



The EU's Policy Framework on support to transitional justice

Summary:

*This document forms part of the implementation of the **EU Action Plan on Human Rights and Democracy –2015 - 2019**, which outlines in action 22 (b) **the commitment to develop and implement an EU policy on Transitional Justice**. The objective is to **provide a framework for EU support** to transitional justice mechanisms and processes and **enhance the EU's ability to play a more active and consistent role**, both in our engagement with partner countries and with international and regional organisations. This framework sets out how the EU can engage in situations where past violations and abuses, including gross **violations and abuses of human rights and serious violations of international humanitarian law** have occurred, through supporting a context-specific combination of measures **promoting truth, justice, reparations and guarantees of non-recurrence, i.e. ensuring transitional justice**. It builds upon and complements the **EU's existing strong policy in support of the International Criminal Court** and takes account of the UN's framework and activities on transitional justice.*

*It also puts an emphasis on how transitional justice strategies are designed and implemented: Any such process must be **locally and nationally owned, inclusive, gender sensitive and respect states' obligations under international law**. Therefore, the participation of civil society, victims, persons belonging to minority groups, women and youth in such processes plays an important role. Transitional justice is seen today as an integral part of state- and peace-building and therefore should also be embedded in the wider crisis response, conflict prevention, security and development efforts of the EU.*

I. Definition and objectives of transitional justice

The UN Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies describes transitional justice as «the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof"¹. This is today the most commonly used definition, and that applied by the EU. It incorporates the four essential elements of transitional justice, namely:

- criminal justice;
- truth;
- reparations; and
- guarantees of non-recurrence/institutional reform.

These four elements are enshrined in existing international instruments pertaining to transitional justice. They serve as guidance for the EU's transitional justice approach, **aiming at attaining the following objectives**, with a view to preventing the recurrence of crises, addressing the most serious crimes of concern to the international community as a whole, and averting future violations of human rights²:

a) **Ending impunity:** Justice for the victims of serious international crimes can only be fully achieved if the perpetrators of those crimes are brought to justice and held accountable by fair and effective judicial bodies, at the national or international level, which allow victims to participate and have their voices heard and taken into account. Prosecution also has a role to play in deterring the future commission of such crimes. This element goes back to the Nuremberg and Tokyo trials and principles which constitute a cornerstone of the current international legal order.

b) **Providing recognition and redress to victims:** Transitional justice includes an acknowledgment that victims have been harmed. To recognise the suffering alone is however not sufficient. Rather, it must be acknowledged that victims are holders of rights who are, inter alia, entitled to an effective remedy and adequate reparation. Post-conflict or post-transition processes need to ensure that victims are not re-victimised or re-traumatised.

c) **Fostering trust:** The four elements of transitional justice aim to promote trust by restoring confidence in the institutions of the state and contribute to reaffirming social values that violations or abuses will not be tolerated or allowed to recur. This contributes to restoring the social fabric of the society.

d) **Strengthening the rule of law:** Transitional justice measures should contribute to re-establishing and strengthening the rule of law. Re-establishing the rule of law should be understood not only in the strict sense of reforming laws and institutions, but also substantively, as ensuring that nobody is above the law, that institutions have adequate resources and are accountable, and that people have equal and effective access to justice. This is particularly important as transitional justice interventions sometimes occur in countries or territories in which the rule of law was either not respected in the first place, or severely violated during conflict or by authoritarian regimes.

e) **Contributing to reconciliation:** A transitional justice process which combats impunity, provides recognition to victims, establishes the rule of law and fosters trust also aims to contribute to a process of reconciliation. Reconciliation seeks to redesign the relationship between individuals and enable society to move from a divided past to a shared future. Legal and institutional measures alone will not be sufficient. Initiatives that target the more personal dimension of a transition may also be required, such as official apologies, memorials and the reform

1. S/2004/61

2. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 August 2012, A/HRC/21/46 p.5

of educational systems³. However, reconciliation must not be conceived as an alternative to justice, or a goal that can be achieved independently of the comprehensive implementation of the four elements of transitional justice discussed in detail below. Furthermore, while transitional justice is a core part of the reconciliation process, other components, such as security and development, are equally important.

II. The basis for the EU's Framework on support to transitional justice

Human rights, democracy and rule of law lie at the heart of EU external action. Article 21 of the Treaty on European Union reaffirms that the EU's action on the international stage is guided by these principles.

Recent EU policies are aligned with this legal framework, which is reflected in the 2011 Agenda for Change Communication⁴, Budget Support Communication⁵ and the Council conclusions thereto, as well as in the Strategic Framework on Human Rights and Democracy, adopted by the Council on 25 June 2012⁶. The Strategic Framework specifically reaffirms the strong political commitment from the EU to prevent violations of human rights throughout the world and, where violations occur, to ensure that victims have access to justice and redress and that those responsible are held to account. It further indicates that the EU will continue to promote observance of international humanitarian law⁷ and fight vigorously against impunity for gross violations of human rights and serious violations of international humanitarian law, including sexual and gender-based violence, not least through its commitment to the International Criminal Court (hereinafter the ICC).

Committed to the promotion of peace, democracy, human rights and development, the EU is already an important player in the field of transitional justice and has the legal and policy basis in place to build on and develop more consistent support for transitional justice. This includes the following actions:

1. The EU is a staunch supporter of the Rome Statute and the ICC. The **strong EU policy in support of the ICC** is based on a 2011 Council Decision⁸ and Action Plan on its implementation⁹. The ICC is the only permanent international criminal court with global aspiration. At the same time, the EU recognises that accountability and justice are most successful if the justice system of each State functions effectively and independently, thereby enabling the ICC to serve its intended role, which is to be a court of last resort, complementing national jurisdictions. This is in line with the «principle of complementarity¹⁰». The EU and its Member States provide support to third countries in order to assist them in developing and strengthening their capacities to meet the obligations arising out of the Rome Statute by, e.g. promoting national legislation implementing the Rome Statute and supporting justice and rule of law programmes with a focus on criminal justice, as underlined in the Toolkit for bridging the gap between International and National Justice¹¹.

3. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 August 2012, A/HRC/21/46

4. COM (2011) 637 final

5. COM (2011) 638 final

6. Doc 11855/12 Annex II

7. The EU is a major advocate for International Humanitarian Law and humanitarian principles and continues to implement the EU Guidelines on International Humanitarian Law, adopted in 2005 and updated in 2009, which serve as a tool to promote compliance with International Humanitarian Law by third states and non-state actors

8. Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76 of 22.3.2011, p. 56.

9. The principles of the Rome Statute, as well as those governing the functioning of the ICC, are fully in line with the principles and objectives of the Union. The ICC has been established to investigate prosecute and try individuals suspected of committing the most serious crimes, and thus to contribute to the prevention of such crimes. The serious crimes within the jurisdiction of the ICC, namely genocide, crimes against humanity and war crimes, and the crime of aggression are of concern to the international community as a whole, the Union and its Member States.

10. The ICC does not replace national criminal justice systems; rather, it complements them. It can investigate and, where warranted, prosecute and try individuals only if the State which has jurisdiction over the case is unwilling or unable genuinely to carry out the investigation or prosecution or where there is complete inaction by the relevant State. Under the principle of complementarity, States retain primary responsibility for trying the perpetrators of crimes under the jurisdiction of the ICC.

11. Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for bridging the gap between international and national justice, SWD (2013) 26 final.

2. In November 2007, the Council endorsed the Communication «**Towards an EU response to situations of Fragility - engaging in difficult environments for sustainable development, stability and peace**» and underlined the importance of adapted EU policy responses depending on the specific features of the situation of fragility.¹² This was enhanced by the adoption of the «Concept on Strengthening EU Mediation and Dialogue Capacities» which acknowledged that the EU should consider on a case-by-case basis how best to support transitional justice mechanisms, including how to best address impunity. The Council also recalled that EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law¹³.

3. **The EU's comprehensive approach to external conflicts and crises** as set out in the EU's Joint Communication of 2013 and the May 2014 Council conclusions, covers all stages of the cycle of conflicts and crises, including early recovery, stabilisation and peace-building. The EU aims to help countries get back on track towards sustainable long-term development, with responses that must be context-specific and driven by the reality of the situation on the ground¹⁴.

4. Through its **CSDP missions and operations**, the EU is engaged in conflict and crisis situations where the legacies of war crimes, genocide, crimes against humanity and other gross violations of human rights are – or may become – relevant. **The EU concept for support to Security Sector Reform (SSR)**¹⁵ acknowledges the potential role of CSDP missions in supporting transitional justice mechanisms relevant for security and justice sector reform. Similarly, one of the principles for **EU support to Disarmament, Demobilisation and Reintegration (DDR)**¹⁶ is that the EU should ensure respect for human rights and carry out DDR support in relation to efforts in the area of reconciliation and transitional justice.

5. **EU Member States have a wealth of experience in dealing with the past.** Many European countries have engaged in transitional justice processes, and in some those processes remain ongoing. Several European countries continue to deal with their own legacies in third countries. Their experience shapes EU external action in this field.

6. Last but not least, the EU is one of the biggest **financial contributors to transitional justice initiatives worldwide**, including through geographic and thematic EU external assistance instruments. The EU is likely to remain for 2014-2020 the largest donor in the area of democracy, rule of law, justice and security sector reform and good governance, gender equality and support for vulnerable groups worldwide.

Transitional justice support is an issue that cuts across instruments. This framework provides a basis for EU engagement in the area of transitional justice in its external action with the following aims:

- To strengthen the EU's position on transitional justice and to increase coherence, consistency and effectiveness in EU engagement on transitional justice;
- To promote a comprehensive approach to transitional justice, with the aim of achieving peaceful, just and democratic societies based on rule of law and respect for human rights, helping to recognise and redress the harms suffered by victims of human rights and international humanitarian law violations, fighting impunity, fostering trust, contributing to reconciliation and thus preventing repetition of violations or abuses in the future.

12. Council Conclusions on a EU response to situations of fragility 19-20 November 2007 welcoming COM(2007) 643 final

13. Council conclusions 17 November 2009 endorsing the Concept on Strengthening EU Mediation and Dialogue Capacities 15779/09
http://www.eeas.europa.eu/cfsp/conflict_prevention/docs/concept_strengthening_eu_med_en.pdf

14. Council conclusions on the EU's Comprehensive approach, 12 May 2014 and Joint Communication to the European Parliament and the Council The EU's Comprehensive Approach To External Conflict And Crises JOIN(2013) 30 final
http://www.eeas.europa.eu/statements/docs/2013/131211_03_en.pdf

15. EU Concept for support to Security Sector Reform, 13 October 2005, 12566/4/05
<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012566%202005%20REV%204>

16. Council Conclusions of 15 December 2006 (16879/1/06) endorsing the EU Concept for support to Disarmament, Demobilisation and Reintegration(DDR)
https://ec.europa.eu/europeaid/policies/fragility-and-crisis-management/links-between-security-and-development/security-sector_en

III. Elements of transitional justice

As mentioned above, truth, justice, reparations and guarantees of non-recurrence/institutional reform constitute the four elements of transitional justice. Each element comprises a variety of measures, both judicial and non-judicial.

1) **Criminal justice:** The obligation of states to investigate and prosecute “serious crimes under international law” is today firmly established under treaty law. The ICC statute affirms that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes¹⁷.” The UN General Assembly also confirmed that “States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.¹⁸” For this set of serious crimes under international law, there can be no impunity¹⁹. This reflects the legacy of the Nuremberg and Tokyo trials. The term “serious crimes under international law” is defined by the UN in the “Updated Set of Principles to Combat Impunity²⁰” as encompassing gross violations of human rights and serious violations of international humanitarian law²¹.

