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The UN Security Council *and* Transitional Justice

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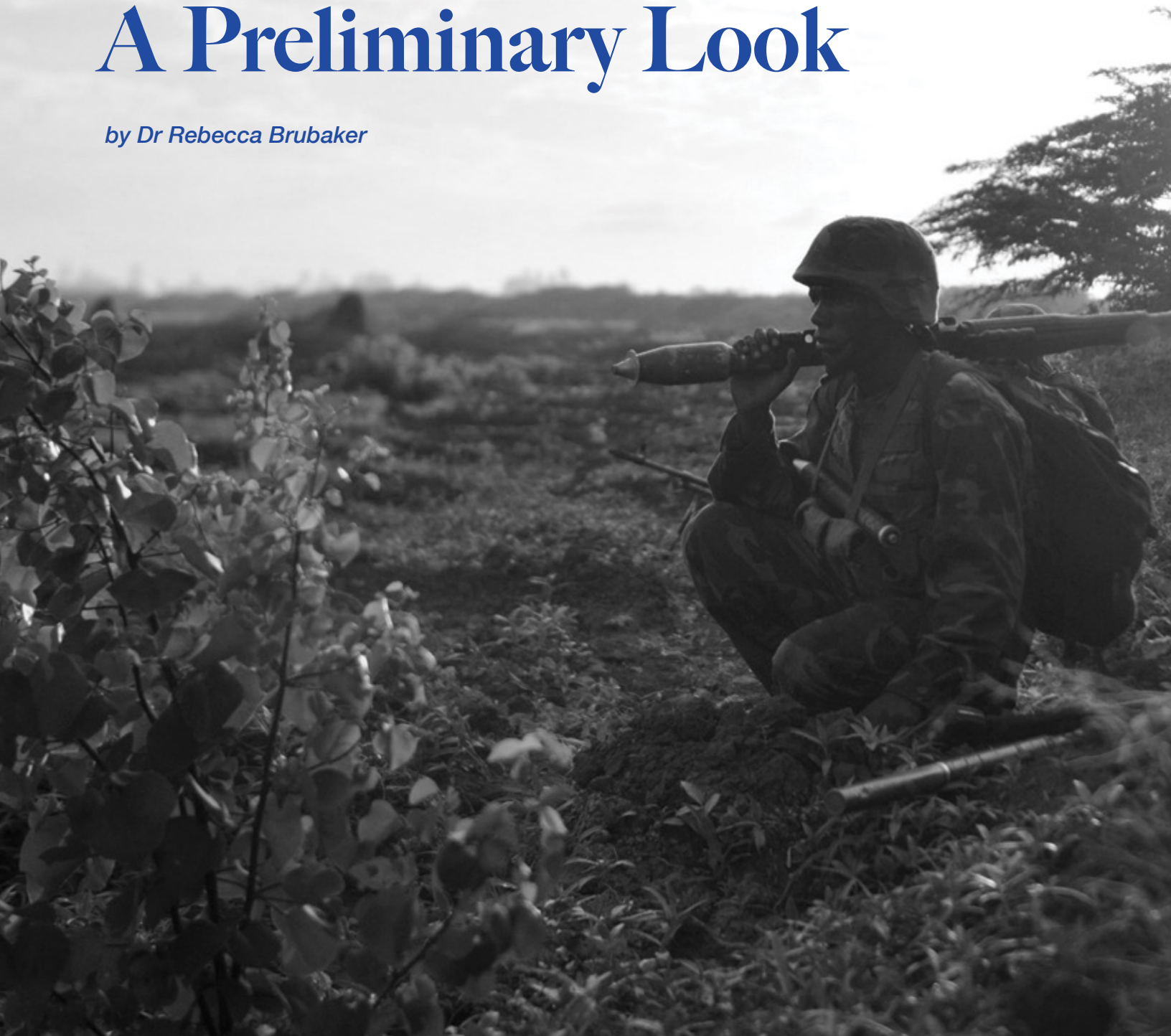


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The UN Security Council and Transitional Justice: A Preliminary Look

by Dr Rebecca Brubaker



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Introduction

The United Nations (UN) Security Council is an insufficiently understood source of support for transitional justice interventions on the ground. In the best-case scenarios, the Council has assisted national and local endeavours by amplifying the voices of domestic stakeholders, exerting pressure over recalcitrant actors, guarding the integrity of existing peace agreements from internal attacks, leveraging resources, and mandating supportive mechanisms. In other cases, the Security Council's support has backfired, frustrating national efforts or eroding local capacity. Given these contrasting outcomes, this report seeks to provide a preliminary look, across five case studies, at the conditions under which support from the Security Council – as one of many actors in the UN's transitional justice architecture – can positively impact transitional justice efforts on the ground.

This report is written for a general audience, though should also be of interest to transitional justice specialists and those interested in the role of the Security Council. This was a deliberate choice given a general finding through the research that outside the community of transitional justice theorists and practitioners, too little is known about this field. Diverging understandings of the definition and scope of transitional justice permeate both the chamber of the Security Council as well as key corridors of the UN Secretariat and the broader UN system.¹ To this end, it was thought useful to frame the findings from this exploratory project as part of a broader discussion on transitional justice, to help foster greater understanding and a more coherent, coordinated approach within the UN system.

This cross-cutting paper is divided into five parts. The first part offers an overview of the concept of transitional justice and its core components and then situates transitional justice concepts in the broader practice of international law. The second section provides a brief introduction to transitional justice and the UN system, examining the primary entities charged with supporting its implementation. The third section zooms in on one particular and, as of yet, understudied UN entity with regards to transitional justice – the Security Council. Drawing on recent work, it briefly touches on how the Council's approach to transitional justice has evolved over the last three decades and the various debates within the Council on transitional justice's relation to the Council's broader work. The fourth section, as the core of the report, looks at the impact of Security Council strategy and actions on transitional justice efforts on the ground. Drawing from the case studies in this report, it describes the mechanisms used, the challenges faced, and the factors that facilitated impact in these cases. The paper concludes with a number of recommendations for the Security Council, the Secretariat, and transitional justice advocates as they think through whether, when and how to engage Council members on these issues going forward.

The paper is designed as a preliminary look at the issue of impact with the goal of sparking discussion and further research. The report and the adjoining case studies – which were completed in August 2020 – are a first attempt at identifying issues that deserve further deliberation.



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Introduction to Transitional Justice

Brief Introduction to the Field

The field of transitional justice emerged out of a realization that purely judicial and punitive mechanisms – through courts and trials – were insufficient for addressing instances of widespread violations of rights following violent or particularly disruptive societal transitions. A main impetus of the new approach was to prevent recurrent cycles of violence and build more socially rooted transitions away from widespread crimes. Broadly, transitional justice can be defined as “cover[ing] all processes and mechanisms associated with a society’s attempts to come to terms with a legacy of massive human rights abuses and large-scale violence.”² The field emerged in a context of transitions from authoritarian rule in Latin America in the 1980s.³ Currently, transitional justice endeavours, in

contrast to the 1980s, are increasingly considered in the context of exits from widespread, devastating armed conflict. The goal of these interventions is to not only ‘deal with the past,’ but also to lay the foundation for preventing such devastating returns to conflict in the future. Importantly, these more recent contexts involve weaker institutions, perpetrators other than the State, and severely diminished capacity and often bandwidth amongst those charged with or responsible for seeing such changes through on the ground.⁴ Since the mid-2000s, transitional justice measures are increasingly applied to address situations of *ongoing conflict*, which comes with an additional set of challenges. These two shifts in the field have led to questions about whether transitional justice measures that were “born” in post-authoritarian contexts were still adequate and effective tools

to use in post-conflict and conflict settings. The context of the field's origins, in transitions from authoritarian rule, however, continues to colour the current expectations around what is ideal versus what is realistic to expect of societies undergoing a transition.⁵ The paper will return to the implications of both of these shifts in the section on Security Council impact and recommendations.

Four Components of Transitional Justice

The UN's approach to transitional justice is comprised of four elements: criminal justice, fact-finding/truth-seeking, reparations, and guarantees of non-recurrence. These four elements combined, pursued in a context-sensitive and survivor-centred manner, are said to both help a society heal from past instances of widespread violence and prevent future violence. In other words, transitional justice, in this broad framing, is an integral piece in the overall UN effort to prevent conflict.⁶

In practice, each of these elements has taken a variety of forms depending on the specific context, priorities of the stakeholders involved, and the political room for manoeuvre. Manifestations of criminal justice have included, for example, national, hybrid, regional, international and community-based trials. Consider the purely national trials of *ancienne régime* members in Chile or Argentina⁷ or the hybrid courts in Cambodia, Sierra Leone and, most recently, the newly proposed hybrid court in South Sudan, which draws from local law but engages international judges.⁸ Criminal justice as part of a transitional justice agenda has also been pursued through local and informal approaches, grounded in traditions other than formal or conventional law doctrines. The most widely cited examples are the community-led *gacaca* courts in Rwanda used to try Rwandan nationals accused of crimes committed during the 1994 genocide against Rwanda's Tutsis.⁹ Regional courts, such as the Inter-American Court of Human Rights, proved critical in combatting impunity and ending

widespread amnesties for those involved in mass human rights violations in Latin America in the 1980s.¹⁰ Consider the international endeavours: the *ad hoc* international tribunals relating to Former Yugoslavia and Rwanda as well as the permanently established International Criminal Court (ICC). The ICC is the most prominent and controversial amongst this last category. Established in 2002, the Court was designed as a mechanism of last resort – a recourse for those who had exhausted local and national remedies and resided under the authority of governments who were either unable or unwilling to try those accused of the most serious crimes under international law.¹¹ The Security Council holds the authority to refer cases for investigation to this international court.¹²

Fact-finding/truth-seeking, reparations and guarantees of non-recurrence often receive less attention than criminal justice. This is due, in part, to a common misperception that these three other pillars are equivalent to a “soft form of justice” and that they are “a means of pursuing the aim of reconciliation bypassing the implementation of the four measures under the mandate.”¹³ From the case studies for this report, it nevertheless appears that the other three elements have a role in Council considerations. Moreover, given the current dynamics on the Council, some experts predict that such elements will be even more likely than prosecutions to garner Council support going forward.¹⁴

Truth-seeking endeavours take different forms. But they share, as an overall goal, the fulfilment of the “right to truth,” understood as institutions, mechanisms or procedures “seek[ing] information and facts about what has actually taken place, to contribute to the fight against impunity, the reinstatement of the rule of law, and ultimately to reconciliation.”¹⁵ Truth commissions constitute one well-known form of truth-seeking. They aim to contribute to building knowledge on, and a record of, past abuses. They can also be used as a means of breaking the silence, launching a national conversation and beginning to help a society to heal.¹⁶ The best known case of such an approach was the South African Truth and Reconciliation Commission.



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A lesser known case is Guatemala, where the Catholic Church spearheaded “one of the most comprehensive unofficial truth commissions ever conducted.”¹⁷

Similar to truth commissions, fact-finding endeavours can contribute to building knowledge on, and a record of, past abuses. There are many instances of domestically-led fact-finding endeavours following the toppling of an authoritarian regime or the cessation of hostilities. At times, these initiatives are conducted as a means of preserving memory by documenting and archiving past abuses. Other times, they provide the foundation for future prosecutions, once there is sufficient momentum or political space to try perpetrators. International fact-finding endeavours may also contribute to truth-seeking. In 2005, the UN Commission on Human Rights mandated the Office of the High Commissioner for Human Rights (OHCHR) to establish a monitoring mission on the ground in Nepal.¹⁸ In South Sudan, the UN mission monitors human rights violations by the parties and uses public reporting to

combat a culture of impunity.¹⁹ Reports of such missions help establish an impartial record of events - records that often feed into transitional justice initiatives.

Reparations also come in many forms; they can be both material and symbolic as well as individual and collective. Examples include financial compensation as well as renaming public spaces, the construction of museums or sites of memory, commemorative events, public apologies, etc. The 2014 Special Rapporteur’s report on reparations referred to the “scandalous” gap in implementation of (particularly material) reparations, when compared to the other three elements of transitional justice. However, important instances exist and merit careful study.²⁰ The 2016 Colombia peace accord, for example, features reparations as one means for perpetrators to make amends to victims following a voluntary confession in Colombia’s “Commission for the Clarification of Truth, Coexistence, and Non-Repetition.”²¹ Some of the longest standing reparations in modern times include those paid by the German Government

to survivors of the Holocaust²² and those paid by the United States to Japanese Americans interned during World War II.²³

Acting on guarantees of non-recurrence, in contrast to the other three elements, generally requires a longer time horizon. But such actions are essential for sustaining the gains derived from the other transitional justice endeavours. For example, reforms of the security sector or the judiciary and the bolstering of the rule of law contribute to the prevention of future large-scale violations of human rights and thereby help fulfil the commitment to prevent future violations.²⁴ Accordingly, this fourth element most closely ties the field of transitional justice with the Security Council's overall goals of not only mitigating but also preventing a return to violent conflict and sustaining the gains made through peace.²⁵

Taken together, these four elements and their various manifestations make up the backbone of the UN's approach to transitional justice. To summarize, while the field of transitional justice is made up of four elements, there is no one way to apply the elements in a given case. Knowing the available elements and approaches in a transitional justice toolbox is only the start. For an intervention to be effective, actors at the local, national, regional, and international level must consider context-specific approaches. Each situation, for example, may call for unique timing, design and application given the country context, and, opportunistically, the political space for manoeuvre.²⁶ In other words, tailoring rather than templates are most effective.²⁷ And even when context-specific interventions are identified, it must be noted that transitional justice endeavours are extremely difficult to carry out. Thus, any analysis of impact must be made with an understanding of the overall likelihood of success in the short and long term. At times, this may mean pursuing the path of least resistance until a community, national elites, an administration, meddling State neighbours, or Great Powers are more amenable to a broader approach.²⁸

The Emphasis on a Holistic, Integrated Approach

According to a 2012 report by the UN Special Rapporteur, interventions work best when transitional justice architects adopt an integrated and comprehensive approach to the four "pillars" of transitional justice – justice, truth, reparations and guarantees of non-recurrence.²⁹ This leads to what is often referred to as approaching transitional justice in a "holistic" way rather than focusing simply on judicial versus non-judicial remedies or singling out one group of perpetrators or one level of responsibility over others.³⁰

Consider the following two case examples for an illustration of how a particular transitional justice intervention might suffer when approached in a segmented rather than a holistic and integrated manner. The international community's intervention in Rwanda, explored in this volume, gave great weight to the right of (most) victims to an effective remedy, as well as the right to reparations and moderate institutional reform. However, Dr Gerald Gahima, former Rwanda Chief Prosecutor, argued that the right to truth was summarily brushed aside in the Rwandan context. As a result, this led to what some experts have characterized as a one-sided account of violations and, thus, an unfulfilled obligation by the State to provide accountability for all victims of widespread violence, no matter the identity of the perpetrator.³¹ By contrast, the Afghanistan case in this volume describes how permanent members of the Security Council blocked efforts to promote accountability for those involved in violations of human rights over the course of the conflict. According to the author, this hesitancy arose from permanent members' and other powerful States' military involvement in the conflict and their subsequent concerns that their soldiers' actions could be construed as war crimes. As a result of this blockage, the Council's mission in Afghanistan focused its efforts on information gathering, especially around civilian causality reporting, rather than on judicial mechanisms.



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II

Transitional Justice and the UN System

In 2004, the UN Secretary-General published a seminal report defining transitional justice as “cover[ing] all processes and mechanisms associated with a society’s attempts to come to terms with a legacy of massive human rights abuses and large-scale violence.”³² In this same report, the Secretary-General emphasized the legitimate authority of domestic actors to determine injustices and design responses at the national level.³³ In 2006, the Secretary-General called for transitional justice to be “consistently integrated” into the UN’s peace operations, thereby linking it to the Security Council’s mandate to maintain international peace and security.³⁴ In this same report, he also recognized that the Security Council mandated several peace operations and special political missions to support and promote justice efforts.

In 2009, the Security Council made reference, for the first time, to the broad range of transitional justice mechanisms, reflecting the wider UN system’s “holistic approach to the issue of fighting impunity for serious violations of international law.”³⁵ In 2010, the Secretary-General published a Guidance Note on transitional justice, outlining the UN system’s and States’ responsibilities.³⁶

OHCHR is the most common point of engagement on transitional justice issues within the UN Secretariat. OHCHR also supports the Special Rapporteur devoted to transitional justice (on truth, justice, reparations and guarantees of non-recurrence).³⁷ Since its establishment, the mandate of the Special Rapporteur has issued nearly 20 reports on issues covering interpretation and implementation of the four



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central elements, as well as specific country reports.³⁸ The inaugural post-holder played an essential role in conceptualizing and circumscribing the four elements, while at the same time addressing the current challenges that transitional justice advocates face.

Looking to the UN system more broadly, many other UN entities conduct significant work on transitional justice. For example, the United Nations Development Programme (UNDP), UN Women, the Department of Peace Operations

and its Rule of Law Unit, and the Peace Building Support Office all lead important endeavours in this space. Historically, however, there has been no evident coordination mechanism on transitional justice issues within the UN system. Rather, actors have operated in parallel and coordinated on a more *ad hoc* basis. However, the UN is currently renewing its approach to transitional justice through extensive, system-wide consultations led by the Executive Office of the Secretary-General and OHCHR. A new guidance note will be issued in 2021.³⁹



III

The Security Council and Transitional Justice

Over the last 30 years, the Security Council has supported the four pillars of transitional justice to varying degrees and in different ways. It has introduced transitional justice-relevant language in peace operation mandates and held missions and States responsible for their implementation. Its members have also issued joint statements calling for the respect of the elements underpinning transitional justice and issued country-specific resolutions drawing from these elements. The Council has hosted thematic debates on reconciliation, rule of law, and historical memory and called for reports from the Secretariat. Security Council country visits have also been a crucial way in which the Council's members have been able to signal their support for domestically-driven endeavours and their condemnation of efforts by some to skirt or overlook a survivor

or “victim”⁴⁰-centred and human rights-based approach.

In February 2020, the Security Council held a meeting on “transitional justice in conflict and post-conflict situations” under the peacebuilding and sustaining peace agenda item.⁴¹ While this was the Council's first meeting exclusively on transitional justice, as a thematic issue, it considered transitional justice indirectly in various contexts for decades.⁴² This open debate was intended to provide the opportunity to examine the role of the Council, amongst other actors, in supporting transitional justice processes.

The February 2020 briefing was held in a context in which the Council, according to some, has played an increasing role in promoting the rule of

law and transitional justice.⁴³ Between 2004 and 2020, for example, the Council made references to the two in over 160 Security Council resolutions.⁴⁴ This was a marked increase over the same period prior to the 2004 report of the Secretary-General on the Rule of Law and Transitional Justice, in which the term was defined.⁴⁵ At the time of the Council briefing, transitional justice activities were also increasingly integrated into Security Council resolutions prescribing actions in thematic areas.⁴⁶ In the concept note prepared for the open debate, the UN's approach in supporting transitional justice processes was described as having become more clearly articulated over the past two decades. It also stated that the Security Council has made more frequent use of the instruments at its disposal in support of transitional justice, "be it through the creation of commissions of inquiry to support the pursuit of truth and justice, or through giving peacekeeping missions [...] or special political missions [...] a mandate to support the design and implementation of nationally owned transitional justice initiatives."⁴⁷

The show of unity on the issue, however, belies different approaches within the Council. At some moments, States have highlighted criminal accountability as the most important element of any transitional justice agenda. At other times, States see criminal justice, especially when internationally-led, as the most threatening and perhaps unwelcome element. At other times, States have advocated for a "holistic" approach to transitional justice drawing from the four elements described above. All members have conceded the importance of initiatives being context-specific. But some put more weight

than others on the importance of measuring and aligning country-specific approaches with existing international standards when these seem to conflict. Given these differences of opinion, it can at times be challenging for the Security Council to rally sufficient support within its own ranks for a particular transitional justice initiative. When it does, the leverage, as discussed in the cases to come, can be unparalleled and significant.

It is also important to highlight that the February 2020 debate occurred in a climate of increasing disunity on the Council⁴⁸ in general and, some have argued, an overall decline in the prominence of human rights and questions of accountability in Council practice more specifically.⁴⁹ In such a climate, it is less realistic to expect robust action from the Council on this topic, especially regarding the creation of new, internationally-led accountability mechanisms. But internationally-led endeavours are only one form of judicial intervention and judicial mechanisms are only one aspect of transitional justice. Concurrently, there are many, less remarked, ways in which the Council has continued to collectively engage at the national and local level on transitional justice. In order to shed light on the instances in which the fifteen members of the Council were able to impact the national transitional justice agenda, the remaining sections of this paper will examine findings from five country case studies. The instances of Council involvement described in these case studies illuminate the variety of ways in which the Council has engaged on this file and the range of outcomes following the Council's interventions.⁵⁰



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IV

Case Research Examining Security Council Impact on the Ground

This section offers a brief overview of cross-cutting findings from five case studies: Afghanistan, Colombia, the Democratic Republic of Congo (DRC), Rwanda and South Sudan. It describes the rationale for case selection, highlights the variety of transitional justice mechanisms featured across the cases, and outlines common inhibiting and enabling factors for enhancing the Council's impact.

The findings shared are only preliminary. Further research is needed, drawing on a larger universe of cases in order to generate assessments of general trends. However, these five cases shed light on a number of potential factors affecting the conditions under which Security Council

action has had a positive impact, no impact or a negative impact. They also provide insights on the nature and the degree of the impact – as it is not always as the Council members themselves expected or intended.

Case Selection and Summaries

These particular cases were selected in order to provide a diverse set of examples of Security Council impact in efforts to support – or, in some cases, block – transitional justice endeavours. The case authors took a broad interpretation of Security Council activity, including both the decisions, resolutions, and statements of the

Council's members as well as the actions of the missions they mandated. Accordingly, the cases demonstrate variations in the Council's impact over time and across three geographical contexts. The five cases also illustrate the use of quite different transitional justice mechanisms and demonstrate impact at the international, regional, national and communal level. The cases are based on a mix of desk and fieldwork.

Afghanistan: This case examines the Security Council's impact on transitional justice initiatives in the post-2001 era, in a context of high significance to key permanent members on the Security Council. The author looks at the impact of Council action around Afghanistan's "reconciliation" programs, its support for the Afghanistan Independent Human Rights Commission (AIHRC) – the institutional lead on transitional justice in Afghanistan – and at the UN special political mission's (UNAMA) human rights monitoring. Overall, the author assesses the impact of the Council as one that was generally detrimental to the judicial transitional justice agenda, as Council members accepted and even endorsed the Government's trading of "reconciliation" for immunity. But the author also highlights the contribution of UNAMA's civilian casualties reporting, as well as the AIHRC's efforts to document abuses committed in the context of the conflict. The author argues that such efforts should be more explicitly and actively supported by the Council, and that they could contribute to establishing a fact-base for future prosecution or historical memory purposes. The case study also explores how the direct involvement of powerful foreign States in the conflict contributed to the body's collective reticence to push for accountability. This position was further enabled by the Afghan Government's own reluctance to push for accountability at the time under study.

Colombia: This case traces recent Council efforts to support the broader peace agreement, including its comprehensive transitional justice elements between 2016 and 2019. The author documents how the Council strategically worked with the Government and key transitional justice stakeholders to defend the independence of the JEP – the independent institutional lead on the judicial transitional justice stream – when it came

under attack. The author describes how this support was enabled not only by unity of position on the Council, but also by a unique investment of its members in protecting the terms of the 2016 peace agreement. This investment was bolstered by the Government of Colombia's (both past and current administrations') recognition of the international reputation and leverage built on the success of their agreement and the international community's subsequent efforts to see implementation run smoothly. The case illustrates missed opportunities for intervention as well, noting the potential blindspots that can arise when the Council's membership is determined to see a case as a success. In accounting for the Council's constructive impact vis-à-vis the JEP, the case describes how the Council and its special political mission balance keeping the relevant parties onside while also nudging them (back) towards compliance with the 2016 agreement. This approach was largely built on Council members' clear respect of the fact that the process was Colombian-designed and led, careful picking of battles, and intervening on the basis of a holistic understanding of the peace deal and the interdependence of its various parts.

DRC: From the First Congolese War in 1996 to the present day, the Council has supported national actors employing a range of tools, spanning the four pillars of transitional justice. The author reveals how shifting and contradictory approaches by the Security Council and its peacekeeping mission, particularly around amnesties, led to the breakdown of certain transitional justice endeavours in the DRC. The author also highlights how the Council's efforts to engage with community-led transitional justice processes have served, at times, to undermine those same processes, as a result of the longstanding close working relationship between the Council's mission and the State and its institutions. Yet, the case also highlights how this longstanding relationship has led to the strengthening of domestic transitional justice efforts, primarily through the Congolese military courts and the mobile gender units.⁵¹

Rwanda: This is the earliest case examined in this project. It captures a different period of engagement with international and national

transitional justice agendas, in which the establishment of international criminal bodies was broadly supported amongst Council members. The beginning of this case precedes the establishment of the ICC. Through the case, the authors helpfully illustrate Council efforts to influence transitional justice endeavours, not only at the international but also at the national and community level. As in the South Sudan and the DRC case studies, it involves a UN peacekeeping mission and spans the period of active and post-conflict settings. The authors begin in 1994, with public statements by the Council during the conflict, which, in turn, facilitated the establishment of accountability mechanisms once the violence ceased. The authors conclude with the closing of the UN International Criminal Tribunal for Rwanda (ICTR), the referral of the Tribunal's cases to national jurisdictions, and the establishment of the residual mechanism. Overall, the case describes the significant impact of Council efforts to embed a legal response to international crimes at the national, international and localized level. It also shows, however, the risk of neglecting to consider how parallel transitional justice endeavours will interact with each other, leading at times to perverse incentives at odds with the goals of those pursuing transitional justice.

South Sudan: Transitional justice in South Sudan became a central issue in the context of the civil war that broke out in 2013. Following reports of widespread atrocities by both the Government and the rebel factions, the 2015 and 2018 peace agreements incorporated specific provisions for transitional justice, including some requiring the UN's support. However, in contrast to other transitional justice processes, in South Sudan the Security Council has played a secondary role, with the African Union and the Intergovernmental Authority on Development placed as more direct supporters and guarantors. According to the case author, the Security Council has, therefore, had a more limited ability to influence transitional justice processes, including regarding the proposed hybrid court. Nonetheless, the author argues that the Council and the UN mission on the ground have played important roles in keeping transitional justice high on the agenda of the conflict parties, contributing to an impartial

factual accounting of violations on all sides, building better public knowledge of transitional justice, and helping to strengthen national capacities relating to the rule of law.

Initial Findings

Across the five cases, authors cited instances of impact relating to all four pillars of transitional justice. The four elements manifested through fact-finding missions and truth commissions as a form of truth-seeking, reforms to the justice sector and institution building as a means of encouraging non-recurrence, reparations, and local, hybrid, national and international trials applied in the pursuit of justice. The fact that the cases focused on these particular manifestations of transitional justice is in no way an indication of their superiority as mechanisms. Rather, they are simply the approaches adopted in the cases under study.

Fact-finding: Each of the cases touched on examples of fact-finding on human rights abuses and civilian casualty reporting during and/or immediately following a period of widespread abuse as a key tool that lays the foundations for possible future truth-seeking or justice endeavours. The South Sudan case, for example, describes how the UN Mission in South Sudan (UNMISS) has produced a series of high-profile human rights reports that have demonstrated serious and widespread violations by both sides in the civil war. These reports not only help to provide an impartial basis for future transitional justice processes, but have also been used by the UN to directly call for greater restraint during the conflict.⁵² Since 2016, the UN's human rights reporting has been bolstered by complementary reports from the UN Human Rights Commission for South Sudan, created by the Human Rights Council.⁵³ According to the case author, there is some hope that these reports will feed into the broader transitional justice process such as by contributing to the building of a factual record for the hybrid court.

Truth commissions: Explicit Council support for truth commissions across these five cases was less common. A majority of the Council's



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members did, however, specifically support the idea of establishing a truth commission in South Sudan designed with the goal of encouraging truth-seeking and eventual reconciliation.⁵⁴ In the Colombia case, in contrast, the author observes that the Council has been less vocal in its defense of the truth commission than in its support of the JEP. This is in spite of the fact that both institutions have come under attack.⁵⁵ Yet, the Security Council did invite the head of Colombia's Truth, Reconciliation and Reparations Commission to brief the Council, as part of the February 2020 Open Debate, providing him with a platform to defend the efforts of the truth commission and the broader principle of the right to truth as an integral element of transitional justice not to be neglected in a single-minded drive for accountability.⁵⁶ The impact of this invitation on the ground is said to have deterred, to a certain degree, efforts to undermine this institution.

Judicial sector reform: The five cases also highlight Security Council-backed interventions aimed at reform of the judicial sector with the aim of facilitating non-recurrence.⁵⁷ This finding sits in

contrast to certain assumptions in the literature attesting to the fact that UN development actors may be better placed than the UN's peace and security arms to push for longer-term types of transitional justice interventions, given their intergenerational focus.⁵⁸ Across the five cases, there were a number of clear examples where the Security Council was either the most vocal or the most impactful in pushing to protect or consolidate reform. For example, the Security Council's support for targeted reforms to the Rwanda criminal justice system was one of the elements that helped nudge Kigali to take on specific reforms over time. These reforms included the drafting and amending of bespoke legislation,⁵⁹ removing capital punishment and investing in prison infrastructure.⁶⁰ The Rwanda case authors describe how such domestic reforms were enabled, in part, by the existence and operation of the International Criminal Tribunal for Rwanda. In a similar vein, the DRC and South Sudan case authors describe how the Security Council, through its missions, helped support the mobile courts in South Sudan and the mobile gender units in DRC. The DRC case author

also emphasizes the benefits of the Council's long-term engagement with key stakeholders, which helped build up the Congolese military courts, through the sharing of evidence, security for judicial personnel and assistance with witness protection.⁶¹

Criminal accountability measures: The impact of the Council's direct and indirect support for criminal accountability was illustrated across the five cases. It manifested through active support for national trials in Colombia, plans for a hybrid court in South Sudan, the community-led Gacaca courts and national and international trials relating to Rwanda, and ICC indictments and community trials in DRC. In Afghanistan, the case author argues that the Council's potential impact on criminal accountability was more limited due to the opposition amongst the permanent members and powerful States outside the Council with a shared interest in protecting their own troops – who had been involved in the conflict in Afghanistan – from potential international or national prosecution. In addition, the case highlights how some government officials, at the time the research was conducted, were opposed to a structured accountability process.⁶²

Reparations: The five cases only showed peripheral Council involvement and impact on material reparations. This is perhaps not surprising as reparations require the concerned State to acknowledge responsibility, in addition to it being a potentially resource-intensive process. Hence, the Council can only encourage countries to undertake an (administrative) reparation programme.⁶³ However, where resources are scarce, Council members may be more likely to forgo including this provision in their resolutions, deeming it as less feasible than other, less costly methods.⁶⁴

The Council's Comparative Advantage

To put these initial observations in context, it is important to note that across these cases, the Council was often not the primary actor in terms of a direct link to outcomes. Rather, the Council's

comparative advantaged seemed to lie in: 1) creating a diplomatic atmosphere conducive to bolstering domestic justice; 2) offering crucial technical and logistical support; or 3) playing an important role in selective naming and shaming, when other actors' efforts to do the same had fallen on deaf ears. In the first instance, the Colombia case gives the most apt example in which the unity (or lack of disunity) on the Council, concerted trips by its members to the region, carefully selected language, and the ability to keep the major players onside in the corridors of New York as well as in its mission's work on the ground, enabled the Council to exert crucial leverage at a pivotal moment in the period immediately following the completion of the peace agreement.

In the second instance, the Council's contribution to the technical and logistical aspects of national transitional justice endeavours was evident across all cases, but most apparent when it coincided with well-resourced, larger Council missions. In the case of DRC and South Sudan, for example, the Council offered critical technical and logistical support to a range of transitional justice endeavours through its two largest peace operations. In DRC, this support ranged from sharing evidence with Congolese prosecution and defense investigators to providing security for the mobile court judges. Civil society organizations, however, delivered the bulk of the technical and funding support to the courts in an innovative international-domestic partnership.⁶⁵ In South Sudan, the 2018 peace agreement set the UN mission's role as support to the relevant regional bodies and national authorities on the transitional justice agenda.⁶⁶

In the third instance, the Council played an important role in Colombia, speaking out when other voices went unheard.⁶⁷ Similarly in Rwanda, where individual Member States and the UN more broadly had lost credibility in the aftermath of the genocide, the Council still called for essential reforms of the domestic justice system. This, however, only followed other instances where the Council had critically remained silent, such as in the face of the Government's refusal to send indicted members of the Rwanda Patriotic Front to Tanzania for questioning by the ICTR.

The Council's Absence

The five cases also capture the impact of the absence of Council action on the success of particular transitional justice endeavours. In the case of Rwanda, for example, the authors describe the impact of the absence of support for truth-seeking, including via a truth commission. And in Afghanistan, and to some extent South Sudan, the authors point to the impact of an insufficient focus on accountability for the most serious crimes on combined efforts to push the transitional justice agenda forward. The DRC case author also suggests that Council action, when compared to other UN and external actors' contributions in the region, was most effective when targeted at the international or national levels rather than towards local/communal processes – a finding otherwise at odds with recent calls for the Council to engage more on community-driven processes. This case raises the question of whether it is better for the Council and its missions to be, as the author put it: “a distant enabler” rather than a “direct participant” in community-led processes given what is cited in the DRC case as “pervasive suspicion” of State, army, and international actors at certain levels of Council engagement.⁶⁸

Conditions Inhibiting Impact Across the Five Cases

The cases also help to highlight four key challenges to ensuring effective Council impact through its support for national actors and its country missions. The first challenge involved the difficulty of timing the Council's interventions vis-à-vis developments on the ground. Current research suggests that whether a situation is in an active state of conflict (and there is no “transition” to speak of), immediately post-conflict, or in the years following the cessation of hostilities matters for the design and effectiveness of the transitional justice strategy.⁶⁹ The DRC case, for example, illustrates the challenges of privileging support for criminal accountability when a conflict was still ongoing versus once it has concluded and a peace agreement is signed. The author

attributes a poorly timed intervention with the breakdown of the Disarmament, Demobilization and Reintegration (DDR) process. Participants in the DDR process began to doubt the viability and sustainability of the amnesties they had been promised in exchange for laying down their arms.⁷⁰ The Afghanistan and South Sudan cases show the challenges of timing if the Council waits too long to push for accountability, when conflict victors are all or in part responsible for violations and are therefore more reluctant to acquiesce to such measures. In addition, the case authors explore whether there are instances when it is not appropriate for the Council to try to impact transitional developments on the ground. Questions for further research include: What is the potential for Council impact on transitional justice during situations of active conflict? What is the potential for Council impact while an agreement is being negotiated or once it is in place? And should the Council adjust its approach to transitional justice when a peace agreement it is supporting breaks down and conflict re-emerges?

The second challenge evident across the five cases was the issue of how best to support national efforts to plan transitional justice interventions in a context-specific manner. The literature has long stressed the importance of an integrated and holistic approach. Along these lines, the UN Special Rapporteur argued that “the weakness of each of these measures alone provides a powerful incentive to seek ways in which each can interact with the others in order to make up for their individual limitations.”⁷¹ But an “integrated” approach is not necessarily the same as a simultaneous approach. The five cases highlight the importance of thinking through knock-on effects of different types of interventions within a single transitional justice strategy. They describe the unintended consequences of leveraging multiple transitional justice processes simultaneously, without attention to context. The impacts of this “template” rather than “tailored” approach are most evident in the Rwanda and DRC cases, where interventions aimed at promoting justice hurt ongoing efforts to promote truth and guarantees

of non-recurrence. One of the possible inferences from these cases is that “more” in terms of the number of transitional justice interventions pursued, may not necessarily always be better. It is rather a matter of which options from the transitional justice toolkit are most appropriate in a given context, at a given time, and in light of existing needs. In other words, tailored rather than template transitional justice interventions were most likely to be successful.

A third challenge revealed in the cases relates to national ownership. Research has emphasized its importance, particularly at the beginning of a transitional justice process, as “the concept of transitional justice can be perceived as foreign and not relevant in the local context.”⁷² Moreover, at early stages in a transitional justice campaign, there is more of a tendency to resort to pre-existing models rather than allowing the space for one to emerge organically.⁷³ The five case studies illustrate the challenges that arise from insufficiently broad national ownership of the transitional justice agenda. They raise the question: How can the Security Council effectively defend UN values and normative standards and ensure buy-in from the parties? In the case of Afghanistan, the author argues that the Council did not venture far enough. In Rwanda, the case study authors suggest that the Council could have gone further in the second and third phase of its involvement on transitional justice at the international and national levels. By the fourth phase of its intervention, the processes of referring cases to the national courts opened up more extensive dialogues with national actors and struck a better balance between international and local interests and ownership. In the case of the DRC, the author illustrates how the Council may have gone too far in pushing core UN values around amnesties in particular, to the detriment of national ownership and, overtime, national capacity. The result, the author argues, was diminished local capacity and the undermining of perceptions of neutrality of the subnational processes they strove to support. Lastly, in the case of Colombia, the author highlights the tension between those stakeholders that think the Council has not gone far enough in defending

the suite of transitional justice institutions created through the peace accord, while others worry the Council would have lost its influence if went any farther.⁷⁴

Fourth and finally, the cases also illustrate how weak or non-existent institutional architecture is a hurdle to take into account when considering the Council’s ability to support and positively impact national transitional justice agendas. A comparison of South Sudan and Colombia, or DRC in the 2010s versus the 2020s, demonstrates the challenges of being impactful in the presence of weak or non-existent institutions – institutions critical for sustaining the necessary legal and economic reforms central to ensuring non-recurrence. To be impactful, the cases intimate that Council members must evaluate their prioritization of some institutions over others (e.g. Ministries of Defense versus Justice). They must also query whether the institutions they are helping to build or prop up are sufficiently representative to last and whether these institutions are, in fact, prone to or complicit in ongoing human rights violations. If not, the cases raise the question: what options remain? Is supporting and being part of a flawed or incomplete transitional process better than not?

The five cases offer a number of striking examples, such as the AIHRC in Afghanistan or the DDR programme with amnesties in DRC, to suggest that the Security Council, through its actions, has answered in the affirmative. Further research is needed, however, to examine how these dynamics play out in other cases, and whether the results of its endorsements of flawed processes in any given case are more important to bolstering a struggling transitional justice process than the Council’s silence.

