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HOW TRANSITIONAL JUSTICE CAN HELP PEACE IN UKRAINE?

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Nove Pravosuddya Justice Sector Reform Program (New Justice)

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INTRODUCTION

The USAID New Justice Program is designed to support the judiciary, the government, the parliament, the bar, law schools, civil society, media and citizens to create the conditions for an independent, accountable, transparent, and effective justice system that upholds the rule of law and to fight corruption in Ukraine. Pursuant to Objective 5 of the Program: Access to Justice Expanded and Human Rights Protected,¹ New Justice supports justice sector stakeholders and civil society in addressing the need for protecting the rights of citizens including vulnerable groups populations during the armed conflict in the territory of Ukraine.

The International Center for Transitional Justice (ICTJ) works across society and borders to confront the causes and address the consequences of massive human rights violations. ICTJ affirms victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion.

In June-July 2021, USAID New Justice Program in partnership with USAID Human Rights in Action Program (being implemented by the Ukrainian Helsinki Human Rights Union) and International Center for Transitional Justice conducted a seriee of webinars for Ukrainian stakeholders to raise their awareness on 1) peculiarities of criminal proceedings involving participation in an armed conflict, 2) gender sensitive approaches in state policy on transitional justice and the role of civil society organizations in advocacy, 3) and transitional justice concepts for community-based activities on dialog building during ongoing conflict. As a results of the webinars, numerous observations and conclusions were developed and presented in this report.

¹ This includes Sub-Objective 5.1. Access to Justice for Citizens, Including the Most Vulnerable, Expected Result 5.1.7. Citizens, including vulnerable groups, actively participate in access to justice reforms, Sub-Objective 5.2: Human Rights Protected Especially the Rights Of the Most Vulnerable, Expected Result 5.2.1. Awareness of human rights and humanitarian law, how to exercise those rights, and the role of the courts in protecting human rights increased among judges, judicial personnel and advocates, Expected Result 5.2.3 Referral Networks among Judges, Judicial Personnel, Advocates, Social Workers, Police and Community Leaders Strengthened.

TRANSITIONAL JUSTICE AS MEANS TO A LONG-TERM PEACEBUILDING GOAL

Ukraine is facing a serious aggression and conflict that affects its territorial integrity. The Russian occupation of Crimea and the separatist armed struggle initiated by Russian supported militias in the Donbas region have dragged on for years in what is becoming a protracted conflict. The conflict has its roots in a diverse demographic, cultural, and language composition, with regions historically being pulled east or west, and occupied by different powers. This competition has included a natural process of migration and acculturation, as well as episodes of forced migration, transfers of population, and even massacres and famine.² Dealing with the present conflict requires examining not only the consequences of the current violations committed, but also the past and its legacies of fear, distrust, and resentment. One key consideration for defining an effective strategy for responding to such complex situations is the need to look for solutions that could guarantee sustainable peace. There is no military solution in sight, neither is it feasible to consider the permanent political domination of one group over the other. The current situation is evidence that all previous resolutions attempted, through the imposition of dominance of one country over the other, or one linguistic group over the other, including swinging approaches to address the linguistic difference, have been not only futile but are precisely the fuel for increased resentment.

Transitional justice is often described as a series of policy mechanisms, or even a toolbox, to be applied to post-authoritarian or post-conflict situations, mainly for addressing violations of civil and political rights. Historically, it has often been equated to (a) establishing a truth commission; (b) creating a special jurisdiction to investigate a try the most responsible for serious crimes, while providing amnesties or alternative solutions to other less serious crimes; (c) providing reparations to victims, through governmental processes that combine material and symbolic measures, as well as finding the missing and responding to other needs of victims; and (d) reforming the institutions most involved in perpetrating violations, or failing to protect victims from them, in order to prevent their repetition. Reflecting on the questions that led to the development of transitional justice and the ways it has been adapted to different contexts over the last thirty years, provides a richer and more nuanced understanding that could be useful in a situation like Ukraine.

Transitional justice is more than just a set of policies that offer some results. It is a process that seeks to confront the complex dilemmas that challenge sustainable peace and justice. This approach, far from being mechanistic, strives to anchor the respect for human rights as a guarantee for peace and to respond to the causes of conflict to help ensure coexistence. It requires multiple efforts to clarify facts about the violations that took place and create dialogue to help reduce their deniability; to

² See among others, Kaiser, Karl. "Ukraine: Root Causes of a Prolonged Conflict." METRO U.N., January 23, 2019.

acknowledge the plights of victims; to understand the grievances that different groups have, and their role in fueling violence; and to assume responsibility for the causes and consequences of those violations. Those processes should implement concrete actions that respond to the needs of victims, as well as foster political conditions and wide civic and political participation, guaranteeing safety from retribution and discrimination, as a requisite for civic trust.

The relevance of transitional justice in a context like Ukraine lies in its potential for helping a society learn from its past, address its legacies of violations and set the basis for a future of coexistence and good governance. Policies to achieve – under the transitional justice framework – have the respect of human rights and the dignity and worth of the human person as their foundation.³

This requires directing all the efforts to providing conditions towards strengthening trust, the rule of law, and the ability to manage conflicts and differences through peaceful means. Transitional justice cannot be farther from victor's justice, or from the imposition of severe punishment to those who subverted the legal order, particularly because there will be contested understandings of who did so and to what degree it was justified or not. However, it is equally further from providing general or blanket amnesties and pretending to forget all the wrongs and suffering. Accountability and acknowledgement of wrongdoing is defined as a means for a broader end: making sure that the repeated cycles of violence, which characterize the relationship between Ukraine and Russia and among ethnic and linguistic groups living in Ukraine, are replaced by sustainable peace⁴. Accountability is directed to a long-term goal of peace and coexistence.

³ This is the essence of the 1945 United Nations Charter, which bases peace on a strong commitment to respect and guarantee human rights.

