

# Rethinking Peace and Justice

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## I. Introduction

Recent peace negotiations to end violent conflict in Colombia, the Central African Republic, Ukraine, South Sudan, and Afghanistan indicate that striking an appropriate balance between establishing peace and providing justice for serious violations continues to be a challenging issue for negotiators and mediators. On the one hand, it is increasingly understood that peace agreements that excessively ignore or postpone the demands of justice may help achieve conflict reduction in the short-run but rarely avoid controversy or succeed in silencing these demands in the long-run, thus creating unstable situations. On the other hand, it is recognised that an absolutist insistence on ensuring criminal accountability severely limits the room for settlements to be reached, or indeed for peace talks to emerge in the first place.

In the face of this challenge, states continue to take a flexible approach, using a mix of approaches that combine the implementation of peace agreements with justice initiatives that further victims' rights to truth, reparations, accountability, and guarantees of non-repetition. These can include selective prosecution strategies, alternative sanctions, limited and/or conditional amnesties, plea agreements, pardons, use immunity, and quasi or non-judicial forms of accountability. While some may see these practices and trends as a threat to specific norms of justice and thus a threat to the prospect for long-term peace, we argue that these are permissible under international law, are important positive developments in practice at the local level, and point the way to agreements that further both peace and justice in a sustainable way. In making this argument, we focus particularly on the use of amnesties as they are more controversial and

subject to greater restrictions under international law than other legal leniency measures.

Flexible approaches to justice, particularly as part of negotiated transitions out of armed conflict, have received increased recognition in international law and policy in recent years. This is partly due to unease among [some](#) in the global human rights community at negative consequences arising, directly or indirectly, from the turn to criminal law within human rights. Given the practical impossibilities of prosecuting all or most offenders that are generally present in the aftermath of conflict, limitations that prevent the use of alternative methods of accountability may contribute to greater impunity, rather than greater accountability. While there are times when criminal prosecution is the best approach to furthering accountability, relying solely or excessively on criminal prosecution is risky and unnecessary. We argue for more nuanced and creative approaches to accountability in the design and outcomes of political negotiations that more accurately reflect what international law allows or should allow.

In doing so, we aim to offer a simultaneously aspirational and practical viewpoint: aspirational in seeking to maximise peace and justice and guarantee victims' rights; practical by incorporating a critical analysis of the environment in which conflict and negotiations occur. In the opening section, we describe how the handling of peace and justice in political negotiations has evolved in recent decades. Thereafter, we set out the contemporary international legal and policy framework within which decisions on peace and accountability have to be made, arguing that

- 1) carefully designed amnesties and other forms

of leniency and flexibility can play an important role in helping societies to move beyond violent pasts and 2) international law allows space for significant creativity in how this can be achieved. We conclude by exploring how negotiation techniques and process design can take advantage of this flexibility within international law to balance peace and justice.

Our aim in all this is to provoke an overdue discussion among key actors in the mediation, peace, and justice fields on the challenges,

complexities, and benefits of adopting a more balanced approach to peace and justice. Our ideas are informed by the diverse global experiences of IFIT's [Law and Peace Practice Group](#), who have had direct involvement in the negotiation of amnesty and accountability issues in over 20 countries. We also draw, more generally, upon recent developments and innovations in the fields of transitional justice, peace and conflict resolution, international criminal law, international humanitarian law, and international human rights law.

## II. The Evolution of Peace and Justice in Political Negotiations

When transitional justice began taking shape as a field around the end of the Cold War, its core premise was that, in times of transition, some form of reckoning with the past was necessary to ensure future stability. Many early transitional justice advocates understood democratic and post-conflict transitions as exceptional moments in which compromise in the pursuit of prosecutions for serious violations may be required in order to help advance social stability, respect for the rule of law, and sustainable peace and democracy. This premise was based on the understanding that the prerogatives of peace and justice can conflict with each other, and that a preference for the former may require limiting or foregoing prosecutions in favour of alternative forms of accountability. Such a flexible approach to justice was largely understood as a practical necessity, and was especially informed by the mix of experiences of democratic and post-conflict transition in Latin America.

