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TRANSITIONAL JUSTICE AND PEACE AGREEMENTS

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1. Transitional justice can be defined as the “conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹ The definition itself is somewhat problematic, in that it implies a defined period of flux after which a post-transitional state sets in, whereas in practice “transition” may cover decades. It also does not articulate what the state is “transitioning” to. For those reasons, some people prefer to talk about “post-conflict” justice, but that label has its own problems, especially where what is at issue was not primarily a conflict between two armed factions but massive repression by a government against its own unarmed people. In any case, for purposes of this paper transitional justice includes that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed at confronting and dealing with the legacies of past violations of human rights and humanitarian law.
2. The universe of transitional justice can be broadly or narrowly defined. At its broadest, it involves all those mechanisms and changes that a society undergoes to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to high school textbooks, from police and court reform to tackling distributional inequities that underlie conflict. This paper will take a narrower view, and will confine the discussion to the types of transitional justice mechanisms usually dealt with as transitional justice in peace agreements: prosecutions or civil lawsuits, amnesty, truth commissions, lustration or cleansing of security forces, formal reparations programs and state-sponsored commemoration or memorialization provisions.
3. The paper proceeds as follows: first, it maps recent debates, and experiences, on the trade-offs between peace and justice, and between truth and justice, during the last two decades. It summarizes the places where such experiences arose from commitments made in peace agreements. It then examines the current state of play of transitional justice efforts. Next it looks specifically at questions of prosecution, and at the legal status of amnesties under international law. Finally, it considers what kinds of transitional justice provisions should be incorporated into peace agreements, and what differences they may make.

EARLY DEBATES ON TRANSITIONAL JUSTICE

4. Post conflict attempts at justice are not new: war crimes trials go back to the 14th century. In the wake of both World Wars there were trials, successful and not. Torturers were tried after the fall of the Greek dictatorship of the 1970s, while a consensus among elites postponed questions of justice and reparations in post-Franco Spain and in post-Salazar Portugal.² The decade that concluded with the fall of the Berlin Wall coincided with a wave of changes, negotiated or compelled, from military dictatorships to civilian governments in the Southern Cone of South America, the Philippines and in a number of African countries. The negotiated end of South Africa's apartheid regime, and ends to the civil wars of Central America, soon followed.
5. These cases raised a lively debate regarding the proper strategy after a dictatorship falls or a civil conflict ends. Much of the debate was framed by the conditions of transition in Latin America and Eastern Europe. In the former, the prior dictators and their military and civilian supporters still wielded a good deal of power, and could credibly threaten mayhem if their interests were not respected. Moreover, these transitions were largely negotiated between elites, not compelled by military defeat or popular uprising. Under these circumstances, diplomats, political scientists and also human rights activists argued that it was shortsighted to overwhelm newly installed, fragile civilian governments with demands for criminal prosecutions. Thus, amnesties were an inevitable concession, trading justice for the past in exchange for justice in the future.
6. In Argentina and later in Chile, incoming civilian governments had commissioned broad-based commissions of notables to investigate and document the human rights violations of the prior regime. While both the Argentine Sábato Commission and Chile's Truth and Reconciliation Commission actually turned their findings over to the courts (and, in Argentina, members of the ruling juntas and a few other top security force officers were prosecuted), the model of a "truth commission" gained force as a "second-best" option where trials were deemed too destabilizing. Truth commissions seemed less confrontational while still not ignoring the violations and doing something for victims.
7. The emphasis on "truth" required a theory of why the truth was so important. In Latin America, the rationale was tied to the nature of the repression. For the most part, the military governments did not openly kill their opponents. Rather, large numbers of people were disappeared, picked up by official or unofficial security forces who then refused to acknowledge the detention. Almost all were killed, often after extended torture, and in many cases the bodies were never found. Even when the regimes' opponents were outright murdered, it was often by unofficial death squads who wore civilian clothes and provided a measure of deniability to the regimes. The families of those who disappeared were ostracized as a climate of generalized terror set in.
8. In Eastern Europe, the period of massive killings had usually passed long before, but there was a pervasive sense of constant surveillance and arbitrary punishment handed down by a state that hid its true face. Opening up of state archives and historical commissions was the Eastern European response. Truth was needed to reverse the silence and denial of the dictatorship years, to establish the extent, origin and nature of the crimes, which were not well known, and to know who had collaborated in an effort to limit their future influence. Even though the human rights violations were usually common knowledge, there was a huge gap between knowledge and acknowledgement.³
9. Psychological research, especially with torture survivors, reinforced the notion that truth was important in itself. Survivors seemed to be helped by telling their story to a sympathetic listener and by seeing it within a larger social context. It seemed reasonable that, just as individuals need "closure" to leave trauma behind, whole traumatized societies would benefit from a public airing

leading to closure. Religious leaders chimed in, arguing that knowing the truth would allow the victims to forgive without forgetting and the perpetrators to confess and atone, thus setting the stage for former enemies to live together.

10. The South African experience became the best-known of these experiments. An amnesty law was required in the country's interim constitution, but the Parliament decided to tie amnesty to full disclosure of the crimes by any individual seeking amnesty. They grafted this amnesty process onto a Truth and Reconciliation Commission aimed at hearing victims stories, documenting the violations, and providing recommendations.
11. The backers of the South African TRC's, unlike the proponents of previous TRCs, did not argue merely that a truth commission was a second-best alternative where trials were unavailable, although they did point to the fear of a protracted civil war as motivating an amnesty law. Rather, they insisted, a well-run commission could accomplish things no trial could provide. It could focus on the overall pattern of violations, rather than zeroing in on just those cases that happened to be brought to trial. It could keep the focus of testimony and discussion on the victims rather than the perpetrators, and allow victims to testify in a supportive setting more conducive to healing than the sometimes brutal cross-examination of a criminal or civil trial. By offering amnesty in exchange for confession, it could elicit information from perpetrators that would be unlikely to emerge in a criminal trial where the burden of proof remained on the state. Moreover, non-judicial methods were better at dealing with the many shades of gray that characterize most conflicts. Trials divided the universe into a small group of guilty parties and an innocent majority, which was thereby cleansed of wrongdoing. In reality, however, large numbers of people supported those who committed the actual violations, and even larger numbers turned their faces away and were silent. Trials could not adequately engage with those nuances.
12. Truth commissions became a staple of the transitional justice menu. They were incorporated into U.N. sponsored peace accords in El Salvador, Guatemala, Sierra Leone, Democratic Republic of Congo, Burundi and elsewhere.⁴ Other elements of the transitional justice "toolbox" were used far less frequently. Lustration or cleansing of political leaders and security forces was a major component of efforts in the Czech Republic and elsewhere in Eastern Europe, but was criticized for being overbroad and based on unreliable secret police records. Army officers were vetted in El Salvador. Reparations programs were implemented in Argentina, Chile, and (eventually, on a scaled-down basis) South Africa, and are just now being carried out in Guatemala, but beyond these reparations efforts are scarce. Commemoration has taken a wide range of forms, including monuments, reburials and grave markers, conversion of prisons and torture sites into museums and the like.
13. By the time of the South African TRC in 1995, a further set of considerations had to be added to the mix. In the early 1990s, a bloody ethnic conflict in the former Yugoslavia left 200,000 dead. Western powers dithered, but eventually agreed to try to deter ongoing atrocities by setting up an international criminal tribunal. In addition to deterrence, the tribunal was supposed to contribute to reconciliation through justice, to create a historical record, and to remove some of the worst offenders from positions of power. It was set up via Security Council resolution, which in theory at least ensured the cooperation of all U.N. members. A year later, in 1994, the slaughter of over three quarters of a million people, from the Tutsi ethnic minority and moderate majority-ethnicity Hutus who opposed the killing, during 3 months in Rwanda, prompted the creation of a similar international criminal tribunal for Rwanda.
14. Criminal prosecution was seen as essential in these cases in part because the killings had been massive, open and notorious (indeed, broadcast on Rwandan radio) and so a "truth commission," by itself, was thought both inadequate and unnecessary. It seemed clear that in

some cases at least, justice as well as truth were crucial. Only trials could provide for the confrontation of evidence and witnesses that would create an unimpeachable factual record. Moreover, only trials could adequately individualize responsibility, holding the guilty parties liable without stigmatizing entire ethnic or religious groups. This was important to avoid continuing bouts of violence as well as the temptation of private revenge.

