



## The Peace and Justice Initiative

Towards Universal Implementation of the ICC Statute

### Position Paper on Yemeni Draft Law on Transitional Justice and National Reconciliation

#### Presented to:

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**19<sup>th</sup> March 2012**

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**20<sup>th</sup> March 2012**

1. Yemen is currently in a state of transition. Following the agreement to hand over power, President Saleh has left the country. A Government of National Unity has been formed, early presidential elections took place and Abd-Rabbu Mansour Hadi has been sworn in as Yemen's interim president on 25 February 2012. During the interim period, Yemen will have to tackle huge challenges, including the consolidation and maintenance of peace, economic stabilization and the reform of the state organs and the political system. Last but not least, Yemen will have to come to terms with its past human rights violations in order to achieve peace and reconciliation. The adoption of a "Law on Transitional Justice and National Reconciliation" could constitute an important step forward in this process.
2. In the hope to assist the Yemeni people in the transition process, the Peace and Justice Initiative hereby provides an expert opinion on the draft "Law on Transitional Justice and National Reconciliation". The comments relate to the version of the Law of end of February 2012. ( ص مشروع قانون بشأن العدالة الانتقالية والمصالحة الوطنية )  
(شروع قانون رقم ( ) لسنة 2012م بشأن العدالة الانتقالية والمصالحة الوطنية)

## A. The Scope of Transitional Justice

3. Before addressing the Draft Law and its provisions in detail, it is useful to recall the concept and meaning of “transitional justice”.
4. “Transitional justice” relates to a transition period following a regime change, during which justice is sought for human rights violations that occurred during the outgoing political regime or during the regime change. “Transitional justice” as set out by the United Nations, “comprises a 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.”<sup>1</sup>
5. Reconciliation is closely associated with transitional justice. In fact, one of the ultimate goals of transitional justice processes is to achieve peace and reconciliation. Further, transitional justice aims at (re-)establishing the rule of law and political institutions that are able to safeguard the human rights and prevent future human rights violations.
6. Experience with several regime changes in the world has shown that states often resort to a combination of several transitional justice mechanisms/measures of judicial and non-judicial nature, including the following:
  - individual prosecutions and criminal trials
  - reparations
  - truth-seeking
  - institutional reform
  - vetting and dismissals.<sup>2</sup>
7. Particularly during the last years, the United Nations has developed common strategies and basic principles on how to promote justice and the rule of law in conflict and post-conflict societies with the help of these transitional justice mechanisms.<sup>3</sup>

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<sup>1</sup> Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, U.N. Doc. S/2004/616 of 23 August 2004 (hereafter: UN Report on Transitional Justice 2004, para. 8. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement> (accessed 12 March 2012).

<sup>2</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 8. See also Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2011/634, 12 October 2011 (hereafter: UN Report on Transitional Justice 2011), para. 17. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/542/87/PDF/N1154287.pdf?OpenElement> (accessed 12 March 2012).

8. Individual prosecutions and criminal trials play a crucial role in the transitional justice process, as they constitute a direct form of accountability for perpetrators of crimes and also a measure of justice for victims. Further, criminal trials – if conducted before independent and impartial judicial bodies in accordance with the principles of fair trial – may help to strengthen the public confidence in the state’s ability and willingness to enforce the law, and thus ultimately contribute to the restoration of civility and peace.<sup>4</sup>
9. Over the past decades, consensus has been reached within the international community to end impunity for the gravest crimes and to prosecute at least those most responsible for serious international crimes including war crimes, crimes against humanity, genocide, and gross violations of human rights.<sup>5</sup>
10. Domestic justice systems should be the “first resort in pursuit of accountability”.<sup>6</sup> But where domestic authorities are unwilling or unable to prosecute violators at home, the international community, in particular the ad-hoc and hybrid international criminal tribunals and most recently the International Criminal Court (ICC), are able to step in.
11. While criminal trials necessarily focus on the perpetrators, victims may also benefit from such trials, where they are heard as witnesses and where they see their tormentors being held accountable for the wrongdoings. However, victims of gross human rights violations often need additional measures to achieve redress. To that end, reparations for harm suffered are effective and expeditious complements to criminal trials.
12. Reparations may take various forms, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The United Nations have recently adopted “Basic Principles and Guidelines on Reparation” comprehensively dealing with all issues

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<sup>3</sup> On 24 September 2003, the Security Council met at the ministerial level to discuss the United Nations role in establishing justice and the rule of law in post-conflict societies and highlighted the need to harness and direct expertise and experience so that the lessons and experience of the past could be learned and built upon. The Secretary-General issued a first comprehensive report in 2004 (UN Report on Transitional Justice 2004 (supra note 1)); a follow-up report was issued in 2011 (UN Report on Transitional Justice 2011). See also Guidance-Note of the Secretary-General, *United Nations Approach to Transitional Justice*, March 2010, para. 5 (National consultation), available at [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf) (accessed 12 March 2012).

<sup>4</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 39.

<sup>5</sup> The origins trace back to the Nuremberg and Tokio trials after the Second World War. Especially in the last 20 years, the commitment to end impunity for gross violations of human rights and international crimes became manifest in numerous criminal trials both on the domestic and international levels. The Rome Statute of the International Criminal Court and its accompanying documents now include detailed provisions on the crimes and the prosecution of perpetrators of aggression, genocide, crimes against humanity and war crimes.

<sup>6</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 40.

of reparation for victims of gross human rights violations.<sup>7</sup> These principles should guide State authorities in crafting adequate reparations for victims of human rights violations.