This understanding changed with the emergence and expansion of international or internationalised criminal tribunals, innovations in transnational criminal prosecutions, and the growing assertion of the existence of an anti-impunity norm by prominent international human rights organisations and the United Nations. These developments contributed to a shift in dominant debates in policy and scholarship from peace versus justice to no peace without justice, with justice understood primarily as criminal prosecution. Thus, rather than argue that securing peace and stability might require foregoing comprehensive criminal investigations and prosecutions, this emerging view argued the opposite – that long-term peace and stability required robust

criminal prosecutions. Some adopted this position as an empirical fact, while others adopted it as an aspirational goal to pressure states to increase their commitment to justice, in line with a hard interpretation of specific prosecution obligations contained in a number of treaties.

Yet, divergences existed among the same anti-impunity proponents regarding the extent to which prosecution strategies should seek to ensure comprehensiveness in holding to account those responsible for violent offences. Some began to assert an uncompromising position that [all perpetrators of international crimes and gross human rights violations must be prosecuted](#), arguing that systematic criminal prosecutions are a prerequisite for durable peace. Others focused their efforts on calling for a limited, targeted number of prosecutions of the [military, political, or other leaders](#) considered 'most responsible' for the worst and most widespread violations. The proponents of these divergent approaches nevertheless agreed that while other transitional justice mechanisms are permissible, and even desirable, they should be undertaken as a complement to, and not a replacement for, criminal trials.

Yet, amnesties did not disappear from negotiating tables even as the cause of criminal justice rose. Instead, amnesty and other forms of leniency or non-penal accountability continued to play a pivotal role in political and peace negotiations. This trend persists uninterrupted. For example, a 'general amnesty' was granted in 2018 to rebel fighters in [South Sudan](#) to facilitate their surrender as part of a peace process; the 2019 peace agreement to end the conflict in

the [Central African Republic](#) provided for the creation of a truth commission that would promote truth, justice, reparation, national reconciliation and pardon; and the [Afghan](#) consultative peace assembly, in a confidence-building gesture to stimulate negotiations, recently oversaw the release of hundreds of prisoners accused of atrocities. On top of this, there are other ongoing cases like the Minsk peace talks to end the conflict in eastern Ukraine, where the agenda of the talks stipulates the requirement of amnesty, but omits any mention of victims or accountability.

Our review of state practice shows that amnesties and other forms of leniency for crimes committed in conflict are commonly offered on condition of war termination, disarmament, renunciation of violence, and so on. Such amnesties and related measures are frequently implemented in peace processes that also entail selective prosecution strategies, truth commissions, and other accountability mechanisms, albeit without being conditioned on perpetrators contributing directly to truth recovery and reparations. However, Colombia's 2016 peace deal with the FARC rebel group provides a recent and high-profile example of a negotiated transitional justice system with leniency measures conditioned on expressions of responsibility and other forms of redress for victims. In addition, the 2015 amnesty in Libya stated that to benefit from an amnesty, perpetrators must 'present a written pledge not to commit crime again and to return the embezzled public funds, as well as reconciliation with victims of crime'.

All of this demonstrates that an 'age of accountability' in which systematic prosecutions would be pursued against those responsible for

serious violations has yet to arrive. The evidence indicates that it is unrealistic to expect prosecutions to be carried out against all or even most persons alleged to be responsible for international crimes or serious human rights violations. Even if such robust prosecutions were possible, it is unclear that they would achieve the peace benefits that some of the defenders of such an approach have claimed. A more realistic and desirable objective is to find a way to reduce the natural tensions between peace and justice and to fulfil both to the greatest extent possible, within the framework of the overall peace process. Although seeking to balance both demands can be challenging for the legitimacy of the process and the viability of the negotiation itself, doing so is more likely to help meet the expectations and manage the interests of victims, offenders, and other key constituencies, thus increasing the legitimacy and sustainability of the resulting pact.