15. The Tribunals were praised for reaffirming the principle that accountability was an important international concern. Their Statutes, Rules of Evidence and Procedure, and rulings were milestones in the development of international criminal law, and they served as training grounds for a corps of international investigators, lawyers and judges. They developed important jurisprudence on genocide, crimes against humanity and war crimes, among other issues. They contributed to creating an authoritative record of the origins and nature of the violence, incapacitated a number of offenders, allowed some victims to tell their story, and limited the ability of some local authorities to do further mischief. They established that heads of state were not immune from trial before an international tribunal, and pioneered techniques like the use of sealed indictments and plea bargains in the international criminal context. As of October 2004, the Yugoslav Tribunal has indicted fifty-two individuals, including former president Slobodan Milosevic. The Rwandan Tribunal has indicted twenty-one leaders of the Rwanda genocide, including the former army Chief-of-Staff, bringing the total number of indictees from both tribunals to seventy-three.⁵
16. And yet, by the end of the decade criticism mounted as well. The Tribunals were enormously expensive and time-consuming, and critics noted that the same resources might have been better spent on rebuilding the national legal systems. They seemed remote from the “target” societies, both literally and figuratively, and it was doubtful whether the populations of the Balkans or Rwanda accepted the facts established in their rulings as authoritative.⁶ It was unclear what their long-term legacy would be, as domestic courts seemed woefully unprepared to take up the cases the Tribunals lacked resources to pursue.
17. Two other events at the end of the 1990s raised the profile of international justice efforts: the creation of the International Criminal Court and the arrest of Augusto Pinochet. After a number of preparatory meetings, a conference convened in 1998 to create the Rome Statute of the International Criminal Court. The ICC has jurisdiction over genocide, crimes against humanity, and war crimes. (A fourth crime, aggression, will be added once defined.) Unlike the Yugoslav and Rwanda Tribunals, the ICC’s jurisdiction is complementary to that of national courts: it can only prosecute when local courts prove unable or unwilling to do so. As of 2004, some 97 countries are parties to the ICC Statute. The prosecutor has announced his first investigations, but no indictments have been forthcoming to date.
18. Scarcely three months after the signing of the Rome Statute, the former head of Chile’s military government, Augusto Pinochet, was arrested in London under a provision of Spanish law providing jurisdiction in local courts for cases of genocide, terrorism and other international crimes under ratified treaties. The British House of Lords found that he had no immunity as a former head of state from charges of torture, and that torture constituted an “extradition crime” under U.K. law, at least once the U.K. joined the Convention Against Torture. The highest Spanish criminal appeals court also upheld the prosecution under Spain’s universal jurisdiction law.
19. These two major trends – the increasing use of investigative or “truth and reconciliation” commissions and the use of international and transnational trials – came together by the beginning of the new millennium. The debate about truth versus justice seemed to be resolving in favor of an approach that recognized the value of both approaches. Even those who had argued strenuously in favor of a non-prosecutorial, “truth-centered” approach recognized

exceptions for crimes against humanity, while advocates of prosecution recognized that a truth-seeking and truth-telling exercise could serve as a valuable precursor or complement, even if not a substitute, for prosecutions. This mutual recognition combined with increasing attention at the international level to issues of reparations and structural reform. Practitioners and scholars began to speak of a “package” of measures, of an intertwined set of obligations arising in cases of massive or systematic violations, composed of truth, justice, reparation and guarantees of non-repetition.

THE NEXT GENERATION

20. As the new millennium began, there was an increasing consensus that in the wake of massive human rights and humanitarian law violations some kind of transitional justice measures were needed. The consensus was never absolute: Mozambique, for example, decided against confronting its past. However, by and large, for successor governments the no-action option was no longer either desirable or viable. Many of these governments, moreover, had international observers, missions, administrators or advisors present, and these people generally urged attention to transitional justice issues. Their concerns dovetailed with those of international banks and aid agencies, which had discovered that increased attention to the rule of law was a prerequisite to economic development.
21. One major aspect of this new phenomenon is the simultaneous existence of a number of different mechanisms aimed at transitional justice. From being substitutes for trials, truth commissions are now often seen as complements to criminal processes, and a number of them have coexisted with ongoing criminal investigations. The relationships between these two institutions necessarily become more complicated, as they must navigate issues of evidence-and witness-sharing, division of labors, and the like. Thus, Sierra Leone has had both a Truth Commission and a Special Court, East Timor has both a Commission for Truth, Reception and Reconciliation and Special Crimes Panels (and prosecuting units). Beyond the truth commission/court bifurcation a whole array of unique methods for combining truth-seeking and prosecutorial functions developed. Thus, for example, the Peruvian Truth and Reconciliation Commission contained a special unit whose job was to cumulate and organize evidence of crimes (and criminals) that could be presented to prosecutors. The Mexican Special Prosecutor, in contrast, has a citizen advisory committee that sees its job as compiling a historical record.
22. Along another dimension, this new multilayered reality exhibits an increasingly complex set of relationships among the local, national and international planes. Early experiences with truth commissions and courts were almost completely national, as in South Africa or Chile (with some international assistance), or completely international, like El Salvador. More recently, however, peace accords have created more complex interrelationships between the national and international: agreements between governments and the U.N., for instance, to share responsibilities. The Guatemalan Historical Clarification Commission pioneered the use of a “hybrid” institution composed of both national and international commissioners and staff; a subsequent commission in Sierra Leone followed a variant of that model. “Hybrid” courts in East Timor, Sierra Leone, Kosovo, Cambodia and elsewhere also combine international and national authority and staffing in various ways.⁷ In theory, these hybrid institutions can combine the independence, impartiality and resources of an international institution with the grounding in national realities and culture, and the reduced costs, of a national effort. Or they can create orphan institutions fully owned by neither their international nor national progenitors.
23. Two dimensions – national/international, or truth commission/trial—are no longer enough to map the universe of transitional justice efforts. Transitional justice now reaches down into the local village or neighborhood level, and makes use of a number of techniques drawn from or

influenced by local customary law that combine elements of truth-telling, amnesty, justice, reparations and apology. In East Timor, the Truth Commission organized Community Reconciliation hearings where low-level perpetrators (none who had committed murder or crimes against humanity) were granted immunity from formal prosecution in exchange for appearing at a community-level hearing, recounting their crimes, and carrying out a sanction imposed by the community itself. Sanctions ranged from apology, to minimal payments, to rebuilding houses or schools. In Rwanda, the government is carrying a large-scale experiment in the use of village-level gacaca courts to judge alleged perpetrators of the 1994 genocide. These proceedings, like those in East Timor, exclude those accused of the most serious crimes.