13. As acknowledged by the United Nations, victims have a right to know the truth about the circumstances and reasons of the perpetration of crimes.<sup>8</sup> In this context, truth commissions have proven to be another predominantly victim-centred mechanism and useful complement to criminal trials. The term “truth commission” is used for official, temporary, non-judicial bodies tasked to investigate a pattern of human rights violations, establish a record of events and make recommendations.<sup>9</sup> More than 30 countries all over the world have seen truth commissions in various forms.<sup>10</sup>
14. In addition to these measures, a regime change often requires basic institutional reforms in order to (re)establish the rule of law. The (re-)establishment of the rule of law as a “principle of governance in which all persons, institutions and entities and the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”,<sup>11</sup> is arguably the most difficult task. It often requires simultaneous reforms and restructuring of the political system, the justice sector, the armed forces and the public service.

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<sup>7</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (hereafter: *Basic Principles on Reparation*), available at <http://www.unhcr.org/refworld/docid/4721cb942.html> (accessed 12 March 2012).

<sup>8</sup> Report of the Office of the High Commissioner of the United Nations for Human Rights, *Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91 of 9 January 2006; General Assembly of the OAS, Resolutions: AG/RES. 2175 (XXXVI-O/06) of 6 June 2006, AG/RES. 2267 (XXXVII-O/07) of 5 June 2007; AG/RES. 2406 (XXXVIII-O/08) of 3 June 2008; AG/RES. 2509 (XXXIX-O/09) of 4 June 2009, and AG/RES. 2595 (XL-O/10) of 12 July 2010, and Report of Diane Orentlicher, Independent expert responsible for updating the set of principles to combat impunity (E/CN.4/2005/102) of 18 February 2005.

<sup>9</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 50.

<sup>10</sup> The most prominent truth commission and often considered as a model truth commission was the South African Truth and Reconciliation Commission, established in 1995. Truth commissions were also established in Argentina (1983), Bolivia (1982), Chad (1990), Chile (1990), DRC (2003), Ecuador (1996, 2007), El Salvador (1992), Germany (1992, 1995), Ghana (2003), Guatemala (1997), Haiti (1995), Honduras (2012), Kenya (2009), Liberia (2006), Mauritius (2012), Morocco (2004), Nigeria (1999), Panama (2001), Paraguay (2004), Peru (2001), Rwanda (1999), Serbia&Montenegro (2002), Sierra Leone (2002), Solomon Islands (2009), South Korea (2000), Timor-Leste (2002), Uganda (1974, 1986), Uruguay (2000). New efforts are under way in Burundi, Côte d’Ivoire, Nepal and Uganda.

The United States Institute of Peace has compiled background information for all truth commissions in a “digital collection”, available at <http://www.usip.org/publications/truth-commission-digital-collection> (accessed 12 March 2012).

<sup>11</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 6.

15. When reforming the public service, additional vetting procedures may be carried out, and as a consequence, individuals who are identified as suspected perpetrators of human rights violations may be dismissed.
16. At all times in the transitional justice process and with respect to all mechanisms/measures applied, a meaningful and substantial participation of the public, the victims, other minorities and the civil society is a precondition for a successful transition.<sup>12</sup>

## **B. Comments on the Draft Law on Transitional Justice and National Reconciliation**

17. The following section contains comments on the Draft Law on Transitional Justice and National Reconciliation (hereafter: the Draft Law).

### **I. Definition and Understanding of Transitional Justice – Lack of Provisions on Accountability**

18. The Draft Law gives a definition of “transitional justice” in Article 2. Transitional justice shall be understood as “restorative/conciliatory justice” and as being “non-judicial”. The definition further refers to the aspects of truth-seeking and reparation in the transitional justice process.
19. The definition as given in the Draft Law lacks an integral element of transitional justice, namely provisions for the accountability of individuals responsible for serious human rights violations. As mentioned above, “transitional justice” as defined by the United Nations, is a set of judicial and non-judicial processes and mechanisms to ensure accountability for past human rights abuses, to serve justice and achieve reconciliation.<sup>13</sup> Thus, accountability is at the very heart of transitional justice.
20. In omitting to address accountability and in narrowing the transitional justice process to “non-judicial” measures, the Draft Law conflicts with the transitional justice concept of

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<sup>12</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 17; see also Guidance-Note of the Secretary-General, *United Nations Approach to Transitional Justice*, March 2010, para. 5 (National consultation), available at [http://www.unrol.org/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf) (accessed 12 March 2012).

<sup>13</sup> UN Report on Transitional Justice 2004 (supra note 1), para. 8.

the United Nations. Furthermore, it does not accord with the Security Council Resolution 2014 (2011). The resolution stresses the need for an investigation into human rights abuses and violations in Yemen, requires that impunity for human rights violations must be avoided and “full accountability”<sup>14</sup> be assured. It “strongly condemns the continued human rights violations by the Yemeni authorities (...) and other actors”, and “stresses that all those responsible for violence, human rights violations and abuses should be held accountable”<sup>15</sup>.

21. We therefore strongly recommend to include provisions addressing accountability in the Draft Law.
22. “Full accountability” means that perpetrators of serious human rights violations will not go unpunished, but are made answerable for their deeds. In cases of serious violations of human rights, genocide, crimes against humanity and war crimes, states have the duty to investigate and prosecute those persons responsible for these crimes. This principle is enshrined in several international conventions, such as the Torture Convention and Genocide Convention,<sup>16</sup> and it became a firm principle in international customary law.<sup>17</sup> The delivery of reparations and establishment of truth-seeking commissions, while highly important in the transitional justice process, are no substitute for criminal prosecution.<sup>18</sup>
23. Further, experience with previous regime changes seems to suggest that peace and reconciliation cannot be achieved in the long term unless accountability for the gravest human rights abuses is ensured and those abuses are adequately addressed through a fair

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<sup>14</sup> U.N. Doc. S/RES/2014 (2011) of 21 October 2011, available at [http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/2014%20\(2011\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/2014%20(2011)) (accessed 12 March 2012).