Ultimately, an approach to negotiations that allows and supports a more creative approach to justice (that incorporates, for example, more restorative over retributive justice) is more likely to fulfil victims' rights to an effective remedy through truth, justice, reparations, and guarantees of non-repetition. To equate justice solely or excessively with criminal investigations and trials is short-sighted as it ignores the breadth of creative approaches that have been adopted – and are needed – as part of political negotiations. Lastly, as explained in more detail below, international law allows, and the pursuit of justice and peace would be furthered by, a more nuanced understanding of the relationship between amnesties and justice and of the many creative approaches available to crafting amnesties.

### III. Legal and Policy Environment

Peace negotiations have long been conducted in international law's shadow. International law has provided the outer legal, and thus often the outer political, limit to what could or should be agreed to in the pursuit of peace. Over the last thirty years, those outer limits have become more detailed and exigent in their requirements, yet they still provide an enormous amount of room for creativity and movement with respect to justice. In addition, while there has been a strong tendency to argue that international law prohibits amnesty in all its forms in response to international crimes – and while some, includ-

ing the [United Nations](#), have interpreted that prohibition to include gross violations of human rights – a careful and detailed analysis of the current state of international law and policy reveals a continuously flexible law and policy environment. As discussed below, neither treaties nor customary international law provide the clear prohibition some claim against some forms of amnesty and legal leniency for international crimes and gross violations of human rights. Similarly, while sometimes more rigid than the law requires, relevant policy guidelines developed by regional and international organisations

often leave room for the malleable approaches to fulfilling state obligations with respect to truth, justice, reparations, and guarantees of non-repetition that negotiation contexts intrinsically require.

### A. International Criminal Law Treaties

States have consistently declined to prohibit amnesty in international treaties. This was evident, most recently, in the negotiations leading to the Rome Statute (1998) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). Neither refers to nor prohibits amnesty. The only multilateral treaty that mentions amnesty remains Additional Protocol II to the Geneva Conventions (1977), which calls on states to grant, not prohibit, the broadest possible amnesty at the end of non-international armed conflicts. Although the International Committee of the Red Cross has interpreted this provision to exclude war crimes committed in non-international armed conflicts, widespread use of amnesties at the end of such conflicts indicates that states have adopted a different interpretation of this provision.

While no treaty prohibits amnesty or similar types of leniency, some find implicit authority for such a prohibition in treaty provisions that require the criminalisation, prosecution, extradition, or punishment of those responsible for certain crimes under international law (e.g. genocide, grave breaches of the Geneva Conventions, torture, and enforced disappearances). These treaties are silent on the legality of amnesties, alternative forms of accountability, and other forms of leniency for treaty breaches. However, their explicit prosecution obligations have been interpreted by many to mean that states parties to these treaties (or all states where the treaty-based duty to prosecute is accepted as a customary norm) violate these treaties if they enact amnesties or other measures to prevent prosecutions. Yet none of these treaties specifies that all perpetrators must be prosecuted or otherwise held accountable, and none provide precise guidance or limitations on how individuals are to be held to account, including how harshly they should be sentenced and punished. Further, the conventions against torture and enforced disappearances explicitly recognise the role of national prosecuting authorities in deciding whether to prosecute the relevant offences, knowing that many legal systems allow for the exercise of prosecutorial discretion in deciding

whether to prosecute a specific individual. Thus, states parties retain flexibility regarding, among other things, whom to prioritise for prosecution in keeping with the rights of victims and the capacity and priorities of the court system.

### B. Customary International Law

Where treaty rules contain gaps, the legality of amnesties or other leniency measures may be determined through customary international law, which is created by a combination of 1) state practice and 2) *opinio juris*, meaning the subjective perception by a state that a particular legal standard is binding upon it.

In this regard, the categories of crimes against humanity and war crimes committed in non-international armed conflicts bear special mention. The International Law Commission is studying a proposed convention on the former that contains similar extradite or prosecute language as found in the conventions against torture and enforced disappearances, but there remains no treaty dedicated to the obligation of states to prevent and punish crimes against humanity. Similarly, although the Geneva Conventions require state parties to prosecute grave breaches committed in international armed conflict, war crimes committed in non-international armed conflicts are not subject to a treaty-based prosecution obligation. As such, arguments that amnesties are prohibited for crimes against humanity or for war crimes committed in non-international armed conflicts are necessarily based on the assertion of the existence of state obligations to prosecute these crimes under customary international law. It is only thus that one could potentially infer the impermissibility of an amnesty that encompassed such crimes.

