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# Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building

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# **Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building**

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Amanda Cats-Baril

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## Acknowledgements

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## Key recommendations

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The increased prevalence of political transitions following internal conflict has seen heightened attention given to both transitional justice and constitution-building as fields of study and intervention. However, little attention has been paid to understanding how the interaction between the two fields can better serve their respective and mutual objectives. The fact that the two processes can, and often do, coexist is recognized but there is a need for practitioners in both fields to better understand this coexistence and the factors that act on it. This paper is a first step towards better understanding how synergies between transitional justice and constitution-building can be maximized. It highlights the interactions and overlap between transitional justice and constitution-building, and aims to encourage decision-makers and experts in the field to consider options for maximizing the comparative advantages of transitional justice and constitution-building respectively, to pursue the overall goal of sustainable peace and development. The paper illustrates the potential power of combining transitional justice and constitution-building to achieve conflict prevention, deepen conflict transformation and promote sustainable peace, but also details the challenges inherent in conflating the two processes. Without proposing specific models or answers, the paper highlights the importance of seeing transitional justice and constitution-building processes as complementary rather than competitive, and expands our understanding not only of what one process can do to improve itself, but of the ways in which breaking down silos and looking at nuanced interactions between transitional justice and constitution-building processes can help to address the major challenges that transitions present.

To support policymakers and practitioners in translating the theory presented in this paper into concrete action, the key findings and policy recommendations that arise out of this analysis and research are highlighted below:

1. Synergistic thinking at the policy level: More interaction and coordination between the transitional justice and constitution-building communities of practice is required in order to influence policy mandates and frameworks for operation of and support to constitution-building and transitional justice.

The Fifth Edinburgh Dialogue in 2018 brought key practitioners and organizations from the transitional justice and constitution-building fields together, and in doing so highlighted the many commonalities between the

two fields but also the lack of interaction between both communities. The fields have experienced similar developments over recent years, including the increasing demand for public participation, the expansion of the objectives for both processes, frequent collapses in both processes, a multiplication of actors in each field and a common gap between the desired outcomes and the actual outputs of the processes.

The two communities can learn greatly from one another, and international donors, member states of key organizations and the international organizations themselves should proactively arrange more opportunities to interact at the global strategy/policy level.

2. Coordination of support: National actors and country-level donors should create and design institutional structures to coordinate their support for constitution-building and transitional justice.

Beyond the idea of conceptual synergy at the policy level, this paper has implications for the institutional design of transitional mechanisms in practice. For example, the Ministry of Justice in The Gambia, with financial support from the UK High Commission, created a specific, single office to oversee the two transitional processes. This allows the Government to ensure synergies between the two processes, in particular during the design and sequencing of the processes and the setting up of the two respective independent commissions. This is an approach that should be considered in other future contexts. Nepal provides a counter example: while a Ministry of Peace and Reconstruction was established, with a mandate that included overseeing transitional justice, this was institutionally completely isolated from the Constituent Assembly and constitution-building processes.

Similarly, international partners should ensure that their support to transitional justice and constitution-building processes in transitional contexts does not become disconnected, and that there is at least one person following both processes with a sufficient level of detail. This is particularly true in institutions where there is a divide between political and developmental support (for example, US embassies/state department and USAID; United Nations Department of Political and Peacebuilding Affairs and the United Nations Development Programme etc.): decision-making around political positions and financial support to these processes should be coordinated.

3. Interaction between transitional justice and constitution-building bodies: Where constitution-making bodies and truth commissions (or similar transitional justice bodies) operate concurrently, they should proactively seek opportunities to discuss their findings and trajectories with one another, and share opportunities to present this information to the public and seek popular inputs.



The paper shows that truth commissions and constitution-making bodies will have much in common: they will often both engage in broad consultations; they will seek to arrive at a consensus over what went wrong in the past and on remedies in the future to prevent the same. In these efforts, both processes seek to create a narrative about a country's past and future and it is important for conflict transformation that these narratives reinforce, rather than contradict, each other.

4. Sequencing: In cases where actors have some control over the design of the two processes, sequencing should be carefully thought through. In cases where there is less agency in the timing of the two processes, actors should be aware of the trade-offs of different orders of sequencing and how to manage them if possible.

There is no one right answer to questions of how to sequence transitional justice and constitution-building processes—much depends on the context at hand. However, where transitional justice processes precede constitution-building processes—and vice versa—there are consequential trade-offs that should be considered. For example, where a truth-seeking process as part of transitional justice precedes constitution-building, it can help to identify past wrongdoing and set an agenda for change, including identifying recommendations for institutional reforms to be implemented during constitutional reform. Conversely, constitution-building can be used to provide important guarantees to outgoing regimes and actors in order to ensure their participation in and encourage more political will in transitional justice processes.

5. Truth commissions should be clearer, more specific and more explicit regarding recommendations for constitutional/institutional reform.

Truth commission reports have often made recommendations for 'constitutional reform' or 'institutional reform', without providing more guidance. While detailed constitutional design recommendations are, and should be, beyond the competence of truth commissions, truth-seeking processes should also maximize their potential in creating a tone and a narrative. Therefore, more concrete recommendations such as 'stronger oversight over executive actions' or 'strengthened parliamentary oversight over security sector agencies' may help to bolster arguments during constitutional negotiations, underpinning these with a rights-based framework and clear connection to the root causes of conflict.

6. The shared origins of constitution-building and transitional justice in the political settlement underlying a nation's transition require a recognition of the political nature of both of these processes and the compromises and

negotiations that might be necessary to maintain the momentum of the transition.

In both Indonesia and Nepal, international standards and norms were used in court cases to judge the legality of transitional justice legislation. In both of these cases, judges struck down aspects of the legislation related to amnesty leading to a complete stalling of transitional justice processes. The international community, at least in the case of Nepal (see case study in section 5), also then refused to support the transitional justice process until the relevant law was amended. This left the already institutionally vulnerable Truth and Reconciliation Commission and Commission of Investigation on Enforced Disappeared Persons without financial or technical backing. The people most affected by this lack of support were victims. It is necessary to strike a balance between ideals and pragmatism when supporting transitional processes and not to insist on 'the perfect' at the expense of 'the good'. Without suggesting a deviation from critical human rights standards and obligations, this paper shows how the interaction between transitional justice and constitution-building can help to balance some of the conflicting demands placed on transitional processes, and also how critical the underlying political settlement is.

## Executive summary

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For as long as [obstacles] exist there will be a drive to overcome them, there will be a tension that keeps alive the idea that things can be different. When all the challenges are gone, that is when the real danger arises.  
(Langa 2006: 360)

There is increased recognition of the need for ‘stronger coordination amongst peace building, development and justice responses in fragile situations’ (Powell 2010: 231) and for increased attention to be given to the possible linkages between these and other aspects of post-conflict and political transitions. This paper responds to these needs, with a focus on the interactions between two particular processes: transitional justice and constitution-building. Examining the interactions between transitional justice and constitution-building is worthwhile because of the frequency with which the two processes occur in overlapping settings and also because of the substantive overlap in the principles that shape the processes. This suggests that anticipating and intentionally designing for the coordinated implementation of the two processes could allow both transitional justice and constitution-building to better meet their proclaimed aims, including reconciliation, institutional reform and, arguably, sustainable peace.

Specifically, this paper holds that it is useful for practitioners to better understand the relationship between transitional justice and constitution-building because:

1. The processes have similar aims which could benefit from harmonization or at least thoughtful consideration of their interaction and overlap. Instead of relying on either process in isolation to achieve these aims, it is worth considering how transitional justice and constitution-building can mutually reinforce one another and how their relative strengths can be leveraged to better achieve shared macro-goals.
2. While there is great potential for transitional justice and constitution-building to mutually reinforce one another, there is also a risk that the contemporary overlap in the processes can mean that one process undermines the other, or at least that the synergies between them are lost and competition for political

attention and financing emerges. As the chances of this are minimized, so the relationship between the two processes is better understood.

3. Acknowledging the difficulty, and often near impossibility, of intentionally sequencing transitions, and having a better understanding of how transitional justice and constitution-building interact and the comparative strengths of each process, can allow for earlier identification of ways in which sequencing could maximize potential synergies, as well as better communications with the public about how the processes, and their principles and objectives, are interrelated.
4. Transitional justice and constitution-building may provide the legal and political underpinnings for one another. In this way, each can provide protection and momentum for the other but, again, this is more likely to occur if these potentialities are understood and planned for.
5. Both transitional justice and constitution-building are highly context-specific processes that have to be designed, planned and implemented with an awareness of the specific place in which they occur. A growing body of practice and experience, however, suggests that there is a benefit to examining comparative examples to try to better understand the general dynamics of how constitution-building and transitional justice interact.

The discussions between leading practitioners and experts at the Fifth Edinburgh Dialogue in 2018<sup>1</sup> (which gave rise to this paper) and the subsequent analysis of literature and case studies suggest that there is indeed a rich set of interactions between constitution-building and transitional justice and great potential for the processes to mutually reinforce one another. Efforts to ‘constitutionalize’ transitional justice, which can be as narrow as including reparations in the constitution or as all-encompassing as restructuring the state to permanently shift access to power and resources, help to further the impact and realization of transitional justice prerogatives. Similarly, transitional justice can provide rights-based justifications for constitutional reform, therefore highlighting how constitution-building is meant to contribute to conflict transformation and providing the process with non-politicized justifications.

Importantly, in most cases of post-conflict or democratic transitions, transitional justice and constitution-building are at once shaped by and result in a ‘pacted transition’, rooted in agreement between opposing parties at the heart of the conflict, one that must be carefully built and sustained. Transitions are not linear—as much as they depend on the initial distribution and exercise of power, this ‘political settlement’ is increasingly:

. . . looked on as the beginning of a process rather than its end. Transition is understood as an ongoing process, involving ongoing contestation over its nature and direction. Mechanisms to deal with the past, therefore, have to be understood both as a *response* to contestation and as *vehicles* for the ongoing contestation that comprises an integral part of political bargaining over the nature of the state.

(Bell 2017: 95, emphasis added)

Transitional justice and constitution-building in transition must sustain a careful balance between past and future along a continuum of a negotiated transition: a transition whose beginning is hard to recognize, and whose end is often not in sight. Process-wise, transitional justice and constitution-building can together be used to promote adherence with, and reconfiguration of, the overall political settlement underlying the transition; and to solicit and respond to the public's inputs to and demands of the transition. Transitional justice and constitution-building after conflict or authoritarianism require broad popular acquiescence as well as the consent of the political elite. Transitional justice and constitution-building must be designed to balance participation and transparency with compromise and flexibility, in order to secure both elite and public support for transformative processes. In combination, transitional justice and constitution-building can allow for a better balancing of mandates and sources of legitimacy for the transition as a whole, and therefore help to maintain momentum towards conflict transformation and peace. In so doing, the combination of transitional justice and constitution-building contributes to the pursuit of UN Sustainable Development Goal (SDG) 16: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable institutions at all levels.'

The paper begins by laying out the overall transitional context in which transitional justice and constitution-building interact, and some of the special considerations this might entail, and by defining the respective fields of transitional justice and constitution-building in section 1. This mapping is followed by a deeper discussion on the implications of the transitional context in section 2. The conceptual framework of the paper (section 3) focuses on substantive ways in which constitution-building and transitional justice can mutually reinforce one another in pursuit of shared aims, primarily conflict transformation, prevention of recurrence, and sustainable peace and development. The conceptual framework is structured around the four rights that underpin transitional justice, namely, the right to: truth, justice, reparations, and guarantees of non-recurrence. Under each right, the paper discusses how the interaction between constitution-building and transitional justice might influence the ways in which the right is pursued—and how successfully. Issues raised in the Introduction and the conceptual framework are then examined in the context of six case studies (section 5): Colombia, Guatemala, Nepal, Rwanda, South Africa and Tunisia. Each case study was chosen to illustrate identified key lessons.

### Endnotes

1. The Fifth Annual Edinburgh Dialogue on Post-Conflict Constitution-Building, organized by International IDEA, the Political Settlements Research Programme and the Edinburgh Centre for Constitutional Law on 10–11 December 2018, brought together experts and practitioners from the fields of transitional justice, constitution-building and conflict mediation to explore areas of overlap and interaction between constitution-building and transitional justice.

## 1. Introduction

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How do communities emerge from the rubble and make for themselves a new legal space?  
(Mendez 2012: 1271)

Numerous fragile and conflict-affected states, including The Gambia, Libya, Somalia, South Sudan, Sudan and Yemen, currently face the same challenge previously faced by countries emerging from violent conflict and/or years of despotic authoritarianism, such as Argentina, Chile, Indonesia, Rwanda and South Africa. That is, how to establish a framework of law and justice that will enable the country and its population to deal with the past while simultaneously building a broadly supported and popularly legitimate legal and political framework for the future. Responses to this challenge often involve two interrelated and overlapping processes—constitution-building and transitional justice.

Both constitution-building and transitional justice play a key role in moving societies from authoritarianism to democracy, and from conflict to peace. Each is an integral part of broader peace-building efforts in the aftermath of armed conflict and political transitions. The interaction of transitional justice and constitution-building in these contexts raises questions as to how to manage potential tensions and maximize synergies.

Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible . . . and in which change is unpredictable, but the idea of change is constant.  
(Langa 2006: 354)

### Definition of conflict transformation

Conflict transformation is to envision and respond to the ebb and flow of social conflict as life-giving opportunities for creating constructive change processes that reduce violence, increase justice in direct interaction and social structures, and respond to real-life problems in human relationships.  
(Lederach 2003: 14)

The goal of both transitional justice and constitution-building in post-conflict settings is that ‘conflict is translated into the new political and legal institutions, which aim to provide a nonviolent context in which underlying disagreement can be managed. The hope is that the conflict, rather than being “resolved”, will at least be prevented and “transformed” into less violent forms, and that in the future new opportunities to transcend’ (Bell 2017: 95) conflict and ensure sustainable peace might be created and cultivated. Concepts of conflict transformation and prevention are central to both transitional justice and constitution-building, and to understanding the significance of both processes in transitions. Furthermore, it is difficult to define a distinct beginning and end to a transition, as questions of the past and accountability will resurface periodically. The goal of transitional processes should therefore not be to put an end to these questions, but to create systems and institutions that are capable of responding to them over time (Bell 2017), allowing a ‘progressive realization’ of the objectives of the transition (Waldorf 2017: 42).

The prevention of violence and impunity, and the promotion of accountability and sustainable peace—recognized transitional justice objectives—are at the heart of post-conflict and transitional constitution-building, which aims to fulfil a state-building and peace-building role by addressing the root causes of conflict and providing the institutional and legal framework for a new, more peaceful and inclusive state. Both transitional justice and constitution-building therefore have a role to play in realizing SDG 16 on the promotion of peaceful, just and inclusive societies through access to justice and effective and accountable institutions (see, for example, ICTJ 2019c). Transitional justice and constitution-building processes, when combined, can encourage rights-based reform towards such societies. By focusing on how to maximize the positive interactions between these two processes, practitioners can better promote SDG 16, encouraging deeper reform that is well understood by the public and linked to rights-based objectives such as the right to justice.

Law in transitional periods is both backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous.  
(Teitel 2000: 215)

Both transitional justice and constitution-building require a simultaneous retrospective and prospective approach: looking forward towards a vision of a sustainable political peace, while acknowledging and even seeking to address past grievances and causes of conflict and repression—notably social and political exclusion. The tension between these forward- and backward-looking dimensions is often understood as a tension between the demands of peace and of justice: recognizing that the past must be addressed for any transition to be possible, but also that addressing the past is an ongoing and contentious process in itself and one which risks unsettling the fragile political settlement or peace. Navigating the move from the injustices of the past to a more just and peaceful future often requires both transitional justice and constitution-building processes to accommodate the interests of both agitators for change and the outgoing regime or existing political elite. This requires that the design and implementation of transitional justice and constitution-



building processes reflect agreement on the scope and nature of the transition at hand.

In the *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, the United Nations (2010) notes that transitional justice requires that ‘public institutions that helped perpetuate conflict or repressive rule . . . be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law’. In this statement, one can recognize the depth, scope and complexity of transitional justice—a process that aims to contribute to profound cultural, political and structural transformation of the state after conflict or authoritarianism. This type of transformation is often reinforced by, or even entails a commitment to, constitutional change. Despite these evident overlaps, however, there has been little consideration of the linkages between constitution-building and transitional justice, let alone serious thinking about a ‘theory of cooperation, or at least harmony between the two processes’ (Mendez 2012: 1271). This is an unfortunate gap as the overlapping objectives, and yet distinct mandates of transitional justice and constitution-building, mean that the interactions between the two processes can be mutually reinforcing, especially if the comparative advantages of each are maximized through intentional process design that recognizes such potential synergies.

