

The UN Peacebuilding Commission and Transitional Justice

By Gerhard Thallinger*

A. Introduction

This contribution examines the possible contribution the UN Peacebuilding Commission (PBC) can make towards the achievement of transitional justice in countries or regions recovering from (civil) war or other serious conflict. It will first briefly epitomize the recent process culminating in the set-up of the PBC and then address the functions and tools of the Commission with particular focus on its transitional justice capabilities. Thereby, I will examine conceivable operative approaches the PBC might take in the first cases submitted to it, i.e., Burundi and Sierra Leone, and assess the Commission's potential and added value both in general terms but in particular with regard to transitional justice activities.

I. Past – Intending to Close a “Gaping Hole” Within the UN Peacebuilding Architecture

1. The Evolution of the Peacebuilding Commission

Shortly after the need for revitalization of the United Nations¹ ultimately broke surface in the course of the Security Council's stalemate on Iraq in 2003, Secretary-General Kofi Annan announced his intention to create a high-level panel of eminent experts entrusted with several tasks, among them, “to recommend ways of strengthening the United Nations, through reform of its institutions and processes.”² Barely more than a year after its formal establishment the High-level

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¹ The gradually accepted necessity of UN reform is manifestly reflected in Section VIII of the Millennium Declaration, entitled “Strengthening the United Nations.” G.A. Res. 55/2, U.N. Doc. A/55/49 (Sept. 18, 2000).

² Kofi Annan, Secretary-General, United Nations, Address to the General Assembly (Sept. 23, 2003), available at <http://www.un.org/webcast/ga/58/statements/sg2eng030923>.

panel on Threats, Challenges and Change published its report proffering several major reform proposals including the creation of a UN Peacebuilding Commission.³ Having identified a “key *institutional gap*”⁴ within the purview of the UN, the High-level panel forged the PBC with the aim “to identify countries which are under stress and risk sliding towards State collapse; to organize, in partnership with the national Government, proactive assistance in preventing that process from developing further; to assist in the planning for transitions between conflict and post-conflict”.⁵

The initiative was warmly welcomed by the Secretary-General and largely adopted in his report in March 2005 setting out the reform agenda for the World Summit of Heads of State and Government in September 2005. Remembering the devastating backslide into bloodshed in Angola in 1993 and Rwanda in 1994, and referring to a study showing that roughly half of all countries that emerge from war lapse back into violence within five years,⁶ he argued:

[I]f we are going to prevent conflict we must ensure that peace agreements are implemented in a sustained and sustainable manner. Yet at this very point there is a gaping hole in the United Nations institutional machinery: no part of the United

³ *A more secure world: Our shared responsibility: Report of the Secretary General's High-level Panel on Threats, Challenges and Change*, 83-4, paras. 261-64, A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/>.

⁴ *Id.* at para. 261 (emphasis added). The High-level Panel detected an omission within the UN institutions when it comes to peacebuilding. The notion of peacebuilding as such was of course not novel to the UN in 2003-4, but appeared prominently on its agenda after the end of the Cold War. See, e.g., The Secretary-General, *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping, Report by the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, G.A. Res. 45/277, Section VI on post-conflict peace-building, paras. 55-59, U N. Doc. A/47/277 - S/24111 (June 17, 1992), available at <http://www.un.org/Docs/SG/agpeace.html>.

⁵ *A more secure world*, *supra* note 3, at 83-84, para. 264. Pursuant to the High-level Panel, this silence on peacebuilding in the Charter resulted from the fact that UN involvement in largely internal conflicts was not initially envisaged by the Member States. *A more secure world*, *supra* note 3, at 83, para. 261. See Peter Huber, *The United Nations Peacebuilding Commission - closing a gap in the UN system?*, in TRANSITIONAL CONSTITUTIONALISM: PROCEEDINGS OF THE 2ND VIENNA WORKSHOP ON INTERNATIONAL CONSTITUTIONAL LAW 157, 158-59 (Konrad Lachmayer, Harald Eberhard, and Gerhard Thallinger, eds., Nomos/facultas.wuv 2007), who points towards the changing nature of Article 2(7) of the UN Charter, thereby alluding to the reference to the emerging “responsibility to protect” in both the High-level Panel report and the Secretary-General’s report, *In larger freedom* (see *infra* note 7). In this context, the question arises whether the work of the PBC ought to be limited only to countries that have overcome internal conflicts or shall also encompass entire regions in transition from inter-State conflict to peace.

⁶ PAUL COLLIER *ET AL.*, BREAKING THE CONFLICT TRAP: CIVIL WAR AND DEVELOPMENT POLICY 7 (2003).

Nations system effectively addresses the challenge of helping countries with the transition from war to lasting peace.⁷

Thus, he proposed to Member States the creation of an intergovernmental Peacebuilding Commission, a Peacebuilding Support Office within the UN Secretariat and a standing fund for peacebuilding.⁸ While adopting most of the suggestions of the High-level panel report, the Secretary-General made one major substantial amendment to the prospective functions of the PBC: He restricted the Commission's purview to truly post-conflict situations by advocating against "an early warning or monitoring function",⁹ whereas the High-level panel's broadly framed terms could have been interpreted as including such wider powers.¹⁰ In conceding that "[t]here are other mechanisms in the United Nations for what has become known as 'operational prevention,'" ¹¹ the Secretary-General responded presumably to concerns within the UN that the Commission might engage in prerogatives belonging to the Security Council, but also to pressure from governments wary that they might be the ones under scrutiny.¹² This particular aspect of delimiting the PBC's competences might be seen as a general effort within the UN and its Member States to avoid the Commission, once it was put on the table by the High-level panel, from absorbing what were considered to be too far-reaching powers and thus from being too large in scale.¹³ In organizational terms, the report of the Secretary-General proposed that the PBC is supposed to have 15 –

⁷ The Secretary-General, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, 31, para. 114, U.N. Doc. A/59/2005 (Mar. 21, 2005), available at <http://www.un.org/largerfreedom/contents.htm>.

⁸ *In larger freedom*, *supra* note 7, at 31-32, paras. 114-5.

⁹ *Id.* at para. 115.

¹⁰ *A more secure world*, *supra* note 3, at 83-84, paras. 261-64. Such an interpretation is particularly tenable when one considers the establishment of the PBC as a lesson learned from the UN failure in Rwanda in 1994, where the absence of a proper UN early warning mechanism was considered as the major reason for the UN's failure to act to prevent the country's relapse into violence.

¹¹ Addendum 2 to *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, 4, para. 17, U.N. Doc. A/59/2005 (Mar. 21, 2005), available at <http://www.un.org/largerfreedom/contents.htm>. The Secretary-General is alluding to the pertinent power of the Security Council but also, though in fact almost never used, to his own competence according to Article 99 of the UN Charter "to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."

¹² See Simon Chesterman, *From State Failure to State-Building: Problems and Prospects for a United Nations Peacebuilding Commission*, 2 JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 155, 169 (2005).

¹³ For the Commission's functions, see in detail *infra* II.

20 members and introduced the concept of country-specific formats bringing together all core actors to lead a particular crisis-prone country to more stability.¹⁴

During the World Summit in September 2005, the Heads of State and Government followed the Secretary-General's proposals and decided to set up the Peacebuilding Commission as an intergovernmental advisory body.¹⁵ It was decided that the Secretary-General should establish a Peacebuilding Support Office and a standing Peacebuilding Fund.¹⁶ The World Summit Outcome Document adopted the concept of country-specific meetings and contrived an Organizational Committee as the main organ of the Commission.¹⁷

On the basis of these preparatory works, the Peacebuilding Commission was – after arduous negotiations – finally established by two concurrent resolutions of the General Assembly and the Security Council in December 2005 and held its inaugural session on 23 June 2006.¹⁸ The two resolutions describe the basic institutional architecture and the pertinent functions of the Commission, which are going to be outlined subsequently.

2. Institutional Framework and Organizational Structure

The resolutions establishing the PBC create the Commission as an advisory subsidiary organ of the General Assembly and the Security Council, the first body of its kind. The General Assembly will have overall responsibility to review the work of the Peacebuilding Commission by debating its annual report.¹⁹

The founding resolutions implemented the World Summit Outcome Document's proposals, such as letting the Commission meet in various configurations, i.e., the Organizational Committee and country-specific meetings.²⁰ The Organizational

¹⁴ Addendum 2 to *In larger freedom*, *supra* note 11, at 3, para. 12, at 6, para. 28.

¹⁵ World Summit Outcome Document, G.A. Res. 60/1, 24, para. 97, (Oct. 24, 2005).