Some commentators circumvent these inconvenient facts by relying on a more general (or ‘cumulative’) obligation to prosecute international crimes and gross human rights violations as the basis for asserting the existence of a custom-based prohibition on amnesties for such crimes. This is coherent inasmuch as 1) states are permitted to prosecute any person they deem responsible for crimes against humanity and war crimes in non-international armed conflicts, and 2) states may have treaty obligations to prosecute torture and enforced disappearances, which are constitutive elements for proving the commission of certain crimes against humanity. However, there is insufficient state

practice to support the existence of customary rules requiring prosecution of those responsible for such crimes. This uncertainty, coupled with [ongoing state practice in granting amnesties for these offences](#), undermines the customary-law basis to infer the existence of a rule that amnesties and other forms of leniency are absolutely prohibited for all such crimes.

This indeterminate state of customary international law with respect to amnesties was recognised, among others, by the UN Special Rapporteur tasked with preparing an International Convention on the Prevention and Punishment of Crimes Against Humanity. He [noted](#) that the law is unsettled on whether states are prohibited from granting amnesty for these crimes due to 1) the continued refusal of states to agree to a treaty prohibition on amnesties, and 2) states' continued willingness to enact or endorse amnesties for international crimes and serious violations. On this basis, in keeping with the approach in the conventions against torture and disappearances, he recommended that any future treaty on crimes against humanity omit any explicit reference to amnesty.

Some argue, nonetheless, that the trend of international law is evolving toward 1) a more robust obligation to prosecute and 2) a categorical prohibition against any amnesty for international crimes and gross violations of human rights. But what is clear is that any such trend has not crystallised as a new norm. Moreover, for reasons explained later in this paper, we believe that the development of categorical obligation or prohibition would unnecessarily and unproductively constrain states – and thus non-state armed actors as well – in their ability to 1) negotiate the prevention or resolution of armed conflicts, and 2) adopt creative and efficient prosecutorial strategies at war's end.

### C. Human Rights Treaties

International human rights law treaties oblige states parties to provide victims of human rights violations with a remedy. This obligation can be fulfilled through a variety of measures, including civil remedies or administrative mechanisms. Some [treaty bodies](#) and human rights advocates have interpreted this obligation to require national investigations and prosecutions of those responsible for gross violations, such as breaches of the right to life, even where these

violations do not constitute international crimes. This argument is problematic for several reasons.

First, there is no accepted definition of what constitutes a 'gross' violation of human rights, and thus it is unclear which types of violations would trigger an obligation to prosecute, or whether those crimes trigger this obligation only when they are perpetrated systematically. Second, most international human rights bodies recognise that states enjoy discretion (sometimes referred to as a 'margin of appreciation') in how they remedy human rights violations. Even the Inter-American human rights system, which has developed an extensive jurisprudence on amnesties and other forms of leniency, offers a more flexible approach than many assume – especially in war contexts. The Inter-American Court's judgments on the amnesty laws enacted during the transitions from military rule in the region established a strong norm against enacting broad and unconditional amnesties for serious violations that offer nothing to victims and require nothing from perpetrators. But more recent jurisprudence, engaged with more subtle and complex amnesties and other forms of leniency, indicates greater openness and flexibility. For example, in *La Rochela Massacre v Colombia*, the Court found that the combination of punishment and leniency encompassed in Colombia's 2005 Justice and Peace Law is permissible. Created to encourage paramilitaries to disarm, the law provided for reduced sentences of five to eight years for persons convicted of crimes against humanity who disclose the truth of their actions, contribute to reparations for victims, and commit to non-recidivism.