Conditions Enabling Impact Across the Five Cases

Beyond highlighting challenges, the five cases also begin to hint at some of the conditions that enable impact. These conditions might help explain why the Council was more effective

in supporting transitional justice endeavours in some instances and not others. The most commonly cited conditions are summarized below:

1. Council unity, is of course, important for spurring action. But even more important, in these cases, was the absence of direct Permanent Five or Elected Ten involvement in the human rights violations in question. Comparing Council interests, for example, in Afghanistan versus Colombia, paints this picture quite starkly, as well as Council involvement on Rwanda.

Conversely, this observation raises the question: what impact, if any, can the Security Council have when perpetrators or facilitators of the human rights violations in question sit on the Council? What options are available in these circumstances? What recourse do other Council members or parts of the UN have?

2. In addition, broad enabling language is useful and, most often, a precondition for impact. But how it is used matters more. While similarly broad language existed in the Colombian and Afghan cases, the Security Council leveraged the existing language in Colombia to greater effect. In contrast, the language employed in the case of Afghanistan remained aspirational, in many respects, when compared to what the Security Council was willing to seek to enforce.⁷⁵
3. It is also helpful for both the Council and its missions to embrace a holistic, needs-based, victim-centred approach to transitional justice early. It only gets harder with time. Colombia and South Sudan both present cases where this was done well – in Colombia due to the strength of pre-existing national transitional justice efforts, which the Council could help reinforce, and in South Sudan, due to the attention, expertise, and advocacy of the mission leadership to this issue. DRC presents a harder case, in which external actors, including the

Council, attempted to impose a victim-centred approach⁷⁶ midway through a UN mission strategy weighted towards a State-centred approach. The result, according to the case author, was a confusion of incentives and the breaking down of the existing DDR measures that, while imperfect, had been harnessing important benefits in terms of demobilization and disarmament of armed groups.

4. Knowing and using the Council's comparative advantage on an issue both internally (within the UN family) and externally (versus regional organizations or influential Member States) is key to increasing the Council's impact. This condition includes knowing when not to act in order to safeguard the space for those who might be most influential vis-à-vis a government or stakeholders in a given situation. For example, in the case of South Sudan, the Council and its mission were charged with supporting regional and national endeavours. As a result, according to the case author, the UN mission has not always best placed to push for national reforms when compared to major regional players. In DRC, the author suggests that even when the Council did not hold a comparative advantage, its insistence on pushing a particular approach to the transitional justice agenda curtailed parallel local and national efforts and curtailed its own efficacy on the broader transitional justice file.
5. The Council is most impactful when it strikes the appropriate balance between international standard-setting and context-sensitive approaches. The study of Council impact in DRC demonstrates a case in which, the author argues the Council failed to strike this balance effectively, pushing too hard for the imposition of contested standards (around the ICC) to the detriment of other non-judicial transitional justice goals. The analysis of Council impact in Rwanda, in contrast, presents a case where the

Council could have pushed harder for the incorporation of certain international standards into the domestic practice from an earlier stage.

6. The Council's ability to impact justice reform may depend on the duration and size/capacity of the mission and on how the transitional justice efforts around justice sector reform under "non-recurrence" are linked to broader rule of law reform support. In the current environment in which lighter touch, limited duration missions are the model preferred by host governments, the Council may be less well placed to effectively support justice reforms than other actors in the UN system.⁷⁷ These reforms often need longer-term relationships with key stakeholders and an intergenerational planning vision. In spite of this, the Council can offer critical, time-sensitive support to institutions under threat, while recognizing that transitional justice actors relying on such support would not be sustainable in the mid- to longer-term.
7. The Council's influence can also be complemented by actors with a comparative advantage, e.g. those with local expertise, local legitimacy, or those operating outside the political limitations experienced by the Council. According to one national champion of transitional justice featured in the Colombia case: "The more modest the Council is in its ambitions, the more effective it can be in the results."⁷⁸ In other words, the

Council should neither rush in nor, after careful reflection, should it fear strategic and limited action on transitional justice because it brings unique qualities to the fore that others lack.

8. Lastly, the cases highlight a common condition related to Security Council mandated mission structures: integration makes the Council's ability to impact transitional justice endeavours easier. But they may be less necessary if the mission leadership is sensitized to the issues and coordinates well with OHCHR and other UN counterparts working on transitional justice.⁷⁹

In summary, the five case studies provide an excellent jumping off point for an initial analysis of Security Council impact on transitional justice efforts on the ground. This analysis does not pretend that the five cases capture all key issues. Rather, the above elements are meant to start a discussion, and not limit it.

Overall, these cases show that there is a need for a comprehensive analysis of the conditions under which the Council can be most impactful. Ideally, this assessment should be conducted in a country prior to the moment when a case lands on the Council's agenda. Currently, no such process exists, especially as regards an assessment of institutional strengths and weaknesses. The Security Council, in turn, could call upon the Secretariat, its missions on the ground and its thematic and country envoys to provide such an analysis through mandated briefings or reports.



V

Overarching Takeaways⁸⁰

To conclude, the findings from the case studies coalesce around a number of takeaways for the Security Council, the UN Secretariat, and transitional justice advocates at the local, national and international level. The recommendations are meant to provide a point of departure for further policy research and consultations. Going forward, key stakeholders may choose to flesh out and hone these proposals for general application or to adapt and apply them in particular cases.

For UN Security Council Members:

1. Remember the unique role the Council can play, on a normative level, in upholding international standards and calling for accountability and compliance with existing transitional justice endeavours. On a more operational level, Council

members might add the most value by encouraging national ownership and preserving the local nature of community-based initiatives. This often comes in the form of technical expertise or logistical support.

2. Recognize that by simply staying the course and going for an incremental strategy, consistent attention from the Council can give stability to the immediate post-conflict stage. National authorities and conflict parties, particularly in the Colombia case, attest to how the Council has become an important factor in the weight given to the peace process, including the transitional justice elements.
3. Consider that adequate and context-sensitive mandate language may be all that is needed as long as the Council-mandated mission leadership is ready to take the transitional justice agenda

forward. According to two former multi-mandate Special Representatives to the Secretary-General (SRSGs) interviewed for this volume: “just enough to work with should be sufficient.”⁸¹

4. Draft transitional justice mandates in broad, enabling language, as too detailed and prescriptive wording may obstruct effective and adaptive transitional justice action on the ground. That said, endowing UN missions with clear and strong mandates for monitoring and reporting holds tremendous value. In addition, language encouraging missions to integrate an analysis of transitional justice into their transition planning, where it is not currently present, will help consolidate and protect gains following the mission’s departure.
5. Remember that modest and incremental support to national authorities is often better than a “fire hose”⁸² approach, due to the intimate and interconnected relationship between transitional justice initiatives. In other words, the Council’s support for one type of transitional justice mechanism will affect both that mechanism and the others employed, even if the Council is not involved with these other endeavours. Thus, there is a need to think holistically and to monitor parallel efforts to ensure they work in complimentary rather than conflictual ways.
6. Consider that the impact of the Council’s actions will also depend on the dynamic relationship between the Council and the affected State. Transitional justice is most effective when parties feel they are able to engage around transitional justice with the UN.⁸³ Thus advice and setting expectations will be needed as relationships fluctuate throughout the course of the Council’s engagement.
7. Work with the national authorities to embed support for transitional justice in the overall transition – not as a separate piece. The Council does not need a

transitional justice strategy *per se* – at least by this formal name. But it should ensure that the elements in a transition that will assist with non-recurrence are adequately supported – looking for where the objectives of peace and transitional justice dovetail in positive ways. The Secretariat can play an essential role in helping Council members achieve this.

8. Continue to include expert transitional justice briefers in existing open and closed Security Council briefings.

For the UN Secretariat:

1. Recognize that transitional justice is a political issue and not simply a technical exercise. As such, engagement often requires finding willing stakeholders at the national and community levels. But this recognition needs to be built upon and guided by a rights-based approach as articulated by the Special Rapporteur, which puts victims’ rights and States’ obligations at the centre of the approach taken.
2. Ensure that victims are engaged early in the process and that a diversity of stakeholders are engaged. Base early engagements on conflict and stakeholder analyses conducted promptly and jointly by the relevant UN entities and agencies.
3. Look to raise awareness, present necessary facts, and guide the Council in its understanding of the: 1) country’s own transitional justice strategy; 2) places where the Council will have a comparative advantage; 3) places where it is perhaps best for the Council to defer to other actors in and outside the UN system; and 4) provide early warning to the Council when crucial elements of a transitional justice endeavours are under threat.
4. Advocate for the principles behind transitional justice in a strategic and targeted way. Important endeavours have included the call for considering a

victim-centred approach or the joint UN Department of Political Affairs-OHCHR report on the value of public reporting on human rights violations.⁸⁴

5. Carefully select appropriate SRSs who will know how to interpret and use the broad enabling language of the resolutions to open up the possibilities that are in the mandate rather than be restricted by them.
6. Strive for a needs-based and context-specific approach vis-à-vis the national authorities. Frequent engagement and, where feasible, the co-designing of mandates and missions with national authorities has proved beneficial in the cases examined.
7. Refrain from automatically calling on the Council to “do more” in any given case. This can, as the cases have shown, lead to unhelpful micromanagement from New York and introduce (more) partiality into different stages of the transitional justice process on the ground. Instead, the Secretariat could support Council efforts to provide broad support for actors on the ground to do what is needed to push their strategy forward, within the margins of UN standards.
8. Integrate human rights, rule of law, and development focus when coordinating UN support to a national transitional justice process, understanding that transitional justice interventions are not temporary, but take time and require a longer-term focus.
9. Weigh the advantages and limits of advocating for an explicit reference to transitional justice in a mandate, a Secretary-General report, or a Council statement. In some instances using the term can increase the impression of foreign imposition and decrease the impression of local ownership, especially where there is not a longstanding tradition of transitional justice, by that name.

10. Continue to raise awareness in the Council on these issues, encourage briefings by the High Commissioner for Human Rights, country-specific Special Rapporteurs, Special Advisors on Children and Armed Conflict and Sexual Violence in Conflict.
11. Consider seconding OHCHR colleagues with transitional justice expertise to relevant parts of the system to help build in-house capacity on this file, as was done in the case of the Peacebuilding Support Office.⁸⁵
12. Consider developing a flexible coordination mechanism, to increase coherence and joint approaches across the system.

For Transitional Justice Advocates at the Local, National and International Levels:

1. Decide if and when it is advantageous to engage the Council on these issues. When it comes to Council mandates on transitional justice, more is not necessarily better. Rather it can be important to preserve space for flexibility and creativity on the ground. Council involvement brings a number of potential benefits in the best scenarios, including international attention and pressure, an amplification of local or even marginalized voices, as well as resources, and technical and logistical support. But Council involvement also has the potential to further politicize issues that could, at times, be more easily confronted out of the international spotlight. The Council will also necessarily introduce certain political considerations from the national interests of its fifteen members into its decision-making. Moreover, the Council will have to manage its relationship with the host government and often its neighbours, which may as often frustrate transitional justice endeavours as it facilitates them.

2. Accept that the Security Council's own engagement will be limited and put pressure on the Secretariat to do the briefings and detailed analysis. It asks a lot of the Council to understand the history and context of each situation for which it is seized. That said, much of the information it receives is mediated through the Secretariat's reports and expectations. Thus, it is important to focus on the understanding and commitment of Secretariat actors including the mission leadership, national and expert briefers to the Council, and the verbatim transcripts from the Council's briefings and debates.
3. Consider whether involving the Security Council – versus another actor within the UN system – is best when a national strategy is lacking or fractured. While the Council's members can emphasize international standards and encourage compliance in a given case, the body is less suited to supporting the creation of a country-specific transitional justice strategy.
4. Continue to insist that any intervention in a given country is needs-based. Help the broader UN system and Council members to understand these needs and work with them even if the result looks quite different from transitional justice processes that have existed previously. Conversely, bring a situation to the Council's attention when uneven national or local needs are driving the process and leading to selective justice for only one set of perpetrators or justice/reparations for one category of victims.
5. Consider establishing a "Group of Friends" on transitional justice, composed of Like-minded Member States. This group could then help coordinate and pressure action on files within the Security Council or lead the way in funding or tracking the implementation of measures called for by the Council in the transitional justice sphere. Inspiration could be drawn from the current "Group of Friends on Mediation" co-chaired by Finland and Turkey.⁸⁶

References

- 1 Closed workshops with transitional justice and Security Council practitioners and experts, June – August, 2020. See also the inaugural report of the Special Rapporteur on Truth, Justice, Reparations and Non-Recurrence, in which he seeks to dispel common misconceptions regarding the field. Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,” United Nations General Assembly, 9 August 2012, A/HRC/21/46.
- 2 United Nations Security Council, “The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, United Nations, 23 August 2004, S/2004/616: para 8. In a similar vein, ICTJ defines the term as “a set of approaches and mechanisms designed to address the situation of massive violations of human rights in the wake of repressive rule or conflict. The scale and impact of such violations requires solutions that not only provide a meaningful measure of justice for very large numbers of victims but also which help reconstruct the basic elements of trust between citizens and the government institutions that are necessary for the rule of law to function effectively,” International Centre for Transitional Justice, “Transitional Justice in the United Nations Human Rights Council,” *ICTJ Briefing* (2011)
- 3 Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice,” United Nations General Assembly, 7 August 2017, A/HRC/36/50/Add.1: para. 3. The field also has roots in the post-World War II Nuremberg and Tokyo trials.
- 4 Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,” United Nations General Assembly, 9 August 2012, A/HRC/21/46/Sec. B.
- 5 Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,” United Nations General Assembly, 21 August 2017, A/HRC/36/50, Sec. V.
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- 7 Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice,” United Nations General Assembly, 7 August 2017, A/HRC/36/50/Add.1
- 8 See the South Sudan case study in this volume for more information on the hybrid court.
- 9 “Category I” genocide cases were tried through both Rwanda’s national court and through the UN-backed ICTR. In its last two years, the Gacaca courts also dealt with Category I cases.
- 10 Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice,” United Nations General Assembly, 7 August 2017, A/HRC/36/50/Add.1: para. 8. Other regional courts include the African Court of Human Rights and the European Court of Human Rights.
- 11 For a further discussion on the role of the ICC in this volume, see the DRC and the Colombia case.
- 12 In addition to the Security Council, States can also make referrals to the ICC. The Chief Prosecutor of the ICC can also initiate investigations *proprio motu*. For more information see: International Criminal Court, Rome Statute of the International Criminal Court (The Hague: United Nations, 2011), <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx>.
- 13 This is not the only misperception. The first report of the Special Rapporteur also directly countered prevalent “misconceptions” around transitional justice including that it is equivalent to a “soft form of justice” and that it is “a means of pursuing the aim of reconciliation bypassing the implementation of the four measures under the mandate” Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,” United Nations, 9 August 2012, A/HRC/21/4/Sec. C : para. 19.
- 14 Closed workshops with transitional justice and Security Council practitioners and experts, June – August, 2020. whether these institutions are in fact prone to or complicit in ongoing human rights violations.
- 15 A/HRC/24/42/ Sec. III: para. 18-21.
- 16 In the Special Rapporteur’s inaugural 2012 report, he speaks of the goals of transitional justice as “assisting in the pursuit of two mediate goals, i.e., providing recognition to victims and fostering trust, and two final goals, i.e., contributing to reconciliation and strengthening the rule of law. Human Rights Council, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff,” United Nations General Assembly, 9 August 2012, A/HRC/21/46/Sec. C: para. 21.
- 17 UN Peacebuilding Fund, “Secretary-General’s Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice,” (New York: PBSO, 2020): 14.
- 18 Rebecca Brubaker, with contributions from Akhilesh Upadhyay, “Breaking the Mold: Lessons from Sixteen Years of Innovative UN Political Engagement in Nepal,” International Peace Institute, February 2021.
- 19 See the case study on South Sudan in this volume.
- 20 United Nations General Assembly, “Promotion of truth, justice, reparation and guarantees of non-recurrence: Note by the Secretary-General,” United Nations, 14 October 2014, A/69/518: para. 6.
- 21 Ted Piconne, *Peace with Justice: The Colombian Experience with Transitional Justice* (Washington DC: Brookings, 2019), https://www.brookings.edu/wp-content/uploads/2019/06/FP_20190708_colombia.pdf. See also Colombia case in this volume.

- 22 On compensation paid to survivors of the Holocaust, see, as one example, Michael Wise, "Reparations," *The Atlantic Monthly* 272, 4 (1993): p. 32-35. "Before the 1952 [West German] agreements [on reparations and indemnification] there was no precedent in international law for a nation-state to assume responsibility for crimes it committed against a minority within its jurisdiction, and no precedent for collective claims of this kind. Even if nothing can call the dead back to life or obliterate the crimes, Nahum Goldmann [the chief negotiator for Israel at the claims conference] wrote in his memoirs, 'this agreement is one of the few great victories for moral principles in modern times.' Wise quotes the Executive Director of the Conference managing the dispersal of claims, which resulted from these agreements, as stating: 'For this [Claims Conference] the bottom line is...the principle of accountability. Germany, by accepting responsibility for its predecessor government, has taken a step that has overriding moral significance for the international community.'"
- 23 Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice," United Nations General Assembly, 7 August 2017, A/HRC/36/50/Add.1.
- 24 Human Rights Council, "Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence," United Nations, 6 June 2018, A/HRC/37/65; United Nations General Assembly, "Promotion of truth, justice, reparation and guarantees of non-recurrence: Note by the Secretary-General," United Nations, 12 October 2017, A/72/523.
- 25 UN Peacebuilding Fund, "Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice," (New York: PBSO, 2020).
- 26 See, for example Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford: OUP, 2019); or Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: CUP, 2018) on the shortcomings of the holistic transitional justice push, which, they each argue, does not account sufficiently for the tensions among the different transitional justice approaches when applied in tandem. Both authors argue that not all of these different mechanisms work easily together. For example, while some leaders in Rwanda pushed for a Truth and Reconciliation Commission, with some form of amnesty, they did not elaborate on how this would have operated effectively alongside the punitive judicial component that – for some suspects – they believed were also necessary.
- 27 Tailoring may require going beyond the mechanisms briefly highlighted in this volume or the transitional justice toolbox as it is currently conceived in the 2010 UN Guidelines.
- 28 Closed UN workshops on transitional justice with practitioners and senior UN experts, NY, Summer 2020.
- 29 The interconnectivity of the approach is elaborated in the first report of the Special Rapporteur, a mandate established in 2011: Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff," United Nations General Assembly, 9 August 2012, A/HRC/21/46/ Sec. D: para. 22 states: "International experience, as well as research, suggests that the comprehensive implementation of the four components of the mandate provides stronger reasons for various stakeholders, foremost amongst them, the victims, to understand the measures as efforts to achieve justice in the aftermath of violations than their disconnected or disaggregated implementation."
- 30 Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff," United Nations General Assembly, 9 August 2012, A/HRC/21/46/Sec. D.
- 31 See case study on Rwanda in this volume.
- 32 United Nations Security Council, "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, United Nations, 23 August 2004, S/2004/616.
- 33 Ibid.
- 34 United Nations Security Council, "Uniting our strengths: Enhancing United Nations support for the rule of law: Report of the Secretary-General," United Nations, 14 December 2006, A/61/636–S/2006/980; United Nations, "Charter of the United Nations" 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI, Article 1(1).
- 35 United Nations Security Council, "Resolution 1894, adopted by the Security Council at its 6216th meeting," United Nations, 11 November 2009, S/RES/1894, quoted in International Centre for Transitional Justice, "Transitional Justice in the United Nations Human Rights Council," *ICTJ Briefing* (2011). The report continues by noting that the Council is "less consistent when it comes to referring to such mechanisms in country-specific resolutions."
- 36 For example, they refer to an "inalienable right to know the truth" and a "duty to preserve memory" (Joinet/Orentlicher Principles, Principles 2 and 3). See: United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (New York: United Nations, 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.
- 37 The mandate was established, by consensus, under Human Rights Council, "Resolution adopted by the Human Rights Council 18/7: Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence," United Nations, 13 October 2011, A/HRC/RES/18/7.
- 38 OHCHR, "Annual thematic reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence," accessed 22 January 2020, <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/AnnualReports.aspx>
- 39 Closed UN workshops on transitional justice practitioners and senior UN experts, NY, Summer 2020.
- 40 The term "victim-centred" appears most frequently in the UN documentation although "survivor-centred" is now preferred by many. In order to accurately reflect the original language of these reports, this volume will generally use "victim-centred."
- 41 Security Council Report, "February 2020 Monthly Forecast," accessed 25 January 2021, <https://www.securitycouncilreport.org/monthly-forecast/2020-02/transitional-justice.php>; and Security Council Report, "Transitional Justice Open Debate," accessed 25 January 2021, <https://www.whatsinblue.org/2020/02/transitional-justice-open-debate.php>.
- 42 Most recently, at the initiative of the UK, the Council held an Open Debate to discuss the role of reconciliation in maintaining international peace and security.
- 43 While this role may be increasing, it is also important to highlight that transitional justice and the rule of law represent broad substantive areas that have been the focus of attention by the United Nations for decades. The matter has been on the agenda of the General Assembly since 1993 under the agenda item 'Strengthening the rule of law'. On 24 September 2003, the Security Council met at the ministerial level to discuss the United Nations role in establishing justice and the rule of law in post-conflict societies.

- 44 This is referring to 'rule of law' and 'transitional justice' as separate phrases.
- 45 United Nations, "Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies," United Nations, 12 October 2011, S/2011/634: para. 10.
- 46 For example, in its resolutions 1674 (2006) and 1894 (2009), the Security Council noted the important role of Security Sector Reform and accountability mechanisms in the protection of civilians in armed conflict. United Nations Security Council, "Resolution 1674, adopted by the Security Council at its 5430th meeting," United Nations, 28 April 2006, S/RES/1674; United Nations Security Council, "Resolution 1894, adopted by the Security Council at its 6216th meeting," United Nations, 11 November 2009, S/RES/1894.
- 47 United Nations Security Council, Letter dated 4 February 2020 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General," United Nations, 5 February 2020, S/2020/98: para. 4.
- 48 Richard Gowan, *Minimum Order: The Role of the Security Council in an Era of Great Power Competition* (New York: United Nations University, 2018).
- 49 For an appraisal of the decline of human rights in the Security Council, see, Security Council Report, *The Rule of Law: Retreat from Accountability* (New York: Security Council Report, 2019), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_rule_of_law_2019.pdf.
- 50 For more on the evolution of Security Council language and strategies vis-à-vis transitional justice, see forthcoming work by Security Council Report (a partner in the overarching project under which this report was conducted). According to this research, four broad elements are in play when the Security Council incorporates transitional justice measures or references: a) how well do members understand these issues; b) temporary and sequencing factors (when they are interested and when they are not); c) broad political push and pull factors; and d) reporting and narrative factors that can be persuasive on the Council. In addition, the research highlights that despite the fact that the Council often seeks to send a strong message about accountability, in practice it is much less persistent in demanding to know how this is being operationalized on the ground.
- 51 This case broadly aligns with a recent assessment conducted by PBSO which concludes that: [PBSO report says engagement was on all 4 pillars but it was thin. But to have been focused and to sequence interventions and they must be "needs based" and "locally owned" approach rather than a "one size fits all" approach]. UN Peacebuilding Fund, *Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice* (New York: PBSO, 2020).
- 52 UNMISS and OHCHR, *Indiscriminate Attacks against Civilians in Southern Unity in April – May 2018* (Geneva: OHCHR, 2018), https://unmiss.unmissions.org/sites/default/files/unmissohchr_report_on_indiscriminate_attacks_against_civilians_in_southern_unity_april-may_2018.pdf.
- 53 Human Rights Council, "Resolution adopted by the Human Rights Council on 23 March 2016," United Nations, 27 April 2016, A/HRC/RES/31/20.
- 54 The Council was divided rather than unanimous in its support for the resolution that approved of the Truth and Reconciliation Commission.
- 55 Interviews with Council members and senior diplomatic officials, April - May 2020. See also Colombia case in this volume.
- 56 United Nations, "Transitional justice in conflict and post-conflict situations - 8723rd Security Council Meeting," 13 February 2020 (23 min. and 35 seconds): https://www.youtube.com/watch?v=oAueD-6cp_2Q&list=PLwoDFQJEQ_ObkicaYYXnLWklzvXDl8H-p_&index=143
- 57 Justice reform measures are considered transitional justice measures to the extent that they fit into the broader concept of "guarantees of non-recurrence." In order to fall under this understanding, justice reform measures need to aim at non-recurrence of the type of human rights violations that have been prevalent and the legacy of which national actors are seeking to address.
- 58 UN Peacebuilding Fund, *Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice* (New York: PBSO, 2020).
- 59 "Organic Law No. 11/2007 of 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States," *Official Gazette of the Republic of Rwanda* 46 (2007).
- 60 See Rwanda case study in this volume.
- 61 This case broadly aligns with a recent assessment conducted by PBSO which concludes that engagement was broad (on all 4 pillars) but thin. In a similar vein, the PBSO brief concludes that to have been focused and to sequence interventions and the UN must adopt a "needs-based" and "locally-owned" approach rather than a "one size fits all" approach.
- 62 See case on Afghanistan in this volume.
- 63 To be contrasted with reparations arising as a consequence of a judicial process.
- 64 The South Sudan case discusses some of the potential pitfalls of the Council support, in building broader expectations that the international community will financially support reparations. In Colombia, in contrast, support for the reparation provisions in the peace deal have come both from the Council's special political mission in Colombia, as well as other parts of the UN system. For example, the UN Peace Building Fund has supported a few projects related to strengthening this mechanism (See, UN Peacebuilding Fund, *Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice* (New York: PBSO, 2020).
- 65 The CSOs included: the American Bar Association/Rule of Law Initiative (ABA/ROLI), the Open Society Justice Initiative (OSJI) and the Open Society Initiative for Southern Africa (OSISA). See DRC case in this volume for further information.
- 66 UKMISS's transitional justice strategy also included offering support to the Ministry of Justice to establish a coordinating transitional justice technical committee, developing effective victim/witness programs, and expanding outreach and sensitization programs to build a common understanding of transitional justice measures. See South Sudan case in this volume for further information.
- 67 See Colombia case study in this volume.
- 68 See DRC case study in this volume.
- 69 UN Peacebuilding Fund, "Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice," (New York: PBSO, 2020).
- 70 See DRC case study in this volume.
- 71 Human Rights Council, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff," United Nations General Assembly, 9 August 2012, A/HRC/21/46/Sec. D: para. 22.

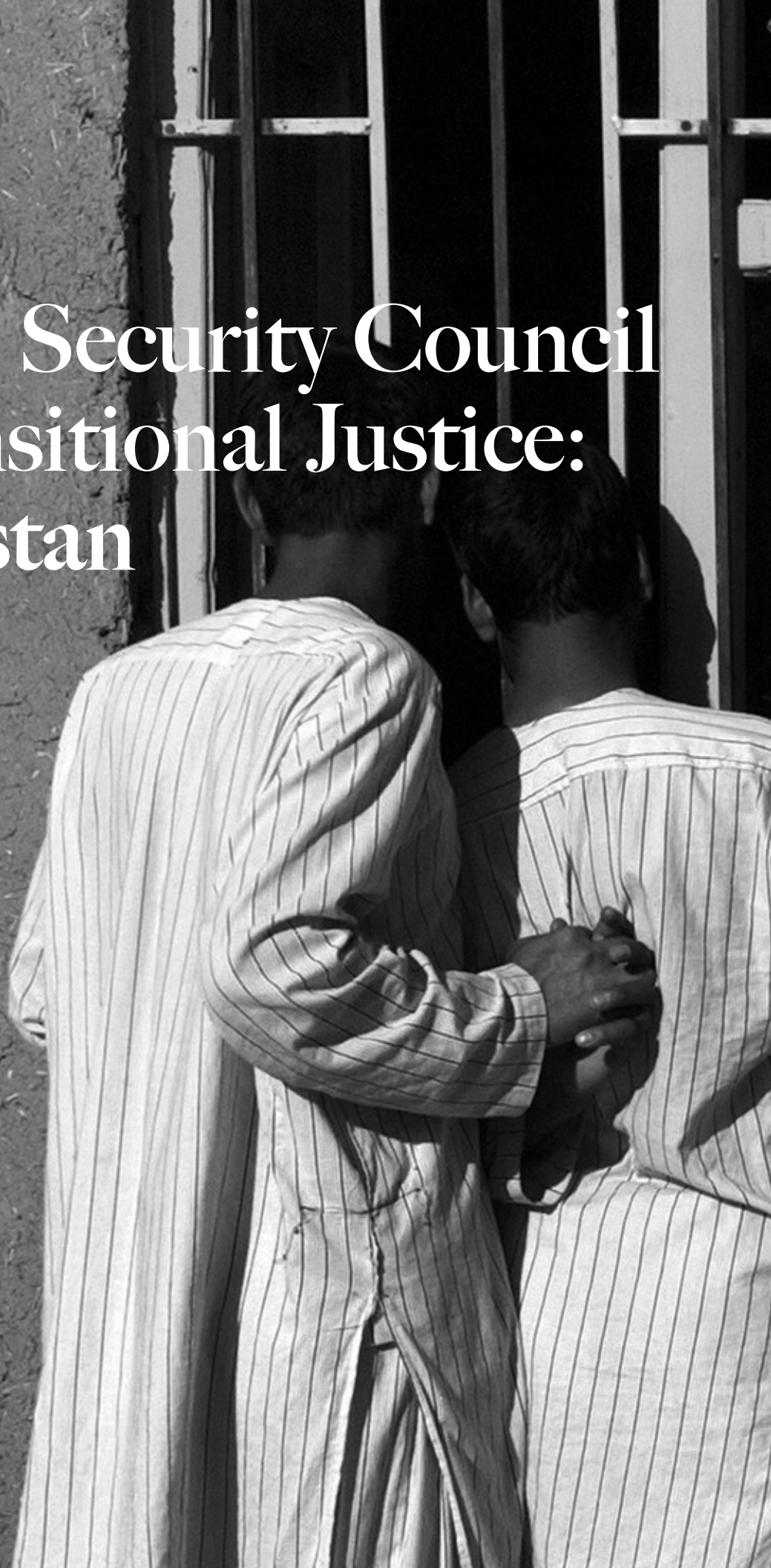
- 72 UN Peacebuilding Fund, "Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice," (New York: PBSO, 2020): 31.
- 73 Closed UN workshops on transitional justice with practitioners and senior UN experts, NY, Summer 2020.
- 74 See Colombia case study in this volume.
- 75 It should be noted, however, there is a large difference between a post-peace-agreement context (Colombia) and a no-peace-agreement context (Afghanistan during the period of the case study).
- 76 The Council did not express its shift in strategy as "victim-centred," but some interviewees argued that it was implicit in the Council's shift to viewing prosecutions (v. amnesties) as necessary for high-ranking atrocity suspects.
- 77 Comparing UNMIN or the UN Mission in Colombia, for example, to MONUSCO.
- 78 Interview, Senior Government official with experience leading national transitional justice strategy, with Security Council backing, via Zoom, 7 July 2020.
- 79 See case study on Colombia in this volume.
- 80 The author would like to thank the individuals who participated in the 7 July 2020 expert closed workshop for their reflections on these issues. The author has sought to incorporate their recommendations into this section.
- 81 Interviews, via Zoom, 4 and 7 July 2020.
- 82 As described by a discussant in an expert workshop, Summer 2020.
- 83 See Rwanda case study in this volume.
- 84 OHCHR, DPA and DPKO, Public Reporting on Human Rights by United Nations Peace Operations: Good Practices, Lessons Learned and Challenges, (New York: United Nations, 2017).
- 85 UN Peacebuilding Fund, "Secretary-General's Peacebuilding Fund: Thematic Review - PBF-supported projects on Transitional Justice," (New York: PBSO, 2020): 16.
- 86 United Nations Peacekeepers, "Group of Friends of Mediation," accessed 22 January 2021, <https://peacemaker.un.org/friendsofmediation>.



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The UN Security Council and Transitional Justice: Afghanistan

by Cale Salih
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Introduction

The UN Security Council's approach to transitional justice in Afghanistan in the post-2001 era has generally reflected the international community's, and most notably the United States', prioritization of short-term stability and accommodation of potential spoilers. Some States – including those seeking to withdraw international forces and to facilitate returns of asylum seekers – have viewed transitional justice as potentially destabilizing.¹ According to this view, transitional justice is a Pandora's box that could threaten powerful officials, undermine negotiations with armed actors, deter disarmament, and/or complicate US-led counter-insurgency efforts that rely on former militia commanders.² Further, an element of self-preservation drives the lack of political will among certain members of the Security Council to reckon with human rights violations. Virtually all those involved in the Afghan conflict – not only the Taliban, affiliated armed groups, and Afghan security forces, but also international actors, including US armed forces and the CIA,³ UK armed forces,⁴ and others⁵ – may have committed violations of international humanitarian law.⁶ US and other States' opposition to efforts to hold perpetrators to account, for example through an ICC investigation, is instrumental in shaping the Council's reticence on transitional justice.⁷ The Council's weakness on this issue, in turn, is complemented by a lack of political will on the part of the Afghan Government to adopt or implement transitional justice measures, especially concerning accountability and vetting. The Government and security forces include powerful figures who have been complicit in past abuses and would likely be targets of such measures.⁸

The failure of the Council to advocate for and shape meaningful transitional justice efforts in the case of Afghanistan is most clear with respect to accountability. Unlike the Council's advocacy

for criminal accountability for international crimes in some other cases, such as Sierra Leone, the Council has not pushed for punitive action against powerful actors who have been involved, and some of whom continue to be involved, in human rights abuses in Afghanistan. Instead, the Council has arguably legitimized deals in which the Government of Afghanistan has granted immunity to suspected war criminals, signaling that the international community finds such bargains acceptable. As Patricia Gossman and Sari Kouvo have written, comparing the international community's engagement on transitional justice to other cases: "Kabul was burning at the same time that atrocities were committed in Sarajevo, Kigali and Freetown... but in none [of these cases] except Afghanistan have justice issues been so completely swept under the carpet."⁹

That said, Security Council resolutions have evolved over the years toward expressing support for some aspects of transitional justice that are less obviously contentious than accountability. From 2006-09, for instance, the Council repeatedly called for the implementation of an Action Plan on transitional justice. In the late 2000s, the Council strengthened its expressed support for the Afghan Independent Human Rights Commission (AIHRC), the main institutional lead in Afghanistan on transitional justice. The Council also introduced references to vetting in relation to demobilization, disarmament and reintegration (DDR) and security sector reform (SSR). However, few of these resolution references appear to have had significant impact on transitional justice on the ground. In fact, the late 2000s is a period when traction on transitional justice was waning in Afghanistan, due primarily to: 1) the passage of a near-blanket amnesty law in 2008, which "dealt a near fatal blow"¹⁰ to efforts to counter impunity; 2) attacks, including by the Government of Afghanistan, on the AIHRC; 3) the lack of implementation of most



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of the Action Plan; and 4) the US Government's shift in strategy toward negotiations with the Taliban.¹¹ Thus, strengthened language during this period was likely an aspirational attempt by the drafters to inject momentum into transitional justice efforts when they appeared all but dead. That is, Security Council resolution language during this time was more a reflection of the declining prospects of transitional justice on the ground than of an impactful and purposeful initiative by the Council.

This study is based on a review of open-source literature and 20 interviews, including with: Afghan civil society, former and current staff of the Afghan Independent Human Rights Commission (AIHRC), international transitional justice and Afghanistan experts, former and current UN Assistance Mission in Afghanistan (UNAMA) staff, and diplomats. The study presumes a level of knowledge about the conflict in Afghanistan. For background on the post-Bonn context refer to the footnote.¹²



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Overview of the Council's Approach to Transitional Justice in Afghanistan

Reconciliation

The Council's stance on transitional justice in Afghanistan is most evident in its language on "reconciliation," a term frequently used to refer to deals struck between the Government of Afghanistan and individuals or groups involved in the conflict. In exchange for ceasing armed activity against the State, the Government has granted "reconciled" individuals (*de facto* or explicit) immunity from prosecution for past crimes and, in many cases, official Government or security posts and the green light to run for elections.¹³ The Council has implicitly supported this approach, stating that "all Afghans"¹⁴ who meet the three basic conditions are eligible to

reconcile with the Government: 1) renounce violence;¹⁵ 2) have no links to terrorism; and 3) respect the Afghan constitution.¹⁶ These criteria are derived from the Afghanistan Peace and Reintegration Programme (APRP),¹⁷ which was launched in 2010 to facilitate the reintegration into civilian life of rank-and-file ex-combatants and to engage Taliban and other armed groups' leaderships with the aim of reaching a political settlement.¹⁸ The three eligibility criteria laid out in Council resolutions are forward-facing; that is, they do not take into account an individual's past human rights record, nor do they account for command or superior responsibility, as they are open to "all," regardless of rank.

The Council has, thus, delinked the rules of war and reconciliation,¹⁹ rather than making the latter conditional on a minimum degree of past compliance with the former. For example, many Council resolutions have condemned the Taliban's attacks on civilians. These same resolutions also call for individuals affiliated with the Taliban to reconcile with the Government, without conditioning reconciliation (and any corresponding pardon, amnesty or leniency) on any degree of compliance with human rights.²⁰ Beyond endorsement, the Council has, in fact, facilitated some of these deals by delisting from UN sanctions "reconciled" individuals - a crucial incentive for many actors to enter such deals. For example, in 2017, the Council lifted sanctions on Gulbuddin Hekmatyar, a notorious insurgent leader and war crimes suspect.²¹

The Council's endorsement and reinforcement of such reconciliation deals in Afghanistan is notable because the deals that grant immunity to war crimes suspects (such as Hekmatyar) arguably violate Afghanistan's obligations under international law.²² It also potentially conflicts with the UN's longstanding position that "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights."²³ Further, the Council's support for these deals stands in stark contrast to its affirmation of the inapplicability of amnesty to international crimes in other cases, such as Sierra Leone.²⁴

AIHRC and the Action Plan

Although the Council has largely ignored the issue of accountability for past crimes, it has repeatedly commended the work of the AIHRC, the institutional lead on transitional justice in Afghanistan. The AIHRC was itself born of the Bonn Agreement, which the Council endorsed.²⁵ The AIHRC led the development of a national Action Plan for peace, reconciliation and justice, which the Afghan Government adopted in 2006. The Action Plan put forward several transitional justice measures for implementation over a three year timeline, including in relation to

truth-telling, vetting and institutional reform, symbolic forms of reparation, and the creation of a task force to make recommendations to the President on accountability.²⁶ As an outcome of the Action Plan, the AIHRC undertook a landmark conflict mapping study. This study was intended to provide a basis for dialogue about the pre-2001 phases of conflict.²⁷ However, it was never released due to resistance from key players - including the US, many Europeans, the Afghan Government, and even reportedly UNAMA²⁸ - who feared it would rock the boat in Kabul. Then-President Karzai in 2011 did not renew the tenure of the AIHRC's Commissioner, Nader Nadery, who had overseen the report and had been an outspoken critic of electoral fraud in Karzai's bid for reelection in 2009.²⁹

The Council has repeatedly praised the AIHRC over many years³⁰ and strengthened its language supporting the institution as it came under attack. In the first resolution passed after Nadery's dismissal, the Council augmented its commendation of the AIHRC's work and introduced reference to the need to protect the institution's independence.³¹ Beyond praise, the Council has also repeatedly mandated UNAMA, in collaboration with Office of the High Commission for Human Rights (OHCHR), to strengthen the capacity of the AIHRC, including in some resolutions with an explicit view to promoting accountability.³² However, the Council stopped short of referencing or calling for the publication of the AIHRC's most important work: the mapping report.

