of the perceptions, legitimacy and effectiveness of transitional justice mechanisms?
>
> - How strong is the presence of international actors in the post-conflict situation?
>
> - Are there conflicting interests, priorities and strategies among the international actors? If so, (how) can these be overcome?
>
> - Are international actors sending out conflicting or uncoordinated signals to ruling elites regarding their responsibility for transitional justice mechanisms? If so, how could this be avoided? What are the implications for civil society?

The answers given during the assessment phase to these questions indicate:

- To what extent processes for dealing with the past and transitional justice mechanisms are developed and owned by actors from the affected society: the stronger the presence of international organisations, the greater the risk that external models will be imposed, with a resulting lack of ownership. At the same time, however, international actors are often confronted with the dilemma that without their initiatives, processes would be blocked or measures would not be implemented at all.

- Whether international actors – due to the frequent blockading tactics at government level – resort to cooperation with civil society actors but, at the same time, tend to focus on service delivery, or whether the responsibility of state actors is reflected in policy dialogue, with the (socio-) political role of civil society actors being promoted at the same time.

2. Maintaining the Process

When planning transitional justice measures, questions also arise as to how to maintain sustainable processes: is the time really ripe for a specific measure? How do we deal with the fact that at state level, processes are often blocked or set back as a result of changes at government level? Is the sustainability of measures ensured? The following working principles are helpful in answering these questions:

Not One Size Fits All!

Despite the recognition that an individual transitional justice mechanism cannot do justice to complex post-conflict situations and that a package of measures must be developed, interests and resources often still focus on a single mechanism. This is then quickly overburdened by overly ambitious objectives and expectations. Prosecution cannot provide comprehensive justice or fully reflect the different interests of victims, and nor do truth commissions automatically lead to reconciliation. So it is important to develop a package of measures as early as possible and, in this context, carefully coordinate the timeframe and mandate of the various mechanisms. If no such package can be envisaged in the first place, it is essential to find ways of progressively enhancing an individual mechanism through other measures over time.

Considering Complexity

Institutions, social relationships and basic values must be considered in a holistic sense. In addition, the function and responsibility of governmental actors must not be ignored by civil society, and, by the same token, civil society's role must not be ignored by the state. And unless fundamental values are integrated into the process, institutional reform is likely to be incomplete, along with trust-building measures and efforts to re-establish social relationships. As a state actor, it is important to develop a broader spectrum of partners among state and civil society organisations; civil society organisations, in turn, should identify links to processes at state level in order to support, contribute or critically monitor them.

Thinking in Stages, Linking in With Existing Processes

Timing and sequencing of transitional justice measures are one of the major challenges. The "right" points in time can only be planned to a limited extent, however, as the dynamics of transition processes cannot be predicted in advance. Very often, individual measures, such as the documentation of human rights violations or the identification of missing persons, are a *prerequisite* for further steps. The decades of work undertaken by Chilean human rights organisations, for example, have established an important basis for the Truth Commission, whose own documentation was used years later in criminal trials. So it is important to take account of current developments without losing sight of the longer timeframe, thus safeguarding the continuity of processes as far as possible.

Key questions can also be developed for these three working principles. The following aspects must be considered first of all:

- To what extent, at the given point in time, are the prerequisites in place for the specific measures: this will determine which positive or, indeed, negative political and social dynamics evolve.

- Whether the mandate, objectives and implementation of various transitional justice mechanisms are coordinated: this will determine the extent to which they are mutually reinforcing or obstructive.

Establish Consultation Mechanisms!
In order to avoid the concentration of political interest and financial resources on a single mechanism or group of actors and safeguard the continuity of processes through appropriate resource allocation and planning of follow-up measures, coordination and consultation mechanisms are required at various levels. These should be equipped with appropriate resources and a multidisciplinary team of personnel. The active involvement of interest groups and other civil society organisations is key.

- Whether sufficient consideration is being given not only to complementarity among actors but also to synergies between transitional justice mechanisms and more wide-ranging development aid: this will determine the extent to which continuous processes geared towards the shaping of a common future can evolve.

Key Questions
• Which structural prerequisites (e.g. capacities of public institutions, political will, a strong civil society) are in place in the society concerned in order to implement transitional justice measures? Are initial steps necessary to establish these conditions, and what might they consist of?
• Is the mandate of the various mechanisms formulated in such a way that there is complementarity between them and bias/partiality is largely ruled out? Which period of time, violations/crimes committed and actors are defined in the mandate?
• Do detailed needs assessments and sector analyses exist for the various mechanisms? Has any mapping of international actors been undertaken which provides information about priorities and possible gaps?
• Have coordination and consultation mechanisms been established with partner governments and civil society actors? Are sufficient human and financial resources available for these mechanisms?
• Which opportunities exist to create synergies between transitional justice mechanisms and development programmes? Which coordination and planning processes are required in this context?

