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JOINT STAFF WORKING DOCUMENT

The EU's Framework on support to transitional justice

The EU's Framework on support to transitional justice

Summary:

*This document forms part of the implementation of the **EU Action Plan on Human Rights and Democracy 2012 - 2014**, which outlines in action 27 (c) **the commitment to develop a policy on transitional justice**. The objective is to **provide a framework for EU support to transitional justice mechanisms and processes and enhance the EU's ability to play a more active and consistent role**, both in our engagement with partner countries and with international and regional organisations. This framework sets out how the EU can engage in situations where past abuses, including **gross violations of human rights and serious violations of international humanitarian law** have occurred, through supporting a context-specific combination of measures **promoting truth, justice, reparations and guarantees of non-recurrence, i.e. ensuring transitional justice**. It builds upon and complements the **EU's existing strong policy in support of the International Criminal Court** and takes into account the UN's framework and activities on transitional justice.*

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

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

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

Recent EU policies are aligned with this legal framework, which is reflected in the 2011 Agenda for Change Communication,¹ Budget Support Communication² and the Council conclusions thereto, as well as in the Strategic Framework on Human Rights and Democracy,

¹ COM (2011) 637 final

² COM (2011) 638 final

adopted by the Council on 25 June 2012.³ The Strategic Framework specifically reaffirms the strong political commitment from the EU to prevent violations of human rights throughout the world and, where violations occur, to ensure that victims have access to justice and redress and that those responsible are held to account. It further indicates that the EU will continue to promote observance of international humanitarian law⁴ and fight vigorously against impunity for gross violations of human rights and serious violations of international humanitarian law, including sexual and gender-based violence that occurs in connection with armed conflict, not least through its commitment to the International Criminal Court (hereinafter the ICC).

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

1. The EU is a staunch supporter of the Rome Statute and the ICC. The **strong EU policy in support of the ICC** is based on a 2011 Council Decision⁵ and Action Plan on its implementation⁶. The ICC is the only permanent international criminal court with world-wide reach. At the same time, the EU recognises that accountability and justice are most successful if the justice system of each State functions effectively and independently, thereby enabling the ICC to serve its intended role, which is to be a court of last resort, complementing national jurisdictions. This is in line with the "principle of complementarity"⁷. The EU and its Member States provide support to third countries in

³ 11855/12 Annex II

⁴ The EU is a major advocate for International Humanitarian Law and humanitarian principles and continues to implement the EU Guidelines on International Humanitarian Law, adopted in 2005 and updated in 2009, which serve as a tool to promote compliance with International Humanitarian Law by third states and non-state actors.

⁵ Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76 of 22.3.2011, p. 56.

⁶ The principles of the Rome Statute, as well as those governing the functioning of the ICC, are fully in line with the principles and objectives of the Union. The ICC has been established to investigate prosecute and try individuals suspected of committing the most serious crimes, and thus to contribute to the prevention of such crimes. The serious crimes within the jurisdiction of the ICC, namely genocide, crimes against humanity and war crimes, and the crime of aggression are of concern to the international community as a whole, the Union and its Member States.

⁷ The ICC does not replace national criminal justice systems; rather, it complements them. It can investigate and, where warranted, prosecute and try individuals only if the State which has jurisdiction over the case is unwilling or unable genuinely to carry out the investigation or prosecution. Under the principle of complementarity, States retain primary responsibility for trying the perpetrators of crimes under the jurisdiction of the ICC.

order to assist them in developing and strengthening their capacities to meet the obligations arising out of the Rome Statute by, e.g. promoting national legislation implementing the Rome Statute and supporting justice and rule of law programmes with a focus on criminal justice, as underlined in the Toolkit for bridging the gap between International and National Justice⁸.