In several resolutions between 2006-09, the Council expressed support for the Action Plan, and encouraged international support for the Plan.³³ In March 2009, after the timeline for implementing the Action Plan has passed, the Council called for "enhanced efforts to ensure [its] full implementation."³⁴ The Council's support for the Action Plan - which has a past-facing stance and victim-centered approach, and which affirms the inapplicability of amnesty to war crimes³⁵ - appears inconsistent with its support for reconciliation processes in Afghanistan that offer immunity regardless of an individual's past human rights record.



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UNAMA

The UN enjoys a broad mandate granted by the Bonn Agreement, which was endorsed by the Security Council, to investigate human rights violations and recommend corrective action in Afghanistan.³⁶ For over a decade, the mission (in more recent years in partnership with OHCHR) has issued regular, methodologically rigorous reports on civilian casualties, including those caused by international forces and Afghan security forces.³⁷ Some Security Council resolutions have noted UNAMA's reports on protection of civilians³⁸ and recognized the importance of reporting the situation of civilian casualties back to the Council.³⁹ Further, some Council resolutions have specifically mandated UNAMA to report on violations against children.⁴⁰

Although the Council mandated UNAMA to support the capacity of the AIHRC as early as 2003,⁴¹ it only began to explicitly mandate the mission to work on transitional justice in 2010.⁴² However, the Council references transitional justice in relation to UNAMA's work on rule of law, rather than on broader human

rights or reconciliation.⁴³ Given the timing, this introduction into UNAMA's mandate was likely a deliberate attempt by the drafters to revive traction on transitional justice despite the recent passage of the amnesty law, the attacks on the AIHRC and the lapsing of the Action Plan. The reference to transitional justice is maintained in subsequent UNAMA mandates. More recent resolutions expand on the concept. A 2019 resolution includes innovative and more open-ended language on transitional justice, originally suggested by OHCHR, calling on UNAMA to advise on the "establishment and implementation of judicial and non-judicial processes to address the legacy of large-scale human rights violations and abuses as well as international crimes and to prevent their recurrence."⁴⁴ This language is placed squarely in the human rights section of the mandate.

Security Sector Reform

Early resolutions do not explicitly link SSR to human rights and transitional justice.⁴⁵ Starting in 2007, however, the Council began to reference

the need to increase the “accountability” of the Afghan security sector.⁴⁶ In 2010, amidst the weakened climate for transitional justice described above, the Council explicitly referred to “appropriate vetting procedures”⁴⁷ as part of SSR, a reference that is repeated in several future resolutions.

Demobilization, Disarmament and Reintegration

The Council expressed support for DDR processes in Afghanistan, even where such programmes are widely deemed to have failed or been carried out to the detriment of transitional justice aspirations.⁴⁸ Starting in 2011, the Council began to introduce a generic reference to the need for an “appropriate vetting mechanism” to address operational challenges in the APRP.⁴⁹ Beginning in 2012, the Council starts to more explicitly link human rights and DDR by stressing the need for collaboration between the APRP and the AIHRC in assessing the human rights and gender implications of the peace and reconciliation process.⁵⁰

Victims

In general, the Council’s resolutions have not been victim-centered, neither for victims of prior phases of the war nor the ongoing one. One exception is with respect to child victims, as many resolutions do refer to the need to “bring to justice” those responsible for abuses committed against children in the conflict⁵¹ and, as noted above, UNAMA is mandated to report on violations and abuses against children.⁵² Although there are repeated references in Council resolutions to the need to protect the rights of women, these are not linked to any parallel call for accountability for those who violate women’s rights, as appears in the case of children. In the case of civilian casualties caused by international forces, the Council merely notes the importance of “after-action reviews” and “joint investigations” where the Government of Afghanistan finds those investigations appropriate.⁵³

What the Council has Left Out

It is important for this study not only to analyse what the Council has said, but also what it has not said, on transitional justice. The Council’s most noteworthy points of silence include the following:

- **Dasht-e-Leili:** Although the Council has condemned the Taliban for a multitude of violations, it has been quieter regarding atrocities committed against the Taliban. In 1998, the Council did call for an investigation into alleged mass executions of prisoners of war and civilians (indirectly referring to, *inter alia*, the 1997 killings of large numbers of Taliban prisoners in and around Mazar-i-Sharif),⁵⁴ although the UN failed to follow through effectively.⁵⁵ By contrast, the Council was silent regarding the deaths in custody of reportedly as many as 2,000⁵⁶ Taliban prisoners under the control of Dostum-aligned forces in 2001 (the Dasht-e-Leili massacre). Neither is there Council reference to the finding, in 2008 by a Physicians for Human Rights (PHR) forensic specialist seconded to UNAMA, that evidence at the site had been tampered with and destroyed (a potential war crime in and of itself).⁵⁷ This silence endured despite significant efforts by advocacy groups, namely PHR, to pressure the Council into mandating an investigation into the gravesite.⁵⁸ (Dasht-e-Leili was particularly sensitive for the US, which was backing Dostum (a paid CIA asset⁵⁹) at the time and whose special forces were allegedly present when Dostum’s forces compelled Taliban prisoners into containers – where they eventually suffocated and some were reportedly shot.⁶⁰)
- **International Criminal Court (ICC):** The Council has been silent regarding efforts led by Afghan and international civil society and activists to open an ICC investigation into possible war crimes committed in Afghanistan. By contrast, the Council has referred two other situations to the ICC⁶¹ and, in some cases, called on

States to cooperate with the Court.⁶² While the Council's silence on the ICC is by no means unique to Afghanistan,⁶³ it is more deafening in this case due to the high-stakes implications for members of the Council. The US, for example, vehemently opposes ICC involvement in Afghanistan, fearing it would expose American forces and members of the CIA to the Court's jurisdiction (Russia and China are also not supportive).

- **Others:** The Council has not made any reference to Afghanistan's near-blanket amnesty law, even though it

arguably conflicts with Afghanistan's obligations under both domestic and international law.⁶⁴ The Council does not make reference to reparations for victims, though it has indirectly supported symbolic reparations through expressed support for the Action Plan. Although the Council repeatedly refers to the need for credible, transparent and inclusive elections,⁶⁵ it made no reference to vetting electoral candidates – a particularly contentious issue in Afghanistan.⁶⁶



II

Impact of Council Resolutions on Transitional Justice in Afghanistan

Interviews with Afghan civil society, national and international human rights experts, UN and other multilateral officials, and diplomats reveal little evidence of the proponents of transitional justice being able to draw on Security Council resolutions to augment their advocacy, even in cases where Council language has been relatively strong. The main impediment to the implementation of some of the Council's stronger language on transitional justice, for instance with respect to the Action Plan, has been the absence of domestic and international political will to address a legacy of past – and ongoing – human rights abuses. Domestically, transitional justice was described by one interviewee as a “circular

firing squad,”⁶⁷ in that virtually all parties to the conflict have been complicit in violations, so nobody wanted to open the file. In this context, human rights defenders have faced intimidation, harassment and worse, shrinking the space for civil society to bring transitional justice issues to the fore.⁶⁸ Internationally, the US and others continued to object to meaningful transitional justice, which they saw as having the potential to undermine their broader security goals in Afghanistan. The US and other Member States also saw some accountability efforts, such as calls for ICC involvement, as threatening to its own personnel.



III

Accountability/ Reconciliation

The clearest aspect of transitional justice on which the Council appears to have had impact is accountability. However, this impact has rolled back, rather than advanced, the transitional justice agenda. Several Afghan civil society interviewees argued that the Council's endorsement of "reconciliation" deals struck without due regard to human rights has made it harder to argue against impunity in Afghanistan. They argued that these endorsements have appeared to confer international approval for impunity deals for war criminals.⁶⁹ Although sanctions lists are distinct from judicial proceedings and have no bearing on whether an individual can be prosecuted at home or abroad for human rights violations, the Council's delisting of certain individuals (e.g., Hekmatyar) has, according to interviewees, reinforced

this perception of international approval.⁷⁰ Further, interviewees argued that the Council's simultaneous condemnation of Taliban attacks against civilians, and calls for those affiliated with the Taliban – regardless of their involvement in such attacks – to reconcile with the Government, have signaled that the international community prioritizes the negotiation of a deal with the group at the near-complete expense of accountability.⁷¹ Afghan human rights defenders argued that the Council's silence on the ICC and the amnesty law has sent similar signals.

In short, the Council has endorsed the prevailing approach to reconciliation in Afghanistan, which is "premised on a paradigm of amnesty and surrender rather than true peacebuilding."⁷² This leaves human rights defenders with fewer

avenues to push for tying reconciliation to transitional justice – for example, by making amnesty, pardon or other forms of leniency conditional on an established degree of past and future compliance with human rights, and on participation in truth-telling, reparations, and/or guarantees of non-recurrence. As one Afghan civil society actor put plainly, “The approach of the Security Council has further strengthened the culture of impunity in Afghanistan.”⁷³

UNAMA

UNAMA, as a Security Council-mandated mission, refers to Council resolutions for both guidance on how to prioritize its human rights-related work, and cover for certain sensitive activities. For example, the original Bonn mandate, combined with continued references by the Council, allows UNAMA to claim a Council mandate to continue its highly sensitive reporting work on civilian casualties. Although these reports are not a transitional justice exercise *per se*, they constitute an impartial and credible documentation effort that could be an important part of future transitional justice efforts.⁷⁴ UNAMA has also, in accordance with its mandate, worked with the AIHRC. For example, the mission’s Human Rights Unit recently facilitated the provision of technical advice and assistance on transitional justice to the AIHRC. Overall, UNAMA’s support does not appear to have been vital to the AIHRC’s work on transitional justice until recently. In late 2019 and early 2020, UNAMA’s technical assistance to the Commission on Transitional Justice issues increased considerably.⁷⁵ Due to its broader political mandate, parts of UNAMA have, at times, been wary of some of the AIHRC’s most important but politically sensitive work, such as the mapping report.⁷⁶

As is common in integrated missions, UNAMA has, at times, experienced tension between its political and human rights work. Many interviewees argued that some within UNAMA have occasionally viewed transitional justice as a “showstopper on the road toward a negotiated settlement... it was looked at as in, how do we make this not a roadblock, and how do we get

around the question?”⁷⁷ Another interviewee argued that “The political section of UNAMA was making the decisions, and even blocking human rights.”⁷⁸ For example, UNAMA in the mid-2000s argued against the publication of an OHCHR-produced conflict mapping report, arguing it “would endanger UN staff and complicate negotiations surrounding the planned demobilization of several powerful militias.”⁷⁹ The report was later leaked.⁸⁰

The Council’s mandating of UNAMA explicitly to work on transitional justice starting in 2010 does not appear to have had a major impact on the mission’s work. In fact, many interviewees argued that although UNAMA had offered some support to transitional justice efforts prior to 2009, particularly in relation to backing the Action Plan, its work on transitional justice dropped off significantly after 2009/2010. One Afghan civil society actor, who had previously worked with UNAMA, said: “simply nothing was done after 2010 at UNAMA on transitional justice, except that sometimes here and there they attended meetings... before 2009 they helped with the development of the Action Plan and provided technical support to the AIHRC’s work on the mapping report,” and some smaller projects. But “2009 was the year that the international community, including the UN, dropped transitional justice from their agenda... I didn’t see UN staff after 2010 coming to meetings and making strong reference to the [Security Council] mandate for UNAMA to work on transitional justice.”⁸¹

In some ways, this is understandable – as discussed above, the environment for transitional justice in Afghanistan grew much more challenging in the late 2000s. Further, as the US began to consider and hold talks with the Taliban, UNAMA felt the need to avoid being seen as negatively impacting the peace process.⁸² The mission has also been conscious of the need to avoid high-profile work that might prompt blowback; a cautionary tale, for instance, concerns the publication of a Human Rights Watch report identifying individuals responsible for war crimes that may have triggered Afghanistan’s Parliament to expedite

the development of the amnesty law.⁸³ But – notwithstanding widespread appreciation for UNAMA's Human Rights Unit – interviews suggest that the mission as a whole at times erred too far on the side of caution. Several Afghan human rights defenders and some international experts expressed disappointment at UNAMA's reticence, saying they had hoped for more open advocacy and support from the mission at key junctures.⁸⁴

UNAMA appears to now be poised to ramp up its work on transitional justice after a decade-long lull. In early 2019, UNAMA began looking intensively at transitional justice challenges and needs in Afghanistan. This renewed attention was reflected in the 2019 Council resolution mandating the mission to advise on judicial and non-judicial processes to address the legacy of human rights violations, and to prevent their recurrence.⁸⁵ This language is sufficiently specific, yet covers a broad range of potential processes (ranging from accountability to institutional reform as a guarantee of non-recurrence). Its placement helpfully connects it to UNAMA's and OHCHR's broader human rights work in Afghanistan. Because of its wording and placement, this language appears to be more enabling to UNAMA than the brief references to "transitional justice" in connection with rule of law found in earlier resolutions. Indeed, UNAMA officials interviewed for this report confirmed that they prefer this language as it makes it easier for them to support transitional justice in a highly sensitive political environment.⁸⁶ A former UNAMA official argued that although the Council has not been a "driver" of how the mission interprets its human rights mandate, the 2019 language has been one factor among many that is enabling the mission to increase its focus on transitional justice.⁸⁷ While promising, it is too early, however, to ascertain the ultimate impact that the language found in the 2019 resolution will have.

Finally, the Council's inconsistent approach to condemning violations committed by the Taliban, but not always those against the Taliban (namely, Dasht-e-Leili) may have, according to some international experts, undermined the UN's credibility as an impartial partner on transitional

justice.⁸⁸ However, a former UNAMA staff member noted that the Taliban was generally able to distinguish between the Council and the mission, particularly due to the latter's credible and impartial reporting on civilian casualties.⁸⁹

AIHRC

The Bonn Agreement, which was endorsed by the Council, had a clear impact on transitional justice in Afghanistan by calling for the creation of the AIHRC. The Council's consistent commendation of the AIHRC's work, and its increased calls in the late 2000s for protecting its independence and providing it with funding, may have been beneficial. Some former AIHRC staff and experts⁹⁰ pointed to the Council's support as one factor, though by no means a determinative one, that may have helped buoy the institution during pressure it faced in the aftermath of the mapping report.⁹¹ Another former AIHRC staff member who worked on the mapping report, however, argued that the Council's support was not felt strongly in the country: "No, you never felt that you had the support of this big international body and that you could work freely, or that you would see that this international body is putting pressure on the Afghan Government [to support transitional justice.]"⁹² Another civil society actor noted that strong international support for the AIHRC was crucial to its survival, but that the Security Council was only a small part of that; far more important was financial support coming largely from European countries, which allowed the AIHRC to maintain its independence.⁹³

The Council praised the AIHRC's work in mostly general terms. It did not support in specific terms the Commission's most sensitive – but arguably most important – work: the mapping report. The mapping report offered a critical documentation effort akin to a truth commission report, which, had it been published, could have provided a basis for broader transitional justice efforts.⁹⁴ An interviewee argued that the Council's silence on the report was a missed opportunity to support transitional justice efforts. Given the resistance of key players, including the US, the Council would have been unlikely to call for the report's publication. But it could, perhaps, have



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been persuaded to call for the compilation of the report, even if only confidentially and to professionally document facts.⁹⁵

Action Plan

Interviews with Afghan civil society actors, diplomats, and international human rights experts reveal that the Council's expressed support for the Action Plan was not felt strongly on the ground. As one former diplomat put it: "I didn't go to the President and say you have to do this because the Council is asking for it. I don't think anyone paid attention to the Council on this."⁹⁶ A prominent human rights expert, in response to the question of whether he had ever leveraged language in Security Council resolutions in his advocacy for the implementation of the Plan, said the thought had never crossed his mind.⁹⁷ Instead, the President's signing of the Action Plan and the few measures that were implemented are owed primarily to the advocacy efforts of the AIHRC (particularly Dr Sima Samar) and a progressive adviser to

President Karzai (Dr Rangin Dadfar Spanta).⁹⁸ The Action Plan's timeline for implementation passed in 2009 and, aside from the mapping report and some memorialization initiatives, it remains largely unimplemented at the time of writing.

Integrated Approach to Conflict Prevention

The Council, for the most part, has mirrored the international community's failure to adopt an integrated approach to conflict prevention and institutional reform in Afghanistan. In fact, the Council has arguably reinforced the separation between DDR and transitional justice by endorsing "reconciliation" under the terms of the APRP disarmament programme. The APRP incentivized the participation of senior commanders from major anti-Taliban forces by offering them Government posts and did not vet on human rights grounds, "with the result that former fighters responsible for past abuses or war crimes were reappointed to security posts."⁹⁹

The lack of an integrated approach to such issues¹⁰⁰ has, according to Patricia Gossman, “stymied efforts to build a competent police force, reform government ministries, disarm militia forces and establish a functioning judicial system.”¹⁰¹ The “incentive” approach to DDR has been criticized as a means of “buying” the support of powerful figures with the potential to spoil the peace process, thereby “entrench[ing] the very people responsible for rampant lawlessness in the first place.”¹⁰² The Council, by treating DDR, SSR and related matters mostly separate from transitional justice is, thus, reflecting a non-integrated approach that has not only hurt the human rights agenda but also broader State-building and governance efforts in Afghanistan.

ICC

Despite the Council’s silence on this issue, sustained advocacy by Afghan civil society and activists bore fruit in March 2020 when the ICC Appeals Chamber authorized the Prosecutor to open an investigation into alleged war crimes related to the situation in Afghanistan.¹⁰³ (Afghanistan is a State party to the Rome Statute.) However, an Afghan civil society actor warned that without international pressure, the Government of Afghanistan would be less likely to cooperate with the Court.¹⁰⁴



IV

Key Takeaways

1 THE PERILS OF PERMANENT FIVE MILITARY INVOLVEMENT

In cases where one or more permanent members of the Security Council (or another powerful Member State) is involved militarily, and potentially implicated in war crimes, the Council is highly unlikely to be a positive influence on transitional justice efforts. This is hardly a novel finding (see, for instance, the Syria case), but one that Afghanistan demonstrates starkly.

2 TRANSITIONAL JUSTICE AMIDST ONGOING CONFLICT

Transitional justice, as traditionally conceived, is a set of tools to be implemented in the context of post-authoritarian and post-conflict transitions. In cases like Afghanistan, where conflict is ongoing, transitional justice must compete with other priorities, such as incentivizing

defections and negotiating with armed groups. In all contexts, but especially contexts of ongoing conflict, therefore, it is crucial to approach transitional justice in an integrated fashion. This does not mean that States attempting to transition away from conflict should try to do everything at once – policy interventions must be sequenced and tailored appropriately for the context. However, “efforts should be taken to constructively connect [transitional justice and DDR] in ways that contribute to a stable, just and long-term peace.”¹⁰⁵ In the case of Afghanistan, the failure to coordinate transitional justice with DDR and other conflict resolution tools has contributed to unsustainable compromises that have entrenched abusive elites and failed to guarantee non-recurrence. The Council should explicitly push for integrated approaches to transitional justice, rather than addressing it on a track separate from other conflict resolution approaches. As Patricia Gossman has argued, “the

principles of transitional justice should inform security sector, judicial and political reforms to create effective, accountable institutions.”¹⁰⁶

3 WHERE POLITICAL SPACE IS LIMITED, DO NOT LOSE SIGHT OF THE IMPORTANCE OF DOCUMENTATION

In the case of Afghanistan, insufficient political will among national, and some key international, actors has precluded much action on transitional justice. Yet, despite the unforgiving context, some actors, at times with Council support, have managed to document the conflict in ways that contribute to transitional justice goals. Arguably, UNAMA’s most important contribution to transitional justice has been something that is not, at first glance, transitional justice: its civilian casualties reporting. These reports constitute an important documentation effort that could become a part of future transitional justice efforts. A mandate from Bonn, and repeated reference in Security Council resolutions, has given UNAMA cover to undertake this highly sensitive and important work. UNAMA’s civilian casualties reporting may also have helped protect the mission’s credibility as an impartial partner on human rights and transitional justice, distinguishing it from the Security Council’s uneven approach to condemning human rights violators. Another documentation effort that the Council could have, but failed to, provide cover for was the AIHRC’s mapping report. A nod from the Council to this report – for example, by calling for its compilation, even if only confidentially – might have helped protect those who worked on the report from attacks and intimidation, and perhaps enabled private discussion of its findings among policymakers.

4 AMNESTY

The case of Afghanistan demonstrates that the Council’s endorsement of reconciliation deals that entail amnesty for possible war crimes can reinforce a climate of impunity. Further, and although sanctions are distinct from judicial proceedings, the Council’s decision to

delist individuals who are amnestied at home can (perhaps inadvertently) signal that the international community finds such amnesties acceptable. This does not mean that the Council should automatically reject amnesties. If designed with eligibility and other conditions attached, amnesties can contribute to accountability¹⁰⁷ and facilitate transitions away from conflict.¹⁰⁸ However, before deciding whether to endorse, condemn or remain silent on an immunity or legal leniency measure, the Council should assess whether the measures in question advance accountability or impunity. In Afghanistan, the latter was the case.

5 SNOWBALLING LANGUAGE

The case of Afghanistan shows that language on transitional justice in Council resolutions can snowball over time. Starting around 2010, Council resolutions began to include strengthened language on transitional justice, which was then repeated and expanded upon in future resolutions. Language sticks because it is far easier to replicate and build upon wording from past resolutions than to introduce new, more ambitious language from scratch.¹⁰⁹ To some advocates of transitional justice, consistent Council reference to an issue over several years may be helpful – as may have been the case for the AIHRC.

6 COUNCIL LANGUAGE MATTERS, HOW IT IS USED MATTERS MORE

Ultimately, what matters is not only the language in the resolutions, but whether and how advocates on the ground leverage that language. In Afghanistan, for instance, despite relatively strong language in support of the Action Plan, few actors appear to have leveraged the relevant resolutions in their advocacy for the Plan’s implementation. (In Colombia, by contrast, the Council produced far less language on transitional justice, but advocates leveraged the available language more effectively). There may be a role for UN missions to alert civil society and other advocates to relevant references in Security Council resolutions that may augment their advocacy strategies.

7 WORDING AND PLACEMENT MATTERS

In the case of Afghanistan, the 2019 resolution's more open-ended language on "judicial and non-judicial processes" is preferable to the generic references to "transitional justice" found in earlier resolutions. The former illustrates the fuller range of measures that can be considered transitional

justice, and helpfully acknowledges that not all these measures need be judicial. Indeed, non-judicial exercises, such as truth-telling, may be as important for accountability as judicial processes, such as criminal trials. Further, the placement of the 2019 resolution's language squarely in the human rights section of the UNAMA mandate is more appropriate than referencing transitional justice in relation to rule of law.

References

- 1 Patricia Gossman, *Transitional Justice and DDR: The Case of Afghanistan* (New York: International Center for Transitional Justice, 2009)
- 2 As Patricia Gossman has noted: “[I]nternational actors, who saw the principal threat to security as the Taliban and al-Qaeda, opted to rely on former militia commanders and faction leaders to act as a bulwark against Taliban insurgent forces to guarantee stability... by the end of 2002, commanders and factional leaders who not only had long records of human rights abuses and war crimes accusations... had entrenched themselves in new positions of power. Questions of past war crimes were suppressed or deferred, and the disarmament process proceeded selectively in order to avoid confrontation with the most powerful players.” Patricia Gossman, *Transitional Justice and DDR*. For more on the politics of disarmament and rearmament in Afghanistan, see, Deedee Derksen, *The Politics of Disarmament and Rearmament in Afghanistan* (Washington DC: United States Institute of Peace, 2015).
- 3 The ICC Office of the Prosecutor found reasonable basis to believe that American forces and the CIA committed war crimes in Afghanistan and in CIA black sites in eastern Europe from 2002-14, namely torture of detainees. Priyanka Boghani, “ICC Prosecutor Says US May Have Committed War Crimes in Afghanistan,” *PBS*, 16 November 2016, www.pbs.org/wgbh/frontline/article/icc-prosecutor-says-u-s-may-have-committed-war-crimes-in-afghanistan/.
- 4 Matt Bardo and O’Grady, Hannah, “Did UK Special Forces execute unarmed civilians?,” *BBC*, 1 August 2020.
- 5 Canadian, Australian and other international forces have also been accused of having committed war crimes in Afghanistan. See, for example, “Australia: Hold Special Forces to Account,” *Human Rights Watch*, 23 March 2020. Erna Paris, “Will Canada finally deal with its Afghan war skeletons?,” *The Globe and Mail*, 5 January 2018.
- 6 Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan* (Kabul: Afghanistan Analysts Network, 2013).
- 7 A former diplomat criticized the Council’s weakness on transitional justice in Afghanistan, saying “It simply went along with whatever the US wanted.” Interview, November 2019.
- 8 This is the result of the particular nature of Afghanistan’s post-2001 transition. Unlike other transitions in more “classic” transitional justice cases, where abusive authoritarian regimes were swept aside by popular resistance and replaced with new leaders willing to hold their predecessors to account, the Northern Alliance in Afghanistan reassumed power in the post-2001 era after having committed many abuses in prior phases of the conflict. As Patricia Gossman and Sari Kouvo have noted, their culpability for past atrocities “left them unwilling to pursue justice once the Taliban were gone.” Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*.
- 9 Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*.
- 10 The Law provides near-blanket amnesty to those involved in conflicts before 2001, and in practice to those involved in present conflicts, without reference to specific crimes. Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*.
- 11 Ewen MacAskill and Simon Tisdall, “White House Shifts Afghanistan Strategy towards Talks with Taliban,” *The Guardian*, 19 July 2010, www.theguardian.com/world/2010/jul/19/obama-afghanistan-strategy-taliban-negotiate.
- 12 Anna Larson and Alexander Ramsbotham, “Incremental peace in Afghanistan,” *Accord* 27 (2018).
- 13 For example, Hekmatyar had signed a widely criticized deal with the Afghan government which granted him immunity for his past crimes and the green light to run for political office. Mashal, Mujib, “Gulbuddin Hekmatyar, Afghan Warlord, Returns to City He Left in Ruins,” *The New York Times*, 4 May 2017, www.nytimes.com/2017/05/04/world/asia/afghan-warlord-returns-to-city-he-left-in-ruins-with-hope-for-peace.html.
- 14 United Nations Security Council, “Resolution 1988, adopted by the Security Council at its 6557th meeting,” United Nations, 17 June 2011, S/RES/1988. This language on “all Afghans” echoes the Kabul International Conference on Afghanistan, “A Renewed Commitment by the Afghan Government to the Afghan People, A Renewed Commitment by the International Community to Afghanistan,” Kabul, 20 July 2010, https://www.unodc.org/documents/afghanistan/Kabul_Conference/FINAL_Kabul_Conference_Communique.pdf.
- 15 Sometimes this condition is phrased as ‘willingness to join in building a peaceful Afghanistan’. United Nations Security Council, “Resolution 1917, adopted by the Security Council at its 6290th meeting,” United Nations, 22 March 2010, S/RES/1917.
- 16 See, for example, United Nations Security Council, “Resolution 2255, Adopted by the Security Council at its 7590th meeting,” United Nations, 22 December 2015, S/RES/2255. Although the Afghan constitution does contain human rights provisions, in practice these have not been applied in a past-facing way to determine individual eligibility into the APRP or “reconciliation.” In fact, at least one part of the constitution (Article 62) has arguably impeded transitional justice – interviewees argued that the provision that ministers must not have been “convicted of crimes against humanity” places an excessively high bar for vetting efforts. Interviews, November 2019. See, Islamic Republic of Afghanistan, “The Constitution of Afghanistan,” Ratified 26 January 2004, <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>. Interestingly, the Council, starting in 2010, begins to add a slight tweak to the wording of these conditions, so that the third reads “accept the Afghan constitution, particularly as it relates to gender and human rights issues.” Although the text in italics is not found in the Kabul Communiqué laying out the APRP conditions, several future Security Council resolutions maintain it (e.g., S/RES/2120 (2013)). Thus, it appears that the drafters slipped in a reference to human rights in the eligibility conditions, but still not one that would take into account an individual’s past human rights record and thereby exclude from reconciliation those accused of serious crimes.

- 17 Kabul International Conference on Afghanistan, "A Renewed Commitment by the Afghan Government to the Afghan People, A Renewed Commitment by the International Community to Afghanistan."
- 18 Deedee Derksen, *Options for Reintegrating Taliban Fighters in an Afghan Peace Process*. (Washington DC: United States Institute of Peace, 2019).
- 19 It is worth noting is that in 2016, the Council does draw a somewhat generic link between human rights to reconciliation, stressing the role of UNAMA in collaborating with the AIHRC to assess the human rights and gender implications of the peace process (see, United Nations Security Council, "Resolution 2274, adopted by the Security Council at its 7645th meeting," United Nations, 15 March 2016, S/RES/2274). However, this stops short of conditioning reconciliation (and any corresponding pardon, amnesty or leniency) on compliance with human rights.
- 20 See, for example, United Nations Security Council, "Resolution 2255, adopted by the Security Council at its 7590th meeting," United Nations, 22 December 2015, S/RES/2255.
- 21 "Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee Removes One Entry from Its Sanctions List," United Nations Security Council, 3 February 2017, SC/12705. See also: Patricia Gossman, "Afghanistan War Crimes Suspect Comes Home," *Human Rights Watch*, 21 September 2016, www.hrw.org/news/2016/09/21/afghanistan-war-crimes-suspect-comes-home.
- 22 Patricia Gossman, *Amnesty and the Peace Process in Afghanistan* (Washington DC: International Network to Promote the Rule of Law, 2019).
- 23 United Nations Security Council, "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General," United Nations, 23 August 2004, S/2004/616.
- 24 For example, in 2000 the Council recalled that the UN holds the understanding that the amnesty provisions of the peace agreement "shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." United Nations Security Council, "Resolution 1315, adopted by the Security Council at its 4186th meeting," United Nations, 14 August 2000, S/RES/1315. In 2008, the Council welcomed the government of the DRC's exclusion of international crimes from a proposed amnesty for acts of war and insurrection (1797 2008). In a 2008 resolution on women, peace and security, the Council stressed the need to exclude from amnesty provisions sexual violence crimes (United Nations Security Council, "Resolution 1820, adopted by the Security Council at its 5916th meeting," United Nations, 19 June 2008, S/RES/1820.).
- 25 United Nations Security Council, "Resolution 1386, adopted by the Security Council at its 4443rd meeting," United Nations, 20 December 2001, S/RES/1386.
- 26 A draft version of the Action Plan is available online. Government of the Islamic Republic of Afghanistan, "Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan," *Afghan Independent Human Rights Commission*, 2005, www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action_Pln_Gov_Af.pdf.
- 27 Patricia Grossman, *Documentation and Transitional Justice in Afghanistan* (Washington DC: United States Institute of Peace, 2013), www.usip.org/publications/2013/09/documentation-and-transitional-justice-afghanistan.
- 28 Rashid, Ahmed. "The Cloak of Silence: Afghanistan's Human Rights Mappings." *Afghanistan Analysts Network*, 27 July 2012, www.afghanistan-analysts.org/the-cloak-of-silence-afghanistans-human-rights-mappings/. Interviews also confirmed the resistance of these actors to see the report published. Interviews with author, November 2019.
- 29 Patricia Grossman, *Documentation and Transitional Justice in Afghanistan*.
- 30 Praise for the AIHRC has featured in resolutions over many years; for example, in 2005 the Council expressed support for the AIHRC's report, A Call to Justice, which surveyed Afghans country-wide to show that most Afghans support justice for past crimes. This signaled the close attention and appreciation of the Council to the AIHRC's work. United Nations General Assembly, "Resolution 1589, adopted by the Security Council at its 5148th meeting," United Nations, 24 March 2005, S/RES/1589.
- 31 In 2012, the Council commended the "courageous efforts to monitor respect for human rights in Afghanistan as well as to foster and protect these rights and to promote the emergence of a pluralistic civil society" and stressed the "importance of full cooperation with AIHRC by all relevant actors and of allowing their independence as well as ensuring their safety." United Nations General Assembly, "Resolution 2041, adopted by the Security Council at its 6738th meeting," United Nations, 22 March 2012, S/RES/2041.
- 32 United Nations General Assembly, "Resolution 1974, adopted by the Security Council at its 6500th meeting," United Nations, 22 March 2011, S/RES/1974.
- 33 See, for example, United Nations General Assembly, "Resolution 1662, adopted by the Security Council at its 5393rd meeting," United Nations, 23 March 2006, S/RES/1662.
- 34 United Nations General Assembly, "Resolution 1868, adopted by the Security Council at its 6098th meeting," United Nations, 23 March 2009, S/RES/1868. Some have suggested this was a deliberate attempt by the Council to give the Action Plan a last breath of life before it expired. Emily Winterbotham, *The State of Transitional Justice in Afghanistan Actors, Approaches and Challenges* (Kabul: Afghanistan Research and Evaluation Unit, 2010).
- 35 Afghan Independent Human Rights Commission (2005).
- 36 "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement)." S/2001/1154 Annex II, 2001, peacemaker.un.org/sites/peacemaker.un.org/files/AF_011205_AgreementProvisionalArrangementsinAfghanistan%28en%29.pdf.
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- 38 S/RES/2145 (2014).
- 39 United Nations Security Council, "Resolution 2274, adopted by the Security Council at its 7645th meeting," United Nations, 15 March 2016, S/RES/2274.
- 40 United Nations General Assembly, "Resolution 2489, adopted by the Security Council at its 8620th meeting," United Nations, 17 September 2019, S/RES/2489.
- 41 United Nations General Assembly, "Resolution 1471, adopted by the Security Council at its 4730th meeting," United Nations, 28 March 2003, S/RES/1471.
- 42 United Nations General Assembly, "Resolution 1917, adopted by the Security Council at its 6290th meeting," United Nations, 22 March 2010, S/RES/1917.

- 43 For example, in 2010 the Council mandated UNAMA and the Special Representative to lead international civilian efforts in “support[ing] and strengthen[ing] efforts to improve governance and the rule of law including transitional justice...”. Ibid.
- 44 United Nations Security Council, “Resolution 2489, adopted by the Security Council at its 8620th meeting,” United Nations, 17 September 2019, S/RES/2489.
- 45 See, for example, United Nations Security Council, “Resolution 1662, adopted by the Security Council at its 5393rd meeting,” United Nations, 23 March 2006, S/RES/1662.
- 46 United Nations Security Council, “Resolution 1776, adopted by the Security Council at its 5744th meeting,” United Nations, 19 September 2007, S/RES/1776.
- 47 United Nations Security Council, “Resolution 1917, adopted by the Security Council at its 6290th meeting,” United Nations, 22 March 2010, S/RES/1917.
- 48 For example, in 2007 the Council welcomed the “successful conclusion of the DDR progress started in October 2013,” United Nations Security Council, “Resolution 1746, adopted by the Security Council at its 5645th meeting,” United Nations, 23 March 2007, S/RES/1746. On the shortcomings of that DDR program, see, Deedee Derksen, *The Politics of Disarmament and Rearmament in Afghanistan*.
- 49 United Nations Security Council, “Resolution 2011, adopted by the Security Council at its 6629th meeting,” United Nations, 12 October 2011, S/RES/2011.
- 50 United Nations Security Council, “Resolution 2041, adopted by the Security Council at its 6738th meeting,” United Nations, 22 March 2012, S/RES/2041.
- 51 United Nations Security Council, “Resolution 1868, adopted by the Security Council at its 6098th meeting,” United Nations, 23 March 2009, S/RES/1868.
- 52 United Nations Security Council, “Resolution 2489, adopted by the Security Council at its 8620th meeting,” United Nations, 17 September 2019, S/RES/2489.
- 53 United Nations Security Council, “Resolution 2274, adopted by the Security Council at its 7645th meeting,” United Nations, 15 March 2016, S/RES/2274.
- 54 United Nations Security Council, “Resolution 1193, adopted by the Security Council at its 3921st meeting,” United Nations, 28 August 1988, S/RES/1193. For more on Mazar-i-Sharif, see “The Massacre in Mazar-i Sharif,” *Human Rights Watch Reports* 10, 7, (1988), www.hrw.org/legacy/reports98/afghan/Afrep00.htm.
- 55 Eventually OHCHR did investigate and write a report, but one that did not attribute responsibility for war crimes, leading Human Rights Watch to criticize the report as showing the UN “at its cautious worst.” Gossman and Kouvo write, “the UN dragged its feet... there was simply no support for such an investigation.” Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*.
- 56 Physicians for Human Rights, citing US government documents. See, Susannah Sirkin, “War Crimes and the White House: The Bush Administration’s Cover-Up of the Dasht-e-Leili Massacre,” Physicians for Human Rights, 15 July 2009, <https://phr.org/our-work/resources/war-crimes-and-the-white-house-the-bush-administrations-cover-up-of-the-dasht-e-leili-massacre-2/>.
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- 58 “Assessments and Documentation in Afghanistan I Assessments in Afghanistan: Dasht-e-Leili,” Physicians for Human Rights.
- 59 James Risen, “US Inaction Seen After Taliban P.O.W.’s Died,” *New York Times*, 10 July 2009.
- 60 Mark Benjamin, “Did US Forces Watch Afghan Massacre?” *Salon*, 22 July 2009, www.salon.com/2009/07/22/mass_graves/. The US was also very resistant to any efforts to investigate Dasht-e-Leili because the episode tied into the broader issue of CIA black sites and torture, as the survivors of Dasht-E-Leili were sent to Guantanamo. Interview with investigator, November 2019.
- 61 For Libya, see United Nations Security Council, “Resolution 1970, adopted by the Security Council at its 6491st meeting,” United Nations, 26 February 2011, S/RES/1970; for Darfur, see United Nations Security Council, “Resolution 1593, adopted by the Security Council at its 5158th meeting,” United Nations, 31 March 2005, S/RES/1593.
- 62 For example, the Council welcomed the cooperation of the government of Cote d’Ivoire with the ICC. United Nations Security Council, “Resolution 2045, adopted by the Security Council at its 6761st meeting,” United Nations, 26 April 2012, S/RES/2045. In another resolution, the Council recalled that “Burundi is a State Party to the Rome Statute of the International Criminal Court, and has undertaken obligations to fight impunity for crimes falling within the jurisdiction of the Court.” United Nations Security Council, “Resolution 2248, adopted by the Security Council at its 7557th meeting,” United Nations, 12 November 2015, S/RES/2248.
- 63 The Council has not referred many of the world’s deadliest conflicts – such as the Syrian civil war – to the ICC.
- 64 Afghanistan’s revised Penal Code (2017) incorporates Rome Statute crimes. See, Patricia Gossman, *Amnesty and the Peace Process in Afghanistan*.
- 65 United Nations General Assembly, “Resolution 2405, adopted by the Security Council at its 8199th meeting,” United Nations, 8 March 2018, S/RES/2405.
- 66 While there are many other topics that the Council has referred to that intersect in some ways with transitional justice – for example, justice sector reform and counter-terrorism – these are beyond the scope of this short case study. See, for example, United Nations General Assembly, “Resolution 2405, adopted by the Security Council at its 8199th meeting,” United Nations, 8 March 2018, S/RES/2405.
- 67 Interview with former UNAMA staff, November 2019
- 68 Amnesty International, *Defenceless Defenders: Afghanistan’s Human Rights Community Under Attack*. (London: Amnesty International, 2019).
- 69 Interviews with Afghan civil society actors, November 2019.