In Focus: **A Lack of Complementarity and Ownership in Bosnia**

The difficulties associated with processes due to issues of mandating, the absence of appropriate framework conditions, the related issues of timing and a lack of involvement of especially affected groups are apparent from the long-standing efforts to establish a truth commission in Bosnia and Herzegovina.

The United States Institute of Peace (USIP) initiated preliminary consultations on this issue with civil society organisations in 1997. However, this effort failed, not only due to the lack of political will on the part of the nationalist parties in government. The International Criminal Tribunal for the Former Yugoslavia (ICTY) also vetoed the idea, fearing it would overlap with its mandate and possibly disrupt investigations and prosecution. It was not until two years later that an agreement was reached with the ICTY; the Truth and Reconciliation Association finally submitted a draft statute to the Bosnian Ministry for Human Rights and Refugees in 2001. However, neither this effort nor the renewed attempt four years later by USIP and the Office of the High Representative (OHR) to bring forward national legislation was successful. On both occasions, the international actors failed to seize the opportunity to initiate broad-based consultation processes with civil society actors and, in particular, to involve the various organisations representing the interests of victims, missing persons and refugees and thus give them a chance to voice their needs and assert their rights – also vis-à-vis the country's political elite.

Nonetheless, there is scope to link in with various local initiatives, but this has rarely been considered until now. Human rights and peace organisations, associations representing victims and missing persons, artists and film makers have documented the facts, recounted individual fates or created space for "story telling" at local level. Many organisations hope that these pieces of the puzzle can in future be fitted together to provide a broader picture and ultimately, in a further step, be integrated into the overall context of the wars in former Yugoslavia.

3. Planning Individual Mechanisms

After analysing the context and possibilities to maintain the process, it is important to define the structural and substantive aspects of a transitional justice mechanism in more detail and look at possible ways of combining it with other mechanisms.

Prosecution

International law obliges states and the international community to prosecute war crimes, crimes against humanity and gross human rights violations. At the international level, the prosecution of war crimes has become a central mechanism marking the formal and moral break with the previous system. The formula which is increasingly being applied is that trials of key figures responsible for crimes should be initiated as soon as possible in order to send out clear signals about right and wrong. There is also an increasing tendency to set up mixed

Attention!
In a context of mass violence and genocide, but also in situations where concealed violence has been carried out by a repressive regime through a strong "division of labor", it is extremely difficult to prove the responsibility of political elites ("command responsibility") and numerous perpetrators via formal judicial proceedings. In West Germany, for example, only around 10% of former SS concentration camp guards were brought to justice; this is in line with the average conviction rate in post-conflict contexts.

courts, staffed by both domestic and international personnel. In this context, it is important:

- To create the requisite institutional conditions for criminal proceedings. This includes strengthening the justice system for the long term.

- To take account of the need to involve victims' groups and provide long-term protection and support for witnesses and victims.

- To provide appropriate resources for information and awareness-raising about the working methods and procedures of (international) tribunals, in order to avoid high expectations, misconceptions and political manipulation in the societies concerned.

Key Questions

- Are special war crimes tribunals provided for in peace treaties? Is it appropriate to establish a "mixed" or a national court? What are the advantages and disadvantages of each of these forms of justice?

- Which (new) conflicts could arise as a result of the prosecution process?

- To what extent can the courts' mandate rule out the (perception of) partiality/victors' justice? Which mechanisms must be established in the long term in order to counter the accusation of bias?

- Is the national justice system adequately resourced and equipped? Which steps are required to ensure its functionality (including lustration processes)? Are any measures envisaged to strengthen the justice sector as a whole?

- How much relevance do victims' groups attach to criminal prosecution? How is the legal status of victims in the prosecution process regulated? Which opportunities do they have to participate? Which long-term protection and support mechanisms exist for witnesses and victims, or need to be developed?

- How can the cooperation between the courts, civil society organisations and victims' organisations be developed and strengthened?