<sup>15</sup> U.N. Doc. S/RES/2014 (2011) of 21 October 2011 (supra note 14), para. 2.

<sup>16</sup> E.g. Art. 4 of the Genocide Convention, Art. 7 of the Torture Convention. Further, there is a duty to prosecute certain grave breaches of the Geneva Conventions, such as killings, serious bodily injury or unlawful confinement (see Art. 146 of Geneva Convention IV).

<sup>17</sup> The customary law status of this rule is confirmed in the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 of 17 July 1998, available at <http://icc-cpi.int/>, Preamble, para. 6 (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”), but it is also to be found in several UN documents. The duty to investigate, to prosecute and to punish serious human rights violations is also referred to in the *Basic Principles on Reparation* (supra note 7).

<sup>18</sup> On 5 March 2012, UN special rapporteur on torture to the UN Human Rights Council stated for example: “Commissions of inquiry are strong and flexible mechanisms that can yield ample benefits for governments, victim communities and the wider public, but they do not relieve States of their legal obligations to investigate and prosecute torture, and to provide effective remedies to victims of past violations, including reparation for the harm suffered and to prevent its reoccurrence”;

See <http://www.un.org/apps/news/story.asp?NewsID=41455&Cr=torture&Cr1=> (accessed 12 March 2012).

administration of justice.<sup>19</sup> Countries which passed amnesty laws often faced continuous public pressing for accountability and eventually annulled amnesty laws and started criminal prosecution. Argentina and Guatemala may serve as examples.<sup>20</sup> Another example is Sierra Leone, where the amnesty provided for in the 1999 Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front did not end the conflict or deter further atrocities. It is noteworthy that the Peace Agreement also provided for the establishment of a Truth and Reconciliation Commission.<sup>21</sup> Eventually, the Special Court of Sierra Leone (SCSL) was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.<sup>22</sup>

24. While it is therefore indispensable to include provisions addressing accountability in the Draft Law, it need not be in the form of a definition. We suggest to either abstain from giving a definition of transitional justice or to adopt the definition of transitional justice given in the 2004 United Nations Report on Transitional Justice. Whether or not in the form of a definition, the Draft Law should contain an unequivocal commitment to the principle of accountability of those being most responsible for serious human rights violations.

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<sup>19</sup> The United Nations High Commissioner on Human Rights stated that: “[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes; Office of the High Commissioner of the United Nations, *Rule of Law Tools for Post-Conflict Societies. Amnesties*, New York/Geneva 2009 (hereafter OHCHR Rule of Law Tool Amnesties), available at [http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf) (accessed 12 March 2012), page V.

<sup>20</sup> Argentina may serve as an example. Right after the military dictatorship (1976-1983), a so-called “Full Stop” law” (1986) was passed, which forced a halt to the prosecution of crimes committed during the dictatorship, and a “Due Obedience Law” (1987) was passed, which granted automatic immunity to all members of the military. However, challenges to these laws were brought before the Argentinean courts in a number of cases, calling for them to be declared null and void. Finally, in 2003 Congress annulled the laws. Several high-profile cases were reopened in 2003.

In Guatemala, a “Commission for Historical Clarification” was established to clarify human rights violations related to the thirty-six year internal conflict in Guatemala (1960 to 1996), to foster tolerance and preserve memory of the victims. The commission did not include names of perpetrators or a call for prosecution in its report. However, in an agreement between the United Nations and the government of Guatemala, an International Commission against Impunity in Guatemala (CICIG) was set up and entered into force in September 2007. The CICIG is mandated to conduct independent investigations, present criminal complaints to Guatemala’s Public Prosecutor and take part in criminal proceedings as a complementary prosecutor. It also promotes legal and institutional reform and publishes periodic reports. In 2010 additional trials began against former military officials.

<sup>21</sup> Article VI of the Lomé Peace Accord of 7 July 1999, available at <http://www.sierra-leone.org/lomeaccord.html> (accessed 12 March 2012).

<sup>22</sup> For more information about the Special Court of Sierra Leone, <http://www.sc-sl.org>.

25. Before outlining possible ways to ensure accountability,<sup>23</sup> it is important to clarify the impact of the so-called “Immunity Law” adopted by the Yemeni parliament on 21 January 2012. The law extends “immunity from legal and judicial pursuit” to former President Saleh and “those who worked with him during the period of his rule”, from prosecution over “politically motivated” crimes and stipulates that it may “not be cancelled or appealed/objected to”.<sup>24</sup>
26. The Law can be classified as an amnesty law, as it is ex post facto legislation disallowing prosecution in relation to former President Saleh and his aides.<sup>25</sup> The adoption of the law was widely criticised,<sup>26</sup> and also defended as a political necessity in the specific political situation.<sup>27</sup>
27. From a legal view, it is important to highlight that amnesties are not permissible if they prevent the prosecution of individuals who may be criminally responsible for international crimes including war crimes, crimes against humanity, genocide, and gross human rights abuses. It is now clear that there is a general prohibition in international law on the granting of blanket amnesties for international crimes. There is ample jurisprudence of domestic courts,<sup>28</sup> international and internationalized/hybrid<sup>29</sup> courts to that effect.

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<sup>23</sup> Paragraphs 29 ff.

<sup>24</sup> Law for Immunity from Judicial and Legal Pursuit, adopted on 21 January 2012, Article 2.

<sup>25</sup> Both “amnesties” and “immunity” protect from prosecution. While an amnesty is legislation that blocks criminal action in the state, immunity is a defence that a state official enjoys *qua* his function in the state.

