

Peace Processes as Vehicle of Transitional Justice

Case Study of El Salvador, Indonesia (Aceh), Nepal,
Sudan, Uganda, and the former Yugoslavia



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Introduction

For states that emerged from armed conflict or authoritarian rule, peace negotiations offer key opportunities for the achievement of transitional justice objectives. A peace agreement that sets forth a comprehensive framework and that conscientiously responds to victims' needs can lay the groundwork for national reconciliation and renewal. Conversely, one that deals casually or carelessly with transitional justice imperatives can cause grievances to fester and entrench a culture of impunity.

These findings and visualization present common challenges, lessons and recommendations as to how peace processes can best nurture and promote transitional justice. Adapted from the Global Initiative for Justice, Truth and Reconciliation (GIJTR)'s project on Peace Process and Transitional Justice, we highlighted strategies that stakeholders might adopt in order to motivate genuine discussion of transitional justice and break deadlocks, design robust and responsive programs, and boost compliance. It also provides specific guidance on the five core elements of transitional justice: accountability, truth-

telling, reparations, institutional reform, and memorialization.

Negotiation Dynamics

Conflict resolution and healing, it is argued, require that past wrongs be forgiven or forgotten; retrospection will only serve to prolong conflict and preserve enmity. If unable to overcome obstructionist negotiating tactics, a peace process risks being unable to deliver a meaningful form of transitional justice.

Designing Effective Institutions

a. Holistic Approach

A holistic and integrated approach to transitional justice is vital owing to the collective comprehensiveness and interdependence of its constitutive components. A process skewed too far toward accountability, for instance, will not satisfy victims' needs for truth, redress, and structural reforms.

b. Contextual Adaptation

Transitional justice programs must be

tailored to their local contexts across a number of different dimensions: different types of conflict create different transitional justice needs and opportunities; transitional justice needs may vary within a state depending on how different regions experienced the conflict and transitional justice must account for and ideally incorporate cultural norms and practices.

c. Specificity of Language

Peace agreements that precisely articulate the obligations they require, the time and place of implementation, and the penalties for noncompliance are usually thought to be stronger commitment devices.

d. Civil Society, Victims' and Women's Involvement

During negotiations, civil society, victims' groups and women may be consulted as to their views on the shape and priorities of transitional justice.

e. International Participation

International experts sitting on committees or judicial mechanisms as members or observers may provide technical guidance and oversight. Internationalized mechanisms, such as tribunals or truth commissions, may be perceived as more impartial, capable, and legitimate.





Elements of Transitional Justice

Accountability

Well-crafted peace agreements erect an accountability framework that clearly defines the relationships between its constitutive elements. One of these may be the establishment of new judicial mechanisms, such as specialized chambers or hybrid courts. Within both TJ mechanisms and other accountability mechanisms, the issues of child perpetrators and gender-based violence should be handled with special care.

Truth-Telling and Reconciliation

Truth-telling may help to establish the identities of perpetrators, the root causes of human rights violations, types of violations, circumstances and facts surrounding violations and appropriate remedies. Peace agreements may reference different types of truth-telling processes, including investigatory commissions and “mappings” of patterns in the violations. The truth commission is the most prevalent mechanism for truth-telling that appears in peace agreements.

Reparations

Peace agreements have historically struggled to adequately define the class of victims eligible for monetary reparations, erring both towards over- and under-inclusivity. Drafters should install culturally appropriate procedures to protect survivors and should consider

gender-sensitive forms of proof. In particular, reparation should be provided to marginalized victims and vulnerable communities, including women.

Institutional Reform

Institutional reform, especially vetting, should be sequentially prioritized due to its instrumental value. Beyond expelling bad actors, institutional reform should create pathways for underrepresented groups to enter public service. Peace agreements should therefore introduce anti-corruption guidelines or committees to guarantee long-term public sector accountability. To guard against future abuses, peace agreements may also establish a human rights commission or an ombudsman to monitor governmental policies.

Memorialisation

Negotiators of the Peace agreement can designate funding and staffing to state-led memorialisation projects and can promise support and training for community-led initiatives. Peace agreements may further contribute to memorialisation by guaranteeing the protection and preservation of memorial sites and of the historical record.



Common Challenges

Shaping the Agenda on Transitional Justice

There are a number of reasons that stakeholders may not wish to engage in transitional justice, or otherwise may not view it as a priority agenda item.

- **Peace v. justice:** Peace and transitional justice are often viewed as antithetical rather than complementary. This conception led to the pursuit of the former at the expense of the latter.
- **Unwillingness to negotiate transitional justice:** Political leaders have proven resistant to engaging in discussions on certain aspects of transitional justice, especially accountability.
- **Overlooked transitional justice mechanisms:** Core components of transitional justice are simply discounted or neglected.

included in a peace agreement. As regards institutions to be established, specificity as to the structure, mandate, and composition may be important.