If synergies are not recognized and accounted for, there is a risk that one process is prioritized politically or that the objectives of the two processes are framed as being at odds with one another. For example, in Sri Lanka, the Wickremesinghe–Sirisena Government elected in 2015 has since prioritized constitution-building over transitional justice by ‘making the case that attention must be on a new constitution and that talking of the past and accountability will jeopardize the fragile momentum created for constitutional reform’ (Fonseka 2018). By claiming, essentially, that transitional justice would assign blame to parties and make it more difficult to create political consensus around constitution-building, the Government in Sri Lanka used the (ultimately fruitless) pursuit of constitution-building as a justification for not pursuing transitional justice.

While constitution-building and transitional justice can certainly be seen to share many objectives, there is also a danger in assuming that the two processes are so similar as to be considered mergeable, or that one process can entirely do the work of another. There is a danger in over-expanding the expectations and scope of each field to the extent that they may come to mean everything, and therefore nothing (see, for example, Waldorf 2017: 54–55; Mendez 2012: 1272). This has been discussed widely in the transitional justice literature—for example, with regard to the increasing expectations placed on truth and reconciliation commissions (ICTJ 2014). There is a need to identify areas of overlap while also recognizing that, in certain situations, neither constitution-building nor transitional justice may be capable of meeting an objective on its own. For example, transitional justice cannot deal with all the elements of institutional reform that may be needed to underpin the new post-transition order, and constitution-building is not necessarily the best vehicle for meeting immediate victim needs. As such, it is advisable to focus on where each process can add value towards the overall goals of conflict transformation, conflict prevention and sustainable peace. Over-expansion of the expectations placed on



either of the processes can ultimately damage their legitimacy, by setting them up to disappoint the public. For example, the public might—as seen in the Guatemala case study in section 5—expect a truth and reconciliation commission to be able to resolve the root causes of conflict it identified, in the absence of a corresponding constitution-building process.

### Definitions of transitional justice and constitution-building

**Transitional justice:** Transitional justice refers to the ways in which societies respond to serious and massive human rights violations. It is defined by the United Nations as comprising ‘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’ (United Nations 2010: 2).

**Constitution-building in transitions:** Constitution-building is ‘more complex than the process of constitution-making alone’. Understanding constitution-building requires making ‘a distinction between the written text that is the constitution and the practices that grow out of and sustain the constitution’, and then working to build both (International IDEA 2006: 9). International IDEA defines constitution-building as processes ‘whereby a political entity commits itself to the establishment and observance of a system of values and government . . . Constitution-building stretches over time and involves state as well as non-state organizations. Constitution-building in this sense is almost an evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics’ (ibid.).

## 2. Interactions between political settlements, transitional justice and constitution-building in transitional contexts

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Before presenting the conceptual framework for the interaction of constitution-building and transitional justice, it is important to recognize the context in which the two are likely to interact; namely, in contexts of transition. Transitional contexts represent critical junctures in a nation's history, creating 'opportunities for addressing past injustice, while at the same time retain[ing] continuities with the past that can pose constraints or obstacles for doing so' (Duthie 2017: 9). In this way, transitional processes and mechanisms have to strike a precarious balance between change and continuity.

### Political settlement as origin

In transitional contexts, transitional justice and constitution-building are linked to a broader political settlement process which 'attempts to (re)construct the state to reconfigure how power is held and exercised so as to include previously excluded actors and groups' (Bell 2017: 85). Understanding the way transitional justice and constitution-building interact involves understanding that both are parts of a wider transition process in which all elements of the transition will affect each other. In post-conflict situations, this means that they are best understood 'from a political bargaining perspective to have been context specific and shaped by the negotiation goals of the parties to the conflict as an integral part of a broader set of compromises necessary to a peace transition' (Bell 2017: 93). A key phrase here is compromise: post-conflict contexts often require compromise and moderation, as the aim is not necessarily to eliminate or resolve conflict but to end violent conflict and set up institutions and processes that can manage future conflict without resort to warfare.

A political settlement might violate—or not be 'perfect' according to—international standards, but if the alternative is letting instability or war continue, then compromises may need to be made. A specific example here is the issue of amnesties for gross human rights violations: in South Africa, 'at a very early stage of pre-negotiation, guarantees against conviction had to be given to enable exiles to return to participate in the talks' (Bell 2017: 89); and in Colombia and Aceh, amnesty 'may have helped create conditions for institutional trust, particularly among

ex-combatants’ (Waldorf 2017: 57). While international norms prohibit blanket amnesties for gross human rights violations, some form of amnesty might need to be a precondition for any transition to occur, an essential part of the underlying political settlement. For example, in The Gambia, the law establishing the Truth, Reconciliation and Reparations Commission explicitly empowers it to recommend amnesty for persons in ‘appropriate cases’. This is a tension that plays out in the design of transitional justice mechanisms and processes, and in constitution-building in transitions: concessions might have to be made to outgoing elites in order to ensure that they allow constitutional reform to occur, and if these concessions are forgotten—or deemed illegitimate by the international community—the entire political settlement could effectively be undermined. In sum, normative ideals should not become the enemy of effective, legitimate processes. In most cases, it is the ‘complex and often hidden dimensions of the political bargaining that determines’ (Bell 2017: 102) how constitution-building and transitional justice processes will be designed and implemented.

### Defining political settlement

Formal and informal political agreements that indicate how power is exercised within the state during and/or after a transition. A suggested working definition is: ‘the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power’ (Di John and Putzel 2009: 4).

### Trade-offs, pre-commitments and constraints

Transitional processes exist in the context of many constraints, including commitments that were made prior to an agreement (pre-commitments) that shape the available options for the transition as a whole. For example, in South Africa, an early commitment in the peace process to establishing institutions with the capacity to investigate human rights violations served as an important confidence-building measure to allow the rest of the transition to move forward (Bell 2017: 88). Pre-commitments can be important in bringing people to the table and creating the trust required for negotiations to occur in good faith. Sometimes these pre-commitments will represent compromises that protect the outgoing regime, while trying to meet the demands of the transition as well; status quo, reform and transformation are all at play in these moments, meaning that the resultant institutions and processes reflect the interactions between these impetuses and the actors representing them.

Many constitutions also reinforce aspects of the political settlement by giving protections for outgoing regimes and/or perpetrators of human rights violations; depending on how these are perceived, they can help or hurt the legitimacy of the processes. The classic transitional justice example of these kinds of protections is the constitutionalization of amnesties (e.g. Constitution of South Africa, Schedule 6, section 22, which carried over the authority for amnesties from the post-script to the 1993 Interim Constitution). The ‘higher law’ nature of constitutions can be used to

entrench amnesty, which provides outgoing regimes with an incentive to allow other transitional processes to move forwards, even while potentially protecting impunity at the expense of accountability and justice (see, for example, Cheng, Goodhand and Meehan 2018 on the risks of elite capture). Constitutionalizing such provisions may prevent any subsequent overturn of amnesty laws by the court, as happened in Argentina in 2003, giving further guarantees and security to members of the outgoing regime in coming to a political settlement on transfer of power, which can enable all parties to stay on board with the transition. On the other hand, amnesties and constitutional protection of other pre-commitments from the elite pact can also become divergent pathways to: '(1) Return to violence: where elite bargains do not hold and there is a return to large-scale competitive violence; (2) Elite capture: where elite bargains hold and successfully secure a reduction in levels of armed violence, but where elites monopolize the benefits of peace and leave little scope for sustained progressive change; and (3) developmental peace: where elite bargains sustain and facilitate a move towards a more stable and inclusive political settlement' (Cheng, Goodhand and Meehan 2018: 3).

To better understand the consequences and implications of protecting and adhering to pre-commitments for the health and sustainability of the transition project, it is important to assess to what extent they are included in good faith as opposed to 'self-amnesty' provisions. The latter can be perceived as undermining efforts to fight impunity, and can therefore detract from the legitimacy of the process as a whole. Ghana provides an example of this, with the inclusion of an indemnity/amnesty clause in the Transitional Provision Schedule of the 1992 Constitution (section 34(1)), viewed as an 'imposition by the surrogates of the Provisional National Defense Council (PNDC), government in the Constituent Assembly' (Atta-Kesson 2018). As opposed to the amnesty provisions in South Africa, which received broader popular support as they were framed as an essential part of the overall transition to peace and benefited both sides, the Ghanaian amnesties were never framed or perceived as anything other than a way of protecting the PNDC from prosecution.

While elite pacts are critical to the achievement of a new political settlement, transitional processes have to balance the interests of the elite with those of ordinary citizens, in order to be sustainable. There is growing recognition that the way in which processes are designed and undertaken can affect the degree and sustainability of their impacts in terms of broader transitional objectives, such as reconciliation and state-building. In modern constitution-building, for example, there is an increased 'emphasis on process as opposed to the content of the constitution' (Saunders 2012: 12). This suggests that transitional justice and constitution-building processes, depending on how they are designed, can promote reconciliation and state-building in and of themselves (on transitional justice, see, for example, Duthie 2017: 16; United Nations 2016: 9; for constitution-building, see, for example, International IDEA 2006). Processes can be healing in and of themselves, if they account for inclusion, participation and consultation. This suggests that the way a process is designed is critical to whether it will succeed overall, and especially how legitimate its outcomes will be considered. If well designed, participatory and inclusive processes can help debates around transitional justice and constitution-building get beyond

elite compacts and vested interests, giving victims and other marginalized groups a role in shaping and implementing the objectives of the processes.

There is a real risk, however, that public inputs can cut across what political-military elites are prepared to buy into, putting two sources of legitimacy for the transition at odds with one another. This risk is even more difficult to mitigate or manage when constitution-building and transitional justice processes interact, in particular when it comes to public consultations, which often form a part of both processes. This means that, when the two processes are at play in the same context, there are likely to be, at minimum, two opportunities for the public to express opinions on matters of great importance and sensitivity—resulting in more opportunities for consensus-building but also potential polarization or expressions of preference that are at odds with the political settlement.

In this way, given the multiple opportunities for public opinion to be mobilized ‘against’ the political settlement, the interaction of transitional justice and constitution-building processes might have a negative effect on short-term political stability, heightening instead of minimizing existing divisions and tensions in society and placing the overall political settlement at risk. This is particularly true in situations where consultations are hijacked and overly politicized, with one side claiming to be truly representing the people based on their interpretation of public inputs. Critically, because process matters, there can also be real consequences if a process is poorly designed. Processes that reinforce lines of inequality or privilege, or lack transparency and participation, can backfire, undermining the potential contributions that transitional justice and constitution-building can make to conflict transformation.

In sum, the processes of both transitional justice and constitution-building must be carefully thought through in order to balance the need to establish and protect the political settlement, protect critical pre-commitments and ensure adequate public participation and popular legitimacy.

### 3. Constitution-building and transitional justice: conceptual framework and comparative approaches

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Transitional justice is unlikely to succeed in achieving even its most immediate objectives without accompanying deep structural change. Transitional justice processes can address root causes of conflict and repression and contribute to, promote and trigger change, but they cannot necessarily mandate or implement structural changes or remove the causes of violations by themselves (Duthie 2017: 25, 27). Transitional justice bodies can ‘form blueprints for institutional reform . . . diagnos[ing] institutional failures and prescrib[ing] institutional reforms’ (Waldorf 2017: 58). From these processes, an ‘embryonic constitutional understanding’ can emerge, where parties agree to ‘create political institutions that enable them to govern together and continue to work out that disagreement more peacefully than before’ (Bell 2017: 96). Undertaking constitutional reform builds upon the ‘blueprint’. It can carry the momentum of transitional justice into the future, translating the recommendations of a temporary institution or process, which might be relatively weak in the overall governance landscape, into principles, constraints and commitments in the highest law of the land.

Constitution-building can support the long-term institutionalization and entrenchment of the four underlying pillars of transitional justice: truth, justice, reparation and non-recurrence—and thereby reinforce transitional justice objectives and efforts. The *constitutionalization* of transitional justice can arguably enhance the transformational potential of all four pillars. For the purposes of this paper, ‘constitutionalizing’ transitional justice refers to both narrow and broad efforts to incorporate and further transitional justice prerogatives through constitutional change. Using the right to reparation as an example, constitutionalizing this right in a narrow sense could mean including it in the constitution, while in a broader sense constitutionalizing this right could mean using the constitution to restructure the state to allow for institutionalized reallocation of public power and resources or to establish a land commission to ensure fair and equitable access to land in response to past harms and exclusionary policies.

The *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* states:

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations, along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice, the right to truth, the right to reparations and the guarantees of non-recurrence of violations (duty of prevention). (United Nations 2010: 3–4)

This section addresses the intersection between constitution-building and each of these aspects of transitional justice: truth, justice, reparations and guarantees of non-recurrence.

## Truth

Constitution-building can further the realization of the right to truth in two ways: (a) it can provide constitutional status and protection to the independence of truth-seeking bodies, including by establishing those bodies and/or expanding the mandate of existing bodies; and (b) it can give recognition to a narrative of the past. In either form, or in combining the two, constitution-building can help protect the space needed for open contestations and dialogues about the past, which are key to conflict transformation and prevention. At the same time, efforts to realize the right to truth can influence constitution-building processes, when, for example, truth commissions make recommendations for constitutional reform.

The right to truth is recognized by treaty bodies, regional courts and international tribunals alike. Traditionally, transitional justice mechanisms in support of the right to truth ‘assist post-conflict and transitional societies [to] investigate past human rights violations and are undertaken by truth commissions, commissions of inquiry, or other factfinding missions’ (United Nations 2010: 8). Truth commissions or other truth-seeking bodies are often established as unique (stand-alone) institutions through legislation, as in Indonesia, Nepal and Tunisia; their mandates are usually thematically and temporally limited but can include individual and public hearings, awareness raising, investigation and the mapping and documentation of serious violations of human rights. As ad-hoc institutions, however, the effectiveness of truth commissions is still debated and there are legitimate questions in the transitional justice field as to how to deepen the impact of truth-seeking efforts (see, for example, ICTJ 2014). Without being tied to a broader constitutional structure, truth commissions are vulnerable to institutional drift, where they remain formally in place but their impact lessens—intentionally or unintentionally—over time (Waldorf 2017). Even when established as separate and independent bodies, truth commissions are still nested in existing institutional frameworks, both formal and informal, and are therefore vulnerable to the same institutional weaknesses affecting the broader post-conflict context in which they operate (Waldorf 2017). Furthermore, informal institutional practices and cultures, such as clientelism and partisanship, often replicate themselves in truth commissions, resulting in the old rules of the game being layered on top of new institutions.<sup>1</sup>



The risk that new ad-hoc institutions will replicate existing institutional challenges, some of which may be linked to conflict in the first place, suggests that it might be advisable to link the pursuit of the right to truth to broader constitutional and institutional reform. For example, a country could call for a truth commission in the constitution itself, as was done in Colombia and Somalia. Alternatively, instead of—or in addition to—a truth commission, the act of constitutionalizing truth-seeking efforts could involve the establishment of constitutionally mandated human rights commissions, with enhanced or specified investigatory capacities, as was done in Nepal's 2015 Constitution. The National Human Rights Commission in Nepal was not only imbued with investigatory capacities but given broad powers to pursue these, including to:

- (a) exercise same powers as the court in requiring any person to appear before the Commission for recording their statement . . . examining them, receiving and examining evidence, and ordering the production of any physical proof,
  - (b) . . . enter a person's residence or office, conduct a search and seize any documents and evidence relating to human rights violations therein,
  - (c) enter any government premises or other places, . . . in case the Commission has received information that violation of human rights of a person is occurring thereon and immediate action is required, to provide rescue.
- (Republic of Nepal 2015, article 249(3))

Other bodies can also be given ongoing investigatory capacities, depending on the root causes of conflict in a given country. For example, the Kenyan Constitution establishes a National Land Commission that has the authority 'to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress' (Part 1, article 67(2)(e)). If commissions with these kinds of powers are constitutionally embedded, their work can be more sustainable than the work of ad-hoc commissions established through legislation. Constitutionally established commissions often have a stronger place within the constitutional order, and their institutional autonomy and authority are often better protected and better aligned with the constitution's vision of separation of powers (Mendez 2012), than ad-hoc commissions. Furthermore, including and empowering commissions in the constitutional order enhances their capacity to contribute to long-term conflict transformation, as their mandates will endure as long as the constitution does. Constitutions are inherently harder to change than legislation, making their amendment—and certainly repeal or replacement—less subject to political manipulation and shifting agendas.