2. On 17 November 2009, the Council endorsed the "**Concept on Strengthening EU Mediation and Dialogue Capacities**" and acknowledged that the EU should consider on a case-by-case basis how best to support transitional justice mechanisms, including how to best address impunity. The Council also recalled that EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law, and must contribute to fighting impunity for human rights violations.⁹
3. The EU's comprehensive approach to external conflicts and crises, as set out in the EU's Joint Communication of 2013 and the May 2014 Council conclusions, covers all stages of the cycle of conflicts and crises, including early recovery, stabilisation and peace-building. The EU aims to help countries get back on track towards sustainable long-term development, with responses that must be context-specific and driven by the reality of the situation on the ground.¹⁰
4. Through its **CSDP missions and operations**, the EU is engaged in conflict and crisis situations where the legacies of war crimes, genocide, crimes against humanity and other gross violations of human rights are – or will become – relevant. The **EU concept for support to Security Sector Reform (SSR)**¹¹ identifies a role for CSDP missions in supporting transitional justice mechanisms relevant for security and justice sector reform. This could include vetting the security forces and the judiciary. Similarly, one of the principles for **EU support to Disarmament, Demobilisation and Reintegration**

⁸ Joint Staff Working Document on Advancing the Principle of Complementarity: *Toolkit for bridging the gap between international and national justice*, SWD (2013) 26 final.

⁹ Council conclusions 17 November 2009 endorsing the Concept on Strengthening EU Mediation and Dialogue Capacities 15779/09

http://www.eeas.europa.eu/cfsp/conflict_prevention/docs/concept_strengthening_eu_med_en.pdf

¹⁰ Council conclusions on the EU's Comprehensive approach, 12 May 2014 and Joint Communication to the European Parliament and the Council The EU's Comprehensive Approach To External Conflict And Crises JOIN(2013) 30 final http://www.eeas.europa.eu/statements/docs/2013/131211_03_en.pdf

¹¹ EU Concept for support to Security Sector Reform, 13 October 2005, 12566/4/05

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012566%202005%20REV%204>

(DDR)¹² is that the EU should ensure respect for human rights. and carry out DDR support in relation to efforts in the area of reconciliation and transitional justice.

5. **EU Member States have a wealth of experience in dealing with the past.** Several European countries have gone through transition processes, and in some those processes remain ongoing. Their experience makes EU external action in this field more credible.
6. Last but not least, the EU is one of the biggest **financial contributors to transitional justice initiatives worldwide**, including through geographic and thematic EU external assistance instruments. The EU is likely to remain for 2014-2020 the largest donor in the area of democracy, rule of law, justice and security sector reform and good governance, gender equality and support for vulnerable groups worldwide.

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

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

II. Definition and objectives of transitional justice

The UN Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies describes transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international

¹²Council Conclusions of 15 December 2006 (16879/1/06) endorsing the EU Concept for support to Disarmament, Demobilisation and Reintegration(DDR) https://ec.europa.eu/europeaid/policies/fragility-and-crisis-management/links-between-security-and-development/security-sector_en

involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”¹³. This is today the most commonly used definition, and it incorporates the four essential components of transitional justice, namely:

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

These four components are enshrined in existing international instruments pertaining to transitional justice. They serve as guidance for the EU’s transitional justice approach, **aiming at attaining the following objectives**, with a view to preventing the recurrence of crises, addressing the most serious crimes of concern to the international community as a whole, and averting future violations of human rights:¹⁴

a) Ending impunity: Justice for the victims of serious international crimes can only be fully achieved if the perpetrators of those crimes are brought to justice and held accountable by fair and effective judicial bodies, at the national or international level, which allow victims to participate and have their voices heard and taken into account. Prosecution also has a role to play in deterring the future commission of such crimes. One of the key principles in this regard is that no one – including State officials – is above the law.

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

¹³ S/2004/616

¹⁴ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 August 2012, A/HRC/21/46 p.5

c) Fostering trust: The four components of transitional justice aim to promote trust by restoring confidence in the institutions of the state. The institutional set-up must reflect shared norms and values that make sense to people and motivate them to support the institutions.

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

e) Contributing to reconciliation: A transitional justice process which combats impunity, provides recognition to victims, establishes the rule of law and fosters trust will also contribute to a process of reconciliation. That reconciliation process is understood to include, as a prerequisite, conditions which allow individuals to trust one another as equal rights-holders, and it must be acknowledged that reconciliation is a personal choice by individuals that cannot be enforced. Legal and institutional measures alone will not be sufficient. Initiatives that target the more personal dimension of a transition will also be required, such as official apologies, memorials and the reform of educational systems.¹⁵ However, reconciliation must not be conceived as an alternative to justice, or a goal that can be achieved independently of the comprehensive implementation of the four components of transitional justice discussed in detail below. Furthermore, while transitional justice is a core part of the reconciliation process, other elements, such as security and development, are equally important.