Truth-Seeking Processes

Truth-seeking processes can take very different forms – truth commissions being one of the most well-known. In general, these should be designed not as an alternative but as a complement to criminal prosecution and should be developed in combination with other transitional justice mechanisms. Reparation programmes and political reform processes, for example, are often – but *not necessarily* – based on recommendations made by these commissions. For a truth commission to be successful, it is essential:

- To guarantee the independence of the commission and the credibility and integrity of its members.

- To define its mandate precisely and not too restrictively (e.g. as regards the period of time under review and the victim groups). It is also essential to define how binding its recommendations are to be.

Attention!

Poor follow-up mechanisms and/or a lack of political will in combination with inadequate resources have emerged as a key weakness of truth commissions. In order to sustain their positive effects, national and international actors must gear their political and financial commitment towards the long term and, in particular, aim to create synergies with other transitional justice mechanisms.

- To safeguard a commission's scope to implement its mandate, e.g. through adequate rules on cooperation with state institutions and by safeguarding the commission's access to archives.

- To attach great importance to the quality of recommendations: the more binding, detailed and specific they are, especially in relation to possible reparation programmes or essential reform processes, the more likely they are to be implemented.

- To focus on the role of civil society, which should be involved at every stage and complement and monitor the process, thereby ensuring ownership and avoiding any bias motivated by individual actors' interests.

Key Questions

- How much relevance is attached to truth-seeking processes by the various victims' groups, and which specific outcomes do they hope to achieve?

- Are traditional reconciliation and reintegration mechanisms and their underlying values in line with public truth-seeking processes, or do they conflict with them?

- What are the advantages and disadvantages of national commissions compared with other truth seeking mechanisms past (historians' commissions, local/regional commissions, and traditional mechanisms)?

- How must the mandate and composition of the commission be structured so as to ensure its legitimacy, representativity, the greatest possible balance and a comprehensive analysis of the crimes (taking account of the risk of a hierarchisation of victims)?

- Which procedural rules (information exchange, confidentiality) can be established in order to create synergies between truth commissions and criminal prosecution?

- Is cooperation between the commission, civil society and victims' groups ensured? Are there any mechanisms in place to prevent retraumatisation of witnesses?

- Is there any long-term political and financial commitment for follow-up mechanisms? If not, how can this be established?

- Which opportunities exist to incorporate the findings of commission reports into the planning and implementation of development programmes?

Reparations

Reparations are an important but often neglected element of dealing with the past and reconciliation processes. The material and symbolic, individual and collective compensation for the injustice suffered sends out a signal that responsibility for human rights violations has been assumed and, at the same time, the rights of survivors are recognised and support is being provided so that they can rebuild their lives. Reparation programmes thus lie at the interface between the violent past and a more peaceful democratic future.

Reparations may have various bases. A distinction must be made between:

- *Individual legal entitlements* arising from national or international law, which can be enforced through *legal proceedings* at national, multilateral or international level, and

- A formal *reparations policy*, which is based primarily on *political will* and/or priorities.

Often, the recommendations made by truth commissions establish the formal framework for this type of reparations policy. The range of measures may include individual payments to victims, the establishment of memorial sites or the introduction of memorial days, better access to health and education, the payment of pensions, the issuing of death certificates to relatives of missing persons, or the rehabilitation of detainees.

When developing and implementing reparations programmes, it is important:

- To devise eligibility criteria for different categories of victims; in this context, the approach should be as broad as possible in order to avoid any hierarchisation or marginalisation of victims.

- To create an appropriate mix of material and symbolic reparations which meets recipients' needs for a better standard of living and for moral acknowledgement of their suffering, and avoids giving the impression, which often arises among victim groups, that "blood money" is being paid.

Tip
In the context of mass violence, broad-based programmes are preferable to individual legal proceedings as unequal access to the courts and differences in compensation lead to a hierarchisation of victims and/or the exclusion of numerous victim groups. However, in the absence of a formal reparations policy, legal proceedings can be an *initial step* which generates public debate and creates the necessary pressure for more comprehensive programmes.

- To achieve an appropriate balance between the high administrative and logistical expense involved and the often limited resources available. In this context, victim-offender mediation is only gradually increasing in importance, generally in the context of traditional conflict resolution mechanisms (e.g. assignment of community work, restitution of farm animals, etc.).

- To develop specific culture- and gender-sensitive reparation measures also taking into account the particular forms of violence used and their effects on women and men.

- To strengthen victims' groups, educate them about their rights and at the same time – in conjunction with other civil society actors – to involve them in dialogue with government and/or programme design.