¹⁶ World Summit Outcome Document, G.A. Res. 60/1, 25, paras. 103-04.

¹⁷ World Summit Outcome Document, G.A. Res. 60/1, 24-25, paras. 100-01.

¹⁸ G.A. Res. 60/180 and S.C. Res. 1645 (Dec. 20, 2005); Warren Hoge, *U.N. Creates Commission to Assist Nations Recovering from Wars*, N.Y. TIMES, Dec. 21, 2005, at A25.

¹⁹ As established in Security Council Resolution 1646, para. 2, the annual report submitted to the General Assembly in accordance with General Assembly Resolution 60/180 and Security Council Resolution 1645, para. 15 must also be submitted to the Security Council for an annual debate. S.C. Res. 1645, para. 2, (Dec. 20, 2005).

²⁰ G.A. Res. 60/180 and S.C. Res. 1645, paras. 4, 7, 12, (Dec. 20, 2005).

Committee, whose task will be of a general, more procedural nature involving activities such developing rules of procedure and working methods, consists of a total of 31 Member States including seven from the Security Council (including all five permanent members),²¹ seven States with particular experience in post-conflict recovery from the Economic and Social Council, five out of the top ten financial contributors to the UN budgets (including voluntary contributions to UN agencies and programs and the Peacebuilding Fund), five out of the top ten providers of military personnel and civilian police to UN missions and seven additional members elected by the General Assembly in order to redress remaining geographical imbalances, including States having experienced post-conflict recovery.²²

However, the more substantive work of the Commission is to be done in its country-specific committees in which participants are to be comprised of members of the Organizational Committee, the country under consideration, countries in the region engaged in the post-conflict process and other countries that are involved, relevant regional and subregional organizations, the major financial, troop and civilian police contributors involved in the recovery effort, the senior UN representatives in the field and other relevant UN representatives (including a representative of the Secretary-General) as well as relevant regional and international financial institutions (including representatives from the World Bank, the International Monetary Fund and other institutional donors).²³

In addition, the founding resolutions of the General Assembly and the Security Council request the Secretary-General establish “a small peacebuilding support office staffed by qualified experts to assist and support the Commission”²⁴ and “a multi-year standing peacebuilding fund for post-conflict peacebuilding.”²⁵ The primary functions of the Peacebuilding Support Office (PBSO) will be

²¹ That the P-5 will automatically be members of the Organizational Committee ensues from neither General Assembly Resolution 60/180 nor Security Council Resolution 1645, but was decided by the Security Council on the same day, 20 December 2005 (against the will of the General Assembly), in its separate Resolution 1646.

²² G.A. Res. 60/180 and S.C. Res. 1645, para. 4 (Dec. 20, 2005). The long-awaited election of the members of the Organizational Committee took place in May 2006. For the first 31 members of the Organizational Committee, see <http://www.un.org/peace/peacebuilding/membership.htm>. Mr. Ismael Gaspar Martins of Angola was elected by acclamation as the Committee’s chairman during its inaugural session on 23 June 2006.

²³ G.A. Res. 60/180 and S.C. Res. 1645, paras. 7-9 (Dec. 20, 2005).

²⁴ G.A. Res. 60/180 and S.C. Res. 1645, para. 23 (Dec. 20, 2005).

²⁵ G.A. Res. 60/180 and S.C. Res. 1645, para. 24 (Dec. 20, 2005).

- to prepare the substantive inputs for meetings of the Commission (by gathering and analyzing information on peacebuilding activities and financial commitments)
- to provide high-quality inputs to the planning process for peacebuilding operations
- to conduct best practices analysis and develop policy guidance, as appropriate.²⁶

The PBSO is supposed to work in close cooperation with the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), the United Nations Development Programme (UNDP), and is to draw expertise from other UN agencies such as the Office for the Coordination of Humanitarian Affairs (OCHA) and the Office of the High Commissioner for Human Rights (OHCHR).²⁷ On 16 May 2006, the Secretary-General appointed Carolyn McAskie from Canada as Head of the Peacebuilding Support Office.

The Peacebuilding Fund (PBF) will constitute the final, quintessential segment in the new three-tier peacebuilding architecture of the UN, along with the PBC and the PBSO. It was launched by the Secretary-General on 11 October 2006, in order to kick-start the peacebuilding process with a swift injection of money for the immediate release of resources until more sustained support and engagement of other key stakeholders is established.²⁸ As an “early funding instrument,” the Peacebuilding Fund could compensate for the lack of funding in the period directly after a peace accord has been reached.²⁹ The PBF will rely on voluntary contributions by member States, inter-governmental organizations and other sources, including the private sector, and will not be limited to assist only countries

²⁶ Addendum 2 to *In larger freedom*, *supra* note 11, at 5, para. 21.

²⁷ *Id.* at 7, para. 29. See also Huber, *supra* note 5, at 164-65.

²⁸ G.A. Res. 60/180 and S.C. Res. 1645, para. 24 (Dec. 20, 2005); UN News Service, *Secretary-General launches Peacebuilding Fund to ‘kick-start’ efforts to rebuild after conflict*, Oct. 11, 2006, available at <http://www.un.org/peace/peacebuilding/news.shtml>. As of October 2006, Member States had already contributed and pledged around \$140 million to the Fund, out of a target of \$250 million.

²⁹ The lack of early funding ensues from the fact that it is usually time-consuming to mobilize donors and frequently there remain gaps in funding for activities that donors consider sensitive, such as those linked to political reform or to a country’s security architecture. See *Putting decisions into practice: How will the UN Peacebuilding Commission fulfil its mandate?*, para. 2, *Report on the Wilton Park Conference* (Feb. 10, 2006).

which are on the agenda of the Peacebuilding Commission.³⁰ The fund is managed under the aegis of UNDP, while its day-to-day operation will be overseen by the PBSO, which shall work closely with the Peacebuilding Commission.³¹

II. Potentials – The Functions and Tools of the Peacebuilding Commission

The following section describes the main functions and competences of the PBC the Commission has been equipped with to contribute to a successful transition to stable peace, security and development. Particular emphasis will thereby be put on new paths the Commission deems proper to pursue in order to enhance transitional justice related initiatives and processes. Although the precise shape and functioning of the PBC might only be palpable once the Commission has found its proper operative role, I will finally also attempt to deliver a first assessment of its usefulness and presumable effectiveness.

1. Basic Functions and Competences of the Commission

Contrary to the more open wording adopted during the preparatory works, the PBC was, in the end, explicitly restricted to serve as an “intergovernmental *advisory* body.”³² Pursuant to the founding resolutions its main purposes are the following:

(a) To bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery; (b) To focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development;

(c) To provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, to develop best practices, to help to ensure predictable financing for early recovery activities and to

³⁰ Huber, *Peacebuilding Commission*, supra note 5, at 166-67.

³¹ UN News Service, supra note 28.

³² G.A. Res. 60/180 and S.C. Res. 1645, para. 1 (Dec. 20, 2005) (emphasis added).

extend the period of attention given by the international community to post conflict recovery.³³

It is obvious that these rather brief and generic purposes will be merely conclusive and will leave considerable margin for delimiting the Commission's competences, in particular in the light of the overall goal to achieve "sustainable peace."³⁴ As a corollary, much will depend on how the Commission, in conjunction with the PBSO, assumes its role and finds its path in the first country-specific meetings on Burundi and Sierra Leone.³⁵ To justify a possible broader and bolder approach, the Commission could rely on its "implied powers" for the fulfillment of successful peacebuilding initiatives.³⁶ Such an argument goes back to the very notion of peacebuilding which was unsurprisingly not defined in the resolutions establishing the Commission. Though it is contested as to what is exactly covered by peacebuilding,³⁷ today it is beyond dispute that peacebuilding necessitates a holistic approach and consists of a subset of activities in the political, economic, societal and judicial field.

Not least because of this rather wide notion of peacebuilding, there was a certain desire by member States and within the UN organization itself to restrict the competences of the Commission in order to avoid a "sorcerer's apprentice scenario" that could result in a PBC getting out of bounds and engaging in another UN organ's business. In this regard, the confinement to an advisory body sets clear limits and was bolstered by modest resource allocations to the PBSO as well as by the moderate list of express powers.

The PBC's role as a subsidiary organ with restricted room for manoeuvre is also reflected when it comes to determining the agenda of the Commission. According to the resolutions establishing the PBC, the Organizational Committee relies on requests for advice from the Security Council, ECOSOC, the Secretary-General, and, in exceptional circumstances and only when the Security Council is not seized

³³ G.A. Res. 60/180 and S.C. Res. 1645, para. 2 (Dec. 20, 2005).