<sup>26</sup> United Nations High Commissioner for Human Rights Navi Pillay said that amnesty for perpetrators of war crimes and violations of human rights is contrary to international law, see also comments by Human Rights Watch and amnesty international, available at <http://www.hrw.org/news/2012/01/10/yemen-reject-immunity-law-president-saleh-and-aides> and <http://www.amnesty.org.au/news/comments/27686/>, respectively (accessed 12 March 2012).

<sup>27</sup> The United States defended the agreement; <http://www.guardian.co.uk/world/2012/jan/10/us-backs-yemen-immunity-for-saleh> (accessed 12 March 2012).

<sup>28</sup> In **Latin America**, domestic courts invalidated amnesty laws, i.e., *Re Mazzeo Julio Lilo y otros*, Rec. de casación e inconstitucionalidad, **Argentinian** Supreme Court, 13 July 2007; Judgment C 695/02, **Colombian** Constitutional Court, 28 August 2002; *Re Claudio Lecaros Carrasco*, Supreme Court of **Chile**, Rol. No. 47.205, Recurso No. 3302/2009, 18 May 2010; *Re Santiago Martín Rivas*, Constitutional Court of Peru, Exp. No. 4587-2004-AA/TC, 29 November 2005. This was in reaction to the decision of the **Inter American Court of Human Rights** that amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility intended to prevent the prosecutions of those responsible for serious violations to human rights are not admissible (*Chumbipuma Aguirre et al. v. Perú (Barrios Altos)*, Merits, Series C, No. 75, 14 March 2001).

In **Europe**, in the *Pinochet* and *Galtieri* Cases in **Spain** the amnesty laws of Chile and Argentina respectively were held to be incompatible with international law and did not preclude investigation and prosecution by Spain (*Re Pinochet*, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena, 5 November 1998, and *Re Galtieri*, Orden de prisión provisional incondicional de Leopoldo Fortunato Galtieri por delitos de asesinato, desaparición forzada y genocidio, por el Magistrado-Juez del Juzgado Número cinco de la Audiencia Nacional Española, 25 March 1997). The same result was reached in **The Netherlands** with respect to war



28. Yemen, as a member of the world community, should ensure that, at a minimum, its amnesty law has no legal effect where it impedes the investigation and prosecution of international crimes. In any case, the Yemeni amnesty law does not prevent the prosecution of international crimes by international courts.

## II. Ensuring Accountability for Serious Human Rights Violations – Domestic and international levels

29. There are various ways to ensure legal accountability for serious human rights violations. Prosecutions may be carried out by the domestic authorities. Further, perpetrators may also be held accountable before community-based “courts” or in traditional/tribal conflict-resolving mechanisms. Moreover, there are also ways to involve the International Criminal Court (ICC). Finally, hybrid courts have been created in several post-conflict countries.

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crimes in Afghanistan and **in France** with respect to torture in Mauritania, despite domestic amnesty laws (*Public Prosecutor v. F*, District Court of The Hague, LJN: BA9575, 25 June 2007 and *Re Ould Dah*, Cour de cassation, 23 October 2002, Bull. crim. 2002, No. 195, p. 725 respectively).

See also Judgments of the **European Court of Human Rights**: Cf. T.E.D.H., *Case of Abdulsamet Yaman v. Turkey*, Judgment of 2 November 2004, Application No. 32446/96, para. 55. Cf. T.E.D.H. *Case of Yeter v. Turkey*, Judgment of 13 January 2009, Application No. 33750/03, para. 70.

In **Africa**, different amnesty laws were found to be in violation of the relevant state’s obligations pursuant to the African Charter on Human and Peoples’ Rights by the African Commission on Human and Peoples’ Rights (*Zimbabwe Human Rights NGO v. Zimbabwe*, Communication No. 245/02, 21 May 2006, paras 188-215, *Malawi African Association and Others v. Mauritania*, Communication Nos. 54/91, 61/91, 96/93, 98/93, 164-196/97, 210/98, 11 May 2000, paras 81-84; *Mouvement Ivoirien des Droits Humains (MDI) v. Côte d’Ivoire*, Communication No. 246/02, July 2008, paras 87-97.

<sup>29</sup> **International Criminal Tribunal for the Former Yugoslavia (ICTY)**: *Prosecutor v. Karadžić*, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement, Appeals Chamber, Case No. IT-95-5/18-AR73.4, 12 October 2009, para. 52.

The **Special Court for Sierra Leone**: *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, paras 82, 86-90; see also *Prosecutor v. Gbao*, Decision on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, Case No. SCSL-2004-15-AR72(E), 25 May 2004, para. 9.

After conducting an extensive review of state and judicial practice, the **Extraordinary Chambers in the Courts of Cambodia** concluded that “blanket amnesties for serious international crimes [are now] in breach of international norms.” *Nuon et al.*, Case 002, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne bis in Idem* and Amnesty and Pardon), Trial Chamber, Case File No. 002/19-09-2007/ECCC/TC – E51/15, 3 November 2011, para. 49.

### *National Prosecutions and Community-based Mechanisms*

30. First, investigations may be carried out by the national authorities and, if there is sufficient evidence of human rights violations, alleged perpetrators may be brought to trial before the domestic courts in criminal proceedings and punished.
31. However, in a post-conflict situation and immediately following a regime change, there may be reasons why this is not feasible. The justice sector may not be properly functioning, suffer from corruption and require reform, especially when it was misused during the outgoing regime. Domestic trials lack legitimacy if the judicial institutions are not impartial and independent or are not perceived as such. Further, an appropriate legislative framework for the prosecution of the offences may be missing. Certain behaviour may not be criminalised or the existing provisions relating to criminal proceedings may not include basic fair trial guarantees or adequate witness protection.
32. In addition to criminal trials, perpetrators have also been held accountable for their deeds before community-based “courts” or in other traditional/tribal conflict-resolving mechanisms. The most prominent example are the so-called *gacaca* courts in Rwanda which have helped communities confront the genocide committed in the country in 1994.<sup>30</sup>
33. Local, tribal or community-based conflict-resolving traditions often enjoy broad legitimacy within the population and can thus help foster reconciliation. It is crucial, however, that some basic fair trials guarantees are ensured.
34. The Rwandan *gacaca* courts have been criticized for serious shortcomings in their work, including corruption and procedural irregularities. Possible miscarriages of justice occurred due to “the accused’s inability to mount a defence, using largely untrained judges, trumped-up charges, some based on the Rwandan government’s wish to silence critics; misuse of *gacaca* to settle personal scores; judges’ or officials’ intimidation of defense witnesses; and corruption by judges and parties to cases”.<sup>31</sup>