Beyond the challenges associated with the establishment of truth commissions outside of the constitutional framework, the experience of transitional justice in practice has shown the difficulty of truth-seeking efforts based on the processing of individual cases. There is now a movement towards recognizing patterns of violence, and the factual basis and scope of conflict, instead of particular truths related to individual hearings (Teitel 2000). The evolution in transitional justice away from 'a single-minded focus on individual accountability in favour of a more communitarian conception' (Teitel 2014: 57), which has accompanied the acceptance of transitional



justice's link to peace- and state-building, lends itself to the constitutionalization of truth-seeking efforts, with preambles and other recognitions of a common 'truth' about the past as examples of this. Constitutionally embedding a version of the truth (or the results of truth-seeking efforts) is critical to conflict transformation 'because of the close connection between "discussion of the past" and political bargaining over how to end a conflict . . . intrastate conflict often involves two conflicts: the conflict itself and a "meta-conflict"—that is, a conflict about what the conflict is about' (Bell 2017: 91). It is critical to address both of these conflicts in solidifying a political settlement. Truth-seeking efforts, considered more broadly, are linked to the broader resolution of the meta-conflict, the development of an agreed narrative about the past or a societal or collective truth that will allow for healing and progress towards the future. The South African Constitutional Court recognized the critical place of truth in transitions, in the *South Africa vs McBride* case (2011), holding that 'truth telling was the moral basis of a transition from the injustices of apartheid to democracy and constitutionalism' (ICTJ 2013: 5).

Constitutions can be important symbolically in accounting for past grievances and atrocities, recognizing a narrative about the past that can also guide the future. Constitutional preambles often set forth a narrative about the common history of the country and, when drafted after conflict, can be a meaningful way of capturing understandings about the past in the highest law of the land. Often, the process of composing a meta-narrative of the past, for embodiment in a preamble, is reinforced by other transitional justice processes aimed at consolidating and engaging the public in the development of this narrative. The entrenchment of the narrative can be critical for victims' groups and other stakeholders who might need a high level of recognition of wrongs suffered, as evidenced—for example—in Rwanda's Constitution preamble: 'Conscious of the genocide committed against Tutsi that decimated more than a million sons and daughters of Rwanda, and conscious of the tragic history of our country . . . committed to preventing and punishing the crime of genocide . . . [and] eradicating . . . divisionism and discrimination based on ethnicity, region or any other ground' (Republic of Rwanda 2003/2015: 8).

This preamble shows how constitution-building in transition can bridge the past and present; it encompasses at once a 'narrative' of the genocide and a commitment to preventing the same in the future based on certain constitutional principles including non-discrimination. Beyond preambles, constitutions can help to embed truth-seeking as a practice. Even when thinking of truth-seeking in a more individualized sense, efforts to—for example—constitutionalize the right to information or access to public records (which was at issue in Central and Eastern Europe, see as an example Halmai 2017) give citizens a lasting platform upon which to pursue the truth over time instead of a limited window, as might be provided by transitional justice mechanisms alone. This was done in Sri Lanka through the 19th Amendment, which added article 14(a), Right of Access to Information, to the Constitution; the right has been relied upon by citizens, who have been filing requests according to the outlined procedures (for a study on how the right has been implemented in practice, see CPA 2018).

At the same time, there are risks that certain political contexts can lead to the constitutionalization of one-sided narratives that seek to divide a citizenry into

perpetrators and victims. While in practice some constitution-building and transitional justice processes may have divided people because of the way they were designed and conducted, the aims of constitution-building and transitional justice are to achieve legitimate objectives and increase social cohesion. Interestingly, the Rwandan preamble quoted above was amended in 2008—the original 2003 version just read ‘conscious of the genocide’ without ‘against the Tutsi’, which was added later—showing how perspectives of historical conflict can, in fact, harden over time, even while conversations about the meta-conflict narrative never close. A changing political settlement can therefore lead to the hardening of a narrative that might be weaponized in favour of one group or administration and at the expense of another; the amended Rwandan preamble is less neutral than it once was, showing how an overly politicized or one-sided constitutionalization of a narrative can potentially detract from efforts at conflict transformation and prevention.

Despite potential risks, constitutionalizing truth-seeking efforts and mechanisms can reinforce their contribution to conflict transformation. At the same time, efforts to realize the right to truth directly can in some ways catalyse or shape constitution-building. Truth commission reports, for example, can articulate the need for constitutional reform, as well as explaining it and making specific recommendations for it. While specific choices in constitution-building are often not well explained to the public, truth commission hearings and reports can help to contextualize these choices and connect reforms to specific goals. For example, reforming the justice sector could be linked to addressing the root causes of conflict or to promoting a right to justice. In Sierra Leone, the Truth and Reconciliation Commission made extensive recommendations for constitutional reform, inspiring the later Constitutional Review Committee to make 138 of its own recommendations, only 33 of which were accepted by the Government (Cambayma 2017). In Morocco, the Equity and Reconciliation Commission in its final report in 2005 identified a number of institutional problems that the Commission surmised were related to the perpetuation of human rights violations and a decline in democracy. The Commission went on to recommend a number of constitutional reforms to address these challenges, including ‘reinforcing the principle of separation of powers . . . prohibiting constitutionally any interference by the executive power in the functioning of the judiciary’, constitutionalizing internationally recognized human rights and strengthening judicial review (Kingdom of Morocco 2005). While these reforms were not implemented immediately, they were reflected in the 2011 Constitution.

## Justice

The pursuit of justice can be furthered through constitution-building in a number of ways, including protecting access to justice, fair trial standards and due process, and ensuring meaningful reform of justice sector institutions. Additionally, it is critical to recognize the role that constitution-building—and the (re)establishment of rule of law under a constitution that is seen to constrain all members of society, including those in power—plays more broadly in re-enforcing the supremacy of law and order, as opposed to conflict and chaos. In this way, engaging in constitutional reform, and

re-emphasizing the importance of the constitutional order and the role of courts in protecting that order, can promote the pursuit of justice and ideally contribute to a sustainable project of transformation by channelling conflict into legal institutions and processes for its resolution. Transitional justice can support this process to the extent that it strengthens or helps to re-establish the rule of law, particularly by holding accountable perpetrators of serious international crimes or by reforming rule-of-law institutions such as the judiciary and police in a more accountable and inclusive direction.

Individual accountability through criminal prosecution and other measures has always been an important element of transitional justice. Such efforts have raised constitutional questions, including about the acceptability of punishment for gross human rights violations not previously or currently criminalized under domestic law and the legitimacy of external courts determining ‘criminal’ liability. Transitional justice is aimed at establishing cultures of accountability instead of impunity, while amnesties, which are seen to undermine this aim, have provoked domestic and international resistance. While in some cases amnesties were seen as a means of incentivizing individuals to come forward and tell the truth, without fear of prosecution, they were also seen to significantly undermine a culture of accountability, and maybe even to promote one of impunity, depending on the type of amnesty.

Constitutions can play a key role here, either by protecting the underlying political settlement, even if it includes amnesty, or by empowering courts to make key decisions about the constitutionality of different transitional justice processes. Constitutions can provide for criminal justice to trump claims for amnesties (Tunisia, article 148) or, contrarily, by protecting amnesty (South Africa, Schedule 6, section 22). As such, constitutions can codify different understandings of ‘justice’. Courts might then be called upon to assess these understandings and clarify them. Courts in Argentina, Colombia, Indonesia, Nepal and South Africa, among others, have made critical rulings about the constitutionality of transitional justice legislation and institutions. In these cases, whether the transitional justice mechanisms were upheld or overturned is not what is important, but rather the fact that a court is asserting that all processes and institutions must comply with the constitution. This, in itself, contributes to re-establishing the rule of law and prospects for justice. As such, constitutionalizing the pursuit of, and access to, justice seen during the transitional justice period can amount to (re)empowering existing courts or creating new ones.

The UN Special Rapporteur has outlined the ways in which different transitional justice processes can contribute to the rule of law, thereby reinforcing the constitution-building project. Truth-seeking can expose compromised personnel and recommend reform of rule-of-law institutions, reparations reinforce the principle of equality before the law by recognizing victims’ rights, and prosecutions can demonstrate that justice can be achieved and strengthen domestic judicial systems (United Nations 2012). In order to promote the rule of law, as intended, however, efforts to realize accountability after conflict must be perceived as unbiased and bound by a functioning legal framework. As the UN notes, ‘the credibility and legitimacy of prosecution initiatives require that they are conducted in a non-discriminatory and objective manner, regardless who the alleged perpetrators may

be' (United Nations 2010: 7), and this highlights the need for standards around prosecutorial scope and jurisdiction, which often come from constitutions themselves. In this way, constitutions can guide the development and operation of transitional justice mechanisms, providing for important standards related to fair trials and legal defence. Perceptions of fairness of justice-related actions depend on compliance with these standards.<sup>2</sup> Transitional justice mechanisms such as truth commissions can also provide the rights-based justification for building the capacity of national institutions, aiming to 'reinforce or develop national investigative and prosecutorial capacities, an independent and effective judiciary, adequate legal defense, witness and victims' protection and support, and humane correctional facilities' (United Nations 2010: 7)—although they can rarely achieve these aims on their own. Such aims, if they do not actually require constitutional change, can also be furthered by it.

The Special Rapporteur recognizes that preconditions for fair prosecutions—for example, political independence, budgetary autonomy, meritocratic appointment procedures—are precisely the 'capacities that most countries in a transitional setting are unlikely to have' (United Nations 2014, para. 88). In these settings, ad-hoc, hybrid or fully internationalized tribunals have been set up to deal with prosecutions related to massive human rights violations. These efforts must account for the same pitfalls mentioned above with regard to truth commissions—any institutions added to the existing landscape without deeper reform may risk replicating and reinforcing existing institutional challenges, many of which may underlay the conflict or repression in the first place. There are also challenges around ensuring enforcement and implementation of decisions coming out of ad-hoc mechanisms, since they are not necessarily linked to the broader policing and justice sectors, as seen in Guatemala. Constitutionalizing reforms that protect the independence of the judiciary or increase prosecutorial discretion, and therefore address weaknesses in the administration and institutions of justice, can promote justice in the long term and contribute to meaningful conflict transformation. For example, Morocco's Equity and Reconciliation Commission recommended constitutional reform to effectively prohibit any interference by the executive power in the functioning of the judiciary, protecting the independence of the judiciary in the constitutional structure, which can be seen as a measure to protect the pursuit of justice broadly. The Commission was able to articulate a justification and need for broader constitutional reform of the justice sector and separation of powers.

Combining transitional justice and constitution-building processes can therefore mutually reinforce both processes and their ability to contribute to long-term peace, justice and inclusion. Just as transitional justice can provide momentum for constitution-building, the realization of transitional justice objectives benefits not only from the promulgation of specific reforms but from the 'development of constitutionalism as a political project' (Tanzarella 2017). Constitutions themselves can 'impose significant constraints on the manner in which [transitional justice] measures will be carried out' (Mendez 2012: 1273) in terms of requirements for fair trials and due process, as well as guarantees of equality and non-discrimination before the law, and considerations around separation of powers. Constitutions developed in transition often 'contain a framework for the administration of transitional justice . . .

and become the mandate against which the legitimacy of transitional justice mechanisms and initiatives will be measured' (Mendez 2012: 1272). In complying with constitutional constraints and demonstrating how a constitution can serve as guidance for transitional justice processes, it is possible to build a culture of constitutionalism. Building a culture of constitutionalism is equivalent to establishing a culture of state accountability, overcoming one of the critiques of transitional justice processes—namely, that they focus on individual accountability at the expense of the broader concept of state accountability.

## Reparations

Reparations 'seek to redress systemic violations of human rights by providing a range of material and symbolic benefits to victims' (United Nations 2010: 8). Reparations can be individual or collective, and can include financial compensation, psychosocial and medical services or programmes, educational scholarships or the reform of history curricula, memorialization, the return or redistribution of land or other property, and public apology. Importantly, victims have a recognized right to reparations under international law (United Nations 2006), which means that states have a positive obligation to design and implement reparation programmes that meet the needs of victims, as identified by victims themselves. If well executed, reparations can 'be effective and expeditious complements to truth-seeking processes and prosecution initiatives, by providing concrete remedies to victims, promoting reconciliation, and restoring public trust in the State' (United Nations 2010: 8). In this way, even temporary or ad-hoc reparation programmes can serve as important confidence-building measures, especially if they can be agreed to and administered in advance of (or while) constitution-building is occurring. Reparations can therefore help to maintain momentum and support for the transition, ultimately benefiting prospects for constitution-building in the long run.

Constitution-building processes can also reinforce access to reparations for victims by providing (a) symbolic reparations; (b) specific reparations for conflict victims as a special category; and (c) reparations for other marginalized communities, particularly those whose marginalization is connected with the root causes of the conflict or instability. Each of these will be discussed below.

### Symbolic reparations

Increasingly, other aspects of reparation beyond material compensation, such as symbolic reparations, are being recognized as important. To the extent that public apologies and recognition are considered to be reparations, the language in constitutional preambles—as discussed above in relation to the right to truth—can be reparative. For example, the South African Constitution preamble begins: 'We, the people of South Africa, Recognize the injustices of our past, Honour those who suffered for justice and freedom in our land . . .' (Republic of South Africa 1996). Tunisia's Constitution preamble includes: 'Taking pride in the struggle of our people for independence, to build the state . . . and to achieve the objectives of the revolution for freedom and dignity, the revolution of December 17, 2010 through January 14, 2011, with loyalty to the blood of our virtuous martyrs, to the sacrifices



of Tunisian men and women over the course of generations' (Republic of Tunisia 2014).<sup>3</sup>

Reparations can also take symbolic form in the changing of a flag or the name of a region, or by protecting issues of symbolic importance to victimized communities, thereby giving constitutional recognition to their importance. For example, Serbia's Constitution includes article 79, Right to Preservation of Specificity, which in part protects the rights of members of national minorities to 'use of their symbols in public places' and to 'traditional local names, names of streets, settlements and topographic names' (Republic of Serbia 2006). Kosovo's Constitution similarly provides veto rights to minorities on issues of 'vital interest', including vetoes on 'laws on the use of symbols, including community symbols and public holidays' (Republic of Kosovo 2008/2016: section 1(8)). These types of provisions give marginalized communities the autonomy and authority to protect for the future the symbols that are important to them. Instead of the state building a statue or museum, the constitution gives communities the authority and resources to make their own decisions on the establishment and maintenance of important cultural symbols.

### Reparations for victims

Specific reparations for victims can also be sustainably provided for through constitutional recognition, with 'preferred treatment' serving as one form of symbolic atonement for past wrongs (Mendez 2012: 1280). In this way, constitutions can help to ensure prioritization of victims' needs and rights in the long term, which is especially valuable if victims represent a section of the population who has previously been marginalized or systematically excluded from social, economic and political processes. Nepal provides a good example here. Its 2015 post-conflict Constitution includes conflict victims as a category for special consideration throughout, including in article 42(5), the Right to Social Justice: 'The families of martyrs who sacrificed their lives in the people's movements, armed conflicts and revolutions for a democratic progressive change in Nepal, the families of those who were disappeared, persons who fought for democracy, victims of conflict and the displaced, persons who were physically maimed, the wounded and the victims, shall have the right with priority, as provided for by law, to education, health, employment, housing and social security, with justice and appropriate respect' (Republic of Nepal 2015). Another example is article 39(9), the Right of Children, which promises 'special protection' from the state for children who are victims of conflict. While this can further the goals of transitional justice and conflict prevention, it can also be problematic, as the Rwanda case study in section 5 illustrates.

Rwanda's Constitution also protects victims as a special category—the 'welfare of needy survivors of the genocide against Tutsi' (Republic of Rwanda 2003/2015: article 50). In this way, it exemplifies the UN guidance note on strengthening transitional justice activities, which recommends 'enshrining protections for economic, social, and cultural rights, as well as nondiscrimination clauses, in . . . constitutions' (United Nations 2010: 10). The Rwandan case, however, provides a caution—article 50 is another provision that was amended to read 'genocide against Tutsi' in the revisions of 2008; through this instance of constitution-building, reparations were limited (not expanded) to only apply to one particular group, with

identity being equated with victimhood in Rwanda. This represents a potential tension between transitional justice and constitution-building processes, since transitional justice has a clear requirement to focus on a ‘specialized constituency’—victims (e.g. the UN calls on all actors to ‘ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms’ and to place ‘victims at the center’ of all transitional justice-related efforts (United Nations 2010: 6)).