³⁴ G.A. Res. 60/180 and S.C. Res. 1645, para. 1 (Dec. 20, 2005), para. 5 and e contrario from para. 22 (Dec. 20, 2005).

³⁵ See *infra* III.2.

³⁶ On the implied powers of the PBC, see also *infra* II.3.

³⁷ For a definition of peacebuilding, see *infra* II.2.a.i.

with the matter, also from a Member State on the brink of lapsing or relapsing into conflict.³⁸ As a result, the Commission lacks the power to act *proprio motu*.

Once the PBC has been requested to act and it convenes in its country-specific format, however, the need to determine its ambit resurfaces again. Time will show how the Commission is going to apply the explicitly transferred powers in a concrete scenario. The following considerations might thereby play a role.

The most fundamental and explicit task of the Commission is to draw attention to a country recovering from conflict and to serve as a *coordinator* as well as a *guardian* of the peacebuilding process. The PBC plays the very fundamental role of extending the period of political attention to post-conflict recovery in a certain country or sub-region.³⁹ Even though it was denied an express “early warning or monitoring function”,⁴⁰ the Peacebuilding Commission still has the important capacity to point out obstacles and hazards to peacebuilding efforts when it gives advice or furnishes reports to other UN organs, including the Security Council, once a country has been put on its agenda. The contrary position would be formalistic and, in my opinion, run counter to the Secretary-General’s own holistic approach regarding the indivisibility and interdependence of “security, development and human rights.”⁴¹ Besides, the rejection of an “early warning procedure” within the PBC was intended to clarify that the Commission should be excluded from “conflict prevention” in *non*-post-conflict situations, which should remain the primary responsibility of the Security Council.⁴² As a matter of fact, the PBC’s performance as a guardian of a peace-building process will significantly depend on the Security Council’s willingness to enter into dialogue with the Commission, e.g., by requesting advice on a specific country or region.

Most important, the PBC is intended to become a *forum* for calibrating and streamlining peacebuilding efforts. As an advisory body, it is supposed to assemble relevant actors to coordinate the reconstruction and institution-building efforts for

³⁸ G.A. Res. 60/180 and S.C. Res. 1645, para. 12 (Dec. 20, 2005)

³⁹ G.A. Res. 60/180 and S.C. Res. 1645, para. 2(c) (Dec. 20, 2005); Chesterman, *supra* note 12, at 169.

⁴⁰ *In larger freedom*, *supra* note 7, at 32, para. 115; Addendum 2 to *In larger freedom*, *supra* note 11, at 4, para. 17.

⁴¹ *In larger freedom*, *supra* note 7, at 5-6, paras. 12-17.

⁴² The Security Council, *Security Council Report, Peacebuilding Commission*, no. 3, p. 9 (June 23, 2006). To put it another way, the PBC should not have an early warning function in *stricto sensu*, meaning that it could not bring countries/regions to the attention of the international community on its own motion.

effective and integrated post-conflict development.⁴³ It is meant to improve the coordination of all relevant actors within and outside the United Nations to guarantee that these pull together in their attempts to facilitate a country's transition to peace and stability.⁴⁴ To achieve that end, the founding resolutions lay down that representatives from the World Bank, the International Monetary Fund and other institutional donors ought to be invited to participate in all meetings of the Commission, and that the PBC will work in cooperation with national or transitional authorities in the country under consideration, as well as in consultation with pertinent regional or subregional organizations, to ensure their involvement in the peacebuilding process.⁴⁵ Furthermore, the resolutions call upon the Commission also to consult with civil society, non-governmental organizations and the private sector engaged in peacebuilding activities.⁴⁶ From an organizational perspective, these consultative and coordinative tasks should predominantly but not exclusively be looked after by the Peacebuilding Support Office. Thus, in this respect it is fair to say that the PBSO "will have a *networking role* to ensure that expertise is located and placed at the UN's disposal, and to provide a locus for knowledge that currently lacks an institutional home, such as in democratic transitions and the rule of law."⁴⁷

In sum, the first impression seems to be that the PBC has to be conceptualized as a classical *agora* rather than as a management-oriented, functionalist organ of an international organization. Pursuant to Jan Klabbers' appropriate classification, such an *agora* which is tantamount to a public realm or a talking shop in which international issues can only be debated must be contrasted with managerial institutions consisting of expert bodies which actually get things done.⁴⁸

However, one might object that this conclusion constitutes a hasty judgment as several features of the new Commission do indicate managerial tasks. Such a

⁴³ Nicholas Leddy, *United Nations Update*, 13 HUMAN RIGHTS BRIEF 35, 36 (2005).

⁴⁴ G.A. Res. 60/180 and S.C. Res. 1645, para. 12 (2005). The urgent need for better coordination in post-conflict peacebuilding was bluntly pointed out by the High-level Panel report, which concluded: "Post-conflict operations...have too often been characterized by countless illcoordinated and overlapping bilateral and United Nations programmes, with inter-agency competition preventing the best use of scarce resources." *A more secure world*, *supra* note 3, at 18, para. 38.

⁴⁵ G.A. Res. 60/180 and S.C. Res. 1645, paras. 9-11 (2005).

⁴⁶ G.A. Res. 60/180 and S.C. Res. 1645, para. 21 (2005).

⁴⁷ *Putting decisions into practice*, *supra* note 29, at para. 29 (emphasis added).

⁴⁸ Jan Klabbers, *Two Concepts of International Organization*, 2 INTERNATIONAL ORGANIZATIONS LAW REVIEW 277, 280-284 (2005).

management-oriented element is mirrored by the fact that the Commission seems capable of providing financial injections to a country, in particular in the immediate aftermath of a conflict until further substantial reconstruction and development programmes are set up. For this purpose the Peacebuilding Fund (PBF), which will be administered by the PBSO, is supposed to ensure “the *immediate* release of resources needed to launch peacebuilding activities and the availability of appropriate financing for recovery.”⁴⁹ While one must emphasize that, in regards to funding, the PBC should not become limited to the mere management of the PBF, it is questionable to what extent the Commission’s role will be to assemble donors and become the platform for donor conferences.⁵⁰ On the one side, it is worth mentioning that an institutionalized standing pledging conference adopting, for instance, the role of the Interim Cooperation Framework in Haïti, would be of inestimable value.⁵¹ On the other side, it seems doubtful that the PBC would dispose of the means and resources to perform such a function, and it also must be borne in mind that existing funds, such as the Post-Conflict Fund of the World Bank, the Office of Transitional Initiatives at USAID, or the multi-agency Multi-Country Demobilization and Reintegration Program managed by the World Bank, would regard such an approach as unwanted competition.⁵² Regardless of these considerations, the Peacebuilding Fund itself is undisputedly supposed to occupy a clearly defined niche and constitutes an additional provider of capital for specific peacebuilding initiatives.⁵³ Thus, as recent practice concerning Sierra Leone and Burundi confirms,⁵⁴ the PBF will most likely provide money to all countries which come under consideration by the Peacebuilding Commission (so-called focus countries).

⁴⁹ G.A. Res. 60/180 and S.C. Res. 1645, para. 24 (2005) (emphasis added).

⁵⁰ See Chesterman, *supra* note 12, at 171.

⁵¹ See Haiti – Cadre de Cooperation Interimaire, <http://haiticci.undg.org/index.cfm?Module=ActiveWeb&Page=WebPage&s>

=introduction.

⁵² In a much narrower sense, the PBC could for instance only address the important question of poor donor behavior and provide incentives for donors to meet the real needs of the target country in order to make the aid system more effective and enable a better sequential timing of donor money and programs built thereupon. See *Putting decisions into practice*, *supra* note 29, at para. 17.

⁵³ Gareth Evans, President, International Crisis Group, What Difference Would the Peacebuilding Commission Make: The Case of Burundi, Address to EPC/IRRI Workshop on Peacebuilding Commission and Human Rights Council (Jan. 20, 2006) (available at <http://www.crisisgroup.org/home/index.cfm?id=3903&l=1>).

⁵⁴ See *infra* III.2.