Key Questions
• Is there the political will for a comprehensive reparations policy? If not, how can it be established, and which processes can it link in with (e.g. ongoing legal proceedings)?
• How is the status of different victim groups determined? Do the criteria guarantee as comprehensive an approach as possible, and do they avoid the hierarchisation of victims? Are gender-specific aspects taken into account?
• How much relevance is attached to material and symbolic reparations by the various victim groups? How can these be appropriately balanced, taking account of available resources?
• Which mechanisms are in place for consultations with civil society organisations and victims' groups? Do the various victims' groups have the capacity to participate in consultations, or do this need to be developed first?
• Is information and advocacy work integrated into the catalogue of measures?
• Do mechanisms exist for victim-offender mediation? Is this regarded as useful? If so, in which form (e.g. apologies, community work, financial penalties)?
• How can synergies be created between criminal prosecution, truth commissions, DDR programmes and the reform of state institutions?

Reform of State Institutions

Democracy, justice and peace require an institutional framework. In post-conflict societies, the political system and state institutions must be able to create and safeguard room for equal opportunities, democratic participation and reconciliation processes in the long term. The security, justice and education sectors form central pillars for legal stability, the guarantee of non-repetition of human rights violations, and the development of a shard value system. In the reform of state institutions, the following aspects are therefore relevant from the outset:

- The existence of close, mutually reinforcing links between transitional justice mechanisms and the reform of the political system and state institutions.

- The integration of transitional justice issues in the development of institutional reform projects: this allows the need for *functionality* of state institutions to be linked with the need for *confidence-building and legitimacy*.

Tip
Due to the complexity and political sensitivity of institutional reform processes, it is essential to undertake detailed analyses and establish well-functioning coordination and consultation mechanisms. This must be based on cross-sectoral strategies and multidisciplinary teams of experts. Otherwise, there is a risk that programmes will be restricted to technical aspects (functionality) alone.

Dismissal from office (lustration) and screening as part of the recruitment process are an important mechanism in processes of institutional reform. This applies especially to contexts in which the national justice system is overwhelmed by the task of bringing numerous perpetrators to justice and where the current impunity can be remedied, at least in part, by non-judicial processes. When planning lustration and screening, it is important:

- To opt for a progressive, pragmatic approach: it generally takes time to train new staff and in contexts of mass violence in which the dividing lines between perpetrators and victims are diffuse, it is difficult to find new staff who were clearly not involved in human rights abuses.

- To make procedures transparent and formulate clear criteria against which to check the personal integrity and professional competence of staff, in order to avoid the risk of arbitrary or politically motivated decisions being taken.

- To establish an independent implementation mechanism (commission). This should be institutionalised so that it can operate over the long term.

The close connection between *security and justice sector reform* and transitional justice mechanisms can be illustrated by numerous examples: access to the records of the police, army and intelligence services is important for prosecution, truth-seeking and lustration alike. Unless lustration processes are coordinated with security sector reform (democratic control, internal democratisation, development of a new

Tip
In DDR programmes in particular, it is important to ensure that these do not simply reinforce a culture of impunity and lead to violence being rewarded. It is important to consider the extent to which DDR programmes can be linked with reparation programmes (e.g. victim-perpetrator mediation) and traditional conflict resolution mechanisms. When it comes to reintegration, it is also important to include psychosocial support in the planning of measures. On average, 25% of combatants are traumatised, making it far more difficult for them to reintegrate into civilian life: an increase in domestic violence, alcoholism, unemployment and a reversion to structures of violence are often the outcomes.

understanding of roles, disciplinary proceedings, a change of uniforms and symbols, human rights education) and demobilisation and reintegration processes, individuals who have been dismissed could well be reappointed, or entire units integrated into the new structures, as has occurred in El Salvador, for example. Furthermore, experience in Serbia demonstrates that a judicial system which continues to be politicised and/or weak as well as an unreformed police apparatus cannot conduct criminal investigations effectively, or guarantee due process.

This shows that reform of the justice sector in post-conflict situations should not only be geared towards creating the basic institutional and legal framework for the rule of law and better access to justice, but also to establishing special mechanisms and adequate legislation for victims protection and the prosecution of war crimes.