- 70 “The Council’s decision to delist individuals widely accused of war crimes gives off the “impression that the UN Security Council is not looking for accountability in Afghanistan, but is endorsing the acceptance [of such persons].” Interview with Afghan civil society actor, November 2019. Another Afghan human rights defender said that delisting those implicated in war crimes has “reinforced the perception among people engaged in violations, and among the Afghan public, that for the international community, the plight of victims does not matter.” Interview, Afghan human rights defender, December 2019.
- 71 Interviews with Afghan civil society actors, November 2019.
- 72 Joanna Nathan, “A Review of Reconciliation Efforts in Afghanistan,” *CTC Sentinel* 8, 2 (2009)
- 73 Interview with Afghan civil society actor, November 2019.
- 74 “What UNAMA has done with reporting on civilian casualties is something that could be a part of transitional justice, and since 2009 is the main accurate source for most Afghans and others reporting about human rights in Afghanistan... we are all using reports provided by UNAMA.” Interview with Afghan civil society actor, November 2019.
- 75 Interviews, November 2019.
- 76 Interviews, November 2019. For example, one interviewee who has worked with the AIHRC said: “When I look for support on more controversial issues, I would go to Human Rights Watch or Amnesty International. UNAMA would not be the first place I look, because they try to be more cautious because of their wider political mandate.” Interview, December 2019.
- 77 Interview with former UNAMA staff, November 2019.
- 78 Interview with former UNAMA staff, November 2019.
- 79 Patricia Gossman, *Transitional Justice and DDR: The Case of Afghanistan*
- 80 OHCHR, “Conflict Mapping Report on Afghanistan,” access on 22 September 2020, <http://www.flagrancy.net/salvage/UNMappingReportAfghanistan.pdf>.
- 81 Interview with Afghan civil society actor, November 2019.
- 82 Interview, November 2019.
- 83 “Goa Bites Back Against HRW Call for Prosecution of Prominent Human Rights Abusers,” *Cable: 06KABUL5931_a*, Wikileaks, 23 December 2006, https://search.wikileaks.org/plusd/cables/06KABUL5931_a.html.
- 84 For example, interviewees lamented that UNAMA has not supported efforts by Afghan civil society to support an ICC investigation. An Afghan civil society actor said, “Unfortunately we don’t see support from the UN to stand up to US bullying and threats and support the [ICC] process.” Interview, November 2019.
- 85 United Nations Security Council, “Resolution 2489, adopted by the Security Council at its 8620th meeting,” United Nations, 17 September 2019, S/RES/2489.
- 86 Interview with UNAMA staff, November 2019.
- 87 Interview with former UNAMA staff, November 2019.
- 88 Interview with international expert, November 2019.
- 89 “In the end, the Taliban more or less respected the UN. Since 2009 the Taliban has been engaging [with UNAMA] in a regular dialogue on civilian casualties. They wouldn’t do that if they thought the UN was illegitimate.” Interview with former UNAMA staff, 2020.
- 90 The former chairperson argued that the Council’s support offered the AIHRC “a little bit of protection, or at least confidence.” Interview, November 2019. An external expert argued that the Council’s continued support was a positive factor in efforts to reinvigorate the AIHRC after 2010. Interview, November 2019.
- 91 Although the AIHRC suffered after the attacks it faced in the aftermath of the mapping report, the institution managed to sustain, for the most part, its political independence. It has since regained its footing with a fresh crop of commissioners. Ehsan Qaane, “Beginning of a New Era at the AIHRC: Nine Fresh Commissioners,” Afghanistan Analysts Network, 20 July 2019, www.afghanistan-analysts.org/beginning-of-a-new-era-at-the-aihrc-nine-fresh-commissioners/.
- 92 Interview with former AIHRC staff, November 2019.
- 93 Interview with Afghan civil society actor, November 2019.
- 94 Patricia Grossman, *Documentation and Transitional Justice in Afghanistan*.
- 95 Interview with former UNAMA staff, November 2019.
- 96 Interview with former diplomat, November 2019.
- 97 Interview with international expert, November 2019.
- 98 Interviews, November 2019.
- 99 Patricia Grossman, *Documentation and Transitional Justice in Afghanistan*
- 100 The only explicit link between DDR and transitional justice was with respect to data collected by the Disbandment of Illegal Armed Groups program for the purposes of electoral vetting, but this process largely failed, with very few candidates disqualified and powerful candidates known to have their own private militias not targeted. Patricia Gossman and Sari Kouvo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*.
- 101 Patricia Gossman, *Transitional Justice and DDR: The Case of Afghanistan*.
- 102 Ibid.
- 103 ICC Prosecutor requested in November 2017 to open an investigation; a panel of ICC judges unanimously rejected this request in 2019, on the grounds that commencing an investigation would not serve the interests of justice. The Pre-Trial Chamber II authorized the prosecutor to appeal the ruling, and Afghan civil society continued to lobby for ICC involvement. “Afghanistan: ICC Pre-Trial Chamber II Authorizes Prosecutor to Appeal Decision Refusing Investigation,” International Criminal Court, 17 September 2019, www.icc-cpi.int/Pages/item.aspx?name=pr1479. The Appeals Chamber amended the 2019 decision of the Pre-Trial Chamber II, approving the commencement of an investigation in March 2020. See, “Afghanistan: ICC Appeals Chamber authorizes the opening of an investigation,” International Criminal Court, 5 March 2020, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>.
- 104 United Nations General Assembly, “The situation in Afghanistan and its implications for international peace and security: Report of the Secretary-General,” United Nations, 6 March 2008, A/62/722–S/2008/159.
- 105 United Nations Disarmament, Demobilization and Reintegration Resource Centre, “The Integrated Disarmament, Demobilization and Reintegration Standards,” accessed on 22 September 2020, <https://www.unddr.org/the-iddrs/level-2/>
- 106 Patricia Gossman, *Transitional Justice and DDR: The Case of Afghanistan*.
- 107 For example, amnesty deals that require individuals to participate in truth-telling processes can contribute to accountability. Louise Mallinder, *The Belfast Guidelines on Amnesty and Accountability* (Ulster: Transitional Justice Institute at the University of Ulster, 2013).
- 108 Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).
- 109 Interview with Council member, November 2019.



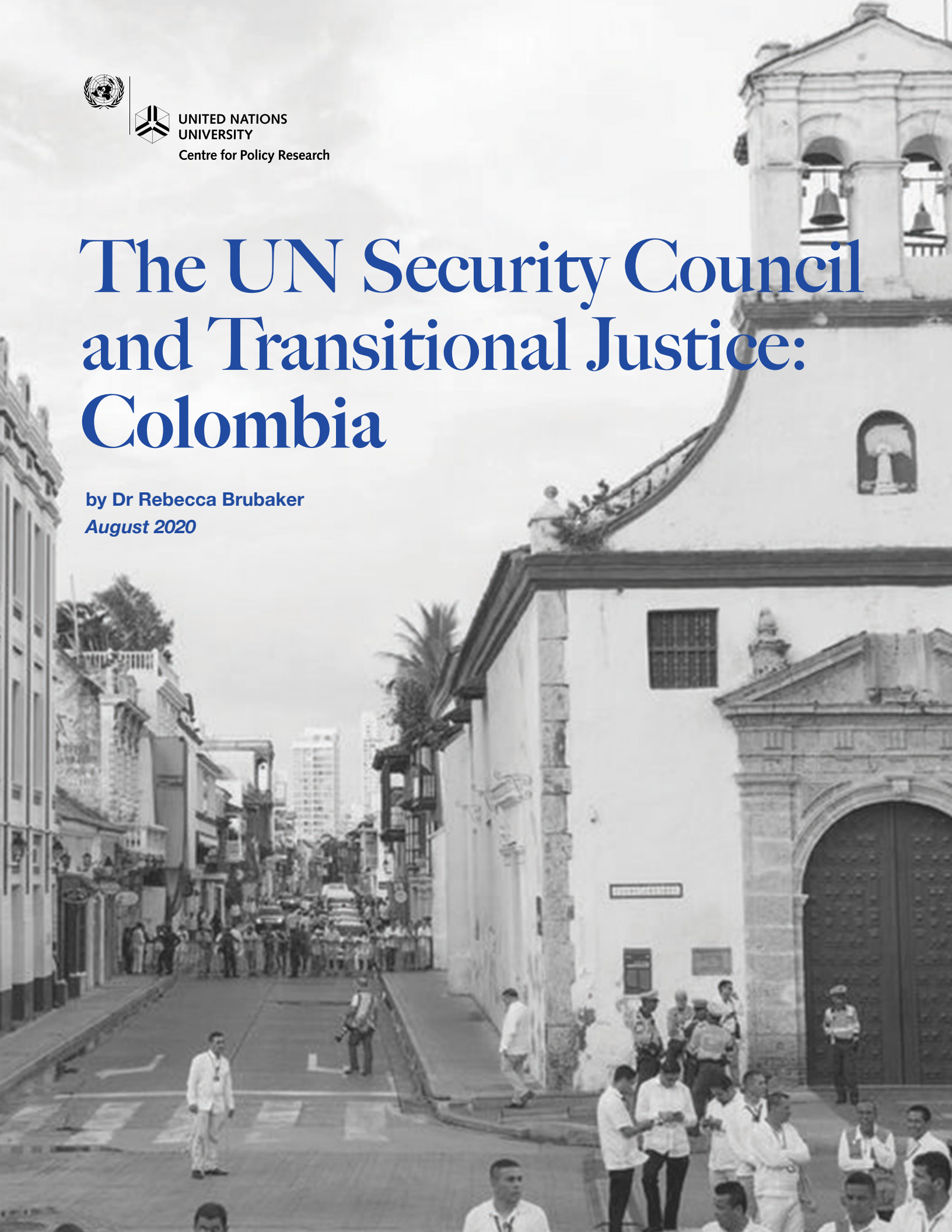
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The UN Security Council and Transitional Justice: Colombia

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Introduction

The situation in Colombia presents a recent process with important, but preliminary, lessons regarding the potential impact of Security Council action (and inaction) on transitional justice on the ground. This support was seen as crucial for defending one of the four pillars of the transitional justice approach – the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, or JEP) – at a moment when it was under significant domestic attack.¹ The Council's ability to provide such support, during a critical period in the implementation of Colombia's peace accord, rested on a number of factors, each of which will be explored in the study.

One can think of the Security Council's involvement in Colombia in three distinct phases: the pre-agreement phase, when the Council was absent from the process; the immediate, post-agreement start-up phase; and the roll-out phase. These three phases provide useful illustrations of when and under what conditions the Council can help bolster the Colombian-led comprehensive approach to transitional justice. Taking these three phases into consideration, a number of important lessons emerge.

First, this paper explores the benefits of adopting a holistic approach to a peace agreement and its comprehensive transitional justice provisions. While the Security Council could have decided to interpret its mandate very narrowly, instead its members chose to comment on implementation of the agreement as a whole. Moreover, many UN Member States have come to understand the Accord's comprehensive approach to truth, justice, reparations and non-repetition as the lynchpin of the project as a whole, which reinforces the need to maintain a holistic approach to the agreement's implementation. Up to the time of writing, the parties have not

seen this as the Council overstepping. If anything, one expert tracking this case noted that this approach is in the Government's interest as it believes Security Council scrutiny holds the FARC ex-combatants more accountable. But if this were to change in the future, either side could challenge the Council as having an overly broad interpretation of its role, an accusation that would also transfer to the mission and its leadership.²

Second, this case helps demonstrate the role the Security Council can play as a "protector of existing peace agreements,"³ especially when political turnover puts an existing accord under threat.⁴ In this case, the Council had to strike a delicate balance between protecting an agreement and respecting Colombia's sovereignty. It managed to achieve this balance through its vocal, consistent but measured support for the JEP during a crucial period when it was under attack. The Security Council's success in this case, however, was contingent on two key factors: The Government in question had a strong desire, despite its objections to the original transitional justice provisions in the peace accord, to remain fully engaged with the international community and to maintain its reputation for cooperation with international law and the UN. In addition, at the time of its intervention, the Security Council was perceived in Colombia as an impartial player.

Third, and unsurprisingly, Security Council unity enabled a consistent and coherent approach. Moreover, this case demonstrates the benefits of an almost unanimous international investment in the success of a particular peace process – or, to quote one Security Council member, "No one wants to see Colombia fail...or to be responsible for it failing."⁵ While unified and active international investment in Colombia's success may make this case fairly unique, it



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also introduces new risks to the process: the ‘fog of presumed success’ can occasionally blind international actors, including Council members, to shortcomings in the transitional justice implementation process.

Fourth and finally, the Colombia case helpfully demonstrates the benefits of a strategic and coordinated use of different actors to deliver messages on transitional justice. Some messages the Council can relay more easily than the mission,

the UN’s Office of the High Commissioner for Human Rights (OHCHR) or the UN Country Team (UNCT). But other messages cannot be brought by the Council, given its make-up and the fact that it is, primarily, a political body. As a result, there is a need for different actors to push the same message in different ways. This study helps demonstrate the importance of coordinated messaging on transitional justice issues and of only relying on the Council to deliver messages when it holds the comparative advantage.



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Context

Phase I

Between 2012 and 2016, the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo (FARC-EP) held formal direct talks in Cuba, to establish the terms of a final peace accord. This process, which came to be known as the “Havana Process,” followed over fifty years of fighting between Colombia’s largest guerilla group and the Government – a conflict that resulted in over 250,000 casualties, tens of thousands of people missing and millions displaced. The last three major attempts to end the conflict had failed.⁶ Thus, expectations were modest given that previous failed attempts are more likely to negatively affect efforts to broker a deal.

During the negotiations, the parties purposefully kept UN Headquarters outside of the formal process, with the exception of a late-stage request for a representative of the Secretary-

General to accompany one of the six technical subcommissions responsible for providing expert advice to the principal negotiating parties.⁷ The parties each had reasons to be wary of UN involvement, given previous experiences with the international body.⁸ These experiences had led them to agree that the Havana Process, unlike previous Colombian processes, would have no international mediator.⁹ Rather, it was to be negotiated “by Colombians and for Colombians.”¹⁰

The International Criminal Court (ICC), civil society, the UN Country Team (UNCT) and a key group of national and international experts known as the “New York Group,” however, were present during this first, pre-agreement stage. They each contributed to shaping what became the transitional justice approach of the draft agreement, based on deliberations of the subcommission on legal affairs.¹¹ The “New York Group,” through soliciting international expertise,



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helped convince the leadership of the FARC-EP that blanket amnesties were off the table, as this approach would violate both international and Colombian law.¹² Civil society groups and the UNCT were instrumental in advocating and arranging the visit of conflict victims to the talks in Havana. Their direct participation is credited with shifting the parties' – particularly the FARC's – approach to transitional justice; after bearing witness to the victims' testimonies, the FARC began to take their concerns more seriously and to put the restoration and future protection of their rights at the centre of the agreement.¹³ The ICC, through the visits of its Deputy Prosecutor to Colombia, played an important role in helping convince the army to allow itself to be considered under the same transitional justice provisions as the guerillas. According to one internal observer, the ICC "was always in the background" during the talks, helped by the fact that the situation was already on the Prosecutor's pre-investigation list and that Colombia was a party to the Rome Statute.¹⁴ According to internal observers, the ICC Deputy Prosecutor made it clear to the army that "Colombia can negotiate its own solution

[to address the most serious crimes], but the ICC would always monitor if [Colombia's solution] is enough..." Following these interventions, "The [army] started to understand that they could be left out of the agreement. But if they were left out, they would be left to ordinary justice (which would never happen), and they, therefore, would be looked after by the ICC."¹⁵ This external pressure, combined with a confidential dialogue between the army leadership and international experts, is credited with nudging the army towards accepting to be treated under the same truth and justice mechanisms as the FARC-EP.¹⁶

Phase II

To the surprise of many within Colombia and within the international community, a final peace agreement was signed in September 2016 (and confirmed, in a modified form, in November 2016).¹⁷ The agreement spelled out both a comprehensive approach to transitional justice and a specific, albeit limited, role for the UN. Secretary-General Ban Ki-moon attended the

initial signing ceremony in September 2016 to show the organization's support for this historic achievement.¹⁸

The transitional justice elements of the Accord were described in Chapter 5 of the agreement.¹⁹ In brief, they included provisions requiring that those responsible for the most serious crimes would be tried through the JEP. Otherwise, there would be the "widest possible" amnesties and limited sanctions for other politically-motivated crimes. In addition, the agreement called for a truth commission and a search unit for the disappeared. Lastly, the Chapter foresaw reparations for victims of the conflict as well as structural changes, including land reform, that would contribute towards the goal of non-recurrence.²⁰

It is important to note that the UN was broadly supportive of these provisions, with OHCHR confirming that Chapter 5, as written, generally conformed to international standards.²¹ In the final peace agreement, the negotiating parties requested that the UN, through OHCHR, provide "partnership on the implementation of Chapter 5 of the peace agreement on the rights of victims."²² The Accord also called on the UN to assist in the monitoring and verification of the ceasefire as part of a trilateral mechanism and the verification of disarmament. Subsequently, the UN mandate was updated to include the reintegration and protection of ex-combatants.²³ This assistance was requested in the form of a UN special political mission.

While there was initially much reticence amongst the parties to base such assistance on a Security Council mandate, a coalition within the Colombian Government, led by the High Commissioner for Peace, Sergio Jaramillo, succeeded in convincing the sceptics to consider a Security Council – rather than a General Assembly (or even a non-UN, regional body) mandate – as some had preferred. The FARC-EP leadership initially favored a Community of Latin American and Caribbean States (CELAC) mandate. The Colombian army leadership, in contrast, desired a hand-picked coalition of friendly States. The army was particularly opposed to the idea of inviting UN blue helmets on Colombia's soil, which some

saw as a measure "only used in failed States," rather than in a middle income country with a professional army.²⁴ Eventually, Jaramillo and his coalition were able to convince sceptics in the Government that UN technical expertise and existing structures would be an asset to the process. In addition, the UN Department of Political and Peacebuilding Affairs (DPPA), through the efforts of Jean Arnault and other senior UN officials, convinced the parties that only a Security Council mandate, rather than a General Assembly mandate, would enable the UN to provide the parties with the security monitoring and verification assistance they had requested.²⁵

This agreement, however, came with certain conditions. First, the parties insisted that the UN monitors be unarmed, out of uniform, and hail from countries in the region. Second, the parties insisted that the Security Council mission would not have an acronym – as this common practice was associated with an extended UN presence. And the parties, particularly Colombia's President Juan Manuel Santos, envisioned only a brief UN presence with a light footprint.²⁶ Third, Santos is reported to have contacted each of the Permanent Five members of the Security Council, declaring that if they were to pursue a Council mandate, "nothing is going to be in the mandate that we have not approved."²⁷ After picking the UK as the penholder, Santos declared that everything in the future mission's mandate would be pre-arranged, to preclude intra-Council debate on the future resolution.²⁸

Accepting these unique conditions, the Security Council unanimously adopted the resolution establishing the "Mission in Colombia" on 25 January 2016.²⁹ Composed of unarmed and un-uniformed monitors from the region, the mission was charged with monitoring and verifying the laying down of arms and, as part of a tripartite mechanism, a definitive bilateral ceasefire and cessation of hostilities following the signing of the peace accord.

Following the mission's first 12 months, and the conclusion of the formal peace agreement, the parties saw a need to adjust the Security Council mandate, which in turn led to the establishment

of a second UN mission under Resolution 2366. This second mission was based on a slightly expanded Council mandate, which included accompanying the parties and verifying their commitments regarding points 3.2 and 3.4 of the Final Peace Accord “on the reintegration of former FARC-EP members, and the implementation of measures of protection and security for former FARC-EP members and communities in territories most affected by the conflict.”³⁰

Phase III

In June 2018, President Santos, who led Colombia through the peace process and signed his name on the final Accord with FARC-EP’s leader, Timochenko, ended his second mandate. A conservative candidate, Iván Duque, was elected President, following a divisive and prolonged campaign. Duque had run on a promise to modify the Accord, especially its transitional justice elements, which were particularly unpopular amongst conservative sectors of the population.³¹ These constituents had disagreed with the modified amnesty provisions afforded to certain members of the FARC. His election introduced uncertainty around the implementation of the peace process, particularly legal guarantees for the FARC-EP members.

In March 2019, to demonstrate his resolve on these issues to this critical base, Duque vetoed a law governing the JEP, presenting various objections including a suggestion that lawmakers revise the approach of prosecuting only those most responsible for international crimes.³² His attempts to modify the Accord were timed with the initiation of the JEP’s operations, which had taken just over two years to get off the ground.

Duque’s announcement introduced fear among FARC-EP members regarding their legal guarantees, which in turn threatened to undermine the peace process. One reporter observed that “caught in the middle of political partisanship and court challenges,” the JEP was finding it difficult by summer 2019 to show “results in its mission to investigate and prosecute the perpetrators of war crimes committed during the country’s 52-year armed conflict.”³³ Ultimately, in June 2019, Duque signed the bill governing the JEP after Congress rejected his suggestions and the Constitutional Court upheld Congress’s rejection.³⁴

The following two sections will examine the Council’s specific approach to the transitional justice issue over these three phases, and the third section will highlight the impact of this approach in Colombia on events that transpired in 2019.



II

Overview of the Security Council's Approach and Actions

It is important to begin by highlighting that Security Council members have been generally united in their approach to Colombia. This approach has four primary elements. First, the Council accepts that the process is Colombian-led and that its role is a minor one compared to other situations on its agenda. Second, despite having a minor role, the Council's members are pursuing a holistic approach to the agreement when supporting parties' efforts at implementation. Third, the Council agrees that both they and the wider international community have much invested in the process as a whole going well.³⁵ And finally, where possible, in order to maintain Council unity, the members look to separate their consideration

of the situation in Colombia from consideration of other more controversial regional issues (such as the situation in Venezuela), which might in turn trigger unhelpful issue linkages with the peace process in Colombia.

As one Council member noted, "The relationship that the Council has with Colombia is one of the most positive of any that it has with those on its agenda."³⁶ This was attributed, in part to the "very open relationship the UK has with the [Government], as a penholder, and between [Colombia] and the rest of the Council."³⁷ It was also attributed to the vested interests of Council members in maintaining Colombia as one their current "success stories", as well as the Colombian

Government's own vested interest in maintaining its reputation in the larger community – a reputation that was recently bolstered through the agreement's successful conclusion, the awarding of the Nobel Peace Prize, growing international investment and the country's entry into the Organisation for Economic Cooperation and Development.³⁸ What is most important to highlight is that this good relationship persisted following the 2018 change in administration.

The four elements of the Council's approach to Colombia are perhaps best illustrated through three phases of involvement: pre-2016, 2016-2019 and 2019-the time of writing. Before 2016, during **Phase I**, the Security Council was absent from deliberations around the peace agreement. The insertion of Chapter 5 and the Accord's overarching focus on non-repetition benefited instead from the parties' consultations with a broader international coalition of actors including the "New York Group," the ICC and the UNCT, as discussed in the previous section. In 2015, however, in the penultimate year of negotiations, the UN was asked to accompany the subcommission on "end of conflict" issues. The Secretary-General appointed Jean Arnault, a veteran of peace processes in Guatemala and Afghanistan, among other places, to lead this UN role. Arnault was later to become the head of the UN Mission in Colombia.

In January 2016, at the start of **Phase II** of the Council's involvement, the Government of Colombia and FARC leaders issued joint letters to the Secretary-General (following a practice used in the context of Nepal), requesting that the Security Council establish a special political mission in Colombia. Nine months later, Santos delivered a copy of the peace agreement to the Security Council, affording it, some have argued, a type of international custodian status vis-à-vis the domestic agreement.³⁹ The Council's subsequent resolutions, in turn, "welcome[d]" the peace agreement, commending the negotiating parties and "underlin[ing] the Council's] full commitment to" the peace process."⁴⁰

Santos' act and these statements provided an important signal to would-be-spoilers that the international community broadly supported

the Accord, including its most controversial chapter on transitional justice. In other words, while parties in Colombia were setting up the architecture to enable the implementation of commitments under the Accord, the Council saw its role as protecting the integrity of the peace deal as a whole, despite the fact that its mission was only charged with monitoring compliance with one of its parts.⁴¹

During this startup phase, DPPA as well as mission leadership chose to follow a similarly holistic approach in their reporting to the Security Council. Although the mission's mandate does not explicitly cover transitional justice, DPPA used reports of the Secretary-General to update Council members on progress towards truth, justice, reparations and non-repetition benchmarks laid out in the accord. For example, one Secretary-General report recounted that: "Victims are participating more and more actively in the transitional justice mechanisms and continue to be powerful voices in the search for truth, justice and reconciliation."⁴² This inclusion of transitional justice was deliberate, intended to convey that even though the mandate of the mission was not to verify Chapter 5 of the Accord, that there was a need to understand the agreement as a comprehensive package of mutually reinforcing commitments.⁴³

Phase III of the Council's involvement on transitional justice issues in Colombia aligns with the period when the transitional justice elements of the Accord came under substantial threat.⁴⁴ 2019 was a period when Council members' resolve to take risks for the sake of protecting the agreement was put to the test. During the polarized debate of early 2019 over the JEP, amidst Duque's March 2019 veto described above, the Security Council, based on reports of the Secretary-General and briefings of the Secretariat, came out strongly in favour of the autonomy and independence of the JEP. The Council was careful not to challenge the Government's right to object to the proposed bill, but it effectively conveyed the message that the issue needed to be addressed in a way that guaranteed the JEP's independence, in line with the peace agreement and with principles enshrined in Colombia's own laws.⁴⁵

During this third phase, the Security Council's meetings offered opportunities for Member States to express their support for the JEP, call for increasing its capacity and independence, and share their concern with the new Colombian authorities about the risks of introducing legal uncertainty into the peace process. Germany, for instance, contended that: "the legal uncertainty of combatants and former combatants is an issue which, if allowed to persist, will be detrimental to the consolidation of the peace process. I would therefore encourage Colombia to increase the capacity of the Special Jurisdiction for Peace."⁴⁶ France, in turn, conveyed that: "I believe it important to stress that the new Colombian authorities... continue to preserve the independence of the Special Jurisdiction for Peace and to do their utmost to bolster the system of justice, truth, reparation and non-repetition."⁴⁷ The Netherlands argued that: "It is also vital to eliminate the uncertainty and fear that FARC-EP ex-combatants feel with respect to their legal guarantees, and to ensure their access to transitional justice."⁴⁸

Moreover, the Council also made good use of press statements to express support for the JEP during this time. For example, one statement read: "members of the Security Council reiterated the need for full respect for the independence and autonomy of the Special Jurisdiction for Peace, and underlined the importance of political and practical support in order for it to achieve its objective of guaranteeing the rights of victims." They also expressed their support for the "Commission on Truth, Co-Existence, and

Non-Repetition, whose role is essential for the establishment of truth and reconciliation."⁴⁹

Further, the Council visited Colombia in July 2019, soon after the issue about the law had been settled. The Council insisted on meeting with the three heads of the transitional justice institutions – the Head of the Truth and Reconciliation Commission (TRC), the JEP and the Unit for the Disappeared.⁵⁰ These meetings appeared on the Council's public agenda, explicitly signaling the importance the Council was placing on these institutions' ability to continue to work autonomously.⁵¹

It is important to reiterate, however, the unique investment of the Council in the success of Colombia's Accord, which prompted it to take such a consistent and united stance during this third phase. Interviewees agreed that there is more at stake for the Council in Colombia than in many other situations on its agenda. The Colombian Accord sets new records, not only in terms of its focus on a comprehensive transitional justice approach but also in terms of its incorporation of gender, human rights, and structural considerations. In supporting the continued integrity of this Accord, and its implementation in its current form, certain Council members are also defending their own principles, more broadly, as expressed in this groundbreaking agreement. To quote one member: "for many countries it is important to defend this peace agreement in order to defend the *issues* that are at stake in this peace agreement."⁵²



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III Impact

Phase I: Knowing When to Hold Back

As described earlier in the text, difficult past experiences engaging the UN as a facilitator had taught parties in Colombia that they were better off negotiating directly with each other.⁵³ Even so, during the years of formal talks in Havana, it may have been tempting for DPPA or the Secretary-General to push for a more active UN political role, given the organization's expertise and existing operational capacity. But DPPA and the Secretary-General purposefully held back, recognizing that the surest way to re-establish parties' trust and to keep the door open for possible future UN involvement, during the post-agreement phase, was to curb their enthusiasm.⁵⁴ The impact of this decision seems to be that it enabled the pro-UN coalition, within the Government's camp (which, of the two conflict parties, was more sceptical of a UN role), the

space to convince their counterparts that a third party would be needed to help monitor and verify the security elements of any future agreement and that the UN was better placed to do this than the alternatives explored.⁵⁵ Even then, it was not a foregone conclusion that by inviting the UN, the parties would invite the Security Council, rather than the General Assembly, to act. Rather, the parties had to be persuaded of the logistical hurdles to a General Assembly, rather than a Security Council-mandated, mission.⁵⁶

Phase II: Taking a Holistic Approach

As discussed in the previous section, both the Security Council and the mission have taken a holistic approach to the situation in Colombia. The impact of this decision has been threefold: by adopting this approach from the beginning

of their involvement and, especially during the roll-out phase, both have managed to give airtime to issues that would have otherwise lacked broad scrutiny. As a result, the parties have felt obliged to account for their progress (or lack of progress) in all, rather than only some, areas. In addition, adopting this holistic approach from the start has helped safeguard the space for future holistic reporting, even as the political climate changes. Finally, through their holistic approach, both the Council and the mission have helped bolster the narrative, common to transitional justice experts and those supporting the peace deal, that the Accord is a comprehensive and integrated approach to peace.⁵⁷ Following this logic implies that success on any one of the six chapters is connected to success on the others. Similarly, neglect of any one element, such as transitional justice, may preclude success in the other realms, such as demobilization and reintegration.

It is unlikely, however, that the Council would have been successful in its efforts to adopt a holistic approach if it had not also carefully picked its battles. As will be discussed later, the Council has been criticized for not more actively highlighting shortcomings in the parties' implementation of Chapter 5. In contrast, members of the Council have argued that their success lies in maintaining their good relationship with the Government, while also nudging key actors in areas that are most under threat. More frank and frequent reporting, in fact, should be undertaken by OHCHR, to discrete conversations with the Special Representative of the Secretary-General (SRSG) or to bilateral meetings between the Government and influential Member States.

Phase III: Support for JEP in 2019

The Security Council's support for the JEP at a time when it was under heavy attack domestically appears to have been important. The Council sent a clear political message that was heard by all parties in Colombia, and which supporters of the agreement could hold up as validating their position. According to one individual closely involved in the peace process: "Without the

Security Council pronouncing itself so regularly on [the need to protect the JEP] and in such a black and white manner, we would not be in this situation now." The interviewee went further to explain: "In a context where the [Duque] Government tried everything to cut [the Accord] down, the Security Council was the crucial actor that forced the Government to continue on that [path]...[and] could not go further in this will to dismantle the peace agreement."⁵⁸

Other actors built off of the Council's initial stance, amplifying its effects. For example, pro-peace agreement figures (including Sergio Jaramillo and Humberto de la Calle) and activists conveyed a letter to the Secretary-General pointing to the Council's reiteration of the need to support the JEP's independence and autonomy, and calling on the mission to take account of threats to the JEP in its next report to Security Council.⁵⁹ Further, a cross-party group of legislators from the UK and Ireland wrote a letter to President Duque, stating: "We recognize that the United Nations Security Council and the Prosecutor of the International Criminal Court both recognize the central position of victims in the implementation of the Peace Agreement." Both reiterated the need to fully respect the Special Jurisdiction for Peace's independence and autonomy.⁶⁰ Such a statement would have borne far less weight if it were not based on the Council's pre-existing position.

The Council's support also buttressed the statement by the UN Mission in Colombia in support of the JEP, issued on 11 March 2019:

It is regrettable that, more than two years after the signing of the Final Agreement, the JEP still does not have a Statutory Law, a solid legal framework that guarantees its operation in full exercise of autonomy and independence, key principles that the UN, through the Security Council [emphasis added], has repeatedly indicated as indispensable. We fully expect that the JEP will receive, from all the country's authorities, the political and practical support for its functioning. This support will determine, to a large extent, whether victims' rights are placed at the centre of peacebuilding.⁶¹

This convergence of international support, which built upon the Security Council's words, strengthened national actors' efforts to protect the JEP.⁶² In the end, the issue was settled in Colombia by the Constitutional Court. While it is difficult to know whether the Court took into account what the Security Council was saying, most observers would agree that the Council had some impact in sending a signal that there was serious international concern about moves against the transitional justice system.⁶³

A precondition for such impact, however, is a Government that feels pressure to "shine at the international level," as one observer put it, and to "avoid being attacked."⁶⁴ The Government's narrative of an ever-stronger Colombia shows a path towards further integration with and reliance on maintaining strong multilateral relationships. On a parallel front, the current Government feels the weight of the legacy of its predecessors, who negotiated the agreement and were honored with the Nobel Peace Prize. Duque is well aware of the degree of international attention and support directed at the peace agreement. As a result, so long as the Government feels scrutinized by a body with the ability to challenge either these multilateral relationships or this legacy, interviewees assessed that it will continue to be "prudent in analysing how far it can go" in efforts to challenge Chapter 5 provisions. It also helps that, currently, the Duque Government perceives Security Council scrutiny on compliance with Chapter 5 as working to its advantage if it serves to increase FARC ex-combatants compliance with the Truth Commission.⁶⁵

At the time of the research conducted for this paper, the immediate threat to the JEP has decreased, and the Government was not trying to proactively rewrite parts of the agreement. But there are still occasional efforts in Congress by legislators from the governing party to introduce legislation that could affect the terms of the transitional justice process. Moreover, the international fora, such as the "Group of 24" previously used by the Government to keep the international community in Colombia informed regarding peace process developments, has ceased to meet.⁶⁶ It is possible that Colombia will see more polarization around transitional

justice in the near future, for example, when the JEP begins issuing sentences, and there will be a need again for the Security Council to lend its vocal support to transitional justice institutions.⁶⁷

Broader Support to Chapter 5 Provisions (beyond the JEP)

The Council's support to transitional justice provisions beyond the JEP has been much more limited. This may, in part, reflect the severity of the threat posed.⁶⁸ While each of the Chapter 5 institutions have come under attack, the efforts to compromise the independence and autonomy of the criminal justice mechanism were most severe.⁶⁹ More, however, may be needed in this space. If the Council is to continue to protect the 2016 Peace Accord in a holistic manner, this may be one area where it could focus attention in the future.

The Security Council took an important step in this direction. Under Belgium's February 2020 Presidency on the Council, the Head of the Truth and Reconciliation Commission, Father Francisco de Roux, was invited to brief the Council as part of an Open Debate on Transitional Justice.⁷⁰ However, such briefings are still the exception, compared to related areas such as Rule of Law or Disarmament, Demobilization and Reintegration (DDR). Thus, further consideration is needed on whether or not the Council is the most effective body, when compared to, for example, OHCHR or a third, non-UN entity, for supporting efforts to ensure that non-judicial elements in Chapter 5 are also fulfilled.

A Cautionary Note: Coordinating a Coherent, System-Wide Approach to Transitional Justice in Colombia

As discussed at the beginning of this paper, Colombia is a unique case in which there is general international unanimity in wishing to see the Accord and the ensuing peace transition succeed. Progress on transitional justice forms an

important part of this process. That said, some have argued that such a strong and generally unanimous desire for success – from the Council and amongst the bodies directly supporting it – has led to certain blindspots when it comes to challenges or gaps in implementation.