III. Elements of transitional justice

¹⁵ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 August 2012, A/HRC/21/46

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

1) Criminal justice: The obligation of states to investigate and prosecute “serious crimes under international law” is today firmly established under treaty and customary law. The “Updated Set of Principles to Combat Impunity”¹⁶, define the term as encompassing gross violations of human rights and serious violations of international humanitarian law.¹⁷ For this set of serious crimes under international law, there can be no impunity¹⁸. The ICC statute states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹⁹ The UN General Assembly also confirmed that “States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.”²⁰

Beyond *de jure* impunity (where laws are inadequate, either because they do not criminalise conduct that should be criminalized, or because they shield perpetrators from prosecution), *de facto* impunity can also arise because of the challenging situations pertaining in post-conflict or post-authoritarian societies. Large numbers of victims and perpetrators, weak state institutions, insufficient political will and inadequate expertise in dealing with mass crimes can contribute to *de facto* impunity. This problem can only be addressed through a comprehensive approach. This may include legislative action, judicial reform and capacity building, and should involve close cooperation with victims and civil society. Of fundamental importance is also the early establishment of a coherent and effective prosecutorial strategy. National prosecution should be based on clear objectives and an investigation of all types of

¹⁶ Updated Set of principles for the protection and promotion of human rights through action to combat impunity E/CN.4/2005/102 and E/CN.4/2005/102/Add.1

¹⁷ *ibid*, p. 6: “(...) the phrase “serious crimes under international law” encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.”

¹⁸ For a detailed discussion on amnesties please see chapter IV

¹⁹ 6th preambular paragraph

²⁰ A/RES/60/147.

crimes, on all sides of a conflict, irrespective of the alleged perpetrators. Strategies for prosecution should be particularly concerned with the systemic and/or structural dimensions of massive violations. Where these strategies include prioritisation of types of cases or alleged perpetrators, this should be based on clear criteria. Criminal justice efforts must also adhere to the principles of fair trial, due process and access to justice for victims. They should be accompanied by a robust communication and outreach strategy to connect with victims and affected communities and to help to restore trust in national judicial institutions. The establishment of hybrid domestic-international tribunals or the temporary inclusion of international staff, including prosecutors and judges, within the domestic justice system, may be considered on an *ad hoc* basis.

Role of the EU: *The EU stresses the importance for each state to safeguard the administration of justice and independence of the judiciary, and to generate political will in order to exercise its criminal jurisdiction over those responsible for serious crimes under international law.²¹ The EU therefore supports reforms of national criminal legislation in order to ensure that it complies with international law, as well as initiatives that seek to reinforce or develop national prosecutorial and judicial strategies and capability, adequate legal defence, and long-term protection and assistance for witnesses and victims. In cases where the ICC is involved, the EU may provide support to the ICC in fulfilling its mandate. Where appropriate, the EU also supports alternative ways of establishing justice (mediation practices or tradition-based mechanisms which are in line with international standards) that can complement formal criminal proceedings.*

2) Truth-seeking initiatives: The right to truth is contained in international legal and policy instruments²² and has been affirmed by both the Inter-American and the European Court of Human Rights²³ as well as by the African Commission on Human and Peoples' rights²⁴.

²¹ For guidance see the Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, on the topic of prosecutorial prioritisation strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law, 27 August 2014. A/HRC/27/56.

²² Notably the Additional Protocol (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (articles 32 and 33) and the International Convention for the Protection of All Persons from Enforced Disappearance (article 24). The right to truth has been also recognised by the Human Rights Council (resolutions 9/11 and 12/12).