In addition, the managerial concept of an international body seems to be embedded in the PBC's country-specific formats, in which it shall support the development of high-quality integrated peacebuilding strategies. While it cannot develop nationally-led strategies, it can, based upon them, promote a strategic compact between government and international partners.⁵⁵ Thus, the Commission's task could be to consult with governments and international organizations and to provide analysis, e.g., on the root causes of economic crisis. In this context, the PBC undertook its first field visit to Sierra Leone from 19 to 25 March 2007 "to forge a relationship with stakeholders on the ground"⁵⁶ and thereby elaborated on strategies concerning the key issues for Sierra Leone, i.e., primarily youth employment and empowerment, good governance, justice sector and security sector reform and capacity-building.⁵⁷ Whether the PBC remains within its narrow, imprecise framework confined to mere consulting or also assumes tasks of a more operational nature is yet hard to prognosticate. In my opinion, it is important to stress that the PBC's country-specific meetings should develop into a proactive institution pulling the strings in a peacebuilding process. Therefore, the PBC must be extremely careful and keen to establish *effective sequencing* of the steps taken including the subtle task of allocating resources.⁵⁸ Integrated strategies which take sequencing of actions seriously must always ensure national ownership to the highest degree attainable in the circumstances of the case and set clear benchmarks to determine when national institutions are able to take over from the international community or NGOs.

In any event, it is conceivable that the Peacebuilding Commission is going to serve extensively as a "think tank" on peacebuilding, harnessing significant experience which undoubtedly already exists within the UN today and developing novel

⁵⁵ See *infra* II.2.b.

⁵⁶ See U.N. Doc. PBC/10 (Feb. 21, 2007).

⁵⁷ *Report of the Peacebuilding Commission mission to Sierra Leone (19 - 25 March 2007), annexed to Identical letters dated 10 May 2007 from the Chairman of the Peacebuilding Commission addressed to the President of the General Assembly and the President of the Security Council*, U.N. Doc. A/61/901-S/2007/269 (May 14, 2007).

⁵⁸ For the requirements of sequencing, see *Putting decisions into practice*: "The process must be broken down into manageable phases, with a credible set of actions where results can be demonstrated and trust created. Once goals are agreed, there needs to be consensus on strategy and detailed negotiation of rules. Designation of critical tasks becomes hugely important; and leaders and managers must be mandated to perform these tasks. A 'living' strategy requires constant reflexive monitoring so that adjustments can be made as contexts shift. This requires a degree of flexibility in decision-making. The PBC can help to build a coalition of international interests around a country, and play a mediating role to ensure that goals are realistic and that progress is well understood." *Putting decisions into practice*, *supra* note 29, at para. 22.

expertise on both an ad-hoc and a permanent basis.⁵⁹ In respect thereof, the PBSO, in conjunction with the country-specific meetings, could create distinct peacebuilding *modules* on both thematic and country-specific levels. Thereby, the PBSO should also assume the task of functioning as a *repository* in peacebuilding affairs.

Against the backdrop of its nature as an advisory body to the “managerial” main organs of the General Assembly and particularly the Security Council, the Peacebuilding Commission represents primarily but not exclusively the agora concept of an international institution.⁶⁰ However, the founding resolutions also provide room for a more managerial approach, which will most notably be assumed by the Peacebuilding Fund (with regard to funding of peacebuilding initiatives in focus countries) and the Peacebuilding Support Office (with respect to a possible function as repository for peacebuilding). While it is clear that major managerial tasks in peacebuilding will rest not only with the Security Council but with other international and national institutions, the extent of the managerial approach followed by the PBC remains to be seen by the practice the Commission adopts in its first years of operations. Therefore, and contrary to what is generally typical for international organizations,⁶¹ it ensues from the design of the Peacebuilding Commission that it is not the managerial but the agora concept which is intended to play the first fiddle.

2. *Specific Functions and Competences of the Commission as Regards Transitional Justice*

a) *Transitional Justice as an Indispensable Ingredient of Peacebuilding*

Without any explicit provisions on transitional justice in its founding resolutions, the argument that the Peacebuilding Commission may take up or enhance transitional justice initiatives rests upon the relationship between post-conflict peacebuilding and transitional justice. The view taken here is that transitional justice forms an absolutely essential component in every post-conflict peacebuilding⁶² process and thus can be seen as a subset of peacebuilding in

⁵⁹ *Putting decisions into practice*, *supra* note 29, at para. 29.

⁶⁰ In this respect, the agora will be constituted by both the Organizational Committee and the country-specific meetings of the Commission.

⁶¹ Klabbers, *supra* note 48, at 287.

⁶² As regards the term “post-conflict peace-building,” which is used for instance in the Secretary-General’s Report, *An Agenda for Peace Preventive diplomacy, peacemaking and peace-building* (see *An Agenda for Peace Preventive diplomacy, peacemaking and peace-building*, *supra* note 4), it must be indicated that it will be used in this paper interchangeably with peacebuilding.

general. Such a proposition ensues from the concept and understanding of peacebuilding on the one side and transitional justice on the other, notions which will be epitomized in the following.

i) The Notion of Peacebuilding

Especially in the course of the 1990s, a vast amount of policy documents and scholarly contributions on peace-keeping and peacebuilding have evolved, including definitions of peacebuilding. Secretary-General Boutros Boutros-Ghali described post-conflict peacebuilding broadly as any “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict” and distinguished it from preventive diplomacy, peacemaking and peace-keeping, a classification which has been proven appropriate and has been maintained in subsequent UN practice.⁶³ However, parts of academia proffer differing classifications, such as a proposal coming from Michael Doyle and Nicholas Sambanis who oppose peacebuilding to war-making and advocate for an even broader notion of peacebuilding, encompassing peacemaking, peace-keeping and post-conflict reconstruction as post-conflict peacebuilding *stricto sensu*.⁶⁴ A different, albeit very similar, concept of peacebuilding is often depicted as “State-building,” or less frequently, due to its aftertaste from decolonization, “nation-building”.⁶⁵

For the purpose of this paper, though, the UN jargon will be followed and peacebuilding is to be understood in the sense of post-conflict reconstruction with the ultimate purpose of establishing sustainable peace.⁶⁶ In order to move from an unsteady post-conflict situation to the sublime goal of sustainable peace, peacebuilding must involve “a full range of approaches, processes, and stages

⁶³ *An Agenda for Peace Preventive diplomacy, peacemaking and peace-building*, *supra* note 4, at paras. 20-21.

⁶⁴ MICHAEL W. DOYLE AND NICHOLAS SAMBANIS, MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS 10-11 (2006), in particular note 16.

⁶⁵ The language on these terms varies -- State-building in general focuses more on the functioning of States as the highest institutions of governance in a certain territory. *See* Chesterman, *supra* note 12, at 169. On the - in particular towards the end of the 1990s remarkably increasing - UN efforts on post-conflict reconstruction through assuming some or all governmental powers on a temporary basis in the form of transitional administrations. *See generally* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING (2004). For a description of the pertinent UN activity in the language of nation-building, *see, e.g.*, Seth G. Jones and James Dobbins, *The UN's Record in Nation Building*, 6 CHICAGO JOURNAL OF INTERNATIONAL LAW 703 (2006).

⁶⁶ To put it in other words, peacebuilding denotes the support in making the transition from conflict to lasting peace. *See* Huw Llewellyn, *The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 718, 723 (2006).

needed for transformation toward more sustainable, peaceful relationships and governance modes and structures.”⁶⁷ Accordingly, peacebuilding in any event entails not only the task of obtaining security and putting an end to hostilities but also the task of engaging in the parallel longer term process aimed at the reconciliation of people and groups, the reform or rebuilding of institutions, structures and economies so as to reduce the possibility of a violent setback.⁶⁸ In contradistinction to State-building, peacebuilding embraces a far broader range of activities than simply setting-up functioning and enduring governance structures and addresses also historical, economical and societal threats to the peace.⁶⁹ Thus, peacebuilding encompasses an enormity of measures, which may vary largely depend on the circumstances and root causes of a specific conflict. In brief, peacebuilding can be depicted as an attempt to create the socio-political conditions for stable peace.⁷⁰

ii) The Notion of Transitional Justice

Having in mind that attempts to define transitional justice vary and undergo constant change, transitional justice can generally be referred to as a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma, including genocide or civil war, in order to build a more democratic, just, or peaceful future.⁷¹ To put it another way, transitional justice is the study of the way societies come to terms with a legacy of gross violations of human rights abuses or of the conception of justice in political transitions.⁷² In countries undergoing the radical shift from repression to democracy or from conflict to peace, the question of transitional justice presents the very first test for the establishment of the rule of law and the new, democratic government.⁷³ In the broadest sense, transitional justice stands for mechanisms of

⁶⁷ Catherine Morris, *What is Peacebuilding? One Definition*, PEACEMAKERS TRUST <http://www.peacemakers.ca/publications/peacebuildingdefinition.html>.