⁴ For a tangible vision of how peacebuilding can be understood it is useful to paraphrasing John Paul Lederach: *If my grandchildren and your grandchildren are going to be living in this same place, let's make sure that we do our best to avoid them having to deal with the conflict that we inherited from our grandparents.* See Lederach, J.P., *The Moral Imagination: The Art and Soul of Building Peace*, Oxford University Press (New York, 2004).

GENDER-SENSITIVE APPROACH TO TRANSITIONAL JUSTICE

Just as the field of transitional justice has evolved in its conceptualization, so has it evolved in the way in which it addresses issues of gender justice. Historically, employing a gender-sensitive approach has been equated with focusing on women victims, and women's experiences have been solely seen through the lens of sexual violence. However, undertaking a this type of approach requires a broader understanding of how men and women are perceived in society and how these perceptions shape their experience of conflict. While one's sex is based upon biological characteristics as assigned at birth, one's gender is shaped by the roles and behaviors society expects men and women to fulfill based upon their sex. These roles shape the types of violations committed, as well as their underlying causes and short- and long-term consequences.

One of the first significant advancements in transitional justice was a recognition that gender inequalities and discrimination impact a woman's access to justice, and accordingly, special policies and procedures are necessary to mitigate these challenges. Several early transitional justice measures sought to treat men and women equally through a "gender-neutral" approach; however, this inevitably led to underreporting of sexual and gender-based violence (SGBV) and a lack of adequate participation of women in the process. Without a concentrated effort on the part of a transitional justice measure to address the obstacles victims of SGBV and women in general face when seeking truth and justice, they remained largely invisible. Thus, many criminal proceedings, truth commissions and reparation programs have developed special staff expertise or formed dedicated units to help operationalize gender considerations, such as measures to protect the confidentiality of SGBV victims and ways to research and investigate gendered patterns of violence. While these developments were significant, they often did not fully capture gendered experiences of conflict. Due to the advocacy of women's groups and gender justice activists, transitional justice has begun to apply a gender lens that is more inclusive. One significant step has been to recognize that while women and girls are often the predominate targets for sexual violence, men and boys are also victims in a wide range of contexts. Often these experiences go undocumented or are not seen through a gendered lens. For example, in the International Criminal Tribunal for the former Yugoslavia's case against Duško Tadić, the charges did not recognize the sexual nature of specific offenses against male victims and, in doing so, obscured an understanding of the harms suffered and the motivations behind the specific acts.⁵ Fortunately, the field is beginning to interrogate how gender roles and hierarchies fuel sexual violence regardless of whether the victim is a man or woman. Through a special unit focused on gender, the Kenya Truth, Justice and Reconciliation Commission was able to document how post-election sexual violence was intended to

⁵ Amrita Kapur and Kelli Muddell, "When No One Calls It Rape," International Center for Transitional Justice (December 2016).

humiliate women as the “weaker” sex and emasculate men so that they were perceived to be as weak as women. This information informed their analysis of patterns of sexual violence and contributed to recommendations for appropriate reparations.

Another key aspect to taking a gendered approach is identifying and addressing forms of gender-based violence that do not fall under the category of sexual violence. These types of violations are committed when the motivation or intended impact is linked to the victim’s gender and the values society associates with it. For example, in some contexts authorities have prevented women in detention from breastfeeding their infants until they cooperated during interrogation. Gender-based violence can also arise when individuals are targeted because they are perceived to deviate from expected gender roles or identities. In areas previously under ISIS rule, individuals who broke the strict rules on how men and women should behave and dress were subjected to various abuses, including torture and murder. In Iraq, human rights groups documented how men wearing tight jeans were suspected of being homosexual and were consequently thrown from buildings to their deaths. Finally, taking a gender-sensitive approach requires examining how structural inequalities impact the consequences of violations. Due to gender hierarchies, women often have less access to economic, political, and social resources than men. This impacts the harms they suffer because of a human rights violation. For example, wives of the disappeared often face more obstacles than their male counterparts. In Lebanon, a woman may face barriers to accessing family bank accounts or selling their homes because these economic resources have to be held in her husband’s name.⁶ Similarly, the economic consequences of a spouse being disabled or killed is often greater for a woman than a man. In most contexts, men have a higher average earning capacity than women. Thus, for widows it is much more difficult to sustain themselves and their families than it is for widowers.

Without this broader understanding and analysis of how gender roles impact the causes and consequences of human rights violations, a transitional justice process will be unable to capture the full range of SGBV that has occurred, provide adequate redress, and adequately contribute to the prevention of further violations.

⁶ Christalla Yakinthou, “Living with the Shadows of the Past: The impact of disappearance on wives of the missing in Lebanon,” International Center for Transitional Justice (March 2015).

APPROACHES TO CRIMINAL ACCOUNTABILITY OF HUMAN RIGHTS VIOLATIONS FOR PEACEBUILDING

As Ukraine confronts armed aggression, occupation, and separatism, perhaps one of the most difficult political dilemmas it faces is the need to demonstrate that criminal justice is not just a form of warfare, or as sometimes described, *lawfare*. Using legal tools and strategies to protect national interests, increase legitimacy, and obtain authoritative decisions by international courts that support the international position of Ukraine are all desirable. However, there is an important nuance to include when attempting to use national criminal law to address the aggression. Facing an aggression that has an internal as well as an external component makes this situation even more complicated.

Even if the immediate scenario provides strong incentives for using criminal justice to prosecute those involved in the aggression, occupation, and organized crime, it might be important to consider the long-term goal of unifying the country. The use of extraordinary legislation, counterterrorism laws, and norms that criminalize political activities or dissent under a label of terrorism, subversion, or treason can become a statement about the inability of Ukraine to provide inclusive governance to those who oppose, fear, or distrust the government.