²³ *El-Masri v. The Former Yugoslav Republic Of Macedonia*, ECtHR, 39630/0913 (2012), *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). *Myrna Mack Chang Case*, Inter-Am.Ct.H.R. (Ser. C) No. 101,

Documentation and truth-seeking processes undertaken by truth commissions, commissions of inquiry, or other fact-finding missions should assist in investigating current and past human rights violations or abuses, thus contributing to public recognition of these violations and of the suffering of victims.²⁵ Beyond the importance for individuals to know the truth, it is also imperative for society as a whole to learn the truth regarding violations, including the identity of the perpetrators and the causes, facts and circumstances in which such violations took place. The duty of states to preserve archives and other evidence, and to facilitate knowledge of those violations, is crucial to achieve the societal dimension of the right to truth.²⁶ Reports and recommendations of truth commissions, as well as the collecting and archiving of information, can be useful for prosecutorial efforts, reparations programmes and institutional reforms. Truth commissions may complement criminal prosecutions, not substitute them. Granting amnesties for serious crimes under international law cannot be their function.

***Role of the EU:** The EU promotes truth-seeking initiatives based on international law and best practice. The EU supports close cooperation between truth commissions and civil society, both before and during the work of a commission, as well as at implementation stage. The EU encourages states to implement truth commissions' recommendations and to preserve memory by undertaking measures such as securing archives and other evidence.*

3) Reparations: The right of victims of human rights violations to reparations is enshrined in international law²⁷ and has been reaffirmed in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

274-75 (2003). *Bámaca Velásquez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 91, 77 (2002), *Barrios Altos Case*, Inter-Am.Ct.H.R. (Ser. C) No. 75 (2001).

²⁴ The African Commission infers a right to truth as part of a right to an effective remedy, see the Commission's Principles and guidelines on the right to a fair trial and legal assistance in Africa, African Union Doc. DOC/OS(XXX)247; see also Resolution ACHPR/Res.111 (XXXXII) 07: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence (2007), which explicitly recognises a right to truth.

²⁵ E/CN.4/2005/102/Add.1

²⁶ HRC Resolution 2005/26

²⁷ Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court.

Rights Law and Serious Violations of International Humanitarian Law.²⁸ Unlike criminal proceedings, which seek to bring the perpetrator to justice if guilt is established, reparations put victims centre-stage, with the goal of achieving restorative justice. Reparations programmes should seek to redress serious crimes under international law by providing a range of material and/or symbolic benefits to victims. They can include individual and collective measures such as monetary compensation, rehabilitation (e.g. medical and psychological services, educational support), measures of socio-economic reintegration, return of property or compensation for loss thereof, but also official public apologies, building museums and memorials, and establishing days of commemoration.²⁹ The recommendations made by truth commissions may establish a framework or include proposals for a reparation policy. The potential to access reparations should be as broad as possible in order to avoid any marginalisation of victims and to support their reintegration and empowerment in society.

***Role of the EU:** The EU encourages a victim-focused approach to reparations policies, which should be culture-, gender- and child-sensitive and have transformative impact. Victims should be consulted in the design of such policies.*

4) Institutional reform/guarantees of non-recurrence: In situations of conflict or in authoritarian states, public institutions are often instruments of repression and injustice, and they may also lack technical capacity. Genuine reform of such institutions is therefore important in re-establishing trust. The aim should be not only to bring perpetrators to justice and redress to the victims, but to prevent repetition of human rights violations in the future, establish rule of law, and ensure the protection of human rights. Institutional reform should include measures promoting integrity, legitimacy, accountability, ensuring the principles of representation and responsiveness of public institutions, and strengthening oversight and democratic control. Civil society must be included in the process. Beyond institutional reform, the guarantees of non-recurrence require further measures such as SSR, DDR, educational and legislative reform.