TRANSITIONAL JUSTICE AND PEACE AGREEMENTS

24. The increasing attention to transitional justice issues in post-conflict periods is reflected in the explicit attention to the subject in some, but not all, peace agreements. This section seeks to evaluate eight specific agreements. These range from a single omnibus agreement (Burundi) to a series of agreements negotiated over a period of several years (Guatemala). The question of which provisions of the agreement concern “transitional justice” can be a bit tricky. For example, provisions on combatant reintegration, resettlement of people displaced by violence, or on police, judicial or even agrarian reform, might be considered part of a package of transitional justice measures in that they seek to undo the causes or consequences of the conflict. Nonetheless, for ease of comparison this study will look only at provisions dealing with prosecutions or amnesties, truth commissions, vetting of security forces, and prisoner releases within the rubric of transitional justice. In addition to the eight agreements studied, useful provisions from other recent agreements will be referenced.
25. The Mozambican 1992 accord has no explicit provisions on dealing with the past. Prisoners, except for those held for ordinary crimes, are to be released, a new police force dedicated to human rights is to operate (but there is no vetting procedure) and government entities are to respect human rights in the future. The Northern Ireland Good Friday accord is also lacking in specific transitional justice provisions, with the exception of prisoner releases. There is a procedure and a timetable set for prisoner releases, and a government commitment to the reintegration of released prisoners. The agreement, in a section labeled “Reconciliation and Victims of Violence, states that “[t]he participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation.”⁸ The parties refer to the work of the Northern Ireland Victims’ Commission, which had been set up earlier by the British government. The agreement also finds that “victims have a right to remember as well as to contribute to a changed society,”⁹ but the right to remember is not translated into any truth-commission like mechanism, but rather into the provision of social services, support for civil society reconciliation initiatives, and the creation of a culture of tolerance. Subsequently, a number of inquiries focused on notorious incidents such as the Bloody Sunday inquiry.
26. The 1991 Cambodian peace accords contained a number of oblique references to the past. For example, the Preamble recognizes that Cambodia's tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past. The article on human rights (art. 15) states that the government commits to “take effective measures to ensure that the policies and practices of the past shall never be allowed to return.” With regard to prisoner releases, the agreement calls for the release of all prisoners of war and civilian internees, to be accomplished by the earliest possible date, with “civilian internees” defined as “all persons who are not prisoners of war and who, having contributed in any way whatsoever to the armed or political struggle, have been arrested or detained by any of the parties by virtue of their contribution thereto.”¹⁰ This clause makes no exception for those accused of

national or international crimes. The oblique language and lack of stronger provisions was apparently the result of political pressure from the U.S. and China, neither of whom wished to see their protégés subject to sanctions.¹¹ It took until 1997 for discussions on bringing to justice those responsible for genocide and crimes against humanity to begin,¹² and until 2004 for a final agreement on the structure, function and financing of a court to be put into place.

27. A number of agreements dealt more or less explicitly with the question of prosecutions and amnesty.¹³ In Sierra Leone, the Lomé accord granted full and complete pardon specifically to rebel leader Foday Sankoh, as well as

absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

28. It also accorded powerful political positions to AFRC/RUF rebel leaders.¹⁴ In lieu of prosecutions for the crimes committed during the war, the Lomé Agreement called for the creation of a truth and reconciliation commission, which was in due time established.¹⁵ The UN representative to the peace negotiations appended a reservation to the Lomé Agreement, stating that the amnesty cannot apply to genocide, crimes against humanity, war crimes and other serious violations of international crimes.¹⁶ The UN High Commissioner for Human Rights insisted that peace was incompatible with impunity.¹⁷ Subsequently, as detailed below, the Sierra Leone government and the U.N. agreed to set up the Special Court for Sierra Leone.
29. In Bosnia-Herzegovina, transitional justice provisions in the Dayton Accord were colored by the existence of the ICTY, established before the accord. The peace accord affirms the duty to cooperate with the tribunal, and excludes from public office anyone who is under indictment or serving a sentence imposed by the ICTY. The ICTY provisions extend to prisoner exchanges, where the parties are to “release and transfer without delay all combatants and civilians .. in conformity with international humanitarian law” and with any ICTY order for arrest, detention, surrender of or access to a prisoner.¹⁸ Annex 7 of the Agreement on Refugees and Displaced Persons similarly provides for an amnesty for “any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute” of the ICTY. Moreover, “[t]he Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.”
30. Article 18 of the most recent peace agreement, in Burundi, calls for the transitional government to request the establishment of an International Judicial Commission of Inquiry to investigate acts of genocide, war crimes and other crimes against humanity and report thereon to the U.N. Security Council. It also calls for a truth and reconciliation commission and contains provisions regarding refugee resettlement and restitution of lands.
31. The Salvadoran peace accords contained a number of oft-forgotten provisions on ending impunity through judicial means, forgotten largely because these provisions were undermined by a subsequent amnesty law. The Armed Forces agreement stated that “the parties recognize the

need to clarify and put an end to any indication of impunity on the part of officers of the armed forces particularly in cases where respect for human rights is jeopardized.... All of this shall be without prejudice to the principle, which the Parties also recognize, that acts of this nature, regardless of the sector to which their perpetrators belong, must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible.”¹⁹ In addition, a commission (the “Ad-hoc Commission”) of Salvadoran notables was set up to purge the military of human rights violators; it eventually recommended over a hundred dismissals.²⁰ The section of the agreement dealing with a truth commission began by noting that while the commission might yield results in the short term, its creation was “without prejudice to the obligations incumbent on the Salvadoran courts to solve such cases and impose the appropriate penalties on the culprits.”²¹ The fact that the commission had identified a case was to have no bearing on any legal investigation.

32. Similarly, the Guatemalan parties, in the global accord on human rights, “coincided in that firm action is needed against impunity. The Government will not instigate the adoption of legislative or any other kind of measures aimed at impeding the trial and punishment of those responsible for human rights violations.” In addition, the government pledged to specifically criminalize disappearances and summary executions, to press internationally for their proscription, and to avoid trying human rights violators outside the normal court system. The Guatemalan accord also creates a truth commission.²²
33. The agreements with explicit provisions on the creation of a truth commission differ in a number of ways. The earlier Salvadoran commission was composed of three international figures, on the theory that no Salvadoran could be seen as impartial. Due to difficulties with this approach, the Guatemalan and Sierra Leone commissions were both hybrids, with a mix of national and international members and staff, while the Burundi commission will be composed of 25 members appointed by the president. The Salvadoran Commission on the Truth focused on emblematic or illustrative “serious acts of violence” from 1980-1992; the Guatemalan Commission was tasked with investigating “human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict” from its beginning until the accord (some 30 years). The Sierra Leone commission was to “create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone,” from 1991-99; the new Burundi commission is to cover the period 1962-2000.
34. All the commissions were to investigate, make findings, write a report and make recommendations. In the Salvadoran case, the parties undertook to carry out the recommendations, while in Sierra Leone the commission was to “submit its report to the Government for immediate implementation of its recommendations;” the Guatemalan accord had no such provisions. In a reaction to the Salvadoran commission’s decision to “name names” of human rights violators, the Guatemalan commission’s mandate explicitly prohibited attributing responsibility to any individual. None of the agreements included public hearings, although the Sierra Leone commission held them. The Burundi agreement is silent on all these particulars, establishing only that the Commission will have 25 members drawn from Burundian society.
35. The range of provisions dealing with the past in peace agreements shows a trend towards more explicit consideration of the subject, perhaps driven by international actors and observers. Moreover, there is a convergence on the desirability of a truth commission (albeit with varying characteristics), and an increasing reference to the need for some prosecutions and to the requirements of international humanitarian law (albeit not universal, as in Sierra Leone). Vetting and reparations issues remain largely off the table.