A balanced approach to criminal justice is needed to reinforce legitimacy. When investigating violations of the laws of war, the approach should be open to examining violations allegedly attributed to all sides, including massacres, torture or other violations attributed to those supporting the government. Even if judgments could be fair and respect due process, focusing prosecutions on only one side of the conflict diminishes the notion of justice. Fighting the aggression while respecting the laws of war can be the most effective tool for strengthening rightfulness. Accountability of those supporting the government who have committed violations of international humanitarian law not only reinforce the legitimacy of efforts to prosecute those who commit similar violations against Ukrainian forces and loyal civilians, but also strengthens internal discipline in the conduct of war.

Additionally, in a situation of ongoing conflict like Ukraine, prosecution should be informed by considering how criminal accountability can contribute to peacebuilding. In a context of armed conflict, where massive violations are committed, the mechanisms used by ordinary prosecutions have proven inadequate. Furthermore, the nature of the violations requires criminal investigations to focus on determining responsibilities for the most serious crimes. Investigations should be limited to violations of international humanitarian law or human rights law committed and/or to

dismantle the system that allows the perpetration of those serious violations and organized crime. It would be impossible – and arguably not effective - to investigate every single crime, while it remains imperative to use the limited investigative resources on the situations that must be prosecuted the most. Still, the complexity and number of violations may make the task impossible. One way for addressing this difficulty has been by organizing the investigations into patterns of violations, which means identifying units or groups that are responsible for many similar violations committed in similar fashion or for the same purpose. Such an approach also helps identify the command structure of those units or organizations, and the individuals responsible for planning, deciding, directing, or executing those patterns of violations, rather than investigating all incidents and ending up targeting only low rank perpetrators. This approach is better suited to the goal of dismantling criminal structures, and targeting powerful actors who can easily negatively influence an eventual peace process.

In addition, the criminal prosecution efforts should be able to include different responses based on the degree of responsibility, degree of collaboration in investigations, acknowledgement of responsibility, and provision of reparations to victims. As is being tried in Colombia, such an approach could reserve purely retributive responses to those who refuse to collaborate, while offering alternative solutions, such as reduction of charges, leniency in sentencing, or alternative proceedings to those who do. Those solutions should however be designed and provided based on clear and verifiable conditions. First of such conditions should be the perpetrator's acknowledgment of responsibility. Other conditions could consist of other tangible contributions to relevant processes of redress and reform, such as guaranteeing effective collaboration in finding the missing; offering reliable information on other investigations; helping clear minefields; assisting with demobilization and disarmament; and responding to victims needs and demands.⁷ Furthermore, certain conducts that constitute criminal offence under the applicable law should be exempted from criminal prosecution if committed in the context of a conflict or secession attempt.⁸

While amnesties for international crimes and other gross violations of human rights and serious violations of humanitarian law are not permissible under international law, a well-developed and calibrated amnesty policy represents a powerful incentive to peace negotiations and can complement prosecution efforts. Excluding criminal prosecution for lesser and politically motivated crimes reduces the number of cases to pursue; allows for the allocation of resources to the most serious violations and those incidents that better represent the different patterns of violence perpetrated during the conflict; and offers perpetrators who were not in a decision-making position (or most responsible) to refute the armed confrontation and reintegrate in the society. At the same time, these types of policies do not completely disregard the damage caused by those actors or their role in the conflict and can condition their amnesty or pardon to a variety of requirements, which, once again, complement the prosecution. The

⁷ See Anna Myriam Roccatello and Gabriel Rojas, *A Mixed Approach to International Crimes: The Retributive and Restorative Justice Procedures of Colombia's Special Jurisdiction for Peace (ICTJ 2020)*, available at <https://www.ictj.org/publication/mixed-approach-international-crimes-retributive-and-restorative-justice-procedures>.

⁸ Following article 6.5 of the 1977 Protocol Additional II of the Geneva Conventions, relating the protection of victims of non-international armed conflicts and applicable provisions under the III Geneva Convention on prisoners of war at the cessation of hostilities.

conditions may include a period of service in social works, obligation to surrender arms or reject affiliation to violent movements, etc. Moreover, the use of counterterrorist narratives, figures like treason, and other special legislation to a situation of armed conflict should be discouraged, distinguishing very clearly what constitutes terrorism and what constitutes armed conflict, without legitimizing the aggression or separatism.⁹ Approaches like these have been tried, with different degrees of success in other countries, such as South Africa,¹⁰ Rwanda,¹¹ and Timor-Leste.¹²

Each experience of criminal prosecution in transitional contexts offers positive and negative lessons. Often their limited results are due to political interference, disregard for the due process principle, or limiting investigations to one group only. In most cases, however, the critical factor has been ineffective investigations. This has not only been the result of lack of independence or capacity of prosecutors and judges, but has also been due to the very nature of the crimes to be prosecuted.¹³ These are so called system crimes that are – and can only be - committed by organized structures as part of a plan or policy, resulting in a series of violations and collective acts of violence against large number of victims. The approaches followed by prosecutors investigating ordinary crimes in normal circumstances are of limited use in contexts of armed conflict. There is the need to adapt strategies and form investigative teams with a strong component of contextual research and analysis to investigate similar criminal phenomena, which includes professionals with experience in investigating organized criminal activities.¹⁴

⁹ This debate has been a complex one in Colombia, where defining political crimes to be amnestied has not been easy. In that case, the use of international humanitarian law has been a useful guidance to determine what are crimes that should be investigated and those responsible face prosecution. See Paul Seils, *Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace*, ICTJ 2015, available at <https://www.ictj.org/publication/squaring-colombia-circle-objectives-punishment-peace>; and OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties 2009*, available at https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf

¹⁰ Where the Truth Commission granted amnesty to those responsible who provided full truth and acknowledge, but who weren't followed up by a serious effort on prosecutions for those who did not come forward. For South Africa, Howard Varney, *Transitional Justice, Criminal Justice, and Exceptionalism in South Africa*, in Amanda Lyons, Michael Reed (eds.), *Contested transitions : dilemmas of transitional justice in Colombia and comparative experience* (Bogotá: ICTJ 2010), 281-299, available at <https://www.ictj.org/publication/contested-transitions-colombia-comparative>.