²⁸ UN General Assembly 2005 A/RES/60/147

²⁹ UN Guidance Note of the Secretary-General on the UN Approach to Transitional Justice: http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf

*The role of the EU: The EU applies the above principles when providing **support to Security and Justice Sector Reforms**. The EU underscores the **importance of civilian control, governance and accountability of security forces**.³⁰ The EU supports initiatives aiming at **strengthening the judiciary** in order to ensure its independence, impartiality, accessibility and effectiveness, as well as the repeal/amendment of national legislation that contravenes international norms. The EU, recognising the power of education to transform societies, **supports education programmes** as well as comprehensive training programmes on human rights and international humanitarian law standards, drawing lessons from a country's own experience of violations and abuses. The EU also encourages states to accompany institutional reforms with **vetting procedures and codes of conduct**. Removing personnel that were involved in past violations should not be pursued only within the security sector. Such procedures should comply with international human rights standards, be transparent, based on clear criteria and be implemented by independent institutions.*

When developing a transitional justice support strategy, **the EU will strive for a flexible approach** based on a **genuine understanding of specific contexts and needs, and the viability** of meaningful transitional justice processes. The mechanisms described in the sections above represent examples that have emerged in practice and do not limit the ways in which transitional justice can be addressed. Transitional justice is an evolving field.

IV. Guiding principles for EU engagement on transitional justice

The following principles will guide EU engagement in transitional justice in its external action:

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

³⁰ EU Concept for support to Security Sector Reform, 13 October 2005, 12566/4/05 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012566%202005%20REV%204>

Transitional justice can only reach its goals if the process of its design and implementation is **nationally and locally-owned and inclusive**, in which all stakeholders can participate and are consulted while respecting international norms and standards.

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

Public acknowledgement is crucial for any transitional justice process. One appropriate means to achieve this goal is organising and supporting outreach activities, including public consultation, media engagement, dissemination of information, and, in general, strategies to engage the public while addressing the potential for disconnects between politics and populations in times of transition. **Outreach and consultations** should thus inform the public about the purpose and design of transitional justice mechanisms, be geared towards understanding the views and expectations of the community, and be tailored to avoid or correct misinterpretations and to manage expectations. Such outreach activities should not be limited to major cities but include all affected communities.

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

2. Apply a context-specific approach

There is **no 'one-size-fit-for-all' approach** to transitional justice: any approach must be based on the needs and objectives of the context and country concerned. While different analysis tools such as conflict analysis³¹, or Post Conflict Needs Assessment and Transitional Results Frameworks (PCNA), exist to identify specific factors (looking at context, mapping causes and stakeholders of a recently-ended or looming conflict, identifying conflict and peace dynamics, identifying post-conflict needs etc.), an analysis of the situation from a transitional justice perspective is required for a comprehensive understanding of the issues in the

³¹ On conflict analysis see the EEAS and Commission *Guidance note on the use of Conflict Analysis in support of EU external action*:

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

particular context. This includes an assessment of the role and impact of violations or abuses on the affected population without discrimination, and the **identification of the needs of the respective victim groups**.

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

3. Address transitional justice in a comprehensive manner

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

*It is therefore essential for the EU to recognise the incremental nature of the changes being sought and the fact that while the transitional justice process represents a **gradual, long-term effort and requires a comprehensive approach**, urgent actions may be necessary to keep progress on all of its components on track.*

4. Timing of transitional justice measures

Early engagement in transitional justice processes is desirable as it provides a signal against impunity and paves the way for justice and rule of law.

It is essential to establish realistic timelines that take account of the particular context, and propose relevant transitional justice measures in light of an **enabling environment** (security, political, social and economic conditions, capacities of existing structures, the position of civil society). In order to safeguard the continuity of transitional justice processes, it is essential to ensure transitional justice processes are taken into account in development cooperation.

As it is not possible to predict the dynamics of any transition process in advance, the EU transitional justice support activities should thus take account of current developments without losing sight of the longer timeframe.

5. Compliance with international norms and standards

In line with the fact that the EU's external action is guided by principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity and respect for the principles of the UN Charter and international law, the EU only supports transitional justice processes that are **in compliance with international norms and standards**. The EU and its Member States are strong supporters of the work of the **UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence**³², who plays a key role in developing a systematic and coherent approach when dealing with gross violations of human rights and serious violations of international humanitarian law.

The **question of permissibility of amnesties**³³ often arises during the negotiation of peace agreements and during other processes of transition. A number of widely-ratified international human rights and humanitarian law treaties³⁴ explicitly oblige States parties to ensure the investigation and prosecution of specific offences, either by instituting criminal proceedings

³² The UN Human Rights Council resolution 18/7 created the mandate of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on 13 October 2011.