36. However, a peace accord and the actual implementation of transitional justice measures may be two very different things. Thus, the Lomé Accord does not foresee the subsequent setting up of the Sierra Leone Special Court, nor does the Cambodia agreement reflect the subsequent decision to set up a hybrid international court there. Conversely, the Salvadoran accords speak eloquently about the need for judicial measures to combat impunity, yet do not reflect the amnesty law, promulgated upon receipt of the truth commission's report, that have left such pronouncements unfulfilled. The conclusion must be that peace accords act like a snapshot of political and legal conditions at a point in time, but subsequent developments may fundamentally alter their terms.

THE QUESTION OF AMNESTY

37. Perhaps the sharpest tensions around issues of transitional justice arise around the question of whether, and when, amnesty may be granted for serious violations of human rights and humanitarian law (sometimes framed as international crimes). As a preliminary note, amnesty refers to a formal promise to forego prosecution, and to treat the alleged crimes as though they had never happened. It is closely related to, but not the same as, a pardon, which is a decision to forego punishment (or further punishment) while leaving the underlying criminal conviction and findings intact. A decision to avoid an amnesty in a peace agreement is not the same as a promise (or threat) to prosecute: lack of resources, prosecutorial discretion, dysfunctional courts or even intimidation of judges and witnesses may well lead to situations where there is neither amnesty nor prosecutions.
38. Amnesty is not problematic when applied to insurgent forces simply for belonging to, or fighting with, the insurgency, or for related offenses such as carrying arms or false identification. However, the granting of amnesty for serious human rights violations (defined by the Inter-American Court as including torture, summary or arbitrary executions and forced disappearances) and serious humanitarian law violations is increasingly disfavored internationally.
39. An increasing number of international and national courts have found, as detailed below, that certain amnesties violate international law. As a related matter, statutes of limitation for such crimes are also increasingly disfavored, either because certain crimes are characterized as "continuing" and therefore no amnesty cut-off applies, or because crimes against humanity are not subject to statutes of limitation as a matter of customary international law. Some national courts have found that a "self-amnesty" granted by the government in power to itself is particularly objectionable. And, finally, a number of national and international courts have found that, given the dubious legality of amnesties under international law, national amnesties are due no deference by international courts or by courts outside the state granting the amnesty.²³ As a practical matter, this means that amnesty loses some of its attraction as a policy instrument, because those accused of the relevant categories of violations will not be able to leave their home state without being potentially subject to prosecution, and will face a continuing threat of international court prosecution.

THE LAW ON AMNESTIES

40. Two separate bodies of law underlie the affirmation that blanket amnesties for international crimes are unlawful under international law, and they may lead to different conclusions. First, a number of treaties specifically require prosecution of violations. The 1949 Geneva Conventions require that persons accused of grave breaches be sought and prosecuted, or extradited to a state that will do so.²⁴ The Genocide Convention requires persons committing genocide to be punished.²⁵ The Torture Convention requires that alleged torture be investigated and that, if the

state has jurisdiction under any of the enumerated bases, that it either extradite the offender or “submit the case to its competent authorities for the purpose of prosecution.”²⁶ The purpose of this language is merely to ensure that decisions to prosecute torture are taken the same way as any other decision to prosecute serious crimes.²⁷ The focus on a duty to prosecute rather than a duty to punish reflects the presumption of innocence, as well as the possibility of a subsequent suspension or reduction of sentence. The Inter-American Convention on Forced Disappearance of Persons²⁸ and the Inter-American Convention on Torture have similar provisions.²⁹ The Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity holds that the passage of time cannot bar prosecutions for war crimes, crimes against humanity and genocide.³⁰ It is this subset of international humanitarian law violations that is most clearly not amnestiable or prescriptable.

41. These treaty provisions create clear obligations for states parties. Torture, for example, must be investigated and prosecuted if a state that has jurisdiction is a party to the Convention,³¹ whether or not it is widespread or systematic enough to constitute a crime against humanity, and whether or not it constitutes a war crime. It is less clear whether the injunction to prosecute grave breaches can be extended to cases of non-international armed conflict. While the International Criminal Tribunal for the Former Yugoslavia has held that Common Article 3 of the Conventions imposes individual criminal responsibility,³² and the distinction between international and non-international armed conflicts has been blurring over time,³³ it is unclear whether states have an obligation, as opposed to simply the ability, to prosecute. In addition, those war crimes which are neither grave breaches nor covered by Common Article 3 are unlawful, incur individual responsibility, and states may prosecute them as war crimes, but it is not clear they are obliged to do so *per se*.³⁴
42. While Common Article 3 is the only reference to non-international armed conflict in the 1949 Conventions, the 1977 Protocols, especially Protocol II, spell out the obligations of combatants in greater detail. Protocol II contains no equivalent to the “grave breaches” provisions, but does contain a specific reference to amnesty in article 6(5). The article reads: “At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” Article 6 of the Protocol in general deals with penal prosecutions, and is largely geared to insuring that those tried by the opposing side are accorded due process of law; a goal of impeding all prosecutions seems inconsistent with the rest of the article. According to the International Committee of the Red Cross, the *travaux préparatoires* of the Protocol reveal that “the provision aims at encouraging amnesty, i.e. a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.” For example, the ICRC cites to the debate around the provision, during which the Soviet representative stated that his delegation was convinced that the provision “could not be constructed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.” Thus, the ICRC interprets the provision as providing for ‘combatant immunity,’ which ensures that a combatant cannot be prosecuted for fighting or killing enemies, as long as the combatant respected international humanitarian law.³⁵ Perhaps the best interpretation of the language, which requires the “broadest possible amnesty” is that amnesty should be as broad as otherwise permitted by international law.
43. The other major source of treaty-based obligation is to be found in the general human rights treaties and their regional analogs in Europe and the Americas. These treaties, including the ICCPR, American Convention on Human Rights and European Convention on Human Rights, contain no explicit obligations regarding prosecution or amnesty. They do, however, prohibit the underlying violations, provide for a right to a remedy and to a hearing before a competent

tribunal for violations of rights. Thus, if the concern is the victim's access to a remedy and a hearing before an impartial body or tribunal, it is easier to argue that other forms of accountability, including variants on a South-Africa style truth commission/amnesty scheme, would meet these requirements without the need for criminal prosecution. Accountability might thus be divorced from prosecution.

44. However, that is not the view taken, by and large, by the national and international courts and quasi-judicial bodies that have considered the issue. The clearest statements have come from the Inter-American system. As early as 1992, the Inter-American Commission held that blanket amnesty laws violated Articles 8 and 25 of the American Convention, read in conjunction with Article 1 establishing state responsibility. These determinations, in cases involving Argentina, El Salvador, Uruguay and Chile, all relied among other things on the Inter-American Court's decision in *Velasquez-Rodriguez*, which had found that the state had an obligation to investigate and prosecute serious violations.³⁶ The Commission has consistently found that the existence of a truth commission, or of administrative sanctions, does not modify the state's obligations to investigate and, if warranted, criminally prosecute. In 2001, the Inter-American Court of Human Rights, in the *Barrios Altos* case, found that:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in *Barrios Altos*, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.³⁷