### Reparations to address marginalization and other root causes of conflict

When conflict or repression is based on ethnic or economic hegemony, or historic marginalization of certain communities, constitutional provisions that recognize cultural diversity or call for the equal inclusion of marginalised groups, or affirmative action measures, can be included to address the root causes of social and political conflict (Böckenförde, Hedling and Wahi 2011). These can effectively address the root causes of injustice and provide for long-term, sustainable, institutionalized and binding measures to repair the traumas of conflict and exclusion. Broader constitutional reforms—most explicitly in cases of federalism or other forms of devolution of power—may seek to redress inequitable access to state resources or historic claims for autonomy. Nepal provides another example here; its preamble explicitly links the establishment of the new, federal republic to the aim of addressing root causes of conflict in the country: ‘Ending all forms of discriminations and oppression created by the *feudal, autocratic, centralized and unitary system* . . . now therefore, in order to fulfil the aspirations for perpetual peace, good governance, development and prosperity through the medium of *federal democratic republican system of governance*, hereby promulgate this Constitution’ (Republic of Nepal 2015; emphasis added). Therefore, historical marginalization, oppression and dispossession of certain groups can be redressed through constitutional reforms aimed at ensuring a fairer share of access to, and control over, public power and revenue. Constitutionalizing these measures improves their potential for multigenerational impact.

There is a trend towards expanding the definition of reparations to include ‘transformative reparations’, which, ‘instead of returning victims to the status quo ante of political marginalization, economic insecurity, and gender inequality . . . are meant to give victims “what they ought to have had under fair conditions” before the gross human rights violations. In this way, they are both corrective and distributive, both backward-looking and forward-looking, both individual and structural’ (Waldorf forthcoming). This move responds to a critique that transitional justice mechanisms are ill suited to producing transformation—a critique that can, at least in part, be addressed by efforts to constitutionalize transitional justice, thereby providing a clear mandate for longer-term and more sustainable societal changes. Including reparations in a constitution can allow them to take on a more transformative character, enhancing their potential to contribute to long-term sustainable peace and development. Along with one-off payments, or the return of an individual piece of property, for example, constitutional reparations can fundamentally affect equality of access to resources, power and well-being in a nation-state. Land provides an apt example here; ‘while transitional justice measures

are unlikely in themselves to have a significant impact on land issues' (Huggins 2009: 2), constitutionalizing these efforts can have a large impact. Transitional justice processes often target restitution—or the return of illegally confiscated property; however, 'in countries where unequal access to land is a cause of conflict, . . . restitution can only complement, not replace, efforts to bring about land tenure reform' (Huggins 2009: 3). Constitution-building can encapsulate these efforts, changing the patterns of landholdings, property laws and other systemic or historic inequalities, and thereby broadening the scope and reach of transitional justice so as to address the root causes of conflict, and not only the events or symptoms of the conflict. In this way, coordinating constitution-building and transitional justice efforts can help to deepen conflict transformation and prevention in the future.

### Guarantees of non-recurrence

The guarantee of non-recurrence was originally defined in the UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (1997, updated 2005). Principle 35 on non-recurrence holds that 'states must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions' (United Nations 2005: 17). The guarantee of non-recurrence underlies, in many ways, all the components of transitional justice, which aim to fight cultures of impunity and abuse and prevent the recurrence of violence through reparative and other measures. The guarantee of non-recurrence is the most obviously 'forward looking' component of transitional justice (Waldorf 2017: 54) and has often been interpreted to be the core right under which human rights protection and institutional reform efforts occur. Traditionally the broadest and least well-defined component of transitional justice, the guarantee of non-recurrence is the component that most clearly overlaps with constitution-building. It is also particularly vulnerable to conceptual expansionism, in terms of the degree to which the non-recurrence mandate is interpreted to include institutional reforms. As constitutions ultimately establish the institutional framework of the state, any efforts to reform institutions will always be enhanced by constitutional reform. Constitution-building processes, then, as a whole can be seen as an effective way of guaranteeing non-recurrence.

The UN calls for institutional reform as part of the guarantee of non-recurrence, saying that 'public institutions that helped perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law. By reforming or building fair and efficient public institutions, institutional reform enables post-conflict and transitional governments to prevent the recurrence of future human rights violations' (United Nations 2010: 9). The International Center for Transitional Justice (ICTJ) has similarly suggested that 'by incorporating a transitional justice element, [institutional] reform efforts can both provide accountability for individual perpetrators and disable the structures that allowed abuses to occur' (ICTJ 2019a). Institutional reform can be individual or personalized such as in the form of vetting; or it can be structural, looking at an entire institutional sector that may have been complicit or worse in



human rights violations. Both approaches' impact on conflict transformation can be enhanced through constitutionalization, but where constitution-building can, perhaps, add the most value is in the area of deep reforms to the distribution and exercise of power in the state. This can occur in two primary ways: first, through institutional innovation and changes in the structure of the state and in the form of the government, which can seek to change the exercise of power and governance practices that may have underlain conflict or repression in the past; and second, by adding human rights protections to the constitutional order, which also places a constraint on power and protection to citizens who may have been marginalized, or worse, in the past.

### Fundamental reform: institutional innovation, change of form of government or structure of state

A stronger separation of powers, in particular de-concentration of power in the executive and a more independent judiciary, increased civilian oversight over the security sector, and a more competitive system of electoral politics are all common elements of constitution-building, and, depending on the context at hand, they can contribute directly to the objective of non-recurrence. For example, the Moroccan Equity and Reconciliation Commission recommended reinforcing the principle of separation of powers to ensure that executive power was constrained; while the UN, in its mapping of transitional justice needs in the Democratic Republic of the Congo (DRC), suggested that 'in light of the impunity enjoyed by the perpetrators of serious violations of human rights and international humanitarian law, and the repetition of crimes within the territory of the DRC, successful reform of the country's justice and security sectors is crucial', and went further to note that 'a clear-cut division of powers within government would help ensure the independence of the judiciary' (OHCHR 2003). In this way, transitional justice mechanisms, such as truth commissions, and the reports and other products they develop, can provide an explanation and needed justification for the large-scale constitutional reforms they recommend, making an explicit link between non-recurrence as an objective and the proposed reforms.

This is also an area where one process can 'do the work of another'. The most apt example is Sri Lanka. Sri Lanka's conflict was recognized to be driven by an overexpansion of the executive presidency powers: 'during the Rajapaksa regime (2005–2015) power was consolidated in the executive presidency leading to increased authoritarianism and centralization and the dismantling of checks and balances' (Fonseka 2018). Arguably, the only successful constitutional reform after the conflict was aimed directly at addressing this driver of conflict: the 19th Amendment to the Constitution reduced the power of the presidency, created the Constitutional Council, strengthened the independence of oversight institutions, and introduced a right to information, as discussed under the section on the right to truth above. In its restriction of the presidential power, particularly, the country represents how constitution-building in transition can promote deep structural change that can remedy root causes of conflict or instability, complementing traditional measures of transitional justice.

Besides macro reforms to the form of the government or structure of the state, institutional innovation can also contribute to non-recurrence. ‘Restructuring institutions to promote integrity and legitimacy, by providing accountability, building independence, ensuring representation, and increasing responsiveness’ (ICTJ 2019a) can contribute to guarantees of non-recurrence, and can certainly be furthered by constitutional reform that institutionalizes the mandate for such restructuring in the highest law of the land. The constitution can set up new courts of justice or oversight institutions. It can give constitutional status to commissions. For example, in Tunisia, where corruption and misappropriation of funds under the Ben Ali Government (1987–2011) was recognized as a conflict driver, the Constitution established a Good Governance and Anti-Corruption Commission (Republic of Tunisia 2014: Title 6, Part 5, article 130).

It is important, here, to remember that ‘No institution—however new or radically reformed—is a blank slate . . . In most cases, institutional creation is better understood as *bounded innovation* within an existing system’ (Fiona Mackay, quoted in Waldorf 2017: 44, emphasis added). Even new institutions added with the best intentions will be “nested” within existing institutional environments’ (Waldorf 2017: 45) and will, just as much as pre-existing institutions, be prone to path dependency from informal political institutional cultures and practices such as clientelism. The difficulties of institutional reform have been widely recognized, with a corresponding emerging focus on the importance of behaviour change to accompany institutional innovations; for example, the UN guidance note on transitional justice calls on governments to ‘incorporate comprehensive training programmes for public officials and employees on applicable human rights and international humanitarian law standards’ (United Nations 2010: 9). A similar recommendation accompanies constitution-building, with a growing emphasis on the need to ensure behavioural change alongside constitutional change for it to realize its potential contribution to conflict transformation.

As well as recognizing the importance of behaviour change, it is also critical to acknowledge that institution-building and institutional reform, especially when related to constitutional change, takes a long time. Transitional justice can play a critical role in these scenarios to maintain the momentum behind larger-scale reform when they are stalled or when political will has waned. Transitional justice mechanisms can also be set up more quickly than constitutionalized institutions; this can be particularly important in post-conflict or transitional situations, where there is likely to be a trust deficit between the state and the people. The instant progress that can be demonstrated by setting up transitional justice mechanisms and processes can be critical in confidence-building and in reassuring the public that the government and the elites are committed to the transition.

### Protecting human rights

Besides institutional reform, non-recurrence can be furthered through the transformation of legal frameworks to better protect and promote human rights. This transformation is most deep when it occurs on a constitutional level. While these human rights reforms could be inspired by transitional justice measures and discourse, they could also shape these measures, because ‘the manner in which the

constitution incorporates international law into the domestic jurisdiction is crucial to understand both the imperatives the constitution may impose to deal with the past, and the restrictions on how to do so' (Mendez 2012: 1273). For example, in Colombia the Constitutional Court has actively used the provisions of the Constitution to uphold or strike down transitional justice measures. Constitutional reform can also be undertaken to recognize new commitments to human rights, pluralism and accountability—laying out a vision for peace that may depend on responding to the understandings of past wrongs, which transitional justice mechanisms provide. Furthermore, 'human rights in themselves represent a constraint on power, and can have a redistributive function—this speaks to both their significance in terms of constitutionalizing new or renewed commitments to human rights after conflict' (Bell 2017: 98).

Some constitutions will incorporate commitments to human rights treaties into their text, for example in the DRC Constitution preamble: 'Reaffirming our adherence and our attachment to the Conventions of the United Nations on the Rights of the Child and on the Rights of Women' (Democratic Republic of the Congo 2005/2011). Other constitutions go arguably further, establishing a special status for treaties writ large to domesticate international human rights obligations. Colombia's article 93 provides an example of this (Republic of Colombia 1991/2015). Another is Argentina's Constitution, which states in article 75(22): 'Treaties and concordats have higher standing than laws. The following [list of international instruments], under the conditions under which they are in force, *stand on the same level as the Constitution*, [but] do not repeal any article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognized therein' (Argentina 1853/1994). Courts in Argentina have relied on this to overturn amnesty laws in the past (Mendez 2012: 1277). Even if a constitution is otherwise silent on transitional justice, constitutional reform to include human rights obligations can focus attention on addressing impunity and contribute to the objective of non-recurrence.

### Vetting

Vetting or lustration involves examining the backgrounds and conduct of existing employees, and adding new recruitment criteria, so as to remove from office any public officials who were personally responsible for gross human rights violations. It can also include the disbandment or suspension of entire security units if they have been proven systematically responsible for gross human rights violations. Vetting is used to re-establish trust and confidence in the state as part of transitional justice, and, arguably, 'of all the transitional justice mechanisms, vetting can be expected to have the greatest impact on institutional trust, because it removes personnel who are deemed untrustworthy' (Waldorf 2017: 59). In contributing to 'civic trust', therefore, one can see a broader link between vetting and the state-building objectives ascribed to transitional justice and constitution-building processes alike. Vetting can also be an important area of interaction between the constitution and transitional justice. A constitution can enshrine restrictions on who can serve in public office or as a public employee. Even if vetting is detailed in legislation, the constitution often sets the parameters for the process and the processes themselves often come under

scrutiny before constitutional/supreme courts. This is critical since the removal of staff must ‘comply with due process of law and the principle of non-discrimination’ (United Nations 2010: 9) and preserve the perception of fairness if it is to have its intended effects: ‘personnel reform legislation should comply with constitutional and international norms, and be clear and precise in order to establish legal certainty and avoid ambiguity and political interference’ (OHCHR 2006: 10). For example, in the Czech Republic, the Constitutional Court was called upon to rule on the constitutionality of the Lustration Law in 1992, after 99 members of parliament complained about its application. While it upheld the law overall, it struck down provisions that allowed for the Minister of Defence and the Minister of the Interior to exempt individuals from the vetting procedure on the basis of ‘state security’ (Priban 2007: 314). The court held that these provisions violated the principles of equality and due process of law. It is also worth noting that vetting is often considered to be a type of administrative justice, exemplifying how transitional justice often spans the dimensions of a justice system—from administrative to military to criminal proceedings—but also how these types of processes need to fit within a broader constitutional order. If vetting does comply with constitutional principles of due process and non-discrimination, it can enhance the legitimacy of the constitutional order. For example, in Kenya there was a sense that new judges were needed to serve as guardians of the new constitution to ensure that vestiges of the old regime did not taint the application of the new constitution. An independent vetting board screened 53 judges and 298 magistrates, and found 44 per cent of the Court of Appeal judges, 7 out of 44 High Court judges and 14 magistrates unsuitable for judicial office (Cottrell Ghai 2012).

In sum, there are many ways that the interaction between constitution-building and transitional justice can enhance efforts towards ensuring a guarantee of non-recurrence. By building upon transitional justice process and mechanisms’ analysis of conflict drivers, meaningful institutional reform—be it at the individual, sectoral or state structure level—is best secured through constitutional change, which can not only deliver specific reforms but, perhaps more importantly, provide a means of institutionalizing these changes for future generations. Creating institutional and legal space for the ongoing pursuit of transitional justice objectives—be it truth, justice, reparations or reconciliation—can enhance the impact of these objectives, contributing to long-term conflict transformation. In the absence of constitutionalization, transitional justice efforts at non-recurrence may remain more vulnerable to waning political will and manipulation, as can be seen in the Guatemala case study in section 5.

### Endnotes

1. In a joint letter from several Special Rapporteurs (2019), the UN expressed concerns about the politicization of appointment procedures for the transitional justice commissions in Nepal and the same was noted in the Democratic Republic of Congo, where political expediency meant members of various warring factions, themselves suspected of human rights violations, were appointed to the Commission. (ICTJ 2014).
2. Perceptions of fairness are, indeed, relevant throughout transitional justice processes, not only in the realm of prosecution but also in the related area of the granting of amnesties. For example, in South Africa, the ANC received more amnesties than members of the security sector. This was significant in two ways. First, it left the process vulnerable to criticisms of bias and partiality, hurting the overall legitimacy of the process in terms of rule-of-law requirements for impartiality. Second, it affected the quality of truth that emerged from the process, since the sources of that truth were more heavily rooted in ANC members' perspectives.
3. It is worth noting here the potential overlap between the different pillars of transitional justice, including when they are constitutionalized. The text of preambles can be seen as representative of the right to truth (in recognizing a meta-narrative) or as a part of reparations in providing recognition to martyrs and other groups. The Moroccan Equity and Reconciliation Commission recognized this link, referring to the truth as a form of reparation: the Commission gives 'equal importance to the issue of restoring dignity, by way of truth seeking, eliminating the aftereffects of violations and preserving memory as an essential component of its reparations approach' (Kingdom of Morocco 2005).

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## 5. Case studies

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Both transitional justice and constitution-building are conceptually complex fields, with larger and ever-expanding demands placed upon them. The fact that both processes often arise out of the same transition and political settlement justifies a closer look at how the interactions between the processes might be designed or seen to complement each other. This is particularly important because of the ‘constraints of scale and fragility’ in times of transition, which means that ‘it will sometimes be prudent not to try to do too many things at the same time’ (ICTJ 2019b). Transitional interventions should seek to complement one another, minimizing tensions and maximizing synergies (Duthie 2017: 30). This means that attention should be paid to better understanding how complementarity can be fostered, encouraged or designed; it might require prioritization and sequencing within and across the two processes.

This section contributes to these efforts, addressing questions such as how to coordinate and sequence constitutional reform and transitional justice efforts. Risks include the fact that political leaders may use one of the two processes to manipulate or block the other; in Sri Lanka, for example, the former President Chandrika Bandaranaike Kumaratunga, who heads the Office of National Unity and Reconciliation, famously stated: ‘If you start the war crimes tribunals now, you can be sure there will be no [new] constitution.’ One process might also be given more priority or urgency than the other, putting the two processes in competition for resources and political will. Nepal illustrates this point, as does Sri Lanka where Colombo’s liberal elite have been criticized for pushing transitional justice at the expense of the broader project to reconfigure a Sinhala Buddhist nation-state into a pluri-national state (Guruparan 2017).

