



Why is the ICC important?

CHAPTER 2

This chapter discusses the importance of the ICC in situations/ countries where the perpetrators of genocide, war crimes or crimes against humanity are not yet prosecuted. It describes how the ICC fits into the greater movement towards justice and reconciliation.

2.1 ICC as part of transitional justice

There are many obstacles to be overcome when reconstructing a country that has suffered from gross abuse of power, a culture of violence and impunity, and of hatred among neighbours. We can learn from the example of many communities in Africa and elsewhere that are meeting these challenges with both courage and compassion.

The process whereby a society makes the political transition from a period of violent conflict to peace, while grappling with the legacy of human rights abuses, is commonly understood as *transitional justice*. The mechanisms of transitional justice include:

Mechanisms of transitional justice

1. **Prosecuting** individual perpetrators through national and international trials like the ICC, International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.
2. **Reforming institutions** like the police and the courts, including **vetting** procedures aimed at identifying and removing from office people thought to have perpetrated crimes against humanity
3. **Compensation** to victims through restitution and reparation schemes as witnessed in Latin America.
4. **Truth-telling**, by community-based **reconciliation** processes or setting up truth commissions as in South Africa.

These four approaches are not mutually exclusive, and can be combined.



See also Chapter 8



One can see an increasing movement towards accountability of perpetrators as an essential part of transitional justice

Victims of gross human rights violations and their relatives demand that the truth be made known about what happened to them. Their cry for the truth and against impunity echoes beyond national frontiers, thanks to networks of solidarity and growing media coverage. Around the world one can see an increasing **movement towards accountability** of perpetrators through national and international prosecutions, as an essential aspect of transitional justice.

From her experience in many different countries Ms. Geneviève Jacques (World Council of Churches) concludes that:

Without justice of a kind that can be recognised and accepted by individuals and communities who have been wounded and humiliated, reconciliation is simply a pious dream.

ICC Judge Ms. Navanethem Pillay (South Africa) states it thus: *The cost of justice is much cheaper than wars.* (Speech December 2004)

The cost of justice is much cheaper than wars

Along these lines, **criminal justice** contributes to the process of healing and of reconciliation by:

1. Restoring a sense of human dignity of the victims, in their own eyes as well as in the eyes of society;
2. Recognising the humanity of the perpetrators by affirming their responsibility for hurting others through just punishment;
3. Informing the public by affirming the supremacy of the law over vengeance and contributing to the country's historical records.

National adjudication of perpetrators is preferable to international prosecution, as it is at a national level that a society must come to terms with its past and pursue reconciliation. However, irrespective of the competence and integrity of national *judicial* systems, the fight against impunity depends upon the *political* will of the authorities and their ability to resist the power of those responsible for past crimes. All too often the pursuit of the prosecution of the accused



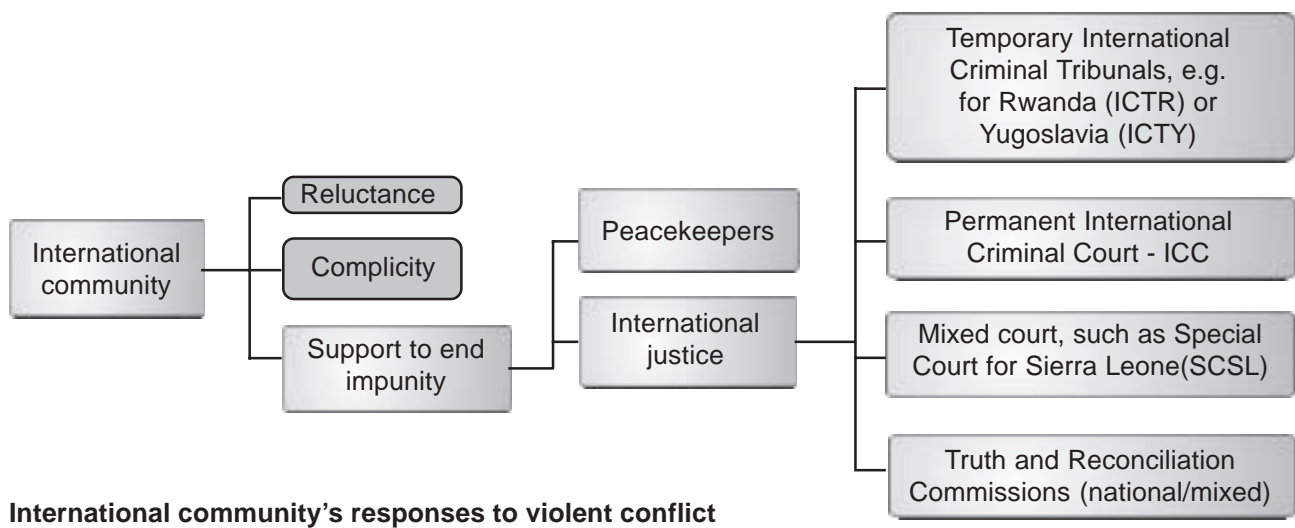
These tribunals have changed the character of international justice and enhanced the global character of the rule of law

results either in victors' justice or political compromise. As a result only a few perpetrators, often from low ranks, will be tried and the actual commanders will remain free, often to subsequently pursue political office.