45. Subsequent cases have reaffirmed these general views.
46. National jurisprudence and legislation in the Americas has also increasingly reaffirmed this view. Early cases by Supreme Courts in several countries reaffirmed the constitutionality of amnesties in the 1980s and early 1990s. By 2005, the trend had turned. Peru repealed its offending amnesty laws. Most spectacularly, the Argentine federal courts had, in at least six cases, found the amnesty laws both unconstitutional and contrary to Argentina's international obligations; in 2004 the legislature finally annulled the laws (it had earlier repealed them, but without retroactive effect). Observers expect the Argentine Supreme Court to ratify the annulment as well as the lower court decisions.³⁸ In Chile, the Supreme Court in 2004 held that amnesty did not apply to continuing crimes like disappearances, and that the Geneva Conventions might in any case require prosecution.³⁹ The Honduran Supreme Court has held that courts must fully investigate and decide who is responsible for what crimes before applying an amnesty law; Chilean courts have done the same. In El Salvador, despite upholding the 1993 blanket amnesty law in 1996, the Supreme Court in 2000 qualified its approval of the law, leaving it to each investigative judge to determine whether application of the amnesty in a particular case would interfere with El Salvador's treaty obligations or with the reparation of a fundamental right – if it would, the amnesty could not be applied.⁴⁰ In Guatemala, a Law of National Reconciliation passed in 1996 grants an amnesty to those involved in the armed conflict, but explicitly excludes genocide, torture and forced disappearances, and until recently it had not been used to amnesty other crimes against humanity.⁴¹ Colombian proposals for reincorporation of paramilitaries, although

highly problematic for many reasons, have been framed as suspended sentences conditional on reparations, among other things, and not as an amnesty law. In the Americas, *de jure* amnesties, at least blanket amnesties, seem increasingly disfavored.

47. Outside the regional context, a similar if less dramatic trend is evident. The U.N. Human Rights Committee, addressing the requirements of the ICCPR, has found that even disciplinary and administrative remedies were not “adequate and effective” under Art. 2(3) of the Covenant in the face of serious violations, and that criminal prosecution was required for such violations.⁴² The Human Rights Commission in 1997 received a Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joint Principles). In 2003, The Commission asked the Secretary-General to commission an independent study with an eye towards updating and adopting them. That process is currently underway, and the independent expert’s report states that “recent decisions have reaffirmed the incompatibility of amnesties that lead to impunity with the duty of States to punish serious crimes under international law (Principles 18 and 25(a)).⁴³ The Secretary-General has also stated that amnesties cannot be granted with respect to international crimes.
48. In 1998, a Trial Chamber of the ICTY observed that a domestic amnesty covering crimes, such as torture, that have attained the status of *jus cogens* norms would violate obligations *erga omnes* and “would not be accorded international legal recognition.”⁴⁴ Courts have in addition found that while sitting heads of state (and foreign ministers) for now have immunity from national prosecutions in third states, they do not have immunity from prosecution in international tribunals.⁴⁵ Former heads of state have no such immunity for international crimes.⁴⁶ A number of national courts have found that statutes of limitation are similarly inapplicable against genocide and crimes against humanity as a matter of customary international law.
49. The debate around the amnesty granted in Sierra Leone’s Lomé peace accord has crystallized some of the issues involved. On 12 June 2000, almost a year after signing the Lomé Agreement, President Kabbah wrote a letter to the UN Secretary General requesting the UN’s assistance in bringing to justice RUF members responsible for the atrocities committed in Sierra Leone’s war. On 14 August 2000 the Security Council requested the UN Secretary General to negotiate the establishment of the Special Court with the Government of Sierra Leone.⁴⁷ However, it was not until 16 January 2002 that an agreement was concluded between the UN and the Government of Sierra Leone on the establishment of a Special Court.⁴⁸ The Special Court has jurisdiction over post-1996 crimes against humanity, war crimes, and other serious violations of international humanitarian law, as well as the domestic crimes of sexually assaulting young girls and setting fire to property. Article 1 of the Statute limits the Court’s personal jurisdiction to those bearing ‘the greatest responsibility’ for the atrocities.⁴⁹ Thus, given the absence of national court prosecutions, in practice all those except the thirty or so likely defendants before the Special Court will continue to benefit from the Lomé amnesty.
50. The Sierra Leone Special Court’s Appeals Chamber deemed the Lomé Agreement’s amnesty provision inapplicable with regard to international crimes.⁵⁰ The Court found that “the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction,” that the Sierra Leone government had accepted that the amnesty provision of Lomé applied only to the national courts, not to either an international court or to other national courts. Moreover, while the Court refused to find that a general norm against amnesties for international crimes had crystallized, it found that such a norm was clearly the direction in which customary law was developing.⁵¹
51. The Sierra Leone Truth Commission, in contrast, criticized the decision to override the Lomé amnesty. It did so not primarily based on the legality or illegality of amnesty *per se*, but on the policy considerations involved in removing amnesties altogether from the “toolkit” of peace

negotiations, and especially on the undermining of principles of certainty and legality involved in granting and then partially retracting an amnesty in Sierra Leone. Although the change of policy might be justified by the RUF's own violations of the accords, "disallowing amnesty in all cases is to deny the on-ground reality of violent conflict and the urgent need to bring such strife and suffering to an end," the Commission wrote.⁵²

52. What, then, would be permissible under the current state of the law? While the answers are quite murky, as a first cut, crimes solely against national law might be amnestied. This might include murder, mayhem, arson and the like if not committed (1) by state-related forces or (2) during conflict or (3) widespread or systematic enough to be considered a crime against humanity. Second, perhaps, individual war crimes that were neither grave breaches nor, in the case of civil conflict, violations of Article 3 of the 1949 Conventions might be amnestiable so long as they did not at the same time constitute crimes against humanity. Finally, it might be possible to argue in cases where an alternative accountability mechanism involving the rights of victims to obtain information and the imposition of some sanction exists, that the requirements of general human rights treaties are met, but only if the crimes involved did not involve the treaty obligations of the state with respect to war crimes, genocide, torture or disappearance. As a quick glance will reveal, the list is, in practice, rather short and not particularly helpful.

LEVELS OF RESPONSIBILITY

53. In addition to the differing views on amnesty, the Sierra Leone case also raises the question of whether prosecutions may be explicitly limited to "those most responsible" or, conversely, an amnesty law can be valid if it excludes from its terms the top leaders and organizers, while encompassing lower- and mid-level fighters. There is an emerging practice along these lines, even though neither the treaty instruments nor the general human rights obligations cited above make any such distinctions.
54. One way of interpreting this practice is merely as a division of labor between national and international courts. Thus the Security Council has since at least 2000 supported the idea that the International Criminal Tribunals for the Former Yugoslavia and Rwanda should focus on civilian, military and paramilitary leaders and should, as part of their completion strategy, "concentrat[e] on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes" while transferring cases involving lesser offenders to the national courts.⁵³ The Prosecutor for the International Criminal Court has similarly expressed his office's intention to focus on the leaders who bear most responsibility, such as the leaders of the State or organization, while leaving lesser offenders to national courts or other (unspecified) means. However, this preference for leaders is not absolute, and the Prosecutor may investigate further down a chain of command if necessary for the whole case.⁵⁴ The Sierra Leone Special Court has found that its mandate to prosecute those bearing the "greatest responsibility" may include not only leaders but mid-level commanders who by their acts encouraged others.
55. National courts have sometimes followed the same strategy. The Alfonsín government in Argentina initially restricted federal prosecutions of the crimes of the military to the nine members of successive ruling Juntas and a few selected civilians, like the chief of police. On the other hand, when that government tried to limit prosecutions to top officers through a "due obedience" law creating a non-rebuttable presumption that all lower-ranked officers were not guilty because they were following orders, the Inter-American Commission and, eventually, the lower national courts, found it unlawful.
56. The Rwandan genocide law divides offenders into categories by level of responsibility, and requires prosecution of category one offenders in the regular courts (where a death sentence is

possible); community-level gacaca courts may try all other offenders. The Genocide Law of 1994 defines this category as follows:

- Persons whose criminal acts or whose acts of criminal participation place them among the planners, organisers, instigators, supervisors and leaders of the crime of Genocide or of a crime against humanity;
- Persons who acted in positions of authority at the National, Prefectorial, Communal, Sector or Cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes;
- Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
- Persons who committed acts of sexual torture or violence.