Beyond de jure impunity (where laws are inadequate, either because they do not criminalise conduct that should be criminalised, or because they shield perpetrators from prosecution), de facto impunity can also arise because of the challenging situations pertaining in post-conflict or post-authoritarian societies. Large numbers of victims and perpetrators, weak state institutions, insufficient political will and inadequate expertise in dealing with mass crimes can contribute to de facto impunity. This problem can only be addressed through a comprehensive and practical approach. This may include legislative action, law enforcement and judicial reform and capacity building, and should involve close cooperation with victims and civil society. Of fundamental importance is also the early establishment of coherent and effective investigative and prosecutorial strategies. Rosters of impartial, highly trained experts can be rapidly deployed to assist governments in carrying out independent investigations. National prosecution should be based on clear objectives and an investigation of all types of crimes, on all sides of a conflict, irrespective of the alleged perpetrators. Often due to the scale of violations during conflict or dictatorship, it is not possible to try all perpetrators. Strategies for prosecution should be particularly concerned with the systemic and/or structural dimensions of massive violations. Where these strategies include prioritisation or the selection of types of cases or alleged perpetrators, this should be based on clear criteria. Criminal justice efforts must also adhere to the principles of fair trial, due process and access to justice for victims. They should be accompanied by a robust communication and outreach strategy to connect with victims and affected communities and to help to restore trust in national judicial institutions. The establishment of hybrid domestic-international tribunals or the temporary inclusion of international staff, including prosecutors and judges, within the domestic justice system, may also have a role to play.

Position of the EU: *The EU stresses the importance for each state to safeguard the administration of justice independence and impartiality of the judiciary, and to generate political will in order to exercise its criminal jurisdiction over those responsible for serious crimes under international law²². The EU therefore **supports reforms of national criminal legislation** in order to ensure that it complies with international law, as well as **initiatives that seek to reinforce or develop national investigative, prosecutorial and judicial strategies***

17. 6th preambular paragraph

18. A/RES/60/147.

19. For a detailed discussion on amnesties please see chapter IV

20. Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102 and E/CN.4/2005/102/Add.1

21. *ibid*, p. 6: “(...) the phrase “serious crimes under international law” encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.”

22. For guidance see the Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, on the topic of prosecutorial prioritisation strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law, 27 August 2014. A/HRC/27/56

and capability, adequate legal defence, and long-term protection and assistance for witnesses and victims. In cases where the ICC is involved, the **EU provides support to the ICC** in fulfilling its mandate and promotes co-operation with the Court. Where appropriate, the **EU also supports alternative ways of establishing justice** (mediation practices or tradition-based mechanisms which are in line with international standards) that can complement formal criminal proceedings.

2) **Truth-seeking initiatives:** The right to truth is contained in international legal and policy instruments²³ and has been affirmed by both the Inter-American and the European Court of Human Rights²⁴ as well as by the African Commission on Human and Peoples' rights²⁵. Truth commissions are flexible instruments which are victim-centered in nature and which can be used to a wide variety of ends, including to comprise a historical record, but also to have a national dialogue by way of public hearings, and to make recommendations for various reforms. Documentation and truth-seeking processes undertaken by truth commissions, commissions of inquiry, or other fact-finding missions can assist in investigating current and past human rights violations or abuses, thus contributing to public recognition of these violations and of the suffering of victims²⁶. Beyond the importance for individuals to know the truth, it is also imperative for society as a whole to learn the truth regarding violations, including the identity of the perpetrators and the causes, facts and circumstances in which such violations took place. The duty of states to preserve archives and other evidence, and to facilitate knowledge of those violations, is crucial to achieve the societal dimension of the right to truth²⁷. Reports and recommendations of truth commissions, as well as the collecting and archiving of information, can be useful for prosecutorial efforts, reparations programmes and institutional reforms. Ensuring the right of citizens and in particular victims to access information and public documents is instrumental in achieving truth and re-establishing trust in the countries' institutions. Truth commissions may complement criminal prosecutions, not substitute them. Granting amnesties for serious crimes under international law cannot be their function and has rarely been the case in practice.

Position of the EU: *The EU promotes truth-seeking initiatives based on international law and best practice. The EU supports close cooperation between truth commissions, victims' groups and civil society, both before and during the work of a commission, as well as at the implementation and follow up stage. The EU encourages states to implement truth commissions' recommendations and to preserve memory by undertaking measures such as securing archives and other evidence. The EU is cognisant of the importance of enhancing the quality of documentation and fact-finding efforts to make truth-telling effective.*

3) **Reparations:** The right of victims of human rights violations to remedy is enshrined in international law²⁸ and has been reaffirmed in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²⁹. Reparations programmes seek to redress harm suffered by victims as a result of serious crimes under international law by providing a range of material and/or symbolic benefits to victims. They can include measures