⁶⁸ Jessica Almqvist, *In Larger Freedom: A Second Call for a Peacebuilding Commission*, FUNDACIÓN PARA LES RELACIONES INTERNACIONALES Y EL DIÁLOGO EXTERIOR (FRIDE), Apr. 2005, <http://www.fride.org/eng/Publications/Publication.aspx?Item=759>.

⁶⁹ Chesterman, *supra* note 12, at 156-57.

⁷⁰ See ROLAND PARIS, *AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT* 68 (2004).

⁷¹ Louis Bickford, *Transitional Justice*, in *THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* 1045-47 (Dinah Shelton ed., 2004)

⁷² RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 3 (2000).

⁷³ See Neil J. Kritz, *The Dilemmas of Transitional Justice*, in *TRANSITIONAL JUSTICE – HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES*, VOL. I xxi (Neil J. Kritz ed., 1995).

what countries “should do about a difficult past” and thus, not only applies to post-conflict societies but also to authoritarian and conflict-ridden societies and mature democracies which are reckoning with past evils like slavery or collaboration with Nazi extermination efforts.⁷⁴ A very well crafted definition of transitional justice which shall be adhered to in this paper was provided by the Secretary-General in a report on the rule of law and transitional justice:

The notion of ‘transitional justice’...comprises 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 involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.⁷⁵

iii) Synopsis: How Peacebuilding and Transitional Justice Overlap

Both peacebuilding and transitional justice are open-ended concepts which are contrived in order to achieve a common purpose – that is sustainable peace. While peacebuilding is the broader notion, transitional justice forms a subset of a peacebuilding initiative, providing a process for establishing public deliberation, truth, reconciliation, compensation of victims and accountability of perpetrators. In various ways, transitional justice and peacebuilding are inextricably linked to each other – this can be exemplified by the adoption of lustration laws as a tool of an institutional reform process ensuring that former perpetrators will be banned from public office, at least for a certain period of time.

However, it could be argued that transitional justice and peacebuilding should be treated as distinct because the former is largely backward-looking whereas the latter is a process solely for the future. Due to oversimplification, neither position is tenable. It is conventional wisdom that peacebuilding demands combating the root causes of a conflict and must thus include a backward analysis.

⁷⁴ David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS AND INTERNATIONAL AFFAIRS 43, 43-44 (1999).

⁷⁵ The Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*, para. 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

Furthermore, the approach towards transitional justice is by far not exclusively backward-looking but increasingly takes a future-centered stance. This becomes visible when one rethinks the very idea of reconciliation. In fact, there is a struggle between transitional justice advocates concerning the extent of backward justice necessary. This amounts to adverse positions between those who believe that fighting impunity requires extensive justice mechanisms for past perpetrators versus those who fear that corrective justice inherently may squander scarce resources and could overburden fledgling democracies on their way towards peace and stability. Accordingly, Ackerman bridges the gulf between past and future, when he argues that “[t]he challenge is to do justice to the victims of the greatest injustice without sacrificing the precious opportunity to build a strong constitutional foundation for the *future* – one in which the terrors of the *past* will become a grim but distant memory.”⁷⁶ This assessment conforms to the finding that “practices of transitional justice that emerge at this time are closely associated with the rise of State-building.”⁷⁷ In sum, it must be highlighted that justice and peace are neither mutually exclusive objectives nor can they be played off against each other, but constitute rather mutually reinforcing imperatives.⁷⁸

As a result, it is fair to say that a post-conflict peacebuilding process, in order to be successful, requires – depending on the circumstances of every single case – a certain amount of varying transitional justice efforts. As a corollary, the Peacebuilding Commission, in its efforts to foster enduring peace and stability, should consider and integrate transitional justice mechanisms in order to ensure a comprehensive approach towards post-conflict reconstruction.

b) The Commission’s Mandate and Transitional Justice

Without any explicit provisions on transitional justice in the resolutions establishing the PBC, one must illuminate the ambit of the Commission’s main functions. Considering its role as an advisory body and thus the absence of any operational power, it is perhaps the PBC’s most important and far-reaching competence to propose *integrated strategies* for post-conflict peacebuilding and recovery.⁷⁹ However, the resolutions fail to substantiate how such strategies could

⁷⁶ BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 98 (1992).

⁷⁷ Ruti G. Teitel, *Transitional Justice in a New Era*, 26 *FORDHAM INTERNATIONAL LAW JOURNAL* 893, 896 (2003).

⁷⁸ *The rule of law and transitional justice*, *supra* note 75, at 1 (summary).

⁷⁹ G.A. Res. 60/180 and S.C. Res. 1645, para. 2 (Dec. 20, 2005).

and should look like. Hence, much will depend on the practice the Commission chooses to follow. Against the backdrop that the work of the PBC is predicated upon the consent of the affected State and that its country-specific meetings will meet in collaboration with representatives from the country under consideration, involved or engaged neighbor countries as well as relevant regional and subregional organizations, the major financial, troop and civilian police contributors, senior and relevant UN representatives as well as regional and international financial institutions,⁸⁰ it is important to note that the Commission is not meant to author and impose strategies upon a country. In reality, the PBC is supposed to provide advice to governments and to inform the design of high quality strategies in partnership with national governments.⁸¹ As an advisory body, the PBC will therefore not make any decisions but issue recommendations delivered to all groups involved in a specific post-conflict reconstruction.

However, it would be regrettable if the Commission chose a very narrow approach as it must not shy away from adopting a proactive and enduring role in pushing on with the adoption and implementation of the strategy agreed upon. One possible, more formalized avenue to warrant enforcement and adherence to an adopted strategy would be to flesh out a “compact” between the respective government and all engaged international actors including built-in mechanisms of accountability of all partners.⁸² The pertinent example hitherto set is the Afghanistan Compact of January 2006. Succeeding the Petersberg agreement of December 2001, the Compact is the result of consultations between the Government of Afghanistan, the United Nations and the international community, and represents a framework for cooperation for the next five years.⁸³ The Peacebuilding Commission could provide expertise or even the framework for the establishment of similar cooperation frameworks.⁸⁴

The emphasis on *integrated* strategies in the founding resolutions of the PBC signifies the need for in-depth advice and analysis of the roots of disorder and threats to peace in a specific conflict-ridden country. In this regard the PBC could

⁸⁰ G.A. Res. 60/180 and S.C. Res. 1645, para. 7 (Dec. 20, 2005).

⁸¹ *Putting decisions into practice*, *supra* note 29, at paras. 12-13.

⁸² *Id.* at 14.

⁸³ The Afghanistan Compact, Jan. 31, 2006, available at www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1134650705195.

⁸⁴ Another initiative, though different and predominantly development aid-focused, is the Interim Cooperation Framework for Haïti. See <http://haiticci.undg.org/index.cfm?Module=ActiveWeb&Page=WebPage&s=introduction>.

have an added value. Instead of taking the all-too-common “laundry list-approach”, in which multiple actors pursue their preferred issues in tandem, the Commission should try to carefully sequence activities in order to achieve maximum results.⁸⁵ It is in this very point that transitional justice comes into play. The Commission could craft viable options for transitional justice mechanisms including plans for their implementation and calibrate these efforts with other post-conflict reconstruction initiatives. As an example, the reform of the security sector must be carefully timed vis-à-vis reconciliation and human rights activities or the reform of the judicial process, so that the local population is confident that their rights will not be abused.⁸⁶

Thereby, the PBC can be reliant upon considerable expertise on transitional justice within the UN system and attempt to channel this flow of knowledge and tailor a case-by-case transitional justice program to be applied to the specific country under consideration. Primarily, the Commission should harness the UN’s resources and experience, as prominently demonstrated in the establishment of the hybrid court for Sierra Leone⁸⁷ or the role of the UN transitional administration in East-Timor (UNTAET).⁸⁸ In this regard, the PBC must perform its role as a think tank and provide expertise in the form of both specific recommendations and general reports. Time will tell which strategies the PBC will pursue but its success will significantly depend on resource allocations. Given the fact that the PBSO is intended to be reasonably small, the Commission should engage in close cooperation with other relevant UN departments such as DPKO, UNDP, OCHA or UN affiliated organizations such as the International Peace Academy.

Furthermore, the Peacebuilding Commission is called upon to consult with civil society, nongovernmental organizations, including women’s organizations, and the

⁸⁵ *Putting decisions into practice, supra* note 29, at para. 11.

⁸⁶ *Id.*

⁸⁷ See S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000); The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, available at <http://www.scs-l.org/scsl-agreement.html>. See also Lisa Danish, *Internationalizing Post-Conflict Justice: The “Hybrid” Special Court of Sierra Leone*, 11 BUFFALO HUMAN RIGHTS LAW REVIEW 89 (2005); Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Court of Sierra Leone*, 19 NEW YORK LAW SCHOOL JOURNAL OF HUMAN RIGHTS 849 (2003).