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<sup>30</sup> See report by Human Rights Watch, Rwanda. Mixed Legacy for Community-Based Genocide Courts, available at <http://www.hrw.org/node/99189> (accessed 12 March 2012).

<sup>31</sup> See Human Rights Watch report of 31 May 2011, <http://www.hrw.org/node/99189> (accessed 12 March 2012).

## *Ratification of the ICC Statute*

35. In such case where national prosecution (and/or community-based conflict-resolving) does not seem feasible, the International Criminal Court (ICC) may exercise its complementary judicial function. The ICC is the first permanent international criminal court capable of trying individuals for genocide, crimes against humanity and war crimes when domestic courts are unable or unwilling to do so. The Rome Statute of the ICC entered into force on 1 July 2002. Since 2002, much progress has been achieved in the establishment of the Court. As of December 2011, 120 countries from all over the world had ratified the Rome Statute. The Middle East and North Africa region is – so far – only represented by Jordan and Tunisia (Jordan ratified in 2002 and Tunisia most recently in June 2011), but more countries in the region seriously discuss whether to join the ICC.<sup>32</sup>
36. Like many other Arab countries Yemen signed the Rome Statute in 2000. A vote for ratification of the Yemeni parliament on 24 March 2007 was, however, revoked on 7 April 2007.<sup>33</sup> We advise Yemen to revisit its discussions on the ratification of the Rome Statute.<sup>34</sup> The ratification of the Rome Statute would be a great step and commitment to justice and accountability and respect for basic human rights. Further, it would open the opportunity to make a referral to the ICC and request the Prosecutor of the ICC to investigate all allegations of crimes, should Yemen come to the conclusion that it is unable to prosecute alleged perpetrators in the country.
37. There is, however, a time limitation, as the ICC may only prosecute crimes committed after the entry into force of Rome Statute (1 July 2002). The ICC jurisdiction is not retrospective. Where a particular state joins the ICC *after* 1 July 2002, the ICC has jurisdiction for crimes committed after the entry into force of the Statute for that state which is “the first day of the month after the 60th day following the deposit by such State

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<sup>32</sup> In Morocco, the Equity and Reconciliation Commission, appointed by the King in 2004 to account for the grave human rights abuses in the country since 1954, included in its final recommendations, which were accepted by the King, a call for Morocco to join the ICC.

<sup>33</sup> Allegedly parliamentarians voted against ratification because they believed it contradicted the Yemeni Constitution and Sharia law. It is also alleged that the ongoing conflict in Northern Yemen prompted the revocation of the vote for ratification, see Coalition for the International Criminal Court, *Global Coalition Urges Yemen to Join International Criminal Court, Says Time to Reconsider 2007 Ratification Vote* (22 December 2008), available at [http://www.iccnw.org/documents/08\\_12\\_Yemen\\_URC\\_Press\\_Release\\_\(2\).pdf](http://www.iccnw.org/documents/08_12_Yemen_URC_Press_Release_(2).pdf) (accessed 12 March 2012).

<sup>34</sup> According to Article 14(B) of the Draft Law, the Government shall review international conventions and instruments and join the instruments and conventions that have not yet been ratified.

of its instrument of ratification, acceptance, approval or accession. (“The 60 day rule”).<sup>35</sup> Such a state may nonetheless accept the jurisdiction of the ICC for the period before the Statute’s entry into force. However, in no case can the Court exercise jurisdiction over events before 1 July 2002. In case that Yemen joins the ICC, this would mean that the ICC would not be able to deal with allegations of crimes committed in Yemen within the period 1994 - 30 June 2002.

38. The ICC Prosecutor would, however, be able to analyse the situation from 1 July 2002 onwards in order to assess whether the allegations of indiscriminate shelling by northern Huthi rebels and the use of unnecessary and lethal force since 2007 in the South or the events during the uprising in Yemen, in particular the use of force against peaceful protesters,<sup>36</sup> constitute international crimes and fall under the jurisdiction of the ICC.

### ***Declaration Accepting ICC Jurisdiction***

39. There is another way to achieve ICC Jurisdiction over the events in Yemen which would not require ratification of the Rome Statute. States which are not party to the Rome Statute may merely accept the Court’s jurisdiction on an *ad hoc* basis in accordance with Article 12, para. 3 of the Rome Statute. To that effect, a declaration must be submitted to the Registrar of the ICC.<sup>37</sup>
40. Should Yemen proceed with such a declaration, the same time limitations as set out above,<sup>38</sup> would apply. Crimes allegedly committed in the period from 1 July 2002 onwards would be covered.

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<sup>35</sup> Article 126(2), Article 11(2) of the Rome Statute of the ICC; For more information <http://www.peaceandjusticeinitiative.org/implementation-resources/what-is-the-temporal-jurisdiction-of-the-icc-and-national-courts>.