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

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

³⁴ Amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights or serious violations of international humanitarian law are inconsistent with State parties' obligations under various sources of international law:

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

against suspected perpetrators in their own courts, or by sending the suspects to another appropriate jurisdiction for prosecution. Accordingly, any amnesty that forecloses prosecution of an offence that is subject to this type of obligation would violate the treaty concerned. Amnesties for gross violations of human rights and serious violations of humanitarian law may also violate customary international law. International law recognises that in some limited circumstances, amnesties might be possible and could facilitate a reconciliation process³⁵, provided they do not prevent the prosecution of individuals who may be criminally responsible for war crimes, crimes against humanity or gross violations of human rights, including gender-specific violations. When states do adopt amnesties, they must take care to ensure that the amnesties do not restrict the enjoyment of human rights including the right to remedy or truth.

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

*The EU firmly believes in the principle that **there cannot be lasting peace without justice.** Therefore the EU supports the established United Nations policy to oppose amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations.*³⁶

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

³⁵ See for example: Protocol II of the Geneva Convention 1977 article 6(5)

³⁶ OHCHR, Rule-of Law Tools for Post-conflict States – Amnesties, 2009, HR/PUB/09/1, available at www.ohchr.org/documents/publications/amnesties_en.pdf.

In May 2014, the Council conclusions on a rights-based approach (RBA) to development cooperation further strengthened the EU commitment to ensure protection, promotion and fulfilment of human rights through a RBA.

The European Commission has committed to implement this RBA in all sectors of intervention of EU development cooperation, including when funding transitional justice processes. It has started to implement this approach on the basis of a dedicated Tool-box Rights-based approach, encompassing all human rights, for EU development cooperation.”³⁷

The EU always strives to apply a rights-based approach in its support to transitional justice.

7. Encourage a victim-centred approach

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

The EU supports domestic outreach efforts which help to facilitate active victim participation in the process and identify victims' needs and perspectives, but which are carried out in a way that does not artificially raise expectations.

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

8. Integrate a gender dimension

³⁷ Commission Staff Working Document Tool Box a Rights Based Approach, Encompassing all Human Rights for EU Development Co-Operation SWD (2014) 152.

Pre-existing gender inequalities inform both the nature of the crimes committed and the consequences of those violations. Victims' experiences of conflict include sexual violence but also wide-scale socio-economic violations and gender-differentiated impacts of forced disappearances, torture, loss of family members and other violations or abuses. It is critical for transitional justice mechanisms to acknowledge and respond to the full range of violations women experience during conflict, including violations of social and economic rights, as well as men and women's differentiated needs with respect to accessing and benefiting from transitional justice processes. In this respect, gender must be mainstreamed throughout transitional justice mechanisms and processes, from their design through to implementation of recommendations. With the adoption of the **2008 EU Comprehensive Approach to the EU implementation of the United Nations Security Council Resolution 1325 and 1820 on women, peace and security** and related resolutions,³⁸ the EU has highlighted its commitment to "enhance the involvement of women and their access to justice, including transitional justice mechanisms" in support of the strengthening and reform of the justice sector and to build capacity for the prosecution of crimes against women and the protection of witnesses.³⁹ The EU will therefore ensure that its efforts contribute to increasing women and girls' access to justice and their ability to secure redress. The EU Guidelines on violence against women and girls and combating all forms of discrimination against them provide a useful EU policy framework in this regard. Also, the EU Plan of Action on Gender Equality and Women's Empowerment explicitly calls on EU Delegations in fragile, conflict or post-conflict countries to develop **strategies to implement the Comprehensive Approach** and to build capacity to address these issues.⁴⁰

*The EU encourages adequate investment in, and focus on, gender-sensitive transitional justice which **addresses the full range of rights violations and abuses suffered by women, girls, men and boys during conflict, and responds to their differentiated vulnerabilities and needs.** The EU supports the provision of adequate **training** on gender and conflict, including on the women, peace and security agenda, within judicial systems. The EU also supports women's **leadership** and role in conflict resolution, peace talks and recovery. The EU*

³⁸ UN Security Council resolutions 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013)

³⁹ 1.12.2008, SEC(2008)/15671/1/08

⁴⁰ 8.3.2010, SEC(2010) 265 final

recognises the important role that women human rights defenders can play in making sure that women and their concerns are represented in transitional justice processes.