¹¹ Where the Government implemented a justice effort that included a participatory community-based process, excluding the most serious crimes and responsibility, but that only targeted Hutus. See among others Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, 2011, available at <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>.

¹² Where a community dialogue and reconciliation project was implemented by the truth commission, for less serious offenses, which resulted in lifting indictments, but was not followed by prosecutions into more serious crimes or degrees of responsibility. See Jeremy Luedi, *Reconciliation over Retribution: The East Timor Truth and Reconciliation Commission*, available at <http://www.jeremyluedi.com/research-papers/2016/11/3/reconciliation-over-retribution-the-east-timor-truth-and-reconciliation-commission>, and ICTJ, *Unfulfilled Expectations*

Victims' perceptions of justice and reparations in Timor-Leste (2009), available at <https://www.ictj.org/publication/unfulfilled-expectations-victims-perceptions-justice-and-reparations-timor-leste>.

¹³ OHCHR, *Rule-of-Law Tools for Post-Conflict States: Prosecution initiatives*, 2006, available at <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>.

¹⁴ These approaches derive from experiences on international criminal justice summarized by OHCHR (Ibid.). For the case of Colombia, see David Martínez O., *Colombia Manual: Contextual Analysis of Criminal Investigations of the National Analysis and Context Division of the Attorney General's Office* (ICTJ 2014), available at <https://www.ictj.org/publication/colombia-manual-contextual-analysis-criminal-investigations-national-analysis>. For the organizational and prosecutorial strategy adopted in Guatemala, see Claudia Paz y Paz Bailey, *Transforming Justice in Guatemala: Strategies and Challenges Investigating Violent Deaths 2011-2014*

Investigating crimes committed during war, occupation, and armed conflict also requires paying special attention to gender and sexual violence. As reported in most conflicts, the use of sexual and gender-based violence is a regular feature, particularly in cases of politically or ethnically motivated armed conflict. Targeting victims because of their gender or using sexual violence against civilians or prisoners is a frequent tool of warfare, ethnic cleansing, and attempts to demoralize or humiliate the enemy. It is also a frequent tool to instill fear in communities and force the displacement of civilians. One obstacle for obtaining justice for these types of crimes is the obsolescence of the legal framework, which frequently defines the crimes related to sexual violence narrowly, as crimes against the honor of a victim or the family, or as a crime against public order, instead of crimes against the personal integrity of victims. In these contexts, sexual violence is not treated with the same gravity of other similar violations, such as torture, prioritizing the perceptions of family and community over the victims' needs and legal rights under international law.

Additionally, given the frequent lack of evidence that accompanies crimes that carry stigma, additional measures are needed to secure and preserve evidence as well as ensure that it is admissible in court. Primarily, this means providing the conditions for victims to report those crimes, guaranteeing their protection, safety and wellbeing, and taking an extremely sensitive and careful approach towards them that respects and re-affirms their dignity.¹⁵ International criminal law experience and norms can offer useful guidance, either for legal reforms or for interpreting existing procedure laws. One particular example is Article 70 of the International Criminal Court Rules of Procedure and Evidence, which establishes special considerations and evidentiary criteria to help adapt proceedings for the prosecution of these kind of crimes.¹⁶ Nevertheless, it is not sufficient to adapt a few evidentiary and procedural rules. The poor record in investigating conflict-related sexual and gender-based crimes is due to several additional factors. One relates to how victims of sexual and gender-based violence are treated prior to and during the legal proceedings, often resulting in re-victimization. With time, both national and international jurisdictions have increased their understanding of the protection and support victims require, including concealing their identity, anticipating and preventing other forms of abuse they could experience while providing testimony or being involved in the investigations (i.e. undergoing invasive medical and psychological testing, confronting perpetrators, reliving traumatic experiences, etc.). In cases of massive sexual violence against a targeted population and by a specific unit, among other important measures, a higher weight should be given to evidence provided by several consistent similar testimonies,

(OSF), available at https://giwps.georgetown.edu/wp-content/uploads/2017/08/Transforming-Justice-in-Guatemala_English.pdf. On the criteria to decide cases by prosecutors, see Howard Varney, Shenali De Silva, and Alexandra Raleigh, *Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute* (ICTJ 2019), available at <https://www.ictj.org/publication/guiding-and-protecting-prosecutors-comparative-overview-policies-guiding-decisions>.

¹⁵ See, for example, Women's Initiative for Gender Justice, "Gender in Practice: Guidelines and Methods to Address Gender-Based Crime in Armed Conflict," available at http://www.iccwomen.org/whatwedo/training/docs/Gender_Training_Handbook.pdf

¹⁶ ICC Rules of Procedure and Evidence, available at <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

as well as experts reports, rather than forcing victims to undergo the conventional forensic examinations.¹⁷

¹⁷ See, for example, the 2016 Sepur Zarco case in Guatemala (case C-01076-2012-00021 Of.2º, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, of 26 February 2016).

DEFINING REPARATIONS POLICIES THAT EMPHASIZE ACCESSIBILITY AND FOCUS ON THE MOST SERIOUS VIOLATIONS

As in the case of criminal justice, reparation for harms caused requires addressing the consequences of violations suffered by victims no matter which side committed them. This is the approach implemented in several countries, like Peru, Colombia, or Kosovo, even though it was resisted by authorities or public opinion. In fact, initial reparations policies in Kosovo, as well as those implemented in other countries which were part of the former Yugoslavia, were limited to victims of violations committed by the other warring party. Similarly, initial policies in Colombia included only victims of what the law labeled as “illegal armed groups”, failing to mention those killed, tortured, or raped by Colombian armed forces or security services. Nevertheless, such approach is contrary to the core notion of human rights, based on common human dignity and inalienable rights. Moreover, a partial understanding of who is a victim and who deserves reparations is a recipe for increasing grievances and perpetuating the conflict. In both Colombia and Kosovo, it was the victims’ movement and civil society that forced the equal inclusion of victims of all sides in the reparations process.