<sup>36</sup> Human Rights Watch confirmed the deaths of 270 protesters and bystanders during the attacks by government security forces and gangs on largely peaceful demonstrations in 2011, most in the capital, Sanaa. Dozens more civilians were killed in apparently indiscriminate attacks by security forces on populated areas during clashes with armed opposition fighters; <http://www.hrw.org/news/2012/01/23/yemen-amnesty-saleh-and-aides-unlawful>; <http://www.hrw.org/reports/2010/04/07/all-quiet-northern-front-0>; <http://www.hrw.org/news/2011/09/20/yemen-protester-killings-show-perils-immunity-deal> (accessed 12 March 2012).

<sup>37</sup> To date, two declarations have been lodged with the Registrar accepting the exercise of the jurisdiction of the Court: In 2003, Ivory Coast lodged a declaration accepting the exercise of the jurisdiction of the Court with respect to alleged crimes committed from 19 September 2002 (post-election violence) (confirmed by Ouattara on 14 December 2010). On 22 January 2009, the Palestinian National Authority lodged a declaration recognizing the jurisdiction of the Court with respect to acts committed on the territory of Palestine since 1 July 2002.

<sup>38</sup> See paragraph 34.

### *Hybrid Courts*

41. Some states have taken yet another path and created – with the help of the international community – so-called hybrid or internationalized courts. The term is used for courts such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the courts of Cambodia (ECCC), and the Timor-Leste Special Panels and Serious Crimes Unit. Hybrid courts are a mix of national and international elements and aim at combining the domestic and purely international prosecution of international crimes.
42. The United Nations was involved in the setting-up of each court. It either incorporated international legal professionals (in Kosovo and Timor-Leste which were under UN administration) or negotiated with the government concerned to establish the court within the existing national legal system.
43. We advise to carefully consider which of the options best fit the actual situation of Yemen. The decision which way to proceed will ultimately depend on a fair assessment of the state of the judicial branch in Yemen, in particular of the problem of corruption and lack of independence and impartiality, and the existing legal framework, questions of constitutionality and conformity with Sharia law, as well as acceptance within the society and the public.
44. It might also be useful to assess whether existing tribal adjudicatory mechanisms in Yemen (*ahkam al-aslaf*) could play a role in ensuring accountability for human rights offenders.

### **III. The Equity and National Reconciliation Commission**

#### *Mandate, Functions and Powers*

45. The Equity and National Reconciliation Commission is mandated to disclose the truth, namely to investigate human rights violations (Article 7(A), (E), (G) of the Draft Law). It shall also deliver reparations to victims (Article (C), (D), (F), (I) of the Draft Law). Further, it shall make recommendations relating to the enhancement of human rights awareness (Article 7(H) of the Draft Law). The Equity and National Reconciliation

Commission as devised in the Draft Law therefore appears as a combined truth and reparation commission.

46. The Draft Law stresses the need to disclose the truth and establish a record of human rights violations which occurred during the Yemeni uprising or before. To that end, a newly created Equity and Reconciliation Commission shall conduct investigations into the events of the uprising and before, analyse the reasons for human rights violations in the past and make recommendations on how to prevent future human rights violations.
47. The creation of a temporary, non-judicial body is an appropriate measure for establishing a record of the events and the human rights violations. Such a "truth commission" may conduct investigations very broadly and give the victims a voice in a forum that is not limited by the special needs and constraints of a court proceeding.

#### ***Mandate ratione temporis***

48. The Draft Law currently provides differing time periods in relation to the investigation into human rights violations which occurred during the uprising on the one hand (since January 2011), and to the reparations on the other. Reparations shall also be granted for human rights violations that occurred since 1994.

There is some friction between the provisions of the Draft Law as all decisions relating to reparations will also necessarily require investigations on the part of the commission. It is therefore not possible to limit the investigation function of the commission to the period of the uprising (Article 7). In fact, the mandate *ratione temporis* of the Commission is adequately described as reaching from 1994 to the issuance of the Draft Law. This is reflected in Article 4 providing that the Draft Law relates to the victims of human rights violations "resulting from the political conflict dating from 1994 and until the issuance of this Law".

#### ***Term of functioning – Sufficient Time***

49. In order to fulfil its functions properly, the Equity and National Reconciliation Commission will need sufficient time. The time factor is often underestimated in truth-seeking commissions.

As regards the Yemeni commission, one must keep in mind that the commission will have to conduct investigations not only in relation to the events of the uprising – which is a relatively limited time period – but also in relation to events that occurred during a 17-year time period (1994-2011). Against this backdrop, the time frame of a maximum of four years given in Article 15 of the Draft Law appears reasonable and a welcome amendment of the preceding version of the law which provided only one year.<sup>39</sup>

### ***Identifying the individuals most responsible for human rights violations***

50. When investigating the events, the Equity and Reconciliation Commission cannot be blind vis-à-vis the individuals responsible for human rights violations. Article 7(G) of the Draft Law currently tasks the commission to “examine the responsibilities of state agencies or any other parties having violated human rights during the past period, to identify the causes and suggest treatments that prevent their recurrence in the future”. This is an important provision. It, however, remains too much in the abstract when referring to the responsibility of “state agencies” and “political parties”, and it remains vague when it provides that “treatments” shall be suggested.
51. We suggest to amend the list of functions in Article 7 or to reformulate Article 7(G) to express that the commission will examine the responsibility of individuals and identify those most responsible for serious human rights violations. Some truth commissions used the following language to describe the commissions function: “*facilitate, and where necessary initiate or coordinate, inquiries into the identity of all persons, authorities, institutions and organisations involved in human rights violations*”.<sup>40</sup>
52. When identifying the responsible individuals, we suggest that the commission applies a standard internationally acknowledged by United Nations Inquiry Missions: There must be “a reliable body of material consistent with other verified circumstances, which tends

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<sup>39</sup> Truth commissions were functioning for various time periods. The South African TRC took seven years to complete its work. The Truth and Reconciliation Commission in Peru took two years and one month to complete its work. Many commissions functioned only for less than two years. Cf. <http://www.usip.org/publications/truth-commission-digital-collection> (accessed 12 March 2012).