The need for flexible justice measures as part of negotiated peace arrangements also arose in the *Case of the Massacres of El Mozote and nearby places v El Salvador*. The Court's main judgment found that El Salvador's 1993 unconditional amnesty violated the American Convention on Human Rights. However, a concurring opinion by the Court's President and four other judges argued that amnesties enacted as part of negotiations to end a civil war should be distinguished from amnesties enacted after dictatorship, and that in the former settings victims' rights to truth, justice, reparations, and guarantees of non-repetition should be balanced with the right to peace. The concurring opinion indicates that focusing prosecutions on those who are responsible for the most serious violations and

dealing with less serious offences through other mechanisms, such as '(r)eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility', might provide an appropriate method of achieving this.

The European Court of Human Rights has adopted a more broadly permissive and flexible approach on the question of amnesty. For example, in *Tarbuk v Croatia*, the European Court asserted that 'even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary'. The only restriction placed on this discretion to amnesty was that the state ensure 'that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public'. With respect to grave human rights violations, in *Marguš v Croatia*, the Grand Chamber of the European Court recognised the '*growing tendency in international law*' (our emphasis) to see amnesties as unacceptable where they conflict with states' obligations to prosecute and punish. However, the Chamber indicated that even for such violations, amnesties may be 'possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims'. The language of the judgment does not require, nor does it preclude, amnesty being conditional on offenders' contributing to reparations or reconciliation.

As with state practice on international crimes, we can observe that no widespread and consistent state practice has emerged to suggest that customary international law prohibits all forms of amnesty for serious human rights violations. Transitioning states continue to experiment with forms of amnesty, alternative sanctions, pardons, and expressions of leniency for a wide range of violations, indicating that state practice and *opinio juris* have not coalesced around the clear-cut prosecution obligation that some claim.

#### **D. International and Regional Policies on Transitional Justice and Conflict Mediation**

Some prominent multilateral organisations have developed policies and standards that include specific prohibitions on amnesty which, while not sources of law, are sources of political influence. However, there is a notable difference be-

tween the policies of the UN and EU, on the one hand, and the African Union on the other. While the policies of the former mostly go beyond what international law currently requires (while also recognising the need for flexibility), that of the latter affords more latitude.

For example, the United Nations Secretary General, in guidelines and reports in 1999 and [2004](#), articulated that the UN would not foster or condone any amnesty for international crimes or gross violations of human rights. Its hard position is, however, tempered by continued recognition in [UN Mediation Guidance](#) that amnesties may be 'considered – and are often encouraged' for political offences, such as treason or rebellion, and may even be encouraged to reintegrate displaced persons and former fighters. While these two positions are not incompatible, reconciling them requires flexibility and creativity.

The [European Union's Transitional Justice Policy Framework](#) expresses the EU's commitment to the principle that 'there cannot be lasting peace without justice'. It endorses the UN policy to oppose amnesties for international crimes and gross human rights violations, 'including in the context of peace negotiations'. However, the EU recognises that under international humanitarian law, states can grant amnesty for legitimate acts of war and that amnesties are permissible for political offences. Drawing on international human rights law, the EU contends that 'where amnesties are permitted under international law they still must be consistent with human rights including the right to remedy or truth', indicating an openness to limited amnesties and other forms of leniency that facilitate or do not undermine the fulfilment of victims' rights to truth and reparation.

The African Union (AU) has adopted a more dynamic position. The principles underpinning the [African Union's Transitional Justice Policy](#), adopted in February 2019, state that 'In the fragile post-conflict setting, a balance and compromise must be struck between peace and reconciliation on the one hand and responsibility and accountability on the other.' The AU policy eschews the adoption of 'a one-size-fits-all approach' to transitional justice, arguing instead that choice of transitional justice mechanisms should be developed in a context-specific manner 'drawing on society's conceptions and needs of justice and reconciliation'. The section on justice and accountability recognises that these goals can

be delivered through a combination of formal and traditional legal measures and should entail ‘conciliation and restitution’. Further, it explicitly ‘leaves a margin of appreciation’ for Member States to use plea bargains, pardons, and mitigation and alternative forms of punishment other than prison sentences. While it rejects the use of ‘blanket’ or unconditional amnesties that prevent investigations of serious offences, facilitate impunity for persons responsible for serious crimes, or perpetuate negative institutional cultures, it leaves open the possibility of condi-

tional amnesties even for those responsible for serious crimes, provided that they are intended to contribute to truth recovery and reparations to victims.