To more fully illustrate this point, consider the Secretary-General's reports to the Security Council. They have provided crucial information for keeping the Council abreast of progress on the implementation of, and threats to, the Integrated System. These reports have acknowledged shortcomings in the implementation of the peace accord⁷¹ and brought to the attention of the Council important threats to its transitional justice elements.⁷² Nevertheless, some have critiqued these reports as being too "rosy," portraying implementation as a "success" even when other parts of the UN system deemed that the transitional justice elements of the Accord were not being executed in a way that conformed with international standards.⁷³

Secretary-General reports to the Security Council generally highlight a more positive picture than OHCHR reports to the Human Rights Council. But one could also argue that this is to be expected given that these reports are directed at different audiences and meant to serve different purposes. For example, the High Commissioner for Human Rights briefed the Human Rights Council in March 2018, expressing deep concern for various aspects of the implementation of the transitional justice parts of the 2016 Accord and concluded that: "Congress did not implement the Integrated System [of Justice, Truth, Reparations and Guarantees of Non-repetition] as conceptualized and, thus far, implementation has not complied with international standards."⁷⁴ By contrast, the Secretary-General's report to the UN Security Council around the same time applauds the "expeditious approval by Congress of the procedures of the Special Jurisdiction."⁷⁵ If coordinated and strategically used, this variation in messaging can work to the UN's advantage. However, if uncoordinated, such seemingly contradictory statements may undermine the credibility and effectiveness of either one of these bodies.

For their own part, some Council members have countered that the language they chose to use in press statements on Colombia is carefully couched so as not to be too prescriptive. According to one, "there is a reason [a reference to transitional justice] comes at the end of the statement and is shorter than the other paragraphs." Colombia has a long history of transitional justice initiatives at the national level, as well as a deep sense of pride in its own legal processes and systems.⁷⁶ Given this context, it was reported that Council members felt that "it is enough to let [the parties] know we are keeping an eye on [Chapter 5] and to let transitional justice stakeholders know that we are keeping an eye on it – without having to enter into a discussion on it with them..."⁷⁷ "We have to be careful," another source added, "language that might look inane to the average person is seen as explosive to the Colombians...but calling for the 'independence' and 'autonomy' of a Colombian institution is feedback that is well received as these are principles already well embraced by many Colombian institutions."⁷⁸

Those who spoke to the above point also emphasized the greater potential for the Council to play the role of "bad cop" than that of a Head of Mission or Resident Coordinator. The SRSG, for his part, can nudge the Government on issues such as the JEP both in public and behind closed doors. He can warn the Government that lack of progress "will not put them in the best light" in future reporting to the Council, but the SRSG is more limited in her or his ability to publicly critique a conflict party. The Council, in contrast, is a more effective form of *public* pressure, if used sparingly, as Colombian senior officials are particularly "reluctant to expose themselves to the scrutiny the Council brings."⁷⁹

A Cautionary Note: The Impact of Engaging the Council on the Broader UN System

The establishment of a UN mission and the embedding of its mandate in a Security Council resolution shifts how the broader UNCT can engage with transitional justice issues within

Colombia. On the one hand, the mission may provide existing UNCT initiatives with a louder microphone and an additional source of leverage vis-à-vis the Government or the other conflict parties. Some have observed, however, that the arrival of a large and well-resourced UN mission in this instance may have diminished OHCHR's profile in Colombia in particular at precisely the time the Office was being tasked by the negotiating parties with significant responsibilities in supporting the implementation of the Accord, especially Chapter 5.⁸⁰ After the arrival of the mission, OHCHR reportedly experienced more difficult and distant relations with the Government, which preferred to deal with the mission directly. But this challenge would certainly not be unique to the mission in Colombia. In previous cases, such as the UN's work in Nepal, there was a concerted division of labour between the Security Council mandated special political mission, with its limited verification and monitoring mandate, and the OHCHR country mission, which tackled transitional justice issues more directly.⁸¹ So long as transitional justice issues remain the most sensitive ones for a host government, the UN actor most vocally pushing for progress on transitional justice may experience a strained relationship with government officials.

Others have observed that this particular challenge may have been overcome if the UN Mission in Colombia had been integrated rather than non-integrated. One representative from the mission interviewed for this study argued that an integrated mission "would have helped collaboration between the mission and OHCHR. Now this [collaboration] is left to what we manage to do at the regional level, because there are no guidelines or memorandums of understanding between us [the mission and OHCHR]. We are trying not to duplicate the work that OHCHR is

doing, especially if you ask the same questions to social leaders."⁸² An OHCHR official argued that in general coordination has not worked well and that frequently "you'd have a situation where you would show up to investigate the killing of a human rights defender, and they'd say why are you here? The UN was here yesterday."⁸³ Reportedly, coordination on the ground between the mission and OHCHR has noticeably improved as the leadership of both have actively sought to foster coordination on the transitional justice file.

While structure (i.e., an integrated versus a non-integrated mission) may have played a role in complicating coordination between OHCHR and the Security Council-mandated mission, it can also be overcome. For example, in Nepal, a non-integrated mission structured very similarly to that in Colombia proved unproblematic for OHCHR's work on human rights – and within that, transitional justice. In fact, OHCHR-Nepal's leadership reported finding this separation advantageous at times "as...it accorded the office more independence, while shielding its members from the political compromises that can arise in a political mission's work."⁸⁴ Thus, one cannot assume that an integrated mission would have solved the inter-entity hurdles faced in Colombia. That said, it is important to highlight that the staffing situation in Nepal was also quite unique: the first head of the UN mission, Ian Martin, had previously headed Nepal's OHCHR country mission, and thus was attuned to the office's work and ensured collaboration rather than competition.⁸⁵ Thus, effective collaboration may depend on more than the structure. It may also ride on individual personalities, familiarity of the leaders with the mandate/working methods of the other entity and the willingness of both entities to coordinate their work, in spite of their separate structures.



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IV

Key Takeaways

1 THE IMPORTANCE OF UNITY ON THE SECURITY COUNCIL AND A COLLECTIVE VESTED INTEREST IN SUCCESS

A unified Security Council is an essential precondition for effective action. Even more importantly, this case demonstrates the benefits of collective investment in the success of a particular case – or, to repeat the quote from one Council member: “No one wants to see [the Colombian peace process] fail...or to be responsible for it failing.”⁸⁶ This collective vested interest in success has enabled the Council to take calculated risks, in terms of leaning on parties to comply with their Chapter 5 obligations, given that technically speaking, Chapter 5 falls outside the mission’s narrow mandate. It is also important to note one risk, however, of being labeled a success: a strong unanimous belief in success can also blind actors to setbacks and

gaps. In this context, it is important for the Council to seek differing views and, where possible, travel to the region, as they did in this case.

2 ASSESS WHERE THE COUNCIL’S LEVERAGE LIES AND WHEN ITS INTERVENTION, VERSUS THAT OF OTHER PARTIES, WILL BE MOST IMPACTFUL

The Colombia case helpfully demonstrates the strategic and coordinated use of different actors to deliver tough messages around transitional justice and indicates the importance of understanding and then leveraging multiple parts within the system. Some messages the Council can relay more easily than its in-country counterparts. But other messages cannot be brought by the Council, given its make-up and the fact that it is, primarily, a political body. These

may be better shared bilaterally, by OHCHR or by third parties such as the ICC or the “New York Group” (in Phase I). This study helps demonstrate the importance of coordinating messages on the issue and only relying on the Council to deliver messages when it has a comparative advantage in doing so.

3 COUNCIL LEVERAGE IS MOST EFFECTIVE WHEN APPLIED TO A COLOMBIAN-OWNED AND LED PROCESS WITH STRONG LOCAL BUY-IN

Transitional justice, as a part of the final peace agreement, emerged organically in Colombia. Given this basis, it was easier for the Security Council to apply pressure at key moments on a country that already “owned” its process. Compare Colombia to a situation where no political elites inside a country are pushing for transitional justice measures or in which these measures were externally imposed. In this scenario, even a united Security Council would be unable to effectively pressure compliance with such measures. As the Council was reinforcing a genuinely Colombian-owned, Colombian-led transitional justice agenda, its words were more likely to reach domestic actors with the power to leverage them.

4 LANGUAGE MATTERS, BUT HOW ADVOCATES USE IT MATTERS MORE

In the case of Colombia, the Security Council expressed its support for transitional justice institutions primarily through press statements and meetings with leaders of those institutions during an official mission to the country. As described above, these statements were carefully crafted and timed so as to influence the parties without alienating them. Although such communications are less ‘blunt’ than Council resolutions or OHCHR’s reports to the Human Rights Council, they proved important in the case of Colombia, not only as written but because national and international actors leveraged them

effectively. This is to be contrasted with the use of existing language in the Afghanistan case.

5 THE SECURITY COUNCIL AND ITS MISSION SHOULD TREAT PEACE AGREEMENT IMPLEMENTATION HOLISTICALLY

Even in cases where a mission has a narrow mandate, it is good practice for the mission to report back to the Council on progress toward implementation on an agreement as a whole, including its transitional justice elements. Doing so conveys to the parties that transitional justice is part of a comprehensive set of commitments. Simultaneously, in adopting a holistic approach to its statements on a peace process, the Council can help to signal to the parties that success in one area (such as DDR) is contingent on success in others (e.g. truth, justice and structural reform).

6 STRUCTURES SHOULD ENABLE, NOT LIMIT, COORDINATION

In the case of Colombia, the Government and the FARC-EP requested a specific role for the UN mission. The mission is, thus, a product of the negotiating parties’ request; it was not up to the UN bureaucracy to shape the mission as it saw fit. An integrated mission with a robust human rights/transitional justice mandate was therefore unrealistic in the case of Colombia and may be so in future cases. When dealing with a non-integrated mission, it is crucial to ensure that mission leadership is attuned to human rights and transitional justice prerogatives. It is also more important for the mission to seek inputs in their reporting on transitional justice from relevant sections of the UNCT, such as OHCHR. Arranging MOUs or other protocols offering guidance on collaboration may be helpful to ensure effective coordination between the mission and OHCHR and other elements of the country team supporting the transitional justice agenda. Moreover, it is also important to set the right incentives for field staff to cooperate and minimize duplication.

7 FRAME THE SECURITY COUNCIL'S ROLE AS AN INTERNATIONAL GUARANTOR OF NATIONAL AGREEMENTS, ONCE SIGNED

The Colombia case helps to demonstrate the role that the Council can play as a “protector of existing [national] peace agreements,” after the parties that signed the agreement have stepped down or moved on. There is a delicate balance, however, between protecting an agreement, which is nationally-led and nationally-owned, and respecting a country’s sovereign right to lead on the implementation of its own agreement. Thus far, the Council has achieved this delicate balance in Colombia, through the timing and scale of its involvement, the unique conditions of its involvement, the measured and context-sensitive approach of its critiques, the quality of the relationship it enjoys with the parties, and the eagerness of the Government to maintain a positive reputation in the international sphere.

8 EXPLORE OPTIONS FOR ADDING A TRANSITIONAL JUSTICE MONITORING ROLE INTO A FUTURE, REVISED MISSION MANDATE

The UN Verification Mission in Colombia’s mandate was renewed in September 2020. In light of the importance of continued success on Chapter 5 for the health of the full agreement, and in light of the combined vested interest of both the international community and the Government in maintaining Colombia as a success case, Council members and the Government should consider the possibility of slightly expanding the verification mandate to include verification of some aspects of the transitional justice architecture.⁸⁷ The argument could be made to the Government that such international, third-party verification would assist in its efforts to encourage FARC members to comply with their obligations under the agreement and to keep the ICC at bay. But such a recommendation would also enable more robust verification of the army’s compliance, which, understandably, will be a harder sell. *This is a developing situation since the completion of this paper.*

References

- 1 The four pillars include: truth, justice, reparations and non-repetition.
- 2 See Rebecca Brubaker and Akhilesh Upadhyay, *The Contested UN Legacy in Nepal: Examining Six Narratives* (New York: United Nations University, forthcoming) for a discussion on how this unfolded in the UN's work on Transitional Justice in Nepal.
- 3 Source withheld.
- 4 Source withheld.
- 5 Source withheld.
- 6 Renata Segura and Delphine Mechoulan, *Made in Havana: How Colombia and the FARC Decided to End the War* (New York: International Peace Institute, 2017): 5.
- 7 This was in August 2015.
- 8 Cale Salih, "What Works in UN Resident Coordinator-led Conflict Prevention: Lessons from the Field, Colombia: 2012 - 2016," *What Works in UN Resident Coordinator-Led Conflict Prevention: Lessons from the Field* eds. in Sebastian von Einsiedel et al. (Tokyo: United Nations University, 2018), <https://i.unu.edu/media/cpr.unu.edu/attachment/2849/RC-Project-Colombia.pdf>.
- 9 The parties did, however, ask Norway and Cuba to the play the role of guarantor countries and Chile and Venezuela to serve as "accompanying" countries to the process.
- 10 Segura and Mechoulan, *Made in Havana: How Colombia and the FARC Decided to End the War*: 4.
- 11 Of the six subcommissions, this commission was both the most fraught and the corresponding chapter in the final Accord took the longest time to negotiate.
- 12 Segura and Mechoulan, *Made in Havana*: 17. According to this report: "The group began as an informal, confidential space to brainstorm possible solutions to the very difficult questions facing the negotiators on transitional justice."
- 13 Salih, "What Works in UN Resident Coordinator-led Conflict Prevention: Lessons from the Field, Colombia: 2012 – 2016".
- 14 International Criminal Court, "Preliminary examination: Colombia," accessed 22 September 2020, <https://www.icc-cpi.int/colombia>. "The situation in Colombia has been under preliminary examination since June 2004".
- 15 Source withheld.
- 16 Source withheld.
- 17 This was following an initial rejection through a simple majority plebiscite and a revision process. See, Government of the Republic of Colombia and FARC-EP, "Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace," 24 November 2016, <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>.
- 18 This agreement was then put to a referendum on 2 October 2016, where it lost by a slim margin. Feedback was taken from those who voted against it and incorporated, through further negotiations, into a revised version. The revised version was then signed in a second, more discrete and low-key ceremony in November 2016. One of the revisions included limiting certain transitional justice provisions in the agreement to 10 years.
- 19 Chapter 5: Agreement regarding the Victims of the Conflict: Comprehensive System for Truth, Justice, Reparations and Non-Recurrence", including the Special Jurisdiction for Peace; and Commitment on Human Rights, *Final Agreement*: 132.
- 20 Ibid.
- 21 United Nations General Assembly, "Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia," United Nations, 21 March 2018, A/HRC/37/3/Add.3.
- 22 United Nations General Assembly, "Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia," United Nations, 23 March 2017, A/HRC/34/3/Add.3.
- 23 Article 62. The Accord, however, states that the parties would request assistance from the UN, via the General Assembly, rather than the Security Council, a point of much debate.
- 24 Source withheld. See, Segura and Mechoulan. *Made in Havana*: 18 regarding the Government's sensitivities around the referencing of Colombia as a fragile state.
- 25 They "request[ed] the participation of the United Nations in the international component of the tripartite monitoring and verification mechanism of the Agreement on the ceasefire and definitive and bilateral cessation of hostilities and the abandonment of arms." United Nations Security Council, "Identical letters dated 19 January 2016 from the Permanent Representative of Colombia to the United Nations addressed to the Secretary-General and the President of the Security Council," United Nations, 22 January 2016, S/2016/53.
- 26 Source withheld. To a great extent, this monitoring presence in Colombia was modeled after the UN Mission in Nepal (UNMIN), composed of unarmed, out-of-uniform, civilian monitors. This mission was also conceived as a "focused mission of limited duration."
- 27 Source withheld.
- 28 One Council member suggested that Colombia picked the UK as a penholder as the UK approached the role ready to "listen hard to Colombia's concerns." In addition, they had neither a strong, formal pre-existing relationship with the parties or an agenda in the region.
- 29 United Nations Security Council, "Resolution 2261, adopted by the Security Council at its 7609th meeting," United Nations, 25 January 2016, S/RES/2261.
- 30 UN Department of Political and Peacebuilding Affairs, "Verification Mission in Colombia," accessed 22 September 2020, <https://dppa.un.org/en/mission/verification-mission-colombia>.
- 31 The Colombian Parliament had already voted to weaken certain aspect of transitional justice in the Accord in early 2017, excluding "terceros" from the JEP.
- 32 Andrés Bermúdez Liévano, "In Colombia, Transitional Justice is Caught Up in Politics," *JusticeInfo*, 30 July 2019, <https://www.justiceinfo.net/en/tribunals/national-tribunals/42052-colombia-transitional-justice-is-caught-up-in-politics.html>.
- 33 Ibid.
- 34 Ibid.

- 35 One Council member explained: "All Council members realize that Colombia makes the Council look good. It is one of the files where the actors are more or less on the same page. No one really wants to be the one that messes it up" (source withheld).
- 36 Another noted the same for the Head of the UN Mission in Colombia (source withheld).
- 37 Source withheld.
- 38 Colombia was admitted to the OECD in April 2020. OECD, "Colombia's path towards OECD accession," accessed 22 September 2020, <https://www.oecd.org/colombia/colombia-accession-to-the-oecd.htm>.
- 39 Source withheld.
- 40 See, United Nations Security Council, "Resolution 2307, adopted by the Security Council at its 7768th meeting," United Nations, 13 September 2016, S/RES/2307; United Nations Security Council, "Resolution 2261, adopted by the Security Council at its 7609th meeting," United Nations, 25 January 2016, S/RES/2261.
- 41 Source withheld.
- 42 United Nations Security Council, "United Nations Verification Mission in Colombia, Report of the Secretary-General" United Nations, 26 December 2019, S/2019/988.
- 43 Source withheld.
- 44 It is important to note that these elements had already come under threat with the 2016 plebiscite and then again in late 2016 - early 2017 with efforts to translate the Accord into national law.
- 45 Source withheld.
- 46 United Nations Security Council, "8450th meeting," United Nations, 23 January 2019, S/PV.8450.
- 47 United Nations Security Council, "8368th meeting," United Nations, 10 October 2018, S/PV.8368.
- 48 Ibid.
- 49 United Nations Security Council, "Security Council Press Statement on Colombia," United Nations, 24 January 2019, SC/13676.
- 50 Source withheld.
- 51 Source withheld.
- 52 Source withheld.
- 53 Segura and Mechoulam, *Made in Havana*: 18-19.
- 54 In contrast, the Resident Coordinator was quite active during this period, in promoting prevention and transitional justice in particular. For an analysis of his efforts see: Cale Salih, "What Works in UN Resident Coordinator-led Conflict Prevention: Lessons from the Field, Colombia: 2012 - 2016".
- 55 Phone interview, May 2020
- 56 Phone interview, May 2020. Colombia suggested that this mission could be done through the General Assembly. But in looking at the tasks the parties were asking the verification mission to carry out – in looking at how the mission would be structured and given its focus on peace and security (following the completion of the peace agreement), the feeling amongst those at UN Headquarters was generally that it would be much more appropriate to mandate it through the Council rather than the General Assembly.
- 57 See, for example, Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice* (Washington DC: Brookings Institution, 2019).
- 58 Source withheld.
- 59 Pro-peace agreement figures (including Sergio Jaramillo and Humberto de la Calle) and activists conveyed a letter to the Secretary-General pointing to the Council's reiteration of the need to support the JEP's independence and autonomy and calling on the UN Mission to take account of threats to JEP in its next report to UN Security Council. National Government Negotiating Team in the Peace Dialogues, "Letter dated 11 March 2018 to Antonio Guterres, Secretary General of the United Nations," Justice for Colombia, accessed 22 September 2020, <https://justiceforcolombia.org/news/letter-to-the-un-general-secretary-on-president-duques-jep-objections/>.
- 60 Parliamentary Friends of Colombia in Britain and Ireland, "Letter dated 3 April 2019 to President Ivan Duque," Justice for Colombia, accessed 22 September 2020, <https://justiceforcolombia.org/news/letter-to-president-duque-from-parliamentary-friends-of-colombia-in-britain-and-ireland/>.
- 61 UN Verification Mission in Colombia, "The United Nations System and the Verification Mission in Colombia Reaffirm the Importance of the Special Jurisdiction for Peace as the Main Instrument for Guaranteeing Victims' Rights for Justice," 11 March 2019, <https://colombia.unmissions.org/en/united-nations-system-and-verification-mission-colombia-reaffirm-importance-special-jurisdiction>.
- 62 Source withheld.
- 63 Source withheld.
- 64 Source withheld.
- 65 Source withheld.
- 66 Source withheld.
- 67 As one international observer in Colombia described, in this current political climate, "The Security Council is one of the only places where the whole agreement is still being discussed...and a place where the peace agreement has been protected" (source withheld).
- 68 It may also reflect a general tendency on the part of the Council to privilege support for judicial mechanisms over non-judicial mechanisms. Security Council Report, Consultation on the Security Council and Transitional Justice, 10 June 2020 [virtual].
- 69 See discussion in Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice*.
- 70 United Nations Security Council, "Transitional justice in conflict and post-conflict situations - 8723rd Security Council Meeting," 13 February 2020, https://www.youtube.com/watch?v=oAueD6cp_2Q.
- 71 E.g., "What is equally irrefutable is that peace faces serious obstacles to its consolidation. The greatest concern is the situation of insecurity in a number of areas in the countryside, where social leaders are being killed in alarming numbers; many former FARC-EP members have also fallen victim and the necessary presence of the State has yet to arrive. As this report also makes clear, the reintegration process has been slow to gain traction in many respects. Many former FARC-EP members remain deeply concerned about what they perceive as precarious legal, physical and economic conditions; I commend the perseverance of the vast majority who remain engaged in and firmly committed to the peace process. I regret that polarization around the peace process also continues. National reconciliation remains incipient despite the encouraging beginnings of the transitional justice system, whose autonomy must be respected." United Nations Security Council, "United Nations Verification Mission in Colombia, Report of the Secretary-General," United Nations, 26 December 2018, S/2018/1159.

- 72 E.g., “The detention of Mr. Hernández has caused considerable alarm among FARC members, particularly those in the territorial areas for training and reintegration. They are skeptical of the allegations and concerned that any other FARC member could be similarly charged. This case compounds the former FARC-EP members’ widespread sense of legal uncertainty that results from the continuing controversy over the transitional justice system.” United Nations Security Council, “United Nations Verification Mission in Colombia, Report of the Secretary-General,” United Nations, 20 July 2018, S/2018/723.
- 73 United Nations General Assembly, “Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, United Nations, 23 March 2017, A/HRC/34/3/Add.3. For example, one concern highlighted in OHCHR’s reporting, but largely absent from the mission reporting, is the fact that “the expectations created by the Integrated System to reduce impunity for violations of human rights and international humanitarian law are undermined by the exclusion of non-military State agents and private individuals from the scope of mandatory application of the JEP.
- 74 Ibid.
- 75 United Nations Security Council, “Report of the Secretary-General on the United Nations Verification Mission in Colombia,” United Nations, 2 April 2018, S/2018/279.
- 76 See, for example, President Juan Manuel Santos, “11th Annual Emilio Mignone Lecture on Transitional Justice,” Center for Human Rights and Global Justice, 4 March 2020, <https://www.youtube.com/watch?v=xkojSGesxE>.
- 77 Source withheld.
- 78 Source withheld.
- 79 Source withheld.
- 80 United Nations General Assembly, “Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, United Nations, 23 March 2017, A/HRC/34/3/Add.3.
- 81 Rebecca Brubaker, *Breaking the Mold: Lessons from Sixteen Years of UN Engagement in Nepal* (New York: United Nations University, 2020).
- 82 Interview, UNVMC official, January 2020.
- 83 Interview, OHCHR official, January 2020.
- 84 In addition, the report notes that “this decision was primarily a practicality – for such a short mission duration, it made little sense to integrate the components only to disentangle them 12 months later.”: 14.
- 85 Rebecca Brubaker, *Breaking the Mold*: 16.
- 86 Source withheld.
- 87 At the time of drafting, JEP President Patricia Linares had just submitted a request to the Colombian President to broaden the UN Mission’s mandate. “La carta de la presidenta de la JEP al Presidente de la República,” *Semana*, 6 June 2020, <https://www.semana.com/nacion/articulo/la-presidenta-de-la-jep-le-pide-ayuda-a-duque/676668>.



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The UN Security Council and Transitional Justice: The Democratic Republic of the Congo

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Introduction

This study examines the impact of the United Nations Security Council's transitional justice engagements in the Democratic Republic of the Congo (DRC) since the start of the First Congo War in October 1996. This analysis adopts a broad notion of transitional justice, encompassing the full range of judicial and non-judicial responses to serious human rights violations in the DRC, namely amnesties; domestic and international prosecutions; demobilization, disarmament and reintegration (DDR); security sector reform (SSR)¹; a Truth and Reconciliation Commission (TRC) and other forms of truth-seeking and documentation; victim reparations; and community-based reconciliation. These mechanisms have focused on violations committed in the fluid and overlapping conflicts in the provinces of North and South Kivu and Ituri (and to a lesser extent in Equateur, Maniema, Katanga and the Kasais). During this period, fighting between an array of government and rebel forces has caused the deaths of more than five million people and internally displaced a further five million.²

Drawing on an analysis of Security Council resolutions concerning the DRC since 1996, the author's interviews, and field research in the country since 2003, this study highlights a significant evolution in the Council's language and practice concerning transitional justice over the last 24 years. The Council has shifted gradually from pursuing long term peace in the DRC on the basis of political dialogue and negotiation, in which the offer of amnesty to high-level perpetrators of international crimes was a key incentive, to advocating a holistic perspective of peace through transitional justice that prohibits amnesties for international crimes. This evolution reflects changing dynamics in the DRC as well as in the UN's global approach to conflict resolution

and transitional justice, first articulated in the 2004 *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* and refined in the UN Office of the High Commissioner for Human Rights (OHCHR) 2009 report *Rule-of-Law Tools for Post-Conflict States: Amnesties*. The latter states:

"The United Nations policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations, represents an important evolution, grounded in long experience."³

While there are important differences among the Council's, OHCHR's and other UN agencies' positions on transitional justice matters in the DRC, the 2004 Secretary-General's report and the 2009 OHCHR report represent critical junctures in the UN's overall thinking on these themes. These also reflect broader pro-prosecution trends in the human rights advocacy and international criminal justice communities, galvanized by the inauguration of the permanent International Criminal Court (ICC) in 2002.

As this study will highlight, the Security Council and UN agencies operating in the DRC have often disagreed on these issues, with some UN actors adopting a stringent anti-amnesty stance, while others have advocated the use of amnesties in nationally-led UN-facilitated processes of DDR and SSR. While amnesties have, in some key instances, incentivized combatants in the DRC to cease hostilities, the UN's variable position on this issue has created significant confusion among armed groups, affected communities and national and international agencies involved in conflict mitigation.



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Furthermore, the close entanglement of the UN peacekeeping missions, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and its successor the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), with the Congolese Government – reflecting the Security Council's view that State-building and bolstering Congolese institutions are central to addressing the legacies of conflict – has complicated various UN efforts at transitional justice. Seeing itself as a guarantor of the newly consolidated Congolese State, the UN has often succeeded in bolstering domestic transitional justice efforts, principally through the Congolese military courts and mobile gender units. At other times, however, UN support for other forms of foreign intervention, especially through the ICC, has undermined national ownership and decision-making. Furthermore, the UN itself has, at times, complicated domestic transitional

justice measures by becoming overly embroiled in community-based efforts. Changes to the Security Council – and broader UN – practice in the DRC are required to maximize the national gains from the UN's involvement in transitional justice, while minimizing any risks to the domestic system.

This study is structured in three parts: The first section traces the evolution of the Security Council's goals, tools and implementation of transitional justice in the DRC from 1996 until the time of writing. The second section analyses the impact of the Security Council on the practice of transitional justice in the DRC, highlighting the positive and negative consequences of the Council's approaches. Finally, the third section draws some conclusions from that analysis and offers recommendations for the Security Council's ongoing engagement with transitional justice issues in the DRC.



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Evolution of the Security Council's Goals, Tools and Implementation of Transitional Justice

Since 1996, six phases are discernible in the evolution of the Security Council's transitional justice goals, tools and implementation in the DRC. These phases highlight the Council's shifting emphasis from achieving fundamental peace and stability across the DRC to facilitating the creation of a robust Congolese State, the transition to the DRC's first post-conflict elections in 2006 and the entrenchment of accountability and the rule of law across the country, as the basis of democratic governance and economic growth. Changes in

the Council's approach across this period stem both from political and conflict developments in the DRC as well as changes in global UN thinking on transitional justice matters. Throughout, the Council has linked punitive forms of transitional justice to its overarching concerns in the DRC, calling for the prosecution of foreign actors perceived as undermining Congolese State sovereignty; perpetrators of crimes designed to disrupt national elections; actors responsible for the murder of UN peacekeepers; and perpetrators of economic crimes that jeopardize



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national development. Arguably, the most important change has been the Council's increasing emphasis on criminal accountability and opposition to the use of amnesties (which the Council often equates with "impunity"), for perpetrators of international crimes.

During **Phase I** (between 1996 and 1998), the period of the First and Second Congo Wars, the Council focused on securing peace through dialogue and negotiation among the newly installed Congolese Government under Laurent-Désiré Kabila (whose Alliance des Forces Démocratiques pour la Libération du Congo/Zaire [AFDL] ended the 36-year-long regime of Mobutu Sese Seko in May 1997) Rwanda, Uganda, Burundi and their various rebel proxies.⁴ During this period, Security Council resolutions eschewed any reference to transitional justice, save a passing mention in 1998 of the "individual responsibility" of senior government officials and rebel leaders for large-scale human rights violations.⁵ The Council underlined the need for UN agencies to support domestic prosecutorial efforts through the documentation of crimes and other efforts, for the wider maintenance of

peace and stability.⁶ Security Council language and practice during Phase I also emphasised the need to deal with the rapidly deteriorating humanitarian situation in eastern DRC. This centred on camps for Hutu refugees fleeing the Rwandan Patriotic Front's (RPF) advance following the 1994 genocide of Tutsi in Rwanda and for internally displaced persons after the AFDL invasion of the DRC in October 1996.⁷

Similarly, **Phase II** (between 1999 and 2001) involved little Security Council engagement with transitional justice, with the focus again on peace through dialogue, facilitated by the newly appointed Secretary-General's Special Representative for Peace.⁸ Central to these efforts was MONUC, created through a Security Council resolution in November 1999, deployed in February 2000, and mandated to supervise the implementation of the 1999 Lusaka Peace Agreement signed by the DRC, Rwanda, Uganda, Angola, Zimbabwe and Namibia.⁹ To ensure Congolese sovereignty and to help build a more effective Congolese State, the Council demanded the withdrawal of "foreign forces," principally Rwanda and Uganda, and called for

international investigations into serious human rights violations committed by these actors.¹⁰ The Council also called for investigations into the assassination of Laurent Kabila in January 2001, which brought his son Joseph into power.¹¹ Starting in 2000, the Council stressed consistently the need for UN-facilitated DDR and SSR, stating that the repatriation of foreign combatants and building an effective national army and police force were essential to establishing a functional Congolese State and securing a lasting peace.¹²

Phase III (between 2002 and 2005) marked a significant shift, with transitional justice featuring routinely in Council resolutions and UN practice in the DRC. This reflected a general change in Security Council approaches, in line with the recommendations of the UN Executive Committee on Peace and Security's (ECPS) 2002 report on rule of law strategies for peace operations.¹³ By 2002, MONUC was mandated to coordinate all UN activities across Congo, with a primary focus on supporting the Congolese transitional Government's preparations for national elections, the timeline for which was agreed at the Inter-Congolese Dialogue in Sun City in April 2002.¹⁴ A major threat to the elections, numerous Security Council resolutions emphasized from 2003 onwards, was "the absence of accountability throughout the DRC" and weak adherence to the rule of law, which undermined "national reconciliation."¹⁵ During Phase III, Security Council resolutions used stronger and more frequent language regarding the need for criminal accountability, precipitated by the murder of two MONUC peacekeepers in Ituri in May 2003.¹⁶ This trend continued in Phase IV, with Security Council resolutions amplifying calls for prosecutions following the killing in Ituri of nine MONUC peacekeepers in February 2005 and eight peacekeepers in January 2006.¹⁷ In response, the Council insisted, there should be "no impunity" for international crimes – genocide, war crimes and crimes against humanity – a refrain that has since continued throughout Council resolutions and UN practice.¹⁸

In 2004, MONUC's mandate was expanded to include assisting SSR through a process known as *brassage*, or the integration of rebel

combatants into the newly constituted national army, the Forces Armées de la République Démocratique du Congo (FARDC).¹⁹ MONUC was also mandated to support the prosecution of suspected perpetrators of international crimes. The Council stated that this should take place through the Congolese domestic courts,²⁰ but in 2005 it also called for the Forces Démocratiques de Libération du Rwanda (FDLR) rebels – comprising many suspected perpetrators of the Rwandan genocide – to cooperate with the UN International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania.²¹ As violence engulfed the province of Ituri, accountability for three sets of crimes dominated Security Council resolutions in this period: the plunder of the DRC's natural resources; the illegal cross-border weapons trade; and sexual violence.²² 2004 also marked the first Council acknowledgement of crimes against civilians committed by MONUC personnel.²³

The key event determining the Security Council's stance on transitional justice in **Phase IV** (between 2006 and 2009) was the July 2006 elections, the first multiparty vote in the DRC in 41 years and, at a cost of USD 500 million, the most expensive UN-run election in history.²⁴ After the elections, the Congolese Government formally assumed responsibility from MONUC for all security issues, including the oversight of DDR and civilian protection.²⁵ Security Council resolutions in 2006 and 2007 stressed the importance of the elections for establishing coherent State authority throughout the DRC and for laying the grounds for "permanent dialogue" between the newly elected Government and its various opponents, including rebel groups.²⁶ From 2008 onwards, Security Council resolutions referred regularly to the need to hold criminally accountable all actors who had committed grave human rights violations designed to disrupt the 2006 and subsequent elections.²⁷

With Joseph Kabila's Government now elected and thus publicly legitimized, the Security Council's focus on criminal accountability – begun in Phase III – for the first time included crimes committed by Congolese State actors.²⁸ As a result, the 2007 national transitional

justice strategy, to be jointly coordinated by the Congolese Government and MONUC – the first time the term transitional justice was mentioned in Security Council resolutions regarding the DRC – included a range of measures to address government culpability,²⁹ principally for economic crimes such as corruption and embezzlement. Alongside ongoing processes of DDR and SSR, the transitional justice strategy emphasized the need to vet State actors – both military and civilian officials – for involvement in international crimes, although (as discussed later) MONUC was initially reluctant to do so.³⁰ The Security Council also successfully lobbied for the exclusion of these crimes from the national amnesty, which was adopted by the National Assembly in July 2008 and signed into law by President Kabila in May 2009.³¹

Based on the Security Council's view that the "peace and security situation [had] improved"³² across the DRC, in **Phase V** (between 2010 and 2012), the Council concentrated on economic development, with transitional justice concerns routinely linked to that goal. Numerous Council resolutions described delivering accountability and combating impunity for serious crimes as important for the interconnected purposes of peace, national reconciliation, development and prosperity.³³

In 2010, MONUC, under Security Council Resolution 1925, transitioned to MONUSCO, with a mandate geared towards consolidating Congolese State authority and bolstering its civilian protection capacity rather than its predecessor's focus on the implementation of the Lusaka and Sun City Peace Accords.³⁴ In this period, MONUSCO's primary transitional justice activity comprised support for the national military tribunals, with UN Prosecution Support Cells throughout the country focusing on crimes committed by the Congolese army including international crimes. The Security Council also raised concerns over a range of new FARDC criminal activities such as smuggling and drug trafficking.³⁵ Council resolutions in Phase V, for the first time, mentioned the Congolese Government's cooperation with the ICC. President Kabila referred the conflict situation in the DRC

to the ICC in April 2004, with ICC investigations beginning two months later.³⁶ In January 2009, the Congolese rebel leader Thomas Lubanga became the ICC's first ever suspect to face trial in The Hague.

One notable absence in Security Council resolutions during this period was any mention of the OHCHR mapping report in August 2010, which documented serious human rights violations committed in the DRC between March 1993 and June 2003. The report was framed explicitly as the basis of future transitional justice endeavours, including prosecutions.³⁷ While the Council had called for the Congolese Government's cooperation with the mapping exercise in 2007,³⁸ the 2010 report elicited no reference in any subsequent Security Council resolutions. Some OHCHR officials at the time attributed the Council's silence on this matter to the report's controversial finding that Rwanda had committed "genocide" against Hutu civilians in eastern DRC as revenge for the 1994 genocide of Tutsi in Rwanda, a claim widely criticized by commentators and denied vociferously by the Rwandan Government which, with US and UK backing, lobbied the Council to suppress the report.³⁹

Finally, **Phase VI** (between 2013 to the time of writing) represented a further strengthening of the Council's language and practice around criminal accountability – and the prohibition against amnesties – for serious crimes in the DRC. Alongside continued references to the need for domestic justice for FARDC atrocities, the importance of the Congolese Government's cooperation with the ICC and the rejection of amnesties for international crimes, the Council extended this framework to emphasize prosecutions, rather than DDR or SSR, as the appropriate measure for rebel perpetrators.⁴⁰ This signifies a major shift, especially in removing amnesty as a possible incentive for rebel combatants to integrate into the FARDC. While consistent with the Council's increasing global emphasis on prosecutions for serious crimes, this change also stems from growing frustration (within the Council, MONUSCO and OHCHR) over perceived failures of the *brassage* process,

principally the extent to which rebel groups maintained parallel chains of command and continued committing serious crimes against civilians after their integration into the FARDC.⁴¹

Driven by similar concerns, starting in 2013, Resolution 2098 created the UN Force Integration Brigade (FIB) within MONUSCO – the first UN peacekeeping mission in the world mandated to use force to “neutralize and disarm” groups considered a threat to State authority and civilian safety, with a specific focus on the March 23 Movement (M23), the Allied Democratic Forces (ADF) and the FDLR.⁴² Taken together, these measures – denying amnesties as an incentive for military integration and the bolstered military approach of the FIB – represented a tougher stance against rebel groups and a move away from the negotiation and inducement approach witnessed in previous DDR and SSR efforts. Crucially, though, in 2017, the Council expressed frustration at the inability of DDR processes to adjust to changing circumstances in eastern DRC, including escalating conflict in the Kasai

regions, highlighting the extent to which the Council still considers DDR essential in tackling armed groups.⁴³

Phase VI also witnessed a greater Security Council emphasis on community-based approaches to transitional justice and conflict mitigation, with several resolutions in 2019 stressing MONUSCO’s role in supporting or facilitating bottom-up conflict resolution, dialogue and security.⁴⁴ Whereas the Council had previously discussed reconciliation in national terms, 2019 saw a new emphasis on community reconciliation.⁴⁵ This, perhaps, resulted from MONUSCO’s growing focus on community engagement generally in this period, designed to improve the peacekeeping mission’s standing with conflict-affected communities.⁴⁶ More broadly, in recent years the UN system – driven principally by the United Nations Development Programme (UNDP) – has increasingly viewed reconciliation, understood in terms of transforming intra and intercommunal relations, as essential for sustainable peace.⁴⁷



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II

Analysing the Security Council's Impact on Transitional Justice

Across the six phases just outlined, the Security Council – while never the most significant actor – has had a variable impact on transitional justice in the DRC. This section examines the Council's most important positive and negative effects in this domain. In particular, the fraught issue of amnesties – their stated illegality versus their continued efficacy for a range of conflict mitigation processes – has dominated, and complicated, the UN's transitional justice activities in the DRC.