<sup>40</sup> See i.e. South African “Promotion of National Unity and Reconciliation Act 34 of 1995”, available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (accessed 12 March 2012), establishing the Truth and Reconciliation Commission, section 4(A); UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, available at <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg10e.pdf> (accessed 12 March 2012), section 13(1).

to show that a person may reasonably be suspected of being involved in the commission of a crime.”<sup>41</sup>

53. In identifying or naming those individuals, the commission will not only fulfil its function to reveal the “full truth”, but also make an important contribution to the prosecution of alleged human rights violators. It is important to note that no legal consequences will flow from the naming of individuals by the commission as the final judgment on the criminal responsibility can only be reached by a court.
54. Egypt has recently followed that path. In its final report, the Egyptian Inquiry Commission established by the Egyptian interim government to investigate violations that occurred during the protests in Egypt, named several members of the National Democratic Party of Egypt responsible for the attacks on protestors at the Tahrir Square in Cairo on 2 February 2011. Reacting to the report, the transitional government in Egypt decided to start prosecuting high officials and security officials on charges related to corruption and violence against demonstrators during the uprising.<sup>42</sup>

### *Identifying the victims*

55. It should also be considered that the commission would need to determine who are the victims of human right violations. Some laws establishing truth commissions included a definition of who was to be considered a victim.<sup>43</sup> The inclusion of a definition of “victim” in Article 2 should be considered. To that end, the definition given in the “Basic Principles on Reparation” could be taken as guidance.<sup>44</sup>

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<sup>41</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, p. 4.

<sup>42</sup> See International Center for Transitional Justice (ICTJ) on Egypt, <http://ictj.org/es/node/9564> (accessed 12 March 2012).

<sup>43</sup> South African Promotion of National Unity and Reconciliation Act 34 of 1995 (supra note 40), section 1; UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (supra note 40), section 1 (n): “*Victim*” means a person who, individually or as part of a collective, has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her rights as a result of acts or omissions over which the *Commission* has jurisdiction to consider and includes the relatives or dependents of persons who have individually suffered harm”.

<sup>44</sup> Basic Principles on Reparation (supra note 7), section V 8: “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”



### ***Investigation of human rights violations***

56. Further, we advise to consider the use of the terms “human rights violation” and “serious/gross human rights violation”. As the use of the one or the other implies a different threshold, care must be taken. Currently, the Draft Law plans compensation and reparation for victims of all human rights violations that have occurred since 1994 (Article 7 (C)), while it shall listen to victims of “gross human rights violations” (Article 7(A)). In this context, it seems worth considering whether to limit compensation to victims of “serious/gross” human rights violations.<sup>45</sup>
57. Finally, the term “all credible” allegations of human rights violations in Article 7(A) could be misleading as it is the task of the commission to investigate whether human rights violations actually took place and whether allegations were “credible”. Article 7(A) should therefore not make reference to the term of “credibility”.

### ***Reparations - Terminology***

58. The Draft Law uses various terminology when dealing with reparations for victims and often refers to “compensation”. It is advisable to use the term “reparations” as the generic or umbrella term throughout the Draft Law. As set out above, reparations include measures of restitution,<sup>46</sup> compensation,<sup>47</sup> rehabilitation, satisfaction and non repetition guarantees. Thus, the term reparation need not be just pecuniary. We advise to use these terms as set out in the “Basic Principles on Reparation” in order to avoid misunderstanding. In particular, the language in the following subparagraphs might require revision:

-Article 3 (2): “ensuring material and moral compensation and support to those who suffered during that period, through moral reparations”;  
We suggest to use the following language: “*ensuring a set on integral reparations to victims of human rights violations during that period, and their families*”;

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<sup>45</sup> Consider practicability concerns dealt with below under “Reparation - Feasibility”.

<sup>46</sup> Restitution means that a victim is restored to the original situation before the human rights violation. It includes “the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.” See *Basic Principles and Guidelines on Reparation* (supra note 7), para. 19.

<sup>47</sup> The term “compensation” is used when there is any economically assessable damage. See *Basic Principles and Guidelines on Reparation* (supra note 7), para. 20.

-Article 7 (C): Assure reparation and compensation for victims;  
We suggest to formulate: *Ensure full reparations for victims.*

-Article 7 (C): education for children

We suggest amending the text to read as follows: *free education/scholarships for children who suffered serious human rights violations or whose families suffered serious human rights violations.*

59. In order to enhance the clarity of the Draft Law, a legal definition of the term “reparation” may also be included in Article 2.

60. Finally, we suggest devoting one Article in the law to matters relating to compensation (in particular reflecting the substance of Article 8(E)).

### ***Reparations - Feasibility***

61. The scope of reparations, in particular compensatory measures, envisaged by the Draft Law, seems to be broad and ambitious. It is crucial that the planned measures are feasible. The functioning, credibility and the ultimate success of the commission may be at stake if the reparations granted by the commission cannot be implemented due to financial constraints or practical hindrances.<sup>48</sup>

62. The following provisions appear as particularly far-reaching and may require further considerations concerning their (financial) feasibility:

Article 7 (D): victims may be granted treatment and rehabilitation *abroad*

Article 8 (E): compensation includes *incidental* damages and *lost wages*

### ***Powers of the Commission***

63. The powers of the commission are set out in Article 8 of the Draft Law. The Article contains the most relevant powers of a truth commission. We welcome that the article now better details the various powers than the preceding version of the law.

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<sup>48</sup> UN Report on Transitional Justice 2011 (supra note 2), para. 24.