Such inclusion is not only an obligation under international human rights law, but also provides an important legitimating reason for a government to claim that they are capable and willing to provide equal protection under the law to all citizens, no matter which they supported during the conflict. It also makes reparations more accessible, as victims would not need to prove their nationality, or which side the perpetrator fought for.

In contexts where massive human rights violations have been committed, one of the most significant obstacles to victims receiving reparations is the gap that often occurs between a government’s recognition of the right to reparation and their ability to provide them. The delivery of concrete, meaningful reparations to victims requires careful policy design and a clear understanding of what is possible and what is not. In many contexts, this implementation gap is often the result of victims having to rely on judicial proceedings to obtain reparations. While judicial reparations can help advance specific cases and shed light on certain types of abuses, they are limited to the scope of victims who can take part in the case. This often results in the exclusion of victims who do not have enough evidence, fear reprisal, or run the risk of being retraumatized by a formal and adversarial process.

Similarly, administrative reparations programs that are established by legislation or decree can face similar obstacles. These programs are based on an individual assessment of claims made by victims and can target a larger number of victims. However, even if an administrative program has the ability to receive more applicants than judicial proceedings and adopt lower verifications standards, it still rests on the assumption that reparations should respond to the damages each individual suffered and can prove. One of the dilemmas is that those who suffered easily calculable losses, such as property damages and those who have documented evidence of the violations, they suffered will have a greater chance of receiving a higher amount of compensation. Additionally, victims who are economically marginalized, such as those who do not have legal rights to land, are students or work in the informal sector will inevitably receive less despite having suffered similar violations. Finally, if an administrative reparations process is based upon the assumption that those who lost more should receive more, it can lead to excluding or limiting reparations for those who need them the most: the poor, those who do not know how to navigate the system, and other marginalized populations such as women. Guaranteeing effective reparations requires designing an integrated policy that seeks to address these obstacles.

Given how gender inequalities impact the consequences of human rights violations and the vulnerability of victims of SGBV, such an integrated policy must be gender-sensitive and gender-responsive. A gender-specific approach needs to inform decisions about which categories of victims qualify for reparations and what forms those reparations take. This needs to happen at the design stage of the process, but the program must be responsive if challenges arise. Lessons from other contexts demonstrate that even if a mechanism is designed in a gender-sensitive way, obstacles still often arise during implementation. This requires any transitional justice initiative, including reparations, to receive feedback from victims and civil society and be able to adapt accordingly.

The rationale and information that informs the design of a reparations policy impacts whether sexual and gender-based violations, as well as the specific harms that women experience from other types of violations, are considered. For example, a penal code that is relied on to define violations may not include important types of sexual violence. In Colombia, victims of enforced sterilization, forced pregnancy and forced nudity were not eligible for reparations until an additional law was passed to include these offenses. Given economic inequalities, women victims may face other challenges to accessing reparations. In many contexts, women are paid less or are responsible for unpaid domestic work, which can severely impact the amount of compensation they receive if it is calculated exclusively based on loss of income. Additionally, basing reparations for sexual violence victims upon loss of potential income due to physical disability is particularly problematic. Sierra Leone's Truth and Reconciliation Commission chose not to subject victims of sexual violence to earning capacity tests given that the intense amount of stigma associated with such violence made it difficult for victims to sustain themselves regardless of whatever injury the violation may have caused.

Another critical component of taking a gendered approach is to identify challenges that women and victims of SGBV may face in applying for reparations and design a process that mitigates those. Logistical obstacles may exist for women in accessing

their benefits, such as lack of access to safe and affordable transportation or inability to take time from family responsibilities. Anticipating that women would not be able to leave their families to access benefits such as medical care, the truth commission in Timor-Leste recommended having such services provided at the same place their children would receive their benefits. Another issue can be that of documentation. For many victims of sexual violence, fear of ostracization has led them to stay silent about the violations they endured. Those that did not disclose the experience to anyone or did not seek medical assistance are limited in the type of evidence they can provide a reparations mechanism. Such a challenge can be navigated by being flexible with the types of evidence that are acceptable. The fear of stigma can also impact if a victim chooses to even apply. Using a gender lens, several reparations programs have ensured that sexual violence victims cannot be identified by creating a safe and confidential registration process and ensuring that a broad category of victims receives the same type of benefit as a victim of sexual violence.

In armed conflict, a large number of people often suffer from violence, destruction of property, or restrictions to education and livelihood. Given the types and scale of human rights violations, most governments may not be able to afford the cost of providing individual remedy to all victims. In these cases, guaranteeing effectiveness may require limiting material reparations to those who suffered the worst violations, which can be defined as those violations that continue to have a serious impact in a victim's life.

Countries that have provided reparations after a period of armed conflict or post-authoritarianism have dealt with the complex dilemmas of how to provide reparations to a large number of victims. Reparation policies implemented in Chile, Colombia, Kosovo and Peru offer important insights about how to define victims who should receive reparations; how to register them in ways that are accessible and safe; how to provide forms of reparations that are meaningful and possible to implement; and how to make this effort compatible with the need for development and reconstruction. Administrative reparations programs, such as these, are strongly anchored in international human rights law and a state's legal obligation to provide reparations, and thus require substantial adaptations from notions that usually govern judicial reparations or claims commissions.