The Security Council's principal contributions to transitional justice in the DRC have been in terms of DDR and the reform of the domestic judicial system. DDR in the DRC has involved

both the demobilization of rebel combatants, who may choose either to integrate into the FARDC through the SSR process of *brassage* or to return to civilian life, with the relative emphasis on these two tracks varying over time depending on political expediency and other factors. The latter process involves combatants' return to Congolese communities or cross-border repatriation through MONUSCO's Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR) programme in the case of foreign armed groups, most notably the Rwandan-dominated FDLR. Since 2002, the DDR division of MONUSCO has demobilized a total of 150,000 rebel combatants.⁴⁸ An implicit amnesty underpins the DDR process,⁴⁹ and combatants



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are not screened for possible participation in serious crimes before demobilization, despite the Security Council's insistence on this measure. The removal of any threat of prosecution has been key to incentivizing combatants to lay down their arms.⁵⁰

The DDR that involves domestic demobilization within the DRC has faced considerable problems, not least the failure of many combatants to integrate effectively into local communities, causing many fighters to return to combat.⁵¹ The repatriation of combatants to Rwanda, Uganda and Burundi, meanwhile, has proven much more successful. Three phases of cross-border DDR since 1998 have focused on Congo-based Rwandan rebels, the first managed by UNDP and the last two by the Rwanda Demobilization and Reintegration Commission (RDRC), building on a framework established through the Lusaka Peace Agreement. This programme has demobilized around 35,000 mainly Hutu former combatants from eastern Congo, the majority members of the FDLR and the former Rwandan army who fled across the border after the 1994 genocide.⁵² These combatants are disarmed by

MONUSCO before being moved to the Mutobo demobilization centre near the town of Musanze in northern Rwanda.

While the Rwanda-focused aspects of DDR have been broadly successful, facilitated by the DRC's implicit provision of amnesty, this programme has run into some difficulties in Rwanda, where three levels of accountability mechanisms – the ICTR, the Rwandan national courts and the *gacaca* community-based courts – have delivered comprehensive justice for suspected *génocidaires*. The national courts and *gacaca* have not prosecuted combatants returning from the DRC, highlighting the premium the Rwandan Government places on the DDR process. This has caused some grievances, though, among everyday Rwandans. Given that a significant number of FDLR fighters, including most of its leadership, participated in the genocide, some Rwandans – particularly convicted perpetrators (including members of the FDLR who were captured on the battlefield or returned to Rwanda voluntarily before the start of DDR in 1998 and were subsequently prosecuted through *gacaca*) – question the lack of accountability

for demobilized FDLR fighters.⁵³ Most reports indicate, nonetheless, that demobilized combatants have integrated successfully into Rwandan communities, largely because of the Rwandan Government's extensive advocacy of the DDR programme, which stresses its benefits for reconciliation in Rwanda and for nullifying rebel threats in eastern Congo.⁵⁴

Greater complications have arisen regarding high-ranking demobilized suspects pursued by the ICTR. While the Lusaka Peace Agreement in 1999 stipulated that MONUC should screen disarmed combatants for possible involvement in Rwandan genocide crimes and hand suspects over to the ICTR, MONUC and MONUSCO have generally refused to do so – highlighting internal UN tensions over the implicit amnesty necessary to enable DDR and the prosecutorial mandate of the ICTR.⁵⁵ Only three ICTR indictees have been extradited from the DRC: Grégoire Ndahimana in 2009, Bernard Munyagashiri in 2011 and Ladislav Ntaganzwa in 2016, all of whom were captured by the Congolese Government and extradited with minimal involvement by MONUC or MONUSCO. These episodes highlight critical tensions between the imperatives of DDR – in which the Security Council has generally played a constructive role – and international prosecutions (including through the UN-run Tribunal), foreshadowing problems surrounding the ICC's interventions in the DRC, discussed below.

The second major positive contribution by the Security Council to transitional justice in the DRC has been effective support for the reform and practice of the Congolese domestic judiciary. These efforts have centred on the military tribunals and mobile gender units, which have now prosecuted hundreds of cases of genocide, war crimes and crimes against humanity. While the Security Council has never been the primary actor in this regard, it has played an important role in creating a diplomatic atmosphere conducive to bolstering domestic justice (at a time when some foreign donors have expressed reservations about supporting such activities) and offering technical and logistical support to domestic judicial actors. As argued below, however, tensions have arisen between the Council and UN agencies based in the DRC over

the extent to which the Council's support for ICC investigations in the DRC has, at times, undercut the work of the national courts.

Since 2003, a European Commission (EC) funded reform process has bolstered the domestic courts and enabled them to investigate and prosecute a wide range of war crimes and crimes against humanity. Centring on Ituri, the EC's investment of more than USD 40 million towards reforming the Congolese judiciary has seen considerable progress in local capacity.⁵⁶ This programme became the basis of the much broader Restoration of Justice in the East of the DRC (REJUSCO) initiative funded by the EC, Belgium, the Netherlands and Sweden, which extended to the Kivus and other provinces.⁵⁷ Implemented by the Belgian NGO Réseau des Citoyens-Citizens' Network (RCN), the project in Bunia aimed to establish the minimal operation of the local police and judiciary and to improve arrest and detention processes and facilities. The EC funded the purchase of new judicial offices and equipment and provided training and salaries for investigators and magistrates. Since 2003, MONUC (followed by MONUSCO) has provided around-the-clock protection to all judges in Bunia.⁵⁸ The Security Council's creation of the UN Joint Human Rights Office (UNJHRO) within MONUSCO in 2008 – merging MONUSCO's previous Human Rights Division and the DRC office of OHCHR – increased the UN's assistance to the Congolese courts through criminal investigations, support for victims and witnesses and sharing of evidence, which has been used in numerous atrocity trials. These developments have helped boost the efficiency of the national courts throughout eastern DRC, including in their handling of high-profile cases concerning international crimes.⁵⁹

One of the most important reforms in the Congolese judicial system has been the use of mobile courts in eight provinces to address a wide range of cases, including atrocity trials. The mobile courts represent an attempt to make justice more accessible to local populations by holding hearings close to the sites of alleged crimes – a model replicated in the mobile courts system in South Sudan since 2018, supported by the UN Mission in South Sudan (UNMISS).⁶⁰

In the DRC, the most extensive mobile courts programme has focused on sexual and gender-based crimes in South Kivu and Maniema. A key innovation here is an international-domestic collaboration, with the mobile courts overseen exclusively by Congolese judges and lawyers but with funding and technical support from the American Bar Association/Rule of Law Initiative (ABA/ROLI), the Open Society Justice Initiative (OSJI) and the Open Society Initiative for Southern Africa (OSISA).

As with the military tribunals, MONUSCO has provided security for the mobile court judges and shared evidence with prosecution and defence investigators. In their three years of operation between 2009 and 2012, twenty mobile courts heard 382 cases (the majority involving senior and middle-ranking members of the Congolese army), leading to 204 rape convictions, 82 convictions for other crimes and 67 acquittals.⁶¹ The majority of cases resulted in the award of victim reparations, although it has proven difficult to secure reparation payments from convicted perpetrators.⁶² Fundamental to these reforms in the DRC has been activism from within the Congolese judicial community, with the support of external actors such as the EC, MONUSCO, ABA/ROLI, OSJI and OSISA. Crucially, these international actors have played a supportive and subordinate role to the Congolese courts, providing finance, evidence and logistical assistance but without undermining national ownership.

While the Security Council overall has boosted DDR and domestic prosecutorial efforts in the DRC, it has generated considerable problems for several important transitional justice approaches (including those same processes it has helped promote). These challenges stem from three main sources: the Council's increasing opposition to amnesties for international crimes; its support for the ICC; and, MONUSCO's recent involvement in community-based responses to atrocities.

First, the Council's growing opposition to amnesties for suspected perpetrators of international crimes has significantly undermined DDR, SSR and the TRC. Since 2002, the DRC has

passed four amnesty laws, all resulting from peace negotiations and designed to facilitate these other mechanisms.⁶³ As discussed earlier, an implicit amnesty also underpins the DDR process that facilitates the return of Congo-based rebels to Rwanda, Uganda and Burundi.

Various UN actors – especially MONUC and MONUSCO – have adhered to these nationally-led amnesty processes because they enable DDR and SSR. MONUC and UNDP also supported a controversial pardon of several Ituri rebel groups in 2006. Acting outside of the 2005 amnesty law, Kabila pardoned Mathieu Ngudjolo and all 10,000 members of his Ituri rebel coalition, the Mouvement Révolutionnaire Congolais (MRC), as well as the rebel groups led by Peter Karim and Cobra Matata, in exchange for their surrender, the decommissioning of their weapons and their integration into the FARDC.⁶⁴ As a result, all three leaders were promoted to the rank of colonel in the Congolese army. Such a practice was common in the lead-up to the 2006 national elections, as the Government sought to minimize the impact of militia groups capable of intimidating voters and disrupting preparations for the poll. MONUC supported the scheme as part of the UN's broader DDR programme in eastern DRC, designed to support preparations for the elections. Kemal Saiki, a MONUC spokesperson, defended the amnesty-for-peace deals with Ngudjolo, Karim and Matata: "The most important thing is to bring an end to the bloodshed. Since these deals have been signed, there has not been any large-scale fighting in Ituri."⁶⁵

As previously discussed, once the 2006 elections were over, the Security Council's opposition to amnesties for perpetrators of international crimes became more entrenched, amplifying calls for prosecutions. In this general atmosphere – and with the ICC nearly four years into its investigations into crimes in Ituri – the Congolese Government saw strategic advantage in cooperating with the ICC, a move praised by the Security Council and international donors.⁶⁶ In February 2008, the Government arrested Ngudjolo at a military training camp in Kinshasa following an ICC warrant issued in July 2007. This amounted to a bait and switch, with Ngudjolo

lured into surrender from his rebel ranks and integrated into the Congolese army, only to be arrested and transferred to The Hague for prosecution 18 months later. While the Congolese Government was widely hailed for its cooperation in arresting and transferring Ngudjolo to the ICC, its duplicity toward a recipient of a government pardon undermined the broader use of amnesty as an incentive for members of rebel groups to lay down their arms. Some UN officials privately expressed disquiet over the handling of the Ngudjolo case.⁶⁷ Interviews with former rebels from Ngudjolo's Front des Nationalistes et Intégrationnistes (FNI) and Forces de Résistance Patriotiques en Ituri (FRPI) in Bunia who had been integrated into the Congolese army underscored this point. One former FNI combatant said:

"This is the big problem with *brassage*. The Government gives us an amnesty, so we join the army and get a new uniform. But look what happened to Ngudjolo. He also got an amnesty but now he's in The Hague. We all wonder whether this will happen to us next."⁶⁸

A former mid-ranking FRPI commander echoed these views: "You can't trust the Government or the ICC. These amnesties mean nothing. They can change their mind at any time, which makes us all vulnerable."⁶⁹ Similar sentiments were expressed by former Congolese rebels in the Mutobo demobilization centre in Rwanda, following the transfer of former CNDP and M23 leader Bosco Ntaganda to the ICC in March 2013:

"We heard what happened to Bosco. He was bigger than us and did the same as we did, coming across the border. Now he's at the ICC. Is that going to happen to us too?"⁷⁰

"The [Rwandan] Government here said that if we come back, we won't be punished. Even when there was *gacaca*, we wouldn't be punished because they wanted us to come home. We trusted them but, after Bosco, none of us are sure we made the right choice."⁷¹

"The Bosco case sends a bad message to others in Congo. Many of them won't come back now. Some people say Bosco wanted to go to the ICC but why would he do that? He could've been reintegrated and gone back to his family in Virunga."⁷²

Such views highlight the extent to which the threat of prosecution can severely undermine SSR and DDR processes. Even the threat of prosecuting only high-ranking suspects can sow doubt among lower-ranking combatants who may not readily appreciate such fine distinctions. In the cases of Ngudjolo and Ntaganda, the UN did not play a direct role in their transfer to The Hague. However, the Security Council's growing anti-amnesty stance – coupled with explicit support for the ICC's investigations in the DRC from 2010 onwards – helped create an atmosphere in which such moves were possible, to the detriment of the UN's own role in DDR and SSR.

Uncertainty over whether amnesties still applied in an era of increased emphasis on prosecutions – a discourse bolstered by regular Security Council resolutions and statements by various UN agencies operating in the DRC – also hampered the efforts of the TRC, which operated between 2003 and 2007. Article V of the TRC Statute broadened the commission's mandate to include active conflict resolution, described as "the prevention or management of conflicts as they occur through mediation between divided communities."⁷³ The President of the TRC, Jean-Luc Kuye, and several TRC Commissioners attempted to resolve conflict by travelling to Kisangani, Bukavu, Goma, Rutshuru and elsewhere to talk to protagonists.⁷⁴ Following Rassemblement Congolais pour la Démocratie (RCD) violence in North Kivu in January 2006, for example, Kuye and a delegation from the TRC travelled to meet with Laurent Nkunda, other RCD commanders and community leaders in Rutshuru and Goma.⁷⁵

Kuye argued that many belligerents refused to confess to crimes or to cooperate with mediators for fear of evidence being used against them in criminal trials, either through the ICC or the

domestic courts. “The ICC came up forcefully in our discussions with several rebel leaders, including Nkunda,” Kuye said. “We would start talking to them, make good progress, then the conversation would stop. They didn’t want to incriminate themselves, even when we stressed that the amnesty was in place.”⁷⁶ This situation echoes challenges in other countries such as Sierra Leone and Timor-Leste that have simultaneously deployed trials and truth commissions. Within such a structure, the former process typically addresses serious violations by high-ranking perpetrators, while the latter addresses crimes by less senior actors. As various commentators have argued, however, the threat of prosecutions in such cases often deters even lower-ranking actors from appearing before truth commissions.⁷⁷

The second set of problems stemming from the Security Council’s evolved position on transitional justice in the DRC concerns the ICC. Especially in the early years of ICC investigations in the DRC, tensions emerged between the Council and other UN agencies over the extent to which the UN should support the Court, which many Congolese judicial actors perceived as competing with domestic courts for jurisdiction over prominent cases. In the DRC, the ICC has charged six suspects – Thomas Lubanga, Bosco Ntaganda, Germain Katanga, Mathieu Ngudjolo, Callixte Mbarushimana and Sylvestre Mudacumura – the first four concerning crimes in Ituri and the last two in North and South Kivu. Lubanga, Ntaganda and Katanga were all convicted, Ngudjolo was acquitted, the case against Mbarushimana was dismissed at the confirmation of charges stage, and Mudacumura reportedly died on the battlefield in 2019.

Broadly, the UN – and within the Security Council, the two permanent members that are also signatories to the Rome Statute, France and the UK – have supported the ICC’s efforts in the DRC, rhetorically and in practice. MONUSCO has provided security, evidence and logistical backing to ICC investigators in the field.⁷⁸ The ICC’s investigations in Ituri were greatly boosted by the Government’s arrest and imprisonment, with MONUC’s assistance, between February and April 2005 of four Ituri rebel leaders: Lubanga,

leader of the Union des Patriotes Congolais (UPC); Floribert Ndjabu, leader of the FNI; Kahwa, leader of the Parti pour l’Unité et la Sauvegarde de l’Intégrité du Congo (PUSIC); and Katanga, military leader of the FRPI. All four suspects were charged with involvement in the murder in February 2005 of nine Bangladeshi peacekeepers, ambushed during a MONUC patrol near the town of Kafe on Lake Albert.

The ICC’s relationship with MONUC and MONUSCO, however, was often fraught, especially in the early years of the ICC’s operations in the DRC. The ICC’s early investigations in Ituri were hampered by MONUC’s initial reluctance to hand over evidence gathered by its own forces in cooperation with the Congolese army and police. Some MONUC officials argued that the ICC’s requests distracted from their primary responsibilities, could jeopardize the security of their forces in the field, and undermine attempts by the national Congolese judiciary – with which MONUC human rights and rule of law personnel worked closely – to prosecute cases of war crimes and crimes against humanity.⁷⁹ Several senior MONUC officials described the unilateralism of the ICC, often assuming the role of ‘top dog’⁸⁰ in this partnership. One high-level MONUC official in Bunia said:

“[The ICC’s] investigators arrived out of the blue and expected us to help them. They wanted access to sites where massacres happened. They wanted help with identifying communities that would speak to them. These are places with many vulnerable people, where we’ve been working for many years and where we have close working relationships...We have to keep working there long after the Court leaves, so we have to be very careful about involving ourselves too much with [ICC personnel].”⁸¹

Difficult relations between the ICC and the UN were a key reason the Lubanga trial – the ICC’s first-ever trial – almost collapsed before it started. In 2008, MONUC refused to allow the ICC Office of the Prosecutor to make public UN-gathered evidence concerning Lubanga. The Defence argued that this compromised Lubanga’s fair trial



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rights because potentially exculpatory evidence was not being disclosed on the basis that the UN wished to maintain the anonymity of local sources.⁸² The ICC Trial Chamber stayed the proceedings in Lubanga for almost one year until the Prosecutor could convince the UN to permit the public release of the relevant evidence.⁸³

Since the ICC opened investigations in the DRC in 2004, senior MONUC and MONUSCO officials (especially in the Human Rights, DDR, Justice Support and Political Affairs Divisions) have, at times, expressed concerns over the ICC's competitiveness with the Congolese judiciary. The peacekeeping mission's disquiet stems from its role in helping rebuild the military tribunals, which on several occasions have seen cases within their jurisdiction usurped by the ICC.

This view was strongest during the ICC's first three cases in Ituri concerning Lubanga, Katanga and Ngudjolo, which the military tribunal in Bunia was also investigating at the time. "When the ICC first came here," Chris Aberi, the State Prosecutor in Bunia, said: "We showed them the dossiers we had already assembled on Lubanga and

others. We were ready to try those cases here. We had the capacity to do this and it would have had a major impact for the people here, to see these [rebel] leaders standing trial in the local courthouse."⁸⁴ John Penza, the Military Prosecutor in Bunia, concurred: "You only have to look at our record here to know what we are capable of. With MONUC's help, we prosecuted Kahwa here – MONUC detained him and we prosecuted him...We found the mass grave at Bavi and we prosecuted [Congolese army captain François Mulesa] Mulombo and his men in connection with that...The ICC is certainly a necessary thing but it should be handling bigger cases than those [it is currently prosecuting]."⁸⁵

That domestic investigations were already underway into the early cases pursued by the ICC should have kept those cases within the domestic jurisdiction, on the basis of the ICC's principle of complementarity. The technical legal reasons that the ICC succeeded in maintaining jurisdiction over the Ituri cases are an issue the author has explored in depth elsewhere.⁸⁶ The impact of these early ICC decisions was widespread disappointment among judicial actors in Ituri (and

their supporters within MONUC and MONUSCO) that, despite the extensive legal reforms of the last 16 years, they would not be able to prosecute some of the most important atrocity suspects in local courtrooms.⁸⁷

This has important ramifications for the long-term legitimacy and efficacy of the domestic judiciary, which Security Council resolutions and various UN agencies stress must be supported as part of a longer-term rule of law strategy. It also led some domestic judicial actors to claim they are receiving mixed messages from the international community, which has invested heavily in legal reform but maintains that such reforms are insufficient to warrant domestic trials of high-profile suspects who are also pursued by the ICC.⁸⁸ Such concerns appear to have diminished over time, as the ICC has not issued new arrest warrants in the DRC and the national courts have focused on a separate and substantial caseload (including cases involving Congolese military and other State actors – a category of suspects eschewed by the ICC). Nevertheless, the ICC's competitiveness with the Congolese courts in its early operations – coinciding with the beginning of major national judicial reforms – jeopardized the latter and highlighted critical tensions between the Security Council's generally pro-ICC stance and the priorities of MONUC and other UN agencies on the ground.

Finally, while the Security Council has recently emphasized the importance of community-based approaches to transitional justice and conflict resolution in the DRC (and advocated direct UN involvement in these processes), it is worth recalling the UN's earlier difficult entanglements at this level, which should inform the present situation. A salient example is the UN's role in a community-level conflict mediation institution in North Kivu known as the Barza Inter-Communaire. The Barza assembled leaders from North Kivu's nine major ethnic groups to help resolve low-level conflicts before they escalated to violence. Between 1998 and early 2004, a period of major instability and armed conflict in many parts of eastern DRC, the Barza generally succeeded in resolving ethnic disputes in North Kivu, particularly those concerning land ownership.⁸⁹ By the end of 2004, however, the

Barza's ability to mitigate ethnic tensions had weakened considerably, and by the end of 2005 the Barza had collapsed altogether.

As a sign of continued faith in the Barza's ability to mitigate ethnic tensions in North Kivu, various external actors, but most prominently MONUC, tried to revive it.⁹⁰ MONUC forged a working relationship with the Barza before the ethnic conflagrations of 2004, sometimes consulting it on conflict resolution issues in certain communities or discussing evidence of atrocities that the Barza gathered during its own investigations.⁹¹ Several months after the collapse of the Barza in 2005, officials from the MONUC's Political Affairs and Human Rights Divisions commenced shuttle diplomacy between Barza leaders, encouraging them to restart an inter-ethnic dialogue and holding general meetings between community leaders that MONUC hoped would encourage Barza leaders to cooperate again.⁹²

These meetings, though, highlighted the problems for community-based initiatives such as the Barza stemming from a perceived overly close relationship with the UN. Some Barza leaders resented the UN's meddling in their affairs. "MONUC's mediation hasn't been particularly effective," said Aloys Majune, the Secretary of the Barza. "We can resolve our own problems. We don't need a big international agency telling us what to do."⁹³ Other leaders noted the danger of the Barza forfeiting its neutrality and, thus, popular legitimacy through its relationship with MONUC, which at the time was widely viewed as having failed to quell the violence in the Kivus and roundly criticized for its close cooperation with the Congolese army during a period of widespread FARDC atrocities against civilians.⁹⁴ Similar issues have bedevilled other community-based responses to mass atrocity in eastern Congo, highlighting the importance of their insulation from international influence for their local legitimacy and efficacy.⁹⁵

A critical realization from the DRC and other contexts, including Rwanda, Uganda and Timor-Leste,⁹⁶ is that community-based mediation and reconciliation, when it is effective, succeeds because it is overseen by leaders whom local actors know intimately and can hold directly

accountable for their responsiveness to local needs. There may be a role for international actors in supporting such measures – through the provision of security or sharing information – but this must not impinge on the independence and authority of local leaders overseeing community-based practices. International actors must be cognizant of the immense power differentials involved when they seek to engage in community-driven practices, the danger of imposing external frameworks that may not necessarily resonate with local communities and the need to participate only on the explicit invitation and terms of local actors.

These issues are likely to impinge on the proposed Truth, Reconciliation and Justice Commission (TJRC) in Kasai-Central province, which may include community-level reconciliation and commemoration ceremonies. The proposal for the TJRC emerged from an expert consultation in 2019, supported by UNJHRO, with citizens in 37 sites in the five territories of Kasai-Central.⁹⁷ While MONUSCO played an important role in the public consultations that led to the TJRC proposal, the Commission's success will hinge on the extent to which it is perceived as locally driven and responsive to the community concerns expressed in the 2019 consultation.



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III

Key Takeaways

The analysis in this study leads to the following three key recommendations for future Security Council engagements with transitional justice in the DRC.

1 CLEARER, PRINCIPLED POSITION ON AMNESTIES

There is an urgent need for the Security Council and UN agencies on the ground in the DRC to clarify their position on the use of amnesties for international crimes, especially given the centrality of amnesties (implicit and explicit) in ongoing UN facilitation of DDR and SSR. This matter is also likely to arise in any future peace negotiations in the country. International criminal law is now a central feature of most peace negotiations around the world, especially those involving UN mediation. As discussed above, the UN increasingly holds that international law prohibits the use of amnesties for suspects

of genocide, war crimes and crimes against humanity and therefore insists on prosecutions within the framework of peace negotiations.⁹⁸ The ICC, meanwhile, has increasingly briefed international mediators about the illegality of amnesties for this category of suspects during peace talks.⁹⁹

While some practitioners and scholars readily accept this anti-amnesty stance, various commentators argue that international criminal law does not so clearly prohibit the use of amnesties for serious crimes.¹⁰⁰ The Rome Statute governing the ICC does not mention amnesties, and other international criminal law statutes and conventions are less prescriptive or say very little about this issue. At the Rome conference in 1998 that led to the ICC Statute, many delegates expressed sympathy for the model of amnesty central to the South African TRC which was underway at the time.¹⁰¹ Philippe Kirsch, the

Chair of the Preparatory Commission in Rome and later the first President of the ICC, stated that the Rome Statute purposely contains a “creative ambiguity”¹⁰² that gives substantial discretion when considering amnesties. This suggests that the international legal basis for the trend against amnesties may be significantly weaker than many advocates, including the Security Council, have proposed. In a highly contested academic arena, various scholars also challenge the widespread assumptions that international trials inherently deter crimes and produce long-term stability and that amnesties (even if highly conditional) foster impunity and ultimately undermine peace and social order.¹⁰³

Furthermore, as MONUC’s and MONUSCO’s role in DDR and SSR has shown, key UN actors see substantial efficacy in the continued use of amnesties as incentives within other important conflict mitigation efforts in the DRC. The Security Council can provide much needed clarity and greater coordination of all UN agencies by articulating more comprehensively the conditions under which amnesties can still be used in UN-facilitated processes in the DRC – acknowledging the successes (and shortcomings) of their use in the past.

2 MORE COHERENT POSITION ON THE ICC, DOMESTIC JUSTICE AND COMPLEMENTARITY

While the Security Council (and broader UN) position on the links among amnesties, DDR and SSR has not always cohered, similar tensions have emerged in the Council’s simultaneous advocacy of the ICC and prosecutions through the Congolese domestic courts. Again, tensions between the Security Council and MONUC/MONUSCO have manifested in this regard. The Council has been highly supportive of the ICC in the DRC context, and the three permanent members that are not signatories to the Rome Statute – China, Russia and the US – have not opposed ICC involvement in the country. At times, however, MONUC/MONUSCO has perceived the ICC as undermining domestic practices in which they have invested heavily. Supporting

domestic efforts often requires using diplomatic and other forms of pressure to convince the ICC to leave particular cases to competent national institutions (even those in the relatively early stages of reform, such as in many parts of eastern DRC) and where possible to support domestic investigations, for example through evidence sharing. The Security Council should recognize that – despite the ICC’s language of “complementarity” – there is often a high degree of competitiveness between international and national prosecutorial bodies, which require cases to legitimize their work.¹⁰⁴

This issue is not unique to the DRC, and tensions have arisen in various contexts where international justice institutions are perceived to have unjustifiably trumped domestic courts.¹⁰⁵ This reality necessitates a stronger stance to safeguard the vital work of domestic courts, whose investigations and prosecutions will continue long after the ICC has departed the DRC. The Security Council and UN agencies operating in Congo can play a vital role in this respect by speaking out when the ICC oversteps and contravenes its own principle of complementarity. The ICC is also widely perceived in some sections of Congolese society as a partisan institution, heavily geared towards the interests of the Government and, therefore, reticent to investigate State crimes.¹⁰⁶ The Security Council and MONUSCO, with their own unavoidable challenges stemming from close relationships with the Congolese Government, must mitigate any risks to UN legitimacy by being seen as too closely linked to the ICC.

3 SEEK WAYS TO ENABLE – BUT NOT DIRECT – COMMUNITY-LEVEL TRANSITIONAL JUSTICE

Finally, the Security Council should adopt a cautious stance when advocating that MONUSCO and other UN agencies engage closely with community-based responses to mass atrocity in eastern DRC. Community-based transitional justice and conflict resolution processes such as the Barza hinge on their deep understanding of contextual factors, responsiveness to localized

needs and local legitimacy (which, in the context of eastern DRC, includes neutrality from the meddling of national and international elites, who are treated with a certain degree of suspicion). Certainly, community-based practices are critical to any lasting peace. Overt UN involvement at this level, however, can jeopardize these processes, necessitating a more careful approach than the UN has sometimes adopted in the past. The initial indications from the Kasai-Central TJRC discussed

above are that the UN has begun to play a constructive, background catalytic role in this provincial transitional justice mechanism, which includes critical community-based dimensions. It is imperative that the independence of the TJRC is maintained and that the UN positions itself as a distanced enabler, rather than as a direct participant, in the provincial and community-level aspects of the process.

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- 63 The first Congolese amnesty law, signed in 2003, stemmed from the peace agreement signed in Sun City in 2002 (Government of the Democratic Republic of Congo, "Amnesty Decree-Law," *Journal Officiel de la République Démocratique du Congo*, 03-001 (2003). Its primary purpose was to weaken the numerous rebel movements challenging the Congolese state – still reorienting after the assassination of Laurent Kabila in January 2001 – through incorporating rebel leaders either into the national executive or the national army. The second amnesty law, signed in 2005, was connected explicitly to the creation of the TRC, as stipulated under the Sun City agreement. The TRC was mandated to investigate political, economic and social crimes committed between Congo's independence in 1960 and the beginning of the transitional period in June 2003. A crucial feature of the TRC was its ability to grant amnesty to perpetrators of 'acts of war, political crimes and crimes of opinion' committed between the start of the rebellion against Mobutu on 20 August 1996 and the establishment of the transitional government on 30 June 2003, in exchange for a full confession of their crimes. (Government of the Democratic Republic of Congo, "Loi n°04 Portant Amnistie Pour Faits de Guerre, Infractions Politiques et d'Opinion," 30 November 2005, Articles 1 and 5.) The third and fourth amnesty laws, passed in May 2009 and February 2014, respectively, resulted from peace negotiations with two main rebel groups, the *Congrès national pour la défense du peuple* (CNDP) in 2009, which by 2014 had evolved into the M23. The 2009 amnesty covers only crimes committed in North and South Kivu between June 2003 and the promulgation of the law (Government of the Democratic Republic of Congo, "Loi No 09/003 du 7 mai 2009 portant Amnistie pour Faits de Guerre et Insurrectionnels Commis dans les Provinces du Nord-Kivu et du Sud-Kivu," 7 May 2009), while the 2014 amnesty covers all 'insurrectional acts, acts of war and political offences' committed within the DRC between 20 December 2005 and 20 December 2013. (Government of the Democratic Republic of Congo, "Loi n° 14/006 du 11 février 2014 portant Amnistie pour Faits Insurrectionnels, Faits de Guerre et Infractions Politiques," 11 February 2014.)
- 64 "DR Congo Militias Lay Down Arms," *BBC*, 27 July 2006, <http://news.bbc.co.uk/1/hi/world/africa/5219076.stm>. For further discussion of the overlaps between the ICC and these Ituri cases, see, Kenneth A. Rodman, "The Peace versus Justice Debate at the ICC: The Case of the Ituri Warlords in the Democratic Republic of the Congo," Workshop Paper, March 2016, http://web.colby.edu/karodman/files/2016/03/ICCWorkshop_DRC.pdf.
- 65 Quoted in Tristan McConnell, "Measures to Keep Peace in Congo Draw Fire," *Christian Science Monitor*, 5 September 2006, <https://www.csmonitor.com/2006/0905/p04s02-woaf.html>. The UN's variable position on amnesties came to a head during the Goma peace talks in January 2008 between the Congolese Government and 22 rebel groups – but centring on the CNDP – cast a spotlight on this issue. The negotiations between the Congolese government and the CNDP were facilitated by the UN, the US and the EU (Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC* (New York: International Center for Transitional Justice, 2009: 18-19). The CNDP pressed hard for a blanket amnesty that would include charges of genocide, war crimes and crimes against humanity, arguing that the 2005 amnesty law was too restrictive in this regard. (Laura Davis, "The Democratic Republic of Congo," *International Justice and the Prevention of Atrocities* ed. Anthony Dworkin, (London: European Council on Foreign Relations, 2013): 4; Government of the Democratic Republic of Congo, "Peace Agreement between the Government and the CNDP," Goma, Democratic Republic of the Congo, 23 March 2009: article 3.) The EU Special Representative for the Great Lakes Region, Roeland van de Geer, however, tabled guidelines designed to avoid amnesties for crimes within the ICC's jurisdiction. (Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*: 11.) The UN found itself in a complicated position, having supported through MONUC the pardon of the Ituri rebel leaders in 2006, while supporting the EU opposition to amnesties for international crimes during the Goma process. Tatiana Carayannis observes that the UN found it an 'embarrassment' that the final Goma agreement involved a peace deal with CNDP deputy leader, Bosco Ntaganda. (Tatiana Carayannis, "The Challenge of Building Sustainable Peace in the DRC," *Centre for Humanitarian Dialogue, Background Paper* (2009): 13.) At the time of the Goma talks, a sealed ICC arrest warrant for Ntaganda was in place; issued on 22 August 2006, it was unsealed soon after the Goma talks on 28 April 2008. (*The Prosecutor v. Bosco Ntaganda* (Judgement), 8 July 2019, International Criminal Court, ICC-PIDS-CIS-DRC-02-016/19_Eng)
- 66 See, Phil Clark, *Distant Justice*: chp. 3.
- 67 Interviews, MONUSCO and UNDP officials, Kisangani and Bunia, 12-15 September 2008.
- 68 Interview, Integrated Former FNI Combatant, Bunia, 24 August 2011.
- 69 Interview, Integrated Former FRPI Combatant, Bunia, 25 August 2011. The case of Cobra Matata elicits similar concerns. He was arrested in Ituri in January 2015 and transferred to Kinshasa to face trial on charges of war crimes and crimes against humanity. The Matata case differs somewhat from Ngudjolo's, though, in that following Matata's integration into the Congolese army in 2006 he defected in 2010 to form a new rebel group in Ituri, the *Front Populaire pour la Justice au Congo* (FPJC), and surrendered to the Congolese authorities in November 2014.
- 70 Interview, Former FDLR Combatant, Mutobo, 19 April 2013.
- 71 Interview, Former FDLR Combatant, Mutobo, 19 April 2013.
- 72 Interview, Former FDLR Combatant, Mutobo, 19 April 2013.

- 73 Government of the Democratic Republic of Congo, "Loi n°04/018 du 30 juillet 2004 Portant Organisation, Attributions et Fonctionnement de la Commission Vérité et Réconciliation," 30 July 2004: article 5.
- 74 Interview, Jean-Luc Kuye, President, Truth and Reconciliation Commission, Kinshasa, 24 January 2006.
- 75 Ibid.
- 76 Ibid.
- 77 See, for example, Abdul Tejan-Cole, "The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission," *Yale Human Rights and Development Journal*, 6, 1 (2014): 139–159.; and Kimberly Lanegran, "Truth Commissions, Human Rights Trials and the Politics of Memory," *Comparative Studies of South Asia, Africa and the Middle East*, 25, 1 (2005): 111–121. The threat of prosecution hampered the Congolese TRC's work but was not the principal reason for the TRC's collapse in 2007 before it could hand down its final report. More fundamental catalysts of the breakdown included the fact that most of Kuye's fellow commissioners were themselves senior figures in rebel groups such as the MLC, RCD and various Mai Mai groups and therefore deterred most everyday Congolese from giving evidence to the commission; the TRC lacked substantial financial and logistical support from the Congolese Government; and the commission ultimately buckled under the weight of its vast mandate (alongside its role in uncovering the truth about past atrocities, handing down amnesties and facilitating peace mediation, it was also expected to deliver victim reparations and hold reconciliation ceremonies between perpetrators and victims). For a fuller discussion of these issues, see Phil Clark, *Distant Justice*: chp. 6.
- 78 Interviews, MONUC/MONUSCO and Congolese Judicial Officials, Bunia, 2008 and 2015.
- 79 Interviews, MONUC Officials, Bunia, 15–16 February 2006.
- 80 Interview, MONUC Official, Bunia, 15 February 2006.
- 81 Ibid.
- 82 *The Prosecutor v. Thomas Lubanga Dyilo* (Trial Proceedings), International Criminal Court, 26 January 2009 (opening), ICC-PIDS-CIS-DRC-01-016/17_Eng. Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 and 13 June 2008: para. 11. Tor Krevier argues, 'MONUC officials had assumed that [their evidence] would merely provide the 'signposts' for the Prosecutor's further investigation, and they were handed over on the expectation of confidentiality. Detailed investigation was not Ocampo's speciality, however, and his case leaned heavily on the MONUC reports.' (Tor Krevier, "Dispensing Global Justice," *New Left Review*, 85 (2014): 87.)
- 83 *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court.
- 84 Interview, Chris Aberi, 11 September 2008.
- 85 Interview, John Penza, Military Prosecutor, Bunia, 10 September 2008.
- 86 See Clark, *Distant Justice*, chapter 5.
- 87 Interviews, Congolese Judicial Officials, Bunia, 2008–2015.
- 88 Interviews, Congolese Judicial Officials, Bunia, 9–13 September 2008. Similar tensions are currently playing out in the Rwandan context around the genocide fugitive Félicien Kabuga. While the Rwandan government has not yet formally announced that it will challenge the UN Residual Mechanism's jurisdiction over the Kabuga case, privately some senior officials in Kigali have raised concerns over the UN's view that it automatically has such jurisdiction (given Rwanda's sustained track record of handling cases transferred from the ICTR). For a fuller discussion of this issue, see Nicola Palmer, "Who Should Try Félicien Kabuga?," *Opinio Juris*, 20 May 2020, <https://opiniojuris.org/2020/05/20/who-should-try-felicien-kabuga/>.
- 89 Evaluating the overall contribution of the Barza, a European Union mission to the DRC in 2001 reported, 'Together with other complementary initiatives in North Kivu, the Barza [has] been able to find peaceful and sustainable solutions to some conflicts and to promote peaceful coexistence. There has been no 'ethnic' violence in the Barza sphere of influence since 1997, despite regular attempts by one or another authority or armed group to spark new clashes. Moreover, partly as a result of the Barza[s] work, there is now a trend among the displaced people to settle in multi-ethnic rather than mono-ethnic villages in North Kivu.' (André Bourque and Peter Sampson, "The European Union's Political and Development Response to the Democratic Republic of Congo," ECDPM *Discussion Paper* 28 (2001):29.
- 90 Interviews, MONUC officials, Goma, 3 February 2006.
- 91 MONUC, *Quelques Eléments de Compréhension de la Crise au Sein du Barza Inter-Communautaire* (Goma: MONUC: 2006) [copy on file with author.]
- 92 Interviews, MONUC officials, Goma, 3 February 2006.
- 93 Interview, Majune, (during joint interview with Safi Adili, Alexis Kalinda and Aloys Majune), Goma, 17 February 2006. [author's translation]
- 94 Interviews, Barza leaders and Congolese citizens, Goma and Bukavu, January–February 2006.
- 95 See, for example, the discussion of the problematic entanglements of the *Réseau Haki na Amani*, a community-based conflict mediation institution in Ituri, with the ICC and other international actors in Phil Clark, *Distant Justice*: chp. 4.
- 96 See, for example, Luc Huyse and Mark Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, International Institute for Democracy and Electoral Assistance (Stockholm: International Institute for Democracy and Electoral Assistance, 2008); Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2010); Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford: Oxford University Press, 2015); Barney Afako, "Reconciliation and Justice: 'Mato Oput' and the Amnesty Act," *Protracted Conflict, Elusive Peace: Initiatives to End the Violence in Northern Uganda*, ed. Okello Lucima (London: Accord, 2002): 64–67; Patrick Burgess, "A New Approach to Restorative Justice: East Timor's Community Reconciliation Processes," *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006); Tanja Hohe, "Justice without Judiciary in East Timor," *Conflict, Security & Development* 3, 3 (2003):335–357.
- 97 "Central Kasai province determined to set up a provincial Truth, Reconciliation and Justice commission," United Nations Peacekeeping, 5 February 2020, <https://peacekeeping.un.org/en/central-kasai-province-determined-to-set-provincial-truth-reconciliation-and-justice-commission>

- 98 United Nations Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*.
- 99 See, for example, Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013): 18.
- 100 See, for example, Max Pensky, "Amnesty on Trial: Impunity, Accountability and the Norms of International Law," *Ethics and Global Politics*, 1, 1–2, (2008): 1–40; Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008); and Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2011); Mark Freeman and Max Pensky, "The Amnesty Controversy in International Law," *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, eds. Francesca Lessa and Leigh A Payne (Cambridge: Cambridge University Press, 2012): 42–65.
- 101 Alexander KA Greenawalt, "Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court," *Virginia Journal of International Law* 50, 1 (2009): 133.
- 102 Quoted in Michael P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court," *Cornell International Law Journal* 32 (1999): 522.
- 103 See, for example, Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, 3 (2003): 5–44.; Leslie Vinjamuri, "Deterrence, Democracy and the Pursuit of International Justice," *Ethics & International Affairs*, 24, 2 (2010): 91–211; Kate Cronin-Furman, "Managing Expectations: International Criminal Trials and the Prospects of Deterrence of Mass Atrocity," *International Journal of Transitional Justice* 7 (2013): 434–454. For differing perspectives, see, Tricia D. Olsen; Leigh A. Payne; Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington DC: United States Institute of Peace, 2010); Kathryn Sikkink, "The Age of Accountability: The Rise of Individual Criminal Accountability," *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, eds. Francesca Lessa and Leigh A Payne (Cambridge: Cambridge University Press, 2012).
- 104 See, for example, Nicola Palmer, *Courts in Conflict*.
- 105 See, for example, Ibid.; Pascale Kalume Kambale, "A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo," *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, eds. Christian De Vos, Sara Kendall and Carsten Stahn (Cambridge: Cambridge University Press, 2015): 171–96; Phil Clark, *Distant Justice*, chps. 4 and 8.
- 106 Ibid.: 97–98.