Thus, even when international organisations have taken a strong stand against amnesties, they tend to acknowledge that some forms of amnesty or leniency are permissible and may be necessary to end violent conflict, though they differ on when a form of amnesty or leniency moves from permissible to prohibited.

## IV. Scope for Creativity in Accountability

Throughout this paper, we have observed how international legal and policy frameworks governing states’ obligations following the commission of international crimes and serious human rights violations provide flexibility with respect to the pursuit of justice. This flexibility is expressed in even more detail in [The Belfast Guidelines on Amnesty and Accountability](#), which draw on state practice to acknowledge, in particular, the availability, utility, and legitimacy of a variety of conditional amnesties. These include amnesties contingent on individual offenders surrendering and participating in disarmament, demobilisation and reintegration programmes; participating in traditional or restorative justice processes; fully disclosing personal involvement in offences; testifying or providing information on third-party involvement with respect to offences; surrendering illegal assets; contributing materially and symbolically to reparations; refraining from the commission of new conflict-related or political offences, or any other type of criminal activity; or adhering to time-limited bans on owning dangerous weapons, standing for election or public office, or serving in the police or armed forces.

The value and permissibility of offering conditional leniency to wrongdoers has also been recognised by the ICC’s Office of the Prosecutor, which publicly [endorsed](#) the peace agreement between the Colombian government and the FARC that allows perpetrators of crimes against

humanity to serve sentences of five to eight years of ‘effective restriction of freedoms and rights’, if they acknowledge responsibility for their crimes, provide reparation and commit to non-repetition. The Office further [observed](#) that ‘reduced sentences are conceivable’ for international crimes, including ‘alternative or non-custodial sentences’, provided that, among other things, the convicted persons fulfil conditions designed to contribute to achieving peace and fulfilling victims’ rights.

All told, these developments reflect a growing realisation that peace and justice (broadly understood) can be incorporated in any negotiation or post-conflict process in a way that furthers the goals of both. In this respect, our descriptive conclusion mirrors our normative position: a principled and flexible approach to furthering peace and justice is more likely to result in lessening the inevitable tensions between the two and more likely to succeed in furthering both. While international law creates a duty to prosecute some international crimes and gross violations of human rights, the duty is framed in a way that allows space for flexibility and creativity. In addition, international law and policy are receptive to, and thus do not automatically prohibit, conditional amnesties or other forms of leniency, particularly those that further important values such as truth, reparations, accountability, institutional reform, and guarantees of non-repetition.

## V. A Better Approach

How can negotiators take advantage of the true bandwidth of international law and policy to accommodate the demands of peace and justice in a way that each strengthens the other to produce more legitimate and sustainable results? We argue that at least three elements are crucial: A) framing, B) negotiation mechanics, and C) a focus on process over end point.

### A. Framing

How the relationship between peace and justice is framed by those negotiating a transition can expand or limit the options available. Reducing the issue to one of amnesty versus prosecution oversimplifies and obscures the choices available for reducing conflict and promoting truth, justice, reparations, and guarantees of non-repetition. By contrast, more open framing of the question helps unpack the requirements of justice and peace into their constituent parts, revealing what measures might best further those individual parts given the specific variables of the context. By following this approach, negotiators are more likely to develop a creative and realistic set of options that better furthers peace and justice.

#### 1. *Disaggregating Justice*

The concept of justice embodies a number of interlocking objectives and moveable parts intended to bring positive outcomes for victims and society. These can include exposing the truth; affirming social norms that reject violence and criminality; rebuilding the rule of law and the legitimacy of justice institutions; individualising guilt; deterring future violations; rehabilitating and reintegrating offenders; spurring official acknowledgement; supporting the healing process for victims; fostering reconciliation; and imposing forms of legal punishment that can extend as far as disqualification from public office.