⁸⁸ See Hansjoerg Strohmeyer, *Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER FORUM OF WORLD AFFAIRS 107 (2001); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 952 (2001).

private sector engaged in peacebuilding activities.⁸⁹ Hereby, the PBSO should, where it finds appropriate to do so, avail itself of the opportunity to request thematic as well as country-specific expertise from external organizations and perform its networking functions. The recommendations the Commission is going to proffer will, in any event, rest upon the circumstances of the post-conflict situation. Theoretically, it is not inconceivable that the PBC in its country-specific meeting would elaborate a comprehensive transitional justice program and recommend, if necessary, the Security Council to take action. Yet, such a course of action presupposes the Security Council will request the Commission's advice, which could make the ambit of the request the decisive point. In any event, it is obvious that *realpolitik* will, in the long run, considerably determine whether the new advisory body will be taken seriously and will be able to operate successfully. The nature of the cases submitted to the Commission will, of course, constitute the most determinative factor of the approach the Commission might take.⁹⁰ This is exemplified by the very first two cases before the PBC, Sierra Leone and Burundi, where, to a different degree, transitional justice mechanisms are already fully operational.⁹¹

Aside from providing expertise, the Commission could be contributive in raising funds for domestic Transitional Justice programs and subsidize Truth Commissions, reparations schemes or various forms of community reconciliation programs. Financing transitional justice is a key factor, as lacking funds constitute a substantial hurdle, in particular for developing countries emerging from civil-war or having deprived a fraudulent, oppressive regime from power. The dilemma is that transitional justice mechanisms like truth commissions need considerable human, financial and technical resources.⁹² In fact, transitional governments very often simply cannot afford to pay for these efforts or undergo public pressure to spend the State's limited available resources instead on the provision of much-

⁸⁹ G.A. Res. 60/180 and S.C. Res. 1645, para. 21 (Dec. 20, 2005). On the opportunities for civil society engagement, see Vanessa Hawkins Wyeth, Friedrich Ebert Stiftung New York, *Report of the Working Conference "Getting the Peacebuilding Commission off the Ground – How to Include Civil Society on the Ground,"* (Sept. 5 2006), available at <http://www.fes-globalization.org/conferencereports.htm>.

⁹⁰ Transitional justice has become a very broad synonym for frequently fundamentally different scenarios. For an overview of different kinds of transition, see the various contributions in Chapter II, *Distinguishing between Transitions: How Circumstances Shape the Available Options*, in TRANSITIONAL JUSTICE – HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, Vol. I 55-120 (Neil J. Kritz ed., 1995)

⁹¹ For more detail, see *infra* III.2.

⁹² See Kritz, *supra* note 73, at xxix. The author shows that in light of the lack of financial means to establish transitional justice efforts, foreign governmental or private funding is an option, pointing out that the Truth Commission for El Salvador received \$1 million, which amounted to some forty percent of the Commission's total budget, from the United States government.

needed food, housing, health care or education facilities. In respect thereof, the Peacebuilding Commission could provide invaluable financial assistance both through the PBF as well as additional initiatives and specific transitional justice programs agreed upon within its country-specific meeting.⁹³ Hereby, the PBC must avail itself of the opportunity to involve the International Financial Institutions (IFIs) in order to mobilize funds.⁹⁴ The allocation of these funds to support domestic justice and reconciliation efforts might then be made contingent upon their compatibility with international law standards and UN policies, similar to the conditionality in international trade law or in granting official development assistance.⁹⁵ While the PBC must avoid imposing transitional justice institutions in a neo-imperialistic way, the UN has to secure that certain human rights standards are met in order to prevent the transitional justice process to become a sham package. In this respect, the controversy and tensions caused within the UN in establishing the Extraordinary Chambers in Cambodia might serve as a deterrent which must not be repeated.⁹⁶ Again, this must by no means be interpreted as to attenuate the significance of local ownership in the peacebuilding process, which is supposed to be guaranteed by the substantial role of the State under consideration in the country-specific meetings of the PBC.

III. Perspectives – the PBC’s First Tentative Steps

First, the process of how the Peacebuilding Commission decides which countries it is going to address shall be epitomized. Subsequently the Commission’s possible

⁹³ As with other strategies and efforts of the PBC, the set-up of transitional justice programs and thus also their financing must be taken with due diligence regarding the sequencing of other actions.

⁹⁴ On the engagement of IFIs in post-conflict situations and their relationship with the Security Council, see Kristen E. Boon, “Open for Business”: *International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 *NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS* 513, 519-33, 553-68 (2007).

⁹⁵ On the justification and legitimacy of such conditionality from an incremental literature, see, e.g., Diego J. Liñán Noguerras and Luis M. Hinojosa Martínez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 *COLUMBIA JOURNAL OF EUROPEAN LAW* 307 (2001). See also Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 *GEORGETOWN PUBLIC POLICY REVIEW* 1, 7-17 (2001).

⁹⁶ The UN had unsuccessfully sought to amend the agreement on the establishment of the chambers to provide for a majority of international judges in both chambers, recognizing that the composition of the Extraordinary Chambers failed to protect the tribunal against political interference and intimidation. Given the precarious state of the judiciary in Cambodia, this risk was perceived as significant. However, the Cambodian government refused to accept an amendment that would remove the Cambodian majority. See Sarah Williams, *The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?*, 53 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* (2004) 227, 234.

input on transitional justice mechanisms in Sierra Leone and Burundi, the first countries submitted to the PBC for consideration, will be evaluated.

1. *Determination of the Commission's Agenda*

According to Article 12 of GA Res. 60/180 and SC Res. 1645 (2005), it is the task of the Organizational Committee to establish the agenda of the Commission. However, the Organizational Committee lacks discretion with regard to the selection of post-conflict countries it deems proper to work on and is reliant upon a request for advice from the Security Council, the Secretary-General, or in exceptional circumstances with the consent of a concerned Member State which is on the verge of lapsing or relapsing into conflict from the Economic and Social Council or the General Assembly, provided that the Security Council is not seized with the matter under Article 12 of the UN Charter.⁹⁷ Furthermore, a conflict-ridden UN Member State can also request the Commission for advice when this State is on the brink of backsliding into conflict and it is not on the agenda of the Security Council.⁹⁸

Article 12 of the founding resolutions is an extremely cautious trigger of the Commission's work. First, it highlights the Security Council's *primary* role in dealing with peace and security and thus avoids any conceivable interference into Council affairs. In addition, the provision reflects the principle of non-intervention by the UN pursuant to Article 2 (7) of the UN Charter, at least insofar as the requests of the ECOSOC and the General Assembly require prior approval by the concerned countries. In my opinion, the consent of the affected country is generally of particular value and should in any event be sought, even if the Security Council will rule on the matter. Yet, situations may arise where countries might oppose the advice of the Commission and thus inhibit its work, unless the Security Council decides on the matter. In these instances, the Commission might be barred from any engagement. From an Article 2 (7) UN Charter perspective, the consent is unlikely to become a strict requirement because the Commission as a mere advisory body does not even have the capacity to "intervene" into the domestic jurisdiction of a Member State.⁹⁹

⁹⁷ G.A. Res. 60/180 and S.C. Res. 1645, para. 12 (2005).

⁹⁸ G.A. Res. 60/180 and S.C. Res. 1645, para. 12 (2005).

⁹⁹ See Questions and Answers on the UN Peacebuilding Commission, #6, <http://www.un.org/peace/peacebuilding/questions.htm>.

2. *Sierra Leone and Burundi – The Litmus Test for the PBC*

Given the limited size and resources of the Peacebuilding Commission it was clear from the very beginning that the PBC would never be able to address all post-conflict peacebuilding efforts all over the world at a certain point of time. It remains to be seen, however, whether the Organizational Committee might take an active approach by issuing more general recommendations and statements on peacebuilding or whether it restrains itself to its administrative tasks such as the adoption of rules of procedure and working methods for the work of the Commission. According to the literal meaning of the founding resolutions it would have to adhere to the latter approach as para. 12 of SC Resolution 1645 (GA Res. 60/180) makes the agenda established by the Organizational Committee contingent upon requests from the enlisted UN organs and Member States respectively. As a corollary, the selection of the countries to be subject to the Commission's advice will turn out to be extremely delicate and most likely depend on political and pragmatic considerations.¹⁰⁰ At the same time it is fundamental that the selection of a small number of countries must not result in a total absence of limelight on countries not selected to be on the PBC's agenda.¹⁰¹ Means to address countries not selected by the PBC could, for instance, rest with the Annual Report of the Commission submitted to the General Assembly and the Security Council, statements issued by the Organizational Committee, as well as studies or conferences initiated by the PBSO. In this regard, it is important to highlight that the resources of the Peacebuilding Fund are in no way exclusively reserved to the countries on the agenda of the PBC but open to all countries in need of financial assistance for post-conflict reconstruction work.¹⁰²

It has always been stressed by UN officials and diplomats that the first countries the Commission is going to deal with shall not be too overwhelming but manageable in size and complexity. After some rumors about possible countries which could be placed on the PBC's first agenda (including Liberia, Haïti and East

¹⁰⁰ Irrespective of the fact that the provisions do not call for the consent of the affected States in the case of a request by the Security Council or the Secretary General, such a consent is in practical terms highly desirable and de facto always required. Otherwise, the work of the PBC in its country-specific meetings either in New York or on-site in the selected country will be substantially inhibited.