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The UN Security Council and Transitional Justice: Rwanda

**HOW INTERNATIONAL AND DOMESTIC DYNAMICS
SHAPED THE PROSECUTION OF GENOCIDE AND
THE PURSUIT OF RECONCILIATION**

by Dr Nicola Palmer
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Introduction

An extensive set of international, national and localized transitional justice processes have been established in Rwanda since the civil war and the 1994 genocide against the Tutsi.¹ This case study assesses the impact of the UN Security Council on these justice initiatives. It highlights the role of the Council in embedding legal responses to international crimes at both the international and national level. However, it also shows how the Council's dominant focus on "accountability for serious international crimes, and the re-establishment of the rule of law"² neglected attending to how multiple transitional justice initiatives interacted with one another. Understanding the impact of the Security Council's actions in Rwanda requires a recognition first of the Council's early role in balancing diplomatic support for a negotiated peace settlement with the normative commitments to prosecuting international crimes; and second the importance of the relationship between the Council and the Rwandan State.³ Overall, the study shows the central importance of taking account of how the actions of the Council and State-led responses to atrocity can be underpinned by different motivations, incentives and goals, fundamentally shaping the impact of the Council on the ground.

Transitional justice in Rwanda can be characterized by four phases and this study will examine each phase, assessing the impact of the Security Council on these activities.

Phase I was internationally oriented. It saw an early focus by the Security Council on supporting the Arusha Peace Agreement (APA) followed by a strong shift, in the wake of the extreme violence from 6 April 1994, towards international criminal accountability with the establishment of the UN's International Criminal Tribunal for Rwanda (ICTR). The Council's public acknowledgment of potential violations of international humanitarian law during the genocide paved the way for its

investment in accountability mechanisms set up after the violence. But on the ground, the peacekeeping mission was simultaneously left with a mandate and staffing that rendered it unable to meaningfully mitigate the staggering loss of civilian lives. This highlights how perceptions of the Council's role in transitional justice initiatives will be informed by the prior or ongoing practice of peacekeeping operations in the country concerned.

Phase II saw the Rwandan Government respond to domestic security concerns through mass incarceration of genocide suspects coupled with a limited set of domestic criminal trials. The early drivers behind these actions are found in the large-scale participation of Rwandan citizens in the genocide, the Rwandan Government's criticisms of the capacity and structure of the ICTR, and the huge population movements into refugee camps during and after the violence. As detailed below, these challenges were identified by the Security Council, but the Rwandan State led on the response, with notably different motivations underpinning their actions from those articulated at the international level.

Phase III was characterized by the national introduction of locally adjudicated accountability mechanisms through the *gacaca* courts, in operation from 2005 until 2012. These courts were designed, at least in part, to deal with the severe prison overcrowding, an issue identified by the Security Council. Although the Security Council does not directly engage with *gacaca*'s handling of these 'lower level' cases, the *gacaca* courts have interacted with the ICTR in complex ways, which shows the importance of taking account of the overlaps and differing goals and interpretations of concurrent transitional justice processes. In addition, adopting a wider lens on transitional justice shows that these penal practices of the ICTR, the national courts'



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Special Chambers and the *gacaca* courts, have been coupled with strong local civil society work aimed at improving inter-community relations. However, these actions have operated in a very different register and entirely separate to the work of the Security Council.

Phase IV, the justice-seeking phase, has seen the referral of cases of ICTR indictees and fugitives to national jurisdictions, including Rwanda and the establishment of the International Residual Mechanism for Criminal Tribunals (IRMCT). This mechanism is part of the completion strategy of the ICTR. This has prompted the Security Council to return its attention to domestic infrastructural support, with a clear focus on judicial institutions. In addition, the Rwandan Government's efforts to have cases referred from the ICTR to its domestic jurisdiction must be understood in light of its much wider efforts to extradite, deport or enable foreign prosecutions of genocide suspects in countries around the world.

The four phases of transitional justice in Rwanda highlight the central importance of taking seriously the agency and objectives of the affected State when examining how transitional justice initiatives are implemented on the ground. Each phase will now be discussed in turn, highlighting the impact of the Council on the ground and the potential role for the Council in engaging with transitional justice in the future. This paper is based on a review of all of the Security Council resolutions and presidential statements on Rwanda since the start of 1994, identifying how and in what way justice-related questions were addressed. This assessment is coupled with extensive desk-based research and insights from prior empirical work undertaken by the first author, based on interviews with 182 participants who have been involved in the enactment of transitional justice processes in Rwanda, including judges, lawyers and government officials alongside witnesses, victims and suspects subject to the authority of the ICTR, the Rwandan national courts and the localized *gacaca* courts.



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Early Impact of the Security Council in Responding to the Rwandan Genocide

In the build-up to the genocide in Rwanda in 1994, the initial focus of the Security Council, as evidenced through its resolutions, was on the implementation of the Arusha Peace Agreement (APA). Central to this agreement was that parties to the Rwandan Civil War, which had begun in 1990,⁴ were urged to establish a broad-based transitional government. The Council coupled this support for the APA with the establishment of the United Nations Assistance Mission for Rwanda (UNAMIR), initially mandated, *inter alia*, to contribute to

the security of Kigali, monitor the ceasefire and repatriation of refugees, assist in coordinating humanitarian assistance, and investigate and report on incidents regarding the activities of the *gendarmerie* and police.⁵

While the Security Council's presidential statements flagged concern about the delays to setting up the transitional power-sharing government and the deteriorating humanitarian situation as early as February 1994,⁶ the Security Council's focus in its resolutions was



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on UNAMIR's "valuable contribution to peace."⁷ Through UNAMIR, the first tool identified as necessary for establishing peace through the APA was the deployment of a battalion in the demilitarized zone, which would indicate, in the words of Resolution 900, that "the international community has thus done its part in ensuring that conditions exist for implementing the [Arusha Peace Agreement]."⁸ Chillingly, this resolution was passed on 5 April 1994, one day before the downing of President Juvénal Habyarimana's plane and the start of the Rwandan genocide.

On 7 April 1994, the Belgian and Ghanaian peacekeepers responsible for the security of the Prime Minister Agathe Uwilingiyimana were taken to Camp Kigali in the capital's centre and the Belgian soldiers were executed. The killing of these ten peacekeepers prompted the withdrawal of the Belgian contingent from UNAMIR on 18 and 19 April 1994. Two days later, the Security Council passed Resolution 912 reducing the number of UNAMIR troops from approximately 2000 to 270.⁹ UNAMIR's mandate was adjusted stating that it would act as an "intermediary in the

political negotiations, with the aim of bringing the two sides back to the Arusha Peace Process" and would "assist in the resumption of humanitarian relief operations to the extent feasible."¹⁰ The mission was left with a single infantry company that was mandated to "provide security [to the UNAMIR Force Commander], as well as a number of military observers to monitor the situation".¹¹ This reduction in troops and limited mandate left UNAMIR unable to respond to the rapid escalation in violence that predominately targeted Tutsi civilians and those Hutu and Twa opposed to the genocidal order.¹²

By May 1994, the genocidal violence had spread across the country with some of the largest massacres of unarmed Tutsi civilians occurring at the Nyarubuye Catholic Church in the east of the country, Murambi Technical School in the south, and Nyamata, just outside of Kigali.¹³ The pressure on the Security Council to expand the use of force mandate of UNAMIR is evident in the Security Council resolutions, but also largely resisted.¹⁴ When faced with the explicit decision to reinforce UNAMIR or significantly limit its role, the Security



Council chose the latter. On the ground, this had devastating consequences as the capacity of UNAMIR to implement its limited humanitarian mandate was negligible. These domestic impacts are well documented.¹⁵ UNAMIR did not play an effective role in preventing the staggering loss of human life. This engendered a strong sense of abandonment among genocide survivors¹⁶ and the Rwandan Patriotic Army (RPA), now the ruling party in Rwanda, and the Rwandan Patriotic Front (RPF).¹⁷ On 17 May 1994, Resolution 918 extended UNAMIR's mandate to "contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas,"¹⁸ increasing troops to 5,500 personnel. This resolution also offers the first mention that "the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law" without making explicit use of the term genocide.¹⁹ The Security Council's public acknowledgment of potential violations of international humanitarian law during the conflict paved the way for accountability mechanisms to be set up after the violence.

However, it is important to recognize that the language expressing the possible occurrence of serious violations of international humanitarian law emerged in the wake of the initial withdrawal of UNAMIR troops. Learning from the Rwandan case, it is crucial that this express recognition of international crimes does not, in and of itself, discharge the Council's wider Chapter IV

mandate to take measures to 'maintain or restore international peace and security' including the protection of civilians - as the actions of peacekeepers during the violence informs perceptions on international support for justice processes after the violence.

While the language of the Council shifted to accountability when the genocide was ongoing, the first steps in gathering information to underpin any transitional justice mechanisms only began in July 1994, once the RPF had gained control of much of the territory of Rwanda. The Security Council led on this accountability push through the establishment of "an impartial Commission of Experts" with the mandate to present "conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide."²⁰ Their work was supported by the appointment of a Special Rapporteur for Rwanda whose mandate was established by the UN Commission on Human Rights. The Commission of Experts followed on from an equivalent commission set up in response to violations of international humanitarian law in the former Yugoslavia. The importance of these fact-finding missions must be acknowledged as they are now well-established tools through which the Security Council can influence early responses to large-scale atrocity. In the case of Rwanda, the Commission's report was instrumental in supporting the establishment of the ICTR²¹ and was later relied on in the judgments of the *ad hoc* Tribunal.²²



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In this internationalized phase of transitional justice, which was strongly focused on criminal accountability, the interplay between actions taken by the Security Council and the Rwandan Government is key in understanding the Council's impact on the ground. On 28 September 1994, in a letter to the President of the Security Council, the Permanent Representative of Rwanda to the UN identified an international criminal tribunal as one of the means to respond to the security concern raised by the remaining ex-government fighters and *génocidaires* on the borders of the Rwandan territory.²³ Three days later, in a letter dated 1 October 1994, the Secretary-General informed the Security Council that the Commission of Experts had recommended that the mandate of the International Criminal Tribunal for the former Yugoslavia should be expanded to include the situation in Rwanda. This chronology shows how there was initially strong Rwandan Government support for the establishment of the ICTR. However, by 8 November 1994, when the Security Council finally adopted Resolution 955 establishing the ICTR, it was with one dissenting vote, that of Rwanda, an elected member of the Council at the time.

Rwanda articulated a number of concerns regarding the agreed structure of the ICTR. These included first, that the Tribunal was granted jurisdiction from 1 January 1994 through to 31 December 1994, while Rwanda felt it should extend back to 1990 to include crimes committed by the previous regime during the civil war period. This was viewed by the new Rwandan Government as key to proving the

planning and preparation of the genocide. Second, that the number of judicial personnel designated to staff the Tribunal was seen by the Rwandan Government as insufficient to deal with the number of suspects, whose arrests by RPF soldiers were continuing at the time and seen as key in securing control of the territory. Third, that the seat of the Tribunal had not been specified and that it should have been made clear that it would sit in Rwanda. Fourth, that there were concerns that the Tribunal would not give sufficient focus to the crimes of genocide, perhaps masking a concern among the RPF leadership of liability for their own conduct during and after the genocide. Finally, there was a concern that the Tribunal prohibited the use of capital punishment, which was still in force in Rwanda.²⁴ This early disagreement between the UN and the Rwandan Government on the structure and reach of the ICTR helps to explain Phase II of the transitional justice initiatives in Rwanda, as it was the catalyst for the enactment of legislation allowing for the domestic prosecution of international crimes. It also set the terms for the Rwandan Government's engagement with the ICTR going forward, where the Government largely cooperated but maintained a critical stance on the ICTR and withdrew cooperation in order to apply pressure on politically sensitive issues.²⁵

It is interesting to note that, following Resolution 955 establishing the ICTR and throughout 1995, the Security Council maintained a commitment to establishing genuine reconciliation "within the frame of reference of the APA."²⁶ As noted above, this peace agreement aimed to establish

a power-sharing transitional government, to integrate the armed forces and repatriate Rwandan refugees. It was about a political transfer of power, not about the establishment of any accountability mechanisms.²⁷ In June 1995, UNAMIR's mandate was adjusted with a stated goal of helping to achieve national reconciliation.²⁸ Reconciliation became the bridging term. It is the continued articulation of the goal of reconciliation that is used to justify the UN's shift away from supporting the Peace Agreement, which is not mentioned again after August 1995, and towards the dominant support for the ICTR. The move towards international criminal accountability began during the genocide, following the reduction in the size and mandate of the peacekeeping mission and was then consolidated following the violence. The importance of justifying the reorientation away from the APA and towards international criminal accountability helps to explain the explicit inclusion of reconciliation within the mandate of the ICTR. However, it also leads to a decoupling of international criminal accountability from a notion of democratic political transition.

In its founding resolution, the ICTR was mandated to respond to a threat to international peace and security by putting an end to the crimes and taking effective measures to bring to justice the persons who were responsible for them, alongside contributing to the process of national reconciliation and to the restoration and maintenance of peace.²⁹ The potential for the ICTR to contribute to national reconciliation offers a key point of continuity in terms of the stated aims of the Security Council as, in practice, it shifts from primarily supporting the implementation of a peace agreement to getting strongly behind the use of criminal trials. The role of criminal trials in contributing to reconciliation is made explicit by 2000, with the Council stating it was:

"convinced...that in the particular circumstances of Rwanda the prosecution of persons responsible for genocide and other serious violations of international humanitarian law contributes to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region"³⁰

The Council's shift in emphasis from a peace process based on a power-sharing government to international criminal justice initially occurred after the peacekeeping operations were being largely withdrawn. This move continued in the wake of the violence and was then justified in terms of the contribution of these legal processes to reconciliation. Some of the personnel working inside the ICTR made sense of these developments in similar terms. In the rather unguarded words of one of the judges:

"You must remember that the Tribunal is not just about Rwanda, it is about the world. It was set up by the United Nations to apologize because they had not acted when Dallaire had called them to act."³¹

It also emerged in interviews with other ICTR personnel who were wrestling with the capacity of the international court to contribute to reconciliation. As one participant in the Office of the Prosecutor said: "If reconciliation is a criterion by which to measure the work of the Tribunal, it has failed dismally."³² Meanwhile, a Senior Defence Counsel interviewee said:

"The contribution [of the ICTR] has been mixed...I do not believe that these trials have had an impact on reconciliation in Rwanda. If they wanted to contribute to this, there needed to also be trials for RPF crimes".³³

In pursuit of its mandate, the ICTR has concluded legal proceedings against 80 individuals with 61 successful prosecutions and 14 acquittals, at the time of writing. This has been a major endeavour in international criminal accountability. For individuals who participated in the ICTR, the Tribunal's contribution to the development of international criminal case law, particularly with regard to the crime of genocide, is recognized as its major contribution³⁴ and this is similarly reflected in the emerging assessment of the ICTR offered by the Security Council and evidenced in its resolutions.³⁵

The impact of the ICTR cases in Rwanda is more difficult to discern. In order to connect these legal proceedings with the affected

population, the ICTR engaged in an outreach programme. However, inside Rwanda this was largely interpreted as a top-down information dissemination process rather than a meaningful route through which to engage with the trials.³⁶ That said, Rwandans are generally well aware of the work of the ICTR and have strong views on

it, often shaped by their own direct engagement with the domestic transitional justice processes discussed below. In addition, as discussed in Phase IV, as part of its completion strategy the ICTR returned its focus to domestic judicial processes and this has impacted domestic activities in this sphere.



II

The Role of the Security Council in Concurrent International and Domestic Criminal Trials

In response to the concerns about the ICTR, coupled with the clear decision to use mass incarceration as a means of establishing territorial control, the Rwandan Legislature passed the 1996 Organic Law, establishing a Special Chamber of the Supreme Court to try both genocide and crimes against humanity, with a temporal jurisdiction from October 1990 until December 1994. This followed the explicit rejection of the use of a truth commission by the Rwandan Government although some Rwandan scholars, involved in these early domestic

processes, have continued to argue for the need for an independent truth-seeking mechanism that is outside of the criminal justice system.³⁷

When the Special Chamber began its operations, it was severely understaffed and was faced with the overwhelming task of trying over 100,000 suspects. Partly as a result of these challenges, the initial trial proceedings were severely criticized by international observers. The criticisms focused on three principal issues: judicial personnel, particularly the limited

number of defence counsel; Rwanda's continued use of capital punishment; and the restricted appeal procedure that only went forward through written submission.³⁸

This second transitional justice phase opens up a question of the role of the Security Council in supporting the development of domestic judicial infrastructure. In establishing the ICTR, the Council "stressed the need for international cooperation to strengthen the Courts and Judicial System of Rwanda, having regard in particular to the necessity for those Courts to deal with large numbers of suspects."³⁹ Later that same year, the Council called "upon States and donor agencies to fulfil their earlier commitments to give assistance for Rwanda's rehabilitation efforts, to increase such assistance, and in particular to support the early and effective functioning of the International Tribunal and the rehabilitation of the Rwandan justice system."⁴⁰ Here, the dual resource demand is evident between international and national legal infrastructure. The final resource allocation was strongly skewed towards the activities of the ICTR. In part, this is because the ICTR was a component of the wider building of supranational institutions to try international crimes, laying the groundwork for the establishment of the International Criminal Court (ICC) in 1998, something acknowledged by the judges and lawyers working inside the institution itself.⁴¹

This contrasts starkly with the views of the judges and lawyers who were interviewed inside the Rwandan national courts. These legal practitioners placed a much heavier weight on what they saw as the role of international actors in supporting the enhancement of domestic legal training and capacity. They then judged the activities of the ICTR in light of this view.⁴² This highlights the dynamic interplay between the objectives articulated at the level of the Security Council and how these actions are interpreted by national actors and shaped by State interests. As discussed below, the Security Council would later sharpen its focus on domestic legal capacity in the final phase of these transitional justice processes as part of the conclusion of the work of the ICTR.

The form of Rwanda's domestic transitional justice initiatives must be understood in the context of the refugee crisis that immediately followed the genocide, which was a central issue identified by the Security Council in its resolutions.⁴³ The Rwandan Government acted in response to this issue and to what it saw as the stalling of the UN-led voluntary repatriation processes. This action prioritized arrests and forced repatriation of refugees and internally displaced persons (IDP) to achieve national security objectives, over respect for human rights standards. As the refugee crisis escalated, with over one million refugees in the border town of Goma in the eastern Democratic Republic of Congo (DRC), the Security Council presidential statements threatened those destabilizing refugee camps with the implementation of international justice, stating that those committing acts of violence were merely steeling the international community's resolve to punish them.⁴⁴

Closure of the refugee and IDP camps began on 22 April 1995, with the forced repatriation of over 150,000 IDPs in Kibeho camp, the largest IDP camp on Rwandan soil, located in the south-western part of the country. Unwilling to accept the potential for the consolidation of fighting forces in the camps, the newly constituted Rwandan Defence Forces (RDF) acted quickly and brutally. It was estimated that over 4,000 people were killed during the actual closing of the Kibeho camp. The official figure, accepted by the then precarious Government of National Unity, was 338 lives lost. The deaths were largely attributed to "criminal elements" operating in the camp.⁴⁵ This large-scale forced repatriation was coupled with continued widespread arrests of genocide suspects as a major domestic security response. It was only after the closure of Kibeho that UNAMIR's mandate was adjusted to include facilitating voluntary refugee repatriation, while at the same time reducing its military component. However, this voluntary repatriation programme⁴⁶ floundered amid rumours of revenge killings and arbitrary arrests in Rwanda. Despite the continued efforts from UNAMIR, the refugee camps in the DRC were similarly closed through military action, led by the Rwandan Government in 1996 and 1998 during the First and

the Second Congo Wars. The Security Council's response in relation to Rwanda's involvement in the DRC was muted, with a focus on efforts to reduce the flow of arms into the DRC.⁴⁷

Despite rising international criticisms of Rwanda's response to the refugee crisis, its involvement in the DRC, and its domestic trials, on 24 April 1998, 22 people convicted of genocide before the national courts were executed in five different locations in Rwanda. This occurred five months before the ICTR handed down its first conviction of genocide and crimes against humanity, sentencing Jean-Paul Akayesu to life imprisonment.⁴⁸ These executions would be the only death sentences for the offence of genocide carried out in the country. Just two weeks later, amid both international and domestic outrage and concerns regarding the pressures on the prisons, courts, and a traumatized citizenry, then-President Pasteur Bizimungu opened discussions on alternative justice mechanisms.⁴⁹ These talks ultimately led to the establishment of the new *gacaca* courts. The timing of these events is notable: just as the establishment of the domestic courts was, in part, a reaction to the criticisms

that the Rwandan Government raised against the ICTR, so *gacaca* was, in part, a response to the international criticisms and domestic challenges raised by the national courts' prosecutions. The establishment of one transitional justice process often informs the development of others, however these processes will not automatically complement one another.

What is notable in this second phase of domestic transitional justice is that the challenges of prison conditions and the repatriation of refugees in Rwanda were consistently recognized by the Security Council resolutions. However, the activities implemented on the ground were driven by the objectives and methods of the Rwandan Government, even when the scope of these activities fell with the UNAMIR mandate. This phase of transitional justice in Rwanda brings to the fore the centrality of understanding the dynamic relationship between the Security Council, its constituent members, peacekeeping missions and crucially the State in which the transitional justice processes are being implemented, in order to determine the Security Council's impact on the ground.



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III

Connecting the Security Council with Localized Transitional Justice

The major domestic transitional justice mechanism implemented in Rwanda is not reflected in any of the resolutions or presidential statements of the Security Council. However, it has interacted with the ICTR in complex ways. *Gacaca* was a State-implemented but locally-administered transitional justice process that drew its name and some of its procedural aspects from a traditional Rwandan process of dispute resolution.⁵⁰ Established by law in 2001, from 2005 to 2012 over 12,000 courts operated across Rwanda, trying individuals suspected of involvement in the genocide, coordinated by the National Service for *Gacaca* Jurisdictions (NSGJ), a centralized government

body. Procedurally, the courts functioned very differently from the national courts and the ICTR. Lawyers did not play any formal role in the hearings and the trials were presided over by popularly elected lay-members of the local community, the *inyangamugayo*.⁵¹ The courts drew on the categorization of suspects initially used by the plea bargaining structure adopted before the national courts. This was based on categorizing the accused in four groups, according to the severity of their offence. Category 1 was reserved for people suspected of being in positions of responsibility and engaging in the organization of the genocide at the national, prefecture, sector or cell level.⁵² Category 2 consisted of those accused



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of being perpetrators and accomplices of murder. Category 3 applied to persons accused of serious assaults against the person, and Category 4 related to those accused solely of committing property offences.⁵³ This categorization formed the backbone of a confession and guilty plea procedure. From 2005, the *gacaca* courts had jurisdiction over suspects in Categories 2, 3 and 4. By 2008, some of the Category 1 cases were also transferred to the localized courts. The number of individuals tried by *gacaca* is quite staggering, with over 600,000 people tried in Categories 1 and 2 and significantly more tried for property offences, leading to a total of over one million individuals tried at the local level.

There is now a very well-established literature on *gacaca* that details the role of these courts in accounting for violence during the genocide, highlighting what *gacaca* endeavoured to achieve,⁵⁴ particularly its contribution to identifying the victims of the violence as well as its impact on interpersonal and State-citizen relations. In line with much of the criticism on transitional justice in Rwanda, the central concern regarding *gacaca* has been the ways in which

the process has strengthened the power of the Rwandan Patriotic Front (RPF) and, with that, its capacity to limit investigations into human rights violations and international crimes committed by its own forces in the build up to, during and after the genocide.⁵⁵ For the purposes of this account, it is important to note that, although the ICTR judges and lawyers were generally inclined to distance their work from *gacaca*, the ICTR's decisions have referred extensively to the local courts. Since the nationwide implementation of *gacaca* in 2005, the ICTR judged 49 individuals for their alleged involvement in the genocide. 47 of these 49 cases referred to the findings of the *gacaca* courts. An analysis of these judgments shows that the ICTR's use of these documents has often been partial and misdirected. However, where the ICTR Chambers were able to have a more grounded and informed view on the local courts, they have been better able to make use of its evidence.⁵⁶

The concurrent operation of the ICTR, the Rwandan national courts and the localized *gacaca* courts shows that compatibility between concurrent transitional justice processes cannot

be assumed but that it is valuable to think through and plan at the outset how multiple institutions could potentially support one another. This could include any initial fact-finding commissions, alongside international criminal processes and any wider domestic transitional justice initiatives.

The Security Council's focus on international and, to a lesser extent, national justice processes belies the significance of both the *gacaca* courts and of civil society involvement in peace and justice initiatives. Looking across local civil society initiatives in Rwanda, there is a dominant focus on intercommunity relations. Influential local NGOs have focused on how to enable dialogues at the community level and how to research them. This is seen in the work of the Institute of Research and Dialogue for Peace (IRDP), which led on early initiatives in this area; Radio La Benevolencija, which produced a hugely popular radio soap opera based on the *gacaca* courts; and the Community-based Socio-therapy Rwanda set up following the conclusion of *gacaca* to look at ongoing tensions particularly within family units.⁵⁷ In addition, genocide survivor-led organizations have played an important role, including the work of the Aegis Trust, which runs the Kigali Genocide Memorial on behalf of the Government's National Commission for the Fight Against Genocide (CNLG) and has led on the roll-out of peace education across Rwanda; Ibuka, an umbrella organization of survivors, associations and concerned individuals, which has consistently advocated for survivor interests;

and most recently, the Ishami Foundation, which is focused on the role of survivors in education and peacebuilding. In addition, there has been an increase in policy think tank work, seen in the work of the Institute of Policy Analysis and Research (IPAR) and Never Again Rwanda, whose work tracks the wider trend in Rwanda towards a greater focus on economic development. Among international NGOs, the focus has been much more starkly on prison conditions and human rights concerns. Up until 2008, Penal Reform International (PRI) played an active role in monitoring prison conditions and the post-genocide trials. In addition, Human Rights Watch and Amnesty International have continued to monitor and prominently report on human rights-related concerns in Rwanda.

Suffice to say that the building of realistic and effective connections between decisions at the level of the Security Council and these civil society-led peace processes is ambitious and challenging and it might require further thinking about what fits within the mandate of contributing to "international peace". The Rwandan case shows that the prosecution of international crimes, which has been articulated as fitting within the mandate of contributing to "international peace and security" will be affected by actions that are taken at the local level; and knowledge and awareness of the full spectrum of justice initiatives will deepen the capacity of the Security Council to impact transitional justice on the ground.



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IV

The Role of the Security Council in Fostering Domestic Capacity and Transnational Accountability

The fourth phase of transitional justice in Rwanda returns to the ICTR and the role of the Security Council in prompting domestic legal change. From 2003, the Security Council endeavoured to conclude the work of the Tribunal, urging the move to a completion strategy that would involve the transfer of lower-ranking perpetrators “to competent national jurisdictions, as appropriate, including Rwanda”.⁵⁸

The introduction of this completion strategy, initially aimed at the conclusion of all trials by 2010, saw the Security Council return to an

articulation that “the strengthening of national judicial systems is crucially important to the rule of law in general.”⁵⁹ At this prompting by the Council, Rule 11*bis* of the ICTR’s Rules of Evidence and Procedure was amended to facilitate the referral of cases to national jurisdictions. This rule established that cases could be referred if countries had a legal framework that criminalized the alleged conduct, appropriate punishment for the offence, adequate conditions of detention, met fair trial guarantees, and the death penalty was not being imposed or carried out.

The push by the Security Council towards concluding the work of the ICTR undoubtedly impacted domestic practice. Rwanda undertook extensive domestic changes including drafting and amending bespoke legislation,⁶⁰ removing the death penalty and investing in prison infrastructure. The first four applications for the referral of cases to Rwanda were denied based on fair trial concerns,⁶¹ resulting in further legislative change on domestic witness protection measures, leading to the transfer of three accused along with the referral of five fugitive dossiers to Rwanda.⁶²

The Council's stated goal was to "reaffirm its determination to combat impunity for all those responsible for serious international crimes," while acknowledging "the substantial contribution of the ICTR to the process of national reconciliation and the restoration of peace and security, and to the fight against impunity and the development of international criminal justice, especially in relation to the crime of genocide."⁶³ The referral of cases was the tool it used to impact domestic practice in support of this aim. These cases have then been monitored under the auspices of the International Residual Mechanism for Criminal Tribunals (IRMCT), which on three occasions has refused motions to revoke the Rwandan referrals.⁶⁴

Inside Rwanda, the push to receive these cases has fit into a much wider judicial and political agenda. As the then-Prosecutor General Martin Ngoga stated during the oral hearings of the first ICTR Rule 11*bis* application:

"Rwanda is working very hard to secure cooperation of national jurisdictions in which we find fugitives of genocide. And the decision of this Chamber will either complement those efforts or cripple them. And this forms the very basis of the legacy of this Court".⁶⁵

For Rwanda, the ICTR referral cases were part of the wider activities of the Rwandan Genocide Fugitives Tracking Unit (GFTU), a specialist unit of the National Public Prosecution Authority (NPPA). The establishment of the GFTU was preceded

by an initial partnership formed in 2004 among Interpol, the ICTR and the NPPA. This led to the issuing of 300 Interpol Red Notices against Rwandan nationals,⁶⁶ including the then nine remaining ICTR fugitives.⁶⁷ While these Interpol warrants have been a centrepiece of the work of the GFTU, the number of indictments issued by the Rwandan Government goes well beyond this, with the official GFTU report from April 2018 stating that 911 indictments have been issued.⁶⁸ In response, at the time of writing, 31 individuals have had their extradition to Rwanda denied, 36 have faced domestic criminal trials outside of Rwanda and 29 people have had their refugee protection, residency permits or citizenship revoked or have been prosecuted for immigration offences on the basis of an allegation of their involvement in an international crime.⁶⁹

There are multiple drivers for this final phase of criminal accountability for the genocide. There is no doubt that one of them is the need to keep the experience of the Rwandan genocide alive in the international sphere while signaling the importance of trying those accused of involvement in violence that was undertaken with intent to destroy, in whole or in part, the Tutsi ethnic group. However, as with most transitional justice initiatives, they can serve multiple purposes - mandates can diverge and can also be interpreted by the people implementing them and by the citizens who participate in them. These transnational proceedings are a mechanism of ensuring that the Rwandan Government maintains influence and reach into its diaspora communities, given the number of indictments and the distribution of these individuals around the world. This highlights a theme evident throughout this study: that following the failures of the UN to act during the genocide, the Rwandan Government has been quite successful at leveraging its own interests at the international level⁷⁰ in pursuing criminal accountability for the genocide in particular, while resisting extensive investigation and trial proceedings against RPF actors. This is not to say that the positions of the permanent members of the Security Council, particularly those of the US and the UK, both of whom have strengthened ties with Rwanda since 1994, have not been diplomatically important,

but rather to acknowledge the significant role and agency of the Rwandan Government in these processes.

The effective lobbying for Rwandan Government interests is similarly seen with two further transitional justice agenda items being acknowledged in the Security Council resolutions. The first concerns the location and access to the ICTR archives. These archives are currently within the IRMCT and the Security Council has advised that the Mechanism and Rwanda must work together on issues of both reconciliation and access to the archives. Similarly, in 2018,

the Security Council notes concerns, largely held by the Rwandan Government over the early release of individuals convicted by the ICTR.⁷¹ From the establishment of the ICTR, to the muted responses to Rwandan military involvement in the DRC, to this more rhetorical support for areas of ongoing transitional justice concern, the Rwandan Government has influenced the Security Council's direction of travel and its impact on the ground. At the same time, actions by the Council drove early fact-finding activities and embedded international and, to a lesser extent, national criminal justice processes in response to the genocide.



V

Key Takeaways

Based on the above analysis, the following section offers some broader conclusions and recommendations for the Security Council, UN Secretariat, and peace operation leadership.

1 BUILD COMPLEMENTARY TRANSITIONAL JUSTICE PROCESSES

Do not assume compatibility. National and local goals might differ from those articulated at the international level. Complementary processes require ongoing communication between transitional justice initiatives that recognizes that mandates shift over time and are influenced by those implementing them. The Rwandan case shows this dynamic relationship with regard to local, national and international proceedings that result in criminal punishment. However, such compatibility will also be important if other legally-oriented transitional justice mechanisms

are involved, such as truth commissions or reparations proceedings. This compatibility needs to be evident in the mandates of these transitional justice processes. It could also usefully be enabled through identifying where there may be evidentiary overlap and, crucially, through designing deliberative channels through which personnel involved in the implementation of a transitional justice intervention can communicate with one another and with affected populations. This will help to identify where domestic initiatives should lead and shape internationalized interventions.

2 THE SECURITY COUNCIL CAN PLAY A ROLE IN EMBEDDING LEGAL RESPONSES TO INTERNATIONAL CRIMES

At both the international and national level, the Council can help to embed legal responses. However, in-country government support will

influence the form and orientation of these initiatives. The more the Security Council directly engages with the affected State and understands these objectives, the better placed it is to find common ground on which to develop embedded transitional justice processes.

3 PRIORITIZE JUSTICE AND FACT-FINDING INITIATIVES EARLY IN THE PEACE PROCESS

Be careful that a shift towards focusing on accountability for serious violations of international humanitarian law does not inhibit or justify the reduction in the peacekeeping actions necessary to prevent ongoing atrocities.

4 STATE BUY-IN TO A TRANSITIONAL JUSTICE PROCESS IS CRUCIAL FOR ITS OPERATION

Even in post-conflict States that may be considered 'weak', State interest will influence the form, mandate and operation of these justice

initiatives. The interplay between actions taken by the Security Council and the relevant government is key in understanding the Council's impact on the ground and a dialogical approach aimed at understanding the domestic objectives would increase the chances of achieving this buy-in.

5 FACT FINDING MISSIONS

Offer a tool through which the Security Council can influence early responses to large scale atrocity. This fact-finding should not replace peacekeeping operations but could usefully run in tandem with them and could feed into a wide spectrum of possible accountability mechanisms, including truth-telling processes, reparations mechanisms, vetting procedures and criminal trials.