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23. The "Right to Truth" needs to be read in the specific context of the Additional Protocol (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (articles 32 and 33) and, for those states which are parties to this Convention, the International Convention for the Protection of All Persons from Enforced Disappearance (article 24). The right to truth has been the subject of Human Rights Council Resolutions 9/11 and 12/12. It is also worth recalling that a specific right to the truth may be characterised differently in some legal systems as the right to know or the right to be informed or freedom of information.
 24. *El-Masri v. The Former Yugoslav Republic Of Macedonia*, ECtHR, 39630/0913 (2012), *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), *Myrna Mack Chang Case*, Inter-Am.Ct.H.R. (Ser. C) No. 101, 274-75 (2003), *Bámaca Velásquez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 91, 77 (2002), *Barrios Altos Case*, Inter-Am.Ct.H.R. (Ser. C) No. 75 (2001).
 25. The African Commission infers a right to truth as part of a right to an effective remedy, see the Commission's Principles and guidelines on the right to a fair trial and legal assistance in Africa, African Union Doc. DOC/OS(XXX)247); see also Resolution ACHPR/Res.111 (XXXII) 07: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence (2007), which explicitly recognises a right to truth.
 26. E/CN.4/2005/102/Add.1
 27. HRC Resolution 2005/26
 28. Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 39 of the Convention on the Rights of the Child, and article 75 of the Rome Statute of the International Criminal Court.
 29. UN General Assembly 2005 A/RES/60/147

such as monetary compensation, rehabilitation (e.g. medical and psychological services, educational support), measures of socio-economic reintegration, return of property or compensation for loss thereof, but also official public apologies, building museums and memorials, and establishing days of commemoration³⁰. The recommendations made by truth commissions may establish a framework or include proposals for a reparation policy. The potential to access reparations should be as inclusive as possible in order to avoid any marginalisation of victims and to support their reintegration and empowerment in society.

Position of the EU: *The EU encourages a participatory, victim-focused approach to reparations policies with the aim of restoring justice and the full reintegration and rehabilitation of victims.*

4) **Institutional reform/guarantees of non-recurrence:** In situations of conflict or in authoritarian states, public institutions are often instruments of repression and injustice, and they may also lack technical capacity. Institutional reform may therefore prove necessary in order to consolidate rule of law and ensure the genuine accountability of public powers in order to re-establish trust, prevent repetition of human rights violations in the future, and ensure the protection of human rights. Institutional reform should include measures promoting integrity, legitimacy, accountability, ensuring the principles of representation and responsiveness of public institutions, and strengthening oversight and democratic control. Participation, including by civil society is essential in the process. Beyond institutional reform, the guarantees of non-recurrence require further measures such as SSR, DDR, educational and constitutional/legislative reform. Best results are achieved where top-down initiatives are complimented with bottom up initiatives, in which local governments, citizens and civil society build a strong basis for inclusive governance and local democracy.

Position of the EU: *The EU applies the above principles when providing **support to Security and Justice Sector Reforms**. The EU underscores the **importance of civilian control, governance and accountability of security forces**³¹. The EU supports initiatives aiming at strengthening the judiciary in order to ensure its independence, impartiality, accessibility and effectiveness, as well as the repeal/amendment of national legislation that contravenes international norms. The EU encourages states to engage in meaningful consultation with civil society throughout the reform process and beyond. The EU, recognising the power of education to transform societies, **supports education programmes** as well as comprehensive training programmes on human rights and international criminal and humanitarian law standards, drawing lessons from a country's own experience of violations and abuses. The EU also encourages states to accompany institutional reforms with **vetting procedures and codes of conduct, when appropriate and in accordance with international human rights standards**. Such procedures should, be transparent, based on clear criteria and be implemented by independent institutions. It is important to ensure that those who have been convicted for serious crimes under international law can no longer hold public office.*

The mechanisms described in the sections above represent examples that have emerged in practice and do not limit the ways in which transitional justice can be addressed. A flexible approach is required in order to respond effectively to the evolving challenges and demands of transitional justice.

30. UN Guidance Note of the Secretary-General on the UN Approach to Transitional Justice:
http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf

31. EU Concept for support to Security Sector Reform, 13 October 2005, 12566/4/05
<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012566%202005%20REV%204>

IV. Guiding principles for EU engagement on transitional justice

When developing a transitional justice support strategy, **the EU will strive for a flexible approach** based on a **genuine understanding of specific contexts and needs, and the viability** of meaningful transitional justice processes. The following principles will guide EU engagement in transitional justice in its external action.

1. The process of transitional justice must be nationally-owned, participative, consultative and include outreach

Transitional justice can only reach its goals if the process of its design and implementation is **nationally and locally-owned and inclusive**, while respecting international norms and standards. It is essential that the process is initiated and driven by government authorities and local civil society.

Active, free and meaningful participation empowers all rights-holders to articulate their needs and expectations. Identifying the relevant stakeholders at the outset of a transitional justice strategy is essential in order to understand and consider their specific needs and demands.

Public acknowledgement is crucial for any transitional justice process. Outreach activities, including public consultation, media engagement and the dissemination of information should thus inform the public about the purpose and design of transitional justice mechanisms, be geared towards understanding the views and expectations of the community, and be tailored to avoid or correct misinterpretations and to manage expectations. Such outreach activities should not be limited to major cities but include all affected communities.

The EU supports dialogue and the constructive involvement of victims, civil society as well as other relevant actors in the design and implementation of transitional justice mechanisms, including through appropriate outreach and communication activities.

2. Apply a context-specific approach

There is **no 'one-size-fit-for-all' approach** to transitional justice: any approach must be based on the needs and objectives of the context and country concerned. While different analysis tools such as conflict analysis³², or Post Conflict Needs Assessment and Transitional Results Frameworks (PCNA), exist to identify specific factors, an analysis of the situation from a transitional justice perspective is required for a comprehensive understanding of the issues in the particular context. This includes an assessment of the nature, role and impact of violations or abuses on the affected population without discrimination, and the **identification of the needs of the respective victim groups**. The international dimension of local conflicts e.g. the involvement of foreign governments or enterprises must also be factored into the analysis.

In contexts where there is no genuine political will to move forward with meaningful transitional justice processes, informal initiatives developed and implemented at the grass roots level can provide impetus to the transitional justice agenda and combat impunity. Informal strategies can also work alongside formal mechanisms to **strengthen their political and societal impact**.

The type and level of EU engagement, as well as the instruments to be used for the support of transitional justice, should be informed by this principle and determined according to the context, based on thorough analysis and consultation.