¹⁰¹ Renske Heemskerk, Friedrich-Ebert-Stiftung New York and Global Partnership for the Prevention of Armed Conflict, *Background paper for "Getting the Peacebuilding Commission off the Ground – How to Include Civil Society on the Ground"* (Sept. 5, 2006), available at www.gppac.org/documents/GPPAC/process/UN_Peacebuilding_Commission/Seminar_PBC_position_RH_29082006.doc.

¹⁰² See Huber, *supra* note 5, at 167.

Timor) the Security Council requested in a letter from 21 June 2006 – with the prior consent of the affected countries – the Commission’s advice on the situations in Burundi and Sierra Leone.¹⁰³ Accordingly, the PBC, in its first Organizational Committee meeting, agreed to reconvene within the following weeks to continue consultations and to consider the Security Council’s request to provide advice on the situations in Burundi and Sierra Leone.¹⁰⁴ The Peacebuilding Commission welcomed the request by the Security Council and started its briefings on the situation in Burundi and Sierra Leone on 19 July 2006.¹⁰⁵ At its first and second country-specific meetings on 13 and 16 October 2006 respectively, the Commission recommended both Sierra Leone and Burundi for support from the newly established Peacebuilding Fund.¹⁰⁶

This reflects the PBC’s cautionary and limited capacities in that it was requested to deal with two countries which have not recently emerged from conflict but where peace agreements have been in force a considerable time and post-conflict reconstruction efforts are ongoing, but at the same time still heavily rest upon international support and attention.¹⁰⁷

As a result, transitional justice mechanisms in both countries have been projected, established or even concluded, as it is the case with the Sierra Leone Truth and Reconciliation Commission, which completed its work in October 2004. In addition, the Special Court for Sierra Leone was set up by an agreement between the UN and the government of Sierra Leone in January 2002¹⁰⁸ and has so far indicted thirteen

¹⁰³ U.N. Doc. PBC/1/OC/2 (June 21, 2006).

¹⁰⁴ See U.N. Doc. PBC/1/OC/1 (June 23, 2006) and the UN press release on the Opening Inaugural Session of the Peacebuilding Commission, available at <http://www.un.org/News/Press/docs/2006/pbc1.doc.htm>.

¹⁰⁵ UN News Centre, *New UN peacebuilding body begins work on Burundi and Sierra Leone*, July 19, 2006, available at <http://www.un.org/News/dh/latest/searchFull.shtml>.

¹⁰⁶ UN News Centre, *UN’s Peacebuilding Commission recommends Sierra Leone for Fund support*, Oct. 13, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=20242&Cr=Sierra&Cr1=Leone>; UN News Centre, *UN’s Peacebuilding Commission recommends Burundi for Fund support*, Oct. 16, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=20266&Cr=Burundi&Cr1>.

¹⁰⁷ In July 1999, after close to a decade of civil war, the government of Sierra Leone and the leadership of the main rebel group, the Revolutionary United Front (RUF), signed a peace agreement in Lomé, Togo. The Arusha Peace and Reconciliation Agreement for Burundi dates from 28 August 2000.

¹⁰⁸ Agreement between the United Nations and the Government of Sierra Leone, *supra* note 87, at art. 6; See Michael P. Scharf, *The Special Court for Sierra Leone*, ASIL INSIGHTS, Oct. 2000; Danish, *supra* note 87, at 89; Miraldi, *supra* note 87, at 849. For a thorough analysis of the Special Court, see also Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone*, Sept. 2004, available at <http://hrw.org/reports/2004/sierraleone0904/>.

individuals (two of them who have died in the meantime) including former Liberian President Charles Taylor for war crimes, crimes against humanity, and other serious violations of international humanitarian law.¹⁰⁹

In its second country-specific meeting on Sierra Leone, the PBC noted that necessary steps for the disbursement of the Peacebuilding Fund in Sierra Leone have been taken (providing approximately US \$25 million) and encouraged the international community to ensure an adequate level of external assistance and to lend support to the government of Sierra Leone to broaden its donor base and secure assistance, including further debt relief, to meet its consolidation objectives.¹¹⁰ PBC members also requested the chairman of the country-specific meeting to develop a work plan (with a corresponding timeline) for the actions to be undertaken by the government, the UN system and the larger international community.¹¹¹

Whereas in Sierra Leone transitional justice institutions are well established, though still reliant upon international attention, participation and financing, the situation in Burundi is different and has so far proven to be difficult. Departing from the Arusha Accord in 2000, which calls for the establishment of both a truth and reconciliation commission and an international judicial commission of inquiry, a UN report in March 2005 (the so-called Kamoloh report) recommends a two-phase approach with the establishment of a non-judicial accountability mechanism in the form of a mixed (consisting of both domestic and international staff) truth commission, and the establishment of a judicial accountability mechanism in the form of a mixed special chamber within the court system of Burundi.¹¹² In the light of repeated indications that Burundi's political group now in power, the CNDD-FDD, which was once allied with the FDD, a rebel movement that may be charged with numerous atrocities, advocates that forgiveness should have priority over

¹⁰⁹ For security reasons, the Sierra Leone Court moved Mr. Taylor's trial to The Hague, where it will take place in the facilities of the International Criminal Court. See British Broadcasting Corporation, *Taylor Flies in for Hague trial*, June 20, 2006, available at <http://news.bbc.co.uk/2/hi/africa/5098070.stm>.

¹¹⁰ *Chairman's Summary, Sierra Leone Country-Specific Meeting, Peacebuilding Commission*, paras. 5, 10 (Dec. 13, 2006), available at <http://www.un.org/peace/peacebuilding/docs.htm>.

¹¹¹ *Id.* at para. 14.

¹¹² *Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi*, U.N. Doc. S/2005/158 (Mar. 11 2005). See also Matthias Goldmann, *Returning Order to Postconflict Societies: State-Building, Constitution-Making, and Justice*, 30 FLETCHER FORUM OF WORLD AFFAIRS 137, 142 - 143 (2006).

justice and accountability, the UN and the government started talks on the establishment of the Burundi Truth Commission in October 2005.¹¹³

Considering that the set-up of transitional justice mechanisms in Burundi has already been protracted, the Peacebuilding Commission should promote and support the establishment of both the Truth Commission and the Special Chamber for Burundi. Aside from co-financing these institutions using assets from the Peacebuilding Fund, the PBC should provide expertise and experience gained from similar processes such as the South African Truth and Reconciliation Commission, the *gacaca* court system in Rwanda or the Commission for Reception, Truth and Reconciliation as well as the Special Panels for Serious Crimes in East Timor.¹¹⁴

Hence, Burundi provides *the* opportunity for the Peacebuilding Commission to show its strength and seriousness when it comes to the promotion of transitional justice. It would be highly desirable that the country-specific mission on Burundi includes justice and reconciliation efforts as one of its major considerations and complies with its mandate to invite civil society institutions with their remarkable knowledge and experience on the relevant subject in order to participate in carving out strategies and support programs for the advancement of transitional justice in Burundi. In the second specific meeting on Burundi the members noted, parallel to the Sierra Leone meeting, that arrangements to facilitate the disbursement of the Peacebuilding Fund had been put in place (with US \$25 million expected to be made available).¹¹⁵ As they did regarding Sierra Leone, PBC members also requested the chairman of the country-specific meeting to develop a work plan (with a corresponding timeline) for the actions to be undertaken by the government, the UN system and the larger international community.¹¹⁶ It should be in these work plans that we see the Commission eventually taking more concrete, distinct steps on the peacebuilding policies in the two countries under consideration and counseling the Security Council to implement specific

¹¹³ UN News Centre, *UN and Burundi will start preparatory talks on post-conflict Truth Commission*, Oct. 14, 2005, available at <http://www.un.org/apps/news/story.asp?NewsID=16242&Cr=burundi&Cr1=>; British Broadcasting Corporation, *Burundi Approves Truth Commission*, June 16, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4098570.stm>. See also Security Council Resolution 1606, in which the Security Council requests the Secretary-General to initiate negotiations on the Burundi Truth Commission and the Special Chamber. S.C. Res. 1606 (June 20, 2005).