Nevertheless, reparations *per se* cannot address the need for reconstruction, including in contexts where there has been massive internal displacement. When restitution of property that has been seized or confiscated is possible, it should be a priority. For property that was destroyed, a strict compensation system might not be the most appropriate remedy, as it would exclude those who cannot prove ownership. Moreover, reconstruction is needed even in cases where destruction was caused by legitimate warfare actions, and not just by violations of international humanitarian law. A peacebuilding approach should guide government in implementing a vast reconstruction policy for providing housing and conditions for returning to communities of origin or resettlement under sustainable conditions. Such an approach should be based on need and not on a determination of violations having been committed, nor should it be limited to property loss, as citizens should be guaranteed the right to housing as well as the return of economic activity.

Reconstruction policy should also include public infrastructure, particularly basic services, schools, healthcare facilities, utilities, and roads. Policy should be based on criteria defined through consultations, not discriminating against regions inhabited by communities that are critical of the government. Such reconstruction efforts could help victims whose right to property has been violated to recover from those harms, even if such efforts are defined by the strict proportionality requirements that reparations would involve.

In addition to prioritizing accessibility of victims over individual full restitution, several experiences have included forms of reparations beyond monetary compensation. In the contexts mentioned where substantial implementation has been made, reparations have rested on standardized forms of compensation, rehabilitation, educational services, and forms of satisfaction. These measures have been defined based on consultations and assessments of the general consequences that victims of similar violations had experienced. In Chile, reparations benefits include a life pension to certain members of the family of those killed or disappeared; a comprehensive psychosocial and health care rehabilitation program; educational scholarships to survivors and the children of those killed or disappeared; and other measures. All families receive the same benefits, regardless of the income of the loved one they lost. Similar approaches have been implemented in Peru and Colombia. In these cases, a participatory process was used to determine the general needs of victims of the different categories of violations considered as the most serious.

To be meaningful reparations require both material and symbolic measures. They can include acknowledgement of wrongdoing; memorialization; establishing that those unfairly persecuted were not criminals and restoring their rights; acknowledgement ceremonies where victims participate; museums and places of remembrance that pay tribute to victims (as often monuments praise the sacrifice made by soldiers); and other forms of affirming the dignity of victims. They can have an important role in making sure that reparations are not the mere distribution of certain goods, nor are they blood money or paying for the conscience of survivors. Moreover, given the unrepairable nature of the violations committed, symbolic forms of reparations can be vital in the acknowledgment of victims. Certainly, the word reparation is an overstatement for the violations committed, as nobody can provide adequate reparation for having lost a loved one, serving years of detention, or enduring grievous attacks to personal integrity such as torture or sexual violence. Reparations can never be complete, nor fully compensatory. Governments can never say that they have repaired victims, but only that they had provided some forms of material support to recognize the harm and taken responsibility for the suffering endured. Thus, reparations are measures for affirming victims' dignity, and to help them address in some limited ways the consequences of those violations. Clear communication regarding this message is essential.

Perhaps one of the most important forms of symbolic reparations is the effective implementation of any material measures provided, in a prompt, accessible and supportive way. Even if reparations measures are often classified as symbolic or material, it can be argued that all forms of reparations are both symbolic and material. The way victims participate, and how they are reached, registered, and treated during the implementation process, might be more important than museums, monuments, or

apologetic speeches. Conversely, a monument built poorly or falls into disrepair by lack of maintenance can end up being an insult to victims.

Finally, when determining the funding sources for a reparations policy a government needs to weigh the likelihood of obtaining the funds needed. Efforts for paying reparations with assets recovered by autocrats, perpetrators, or other States offer little hope. In only a few cases have assets been obtained from autocrats, like Ferdinand Marcos from the Philippines, and rarely in the amounts sufficient for funding reparations for a large number of victims. Interstate reparations involve litigation that can drag for years and compliance against a strong State. Such cases have been more influenced by political negotiations and the willingness of the liable State to pay for political reasons, than from their adherence to the pure legality of the decision. Successful implementation has occurred in countries that had assumed a political and financial commitment to invest resources from their national budgets, to finance different forms of reparations that can improve the life of victims, provide acknowledgment of their suffering, and affirm their dignity and agency.

ACKNOWLEDGING AND ADDRESSING THE CAUSES OF CONFLICT FOR ENDING REPEATED CYCLES OF VIOLENCE

Sustainable peace requires examining what has caused repeated cycles of violence. It is not enough to win a war or even to provide justice to all victims, if the sources of resentment, mistrust, and fears of being discriminated against continue. Moreover, relying exclusively on criminal justice for addressing the violations that were committed does not guarantee that similar forms of political violence will be prevented from happening again. While establishing responsibility for the serious human rights violations is indispensable, it alone does not offer opportunities to address the root causes of conflict and build an inclusive future. As criminal justice focuses on individual responsibility, it can easily fall short in examining deeper and broader responsibilities. Additionally, criminal justice efforts that are not accompanied by other forms of accountability may be seen as revenge or scapegoating, particularly among those who perceive that criminal investigations are unfair or only focused on those more exposed to prosecutions, such as the military. A deeper and participatory understanding of the causes and consequences of conflict can be an essential element for a comprehensive form of accountability, which is needed for peacebuilding.

For these purposes, it is advisable to complement criminal accountability with examining the broader historical context. Such a process could contribute to an understanding of the drivers of the armed conflict by exploring the sources of the distrust and grievances that made citizens want to take up arms against their neighbors. It could help unveil broader forms of political or moral responsibility that are important to acknowledge.

In context of deeply contested narratives, such an examination must be inclusive in order to be effective. It cannot focus on one specific aspect of the conflict or the experience of one specific group, but must involve the broader population. A process that analyzes the historical roots of a conflict, as well as how it was fought by each side, can help reduce the number of acceptable lies and justifications that either side can believe.