32. On conflict analysis see the EEAS and Commission Guidance note on the use of Conflict Analysis in support of EU external action:

https://webgate.ec.europa.eu/multisite/devco/sites/devco/files/guidance%20note%20on%20conflict%20analysis%20Ares%282013%293368902_20131026_en_0.pdf

3. Address transitional justice in a comprehensive manner paying due regard to timing

Transitional justice measures should not be seen in isolation from, or in competition with, each other but rather as **mutually reinforcing**. **Early engagement** in transitional justice processes is desirable as it provides a signal against impunity and paves the way for justice and rule of law.

Each element of transitional justice plays an important role and cannot substitute for another (e.g. truth commission, reparations and institutional reforms are not substitutes for criminal prosecution). In fact, each of these mechanisms is more effective when implemented in combination with others. Thus, **a comprehensive approach** demands a coherent strategy in which each element of a transitional justice strategy acknowledges the need for, and provides space for, other initiatives. Experience shows however that not all possible components of a transitional justice strategy need to be implemented simultaneously.

It is essential to establish realistic timelines that take account of the particular context, and propose relevant transitional justice measures in light of an **enabling environment** (security, political, social and economic conditions, capacities of existing structures, the position of civil society).

Even during conflict, transitional justice processes can begin by means of documentation of violations and abuses, dialogue projects and the setting up of inclusive local government systems.

*As it is not possible to predict the dynamics of any transition process in advance, the EU transitional justice support activities should take account of current developments without losing sight of the longer timeframe and the fact that the transitional justice process **requires a comprehensive approach**.*

4. Compliance with international norms and standards

In line with the fact that the EU's external action is guided by principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity and respect for the principles of the UN Charter and international law, the EU supports transitional justice processes that are **in compliance with international norms and standards**.

The question of permissibility of amnesties³³ often arises during the negotiation of peace agreements and during other processes of transition. Under international humanitarian law, States can grant to persons who have participated in a non-international armed conflict amnesty for such crimes as rebellion, sedition and treason. States can also grant rebels amnesty for legitimate acts of war (such as killing members of the opposing armed forces³⁴). This provision aims at encouraging reconciliation by releasing those detained or punished for the mere fact of having participated to the hostilities. It, however, does not encompass amnesty for those having committed serious international crimes³⁵.

33. Amnesty can be described as legal measures that have the effect of:

- (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
- (b) Retroactively nullifying legal liability previously established.

34. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 6(5).

35. OHCHR, Rule-of Law Tools for Post-conflict States – Amnesties, 2009, p. 16

A number of widely-ratified international human rights and humanitarian law treaties³⁶ explicitly oblige States parties to ensure the investigation and prosecution of specific offences, either by instituting criminal proceedings against suspected perpetrators in their own courts, or by sending the suspects to another appropriate jurisdiction for prosecution. Accordingly, any amnesty that forecloses prosecution of an offence that is subject to this type of obligation would be incompatible with States' obligations under the treaty concerned. Amnesties for gross violations of human rights and serious violations of humanitarian law may also be in breach of States' obligations to punish these crimes under customary international law. In addition, where amnesties are permitted under international law they still must be consistent with human rights including the right to remedy or truth.

Amnesties that exempt from prosecution those responsible for serious crimes under international law in the hope of securing peace have often failed to achieve their aim, and have arguably emboldened their beneficiaries to commit further crimes and undermined trust in the criminal justice system. Conversely, peace agreements have been reached without amnesty provisions for gross violations of human rights or international humanitarian law in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict. By opposing amnesties that establish impunity for serious crimes under international law, this policy seeks to safeguard a space for justice, even when conditions for prosecution are not yet adequately established.

*The EU firmly believes in the principle that **there cannot be lasting peace without justice**. Therefore the **EU supports the established United Nations policy** to oppose amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations³⁷.*

5. Applying a Rights-Based Approach (RBA) to transitional justice

Since May 2014, the **European Union has stepped up its efforts to ensure effective implementation of a Rights-Based Approach (RBA) in all sectors of EU development cooperation**, with the adoption of the Tool – box «A Rights-Based Approach, encompassing all human rights, for EU development cooperation³⁸» and the subsequent adoption of related Council Conclusions³⁹.

A RBA considers human rights principles and standards both as a means and as a goal of development cooperation. It changes the analytical approach and integrates the achievement and fulfilment of human rights in the design, implementation, monitoring and evaluation of all development policies and programmes.

The EU encourages rights-based transitional justice processes. The EU believes that the implementation of the RBA will sustain and reinforce the effectiveness of its support to transitional justice processes. In particular, the EU will apply the five RBA principles in its new transitional justice support activities: (i) legality, universality and indivisibility of human rights (ii) participation (iii) non – discrimination (iv) accountability (v) transparency.

36. Amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights or serious violations of international humanitarian law are inconsistent with State parties' obligations under various sources of international law:

- An amnesty for genocide would violate the Genocide Convention;
- An amnesty for crimes against humanity would be inconsistent with States' obligations under several treaties;
- Amnesties that prevent prosecution of war crimes, whether committed during international or non-international armed conflicts, are inconsistent with States' obligations under the widely ratified Geneva Conventions of 1949 and their 1977 Protocols;
- An amnesty for torture would violate States parties' duties under the widely ratified Convention against Torture as well as other treaties;

37. Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 24 August 2004, paragraphs 10, 64c

38. Commission Staff Working Document Tool Box a Rights Based Approach, Encompassing all Human Rights for EU Development Co-Operation SWD (2014) 152

39. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/142682.pdf

6. Encourage a victim-centred approach

A victim-centered approach requires the early involvement and active participation of victims and affected communities, including diverse ethnic, racial, religious and other groups or minorities. Victims might have a right to justice that goes beyond that pursued through the means of criminal proceedings. The specific interests and needs of the most vulnerable victims should be prioritised to the greatest extent possible. Considerations of the rights of victims may be constrained by the challenges of tackling barriers to meaningful participation, finding their adequate representatives, and of defining victimhood when the lines between victims and perpetrators are blurred.