¹¹⁴ Evans, *supra* note 53.

¹¹⁵ *Chairman's Summary, Burundi Country-Specific Meeting, Peacebuilding Commission*, para. 7, Dec. 12, 2006), available at <http://www.un.org/peace/peacebuilding/docs.htm>.

¹¹⁶ *Id.* at para. 12.

measures.¹¹⁷ In any event, the Council's managerial powers seem to remain the teeth of the new UN peacebuilding architecture securing that the PBC's work is not solely "another donor forum" but can indeed, as Carolyn McAskie put it, "play out at the country level",¹¹⁸ though so far at least the former impression still has to be rebutted.

3. Sense and Sensibility of Establishing the PBC As a New Organ Within the UN System

Having set out the organizational and functional framework of the Commission and looked at the first two focus countries on its agenda the question must be posed whether the PBC can deliver sufficient added value which justifies its much celebrated creation. Can it live up to its high expectations to close a "gaping hole" within the UN system or will it rather become another wallflower in the dense jungle of UN organs, institutions and initiatives? Will the Commission catalyze as a shiny example of the United Nations, in particular of its parent, the Security Council, or collapse and fade away as a sanctimonious utopia?

It comes with no surprise that skepticism might *prima facie* prevail over euphoria. First, one might argue that the whole endeavor appears to be redundant as the UN system provides sufficient capacities which already engage in peacebuilding activities and that these actors – Security Council, DPKO and DPA – should simply enhance their respective coordination. In fact, the answer might be that it is merely misjudgment, that there is no "gaping hole" at all. Second, the great variety and distinctiveness of conflict situations requires an ad-hoc and country-specific approach as it has been achieved by UNMIK in Kosovo and, more successfully, by UNTAET in East-Timor. Third, the cautious delegation of powers to the PBC ensuing notably from institutional competence delimitations proves the needlessness of an additional organ as other institutions exist which are able to perform the same tasks.

Let me first assess the question of competences. As I have outlined above, the delegation of powers to the PBC as an *advisory* body has indeed been carefully drafted. However, this does not imply that the Commission is superfluous, but reflects the supplementary nature of the new body. The fact that the General Assembly and the Security Council have cut the Commission in size is to keep it

¹¹⁷ So far, the interplay between the Commission and the Security Council has been restricted to "reporting duties." See Letter dated 20 December 2006 from the Chairman of the Peacebuilding Commission addressed to the President of the Security Council, S/2006/1050 (Dec. 20, 2006).

¹¹⁸ Carolyn McAskie, Assistant Secretary-General, Peacebuilding Support Office, Open Debate of the Security Council (Jan. 31, 2007), available at <http://www.un.org/peace/peacebuilding/docs.htm>.

under control but has, though causing considerable birth pangs, not emasculated it. “To extend the period of attention given by the international community to post conflict recovery” does not seem to be a breathtaking purpose, but might be key to avoid backslide into conflict. In today’s world of incrementally managerial International Organizations we must not abandon the value of the agora conception of international organizations. Otherwise we have failed to learn our lessons from Angola (1993) and Rwanda (1994). Klabbers correctly points out that the relation between these two conceptions of international bodies is symbiotic.¹¹⁹ In fact, both concepts are inextricably linked with each other, even necessitate each other. Thus, the rationale behind the PBC might have been to provide the platform for institutionalized talk when, after the ceasefire is signed, media and international attention has silenced, whereas the operative, managerial tasks remain within the prerogatives of other UN bodies such as the Security Council. Though, such a rigid position would, as has been pointed out above,¹²⁰ be shortsighted because the Commission does also assume at least some managerial competences which are quite indeterminate, but do complement and extend its purpose as an international awareness platform.

Aside from the essential provision of funds, the Commission is hoped to evolve as an expert body developing best practices and integrated strategies. In particular, when it comes to tackling transitional justice initiatives, the Commission might be an extremely desirable support for countries emerging from conflict who usually lack both knowledge and money and often rely on primarily New York-based NGOs for consulting services. At the same time, with truth commissions spreading and transitional justice becoming a separate field of knowledge concerning a vast array of post-conflict problems, the danger is inherent that the PBC as a provider of, or, in the worst case scenario, an imposer of transitional justice concepts in fact depoliticizes entirely political questions by recasting them as technical issues.¹²¹

The multifaceted institutional and substantive aspects which form part of peacebuilding efforts have been met with sensibility in setting up the PBC. Although the Commission faces numerous difficulties and omnipresent pitfalls, I argue that its establishment does make sense and that it can fulfill a useful task within the UN peacebuilding architecture. In addition to the reasons given above, I would finally like to corroborate this position by highlighting another purpose of the new body which is to “bring together all relevant actors to marshal resources”.

¹¹⁹ Klabbers, *supra* note 48, at 292.

¹²⁰ See *supra* II.1.

¹²¹ For a critical account on this technical specialization of international law, see Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 THE MODERN LAW REVIEW 1, 1-30 (2007).

In this respect I want to focus on the interplay between the main bodies of the UN, primarily the Security Council, and the International Financial Institutions, chiefly the World Bank.¹²² Despite the fact that the World Bank was established as a specialized agency of the UN there often seems to be a substantial gulf between New York and Washington, DC, which might not least result from considerable rivalry between UNDP and the World Bank when it comes to being the most important institutional player in the field of development. However, having repeatedly realized the interconnectedness between peace, security and economic development, the lack of engagement between the Security Council on the one side and the World Bank on the other side is as striking as it is anachronistic. On this point, the PBC could become a precious bridge-builder and answer the prayers for a holistic approach in peacebuilding by marshaling security, political and economic challenges. While the interplay of these fields penetrates the whole range of peacebuilding activities, it also affects transitional justice initiatives. Two examples shall briefly underline this assumption. First, there appears to be a need for better adjusting disarmament, demobilization and reintegration of ex-combatants with transitional justice measures. Second, the role compensation payments to victims of massive human rights violations might play (apart from compensating for the victims' suffering) to enhance economic development seems to be largely underestimated. In these as well as other areas the PBC might bring the relevant actors together and come up with integrated strategies contributing to the achievement of sustainable peace.

For these reasons, I conclude that the Peacebuilding Commission has in principle been equipped with tools which can deliver an added value in attempting to prevent countries which have recovered from conflict from relapsing into civil strife or war. This not least ensues from the fact that the PBC oscillates between the agora and the managerial concept,¹²³ with the main emphasis being put on the former. In this sense, it is a very contemporaneous international body hovering, as Koskenniemi depicts the status quo of public international law, between cosmopolitan ethos and technical specialization.¹²⁴ Nonetheless, the middle- and long-term success of the Commission will heavily depend on the implementation of the PBC's structure and the support both from UN organs and member States.

With Burundi and Sierra Leone on its docket, the Commission is facing its litmus test. This is the decisive moment and opportunity for the PBC to carve out its

¹²² On their relationship, see Boon, *supra* note 94, at 553-58.

¹²³ See *supra* II.1; Klabbers, *supra* note 48, at 280-284.

¹²⁴ Koskenniemi, *supra* note 121, at 1-30.

territory. Whether the Commission will become a success story or just another needle in the UN haystack will be decided in the near future. Carolyn McAskie, presiding over the PBSO, and Ismael Gaspar Martins of Angola, heading the Organizational Committee, together with the other PBC personnel and in particular the country-specific formations on Burundi and Sierra Leone, must now take a proactive, tackling approach based on an open-ended and flexible interpretation of their competences. They face the challenging but not insurmountable task to implement not only the agora but also the managerial concept of international organizations in order to develop the PBC into a showpiece example of a contemporaneous international body.

Making the Peacebuilding Commission a success story is indispensable for both the legitimacy of the UN and its reform process, but most importantly for the fulfillment of the vision of former Secretary-General Kofi Annan, who depicted the Commission as a symbol of hope for the many millions of people throughout the world striving to keep their societies on the fragile road to peace.¹²⁵

¹²⁵ Kofi Annan, Secretary-General, United Nations, Address to the Members of the Organizational Committee at the inaugural session of the Peacebuilding Commission (June 23, 2006).