To create a new value base that is geared towards human dignity, equality, respect and the right to physical and psychological integrity, the *education sector* is of key importance. Priority measures in the reform of the education sector include reforms of the curriculum and textbooks, better training and professional development for teachers based on changed pedagogical concepts and principles (e.g. encouraging individual responsibility, critical reflection), promoting cultural and linguistic diversity, and improving educational opportunities for hitherto marginalised groups and minorities. Measures that help to overcome ethnic/religious segregation and contribute to the development of an integrative culture of remembrance in fragmented post-conflict societies are especially relevant here – and also particularly difficult. In general, it is important:

Special Mechanisms
In 1958, the Central Office for Investigation of Nazi Crimes was established in Ludwigsburg. To this day, the Office continues to pursue its mandate to investigate war crimes. Special prosecutors, but also gender-specific police units, witness protection programmes and national human rights institutions can be established as special mechanisms within the framework of justice and security sector reform. As a rule, adequate legislation need to be put in place first of all: this can include the integration of international legal norms into national law, opportunities for the criminal prosecution of those primarily responsible through the introduction of "command responsibility" in criminal law, and legislation on witness protection or the restitution of property.

- Within the framework of peace building, to make education reform as much of a political priority as reforms in the justice and security sector, for example. Conflict-sensitive planning is important in this context.

- To link and coordinate civil society initiatives and training opportunities within the formal education sector (e.g. human rights/peace education) with state reform processes.

- In truth-seeking and – in association with this – in developing a culture of remembrance in fragmented societies, to link in with local processes and explore opportunities to create an integrative culture of remembrance. Truth commission reports, cultural activities, symbolic acts and rituals and memorialisation can offer starting points here.

Key Questions

- Which starting points for justice and security sector reform can be identified on the basis of a detailed analysis of needs and capacities (staffing, organisational structures)? Is there sufficient political will? If not, how could this be established?

- Which conflict potential, opportunities and risks are associated with the reform projects? Who are the winners, and who are the losers?

- Are clear criteria and transparent procedures in place for lustration and screening?

- (How) can the various information and data-gathering processes (DDR, truth commission, lustration) be interlinked to beneficial effect? Which procedures must be put in place to make this possible?

- Are adequate mechanisms in place for information and advocacy about the reform projects?

- Are gender-specific needs taken into account in the reform processes (e.g. special units within the police, public prosecution service, etc.)?

- Which starting points for education reform arise from a conflict-sensitive analysis of the context? Is there sufficient political will? If not, how could this be established?

- To what extent have mutually exclusive victim identities and associated "truths" and memories developed? Which starting points exist to overcome them (education sector, culture, truth commission report)?

- Are there any consultation mechanisms to facilitate the involvement of civil society, victim groups and ex-combatants? Does civil society have the capacity to (critically) monitor the institutional reform processes? What measures are required to strengthen their role here?

Traditional Conflict Resolution Mechanisms

In the effort to apply mechanisms which are adapted to the specific culture and environment, increasing recourse is being made to local and so-called "traditional" conflict resolution mechanisms. These have become especially important in the context of mass violence with far-reaching destruction of social networks. The gacaca courts in Rwanda, established to investigate and resolve cases of individuals implicated in crimes committed during the genocide in Rwanda in 1994, and local mediation and reconciliation processes as part of the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor, are two examples. In the planning and implementation of such mechanisms, it is important:

Victim-Offender Mediation

Like truth commissions, local conflict resolution and reconciliation mechanisms are based on social processes and aim to restore the social relationships that were destroyed by war and violence. In other words, they are restorative and not punitive. Their key tools include rituals and symbolic acts, community work and the restitution of property.

- To adapt the mandate, implementation and follow-up to the context and its challenges, and, via a broad-based social process, to ensure that this is not dominated by the interests of specific groups/the political elite.

- In mechanisms which involve judicial processes (e.g. gacaca), to ensure compliance with formal procedural standards such as the presumption of innocence, the collection of evidence, witness protection, etc.

- To take account of cultural and gender-sensitive aspects, especially as such mechanisms are generally implemented by older, traditional (male) authorities.

Key Questions

- Do traditional conflict resolution mechanisms exist? If so, what are their underlying values? Do these values conflict with other mechanisms? If so, how could these conflicts be resolved?

- At which level of society and to which conflicts/crimes are these mechanisms applied? Can/must their radius be adapted?

- Which regulatory forms do they use (arbitration, mediation)? Do these need to be adapted to the conflict context?

- Which group of persons is leading the process (traditional authorities, gender issue)? Are there opportunities to expand the group? Which forms of training need to be offered?

- How is the application of traditional mechanisms viewed by victim groups? What is the status of these mechanisms compared with others?

- Have witness protection mechanisms been established?

- How can traditional mechanisms make a contribution to victim-offender mediation and the reintegration of ex-combatants?

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