The EU supports domestic outreach efforts which help to facilitate active victim participation in the process and identify victims' needs and perspectives, but which are carried out in a way that manage victims' expectations.

*The EU encourages states to adopt a victim-centered approach to transitional justice, putting the victims at the heart of the debate, and supports measures ensuring the active **participation, security and reintegration** of victims.*

7. Integrate a gender dimension

Pre-existing gender inequalities inform both the nature of the crimes committed and the consequences of those violations. Victims' experiences of conflict include sexual violence but also wide-scale human rights and socio-economic violations and gender-differentiated impacts of forced disappearances, torture, loss of family members and other violations or abuses. It is critical for transitional justice mechanisms to acknowledge and respond to the full range of violations women and girls experience during conflict as well as men and women's differentiated needs with respect to accessing and benefiting from transitional justice processes. In this respect, gender must be mainstreamed throughout transitional justice mechanisms and processes, from their design through to implementation of recommendations. With the adoption of the **2008 EU Comprehensive Approach to the EU implementation of the United Nations Security Council Resolution 1325 and 1820 on women, peace and security** and related resolutions⁴⁰, the EU has highlighted its commitment to "enhance the involvement of women and their access to justice, including transitional justice mechanisms" in support of the strengthening and reform of the justice sector and to build capacity for the prosecution of crimes against girls and women and the protection of witnesses⁴¹. The EU will therefore ensure that its efforts contribute to increasing women and girls' access to justice and their ability to secure redress. The EU Guidelines on violence against women and girls and combating all forms of discrimination against them provide a useful EU policy framework in this regard. Also, the Joint Commission/EEAS Staff Working Document «Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016-2020» calls on EU Delegations to focus efforts in the area of girl's and women's physical and psychological integrity. Ending sexual violence and gender-based violence in conflict and post conflict situations is a priority area for the EU, in which transitional justice has a strong role to play in bringing perpetrators to account, preventing further violence and supporting survivors to overcome violations.

*The EU encourages investment in, and focus on, gender-sensitive transitional justice which **addresses the full range of rights violations and abuses** during conflict, and **responds to the differentiated vulnerabilities and needs**. The EU supports the provision of training within judicial and security systems on gender and conflict, including on the women, peace and security agenda, The EU also supports women's **leadership** and role in conflict resolution and peace-building. The EU recognises the important role that women human rights defenders can play in making sure that women and their concerns are represented in transitional justice processes.*

⁴⁰. UN Security Council resolutions 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013)

⁴¹. SEC (2008)/15671/1/08

8. Adopt a child sensitive approach

Children are affected by conflicts in many different ways. Crimes are committed against children, not least through their enlistment, conscription or use for participation in hostilities. Schools are often a specific target during conflicts, destroyed or used by fighting forces. But children may also be affected through loss of family members and their inability to access basic services, such as health and education. In some cases, **children may be simultaneously victims, survivors, witnesses and perpetrators of violations**. Children are thus important stakeholders in transitional justice processes; they hold a unique view of what happened, and are a crucial constituent for building a more peaceful future. Not to involve children in these processes would fail to comply with the UN Convention on the Rights of the Child that guarantees the right of children to life, survival and development, as well as the right to express their views freely in all matters affecting them. The EU Agenda for the Rights of the Child⁴², the EU Guidelines on the Rights of the Child and on Children and Armed Conflict (2008)⁴³ including its Strategy for Implementing the Guidelines (2010) , and the EU UNICEF Toolkit for integrating child rights in development (2014)⁴⁴, provide guidance on a child-sensitive approach.

*The EU supports measures that protect and enable **access of children to justice**, and their involvement in the work of transitional justice mechanisms in a way that contributes to children's recovery and long term reintegration and that respect the best interests of the child principle as contained in the UN Convention on the Rights of the Child. The EU encourages measures which are sensitive to the special needs of child victims and perpetrators, including through the provision of **physical and psychological assistance, access to quality education** and vocational training.*

9. Situate transitional justice within the security-development nexus paradigm

As transitional justice mechanisms can significantly contribute to initiating post-conflict recovery and in preventing the emergence of new cycles of violence, the EU recognises the **links between rule of law, peacebuilding, development and transitional justice**. In this context, the main EU objective is to assist partner governments to provide effective, legitimate and accountable justice and security services to their citizens, in a manner that is consistent with democratic norms, rule of law values, good governance principles and respect for human rights. The EU therefore supports transitional justice processes that are forward-looking, with the aim to transform the society by identifying and dealing with root causes of conflict and violence that may reside in discrimination, marginalisation or violation of social, economic and cultural rights. EU support to transitional justice mechanisms and processes are based on Articles 208 and 212 TFEU. Transitional justice is therefore considered as an **integral part of EU external assistance**.

*Since the design and successful implementation of transitional justice processes are interlinked with security, peace, stability and sustainable development, EU support for transitional justice processes should be framed within a **long-term and continuous development cooperation strategy**.*

42. COM(2011) 60 final

43. http://eeas.europa.eu/human_rights/guidelines/index_en.htm

44. Council of the European Union (2010) 2010 Review of the Implementation strategy of the EU Guidelines on Children and Armed Conflicts.

V. Measures to implement the EU framework on support to transitional justice

The EU has an extensive array of political and financial instruments at its disposal for promoting and supporting transitional justice activities. Locally-driven processes will be promoted and facilitated by an appropriate mix of EU instruments tailored to the specific context of each country. The following actions should strengthen EU transitional justice involvement and make it more coherent and efficient.