57. On the other hand, other recent experiences have divided lines between serious and more serious offenses, without any explicit reference to the rank or functions of those accused. For example, the Timor L'Este Serious Crime Panels and Community Reconciliation Hearing process both distinguish between those who committed "serious criminal offenses," who must be prosecuted, and those who have not, who may benefit from a local hearing and subsequent immunity from criminal prosecution. Relevant also is the treatment of due obedience to orders in international law: while the fact that one was acting under orders may mitigate punishment, it will generally not be a complete excuse, at least where the order was "manifestly unlawful."⁵⁵
58. Of course, to a certain extent the simple exercise of prosecutorial discretion in some cases will lead to a focus on leaders and organizers. This is because the nature of at least some international crimes requires proof of elements that will be easier to show the higher one moves up a chain of command, whether military or civilian. Thus, for example, genocide requires proof of ⁵⁶intent to destroy a certain type of group, in whole or in part. In practice, such specific intent will have to be shown circumstantially, through a cumulation of events in which the accused had a hand. Similarly, the "widespread or systematic" nature of crimes against humanity, and the need for the individual defendant's acts to be done with knowledge of the overall attack even if not motivated by it,⁵⁷ all tend to make it easier to prove the elements of the offense for high-ranking defendants than for foot-level soldiers or paramilitaries. The ICTY and ICTR have been inconsistent in requiring the existence of a "plan or policy," but the ICTY Appeals Chamber's emerging view seems to be that a plan or policy is not an element of the offense, and that ."
"The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack."⁵⁸
59. War crimes, on the other hand, have no such limitation, requiring only the existence of an "armed conflict." The ICTY jurisprudence has taken no consistent view on the relationship of degree of responsibility to culpability: it depends on the particular war crime at issue. So, for instance, in cases of unlawful confinement (a grave breach) the court has found that "[i]n the Appeals Chamber's view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has committed a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense."⁵⁹ To the extent a focus on only the top, and/or most heinous perpetrators may be justified under international law rather than as a result of considerations of expediency, cost and the like, war crimes and torture remain the most difficult areas. Given widespread support for schemes that in effect amnesty lower-level combatants who might otherwise be accused of war crimes under Common Article 3, it might be possible to argue

that there is an emerging state practice that for these people accountability does not require formal criminal prosecution, although it may require more than nothing, so long as the top echelons are subject to criminal prosecution.

60. Could a peace agreement legitimately amnesty all but the leaders and organizers (or those bearing the greatest responsibility), while specifying prosecution for the higher-ups to the extent they have committed international crimes? Under certain conditions, maybe. There would have to be a credible prosecution mechanism in place for the leaders, and an alternative form of accountability for those lower down. This might include national court prosecutions, a truth for amnesty scheme like South Africa's, a gacaca-type process resulting in community service or some other sanction, or a new variant rooted in a country's culture and community conflict resolution traditions. There would also have to be some provision for reparations, both material and symbolic, as the rights to truth and to reparations are independent of the duty to prosecute.⁶⁰
61. However, even if such a limited prosecution/amnesty scheme were viable under international law, it would not solve the peace vs. justice dilemma to the extent that those at the negotiating table would almost certainly be the very leaders and organizers most likely to be prosecuted under any such scheme. It might not satisfy the demands of victims, who will still want to see "their" perpetrator brought to justice, and it might create difficulties in drawing appropriate lines in a murky conflict. On the other hand, including everyone in an amnesty would almost certainly violate international law obligations, even given the existence of a truth commission or other non-penal forms of accountability. Thus, the only viable solution may be to take the possibility of a formal amnesty off the table altogether in the name of international law constraints, negotiating instead over such issues as national versus international(ized) prosecutions, timetables or delays, preservation of evidence and the like. The nature of prosecutorial discretion in shaping prosecutions might be a viable point of discussion, as might the possibility of suspended sentences or community service options after trial and sentencing. This latter possibility, however, cannot amount to a veiled amnesty and probably must not apply to leaders and organizers: witness the protests against such a proposed scheme in Colombia.

CONCLUSIONS: WHAT TRANSITIONAL JUSTICE PROVISIONS SHOULD BE INCLUDED IN A PEACE ACCORD?

62. The obligation to deal with the past after conflict does not mandate any particular mechanism or body – neither international tribunal nor truth commission. Rather, the functions of investigating the facts of what happened; giving people (victims, perpetrators and bystanders) a way to tell their stories; providing rehabilitation for combatants and survivors; releasing and reintegrating prisoners; recommending needed changes in law, organization and policy; prosecuting, and where warranted punishing those responsible; cleansing the security forces of human rights violators; commemorating the victims and providing some material aid to survivors, may be met any number of different ways. One of the most important trends of the last few years has been the increasing use of culturally-resonant dispute resolution mechanisms on the local level to do some of these things, which means that global prescriptions are increasingly limited. Rather, the obligation is to see that, somehow, each of these functions is carried out.
63. An initial question concerns the level of detail to be included in the accord itself. There is a virtue to tying both sides to commitments that may later prove difficult to carry out, strengthening their resolve and allowing for international supervision and evaluation of whether what was accorded was actually done. On the other hand, the parties at the table may be too few, and with very particular needs and biases, to permit the full discussion and debate that will make transitional justice mechanisms an integral part of a national dialogue and effort at

reconciliation. In particular, there may be a gender imbalance when combatants sit down to negotiate that will make the resulting accords less sensitive to the needs and desires of women (or children). Given this tension, there is something to be said for sketching broad outlines, enabling provisions and immediate interim steps, along with monitoring, verification and penalties for non-compliance into an accord, but leaving the details to a subsequent national process that may be more inclusive.

64. Having said that, what should these broad outlines look like? First would be a commitment to justice for those who have committed international crimes and/or serious human rights violations. This may require the constitution of a “hybrid” international tribunal where the national courts are completely inoperative, or a state referral to the ICC, or the creation of a special prosecutor or other office within existing national systems aimed at dealing with cases arising from the conflict. It should be coupled with efforts to rebuild or build a functioning national judicial system. A general commitment to end impunity may not be enough, and possible ways of doing so should be specified. At a minimum, evidence collection and preservation for future possible prosecutions as well as investigations should be specified. Official support for exhumations and proper reburials would also be a key provision in an accord, as it is one of the most urgent, and underfunded, needs of survivors. It would be possible to envision an amnesty regime that encompassed crimes of sedition and the like, and lesser offenses that do not constitute international crimes. For example, the Ivory Coast peace agreement holds that “the Government of National Reconciliation will take the necessary steps to ensure release and amnesty for all military personnel being held on charges of threatening State security and will extend this measure to soldiers living in exile.”⁶¹ To the extent these acts nonetheless constitute human rights violations, there should be some alternative accountability mechanism, preferably one that provided both for provision of information and for some expression of remorse or apology. International crimes, however, would have to be prosecuted, although provisions for the exercise of discretion to focus on “those most responsible” first or some similar language might be acceptable. An alternative, although less satisfying, solution might be to include only a general statement in the accord itself, leaving the question open. For instance, the Liberian accord states only “The Parties undertake to respect as well as encourage the Liberian populace to also respect the principles and rules of International Humanitarian law in post-conflict Liberia.” International humanitarian law, of course, also includes obligations to prosecute, although they may not cover all the violations committed in that country’s civil war.
65. The needs of investigation, story-telling and recommendations can be met through a truth commission, although alternative mechanisms could also fulfill them. Other more decentralized or local efforts might also fulfill these needs and should be considered. The agreements on truth commissions detailed above might be consulted, but none of them represent current “best practice.”⁶² Under certain circumstances, especially if the “transition” is itself limited in scope, a truth commission may prove irrelevant or even frustrating to victims (especially if unaccompanied by prosecutions or other structural changes), and so should not be seen as a necessary component of any peace accord. A commitment to the functions of such a commission, without more, may prove more fruitful later on.
66. If desired, thought should be given to the following in designing an appropriate truth commission:
- Participatory process for designing, especially involvement of civil society;
 - Independence and impartiality of commissioners, whether national and/or international;
 - Hearings: public and/or private; protection and social services to witnesses;
 - Organization, scope, period covered, period of operation, form of characterizing violations, methodology, etc.