Criminal investigations and prosecutions are well-suited to achieving some of these elements of justice, and are ill-suited to achieving others. For example, in transitional justice settings, criminal trials focus on the responsibility of a single accused (or at most a few) for what are often individual acts within a larger context of conflict or political repression. While the basis of individual responsibility may eventually be proven, the broader environment, root causes of violence,

and institutional and systemic factors that facilitated the commission of the proven crime often get much less attention. Furthermore, the full experience of the victims is at best a secondary feature, and at worst neglected, in most criminal trials. Criminal trials also require a high level of evidentiary certainty, which is appropriate given the possible imposition of a sentence of incarceration. But this means that guilty parties will sometimes be acquitted, leaving the impression that the individual is innocent or that crimes did not occur, which may further disappoint victims, inflame societal tensions, or undermine confidence in the administration of justice.

These limitations with respect to the utility of criminal prosecutions do not detract from the crucial role they can play in acknowledging harm and assigning responsibility for atrocities. Such benefits are self-evident. Yet, a narrow focus that equates justice with prosecution risks overlooking weaknesses with respect to the utility of trials and neglecting other mechanisms to address such atrocities, thus undermining the scope for achieving both peace and justice. An approach to justice that instead understands it in the broader fashion described above is not only a help to the constraints of peace negotiation, but also an approach that is 1) less likely to overburden criminal prosecution with tasks it cannot adequately or realistically perform, and 2) more likely to produce creative responses that further a state's international obligations in the areas of truth, justice, reparations, and guarantees of non-repetition.

#### 2. *Disaggregating Peace*

Like justice, the concept of peace encompasses a number of interlocking imperatives and constituent parts. In the short term, peace may mean the formal end of a violent conflict. In the long term, peace requires the development of an environment in which differences are negotiated through deliberative processes rather than violent conflict, and in which fundamental human rights are recognised, enforced, and fulfilled.

How a violent conflict ends influences the long-term viability of peace. Done too sloppily, the formal end to violent conflict may be illusory, setting the stage for future violence rather than peace. Done more carefully, the formal ending of

a conflict can lay the groundwork for a realistic long-term peace. A thoughtful, national reckoning with the past – through truth telling, acknowledgement, accountability, reparations, and reconciliation – can be important in this regard.

In this task, the relevance of amnesties is badly misunderstood. They are often conflated with impunity (understood as the absence of criminal prosecutions for serious acts of violence), and thus viewed as furthering an illegitimate peace at the expense of justice. Yet, as we noted above, amnesties come in many shapes and sizes. While some may further impunity, carefully-designed conditional amnesties and other forms of leniency can be crafted in a way that furthers important elements of peace as well as justice, as explained in detail in *The Belfast Guidelines*. Crucial to the long-term legitimacy of such conditional amnesties is a commitment to prosecute or otherwise hold to account those who do not take advantage of such bargains. The legitimacy of the conditional amnesty in South Africa, for example, has been seriously undermined by the failure of the South African state to prosecute those individuals who were either denied amnesty (because they did not fulfil their side of the bargain) or never applied for it.

In brief, it is more useful in the context of a negotiation to frame the discussion around the important constituent elements of peace and justice that each party wants to further, and then move to a discussion about which mechanisms are best suited to furthering those elements. By doing so, negotiations around accountability issues become a discussion of means rather than ends, and are less likely to succumb to the false binary of prosecution versus amnesty, which limits the creative approaches available. While individual transitional justice measures can each contribute in important ways to furthering the objectives of peace and justice, where they are creatively defined and combined, their individual impacts can be multiplied in ways that facilitate realistic and legitimate negotiated settlements.

## **B. Negotiation Mechanics**

In negotiations, good process design is imperative. While often perceived as a secondary or technical matter, a well-thought-out design is necessary for creating a viable negotiation and the possibility of an eventual agreement. Indeed, *how* a negotiation is designed and managed can

be as important as, and merit the same amount of attention as, *what* is being negotiated. Four aspects of this topic merit special mention in relation to the subject of this paper.

A first consideration concerns the use of *confidence-building measures* to create the conditions of a viable process. It is often critical for all sides in a negotiation to agree on early measures that can contribute to building trust between them, while also signalling to the public the seriousness of the endeavour. Examples include unilateral or bilateral ceasefires, the unbanning of political parties, the agreement to include agenda items of importance to the other side, and so on. Offers of legal leniency can also be important for early confidence building, and need not be done in a way that forecloses later agreements on accountability. For example, before the start of the peace negotiations leading to the transition in South Africa, the government used releases of high-profile prisoners, including those who had been convicted of serious violent offences, to build trust.