1. Devising an appropriate EU response based on a thorough analysis and assessment of the specific context.

EU support to transitional justice in a partner country should start with an understanding of the situation and related challenges of transitional justice processes, making use of all available information, including the EU Conflict Early Warning System (EWS), local human rights country strategies and information collected by civil society. This analysis should draw on monitoring and reporting by EU missions in the field (EU delegations, CSDP missions and operations, EU Special Representatives and Member States embassies) as well as reports from regional and international human rights bodies, and identify how the EU can support transitional justice, taking into account existing EU resources and action in the country or region in question. Such an analysis should be improved by better coordination and sharing of information among EU headquarters, EU missions in the field and the Member States. Consideration must be given to the challenges of supporting transitional justice processes or mechanisms where there is limited political will at national level in support of their implementation. The EU should ensure that its support is not used to legitimise a process that does not adequately respond to the rights and needs of the victims of gross human rights violations in a given context. Building on this analysis, the EU should develop its support to transitional justice in a specific situation in a flexible manner, implementing the four elements mentioned above and encouraging local ownership. The EU Delegations should assist in enhancing the coherence of actions of the Union, the Member States and international organisations at the country level.

Actions:

- The EEAS and Commission Services will facilitate a comprehensive and holistic approach to transitional justice, ensuring coordination between all relevant EU institutions/services and Member States.
- Timely identification of the need for context-appropriate EU transitional justice support activity shall be carried out by EU missions in the field in close consultation with the government, civil society and other stakeholders. This will include comprehensive analysis of the challenges of supporting transitional justice mechanisms where there is limited political will in support of their implementation.
- The EEAS should ensure that all relevant EU actors are informed and engaged in the analysis of transitional justice processes and in the identification of EU support to transitional justice.
- The EU shall identify and use an appropriate mix of instruments, to address transitional justice issues at country level.
- EU missions in countries concerned will monitor transitional justice processes and activities as part of their regular human rights monitoring and reporting. Where relevant, transitional justice shall form part of human rights country strategies.
- Common Security and Defence Policy missions will draw attention to their support of transitional justice processes and the achievement of its goals in their annual reports.
- When appropriate, reports from EU missions will be taken up in the relevant Council Working Parties and / or in the Political and Security Committee (PSC) in order to identify an appropriate EU response.

2. Integrating transitional justice into crises response and peacebuilding

Transitional justice contributes to the goals of peacebuilding, enhancing relations between state and society, and establishing the rule of law. The guiding principles highlighted above in section IV should therefore be connected with EU crisis response interventions and placed in the larger context of increasing linkages between transitional justice and peacebuilding.

Assistance under the crisis response component of the Instrument contributing to Stability and Peace (IcSP) continues to provide a basis to further develop support for international criminal tribunals and ad hoc national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights, established in accordance with international standards in the fields of human rights and the rule of law⁴⁵. Moreover, under the IcSP component on conflict prevention, peace-building and crisis preparedness, an opportunity now presents itself to build overall capacity of relevant stakeholders in transitional justice in the areas of mediation, dialogue and reconciliation, of civilian stabilisation missions and of post-conflict recovery activities⁴⁶.

EU missions also consider transitional justice elements in their monitoring and support of democratic institution-building as well as in security and justice sector reforms. For example, promoting vetting mechanisms for security and justice personnel, supporting national capacity to investigate and prosecute serious international crimes and, where relevant, supporting investigations, prosecutions and other relevant work by the ICC.

The EU Special Representatives (EUSR) mandates include, where appropriate, support to stabilisation and reconciliation processes, contribution to initiatives leading to the settlement of conflicts and to the negotiation and implementation of cease-fire agreements, and facilitation and maintenance of close contacts with all the parties. In this framework, promotion of, and support to, transitional justice should, where appropriate, constitute an explicit part of the mandates of EUSRs.

Actions:

- The EU should ensure that catalysers for transitional justice processes (such as state actors, civil society organisations, victims' groups and political parties) are identified in post-conflict interventions through tools that have a specific transitional justice perspective, providing an entry point for conceptualising, negotiating and financing a strategy for recovery and development in fragile, post-conflict settings. National and local ownership is essential to ensure successful transitional justice processes.
- On the basis of the analysis of the situation in the partner country, the EEAS, Commission services and EU missions will seek to ensure that transitional justice forms a vital component in the processes of any peace negotiations which the EU supports. Where necessary, the EU will raise transitional justice issues and the respect of guiding principles set down in section IV in political contacts and dialogues with partner countries, including both the government and opposition.
- The planning process for each CSDP mission and operation will assess how the mission and operation could support the transitional justice process and, in particular, how this mission and operation could contribute to the fight against impunity and support institutional reform.
- Where appropriate, the mandates of EUSRs will include support and promotion of transitional justice efforts.

⁴⁵. Art. 3 (2) (e) of the Regulation (EU) No 230/2014 of 11 March 2014 establishing an Instrument contributing to Stability and Peace, OJ L 77/1, 15.3.2014

⁴⁶. Art. 4 (1) (b) (c) and (d) *ibid*.

3. Linking transitional justice with development cooperation

Justice reform is one of the guarantees of non-recurrence (cf element 4 above) and is equally an important component of development co-operation activities. Justice reform processes are understood to include among others constitutional and legislative reforms, informal and formal justice systems and security sector reforms. A considerable amount of development funds are allocated to strengthen the rule of law and support third countries' national justice systems, including in post-conflict and transition situations. Given States' primary duty to investigate serious international crimes, the EU is particularly engaged in promoting and contributing to strengthening the capacity of national judicial systems to investigate and prosecute serious international crimes⁴⁷.