- **Amnesty:** This striking feature of the sample speaks to the complexity of negotiating this issue. Amnesty can promote reconciliation, incentivize disarmament, relieve the burden on the justice system, and encourage the return of exiles. However, it can also

Designing Transitional Justice Interventions

Once transitional justice has been tabled, negotiators face a number of strategic choices in determining its mechanisms.

- **Specificity:** There are distinct trade-offs as to the level of detail to be



contribute to the cementing of a culture of impunity.

- **Eligibility for reparations:** The contrasting experiences point to a common pitfall in defining the class of victims eligible for reparations.
- **Victors' justice:** Arms-length negotiations may nonetheless yield biased outcomes.
- **International involvement:** International actors may become involved in transitional justice at many different stages.

Implementing Transitional Justice Outputs

- **Institutional capacity, resources, and trust:** The general point that state institutions may not be up to the task of actualizing commitments to transitional justice due to deficits in capacity, resources, and public trust.
- **Political will:** Relatedly, the state may prove unwilling to take the required steps.
- **Lengthy processes:** Proving the adage that justice delayed is justice denied, prolonged transitional justice processes as a source of frustration and a barrier to healing.





Lessons Learned

Civil society, victim and women involvement

The importance of the role played by civil society members, women and conflict victims in transitional justice, both in the negotiations process and participation in the contemplated transitional justice processes.

Implementation oversight

The importance of closely monitoring progress of implementation.

Balance and coordination among transitional justice mechanisms

Negotiators must understand the different functions fulfilled by different transitional justice mechanisms and the link between them, encapsulated in the common negotiating maxims that “nothing is agreed until everything is agreed.”

Local tailoring

Recognizing that transitional justice initiatives must be adapted to meet the needs of the local population.