Guidance in both transitional justice and constitution-building has increasingly emphasized the importance of paying attention to local contexts and conducting detailed situational analysis and stakeholder/power mapping—see, for example, Kemmerer (2008: 8): ‘A careful assessment of historical, social, and cultural contexts is also a task incumbent upon external actors aiming at a fruitful contribution . . . to a successful process of constitution making.’ Practice in both fields suggests that the chances of transitional justice and constitution-building processes achieving the transition’s broader objective of conflict transformation will be enhanced if they each align closely to the political settlement (as discussed above). The chances of success will also be enhanced if both processes operate with real understandings of the

political economy, institutional preconditions and socio-economic realities—including conflict histories—of the contexts in which they are unfolding. Understanding the contextual balance of power will in turn enable better understanding of ‘the interrelationship of the trade-offs’ (Bell 2017: 96) across the transition as a whole. As such, it is vital to consider both macro and micro aspects of the maxim that ‘context matters’, when analysing the interaction of constitution-building and transitional justice.

The case studies included in this paper are chosen to exemplify this point: they provide illustrations of how transitional justice and constitution-building processes have interacted, or not, in different contexts, with regard to critical contextual factors, such as institutional context, the nature of conflict and violence, the political context and power map, and the underlying economic and social structural problems (Duthie 2017). This reminder of the importance of context, and of how deeply the objectives and processes of transitional justice and constitution-building are tied to context, is key to helping practitioners avoid ‘one-size-fits-all formulas and the importation of foreign models’ (United Nations 2010: 5) in both transitional justice and constitution-building.

## Colombia

### Key lessons

1. Constitution-building can provide important protection for, and maintain momentum behind, transitional justice and transitions as a whole.
2. Constitutional protection of transitional justice, and peace processes more generally, is likely to lead to high judicial involvement (judicialization) of these processes—this has advantages (strong protections) and disadvantages (a weakening of the focus on reconciliation, an over-emphasis on formal legal provisions).
3. Incomplete elite pacts can become spoilers, especially where referendums are required to confirm the pact.

### Background

Since the 1960s, Colombia has witnessed an armed conflict between the Government and various guerrilla groups over social and economic tensions, and lack of equitable political participation. This has resulted in the death of more than 262,000 people, the disappearance of 80,514 people (of which 70,587 are still missing), 37,094 kidnappings, 15,687 victims of sexual violence, and 17,804 minors recruited into conflict (Centro Nacional de Memoria Historica 2018). Violence in some cases was carried out by other illegal armed groups, besides guerrillas and the state, including right-wing paramilitaries. Negotiations between the Government and warring parties began in 1982, and have had varying degrees of success. Negotiations with the M-19 and a range of leftist guerrillas resulted in a peace agreement in 1990, which included blanket amnesties for M-19 members. The signing of the agreement was accompanied by a mobilization of civil society that many credit with inciting the process of building the new Colombian Constitution in 1991, which included specific language to anticipate and facilitate transitional justice.

With the new constitutional mandate, Congress passed a number of transitional justice laws including the Justice and Peace Law in 2005 (see CJA 2016) and the Victims Law in 2011 (see Human Rights Watch 2011). The combination of constitutional protection and legislative development succeeded in protecting the transitional justice agenda; despite transitional justice legislation being continually challenged constitutionally, the Constitutional Court used the constitutional text and mandate to defend these laws. In 2012, the Constitution was amended to add Transitional Provisions, including article 66, which gave new momentum to the transition and provided a legal framework for negotiating a final peace agreement. In 2016, the Revolutionary Armed Forces of Colombia (FARC) and the Government agreed to the Final Agreement Ending the Armed Conflict. However, the Final Agreement was opposed by former president Alvaro Uribe, who had taken a hard-line position vis-à-vis the FARC during his 2002–2010 presidency.

Although the Final Agreement spoke mainly to transitional justice without directly calling for constitutional reform, it acknowledged that constitutional reform would be required to implement the Final Agreement, stating that the framework plan for

implementation should arrange for ‘necessary constitutional or legal reforms’ (President of the Republic of Colombia 2016: 33). In October 2016, the Final Agreement failed to pass a public referendum, in a close vote of 50.2 per cent against and 49.8 per cent for, with 38 per cent voter turnout (BBC 2016). The ‘No’ vote was strongly mobilized by Uribe and his colleagues in the Democratic Centre party, including Senator Ivan Duque who would later win the presidential election in 2018.

However, on 12 November 2016, after speedy negotiations with the main opposition parties to the referendum and renegotiations with the FARC, the Government passed a revised version of the Final Agreement that bypassed popular referendum and went straight to congressional approval (International Crisis Group 2017). The passage of the agreement was enabled by ‘temporary constitutional amendments’ from June 2016, which expedited the procedure for congressional approval of the Final Agreement and related laws. These amendments also ‘gave the president sweeping powers to issue decrees with the force of law in order to implement aspects of the accord’ and ‘make the peace agreement with the FARC, once approved by plebiscite and implemented, a “special agreement” for purposes of common article 3 of the Geneva Conventions and state that it is automatically incorporated into the “constitutional block” or broader constitutional order (Landau 2016). The constitutionality of these amendments is likely to come under review of the Constitutional Court, particularly as to the argument that the Final Agreement can be considered part of the ‘constitutional block’. A jurisprudence of the Constitutional Court ‘holds that the Colombian constitution of 1991 incorporates major parts of international law, such as human rights law and international humanitarian law’ (Landau 2016). This jurisprudence has previously been used to apply international norms to domestic agreements and legislation, expanding the reach of the Constitution beyond its text, but it is unclear how the Final Agreement can be considered to have the same status as international treaties and agreements previously encompassed in the ‘constitutional block’ (Landau 2016).

### Constitutionalizing transitional justice

Colombia’s case study shows how constitutional amendments can protect a transitional justice agenda, especially with an empowered court. A commitment to pursuing peace in Colombia was first explicitly constitutionalized in 1991, with the passage of ‘the Human Rights Constitution’ (International IDEA 2016)—named due to its substantive efforts to elevate the protection of human rights in Colombia. The 1991 Constitution not only included a broad catalogue of human rights but also sought to ensure these were enforceable by calling for the *Tutela*, a form of writ petition that can be easily filed and quickly resolved when the fundamental rights recognized in the Constitution are violated. Critically, in the part of the human rights chapter dedicated to civil and political rights, the Constitution stated: ‘Peace is a right and a duty of which compliance is mandatory’ (Republic of Colombia 1991/2015: article 22). This article—giving rise to an enforceable right to peace—paired with article 93 (‘The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia’) and article 13 about equality before the law and non-discrimination, was

the basis for a number of judicial decisions that ultimately protected transitional justice legislation from constitutional challenges.

Article 93 is also significant in that it represents a constitutionalization of international human rights and treaty commitments for non-recurrence. Other articles of the 1991 Constitution also represent attempts to guarantee non-recurrence; for example, article 67 calls for education to ‘train the Colombian when it comes to respect for human rights, peace, and democracy’; article 95(6) makes it a citizen duty ‘to strive toward achieving and maintaining peace’; and article 218 says that police corps will have a primary duty ‘to insure that the inhabitants of Colombia may live together in peace’.

In 2012, Congress approved amendments to the Constitution to commit to pursuing sustainable peace through transitional justice. Specifically, transitional article 66 reads:

Transitional justice instruments . . . their principal objective will be the end of the internal armed conflict facilitation and the achievement of a stable and lasting peace, with the guarantees of non-repetition and security for all Colombians. Such instruments shall ensure at the highest possible level, victims’ rights to truth, justice and reparation.  
(Republic of Colombia 1991/2015: transitional article 66)

In addition to establishing a Truth Commission, transitional article 66 also: mandates judicial or extrajudicial mechanisms for the investigation and punishment of crimes; defines acceptable exceptions that might apply to cases concerning conflict-era violations; and guarantees that conditions will be established for demobilization, among other things. Lastly, the article protects aspects of the political settlement, stating: ‘the above mentioned special criminal constitutional instruments application shall be subject to conditions such as the abandonment of weapons, recognition of responsibility, contribution to discovering the truth and reparation for victims, the release of hostages, and the decoupling of minors who are illegally recruited and held by illegal armed groups’ (ibid.). The article effectively allowed for the possibility of suspending criminal sanctions against guerrilla groups and guaranteed their future political participation if they agreed to demobilize, reinforcing other commitments contained in transitional articles 12 and 13. The amendments were criticized for effectively perpetuating a culture of impunity. Article 66 was constitutionally challenged in 2013 (C-576, C-579) but the Constitutional Court upheld it, reiterating that conflict transformation required more than a purely justice-based approach and recognizing that compromises have to be made in the pursuit of sustainable peace (Cepeda Espinosa and Landau 2017).

The 2012 constitutional amendments provided a sufficient framework for peace talks between FARC and the Government, resulting in the carefully crafted Final Agreement, which—as noted above—did not explicitly call for, but implied the need for, constitutional reform. Although the Final Agreement failed to pass referendum, the Santos Government passed constitutional reforms in 2017 (Actos Legislativos 1, 2 and 3; see Republic of Colombia 2017a, 2017b, 2017c) to entrench the agreement in the constitutional order and combined these amendments to ensure that



transitional justice and the Final Agreement specifically would be binding on the Government for the next 12 years, in an attempt to isolate the agenda from waning political support (Republic of Colombia 2017b).

*Tension between public opinion and the elite pact*

While the referendum—which was not compulsory by law but decided upon by incumbent President Juan Manuel Santos (2010–2018)—was envisioned as key to providing the transition with democratic legitimacy, the Colombia case study exemplifies the tensions that arise when the public is invited to sanctify a political settlement, in particular one which excludes powerful elites. Promises of amnesties or alternative sanctions (besides criminal punishment), as well as guarantees of the right to participate in political processes, made to rank and file combatants who were prepared to give full confessions were central pre-commitments for FARC to participate in peace negotiations (International Crisis Group 2017). However, these same issues were the ones the Democratic Centre party mobilized public opposition around during the referendum campaign. Many felt that the Final Agreement was letting ‘the rebels get away with murder’ (BBC 2016), allowing impunity and political inclusion for FARC guerrillas, often perceived as terrorists.

While, in reviewing the legislation for the referendum, the Constitutional Court explicitly held that even a ‘yes’ vote would not mean the Final Agreement would automatically be part of the constitutional order, in advance of the referendum the Government passed a series of amendments to the Constitution to facilitate their approval of the Final Agreement and its constitutionalization. After the referendum failed, the Government pushed forward with giving the agreement special constitutional status, essentially disregarding public perceptions of the deal (see, for example, International Crisis Group 2017) and passing it, in modified form, through the legislature.

Now the Constitutional Court will be faced with a series of difficult choices:

If it were to strike any of these measures down, particularly the ones stemming directly from the FARC agreement, it would imperil a delicate process and potentially cause grave social and political consequences. But if it were to make its existing doctrines excessively flexible in response to this political pressure, it could risk its achievements in strengthening the rule of law, constitutional values, and the increasingly robust legal nexus between domestic and international law in Colombia. It is reasonable to question whether either risk is too high, and if so asking whether the peace process would have been better off with less judicial oversight.

(Landau 2016)

The tension between the Final Agreement and public perception of the Final Agreement has already circumscribed the transitional process’s potential to contribute to reconciliation (Mitchel 2017). When the Government chose to move forward with the Final Agreement regardless of the public’s concerns—made explicit after the October 2016 Referendum—the stability of the transition process was threatened and politics became more, not less divided. Elections for Congress in 2018 saw the

election of a new Government that was opposed to the Final Agreement, and that had campaigned on promises of weakening FARC protections (Casey 2019).

### Impact on long-term conflict transformation and sustainable peace

The interplay between constitution-building and transitional justice has, overall, been positive in the case of Colombia, where the two processes mutually reinforced each other. Transitional justice has provided the language and momentum for constitutional change, and that change, in return, has given constitutional protection to the transitional justice process and the political settlement. Constitutional change has been of critical importance, as one side of the political divide in Colombia has been opposed to the Final Agreement throughout. In this regard, the Constitutional Court has played a critical role in this process, with its jurisprudence having numerous impacts, including having forced ‘the political system to recognize the rights of victims, a discourse that has become ubiquitous in politics and during the peace process’, and enabled ‘political actors to understand that transitional justice is not an excuse for them to throw away the constitutional rules, and that they instead must synthesize the ordinary and the extraordinary’ (Landau 2016). Without downplaying this key role, it is important to ask what the judicialization of the process might have cost on the side of other transitional justice aims.

The constitutional and legal challenges that characterized Colombia’s process to date have protected key interests in that process but also led to delays in the delivery of certain programmes that are in themselves key to long-term conflict transformation (i.e. reparations and rural land reform). Since the peace deal was signed, Inter-American Commission on Human Rights reports have warned of increasing violence in Colombia, especially targeting members of FARC, social leaders who defend the Final Agreement, and others who seem to show support for the agreement—for example, land plaintiffs that demand or defend the land rights recognized in the Final Agreement (Organization of American States 2019). FARC allies, increasingly frustrated with continued impunity and insecurity and lack of progress on implementing the Final Agreement in good faith, are reportedly remobilizing (Casey 2019). This shows that high levels of impunity persist in Colombia and that the country still has far to go towards transitional justice and sustainable peace. Constitutional protection of these goals, however, will hopefully help them to survive political manoeuvring and keep them on the agenda.

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## Guatemala

### Key lessons

1. Transitional justice without constitution-building can help carry forward specific objectives but may not be able to meet the expectations of long-term institutional reform that accompany a combination of constitution-building and transitional justice.
2. Transitional justice without constitution-building can lead to burdensome expectations being placed on transitional justice mechanisms and programmes, leading to dissatisfaction and perception that the transition is incomplete or unresolved.

### Background

Guatemala's civil war between the Government and the leftist Guatemala National Revolutionary Unit lasted from 1960 to 1996 and resulted in the death or disappearance of more than 200,000 people. The Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, or CEH), established originally through the Oslo Peace Accords (1994), concluded that the state committed genocide against its indigenous peoples and that underlying ethnic tensions in Guatemala—legacies of its colonial history—primarily caused the conflict (CEH 1999: 17). In 1996, the war ended with the signing of the Agreement on a Firm and Lasting Peace (AFLP). This agreement synthesized the contents of 14 previous peace accords and called for both constitutional reform and traditional transitional justice mechanisms like the CEH.

### Constitutionalizing transitional justice

The AFLP preamble states: 'The country now faces the task, in which all Guatemalans must share, of preserving and consolidating peace. To this end, the Peace Agreements provide the country with a comprehensive agenda for overcoming the root causes of the conflict and laying the foundations for a new kind of development' (United Nations 1996b: Preamble). In this statement, the extent of the reform intended is made explicit. The AFLP recognized the potential for constitution-building to promote this transformation: 'The constitutional reforms set out in the Peace Agreements provide the fundamental substantive basis for the reconciliation of Guatemalan society within the framework of the rule of law, democratic coexistence and the full observance of and strict respect for human rights (United Nations 1996b: article 12).

The Agreement on Constitutional Reform and the Electoral Regime (known as the 'Stockholm Agreement', 1996), a sub-agreement that was part of the AFLP, included specific constitutional amendment proposals; for example, constitutional recognition of the Maya, Garifuna and Xinca peoples and amendments to the executive, legislative and judicial branches to ensure full respect of human rights and an end to impunity, and to institutionalize a culture of peace (United Nations 1996a: paras. 5–9). Following the signing of the AFLP, Guatemala formed a Commission on

Constitutional Reform, which carried out widespread consultations. This process 'gave civil society actors in general, and indigenous and women social actors in particular, key political experience and demonstrated important changes with regard to popular participation in decision-making at the national political level' (Brett and Delgado 2005: 16).

The Government presented the constitutional reform package to Congress for their approval in May 1997. Due to political negotiations, by the time the original package of 13 reforms passed with two-thirds approval in Congress in 1998, it had expanded to 50 proposed reforms implicating a range of issues beyond those contained in the Stockholm Agreement (Brett and Delgado 2005: 26). This made it more difficult for people to understand the scope and relevance of the reforms. Successful constitutional challenges of proposed amendments and a state of emergency declared during Hurricane Mitch led to further delays in announcing the referendum, resulting in a mere 76 days for public education. The *Consulta Popular* was held on 18 May 1999, by which time momentum behind the AFLP had slowed. Voter participation was dismally low at only 18.5 per cent; within Guatemala City, only 23 per cent of voters supported the reforms, whereas outside in rural and indigenous parts of the country, there was more support (53 per cent).

A number of reasons, in addition to a few discussed in the preceding paragraph, have been put forward for the failed referendum: political parties were either apathetic or opposed to constitutional reform; the ballot itself was excessively complex; the 'no' campaign capitalized on 'unsubtle' international involvement, alleging that the international community was attempting to determine Guatemala's fate; and, finally, people's lack of trust in political institutions led many to feel disenchanting with the process, manifesting itself in a dismally low voter turnout (see, for example, Brett and Delgado 2005: 22–37). Regardless of the exact cause, prospects for constitutional change seemingly died with the referendum results in Guatemala, even though the commitment to constitution-building was 'central to the peace agreements and the "lynchpins" for the (judicial) sustainability of the entire peace process' (Brett and Delgado 2005: 16). The International Commission against Impunity in Guatemala (CICIG) continued to advocate for a constitution-building process until its closure in September 2019, but any actual constitutional reform is now ultimately in the hands of the Guatemalan Congress, which has been unwilling to pursue the process to date (Sandoval 2017).