9. Adopt a child sensitive approach

Children are affected by conflicts in many different ways. Crimes are committed against children, not least through their enlistment, conscription or use for active participation in hostilities. Schools are often a specific target during conflicts. But children may also be affected indirectly through loss of family members and their inability to access basic services, such as health and education, which may have been interrupted by the conflict. In some cases, **children may be simultaneously victims, survivors, witnesses and perpetrators of violations**. Children are thus important stakeholders in transitional justice processes; they hold a unique view of what happened, and are a crucial constituent for building a more peaceful future. Not to involve children in these processes would fail to comply with the UN Convention on the Rights of the Child that guarantees the right of children to life, survival and development, as well as the right to express their views freely in all matters affecting them. The EU Agenda for the Rights of the Child⁴¹, the EU Guidelines on the Rights of the Child and on Children and Armed Conflict (2008)⁴² including its Strategy for Implementing the Guidelines (2010)⁴³, and the EU UNICEF Toolkit for integrating child rights in development (2014), provide guidance on a child-sensitive approach.

The EU supports measures that protect and enable access of children to justice, and their involvement in the work of transitional justice mechanisms in a way that contributes to children's recovery and reintegration and that is in their best interests.

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

As transitional justice mechanisms can significantly contribute to initiating post-conflict recovery and in preventing the emergence of new cycles of violence, the EU recognises the **links between rule of law, peacebuilding, development and transitional justice**. The EU

⁴¹ COM(2011) 60 final

⁴² http://eeas.europa.eu/human_rights/guidelines/index_en.htm

⁴³ Council of the European Union (2010) 2010 Review of the Implementation strategy of the EU Guidelines on Children and Armed Conflicts.

therefore supports transitional justice processes that are forward-looking, with the aim to transform the society by identifying and dealing with root causes of conflict and violence that may reside in discrimination, marginalisation or violation of social, economic and cultural rights. EU support to transitional justice mechanisms and processes are based on Articles 208 and 212 TFEU. Transitional justice is therefore considered as an **integral part of EU external assistance**.

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

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

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

1. Monitoring, analysing, supporting and reporting on transitional justice

EU support to transitional justice in a partner country should start with an understanding of the situation and related challenges of transitional justice processes, making use of all available information, including local human rights country strategies and information collected by civil society. This analysis should draw on monitoring and reporting by EU missions in the field (EU delegations, CSDP missions and operations, EU Special Representatives and Member States embassies) as well as reports from regional and international human rights bodies, and identify how the EU can support transitional justice, taking into account existing EU resources and action in the country or region in question. Such an analysis should be improved by better coordination and sharing of information among EU headquarters, EU missions in the field and the Member States. Building on this analysis, the EU should develop its support to transitional justice in a specific situation in a flexible manner, implementing the four components mentioned above and encouraging local

ownership. The EU Delegations should assist in enhancing the coherence of actions of the Union, the Member States and international organisations at the country level.

Actions:

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

2. Integrating transitional justice into crises response and peacebuilding

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

Assistance under the crisis response component of the Instrument contributing to Stability and Peace (IcSP) continues to provide a basis to further develop support for international criminal tribunals and *ad hoc* national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights, established in accordance with international standards in the fields of human rights and the rule of law.⁴⁴ Moreover, under the IcSP component on conflict prevention, peace-building and crisis preparedness, an opportunity now presents itself to build overall capacity of relevant stakeholders in transitional justice in the areas of mediation, dialogue and reconciliation, of civilian stabilisation missions and of post-conflict recovery activities.⁴⁵

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

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

Actions:

- The EU should ensure that catalysers for transitional justice processes (such as state actors, civil society organisations, victims' groups and political parties) are identified in post-conflict interventions through tools that have a specific transitional justice lens, providing an entry point for conceptualising, negotiating and financing a strategy for

⁴⁴ Art. 3 (2) (e) of the Regulation (EU) No 230/2014 of 11 March 2014 establishing an Instrument contributing to Stability and Peace, OJ L 77/1, 15.3.2014.