In contexts as profoundly complex as Ukraine's, truth seeking initiatives have often not been able to create a shared narrative among all those impacted by the conflict. However, an impartial investigation, undertaken by a group of people that both sides recognize as having moral authority, can help untangle some myths and acknowledge some forms of wrongdoing that are required for peaceful coexistence and democratic governance. The experiences of past truth commissions show that reconciliation is a

long-term goal that cannot be achieved by the end of a commission's mandate but establishing some degree of accepted truth can help reduce mistrust, fear, and resentment.

One key element for establishing a truth commission is the selection of commissioners. This requires a careful balance, as the members of such a commission must be representative and be seen as credible and trustworthy. ICTJ's experience shows the importance of the process to select commissioners being transparent and consultative. The population should be able to provide input on the list of candidates, who must be carefully vetted. In order for the commission to be seen as independent, appointment of commissioners should not be made by political parties or legislatures. Those chosen should be able to work together to examine the information gathered and come to shared conclusions. A commission led by credible, trustworthy commissioners can help different segments of society, and particularly victims, feel listened to and have their suffering acknowledged.

Another vital lesson learned about past truth-seeking initiatives is that they are more effective if their work is not limited to only producing a final report, even if its findings are well documented and recommendations are well informed. These are important elements of a truth commission's legacy, but so is its ability to spark dialogue and debate in society that goes beyond the life of a commission. In Sierra Leone, the Truth and Reconciliation Commission created a participatory project aimed at creating a common vision for the country. Citizens submitted poems, drawings, songs, and other forms of artwork that captured what type of future they wanted for their country. These submissions were then put on display and collected into a book. Recent truth commissions, like the one still functioning in Colombia, have devoted significant efforts into promoting community and local dialogues, where people from different sides of a conflict are able to listen to each other narrate their stories, have the opportunity to provide or receive apologies, and gain a greater understanding of the suffering caused to others.

The legacy of a truth commission is not only in the findings and recommendations it leaves behind, but also in the public dialogue it has sparked, which hopefully leads to further initiatives that foster discussion and debate on how the conflict has been lived by different communities.

It is not only official truth-seeking initiatives that can help societies understand the suffering caused by people from different sides. Unofficial truth-seeking projects led by civil society can also generate public dialogue and understanding. In Kosovo, a youth group created several urban installations and performances that acknowledged the names of the disappeared on both sides of the conflict. In Tunisia, ICTJ worked with an intergenerational group of women to create several projects that explored issues such as female detainees, the harassment and abuse faced by women whose family members were imprisoned, and protests of youth against ongoing corruption and police brutality. With the help of local artists, this collective produced a graphic novel, book of essays, series of podcasts, and an interactive art exhibit that toured the country. Whether formal or informal, initiatives to learn from the past can help define a future that provides basic conditions for coexistence under a common commitment to human rights.

URGENT ACTIONS AND THE ROLE OF CIVIL SOCIETY

This medium- and long-term vision for a transitional justice-inspired approach requires concrete actions to be implemented even while the conflict is still ongoing. Victims and those who have been displaced have urgent needs that cannot wait. Moreover, actions inspired by a transitional justice and peacebuilding approach can help contribute to a climate favorable to negotiations. Such actions can provide a sign that it is possible to build a society where different communities can feel safe and respected. This can be advanced by (a) the provisions of assistance based on inclusivity, accessibility, and empowerment; (b) advocacy for victims, particularly those who are marginalized; (c) defining transitional justice approaches through a participatory process, and (d) consultations with victims that could help define a transitional agenda, while also serving as a process for mobilization, development of proposals, and agency.

a) Assistance and support fostering inclusion

A message of inclusivity to all Ukrainians needs to be communicated in concrete, actionable terms. Such as addressing the urgent needs of victims and those displaced. Such efforts can help provide legitimacy to the government and civil society organizations. Such efforts may require the ability to deliver bilingual services that include material benefits, as well as psychosocial support and accompaniment. Providing rehabilitation services for the wounded does not need to wait for a transitional justice policy to be designed.

Government policies implementing assistance that is inclusive and does not require asking victims who committed the violations against them is the essence of a humanitarian obligation. Humanitarian assistance should not distinguish among those in need. If implemented without distinctions, this assistance can show that the government has the willingness and the capacity to provide effective support and protection to all Ukrainians and to all those living in its territory.

Civil society efforts could complement government policies. For some services, civil society organizations may be better qualified to be the direct services providers, either using government funds or their own. However, government funding for civil society projects cannot be reliant on any requirements that seek to manipulate the beneficiaries, such as requiring the provision of unsolicited information that can be used against them. In some circumstances, civil society organizations should act independent of the government to guarantee effectiveness and the ability to reach communities that government services cannot.

One particular group that often needs urgent assistance and civil society may be in a better position to provide is victims of sexual and gender-based violence. The provision of medical and psychosocial care can be an important focus for civil society, as well as financial or other forms of assistance. However, support for victims who fear being stigmatized, both men and women, requires services to be provided in

a way that does not require full disclosure of the violations suffered. For example, Sometimes, for reaching victims of sexual or gender based violence it can be advisable to target a broader group of similar victims, considering that many of them would have suffered those violations, without expecting or requiring them to have to come forward as victims of such violations.

In addition, the provision of these forms of support could help advance the acknowledgement and empowerment of victims. Delivering assistance can be an opportunity to help organize victims and create their own platforms to provide input on how to improve services and more effectively reach other victims. Victims and civil society organizations who work with them are best placed to provide input on the most effective forms of assistance and delivery.. In countries like Peru and Colombia, victims' groups were born from efforts to organize around initial assistance policies and have grown into key players for demanding accountability, acknowledgement, and reparations.

b) Advocacy for victims and especially those less visible or powerful

Governments often need pressure from victims and civil society in order to implement an inclusive transitional justice policy. The natural tendency for governments is to focus on those constituencies that have more power, and victims are rarely among them. Decades since the end of occupation and armed conflict in Timor-Leste, the government that is representative of most of victims has been slow to implement reparations recommended by a truth commission. One president even argued that the country's independence and development were sufficient reparations. Nevertheless, the government prioritized implementing a pension system for ex-combatants who had fought against Indonesian occupation (but even among them excluded civilians who assisted those guerrillas through provision of information and supplies, most of which were women). Similarly, in Bosnia and Herzegovina, initial forms of reparations were awarded only for violations more frequently suffered by men. Based on military insurance policies, benefits were awarded for loss of life or physical disability, excluding other forms of violations such as sexual violence. Only later, through active mobilization, victims of sexual violence were included.