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The UN Security Council and Transitional Justice: South Sudan

**AN EARLY ASSESSMENT OF UNMISS'
SUPPORT TO THE PEACE PROCESS**

by Dr Adam Day

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Introduction

The UN Mission in South Sudan (UNMISS) was not originally designed to address issues of transitional justice. Established in 2011 following the secession of South Sudan from Sudan, UNMISS was initially mandated to support State-building and economic development.¹ However, in late 2013, a brutal non-international armed conflict broke out across the country, dividing the population along ethnic grounds, displacing millions of civilians and leading to nearly 400,000 conflict-related deaths over a four-year period.² In early 2013, an UNMISS human rights report found that both parties to the conflict had perpetrated serious human rights violations, including ethnically-targeted killings, forcible displacements, large-scale rapes and other acts amounting to war crimes and crimes against humanity.³ In the context of the continuing armed conflict, the Security Council dramatically shifted UNMISS' mandate in May 2014, curtailing its State-building focus and demanding that it focus on protection of civilians, facilitating humanitarian delivery, human rights and support to an eventual peace process.⁴ Within this new mandate, the Council stressed "the urgent and imperative need to end impunity in South Sudan and to bring to justice perpetrators of such crimes," calling on UNMISS to support such justice efforts.⁵

In 2015, President Salva Kiir and former Vice President Riek Machar signed the Agreement for the Resolution of the Conflict in South (ARCSS), Chapter 5 of which laid out a set of transitional justice commitments of a future Government of National Unity. The Security Council subsequently mandated UNMISS to support the ARCSS, including limited support to a transitional justice process, which would be largely led by the African Union (AU). In 2016, South Sudan again descended into non-international armed

conflict, with both parties violating the terms of the ARCSS. Two years later, the parties signed a revitalized agreement (RARCSS), which again contained a transitional justice chapter. The Security Council similarly mandated UNMISS to support the parties and the AU in implementing these provisions.⁶

This study examines UNMISS' implementation of its transitional justice mandate from 2014 to present, based on an in-depth literature review and interviews with a range of experts. The study benefited from a two-week research trip to South Sudan in 2018, during which the author led a cross-cutting study of UNMISS' mandate implementation, including in areas of human rights and justice.⁷ It is guided by the central question: *How has the Security Council's approach to transitional justice in South Sudan been implemented by UNMISS on the ground, and what impacts can be identified?* To address this question, the study is broken into three sub-questions: (1) what were the transitional justice goals and approaches by the Security Council?; (2) How were the Council's decisions implemented in the field?; and (3) What impact did UNMISS have and what enabled or inhibited its mandate implementation? The study concludes with some more general points and recommendations about transitional justice based on the South Sudan experience.

How has the Security Council's approach to transitional justice in South Sudan been implemented by UNMISS on the ground, and what impacts can be identified?



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The Council's Goals and Approach in South Sudan

Prior to the outbreak of the civil war, the Security Council did express some limited goals with respect to justice, but these were initially focused on the Government. For example, in 2012, a Security Council resolution called upon the Government “to combat impunity and hold accountable all perpetrators of human rights and international humanitarian law violations.”⁸ However, this call was not paired with a demand on UNMISS to support the Government’s anti-impunity work. It is also worth noting here – though beyond the scope of this study – that the Council was not always united on how transitional justice would be addressed in its resolutions. In its 2015 deliberations, for example, Council members were united on the issue of accountability in principle but were divided on whether accountability should be part of the immediate efforts to push for a peace deal.⁹

When the non-international armed conflict first broke out in late 2013, the Council’s approach to justice was primarily focused on human rights monitoring and investigation, as well as support to institutional capacity-building in the justice sector (prisons, courts, police, and legislation). According to the Council, the UN’s human rights report of May 2014 raised a grave concern of serious human rights violations committed by both parties to the conflict, requiring the UN to adopt a strong anti-impunity stance. In its first mandate renewal following the outbreak of the armed conflict, the Council called on UNMISS to monitor and investigate serious human rights violations and to support the AU commission of inquiry into South Sudan.¹⁰ At the same time, the dramatic shift in mandate away from State-building meant that the capacity-building support to South Sudan – which had previously included large-scale support to national justice institutions

– dropped significantly. This reduction in support to the State was seen as necessary, given that the Government was committing human rights violations and violations of international humanitarian law in the conflict. But it also meant that the very poor justice capacities of South Sudanese institutions did not increase much during this period.

From 2014 onward, the Council gradually increased its emphasis and sense of urgency with regard to justice and ending impunity. For example, Resolution 2187 in 2014 speaks of the “increasingly urgent need to end impunity and bring to justice” perpetrators of serious abuses, calls on UNMISS to report more frequently, and asks the Secretary-General to report specifically on the issue of accountability. However, it was not until 2015 that the Council explicitly laid out a role for UNMISS in the area of justice and accountability in the context of the war.

In August 2015, the Intergovernmental Authority on Development (IGAD) brokered the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), temporarily putting a halt to hostilities and preventing the armed conflict from spreading to the region.¹¹ Chapter 5 of the ARCSS included a set of commitments on transitional justice, including the requirement that the newly established Government of National Unity should establish a truth, reconciliation, and healing commission; a hybrid court to try serious crimes under the joint auspices of the AU and the Government of National Unity; and a compensation/reparation commission. The agreement further specified that the parties would seek the assistance of the UN and the AU in implementing the transitional justice provisions.

In October 2015, the Council endorsed the ARCSS and called on all parties to implement its measures. It further modified UNMISS’ mandate to include support to some key provisions of the ARCSS, including the cessation of hostilities, disarmament, demobilization and reintegration (DDR), and the development of a new constitution.¹² The Council tasked UNMISS with support to IGAD and the AU in the implementation and public dissemination of the ARCSS, including the transitional justice provisions. Specifically,

the Council requested that the UN be ready to provide technical assistance to the AU and IGAD for setting up the hybrid court for truth, reconciliation and healing commission. This was not without disagreement in the Council: Russia, Venezuela and Angola all abstained on Resolution 2241 in 2015, disagreeing with inclusion of a mandate to support the hybrid court.¹³

There was little opportunity to implement any of the ARCSS provisions, as the parties again descended into armed conflict in 2016, causing further mass displacements, tens of thousands of deaths, and widespread human rights violations. A cessation of hostilities in December 2017 was quickly broken as fighting continued. When, in 2018, the IGAD again oversaw the signing of the Revitalized ARCSS (RARCSS), its Chapter 5’s transitional justice provisions were more or less the same as the prior agreement, though with less detail on some issues like implementation of the hybrid court.¹⁴ The UN was again listed alongside the AU and IGAD as an organization that would assist the parties in fulfilling their transitional justice commitments. Soon after the RARCSS was signed, the AU formally requested the UN to provide technical assistance in setting up a hybrid tribunal as part of a transitional justice approach in support of South Sudan.¹⁵ The subsequent Council resolution took note of this request and again asked the Secretary-General to make technical assistance available to the AU and the Government of South Sudan.¹⁶

In the context of this peace process, the Council’s approach to transitional justice has four main characteristics. First, it mandated UNMISS with a human rights monitoring and investigation role, compiling a factual base for future justice processes. This took place during a massive increase in human rights violations at the outset of the 2013 conflict, where the Council rapidly shifted UNMISS from a mission almost entirely set up to support the South Sudanese Government to one tasked with monitoring its behavior alongside other conflict parties. In discussions with UNMISS human rights officials in Juba in 2018, however, it was not clear whether this mandate was meant to feed directly into judicial processes and/or future hybrid court activities.¹⁷ The UN’s evidence-gathering mandate

and procedure is not a forensic one to establish individual criminal accountability in a court; it is rather designed to feed into the UN's human rights reports and public advocacy, which are more focused on patterns of actions by the parties to the conflict. Nonetheless, the significant shift to human rights monitoring and investigation demonstrates a strong push by the Council for UNMISS to play a role in establishing the record of violations during the war and end the culture of impunity, potentially even laying the groundwork for future criminal accountability.

Second, the Council's approach to both the 2015 and 2018 peace agreements was the result of the relatively peripheral role of the UN in both agreements. While mentioned several times in the agreements – in particular in the provisions around the ceasefire – the UN was only a witness, neither a guarantor nor a direct signatory to the agreements themselves. And in the transitional justice chapter of the agreement, the parties only commit to seeking the UN's assistance. Without a more direct role of the UN within the agreement, the Council could only encourage UNMISS to provide the technical support requested by the AU in 2018.

Third, the Council mandate from 2014 to 2017 did not include a rule of law component, essentially dropping all of the advisory and capacity-building work of the mission during that period. However, in 2017, the Council reinstated a small rule of law component, which played a small but important rule of law capacity-building component throughout the armed conflict, even while significantly reducing the mission's broader State-building mandate. This was important – as the subsequent section elaborates – because it allowed the mission to continue to engage with justice authorities in tangible ways, including support to mobile courts that try sexual and gender-based crimes, helping bring perpetrators of crimes in the protection of civilians sites to justice, and advisory support to the Government.¹⁸

Fourth, the Security Council's activities were complemented by a range of other actors, including importantly the UN Human Rights Council, but also the Special Representative of the Secretary-General (SRSG) on Sexual Violence in Conflict, the Sanctions Committee on South Sudan, and the Panel of Experts. In April 2016, following UNMISS' reporting on widespread human rights violations during the armed conflict, the Human Rights Council established an independent international Commission on Human Rights in South Sudan. It was composed of three independent experts with a mandate to monitor human rights, assess past reports of violations to establish a factual basis for transitional justice and reconciliation, and to provide guidance on transitional justice issues to the Government of National Unity.¹⁹ Importantly, this Commission had a mandate to preserve evidence and clarify responsibility for alleged gross violations of human rights, something beyond the usual evidence-gathering mandate and capacities of UN peace operations.

Finally, it is worth highlighting that the Council's approach to transitional justice took place during periods of active fighting and/or high risks of relapse. It is only very recently (in 2020) that the parties have appeared to take the RARCSS process seriously and begun implementing its provisions, opening the door to more meaningful progress on the transitional justice provisions. In fact, from 2014 to the time of writing this study, the Council's overriding concern has been the protection of civilians, hundreds of thousands of whom were displaced by the conflict and have been living in UNMISS' protection of civilians sites. This is evidenced by the Council's decision to raise the troop ceiling of the mission, first to 12,000 following the outbreak of the armed conflict and then again to 17,000 in 2016.²⁰ As several UNMISS officials noted, the mission has been consumed with the security and protection aspects of its mandate, leaving less attention and fewer resources for issues like transitional justice.²¹



II UNMISS' Mandate Implementation

A Mission Strategy

In order to understand how UNMISS has approached transitional justice, a broader view of the mission's strategic approach is needed. Following the 2015 signing of the ARCSS and Security Council Resolutions 2241 in 2015 and 2304 in 2016, a "South Sudan Task Force" launched a comprehensive strategic assessment to set priorities for the UN's engagement in South Sudan. In November 2016, the recommendations were transmitted to the Security Council via a special report of the Secretary-General.²² The central points of the report were that the operating environment in South Sudan was extraordinarily restrictive, that the peace agreement was not being implemented seriously, and that there was a very real risk of further

atrocities in the immediate future. The report recommended that UNMISS maintain a focus on its four core tasks – protection of civilians, facilitating humanitarian assistance, monitoring and investigating human rights, and support to the peace process – while paying special attention to transitional institutions that were inclusive and could have a positive impact on the lives of the South Sudanese.

Under the leadership of SRSO David Shearer, UNMISS developed its Mission Concept on the basis of this mandate. The Mission Concept created two broad priority areas for UNMISS: protecting civilians and building durable peace. While these two priorities were viewed as complementary, they could be emphasized differently depending upon the situation on

the ground: when conflict dynamics escalated, UNMISS would increase its emphasis on protection; if the situation improved, it could place greater emphasis on the activities around building a durable peace.²³

Importantly, issues of transitional justice were not placed under the longer-term “durable peace” category but were instead considered part of UNMISS’ immediate protection work. Under the protection priority, in addition to the more traditional protection tasks, “peaceful coexistence, reconciliation and social cohesion” were included as key priorities, as were issues around accountability for human rights violations. Specifically, the protection priority of the Mission Concept spoke to the need to support the establishment of accountability mechanisms laid out in Chapter 5 of the ARCSS (Transitional Justice), including support to a hybrid court for South Sudan. According to UNMISS officials, this reflects the importance and priority SRSF Shearer placed on transitional justice, elevating it as a key priority in the mission. But this does not mean transitional justice is not limited to protection. “While we have prioritized transitional justice within the strategy under protection, UNMISS sees Chapter 5 of the peace agreement as a crucial aspect of the durable peace work of the mission,” a UNMISS official explained. “We see it as strategically connecting our work to limit violence now with our longer-term efforts at durable peace.”²⁴

The Mission Concept thus laid out an anticipated two-year set of conditions for South Sudan that included several issues related to transitional justice: a reinvigorated peace process based on inclusive national dialogue, reduced levels of violence between the parties, reduced number of human rights violations, and some progress of transitional justice processes such as criminal accountability for human rights violations. Unlike many other settings, where transitional justice was positioned as a longer-term post-conflict goal, UNMISS placed clear emphasis on it as an immediate and integral part of its support to the peace process as well as a link to longer-term peace.

Transitional Justice Strategies

In addition to the broader mission strategy, UNMISS, Rule of Law and Human Rights components developed tailored transitional justice strategies for their work.²⁵

The Rule of Law Advisory Section’s “Strategy for Advancing Mutually-Reinforcing Transitional Justice Mechanisms in South Sudan,” provides recommendations for both the UN and South Sudanese actors. Broadly, the strategy recommends that the various strands of the transitional process envisaged in the peace agreement should work together in a complementary way, coordinated by a single entity. In follow-up to this recommendation, UNMISS and the UN Development Programme (UNDP) supported the Ministry of Justice in setting up a technical committee to coordinate the transitional justice work going forward.

Other key areas in the transitional justice strategy include:

- The development of effective victim/ witness protection programmes (including psycho-social support), which are largely absent in South Sudan but essential for viable trials in a hybrid or other court;
- Given the poor knowledge of transitional justice in much of South Sudan, expanding outreach and sensitization programmes to build a common understanding across the South Sudanese population of the transitional justice mechanisms, and to allow for broad based consultations prior to designing Government-led approaches;
- Advice on how to design truth, reconciliation, and healing processes so they complement and reinforce the other mechanisms in the peace agreement;
- Support to national efforts to build justice capacities, taking into account the primacy of the host Government in executing transitional justice programming; and

- Support to sustainable reparations programmes, while also keeping expectations realistic as to what reparations is likely to deliver.

Similarly, the Human Rights Division's strategy contains a broad set of activities geared at supporting transitional justice, within the peace agreement and beyond. It includes priority areas of:

- Advocacy around universal jurisdiction for serious crimes;
- Engagement with regional actors on implementation of Chapter 5 of the peace agreement;
- Engagement with the African Court of Human and People's Rights and other human rights mechanisms around transitional justice;
- Support to national statutory courts, legislation, and civil/military courts on serious crimes;
- Victim and witness protection support; and
- Monitoring accountability across the South Sudan justice system.²⁶

These strategies have guided the work of both components in supporting the mission's engagement on transitional justice, including at the strategic level. According to several UNMISS officials, the strategies also work together, under the broad heading of the SRS's Mission Concept. "We regularly coordinate across the mission's pillars on transitional justice, and we regularly work with UNDP and others to be sure our approaches are aligned," one UN official noted.²⁷

Human Rights Monitoring

According to UNMISS officials, one of the most important elements related to transitional justice has been its work to monitor, investigate and report on human rights violations, aimed at ending a widespread culture of impunity across the country. Here, the mission has placed

particular emphasis on major public reports detailing human rights violations by both the Government and the rebel forces during the height of the armed conflict. Especially during SRS's tenure, the frequency and profile of human rights reporting increased significantly and UNMISS officials have highlighted their use in talks with the parties. For example, a major UNMISS human rights report in July 2018 found that Government and opposition forces had perpetrated a wide range of human rights violations against civilians. These reports were the basis for some of the political outreach to the parties, calling for restraint and criminal prosecution for violations.²⁸

From 2016 onwards, UNMISS' human rights reporting was complemented by regular reports from the UN Commission on Human Rights in South Sudan.²⁹ Importantly, because this commission is independent from the UN peace operation on the ground and not directly involved in supporting the peace process, it has been able to use a broader platform to advocate for transitional justice issues. For example, its reports have regularly detailed the ways in which the conflict parties delayed formation of key transitional justice mechanisms of the peace process, including the hybrid court.³⁰

One of the most important areas of UNMISS' anti-impunity work relates to Conflict-Related Sexual Violence (CRSV), work undertaken in coordination with the SRS on CRSV and a team of experts. Since the outbreak of the armed conflict, tens of thousands of South Sudanese have been subjected to rape, sexual mutilation, and torture. UNMISS Human Rights Division consistently reported on CRSV in public reports in October 2018 and February and July 2019.³¹ A survey by the UN Population Fund found that more than 70 per cent of women living in protection sites in Juba reported having been raped since the start of the armed conflict, mainly by State security forces.³² According to well-respected human rights organizations, the lack of accountability for sexual crimes not only contributed to widespread "normalized" use of sexual violence, but also caused deep societal wounds for which a comprehensive transitional

justice process would be required (though it is worth noting that transitional justice does not have a particularly strong track record on sexual violence).³³ In interviews conducted in 2018 with a wide range of South Sudanese interlocutors, there was a uniform view that the transitional justice provisions of the peace agreement would need to take sexual violence seriously, requiring dedicated and nuanced resources from the UN and others.³⁴

Evaluating the impact of this work is difficult, given the many factors influencing rates of human rights violations and subsequent prosecutions. In interviews with dozens of South Sudanese citizens in 2018, there were very mixed views as to the impact of UNMISS' human rights work, at least in terms of deterring future crimes or countering impunity.³⁵ Several experts, however, noted the importance of establishing a factual record of past crimes in anticipation of a transitional justice process under the peace agreement. Here, UNMISS' role as an unbiased investigative actor present on the ground during the height of the atrocities may be an important future reference point.

Rule of Law Support to Transitional Justice

UNMISS had initially been given an extraordinarily ambitious State-building mandate, with large-scale capacity development remit in the areas of rule of law and justice.³⁶ Within the mission, more than 1,000 staff were categorized as providing capacity-building support, with UNDP focusing a multimillion dollar parallel effort to help build the justice, corrections and police.³⁷ This complemented a broader UN approach focused on State-building, recognizing that South Sudan had some of the worst institutional capacities in the world.³⁸ Following the outbreak of the civil war in 2013, the Council drastically scaled back the rule of law mandate for the mission, resulting in the complete closure of the Rule of Law and Security Institutions Support Office (ROLSISO) in 2014. A very reduced rule of law presence was reintroduced in mid-2017 in the form of the

UNMISS Rule of Law Advisory Section (ROLAS) comprising 12 professionals. From its inception, even with such a small set of resources, ROLAS has proven itself extremely effective in a range of areas related to transitional justice.

One of the most important activities has been support to the creation and deployment of mobile courts across South Sudan. Given the extremely poor infrastructure and lack of State institutional capacity beyond major cities, serious human rights violations went largely unchecked for much of the armed conflict. Even in UN protection of civilians sites, reports of widespread violent crimes and sexual violence have raised worrying signs that the South Sudanese State is unable to address impunity or prevent abuses against its citizens. UNMISS' and UNDP's support to mobile courts has allowed national officials to travel to some of the most affected parts of South Sudan (Bentiu, Rumbek, Yambio, Bor, Malakal) and try hundreds of serious criminal cases.³⁹ More recently, this support has shifted to a "justice hub" model, whereby major urban areas will have all rule of law actors brought together to ensure accountability for serious crimes. According to experts in South Sudan, this work is crucial to showing that there is some justice capacity already in place, building confidence amongst the population ahead of future transitional justice processes.

UNMISS' ROLAS and Human Rights Division have also provided important support to the legislative aspects of the peace process. For example, it supported the development of legislation that would incorporate international crimes into the national legal framework of South Sudan.⁴⁰ A key recommendation by UNMISS was for South Sudan to adopt the Rome Statute as the basis for domestic criminal law for serious crimes (South Sudan already incorporated the Geneva Conventions but it is not clear that they are sufficient to establish criminal penalties as the basis for a hybrid court or other trials). Unfortunately, as of the time of writing, delays in the promulgation of the laws under the previous Government meant that the draft laws were yet to be tabled before the revitalized transitional National Legislative Assembly.

Public Awareness and Sensitization

Public understanding of transitional justice issues has been extremely limited, leading to high risks of misunderstandings and unmet expectations.⁴¹ A priority for UNMISS has been to support the parties' outreach efforts, not only to build better public understanding but also to ensure that the process reflects the needs of a broad swathe of the population. Given that the 2015 peace agreement did not result in a Government of National Unity, this outreach has been especially important to counteract the impression that the consultations may have been one-sided.

In addition to its broader support of the national dialogue process, in 2019, UNMISS supported civil society-led transitional justice working groups in launching awareness forums in Bor, Yambio, Wau, Torit and elsewhere. UNMISS also facilitated a 2019 visit to Uganda by South Sudanese government officials and civil society leaders to learn how Kampala had adopted international crimes under its national laws. Specifically, this work was meant to sensitize the National Legislative Assembly and Government's

representatives as well as civil society to the upcoming transitional justice processes, including the hybrid court, and also provide a channel for the public to influence the course of the transitional justice approaches going forward. While this work was seen as positive, in April 2019, a news reports that the South Sudanese Government had paid a US firm to block the establishment of the hybrid court dealt a serious blow to the process.⁴²

Victim's Voices and Protection

South Sudan has essentially no legislative or institutional protections for victims or witnesses to serious crimes (nor do they have the capacity to provide legal representation), an especially urgent problem for the criminal justice system and also for future transitional justice processes. UNMISS Human Rights Division, partnering with UNICEF and UNDP, have taken forward a Peacebuilding Fund project in Bentiu and Bor to establish victims' networks that would help future trials in courts at national and international level as well as support a truth and reconciliation commission and any reparation programmes.



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III

UNMISS' Contribution to Transitional Justice in South Sudan

This section provides a brief assessment of progress made towards the transitional justice goals set by the South Sudanese peace process, focusing on what factors either enabled or inhibited implementation of UNMISS' mandate.

A Limited Role for Transitional Justice

At the national level, UNMISS appears to have played an important role in keeping transitional justice high on the agenda of both the conflict parties and the international community. SRSG Shearer's clear prioritization of the issue, as well

as UNMISS' high-profile roles in supporting public outreach and sensitization has been seen as helpful in this regard. The very wide readership of UNMISS' human rights reporting too has been crucial in driving public discourse around human rights violations. It is worth noting that the UN Commission on Human Rights in South Sudan was created on the basis of UNMISS reporting of serious human rights violations.⁴³

At the same time, it is important to note that the UN is a fairly peripheral player in the actual implementation of Chapter 5 of the peace agreement. UNMISS officials were clear that the UN's role is largely a supportive one, providing technical and advisory support to processes

that are either run by the South Sudanese or the AU. Several officials noted that this marginal role meant they had little ability to directly influence the course of the process. This has meant that some of the structures being set up to support transitional justice may not align with best practice. For example, the structure of the hybrid court that is contemplated by the parties is overwhelmingly dominated by international/African judges and prosecutors. Some experts interviewed for this study cautioned that insufficient roles for South Sudanese in the court could lead to a lack of local buy-in and affect the sustainability of the court, even if this structure accords with UN guidance.⁴⁴

An Incomplete Justice Sector

One of the greatest challenges in supporting transitional justice in South Sudan is the near total lack of judicial capacity in much of the country. When UNMISS was first deployed in 2011, one of its highest priorities was to help build up the institutions of State across South Sudan, but this work was almost entirely curtailed following the outbreak of the armed conflict in 2013. During the armed conflict, very little progress was made on building a better police force, judicial system or on criminal prosecutions across the country. Equipped with the 12-person Rule of Law Advisory Section, UNMISS has collaborated with UNDP to contribute a remarkable amount to bolstering this capacity, helping to set up mobile courts that have tried hundreds of cases, many for the kinds of serious crimes that might be eligible for a transitional justice process. The more recent progress towards static judicial capacities in major urban areas is another positive signal that South Sudan is building its own capacities towards a functioning rule of law system, but much remains to be done if it is to be ready for large-scale criminal cases and/or truth and reconciliation processes at the national level.

Another one of the most important challenges is the lack of legal basis for transitional justice. As noted above, while South Sudan incorporated the Geneva Conventions into its domestic legislation, there are currently no legal provisions to cover the kinds of serious human rights violations

amounting to international crimes (crimes against humanity, war crimes and genocide) that would be covered by a hybrid court.⁴⁵ Given the extremely slow process of forming a Government of National Unity, and the difficulties in getting draft legislation through to the time of writing, this presents a significant challenge for the broader transitional justice work of the UN and its partners. At the same time, UNMISS officials stressed that many of the individuals within the newly formed Government have expressed enthusiasm about the draft legislation that has been worked up (but not yet passed) with UNMISS' recommendations, so this may move forward in the coming period.

A Divided Population

South Sudan's non-international armed conflict has left the country deeply polarized, with competing narratives around who is to blame for the majority of the human rights violations during the fighting. Part of a transitional justice process will need to combat this polarization, to help build a common narrative based on an accepted set of facts. Here, UNMISS' human rights reporting is already playing an important role. Its high-profile reports on violations by both parties to the conflict have pointed to culpability by all parties. Moreover, its investigations contain important indicators of where the most serious crimes have taken place. For example, UNMISS' human rights reports provided a basis for the UN Commission on Human Rights in South Sudan to look for mass graves that were brought to the attention of national and regional judicial institutions and to demand accountability for serious human rights violations.⁴⁶

While the lack of forensic capacity within UNMISS means its reporting is unlikely to be admissible in the hybrid court or other criminal trials, having an impartial factual account of the armed conflict could well be helpful in a future truth and reconciliation commission, as well as criminal courts at national and regional level. As one UNMISS official stated, "we see the full range of our human rights work as potentially contributing to transitional justice."⁴⁷



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An Increasingly Strong Civil Society

The civil war led to a dramatic reduction of political space across South Sudan, with the National Security Service taking a far more aggressive stance towards political activities and civil society. During a 2018 visit, for example, it was impossible to formally meet with many South Sudanese NGOs without authorization from the National Security Service, an inhibition explicitly designed to limit their interaction with foreign actors. Nonetheless, an extraordinarily robust civil society network has emerged around the issue of transitional justice. The Transitional Justice Working Group for South Sudan offers an umbrella for dozens of organizations to advocate for specific issues, demand implementation of Chapter 5 of the RARCSS, and share information about efforts to combat impunity.⁴⁸ According to several experts in UNMISS, engaging with these groups is a key aspect of the mission's work, in particular when it comes to sensitizing the population about the RARCSS.

Challenging Timing

The peace process has moved in fits and starts, beginning with the 2015 peace agreement, then descending into renewed armed conflict, and culminating in the 2018 revitalized agreement. Because of this, the timing of transitional justice processes has been problematic. For example, under the 2015 agreement, with UNMISS and UNDP support the Government proceeded with public consultations around South Sudan, gauging perceptions of how the transitional justice process should be managed. These consultations have generated important information and public buy-in to the peace process. However, as stipulated in the 2018 agreement, public consultations should be managed by a Government of National Unity, something that has only very recently been formed at the time of writing. What then should the South Sudanese do with the earlier round of consultations? Some within UNMISS expressed concern that these earlier consultations would be seen as biased towards President Kiir, perhaps insufficiently reflecting the views of the opposition-oriented communities.



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Uneven Political Will

The revelations that the Government had hired a consulting firm with the express instruction to thwart the hybrid court sent a clear message that not all South Sudanese leadership had accepted the entirety of the peace agreement.⁴⁹ While it is difficult to assess, quite possibly the many delays that have occurred in the passage of legislation, setting up key mechanisms to support transitional justice, and establishing a budget for the work of South Sudanese institutions could be a reflection of low levels of enthusiasm within parts of Government for a robust transitional justice process. Certainly, before the formation of the Government of National Unity (composed of officials from both the former government and the opposition), the hybrid court was not seen favorably.

Here, the less central role for the UN may have helped. According to UNMISS officials, the Government claimed to be willing to support a transitional justice process with the AU in the lead, particularly in the case of the hybrid court, though several doubted whether this was the

case.⁵⁰ Additionally, having the UN Commission on Human Rights in South Sudan separate from UNMISS has allowed the UN to issue strong messages on transitional justice without drawing the mission too much into the political fray.

Unrealistic Expectations

A 2019 study of dozens of citizens' perceptions across South Sudan found that understanding of transitional justice mechanism in the peace process is very low and varies significantly across communities.⁵¹ More than half of respondents hoped that the truth and reconciliation process would be launched first, while fewer than half hoped for the hybrid court to be established first. There was a great deal of interest in individual reparations for victims, rather than collective compensation for violations during the armed conflict. And, worryingly, the survey found a growing sentiment that transitional justice is a retributive form of addressing past crimes. UNMISS officials also expressed concern of South Sudanese expectations as to the level of international support to a reparations scheme as

being well out of step with the likely contributions: the international community is very unlikely to pay for any forms of restitution in South Sudan.⁵² During a 2018 visit to South Sudan, a range of interlocutors suggested that transitional justice should account for crimes occurring well beyond the 2013-2018 period, including South Sudan People's Defence Forces activities up to 30 years ago.⁵³

The range of expectations across South Sudan places UNMISS in a difficult position. On the one hand, it has a mandate to support the provisions of the peace agreement, which includes a certain amount of advocacy for transitional justice as it is articulated in Chapter 5 of the RARCSS. On the other hand, the long history of the UN in South Sudan has been characterized by enormous amounts of international support, from the 20-year humanitarian Operation Lifeline Sudan, to extraordinarily large amounts of development and humanitarian aid following the country's independence.⁵⁴ In interviews with major donors based in Juba in 2018, it was clear that these levels of support would not extend to paying for the South Sudanese peace process, particularly given the role of the political leadership from both parties to the non-international armed conflict. Chronic failures of the Government of South Sudan to budget for key provisions of the peace agreement – including, for example, President

Kiir's reticence to pay for the cantonment process of opposition troops,⁵⁵ points to a likely shortfall in funding for the transitional justice mechanisms as well. How to maintain public enthusiasm for the peace process, while simultaneously calibrating expectations towards reality, is a major challenge for the UN and its partners.

Limited Rule of Law Capacity

The principal components addressing transitional justice in UNMISS are human rights and the rule of law. Of these, human rights has a well-staffed section, present in all of the main mission sites, and a broad mandate from the Council. In contrast, in 2014 the Security Council chose to end UNMISS' State-building mandate in the face of gross human rights violations, essentially stripping the mission of any rule of law capacity. This was only slightly reconstituted in 2017. However, the dramatic reduction of the rule of law capacities of UNMISS – staffed at only 12 people – has meant it has few resources to support the sweeping scope of transitional justice envisaged in RARCSS. Despite this, the mission has provided important legislative, technical, and advisory support to the parties, helping to shape and improve national judicial capacities even during active fighting on the ground.



IV

Key Takeaways

Based on the above analysis, the following section offers some broader conclusions and recommendations for the Security Council, UN Secretariat, and peace operations leadership.

1 BUILD SECURITY COUNCIL UNITY ON TRANSITIONAL JUSTICE

Disagreements within the Council over the role of UNMISS in supporting transitional justice in South Sudan point to a broader set of ideological differences of opinion across the Permanent Five members. In general terms, Russia, China and various elected members have taken the view that the Council should play a restrained role in pressing for transitional justice, whereas the Permanent Three and many Western countries have pushed for a far more ambitious role for the UN in such settings.⁵⁶ The divisions may have weakened the Council's ability to exert leverage over the conflict parties. Council members should

renew efforts to arrive at common positions about transitional justice generally in order to improve the chances of unified approaches in future conflicts.

2 MANDATE CLEAR ROLES FOR PEACE OPERATIONS

One of the benefits of the RARCSS is that it articulates a clear and fairly limited role for UNMISS in supporting transitional justice for South Sudan. Helpfully, the Security Council mandate also offers a clear set of tasks related to the peace agreement, including a provision that any support would be limited to advice and technical support, and would be done within existing resources.⁵⁷ This may help to reduce expectations that UNMISS will be able to deliver major change on the ground. However, there remain some question areas. For instance, how might the human rights work of UNMISS feed into a transitional justice process (e.g. can the

evidence gathered by UNMISS be used to build a factual record for the hybrid court)? What specific roles should UNMISS play in providing support to the truth and reconciliation commission if it is set up? What role might the mission play on issues like reparations and guarantees of non-recurrence? How should the mission interact with the independent UN Commission on Human Rights in South Sudan as the transitional justice process proceeds? Building a common understanding between the mission and the Council on these kinds of questions will be helpful in the coming period.

3 MATCH MANDATES WITH RESOURCES

The mandate to provide technical, advisory, and logistical support to Chapter 5 of the peace agreement is a limited one, but nonetheless would require significant resources to be fully implemented. The Council's 2014 decision to eliminate UNMISS's rule of law component and, thereafter, introduce a limited capacity in 2017 with roughly 12 professionals does not reflect the likely demands that are being placed on the mission today. Particularly in the light of the 2018 revitalized agreement – which spells out specific tasks for technical and advisory support – greater dedicated rule of law and human rights resources should be provided to the mission. Here, the Security Council should do more to draw insights from the field to ensure that resources match mandates.

4 PRIORITIZE JUSTICE EARLY IN THE PEACE PROCESS

UNMISS has prioritized justice from the outset of its role in the peace process. This not only meant that transitional justice was articulated with the mission's strategic plans – and indeed resulted in a bespoke plan for how the mission would support the transitional justice elements of the peace agreement – but also meant that UNMISS was able to channel its existing activities towards transitional justice even before the parties had begun implementation of the agreement. Examples of this include the work

to pass legislation incorporating international crimes well ahead of the creation of the hybrid court, as well as support to mobile courts to try serious crimes. While the mobile courts are not a transitional justice mechanism in themselves, a range of experts suggested they played an important role in building confidence in the State's ability to combat impunity.

5 ESTABLISH CLEAR ROLES

The notion of good and bad cops is simplistic, but the South Sudan experience does point to the utility of a division of responsibility, particularly around messaging on human rights and justice. For example, due to its independence, the Commission on Human Rights in South Sudan offers the UN the chance to attribute responsibility for serious crimes, and also make more advocacy-leaning public statements pushing for the creation of the hybrid court. These kinds of statements might be difficult for UNMISS, which has a range of responsibilities in-country and might not be able to adopt such a direct advocacy role. "We still have to operate in this country and work with all actors – having an independent voice that can be more loudly calling for specific justice outcomes helps us," one UN official said. This does not mean each entity should go its own way, of course, as the following recommendation notes.

6 DEVELOP A HOLISTIC STRATEGY

A clear lesson from the UNMISS experience is the importance of having both a mission-wide strategy and a strategy for transitional justice, with links between the two. In discussions with UN leadership in Headquarters, the UNMISS mission strategy is often referred to as an example of best practice, helpfully giving direction to all mission components on how to prioritize and link their work to overarching goals of the mission. Likewise, the mission's transitional justice strategies in human rights and rule of law offer a set of actionable recommendations, both for UNMISS and for South Sudanese partners involved in transitional justice implementation. However, it is not clear the extent to which these various strategies are explicitly linked in practice.

Having a single transitional justice strategy for the entire UN family in-country would be an ideal, if difficult, objective.

7 ENGAGE CIVIL SOCIETY

The most robust and influential proponents of transitional justice are not the parties to the agreement, they are the range of civil society groups dedicated to human rights and accountability.⁵⁸ Where UNMISS has been most successful, it has been collaboratively with civil society, engaging and empowering them to expand the understanding and impact of transitional justice work across the country. Particularly in a highly divided country where the political leadership may have uneven enthusiasm for transitional justice, providing strong support to civil society is the crucial element for success.

8 TAKE A BROAD VIEW OF TRANSITIONAL JUSTICE

In interviews with UNMISS officials, it was clear that they viewed much of the human rights, rule of law, and institutional support work of the mission as supporting eventual transitional justice processes in South Sudan. This included human rights monitoring and reporting, enabling mobile justice courts, work on Sexual and Gender-Based Violence accountability, and a broad range of legislative support. It may also include the UN's work on Security Sector Reform and DDR, though UNMISS officials were cautious to raise expectations too much in these areas. Given the patchy implementation of the peace process by the parties, taking a broad view of what constitutes transitional justice has allowed the mission to push forward on important initiatives even absent progress on the peace agreement itself.

9 BALANCE INTERNATIONAL AND NATIONAL INFLUENCE

One of the lessons from other transitional justice processes concerns the importance of balancing the roles of international and national actors. In other hybrid courts – for example, in Cambodia, Sierra Leone, and Timor Leste – international

judges and prosecutors played important complementary roles to national counterparts (though not always without friction).⁵⁹ In the case of the South Sudan hybrid court, however, the current plan envisages a dominant role for international judges and prosecutors, leaving South Sudanese counterparts in a more marginalized role. While this reflects both the highly polarized nature of South Sudanese politics at present (and the likely difficulty in identifying clearly neutral officials for the court), there is a risk that the court will be viewed as an external imposition, not garnering widespread buy-in from the local population.⁶⁰

10 UNDERSTAND AND SHAPE PUBLIC EXPECTATIONS

A recurrent challenge has been the expectations of the South Sudanese in terms of the timeframe, scope, and benefits of a transitional justice process. Given the multi-decade history of South Sudan in which it has consistently been the recipient of enormous levels of humanitarian and development aid, there is a deeply felt expectation that the UN and international donors are ready to deliver significant funds into the restitution and reparations aspects of the peace agreement. There could be an even greater role by the Security Council in calibrating these expectations even more clearly in mandates, and certainly more resources for public outreach and communications for UNMISS would help get a more realistic message out.

11 BUILD COMPLEMENTARY PROCESSES

One of the key recommendations of UNMISS' transitional justice strategy is for the various processes under the peace agreement to be taken forward in a complementary and coordinated way. This is particularly important in transitional justice, where processes like a truth and reconciliation commission needs to be carefully aligned, timed and coordinated with a hybrid court and a reparations scheme. A clearer instruction – within the peace agreement and the Council resolution – as to what entity is responsible for coordinating the various



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processes would be helpful. It will also be important to consider more clearly the issues of non-recurrence, institutional reform, and strengthening civil society, none of which are particularly emphasized by the Council mandates to date.

12 DRAW ON COMPARATIVE EXPERIENCE

While South Sudan presents a unique mixture of conflict dynamics and a legacy of violence that dwarfs many other settings, the transitional

justice approach would benefit from even greater input from prior experiences. Several UNMISS officials pointed to successful engagements with South Sudanese interlocutors, where they were able to point to other African peace processes that had adopted relevant justice approaches for the South Sudanese setting. Within the UN, having a more systematic lessons learned repository on transitional justice, and equipping future missions with transitional justice experts (which they already do via the mediation support team in some instances) could build on this positive experience.

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