### Transitional justice in the absence of a constitution-building process

Since constitutional reforms did not succeed in Guatemala, the expectations for achieving conflict transformation fell on the transitional justice process. As the text of the AFLP demonstrates, constitutional change was considered a necessary accompaniment to transitional justice efforts, so as to achieve structural changes to governance and social relations in Guatemala. In its absence, however, the identified need for structural change was imputed to the transitional justice process, which has had limited success in achieving this (see for example Ross 2004) and was vulnerable to significant politicization by both civil society groups and the government itself (Isaacs 2010).



In pursuit of the four core transitional justice rights, Guatemala undertook several transitional justice efforts, including: the establishment of the CEH, in pursuit of truth; investigations and trials carried out by the CICIG, in pursuit of justice; and a National Reparations Programme to provide conflict victims with compensation as a form of reparation. The fourth pillar, non-recurrence, was arguably never truly addressed, though it was envisioned in the proposed constitutional reforms that would have targeted the root causes of conflict, including ending impunity, ensuring respect for human rights and specifically indigenous rights, and curtailing presidential power (see, for example, Brett and Delgado 2005). Without over-estimating the potentials of constitutional reform, based on comparative case studies it is possible to argue that these sorts of structural reforms could have been supported more wholly by well-intended and politically supported constitutional change.

### Impacts on long-term conflict transformation

The case of Guatemala demonstrates the risks inherent in pursuing transitional justice without constitution-building, or relying on transitional justice to accomplish long-term conflict transformation without linking the process to other transitional endeavours. This risk can be seen in the perceived politicization and limited impact of the Guatemalan transitional justice mechanisms and programmes (see for example Isaacs 2010; Watts 2013).

The situation in Guatemala shows that political negotiations around constitutional change are complex, and there is a risk that these changes might never occur or be significantly delayed. This is a particular risk when popular sentiment rejects a political settlement, as was seen in the *Consulta Popular*. As such, Guatemala equally demonstrates how forming transitional justice mechanisms and programmes when a constitution-building process is stalled can keep the momentum behind the transition and address, to some extent, the objectives of conflict prevention. The fact that Guatemala was able to establish the CEH and carry out arrests through the CICIG is notable, insofar as there were visible acts on behalf of the Government recognizing that conflict had occurred and that some transitional processes were acquired to move the country towards sustainable peace. That said, these processes exhibited some significant limitations and were never able to live up to the expectation of deep structural reform that a constitution-building process represented as part of the original political settlement. It is not possible to evaluate a counterfactual, and since constitutional change never occurred in Guatemala no one knows if this process would indeed have been able to overcome the many forces and interests that underpin the status quo, but constitutional change in itself has symbolic import—demonstrating a commitment and agreement to structural reform—that in its absence was never truly demonstrated in Guatemala.

The CEH was tasked with producing an objective report on conflict-era human rights violations to honour the right to truth and create a public meta-narrative about the conflict (United Nations 1994). While the CEH could not call for prosecutions, it did call for structural reform (United Nations 1994), which arguably would have required constitutional reform to take effect. In the absence of this reform, people's expectations for transitional justice mechanisms, including the CEH, were high: these mechanisms were not only expected to elucidate the truth, but also to promote



healing, reconciliation, non-recurrence and other functions (Ross 2004: 73). The institutional vulnerability of the CEH, as a body that was not constitutionalized, resulted in chronic underfunding and a lack of institutional support. This, in turn, left the CEH heavily reliant on international support, with international funds providing more than 90 per cent of the CEH's budget (ICTJ 2014: 5). The lack of support by the Guatemalan Government, and heavy international involvement, led to criticisms that the CEH was not driven by local interests (Ross 2004: 75), undercutting its legitimacy and therefore its potential to contribute to meaningful conflict transformation.

Without formal links to the broader constitutional order, the CEH lacked authority to compel cooperation from other government bodies; for example, the military routinely questioned the investigatory powers of the CEH and denied the existence of archives and access to information on military tactics during the conflict (Ross 2004: 75–76). The effectiveness of the CEH and its ability to develop a narrative of the past was thereby inhibited, with its incriminating final findings being rejected by the military altogether (Isaacs 2010). Although the CEH's work was celebrated by victims' groups particularly, its impact was limited. For example, even though the CEH report clearly pointed at state responsibility for genocide it was not until 2004 that the Guatemalan state admitted formally that there was a genocidal policy against the Mayan people (an admission made in the landmark *Plan de Sanchez* case before the Inter-American Court). Additionally, 'demands that the government provide information on the fate of some 40,000 disappeared have gone unheeded' (ICTJ 2019). While the CEH issued a very specific report detailing past human rights violations and recommending institutional reforms, it could not implement or compel these institutional reforms in the absence of government will to act in response. Another transitional justice programme affected by the lack of constitutionalization is the National Reparations Programme, committed to by the Government in the AFLP, but never provided with a budget—rendering the programme ineffective—a fact heavily criticized by the Inter-American Commission on Human Rights (IACHR 2017: 138).

In pursuit of the right to justice, in the absence of constitution-building including structural changes to the judiciary and military recommended by the CEH, Guatemala pursued individual accountability through investigations and prosecutions. While the CICIG arrested high-profile individuals, the focus on individual accountability was unable to address the continued prevalence of impunity in Guatemala (see, for example: IACHR 2017: 37; Ghitis 2019). Without constitutional protection, transitional justice was left vulnerable to waning political will and manipulation. For example, Guatemala's President Jimmy Morales recently attempted to remove the CICIG head (Partlow 2018). The vulnerability is particularly acute in the case of General Ríos Montt. Montt was found complicit in the deaths of 1,771 Ixil Mayas between 1982 and 1983, but his conviction was overturned on a technicality (Watts 2013). This led Ana Caba, an ethnic Ixil conflict survivor, to say: 'I'm distressed . . . The powerful people do what they want and we poor and indigenous are devalued. We don't get justice. Justice means nothing for us' (Watts 2013).

This reaction causes one to question to what extent the transitional justice measures put in place by the Government of Guatemala were able to deliver on the rights to truth and justice, and also to question whether or not constitutional change is still required for meaningful conflict transformation and sustainable peace in Guatemala. This is true even when synergies between transitional justice mechanisms were seen in Guatemala; for example, the CEH report was relied upon in the prosecution of Ríos Montt for human rights atrocities (USIP 1997).

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## Nepal

### Key lessons

1. The 2015 Constitution of Nepal demonstrates constitutionalization of transitional justice in several ways; for example, including reparations for victims in the Constitution and embedding a National Human Rights Commission with investigatory capacities.
2. The Constitution restructured the state from unitary to federal with explicit ‘transformational’ intent, aimed at addressing the root causes of conflict; although this intent was arguably weakened by politicization, it shows the depth of possibility in using the constitution-building process to pursue transitional justice objectives.
3. Specific transitional justice mechanisms—such as the Truth and Reconciliation Commission—that were not provided with constitutional protection have had limited impact and effectiveness.
4. The use of constitution promulgation to declare an end-date for transition as a whole begs the question of whether the interactions between constitution-building and transitional justice can have negative impacts on one or other of the two processes; in this case, the constitution-building negatively impacted on transitional justice by taking momentum out of the transition.

### Background

Nepal experienced civil war from 1996 to 2006 between a communist guerrilla group, the Maoists, and the Government. Approximately 16,000 people died and 1,300 disappeared during the conflict, with human rights violations recorded on both sides (see OHCHR 2012; and BBC 2009 for updated figures on fatalities). Nepal’s armed conflict was motivated, in large measure, by the perceived inequality of political, economic and social opportunity across the population. This inequality was tied to the over-centralization of state power and resources in Kathmandu and the institutionalization of the Hindu caste system, which authorized systematic discrimination of groups based on ethnicity/caste, and demands underlying the political settlement aimed at addressing these problems.

Before the Maoists agreed to demobilization, they insisted on a commitment to both a constitution-building process and transitional justice, before signing the Comprehensive Peace Accord (CPA) (Nepal Government and Communist Party of Nepal 2006). The CPA ultimately included constitution-building and transitional justice, notably as two separate components. Constitutional change was to occur through the election of a Constituent Assembly to write a new constitution (CPA Provision 3.2) that would, among other things, restructure the state (CPA Provision 3.5). Transitional justice was meant to address conflict-era human rights violations through the formation of a Truth and Reconciliation Commission (TRC) (CPA Provision 5.2.5). The signing of the CPA launched the transition towards a ‘new Nepal’. In 2007, an Interim Constitution was promulgated to guide the drafting of

the final constitution, including a detailed electoral system for the Constituent Assembly. In 2008, and again in 2013, two Constituent Assemblies were elected and convened in Nepal, with the new federal, democratic Constitution promulgated in 2015.

In 2014, the Supreme Court of Nepal struck down transitional justice legislation establishing the TRC and the Commission of Investigation on Enforced Disappeared Persons (CIEDP) (Adkin 2015). The Government, however, proceeded to establish the TRC and CIEDP formally in February 2015; the Commissions awaited regulations and only became operational more than a year later, after the Commissioners were appointed, in March 2016. The Commissions were never provided with the fiscal, human or political support resources required to be effective and were unpopular with victims themselves; they completed their four-year term without delivering concrete results (ICTJ 2019). The current Government has initiated a process to appoint new Commissioners, but failed to amend the underlying transitional justice legislation to bring it in line with international standards, as directed by the Supreme Court. The Commissioner appointment process has also been criticized by the UN and other expert organizations for its lack of transparency and consultation (Human Rights Watch 2019).

After signing the CPA, a number of other institutional and policy measures were taken to institutionalize peace, including the establishment of a Ministry of Peace and Reconstruction, integration of Maoist ex-combatants into the Nepal army, and the creation of the Nepal Peace Trust Fund, a joint platform for the Government of Nepal and donors for the implementation of the CPA. The Ministry facilitated Local Peace Committees at the local level and distributed monetary compensation to the victims under the Interim Relief Programme. The Nepal Peace Trust Fund and Ministry of Peace were closed, however, as the Government framed the promulgation of the 2015 Constitution as the end of the transition period and restructured ministries to this effect following the 2017 general elections, the first under the new Constitution.

### Constitutionalizing transitional justice

The inclusion of a constitution-building process in the CPA clearly tied constitution-building to a transformative agenda for Nepal. The CPA provided both substantive and process guidance for the constitution-building process in Nepal, based on the 12-Point Understanding of 2005 that recognized that ‘it has become an inevitable need to implement the concept of full democracy through a forward-looking restructuring of the state to resolve the problems related to class, caste, gender, region and so on of all sectors including the political, economic, social and cultural’. The CPA built on this recognition, with firmer calls for state restructuring specifically aimed at addressing the root causes of conflict in Nepal. Article 3.5 of the CPA states: ‘To address the problems related to women, Dalit, indigenous people, Janajatis, Madheshi, oppressed, neglected, minorities and the backward by ending discrimination based on class, caste, language, sex, culture, religion, and region and to restructure the state on the basis of inclusiveness, democracy and progression by ending the present centralized and unitary structure of the state.’ This wording was included in the Interim Constitution, article 33(d) (Republic of Nepal 2007).

Nepal's 2015 Constitution (Republic of Nepal 2015) demonstrates the constitutionalization of transitional justice in a number of ways, for example:

1. The language in the preamble documents the meta-narrative of Nepal's transition, linking the new constitution explicitly to an effort to address the root causes of conflict.
2. There is explicit recognition of conflict victims as a category of peoples for special consideration in regard to social justice and service provision (article 42(5)).
3. It restructures the state into a federal democratic republic to overcome historic marginalization and exclusion.
4. It constitutionalizes a National Human Rights Commission, imbuing it with broad investigatory capacities (Part 25).

While this constitutionalization may provide long-term redress, in the immediate term many victims in Nepal remain disappointed in the Constitution and the transition as a whole. The Constitution does not explicitly recognize transitional justice in any one provision; for example, it does not give constitutional recognition to the TRC or include any special measures for seeking justice for conflict-era human rights violations. As such, even though the Constitution does explicitly reference conflict victims, and also restructures the state with an explicit aim of addressing the root causes of conflict, it does not build a clear link—in the public's eyes nor in substance—between special transitional justice mechanisms and processes and the Constitution. Furthermore, since many of the federal design features that aimed to truly redistribute access to and exercise of power in Nepal were weakened by the 2015 political negotiations, the reparative and transformative impacts of the Constitution did not meet the expectations of significant numbers of Nepalis.

### Impact on long-term conflict transformation and sustainable peace

Nepal successfully promulgated a constitution that restructured the state into a federal, democratic republic from a centralized monarchy. The transition has been significant on many levels, and the restructuring of the state was meant to address the root causes of conflict; furthermore, the Constitution calls for long-term reparations and recognition of conflict victims, the impacts of which remain to be seen. The new federal system, with deepened decentralization, has opened opportunities for local government actors to take steps to address transitional justice objectives that have been unaddressed at the national level:



Although local initiatives are not a complete substitute for a coherent national policy, these powers offer great potential for implementing measures to address promptly and directly a full spectrum of victims' reparative needs, from the symbolic to the material. They encompass food, housing, employment and job creation, medical care, education, legal services, help obtaining official documentation, memorialization initiatives and other forms of public recognition, awareness-raising activities, and measures aimed at preventing the recurrence of human rights abuses. Many of these measures would fulfill fundamental rights guaranteed under the Constitution to all Nepal's citizens, and additional rights secured there for vulnerable populations. (ICTJ 2018: 1)

This quote represents a fundamental interaction between constitution-building and transitional justice, with a new constitution opening new spaces for addressing transitional justice, should this be politically prioritized.

Despite the alleged intent and potential of state restructuring and the democratic transition, Nepal's constitution-building process was ultimately concluded in a rushed and highly politicized fashion, with the leaders of four major political parties signing a 16-point deal to conclude the constitution-building process by June 2015. The deal was ruled invalid in parts by the Supreme Court but the fact that back-door deals had been struck was impossible to ignore and the constitution-building process was fast-tracked on the basis of this consensus. The new political agreements divided the country, and the Madheshi movement in Southern Nepal took on new force, focused on rejecting the new Constitution and its drafting process. Dozens were killed and injured as a result of these protests (Bisarya 2016). The fact that Nepal's constitution-drafting process was ultimately viewed by many as elite-driven, without truly incorporating or speaking to the marginalized in the country, damaged the potential reconciliatory impact of the Constitution. The federal system in the new Constitution, for example, was designed with no reference to or recognition of ethnic diversity—which begs the question of how transformative the federal system can be for the ethnic minority groups that advocated for it initially (see, for example, Jha and Yadav 2018). There was also no intentional civic messaging or engagement that explicitly connected transitional justice to the broader constitution-building process.

Although Nepal's system is new, and new institutions such as the TRC and CIEDP were created to further transitional justice specifically, alongside the institutional reforms and reparations included in the 2015 Constitution, the same political behaviours and inequality persist. The new Government has consistently acted to close civil society space, including the space for victims and other advocacy groups (Budhathoki 2018). The persistence of decision-making driven by the political elite has also had an impact on the transitional justice debate in the country, as 'the TJ [transitional justice] process continues to be undermined by political elites' defense of the country's deeply entrenched system of impunity' (Bhandari 2018). The impact of transitional justice efforts to date has been to worsen trust between victims and the Government, as the Government has broken serial agreements and failed to prioritize victims' voices or needs when designing and implementing transitional justice. In practice, the premises for independent, victim-centred truth and disappearances commissions proved illusory in Nepal.



While the terms of both Commissions were recently extended, faith in their capacity or in the political will required to make their work meaningful is limited at best. In general:

. . . accountability mechanisms have failed to bring justice for violations and pinpoint the obstacles that were encountered by victims and their families as they pursued a remedy for alleged violations. Gaps exist in applicable laws, both in terms of criminalizing violations of international law such as disappearances and torture, and in relation to ensuring the necessary procedural rules for disclosure of information, public investigation and facilitating initiation of proceedings against security personnel or other government employees. These gaps are compounded by a lack of cooperation from security forces and the Maoists in relation to conflict related violations and the failure of the Government to pursue cases involving conflict violations.  
(OHCHR 2012: 25)

Political elites use the fact that the Constitution has been promulgated to say the transition is over, while victims still feel that their needs are unaddressed (Bhandari 2018) and key groups, such as the Madheshis and *Adivasi Janajati* (indigenous peoples), are not satisfied with the state restructuring and constitution-building processes that occurred, as evidenced in the violent protests that marred the Constitution's promulgation, in which more than 40 people died in confrontations with security forces in Southern Nepal (Haviland 2015). It remains too early to assess the long-term impacts of Nepal's transitional justice and constitutional change processes but the immediate reactions and levels of satisfaction do not indicate that sustainable peace has been achieved (see, for example, Amnesty International 2018).