64. We further suggest that Article 8 (D) should also make reference to developing a procedure of hearing victims and witnesses.

65. Article 8 (E) could be extracted to form a separate article on compensation.

### ***Hearing of Witnesses and Witness Protection***

66. Currently, the issue of witness protection is only touched upon in Article 7(B). As the protection of witnesses is a sensitive issue, a more detailed provision could be inserted. The relevant provision in the Law establishing the South African Truth and Reconciliation Commission could be taken as a model provision: “*appropriate measures shall be taken in order to minimize inconvenience to victims and, when necessary, to protect their privacy, to ensure their safety as well as that of their families and of witnesses testifying on their behalf, and to protect them from intimidation*”.<sup>49</sup>

67. Further, it may be worth including a provision on self-incrimination stating that incriminatory statements of witnesses may not be admissible in criminal proceedings. The South African law formulated: “*Any incriminating answer or information obtained or incriminating evidence directly or indirectly shall not be admissible as evidence against the person concerned in criminal proceedings in a court of law or before any body or institution established by or under any law.*”<sup>50</sup> Article 53 of the Regulations of the Inter American Court stipulate that “*States may not institute proceedings against witnesses, expert witnesses, or alleged victims, or their representatives or legal advisers, nor exert pressure on them or on their families on account of statements, opinions, or legal defenses presented to the Court.*”<sup>51</sup>

### ***Independence and Composition of the Commission***

68. The success and the efficacy of the commission will largely depend on its independence. It is therefore worth underlining the independence of the commission as done in Article 9 of the Draft Law.

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<sup>49</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 (supra note 40), section 11 (E).

<sup>50</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 (supra note 40), section 31(3).

<sup>51</sup> See at <http://www.corteidh.or.cr/reglamento.cfm> (accessed 12 March 2012).

69. The independence of a commission largely depends on the nomination procedure. It should be assured that the commission will not appear as a mere representation of the political parties. Currently, the Draft Law only provides that the President will appoint the commission upon nomination by the Interpretation Committee (Article 6 (B)).<sup>52</sup>
70. We suggest to invite the public, the victims, and Yemeni human rights organisations to participate in the nomination procedure by proposing individuals and commenting on the qualifications of nominees.<sup>53</sup>

### *Relationship with Human Rights Commission*

71. According to Article 14, a permanent human rights commission shall be formed within a period not exceeding six months of the issuance of the Draft Law. As the Human Rights Commission shall also receive complaints and investigate human rights violations, it is important to clarify the relationship with the Equity and Reconciliation Commission and have different terms of reference and jurisdiction.

## **IV. Institutional Reform as a Transitional Justice Measure/Mechanism**

72. The current Draft Law addresses institutional reforms in Article 13 (dealing with the National Dialogue Conference). However, little emphasis is put on the need and importance of institutional reforms in the law. According to Article 13(F), for example, the Conference merely “considers the possibility of establishing an independent body for civil service working on institutional reform of all state institutions be it civil, military, or

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<sup>52</sup> The Interpretation Committee, a body created in the so-called Implementation Mechanism of the Gulf Cooperation Council, shall resolve any disputes regarding the interpretation of the Gulf Cooperation Council Initiative and its Implementation Mechanism. Implementation Mechanism, Article 25.

<sup>53</sup> In **East Timor**, a more complicated procedure was followed. A so-called “Selection Panel” was formed in which the most important political actors including NGOs were represented. The Selection Panel called for nominations from the people and could also make nominations. It then selected persons and recommended them to the Transitional Administrator for appointment as commissioners; compare UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (supra note 40), section 4 (3).

The Truth and Reconciliation Commission Act 2000, establishing a commission in **Sierra Leone**, available at <http://www.usip.org/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf> (accessed 12 March 2012) provides that nominations for the national commissioners could be made by “anyone”. With the assistance of an advisory committee, and “after broad consultation with a cross-section of Sierra Leonean society” a list of 10 to 20 finalists shall be created. After an interview before a Selection Panel of six persons the finalists were ranked. Based on the recommendations from the Selection Panel four citizens were then appointed. Schedule– (subsection (1) of section 3).

security.” This language is weaker than the Implementation Mechanism providing that the interim President and the Government of National Unity shall “establish a process of constitutional reform that will address the structure of the State and political system, and submitting constitutional amendments to the Yemeni people through referendum.”<sup>54</sup>

73. As set out above, institutional reforms are indispensable in order to re-establish the rule of law. Such reforms may include the reform of the military and armed forces (see also Clause 17 of Mechanism), the reform of the police and security organs and also of the judicial branch and public sector. Further constitutional amendments may be necessary and the existing legislation shall be reviewed and amended if not in conformance with human rights instruments.
74. As acknowledged in United Nations reports, Yemen particularly suffers from an inefficient formal judicial system and from corruption in the police and judiciary services. Reforms will need to aim at establishing judicial autonomy and the separation of powers; access to justice, transparency, accountability and anti-corruption; protection of human rights; enhancing civic participation; and enhancing central and local government implementation capacity.<sup>55</sup>
75. We therefore strongly advise to include provisions in the Law addressing the importance of institutional reforms.

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<sup>54</sup> Implementation Mechanism, Clause 19, see also Clause 21.

<sup>55</sup> UNDAF Republic of Yemen 2012-2015, Sana’a, January 2011, page 12, available at <http://www.undp.org/ye/reports/Yemen%20-%20final%20signed%20UNDAF.pdf> (accessed 14 March 2012); see also United Nations Common Country Assessment. Republic of Yemen, 2005, pages 25-26, available at <http://www.undp.org/ye/reports/24700f48fb3fb4Yemen%20CCA%20English.pdf> (accessed 14 March 2012).