- Binding nature of recommendations on the parties;
 - Dissemination of findings, follow-up, verification and long-term ownership of process.
67. Prisoner exchanges are a necessary component of any such accord, although the proviso in the Bosnia-Herzegovina Dayton accord reserving those accused of international crimes seems useful.
68. The only accord to incorporate a human rights-based vetting mechanism for security forces was that of El Salvador, with the Ad-Hoc Commission. This Commission was widely viewed as a success⁶³ and some version of it would be worth emulating. Outside the eight agreements studied, the Liberian accord provides that “Incoming service personnel shall be screened with respect to educational, professional, medical and fitness qualifications as well as prior history with regard to human rights abuses.” This might be done as part of the construction of a new army/police force.
69. The existence of restitution, rehabilitation, reintegration and compensation programs for victims and survivors, of commemorative efforts and of reintegration programs for former combatants are also important elements of peace accords, although largely beyond the scope of this paper. While the specifics of such programs are probably beyond what needs to be in an accord, a general commitment to developing such programs would be important. As an example, consider the Liberian accord, which provides for special attention to child combatants as well as a general provision that

The NTGL, in formulating and implementing programs for national rehabilitation, reconstruction and development, for the moral, social and physical reconstruction of Liberia in the post-conflict period, shall ensure that the needs and potentials of the war victims are taken into account and that gender balance is maintained in apportioning responsibilities for program implementation.⁶⁴

70. In designing these measures, part of the key is adapting measures that seem to have been successful elsewhere to national conditions, culture and context. There are no recipes here. And, as discussed, it matters who sits at the bargaining table. Often, those most affected by the conflict are absent as the warring parties trade off concessions to each other at their expense. A true respect for human rights in peace negotiations, therefore, must start by broadening the parties at the table.

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WEBSITES

The most helpful are www.usip.org, which has the text of many major peace accords and truth commission governing statutes, as well as links to related sites, and www.ictj.org, which has brief descriptions of transitional justice measures in many places, and links to the literature.

www.umn.edu/humanrts is the easiest place to find United Nations, European Court of Human Rights, Inter-American Court of Human Rights and other international legal documents.

www.hrw.org has a digest of the decisions of the ICTY and ICTR searchable by topic.

NOTES

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- ¹ Ruti Teitel, *Transitional Justice Genealogy*, 16 *Harvard Human Rights J.*, Spring 2003.
- ² See Bassiouni, *Post-Conflict Justice* (Transnational Press, 2002) for early efforts; for the 1970s see Alexandra Barahona de Brito, ed. *The Politics of Memory* (Oxford University Press, 2001) and Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Johns Hopkins University Press, 1996); for Spain's efforts, in the last five years, to finally confront the legacy of Francoism, see Equipo Nizkor's website, www.derechos.org/nizkor/spain.
- ³ Thomas Nagel made this point at an early conference on transitional justice sponsored by the Aspen Institute.
- ⁴ Not, however, Sudan, Ivory Coast. For a listing and discussion, see Priscilla Hayner, *Unspeakable Truths* (Routledge, 2001).
- ⁵ "War Crimes in the 21st Century", Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Oct. 26, 2004, available at <<http://belgrade.usembassy.gov/current/041118.html>>.
- ⁶ Stover and Weinstein, eds., *My Neighbor, My Enemy* (Cambridge University Press, 2004).
- ⁷ In 2000, the UN's Transitional Administration in East Timor established mixed, international/East Timorese panels of judges to try those accused of serious international humanitarian law violations during the Indonesian occupation and the violence following the 1999 referendum on independence. The UN is also pursuing a hybrid court process in Cambodia as well, where, under one proposal insisted upon by the Cambodian government, a majority of judges and senior officers of the Extraordinary Chambers will be Cambodian nationals. For further discussion of hybrid courts in these countries, see Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 *Harv. Hum. Rts. J.* 245 (2003); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 *Crim. L. F.* 185 (2001); relevant information is also available at <http://www.cij.org>.
- ⁸ The Northern Ireland Peace Agreement, reached in the multi-party negotiations "Good Friday Agreement," 10 April 1998.
- ⁹ *Id.*, section on Rights, Safeguards, and Equality of Opportunity; Reconciliation and Victims of Violence.
- ¹⁰ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991.
- ¹¹ See Michael Vickery, Cambodia chapter, in Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (Oxford University Press, 1995)...
- ¹² See G.A. Res. 135, U.N. GAOR, 52nd Sess., Supp. No. 49, U.N. Doc. A/52/49 (1997).
- ¹³ The Angolan Lusaka Protocol (1994) and the Lincoln Agreement on Peace, Security and Development on Bougainville (1998) also contain blanket amnesty provisions.
- ¹⁴ Lomé Agreement, Article V, granted Foday Sankoh the chairmanship of the Commission for the Management of Strategic Resources, National Reconstruction and Development, and the status of Vice-President. It also granted four additional cabinet posts and four Deputy Minister posts to RUF members. Johnny Paul Koroma received chairmanship of the government's Commission for the Consolidation of Peace.
- ¹⁵ Lomé Agreement, Article XXVI(1).
- ¹⁶ Reference to this reservation is found in the Seventh Report of the Secretary-General on the United Nations Military Observer Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, paras. 7 and 54.
- ¹⁷ SL News Archives, news of 9.7.99.
- ¹⁸ Preamble, Art. IX of Annex 4 (Constitution); Art. IX of Annex 1, General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accord), Dec. 4, 1995.
- ¹⁹ Chapultepec agreements, ch. 1, sec. 5, in U.N., *El Salvador Agreements: The Path to Peace* (1992).
- ²⁰ *Id.*, ch. 1, sec. 3.
- ²¹ Mexico City Agreement, April 27, 1991, sec. IV.
- ²² Global Accord on Human Rights between the Government of the Republic of Guatemala and the URNG, Mexico City, March 29, 1994, U.N. Doc. A/48/928-S/1994/448; Accord on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That have Caused the Guatemalan Population to Suffer, June 23, 1994, U.N. Doc. A/48/954-S/1994/751. In addition, other recent peace accords also create a truth commission. The 2003 Liberia accord, for instance, mandates a national commission with international support but not membership.
- ²³ Ould Dah case, French Court of Cassation Oct. 23, 2002; Argentine and Chilean cases, Spanish Audiencia Nacional (Pleno), Nov. 5 1998.
- ²⁴ E.g. Geneva Convention IV, art. 147. By their terms the grave breaches provisions apply only to cases of international armed conflict.
- ²⁵ Genocide Convention, art. IV, Dec. 9, 1948, 78 U.N. T.S. 277
- ²⁶ Convention Against Torture, art. 7.
- ²⁷ See art. 7(2).
- ²⁸ Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), art. 6.