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## Rwanda

### Key lessons

1. Transitional justice can contribute to a victim and perpetrator dichotomy, which can be manipulated to undemocratic ends, even when there is an official declaration of policies of ‘national unity and reconciliation’.
2. Constitutional reform entrenched a victim–perpetrator identity and one version of the truth in a way that potentially supported deepening ethnic divisions rather than reconciliation.
3. Political manipulation of the transitional justice discourse and ideology pushed through constitutional amendments that led to the closure, instead of the opening up, of spaces for conflict transformation.

Rwandan history is highly contested, with different accounts of where, when and by whose hand inter-ethnic violence began. Regardless, violence escalated significantly into a full-scale civil war when Hutu President Habyarimana’s plane was shot down on 6 April 1994. In reaction, Hutu extremists and allied militias seized control of the government and initiated a genocide that killed approximately three-quarters of the Tutsi population in the course of 100 days (Straus 2019). Tens of thousands of Hutus were also killed, including both Hutu democrats killed by Hutu extremists in the genocide campaigns, and some 25,000 to 40,000 Hutu civilians killed by the Rwandan Patriotic Front (RPF) forces (Des Forges 1999; Straus 2019).

After the war, Rwanda undertook both transitional justice and constitution-building for conflict transformation. The Arusha Accords, signed in August 1993, together with the 1991 Constitution and additional protocols on the rule of law, constituted the fundamental law of Rwanda during the transitional period from 1994 to 2003 (International IDEA 2016). The new Constitution was written by a Constitutional Commission established in 2000 with a mandate to draft and ensure parliamentary approval of a new constitution (International IDEA 2016). While the process was critiqued as ‘highly supervised popular participation’ (International Crisis Group 2002) by the RPF-led Government, the Constitution passed through referendum in 2003 with 93 per cent of the vote.

### Constitutionalizing transitional justice

Rwanda’s Constitution (Republic of Rwanda 2003) represents the constitutionalization of transitional justice in several ways:

1. Truth: It addresses the history of the genocide and the need to fight genocide ideology; for example, the Preamble reads: ‘the genocide . . . organised and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda’.
2. Reparations: It acknowledges the state’s responsibility to provide for destitute survivors of the genocide in article 14 (2003 Constitution).

3. Non-recurrence: It establishes institutions, such as the National Unity and Reconciliation Commission and the National Commission for the Fight Against Genocide, in addition to constitutionally protecting specialized transitional justice-related mechanisms, such as the *gacaca* courts, under article 152 of the Constitution (with 2008 amendments, subsection 2(A)).
4. Reconciliation: The original 2003 text of the Constitution makes no mention of the terms Hutu or Tutsi, in favour of a vision of ‘Rwandans’ and the promotion of national unity.

### *Weaponization of the truth and victim–perpetrator dichotomies*

Despite the early promise of the transitional justice and constitution-building processes, the Rwandan transition has been characterized by a consolidation of power in the RPF, led by Paul Kagame. Throughout Rwanda’s transition, the RPF ‘defined, shaped and controlled political discourse’ to the point that the ‘distinction between the RPF and the government had become increasingly blurred, and in some cases, appeared non-existent’ (Ankut 2005: 11; see Reyntjens 2004). This is in opposition to a culture of constitutionalism, which requires depersonalization of political power.

Instrumentalization of the constitutional order, and the vision of transitional justice expressed by the Constitution, has been central to the RPF’s consolidation of power. Importantly, amendments in 2008 added the words ‘against Tutsi’ to all mentions of the genocide. This protected the RPF’s historical narrative and allowed for weaponization of this narrative of the genocide.

The constitutionalization of the RPF’s genocide narrative had rippling impacts on the effectiveness of transitional justice initiatives. For example, the *gacaca* courts were established with a limited mandate to conduct ‘trial and judgment of cases against persons accused of the crime of genocide and crimes against humanity which were committed between October 1st 1990 and December 31st 1994’ (Constitution with 2008 amendments). The terms of these courts were extended until they closed in 2012, having tried approximately 2 million individuals. ‘But did these courts work to provide justice, build accountability between government and citizens, and heal some of the sharp social divides created by the genocide?’ (Seay 2014). This is the key question in measuring the *gacaca* against the aim of conflict transformation.

While a few scholars who observed the *gacaca* system took a positive view (such as Clark 2010), most criticized its biased implementation, where only Tutsis were considered victims, and Hutus perpetrators (see, for example, Chakravarty 2015; Ingelaere 2016; Rettig 2008; Waldorf 2010). The period of time that the *gacaca* were given jurisdiction over notably excluded the crimes carried out by the RPF and other Tutsis against Hutus in the years following the genocide. This ‘undermined their ability to provide accountability and promote rule of law . . . In the end, *gacaca* served not so much to bridge the gap between perpetrators and victims as to reinforce the very ethnic divisions that were at the heart of the genocide’ (Seay 2014). Through the constitutional order a dichotomy between victim and perpetrator has been introduced and entrenched and the transitional justice process, in its perceived biases, has focused on retributive justice, arguably at the expense of reconciliation (see, for example, Chakravarty 2015).

### Impact on long-term conflict transformation

On the 20th anniversary of the Rwandan Genocide, in 2014, some indicators looked positive for Rwanda's transition: 'Rwanda's life expectancy has doubled in the past decade, and child mortality and HIV rates have plummeted. The Rwandan economy has grown at a staggeringly high 8 percent rate since 2008, making it, by one assessment, the most desirable African country to invest in' (Beauchamp 2014). That said, the victim–perpetrator identities created, politicized and constitutionalized in the aftermath of the genocide deepened divides between Hutus and Tutsis in opposition to the Government's official strategy of creating a non-ethnicized Rwandan community in the name of 'national unity'.

Weaponizing the victim–perpetrator divide, and the linkage between this divide and identity (i.e. where Tutsis are always victims, and Hutus perpetrators), Kagame has stacked his Government almost entirely with Tutsis. Since Pasteur Bizimungu, a Hutu, was named president, 'almost every position of meaningful power in the country has been held by a Tutsi' (French 2013). Bizimungu himself resigned from the Presidency in 2000 'after numerous cases of forced exiles, disappearances, and assassinations of politicians . . . bringing a definitive end to the illusion of ethnic balance in high office' (ibid.). The Government also now prohibits the use of ethnic labels. Bizimungu went on to form a political party in 2001, which was outlawed for being a radical Hutu organization; in 2002, Bizimungu was arrested on charges of endangering the state, and later he was sentenced to 15 years in prison. His story is illustrative of a broader trend. As Theogene Rudasingwa, former Rwandan ambassador to the United States, himself a Tutsi, says: 'When you look at the structure of key parts of government, leadership is occupied almost entirely by Tutsis from the outside, and this is especially true in the military . . . As for the Hutus, they are completely marginalized, and things [for them] have never been as bad as they are today. Almost the entire Hutu elite that was built up since 1959 is either outside the country or dead. They are marginalized and banished, forced into exile when they haven't simply been killed' (quoted in French 2013).

Despite a goal of national unity, the actions of the Rwandan Government directly contradict this messaging, capitalizing on the victim–perpetrator divide to justify essential Tutsi rule and the silencing of discussions or alternative narratives of the violence in Rwanda, as well as any political opposition (see Longman 2017; Reyntjens 2015; Straus and Waldorf 2011). Freedom House has tracked a steady decline of civil liberties in Rwanda, especially since 2015 amendments allowed for Kagame to extend his presidency, with the country being ranked 'not free' in its 2018 report. The Hutu community is particularly silenced with regard to criticizing the Tutsi Government or the transitional process. Journalists who criticize the Government, or try to cover Hutu accounts of violence, are persecuted in the name of strict laws against discussing the genocide and ethnicity in the name of national unity. The 'truth' has therefore been fixed, in a one-sided manner, to support consolidation of power in the Kagame Government (see, for example, Reyntjens 2011 for a discussion of truth and regime practices).

Political opposition leaders are also silenced with the same justifications. For example, Victoire Ingabire Umuhoza, an opposition politician, returned to Rwanda from exile hoping to run for President. Her first visit was to the Genocide Memorial,



where she stated: ‘We are here honoring at this memorial the Tutsi victims of the genocide. There are also Hutu who were victims of crimes against humanity and war crimes, not remembered or honored here . . . Hutu are also suffering. They are wondering when their time will come to remember their people. In order for us to get to that desirable reconciliation, we must be fair and compassionate towards every Rwandan’s suffering’ (quoted in French 2013). She was arrested on charges of ‘genocide ideology’, with Kagame publicly supporting charges against her (French 2013).

As such, ethnic polarization is acute, despite the institutional and other innovations (such as the National Unity and Reconciliation Commission) that were constitutionally protected post-genocide to build a more inclusive political community in Rwanda. Nonetheless, the Kagame administration regards the transition as a success, citing an alleged lack of no large-scale violence in Rwanda in 24 years. *The Economist* notes, however, that this rests on a ‘widely understood, if unspoken, contract whereby people have traded political freedom for peace and economic development’ (2019). The Rwanda case study demonstrates how the interaction of transitional justice and constitution-building can perhaps result in unintended consequences that undermine longer-term objectives of conflict transformation and sustainable peace. In Rwanda, transitional justice language was politicized and used to manipulate constitutional amendments to allow for consolidation of one version of the truth, victim–perpetrator identities linked to ethnicity and power in Kagame’s Government. Spaces for discussing the truth and for healing and reconciliation were closed, instead of opened, through the interaction of transitional justice and constitution-building, which makes Rwanda a case for closer consideration.

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## South Africa

### Key lessons

1. Concurrent constitution-building and transitional justice processes may give more options for bargaining, and also for protecting the political settlement through application of constraints and constitutional guarantees for adherence to foundational compromises.
2. In terms of peaceful dispensation of power in South Africa, conflict transformation can be seen but inequality (socio-economic) still persists as a root cause of conflict.

### Background

Apartheid in South Africa was a racist oligarchy in which one group of people—white South Africans—governed and others were disenfranchised. The oligarchic regime was characterized by massacres, torture, imprisonment, abuse of state authority and a constitutional order which systematically oppressed and marginalized the majority black population. The transition began with negotiations between the government and the African National Congress (ANC) in the late 1980s and early 1990s, which resulted in a political settlement embodied in an Interim Constitution (1993) to guide constitution-building and provide a mandate for transitional justice in South Africa. The Interim Constitution called for a five-year transition under a Government of National Unity and an elected Constituent Assembly to draft a new constitution. It is notable that the apartheid government wanted to draft a new constitution before democratic elections were conducted whereas the ANC wanted elections before the new constitution (Powell 2010). The creation of an Interim Constitution, including the 34 legally binding constitutional principles, before elections for the body that would write the final constitution, provided a roadmap for a transition process agreeable to all sides. Elections were held in 1994 and the ANC won a strong majority, although just under the two-thirds majority required to unilaterally pass a constitution. Drafting the new constitution was itself framed as a transitional and reconciliation process. In addition, traditional transitional justice efforts included establishing a Truth and Reconciliation Commission (TRC) in 1995. The TRC published its final report in 1998 based on the testimony of 22,000 victims and witnesses (ICTJ 2019).

### Constitutionalizing transitional justice

The values, framework for democratic governance, and rights enshrined in South Africa's 1996 Constitution capture the country's approach to reconciliation. The Constitution gives the majority black population access to power and calls for the fair distribution of resources for the first time in South African history, while also protecting the interests of the minority white population, who felt that they were at risk of repression following the transition.

As the preamble declares, the 1996 Constitution was adopted to in part 'heal the divisions of the past and establish a society based on democratic values, social justice

and fundamental human rights'. In this way, the whole Constitution represents a constitutionalization of transitional justice, particularly the non-recurrence and reparations elements. The inclusion of fundamental rights, including socio-economic rights in Chapter 3 of the Constitution, as well as numerous references to non-discrimination and equality before the law, all represent this effort. Furthermore, 'South Africa created legal and political institutions specifically to remedy the socioeconomic injustices of apartheid. Chief amongst these were the human rights and political institutions that emerged' out of the constitution (Powell 2010), including the Human Rights Commission (section 184) and the Constitutional Court.

The constitutionalization of transitional justice in South Africa occurred before international norms against blanket amnesties solidified, leaving the society to make difficult choices about amnesty and accountability in the absence of clear guidance from international law and actors. The interaction of transitional justice and constitution-building in South Africa allowed for protection of the pacted political settlement; making space for bargaining such that difficult choices were made in such a way as to protect the objectives and mitigate fears of prosecution among leaders on both sides of the negotiating table. This, in turn, maintained momentum and political support behind the transition. The text of the Interim Constitution, including the 34 Principles in Schedule 4 and the post-script on national unity and reconciliation (with a commitment to offering amnesties), set parameters for a future constitution that would ensure equal protection for all people under the law, including the white minority who feared retaliatory discrimination in the new South Africa.

The bargain that resulted in acceptance of amnesty in certain cases served both major negotiating parties. For the outgoing white government, amnesties reassured supporters who had been party to human rights abuses or who had friends and family members who had been party to the same, that a transition to democracy would not simply mean punishment. Without this reassurance, the white government would not have had the support necessary to pursue the transition and there was a real danger that the formidable South African security forces would resist change. The ANC and other anti-apartheid movements shared the latter concern. The ANC government was unlikely to be able to govern in the future if the old apartheid forces did not support or allow them to do so. Moreover, the amnesty provisions protected many of the ANC's own members who had committed crimes in the freedom struggle.

The bargain struck on amnesty was protected in Constitutional Principle No. 3 and the post-script to the Interim Constitution, and carried through in the 1996 Constitution in Schedule 6, section 22: 'all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution'. Both the Interim Constitution and the Final Constitution recognized that national unity was an objective of the transition, a necessary foundation for democracy, and therefore that sacrifices on accountability could be accepted in the pursuit of healing. Amnesties were explicitly tied to a greater interest in 'national unity and reconciliation' in South

Africa, constitutionalizing a compromise on the ‘justice’ pillar of transitional justice in favour of the reconciliatory and reparative pillars (namely, truth and reparations).

#### *Protecting the negotiated political settlement through constitution-building and transitional justice interactions*

South Africa provides a strong example of how the initial political bargain influenced, and was maintained by, the interaction of transitional justice and constitution-building. In South Africa it was clear ‘that a negotiated settlement was the only option for solving the country’s problems’ (Powell 2010: 245), with protections for the outgoing white minority regime necessary before they were willing to enter into elections that would undoubtedly spell the rise of a black government under majoritarian politics. Honouring the political settlement was therefore critical to ensuring that the transition as a whole progressed, and the outgoing white minority required constitutional guarantees of certain of its interests, in particular federalism and human rights, before agreeing to a broader transitional justice process, including the TRC. The 34 ‘Constitutional Principles’ identified in Schedule 4 of the Interim Constitution provided a guarantee that the central terms agreed to in negotiations would be carried forward into the new South African constitution.

#### *Constitutional principles to protect minority interests*

Through early political negotiations, the South African negotiators agreed to 34 legally binding ‘Constitutional Principles’ that bound future constitution makers: the new constitution was required to conform with these Principles. The Principles ‘limited the scope of negotiation concerning the final text of the 1996 Constitution’ (Böckenförde, Hedling and Wahiu 2011: 7)—and captured the heart of the political settlement. For example, although the ANC as the majoritarian political force in the transition favoured a centralized state, the 34 Principles called for a form of devolved government, which was a demand of the outgoing white government and one that the ANC had agreed to during the earlier negotiating process. Uniquely, the Principles were enforceable and in 1996 the Constitutional Court rejected the first draft of the constitution for failing to provide sufficient powers to the provincial governments (Constitutional Court of South Africa 1996, paras. 471–81).

The constitutionalization of key principles, central to the political settlement, protected minority interests, honouring the negotiated settlement at the root of the transition and ensuring that all parties stayed on board and open to transitional processes, including transitional justice and truth-seeking. The South Africa case study shows how constitutionalizing principles and aspects of the political settlement can be ‘a tool for breaking political deadlock and creating consensus’ (Böckenförde et al. 2011: 47) by guaranteeing the interests of a minority, facilitating and providing momentum for the transition and associated processes, including transitional justice.