Often the best people to demand visibility and acknowledgment of excluded victims are victims themselves. However, it is not always reasonable to expect victims to have the organizational skills and language needed to create advocacy platforms on their own. Nor is it fair to expect them to be willing to expose themselves to possible repercussions. This is particularly true for victims of sexual violence. Civil society support and direct action can open the door for victims to engage. There are many different forms of support and advocacy, where creativity and ingenuity can be key communication tools. A remarkable example of this was a large exhibition organized by activists at Kosovo's national stadium to counter societal silence on conflict-related sexual violence and destigmatize the violations among the broader public. As part of civil society efforts to broaden the legal recognition of categories of conflict-related violations to include sexual violence, the exhibition displayed the dresses of 5,000 victims along with their individual stories highlighting the devastating effects of these violations.

c) Defining transitional justice approaches through a participatory process

Given the difficult dilemmas and complex questions transitional justice approaches seek to address, they require a high degree of legitimacy. This cannot only be bestowed through representative democratic systems. Even if members of parliament are effective representatives of the people and the government is elected by unquestioned democratic means, the myriad of ways conflict affects different people and communities require additional input to how these complex issues are addressed. Defining transitional justice policies requires leadership and vision that can be provided by government, but it also requires reaching out to those who have been most affected by the violations committed.

Participation in policy definition is often considered as an initial stage for policymaking; however, participation should not be limited to initial consultations. The voices of affected communities and civil society are vital to not only the design of policies but also their implementation. They can help identify problems with reaching certain victims, recommend more effective measures, and help build trust. In addition, victims and civil society participation has proven essential during peace negotiations. As the case of Colombia shows, victims and civil society do not need to be part of the table; however, their inputs on defining the agenda and recommended proposals to those negotiating can be of extreme relevance. The interests of negotiators cannot necessarily align with victims, even if negotiators claim they do. During the Havana negotiations between the Colombian Government and the FARC guerrillas, a delegation of victims attended key moments of the discussions and confronted both parties. Their participation made both parties understand to a deeper degree the suffering that victims of all sides of the conflict continued to experience. This forced the negotiators to pay more attention to the need for acknowledgment and accountability, rather than assuming that they represented the interests of victims.

d) Consultations with victims directed to strengthen their ability to influence policy

Civil society organizations can independently lead a consultation process for the definition of a policy. They can organize a process to discuss with affected communities the priorities of diverse groups of victims for acknowledgment, accountability, reparations, and guarantees of non-repetition. Such efforts can be closely associated with the implementation of assistance and the definition of victims' political platforms, but can be launched even if those other initiatives are not. One important aspect of consultations is that they should not be limited to obtain people's opinions as feedback on a potential policy that is exclusively designed by experts and political actors. Consultations could also help victims and grassroots organizations, particularly women's organizations, become political actors.

This has been done in other contexts, like Côte d'Ivoire and Tunisia, by not only asking needs and priorities, but involving those organizations in developing policy proposals that they could bring into the political debate. As both cases show, even if at some moment the political doors closed, the activism and capacity to demand and lobby for the recognition of victims' rights continued.

In implementing consultations, though, different experiences show the need to make efforts to reach diverse communities, and particularly those who do not feel initially welcomed to provide opinions. Reaching out to certain minorities and communities that still experience fear or who had suffered intra-community violence requires

conditions of trust, confidentiality, and protection. Guaranteeing that the ideas and proposals developed have a gender approach requires additional efforts, not only on how to consult women and on who are qualified to conduct those consultations, but also in the way questions and discussions are managed. This is particularly important for identifying needs of men and women who have suffered sexual violence.

The role of civil society in conducting consultations is essential, as they may have the experience, skills, proximity, and trust of victims and affected communities. However, as the cases of consultations in Sri Lanka and Tunisia show, if consultations are supposed to guide policymaking, it can be important to include policymakers in the process. If not appropriately included, policymakers could consider the consultation as mere opinions influenced by civil society biases and preferences. Some degree of direct contact between authorities and affected communities could help bridge that gap and give more weight to victims' opinions, while showing authorities the knowledge and capacity victims have to recommend policy proposals and monitor policy implementation. This can increase the ability of victims to remain engaged with the policy issues and hold authorities accountable to their commitments.

CONCLUSION

A transitional justice approach could be an important contribution to helping end a conflict. It can provide certainty to those fighting about what is expected from a resolution of the conflict. It can affirm that a commitment to accountability does not mean revenge, nor victor's justice, but a process whose main goal is to establish a foundation for mutual coexistence and the respect of human rights. By providing trust that long held grievances and fear between communities will be addressed, it can also affirm a commitment to exploring the causes and consequences of the current cycle of violence with the aim of preventing its repetition. Finally, a transitional justice approach can reinforce the responsibility of the government to represent the interests of the whole country, and not just a faction of it.

Under these circumstances, a transitional justice policy can provide conditions that make negotiations more favorable, reinforcing a win-win logic. It can help address the past as a contribution to a better future without sacrificing the interests of victims.

Such policies require definitions based on agreement, but also consultation with and participation of the affected communities. A demonstration of the government's commitment to inclusion can begin with the provision of humanitarian assistance to all those affected and consulting them during the design of this assistance. Decades of experiences from other countries demonstrate that both government and civil society can contribute, jointly or separately, to creating a climate favorable to building sustainable peace.