- ²⁹ Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992), art. 14.
- ³⁰ G.A. Res. 2391 of 26 Nov. 1968, entered into force 11 Nov. 1970. There is a similar European Convention.
- ³¹ Article 5 of the Convention lists the states that have jurisdiction.
- ³² Prosecutor v. Tadic, Appeals Chamber, para 134 (2 Oct. 1995). Common Article 3 covers “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment” among other things.
- ³³ See Nicaragua v. United States (Merits), 1986 I.C.J. Reports 14 (Jun. 27, 1986); Theodore Meron, The Humanization of Humanitarian Law, 94 Am. J. Int'l L. 239 (Apr. 2000).
- ³⁴ The jurisprudence of the ICTY states only that violations of Common Article 3, infringements of other articles of the Geneva Conventions that are not grave breaches, and other humanitarian law treaty violations give rise to individual responsibility so long as they are “serious.” Prosecutor v. Furundzija, Dec. 10, 1998, para. 358; elsewhere the Appeals chamber has held that under the Nuremberg precedent “Where these conditions are met, individuals must be held criminally responsible.” Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 128-129. The court is focused on the question of individual responsibility, however, not on a duty to prosecute.
- ³⁵ Letter from Dr. Tony Pfanner, ICRC, “Interpretation of Article 6(5) of the Protocol Additional to the [Geneva] Conventions and relating to the Protection of Victims of International Armed Conflicts, (1998).
- ³⁶ Velasquez-Rodriguez case, OAS Doc. OEA/Ser.L/V/III.19, doc. 13 (1988); Inter-American Commission on Human Rights, Report on the Situation of Human Rights, O.A.S. Doc. OEA/Ser.L./V/II.82, doc. 26 (1992) (El Salvador); OEA/Ser.L./V/II.82, doc. 25 (1992) (Uruguay); OEA/Ser.L./V/II.82, doc. 24 (Argentina). The European Court of Justice has found similar obligations, e.g. in Streletz, Kessler & Krenz v. Germany, European Court of Human Rights, 22 March 2001, para. 86; Akkoç v. Turkey, European Court of Human Rights, 10 October 2000, para. 77.
- ³⁷ Barrios Altos (Chumbipuma Aguirre y otros vs Peru), March 14, 2001.
- ³⁸ Buenos Aires Federal Appeals Chamber, Nov. 2001; annulment Law N. and date. For a view of the earlier cases, see Roht-Arriaza and Gibson, The Developing Jurisprudence on Amnesty, 20 Human Rights Quarterly 843 (Nov. 1998). For a detailed exposition of the later cases, see Roht-Arriaza, The Pinochet Effect (U. Penn Press, 2005).
- ³⁹ Santiago Court of Appeals, Sandoval case, Jan. 5, 2004.
- ⁴⁰ Cases 24-97 and 21-98, Constitutional Chamber, Supreme Court, Sept. 26, 2000.
- ⁴¹ Law of National Reconciliation, Decree 145-96, Dec. 18, 1996. In February 2005, however, the Guatemalan Constitutional Court, according to news reports, approved dismissal of a well-known massacre case based on the LNR.
- ⁴² In 1994, the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR stated the following: “The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.” (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994)). See also, e.g. Bautista de Arellana v. Colombia, No. 563/1993, Oct. 27, 1995. See Independent Study on Best Practices, including Recommendations, to assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity, by Prof. Diane Orentlicher, U.N. Doc. E/CN.4/2004/88, Feb. 27, 2004.
- ⁴³ Id., para. 28.
- ⁴⁴ Prosecutor v. Furundzija, judgement of Dec. 10, 1998, para. 155.
- ⁴⁵ Regina v. Bartle and the Commissioner of Police for the Metropolis, Ex Parte Pinochet, 2 W.L.R. 827, 38 I.L.M. 581 (H. L. 1999) (U.K.); Democratic Republic of the Congo v. Belgium, Arrest Warrant of 11 April 2000, 2002 I.C.J. Reports 1 (Feb. 14, 2002); Prosecutor v. Milosevic, ICTY No. IT-99-37, Indictment and Decision on Review of Indictment and Application for Consequential Orders (May 24, 1999); Prosecutor v Charles Ghankay Taylor, Case No. SCSL-03-01, Indictment (Mar. 3, 2003).
- ⁴⁶ Regina v. Bartle, supra; Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996)).
- ⁴⁷ UN Doc. S/RES/1315, 14 August 2000.
- ⁴⁸ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone dated 16 January 2002 (Special Court Agreement).
- ⁴⁹ Art. 1 of the Statute also adds that such persons may include “those leaders who...have threatened the establishment of and implementation of the peace process in Sierra Leone.” According to the Secretary General, these words “do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy.” Letter dated 12 January 2001 from the Secretary-General

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- addressed to the President of the Security Council, UN Doc. S/2001/40 (SG letter of 12 Jan. 2001, UN Doc. S/2001/40), para. 3.
- ⁵⁰ Prosecutor v. Morris Kallon, Brima Bazzy Kamara, SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, 13 March 2004.
- ⁵¹ Id. at para. 84.
- ⁵² Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, Vo. #B, Cha. VI, para. 11, quoted in William Schabas, *The Sierra Leone Truth and Reconciliation Commission*, in Roht-Arriaza and Mariezcurrena, eds. *Transitional Justice in the New Millennium: Beyond Truth versus Justice* (forthcoming 2005).
- ⁵³ Security Council Res. 1329, U.N. Doc. S/RES/1329, 30 Nov. 2000; Security Council Res. 1503, U.N. Doc. S/RES/1503, 28 Aug. 2003; also S/RES/1534 (2004).
- ⁵⁴ "Paper on some policy issues before the Office of the Prosecutor," Sept. 2003, available at http://icc-cpi.int/library/organs/otp/030905_policy_paper.pdf.
- ⁵⁵ See, e.g. Statute of the International Military Tribunal at Nuremberg;
- ⁵⁶ On the other hand, complicity in genocide need not encompass this specific intent.
- ⁵⁷ Prosecutor v. Kayishema and Ruzindana, (ICTR Trial Chamber), May 21, 1999, para. 133-134: "The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act . See also Ruggiu, (Trial Chamber), June 1, 2000, para. 19-20; Bagilishema, (Trial Chamber), June 7, 2001, para. 94.
- ⁵⁸ Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 95, 98.
- ⁵⁹ Mucic et al., (Appeals Chamber), February 20, 2001, para. 342. However, in a case involving plunder (a violation of the laws of war), the court held that "[t]he term [plunder] is general in scope, comprising not only large-scale seizures of property within the framework of systematic economic exploitations of occupied territory but also acts of appropriation committed by individual soldiers for their private gain. Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 612-613.
- ⁶⁰ Juan Méndez, *Accountability for Past Abuses*, 19 *Human Rights Quarterly* 255 (1997).
- ⁶¹ Linas-Marcoussis Agreement, 24 Jan. 2003.
- ⁶² How these commissions operated in practice, and the quality of their reports, had little connection to the provisions in the agreement. For a more recent example of a commission, see the Peruvian Truth and Reconciliation Commission.
- ⁶³ See, e.g., Margaret Popkin, *A Negotiated End to Impunity?*, in Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (Oxford U. Press, 1995).
- ⁶⁴ Peace Agreement Between the Government of Liberia (GOL), The Liberians United for Reconciliation and Democracy (LURD), The Movement for Democracy in Liberia (MODEL) and the Political Parties, Accra, Ghana, 18th August 2003.