#### *Balancing truth, reconciliation and justice*

South Africa’s Interim Constitution and Final Constitution include a series of anti-majoritarian guarantees which enabled consensus around a broader transitional justice process by providing guarantees for the outgoing regime and former

oppressors. The Interim Constitution clearly tied the provision of amnesties to the broader pursuit of reconciliation and national unity, explicitly calling for amnesties in association with Fundamental Principle No. 3 on national unity and reconciliation and with the language of the post-script on the same principle: ‘there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past’ (Republic of South Africa 1993). Clear communication with the public, and efforts geared at engaging them in both transitional justice and constitution-building, resulted in a widespread understanding—if not acceptance—for this compromise. This minimized the change of tension between tenets of the elite pact and public opinion, seen in other case studies.

### Impacts on long-term conflict transformation

The depth of repression and entrenchment of apartheid in South Africa defined the scope of reform required to achieve its transformation. Constitution-building provided a critical avenue for protecting aspects of the political settlement and ensuring that the interests of formerly warring parties were guaranteed to keep them onboard with the transition. The process aimed at state-building and democratic transition, seeking a dispensation of power shaped by checks and balances, rule of law, equality and institutions that would ensure apartheid didn’t repeat itself, and also that the white minority population would not face repression in South Africa. In many ways, South Africa can be said to have achieved these ends. While protests are still common, and occasionally destructive, in general discontent and disputes are expressed through mobilization behind certain political parties. This shows that in today’s South Africa issues can be debated and laws reformed without the need for violence (Bilchitz et al. 2016).

However, the transition’s impact on long-term conflict transformation is still up for debate. Systemic economic inequality, with its continuing racial undertones and its potential to engender violence, is still extreme, and a widespread failure to implement economic and social rights, such as the right to housing, causes frustration. Many of the recommendations of the South African TRC were not implemented. The Commission’s mandate, rooted in the post-script of the Interim Constitution and elaborated upon in the 1995 Promotion of National Unity and Reconciliation Act, was three-prong:

(a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date . . . by conducting investigations and holding hearings; (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act; (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.

(Republic of South Africa 1995: 4)

Finally, the Commission was to write a report summarizing its work in these three areas. Although hearings were hosted and amnesty granted, the recommendations of the Commission—which included reparations of ZAR 21,000 per year for six years to survivors, and a ‘wealth tax’ on institutions/industries that benefited from apartheid (ICTJ 2019)—were never implemented. Since the TRC published its report only after the Constitution was promulgated, it was not possible for the Constituent Assembly to consider the findings and recommendations of the TRC in designing the final constitution. This explains why, for example, the reparations recommended by the TRC were not institutionalized in the final constitution, as they were in Nepal. The lack of constitutionalization has left these recommendations vulnerable to lack of implementation due to waning political will and objections on grounds of limited resources. This vulnerability is emphasized by the fact that the expected legislation on reparations has never been passed, nor has state funding been put towards reparative initiatives. The incomplete nature of the transition was further highlighted in 2019 as the ruling ANC proposed a constitutional amendment to allow for government expropriation of land for the purposes of redistribution—the vast majority of land ownership still rests in the hands of the small white minority.

While the promise of amnesties in exchange for reconciliation was widely accepted in South Africa, it created a shadow expectation that people who did not come forward to tell the truth would be prosecuted. However, this did not occur; rather, the state pursued a number of measures to allow for ‘back-door amnesties’ for apartheid-era perpetrators who never participated in the TRC (i.e. amending the National Prosecuting Authority’s Prosecution Policy). Upon writing, not a single case is before the South African courts for prosecution (ICTJ 2019). The lack of prosecutions undermined the transition’s contribution to long-term conflict transformation, as many perceive that a culture of impunity has been protected, not remedied, post-apartheid.

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## Tunisia

### Key lessons

1. Political dynamics and composition of transitional institutions can affect the legitimacy of the transitional justice process.
2. The devil is often in the details in designing transitional justice and constitution-building processes; the choice of selection or election of key decision-makers has an impact on the legitimacy of the process outcomes.
3. Even when arising from the same political institutions, constitution-building and transitional justice can take divergent routes and manifest different dynamics.

### Background

Since independence in 1956, Tunisia's state power has been concentrated in the person of the President and his ruling party. In 1987, Zine El Abidine Ben Ali came to power, rebranding and restructuring the former Parti Socialiste Destourien (PSD) into the Democratic Constitutional Rally Party (RCD). Even before Ben Ali's rule, this party (under Habib Bourguiba's leadership) was notorious for restricting human rights, including freedom of expression; Ben Ali's regime carried over this legacy and was also perceived to be widely corrupt. Elections before 2011 were non-competitive due to the absence of effective opposition parties. The Tunisian Revolution of January 2011 represented a popular demand to end authoritarianism, repression and corruption, and to pursue transitional justice. Before stepping down from power, Ben Ali called for the creation of two commissions of inquiry, one to investigate the use of excessive force by security forces and the other to investigate charges of Government corruption. The Commissions were established in an ad-hoc manner and faced resistance from stakeholders, including most prominently the judiciary, which rejected the ad hoc investigatory mandate of the commissions, claiming that investigatory powers should be limited to the judiciary itself.

On 15 January 2011, the day after Ben Ali's departure for Saudi Arabia, Prime Minister Mohamed Ghannouchi appointed a provisional government. In response to popular pressure, in March 2011, the Interim President Fouad Mbaza suspended the 1959 Constitution, dissolved parliament and called for the elections of a National Constituent Assembly (NCA) to draft a new constitution. The Islamist party Ennahda won a plurality in the election and formed a government alliance, known as the Troika, with two secular leftist groups, the Congress for the Republic (CPR) and Ettakatol. The NCA first passed an Interim Constitution (formally known as the Provisional Organization of Public Authorities, Constitutional Act No. 2011-6) in December 2011, to outline how power would be exercised and administered through different branches of government and also to define the priorities for the body's work, both in terms of legislation and in terms of passing the final constitution. The Interim Constitution importantly represented the first effort to institutionalize transitional justice, listing it explicitly as a priority for the NCA. The Organic Law on Establishing and Organizing Transitional Justice (Republic of Tunisia 2011) was

passed by the NCA in December 2013; among other things, it established the Truth and Dignity Commission (TDC) with a four-year mandate to investigate crimes between 1956 and 2013. After a somewhat tortuous negotiation process, the NCA promulgated the final constitution in January 2014, protecting many of the central compromises of the political settlement that allowed for Tunisia's democratic transition, including protection for all transitional justice legislation.

### Constitutionalizing transitional justice

Tunisia's Constitution (2014) represents the constitutionalization of transitional justice in several ways:

1. It identifies transitional justice as an explicit priority; within the final chapter on Transitional Provisions, article 148.9 calls for the state to implement transitional justice system in all its fields and within the deadlines prescribed by the relevant legislation. article 148.9 was added to the Constitution at the last stage of the drafting process, even though transitional justice was central to the political settlement and therefore at issue since the transition began. The late adoption meant there was little time for NCA members to discuss and reflect on their implications. It is the only chapter that was re-evaluated in full by the Consensus Commission, testifying to its sensitivities.
2. It removes key barriers to transitional justice and the transition as a whole, by contracting the country out of problematic pre-existing amnesties and other constitutional/legal barriers to transitional justice. Article 148.9 reads: 'the invocation of non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata* and the prescription of a crime or a punishment are considered inadmissible'.
3. It establishes new institutions to further the aims of guaranteeing non-recurrence; for example, The Good Governance and Anti-Corruption Commission (article 130) to promote transparency, integrity and accountability. It is notable that the TDC was not explicitly mentioned in the constitution, and therefore was left more vulnerable to political manipulation.

### *Limited protection from politicization*

The aim of constitutionalizing transitional justice in Tunisia was to protect the process from later politicization and de-prioritization, though it is debatable whether this protection succeeded. From 2011 onwards, Ennahda claimed authority from the revolution and took ownership over the transitional justice agenda. For example, initially, the Ministry for Human Rights and Transitional Justice was headed by Ennahda, giving rise to the perception that transitional justice was a political agenda for the party and that victims of past repression associated with Ennahda and Islamic movements were being prioritized.

Selecting the members of the TDC also proved controversial, with the process criticized as non-transparent and rushed, giving way to perceptions of political manipulation and illegitimacy. Although there were clear criteria and processes laid

out for the selection of Commissioners, ‘the NCA, which was responsible for selecting commissioners, was not able to generate public ownership of the process, nor was it able to foster full transparency or participation’ (Gantri 2015: 3). The original Transitional Justice Law was amended, removing original provisions for Commissioner selection based on party bloc representation and replacing it with proportionality, giving Ennahda, with the most seats in the NCA, also the most seats on the Selection Committee formed within the NCA. Ultimately, the Selection Committee, chaired by Ennahda, identified 15 TDC Commissioners. While the Committee provided a 15-day window for public input, this was largely seen to be inadequate. Despite controversies, the Committee’s list of candidates was approved by a plenary of the NCA; civil society court challenges failed to halt the appointments. The challenges are notable even if unsuccessful insofar as they demonstrate an interaction between constitutions and transitional justice; namely, when standards set in the constitution are used to measure the legality and legitimacy of transitional justice processes.

The political nature of the selection process impacted the Committee’s effectiveness and legitimacy. By August 2015, four of the appointed Commissioners had resigned and a fifth was removed, which ‘weakened the TDC’s public standing and worsened the tense internal dynamics that have undermined the commission’s ability to obtain a minimum consensus to implement its mandate’ (Gantri 2015: 4). Despite calls to replace the Commissioners through a more transparent and participatory process, the Government favoured direct selection. As such, ‘while the integrity of the selected commissioners has not been the focus of most criticisms, serious problems arose with the selection process itself...during nearly every discussion or media debate on the commission, attention is diverted away from the TDC’s mission, progress, and challenges to the polemics surrounding the commissioners and their ideology, political affiliation, or past deeds’ (Gantri 2015: 3). The TDC completed its work on 31 December 2018. While Parliament voted not to extend the mandate of the TDC, since quorum was not reached the decision did not hold.

Upon its closure, the Commission referred a number of cases to special judicial chambers established by decree in 2016 (No. 2016-1382); it also recommended reparations under the Dignity Fund and institutional reforms to guarantee non-recurrence of authoritarian repression. While the Transitional Justice Law of 2013 requires the government to implement the TDC’s recommendations, it remains to be seen what will happen given that the legitimacy of the TDC and transitional justice process was severely weakened by political backtracking from leading parties. The TDC itself does not exist any longer to oversee or advocate for implementation of its reforms (a shortcoming of its non-constitutional status) so political will from the ruling elite is critical to the long-term success of the process. This has led to civil society pushing for full constitutionalization of the transitional justice law to protect it from political manipulation and ensure that there is follow-up on the TDC’s work and recommendations (Al-Khulidi 2017: 37–78).

To date, criminal investigations initiated based on TDC referrals to special chambers have faced ‘numerous obstacles, including an effective inability to compel the accused and witnesses to appear. In the first special court case, involving a death

in detention under torture, none of the fourteen defendants have shown up' (Goldstein 2019). The special chambers themselves were established in response to civil society pressure, as the few cases that had been tried regarding violence in 2010/2011 under the military courts were perceived to have resulted in unjustly lenient sentences. Although the chambers represent an innovation in the administration of justice, they are ad-hoc like many other transitional justice mechanisms and therefore have experienced difficulties in projecting their legitimacy and authority, particularly over other government institutions. Institutionalizing transitional justice has experienced other challenges as well, as even Ennahda's support is wavering based on political calculations in advance of upcoming elections; the party has come out in support of a contentious law that would allow for 'administrative reconciliation' for economic crimes, despite being the original champions of transitional justice (International Crisis Group 2016).

### Impact on long-term conflict transformation

Tunisia's transition to democracy thus far represents 'the only country whose uprising did not go off the rails' in the Arab Uprisings (Goldstein 2019). The country has transitioned, peacefully, through legitimate and constrained processes into a new constitutional order, complete with oversight institutions and open political competition. The constitution-building aspect of the transition, though not without its challenges, can therefore be seen to have carried the momentum of the transition, including providing protection—as it did—for the transitional justice agenda. Further, the inclusion of Ennahda—a previously repressed group—in the NCA demonstrates how constitution-building can be a vehicle for reconciliation if processes are well designed; the electoral victory of Ennahda, and then their inclusion in the design of the future Tunisian state, gave legitimacy to the process as a whole (Goldstein 2019). This outcome may be the result of a notable difference between constitution-building and transitional justice in Tunisia; while the TDC members were selected through a political process—which ultimately undermined the perceived legitimacy of the Commission—the NCA was elected, holding democratic legitimacy and insulating it from complaints about its composition. This in turn imbued the Constitution with a legitimacy that the transitional justice process ultimately lacked.

Even with constitutional protection, maintaining political will for transitional justice in Tunisia has been a challenge. The new government sees transitional justice as a threat to fragile democracy. In 2014, Beji Caid Essebsi, a man with longstanding ties to Ben Ali and the previous regime, was elected President; he campaigned on a promise to leave the past behind and look forward (Abderrahmen 2018). Once in office, his administration set about undermining transitional justice, including most prominently by passing the Administrative Reconciliation Act (2017) which provides amnesty for economic crimes to placate the fears of the outgoing Ben Ali regime. Although there was civil society resistance, as no constitutional court has been established to date, the law remains in place. Its constitutionality was challenged for contravening article 148.9 but the Provisional Body for the review of the constitutionality of draft laws (created in 2014 to review laws until establishment of the constitutional court) lacked the quorum required to issue a decision in the case.

The passage and endurance of the Administrative Reconciliation Act has fractured the political settlement that allowed for the peaceful democratic transition in Tunisia. Today, ‘it is not about revising the transitional justice process outlined in the constitution but rather finding a compromise that would renew the political elites and the population’s coincidence in this process’ (International Crisis Group 2016: 27). While a constitutional mandate for transitional justice persists, the political will to see this mandate through is lacking.

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## Abbreviations

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AFLP	Agreement on a Firm and Lasting Peace, Guatemala
ANC	African National Congress
CEH	Comisión para el Esclarecimiento Histórico, Guatemala
CICIG	International Commission against Impunity in Guatemala
CIEDP	Commission of Investigation on Enforced Disappeared Persons, Nepal
CPA	Comprehensive Peace Accord, Nepal
DRC	Democratic Republic of the Congo
FARC	Revolutionary Armed Forces of Colombia
IACHR	Inter-American Commission on Human Rights
ICTJ	International Center for Transitional Justice
NCA	National Constituent Assembly, Tunisia
OHCHR	Office of the High Commissioner for Human Rights, United Nations
RPF	Rwandan Patriotic Front
SDG	United Nations Sustainable Development Goal
TDC	Truth and Dignity Commission, Tunisia
TRC	Truth and Reconciliation Commission



## About the author

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**Amanda Cats-Baril** is International IDEA's Senior Programme Officer for constitution-building in Asia and the Pacific. In this capacity, she supports constitution-building processes in Nepal, Myanmar and the Philippines, among other contexts, by providing technical assistance to governments, civil society organizations and International IDEA projects. Cats-Baril is an international lawyer who specializes in constitutional law, human rights, post-conflict transitions and democratization. She focuses on the promotion and protection of minority, particularly indigenous peoples, rights and interests in the context of large-scale development and government reform processes. She has conducted legal research and programme design and management around Asia for local civil society and international organizations, including UNDP, World Bank, The Asia Foundation and the International Working Group on Indigenous Affairs. Prior to joining International IDEA, she served as a democracy and governance specialist with USAID/Nepal, managing a portfolio of peace-building, conflict mitigation and local governance projects, and advising the US government on constitutional issues, transitional justice and conflict sensitivity.

## About the organizations

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*This paper is a product of the Edinburgh Dialogues on Post-Conflict Constitution-Building, jointly convened by International IDEA; the Political Settlements Research Programme of the Global Justice Academy; and the Edinburgh Centre for Constitutional Law at the University of Edinburgh.*

### International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work. International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

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<<http://www.centreforconstitutionallaw.ed.ac.uk/>>

The increased prevalence of political transitions following internal conflict has seen heightened attention given to both transitional justice and constitution-building as fields of study and intervention. However, little attention has been paid to understanding how the interaction between the two fields can better serve their respective and mutual objectives. This Policy Paper promotes better understanding of synergies between transitional justice and constitution-building and encourages decision-makers and experts in the field to consider options for maximizing the comparative advantages of transitional justice and constitution-building respectively, to pursue the overall goal of sustainable peace and development.

The paper illustrates the potential power of combining transitional justice and constitution-building, but also details the challenges inherent in conflating the two processes. Without proposing specific models or answers, the paper highlights the importance of seeing transitional justice and constitution-building processes as complementary rather than competitive, and expands understanding not only of what one process can do to improve itself, but of the ways in which breaking down silos and looking at nuanced interactions between transitional justice and constitution-building processes can help to address the major challenges that transitions present.



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