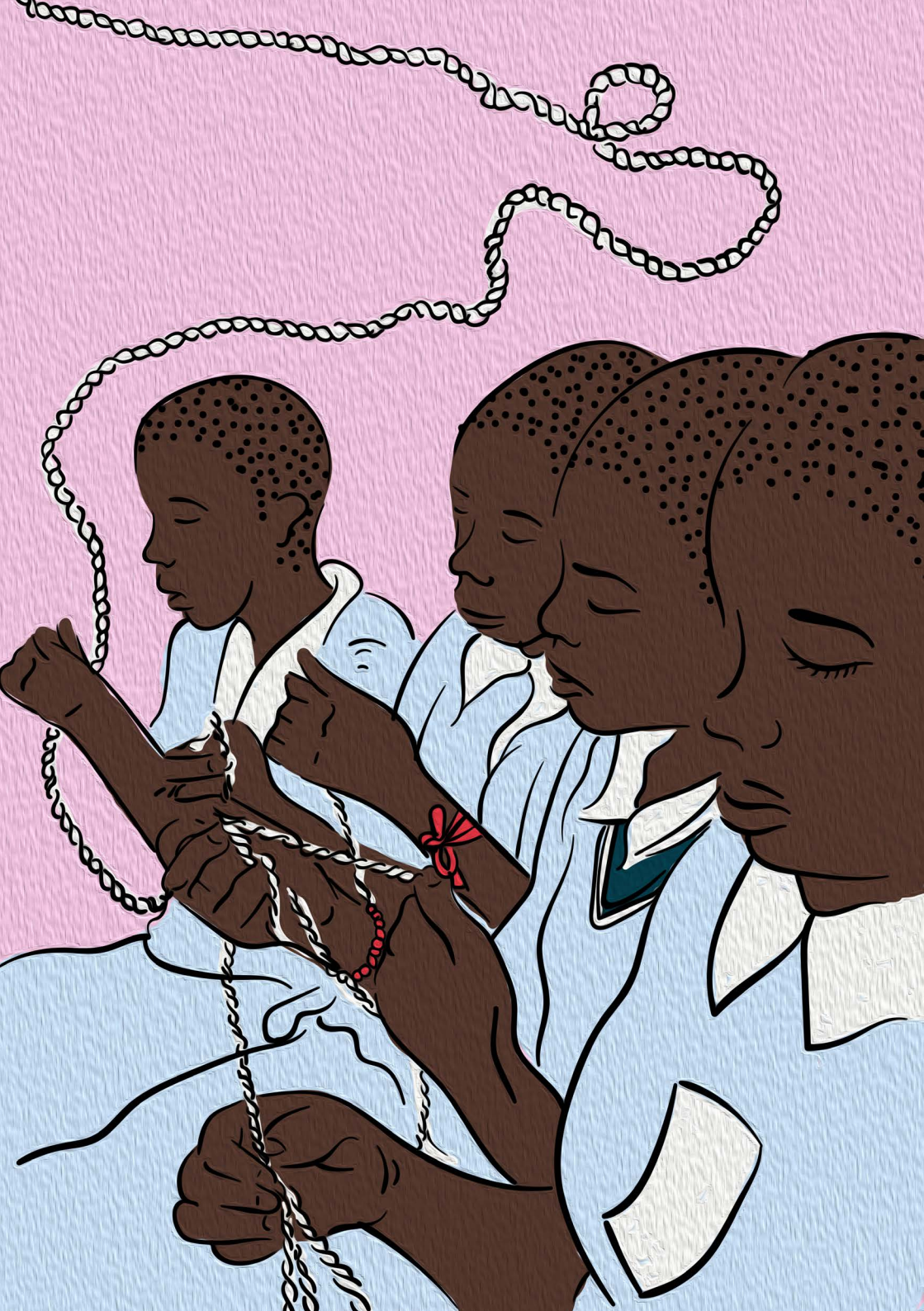
Delegation preparedness

The need of a well prepared negotiating team on transitional justice agenda.

Conclusion

Peace processes represent pivotal moments for post-conflict societies during which transitional justice institutions may take shape. In designing the mechanisms to be included in a peace agreement, they should take a holistic approach that provides for accountability, truth-telling and reconciliation, reparations, institutional reform, and memorialization. They should look for openings to involve civil society and victims' groups, adapt their prescriptions to local context, and weigh the respective merits of constructive ambiguity in the text and international participation in transitional justice institutions.





Case Study Briefs

Lessons, challenges, and experiences explained above were drawn from several countries to better understand the context of peace process and transitional justice initiatives -- that took place in Indonesia, Nepal, El Salvador, Sudan, Uganda and former Yugoslavia and the Balkans. All are documented and written into case studies that can be read further in GIJTR's report, *Negotiating Justice: Peace Processes Vehicles for Transitional Justice*.





Indonesia (Aceh)

In 2005, the government of Indonesia and the opposition Free Aceh Movement (GAM) signed the Peace Agreement MoU Helsinki, which set out in general terms the future government of Aceh and attempted to address the key social, political, and economical causes of the conflict to provide a sustainable peace. The agreement contained various transitional justice elements, including amnesties, DDR, the establishment of a Human Rights Court and a Truth and Reconciliation Commission for Aceh, and specified institutional reforms to help strengthen the rule of law.

Progress in realizing the accord's key provisions relating to justice and accountability has been

slow. After a long delay, the Acehnese parliament passed a local law to establish a Truth and Reconciliation Commission in 2013, with the permanent commission finally established in 2016. Criminal investigations have been opened into a few cases of gross violations of human rights, but the Human Rights Court was never established. In general, the parties to the conflict have demonstrated a willingness to compromise on the rights of victims in exchange for maintaining peace.





Nepal

The Comprehensive Peace Accord (CPA), adopted in November 2006, articulated a commitment to a High-Level Truth and Reconciliation Commission in order to investigate the truth and create an environment of reconciliation in Nepal. Additionally, the Baluwater agreement and 2007 interim constitution also included commitments to establishing a truth commission, providing reparations, and encouraging reconciliation. The negotiation process included the signatory political parties, a High-Level Peace Committee, and the Peace Secretariat, which hosted representatives from political parties. However, civil society was largely excluded from the process, with the only representation being five civil society representatives who attended the talks as observers. Additionally, as discussions continued, both the Maoists and parties aimed to avoid retributive justice and prosecution, and reconciliation became the focus, rather than truth-telling or accountability. One of the main issues of the transitional justice process was the provision of amnesty, which was compounded by overly broad language in the peace agreement that allowed the government to weaken already inadequate justice provisions through years of legislative debates around the amnesty process.

Two institutions were established by

subsequent legislation—the Truth and Reconciliation Commission (TRC) and the Commission of Inquiry on Enforced Disappeared Persons (CIEDP). The TRC was established as a distinct body with the power to investigate the incidents of gross violations of human rights, bring about reconciliation, and make recommendations on reparations and legal action. However, as of February 2019, the TRC had only completed preliminary investigations in less than 10% of its cases due to limited resources, funding, and lack of language services for nearly 50% of Nepal's population who cannot read nor write, while the CIEDP had commenced investigations in 75% of cases. The question of amnesty, along with lack of political will to hold perpetrators accountable, weak language in the peace agreement, lack of adequate funding, and lack of meaningful engagement of diverse stakeholders, has played a significant role in delaying the establishment and implementation of the TRC, as well as the CIEDP to a lesser extent. Additionally, the lack of meaningful engagement of diverse stakeholders, especially civil society, negatively impacted the transparency and effectiveness of transitional justice processes in Nepal. However, the fact that as of 2019, the TRC had received over 63,000 complaints, demonstrates the commitment of victims and their families to justice and truth-telling.