⁴⁵ Art. 4 (1) (b) (c) and (d) *ibid*.

recovery and development in fragile, post-conflict settings. National and local ownership is essential to ensure successful transitional justice processes.

- On the basis of the analysis of the situation in the partner country, the EEAS, Commission services and EU missions will seek to ensure that transitional justice forms a vital component in the processes of any peace negotiations which the EU supports in an effort to prevent a relapse of the conflict.
- Where necessary, the EU will raise transitional justice issues and the respect of guiding principles set down in section IV in political contacts and dialogues with partner countries, including both the government and opposition.
- The planning process for each CSDP mission and operation will assess how the mission and operation could support the transitional justice process and, in particular, how this mission and operation could contribute to the fight against impunity and support institutional reform.
- Where appropriate, the mandates of EUSRs will include support and promotion of transitional justice efforts.

3. Linking transitional justice with development cooperation

The Union provides financial support to transitional justice mechanisms through its geographic (European Neighbourhood Instrument, European Development Fund, Development Cooperation Instrument⁴⁶), as well as thematic funding instruments, in particular the Instrument contributing to Stability and Peace (IcSP)⁴⁷ and the European Instrument for Democracy and Human Rights (EIDHR)⁴⁸. For instance, the EU bilateral support under the European Neighbourhood Instrument targets human rights and the rule of law, including reform of justice, of the public administration and of the security sector.⁴⁹ Also under the geographic programmes of the Development Cooperation Instrument and the

⁴⁶ Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 OJ L 77/27, 15.3.2014 and Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument OJ L 77/27, 15.3.2014.

⁴⁷ Formerly known as Instrument for Stability (IfS). See at section 2 above.

⁴⁸ Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide.

⁴⁹ Art. 2 (2) (a) and annex II of the Regulation (EU) No 232/2014

European Development Fund, the EU supports strengthening the rule of law and the independence of judicial and protection systems and ensuring unhindered and equal access to justice for all.⁵⁰ Given States' primary duty to investigate serious international crimes, the EU is particularly engaged in promoting and contributing to strengthening the capacity of national judicial systems to investigate and prosecute serious international crimes.⁵¹ Last but not least, under the Instrument for Democracy and Human Rights the EU assistance focuses on civil society organisations supporting and promoting transitional justice, as well as the ICC, *ad hoc* international criminal tribunals and the processes of transitional justice and truth and reconciliation mechanisms.⁵²

Actions:

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

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

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

⁵⁰ Annex I of the Regulation (EU) No 233/2014 and Cotonou Agreement, art (8), (9), (33), (96) et seq.

⁵¹ Joint Working Document on Advancing the Rome Statute's Principle of Complementarity SWD (2013) 26 final.

⁵² Art. 2(1)(a) of the Regulation (EU) No 235/2014.

and implementation of transitional justice strategies being crucial for national ownership of transitional justice processes.

Actions:

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

5. Exchange of information and best practices

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

Actions:

- The informal network shall be composed of staff working on transitional justice across the EEAS and the Commission services. It shall exchange regularly and will consult with the representatives of the UN (in particular with the Office of the High Commissioner for Human Rights (OHCHR) and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence) and other international and regional organisations as well as civil society organisations.
- The network shall in particular address and gather information of lessons learned, best practice and indicators used to evaluate results achieved in support to transitional justice

processes by the EU. The network may be consulted by geographic divisions and delegations regarding transitional justice situations they are confronted with.

- Together with EU missions, the network shall work on developing more practical guidance on certain aspects of transitional justice to facilitate work on the ground.
- COHOM shall also undertake periodic exchanges on transitional justice and shall consult with the UN and other regional organisations as well as civil society groups working on transitional justice issues.

6. Training

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

Actions:

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

7. Transitional Justice in the EU enlargement policy

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

Actions:

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

VII Evaluation

EU support to transitional justice will be evaluated regularly.

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

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