*Communication* is a second important element of design and negotiation mechanics that can influence an approach to furthering peace and justice. A successful communications strategy will link sensitive goals such as justice to the broader post-conflict dividends the negotiation seeks to bring about, thus contributing to a more manageable set of public expectations about what is feasible and possible. This includes periodic updates, as circumstances allow, about the progress being made and the continuing challenges.

*Stakeholder input* is another key consideration when peace and justice are being negotiated. Peace talks must take place in conditions that ensure confidentiality, but they need not operate hermetically in all respects. Except where the negotiations are conducted in secret (i.e., without the public being aware of their existence), key stakeholders – such as civil society, victims, political parties, and other actors – should ideally have the ability to feed their ideas into the process through one or more organised mechanisms. This can help diversify the range of perspectives on key issues, thus ensuring more context-sensitive results and increasing the buy-in and ownership of the final agreement by a fuller range of societal stakeholders. This in turn can serve to foster cross-group coalitions capable of future mobilisation to ensure implementation and monitoring of the agreement.

An agenda that allows or encourages the parties to *connect the different issues on the negotiation table* (e.g. disarmament, political participation, transitional justice, and so on) can also be highly important. This is especially so in respect of transitional justice which, because of its political and legal sensitivity, needs clear linkages to the broader aims of the peace negotiation. For example, the ability of a rebel group to transform into a political party and participate in elections could be tied to their surrender and disarmament as part of a conditional amnesty and accountability process. These kinds of linkages and conditionalities have been an important part of the agreements reached – often strengthened with external stakeholder input – in many cases of negotiated peace over the last thirty years.

### C. Process over End Point

Focusing on achieving a negotiated outcome that is more process than end point is usually wise. Given the distrust that naturally exists between parties negotiating an end to armed conflict, there is an understandable tendency to want to create an agreement with fixed and measurable outcomes. Yet, such an approach

risks creating a structure ill-equipped to confront an inevitably fluid process of implementation that will require frequent adjustments. A transitional justice process is especially vulnerable in this regard, because issues of amnesty and criminal accountability are not only technically complex, but also politically controversial and thus susceptible to intensive legislative battles and shifts in public opinion.

With respect to amnesties in particular, it is important to distinguish between those enacted to facilitate the onset of a negotiating process and those incorporated in the final agreement (not to mention those that may be proposed years after an agreement has been signed in order to facilitate reintegration and reconciliation). An awareness of these temporal dimensions of amnesty and other forms of leniency should inform discussions of the measure's objectives and design. For example, if combatants are given broad amnesties to surrender and disarm at the start of political negotiations, they may have little interest in subsequent efforts to use leniency measures to encourage them to engage in truth telling, reparations or other justice-enhancing measures.

## VI. Conclusion

A re-assessment of the relationship between peace and justice is past due. In this discussion paper, we have observed how international law and policy provide ample space for flexibility and creativity in combining peace and justice objectives, including for the provision of some form of leniency for perpetrators in exchange for other social goods. We have also shown that adopting such an approach, and applying the practices we have recommended, can increase the chance of getting political and peace negotiations underway and reaching more realistic and legitimate agreements.

While all negotiations are *sui generis*, and while peace is by definition the principal aim of a 'peace negotiation', in our experience a place for justice – when broadly defined – can usually be found. This is especially so if the process is undertaken with an advance conception of what is possible and what is allowed. While justice is at best one of many issues forming part of the larger agenda of a peace negotiation, there is far more scope for incorporating and delivering on it than parties often imagine.

Founded in 2012, IFIT is an independent, international, non-governmental organisation offering comprehensive analysis and technical advice to national actors involved in negotiations and transitions in fragile and conflict-affected societies. IFIT has supported negotiations and transitions in countries including Colombia, El Salvador, Gambia, Libya, Nigeria, Syria, Sri Lanka, Tunisia, Ukraine, Venezuela and Zimbabwe.