El Salvador

The Peace Accords were signed by the Salvadoran government and the Farabundo Martí National Liberation Front (FMLN) on January 16, 1992, ending El Salvador's 12-year civil war. The main provisions included in the UN-backed agreement were: a cease-fire; the demobilization of military and guerrilla forces; the establishment of the FMLN as a political party and the reintegration of its combatants into society; changes in the nature and responsibilities of the country's armed forces, as well as a reduction in their size; the creation of a new national civilian police force and an intelligence service separate from the military; human rights measures such as the creation of a National Ombudsperson Office; electoral and judicial reforms; legal reforms, including constitutional reforms

to ensure and advance human rights protections. Many of these measures were either never implemented, or went into effect only after a prolonged delay.

The peace process in El Salvador included some transitional justice mechanisms, such as the establishment of the Truth Commission. However, without extensive participation and advocacy from civil society actors during the initial transitional process, implementation, monitoring and evaluation of truth and justice measures were elusive and inherently limited. The current epidemic of violent crime and gang violence in El Salvador, which has placed the country at the top of the list of countries with the highest murder rates, has its roots in the culture of impunity for crimes committed against civilians during the internal armed conflict.





Sudan

The Juba Agreement for Peace in Sudan, signed in October 2020, is distinguished by its region-specific structure. Transitional justice was therefore largely negotiated in five distinct regional tracks, allowing for the accommodation of diverse needs. Common demands included representation in state institutions, socio economic development, and a general amnesty.

Because it is so recent, it is too early to fully assess the success of the Juba Agreement as a vehicle for transitional justice. However, a number of early obstacles have been identified, including coordination across the different regional tracks, competition over limited resources during Sudan's political transition, and the buy-in of non-signatories.

While it does include basic provisions for truth-telling and memorialization, the Juba Agreement is most concerned with accountability, institutional reform, and reparations. Accountability was a primary focus of the negotiations, including the handover of members of the former regime to the International Criminal Court (ICC) and the creation of the Darfur Special Court for War Crimes. Security-sector reform was an equally prominent topic, culminating in the elaboration of a detailed integration process and a series of institutional reforms. In addition, the Juba Agreement establishes a National Lands Commission, with regional sub-directorates, to receive and adjudicate land claims and a Compensation and Reparations Fund.





Uganda

In 2007, the Ugandan government committed to promote redress for violations in the Agreement on Accountability and Reconciliation signed in Juba. Five broad forms of reparation measures were recognized: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The Government of Uganda mandated the Justice, Law and Order Sector (JLOS) to institutionally guide Uganda's transitional justice process. The Juba Peace Agreement and the recently passed Transitional Justice Policy, positioned the existing criminal justice system to establish answerability for crimes committed during the conflict in the northern region. The parties to the Juba Agreement acknowledged that Uganda had formal and informal institutions, and laws, which, with some modifications, had the potential to address the crimes and human rights violations committed. The peace agreement recognized that both the Uganda Human Rights Commission and the Amnesty Commission established under the Amnesty Act of 2000 could be utilized to drive certain aspects of the peace agreement. The Juba Peace Agreement also encourages the application of traditional justice mechanisms, such as *Mato Oput*.

Reparations seem to be uncharted waters in Uganda. There is a need for a comprehensive government-led and stand-alone framework to guide the reparations processes in Uganda. Uganda does not have a stand-alone legislative framework for providing reparations to victims of gross human violations. The great majority of victims are yet to realize their moral and internationally-acknowledged right to reparation. This poses a great challenge for truth, justice, and building sustainable and positive peace in Uganda. In addition, *Mato Oput* has been criticized as inadequately sensitive to survivors of sexual violence, who are required during the ceremony to drink from the same calabash as their perpetrators.



Yugoslavia and the Balkans

Peace agreements in the Balkans were mainly oriented towards post-conflict governance, disarmament, free elections, referendums, reintegration of territories, rights of refugees and the displaced. Rather than the agreements themselves, the primary engines of transitional justice were therefore post-conflict regional mechanisms, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the European Union (EU) accession process.

While notable progress was made in some areas, implementation lacked decisive support from political structures. It also suffered from insufficient regional cooperation in extradition of suspects and transfer

of cases and evidence. Ethnic bias, war crimes apologetics, denial of facts, witness intimidation, and divisive education continue to stand as obstacles to achieving a durable and stable peace.

The Balkans case illustrates the importance of developing and implementing different transitional justice mechanisms simultaneously, with each requiring equal attention and consideration. It also illustrates the way in which the failure of just one mechanism, can lead to serious obstruction and corruption within others.