The European Union provides financial support to transitional justice mechanisms through its geographic (European Neighbourhood Instrument, European Development Fund, Development Cooperation Instrument⁴⁸), as well as thematic funding instruments, in particular the Instrument contributing to Stability and Peace (IcSP⁴⁹) and the European Instrument for Democracy and Human Rights (EIDHR⁵⁰). For instance, the EU bilateral support under the European Neighbourhood Instrument targets human rights and the rule of law, including reform of justice, of the public administration and of the security sector.⁵¹ Also under the geographic programmes of the Development Cooperation Instrument and the European Development Fund, the EU supports strengthening the rule of law and the capacity and independence of judicial and protection systems and ensuring unhindered and equal access to justice for all.⁵² Last but not least, under the Instrument for Democracy and Human Rights the EU assistance focuses on civil society organisations supporting and promoting transitional justice, as well as the ICC, ad hoc international criminal tribunals and the processes of transitional justice and truth and reconciliation mechanisms⁵³.

Actions:

- Where relevant and appropriate, the EEAS, the Commission services and Member States should ensure that when programming and implementing national and regional development aid programmes, support to transitional justice processes is included. EU support to transitional justice processes under the thematic instruments is complementary to that provided under geographic instruments. EU programming is planned and implemented to take into account the necessity to frame the long term nature of transitional justice processes within long-term development cooperation strategies and to achieve continuity of EU support under those instruments.
- The EEAS, Commission Services, EU Member States and EU Missions share information on projects financed in partner countries in the field of transitional justice to allow better coordination and efficient use of resources.

47. Joint Working Document on Advancing the Rome Statute's Principle of Complementarity SWD (2013) 26 final.

48. Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 OJ L 77/27, 15.3.2014 and Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument OJ L 77/27, 15.3.2014.

49. Formerly known as Instrument for Stability (IfS). See at section 2 above.

50. Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide.

51. Art. 2 (2) (a) and annex II of the Regulation (EU) No 232/2014.

52. Annex I of the Regulation (EU) No 233/2014 and Cotonou Agreement, art (8), (9), (33), (96) et seq.

53. Art. 2(1)(a) of the Regulation (EU) No 235/2014.

4. Cooperation with international actors, civil society and within multilateral fora

EU support to transitional justice should be linked and coordinated with actions, resources and expertise of other international and regional actors, in particular at the UN level. Also, the EU should closely work with civil society and provide support to civil society in the design and implementation of transitional justice strategies being crucial for national ownership of transitional justice processes.

Actions:

- EU missions will ensure close coordination and consultation with the UN and other international and regional bodies on the ground as well as with international and local civil society.
- An analysis prior to EU transitional justice involvement will include inputs from civil society and international actors.
- The EU will continue its cooperation with the UN, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and with regional organisations.
- The Member States will draw attention, as appropriate, to transitional justice processes in the Universal Periodic Review conducted by the UN Human Rights Council. The implementation of recommendations accepted by the state under review will be monitored and supported as appropriate.

5. Exchange of information and best practices

The implementation of the EU framework on support to transitional justice shall be supported by an informal network on transitional justice, that will help to increase inter-institutional coordination, together with exchanges in the Council Working Group on Human Rights (COHOM), to promote a coherent approach to transitional justice and to facilitate exchange of information and best practices between different actors involved.

Actions:

- The informal network shall be composed of staff working on transitional justice across the EEAS and the Commission services. It shall exchange regularly and will consult with the representatives of the UN (in particular with the Office of the High Commissioner for Human Rights (OHCHR) and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence) and other international and regional organisations as well as civil society organisations.
- The network shall in particular address and gather information of lessons learned, best practice and indicators used to evaluate results achieved in support to transitional justice processes by the EU. The network may be consulted by geographic divisions and delegations regarding transitional justice situations they are confronted with.
- Together with EU missions, the network shall work on developing more practical guidance on certain aspects of transitional justice to facilitate work on the ground.
- COHOM shall also undertake periodic exchanges on transitional justice and shall consult with the UN and other regional organisations as well as civil society groups working on transitional justice issues.

6. Training

To take a more comprehensive and holistic approach to transitional justice, specific training should be developed in order to broaden expertise on transitional justice across EU institutions and missions in the field.

Actions:

- Training on transitional justice shall be offered to EEAS, Commission services and Member State staff working in / on countries concerned and, where appropriate, also to EUSR teams and members of CSDP operations and missions.
- Member States should be invited to share their training manuals, experiences and lessons learned during such trainings.

7. Transitional Justice in the EU enlargement policy

The EU considers transitional justice to be a priority for candidate countries and potential candidates. The Copenhagen criteria cover these issues through the respect for fundamental rights and the rule of law, and all countries seeking to accede to the Union must demonstrate a credible commitment to promoting these principles by addressing all relevant aspects where obstacles to achieving justice persist.

Actions:

- The EEAS and Commission services, in coordination with Member States, monitor and offer guidance on issues related to transitional justice through pre-accession political dialogue and annual progress reports. The issues should be raised at an early stage during accession talks (Political criteria and Chapter 23), in order to provide sufficient time for tangible progress. Particular attention should be paid to fighting impunity in cases of war crimes, crimes against humanity and genocide ensuring that the rights of all victims are respected, with a particular reference to refugees and IDPs, and ultimately in ensuring that the conflicts of the past cannot reoccur.
- The EU assists these countries to address such issues by means of a comprehensive technical and financial support (Instrument for Pre-accession Assistance II). Particular help is provided to ensure the strengthening of NGOs and civil society committed to seeking truth and promoting reconciliation.

VI Reporting, Monitoring and Evaluation

EU missions will report on implementation through Human Rights Country Strategy Implementation Reports and periodic reporting by CSDP missions.

At Brussels level, there will be annual reporting through the EU's Annual Report on Human Rights and Democracy, the EU's Annual Report on development and external assistance policies and their implementation and the EU's Comprehensive Annual Report on CSDP and CSDP related training and the EU's annual report on the main aspects and basis choices of the CFSP.

EU support to transitional justice will be evaluated regularly including through Council Working Groups and project evaluation.