Regrettably, several regions of Africa are or have been stricken by abuse of power, corruption and widespread human rights violations perpetrated by a host of actors, including guerrilla factions, as well as local, national and neighbouring governments. Often this keeps afflicted societies oppressed and poverty-stricken without the means to pursue the path of peace and development. All too often the international community is reluctant to intervene; Darfur is a distressing example of this. Sometimes foreign countries are even complicit in the violence.

However, the support to end impunity has been considerable as well. Regarding the mechanisms of international justice, despite their limitations and imperfections, the international and mixed ("hybrid") courts (with national and international lawyers, magistrates, etc.) have helped countries to investigate conflicts and try those responsible. These tribunals have changed the character of international justice and enhanced the global character of the rule of law.

The flow chart presents the possible responses of the international community to widespread violent conflict.



International community's responses to violent conflict



The most significant recent development in international justice has been the establishment in 2002 of the **International Criminal Court** (the ICC) with its seat in The Hague, The Netherlands (Europe).

Key facts of the International Criminal Court (ICC)

Initiated by	The United Nations (introduced by Trinidad and Tobago), representatives of civil society and legal experts from around the world
Adoption of Rome Treaty	On 17 July 1998, by an overwhelming majority of the 160 states participating in the Rome Conference.
First State Party	Senegal, ratified on 2 February 1999
Rome Statute entered into force	On 1 July 2002
Number of States Parties at November 2005	100 states from all over the world
Number of African States Parties by November 2005	27 African states (see chart in Appendix), thereby representing the largest regional group
Number of staff members at 1 July 2005	311 staff members from 57 countries around the world, thereby reflecting the Court's international character
Origin of the 18 Judges	3 from Africa, 3 from Asia, 4 from Latin America, 7 from Western Europe/Canada/Australia/New Zealand, 1 from Eastern Europe. The Judges constitute a forum of international experts representing the world's principal legal systems, according to equitable geographical representation of the States Parties. At November 2005, 7 of the 18 Judges are women.
Legal basis	ICC Treaty, also called "Rome Statute of the ICC" (including elements of civil law and common law)



See Chapter 3, for more information on the mandate of the ICC.





“Map showing the ICC in The Hague in proportion to the African context.

The picture below places the ICC within the broader process of transitional justice and reconciliation.



In the Preamble to the ICC the States Parties affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished”. They also declare to be “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes”.

The ICC will hold individuals (former presidents, warlords, generals or mercenaries, vanquished and victors alike) accountable for genocide, war crimes or crimes against humanity. It will also help to prevent and address these crimes in a manner that is as fair, effective and independent as possible. The jurisdiction of the ICC is not retroactive; it will apply only to those crimes committed after 1 July 2002 (the





date that the Rome Statute entered into force). The ICC will be complementary to national jurisdictions, and will act only when national systems are unable or unwilling to genuinely carry out investigations or prosecutions of such crimes. This admissibility of each case will be carefully assessed by the Court's Judges.

These are daunting times for humankind. But at long last, the world has the missing link for the advancement of peace, this new institution with which to battle impunity, this court of law where formerly untouchable perpetrators, regardless of their rank or status, can be held accountable for their crimes.

(Speech by the UN Secretary-General Kofi Annan to the ICC Assembly of States Parties, September 2002)

2.2 The ICC and the local context

The ICC fully respects national criminal jurisdictions. It will **only complement**, not supercede the jurisdiction of national courts. Therefore, the ICC only acts when the national courts are either:

- **unwilling** to genuinely carry out investigations or prosecutions (e.g. in situations where government institutions such as the army or police are responsible for the violence); or
- when they are **unable** to do so (e.g. when state institutions have collapsed due to chaos and violence).

In these cases, without the assistance of the ICC, there would be very little chance that the perpetrators of atrocities and crimes would ever be brought to justice, and thus the climate of impunity would remain unaltered.

It is important to be aware not only of the opportunities of the ICC but also of its inherent limitations. For example, the ICC has no police force or army to enforce its decisions and must rely on the cooperation of governments and civil society to conduct its investigations, issue arrest warrants, hold trials and, ultimately, incarcerate the guilty and provide restitution to the victims.

In some instances, without the ICC there would be little chance that impunity would be halted or stopped

ICC can:

- deal with the most serious crimes (genocide, crimes against humanity and war crimes) committed after 1 July 2002
- prosecute people that were 18 years or older when crimes were committed
- change the dynamics of conflict and thus contribute to end violence
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- deliver impartial, fair and transparent justice
- contribute to end impunity
- try to understand the local culture
- cooperate and communicate with local communities and organisations;
- use human rights monitoring reports from local organisations
- view local conflict resolution initiatives as worthy and complementary to its work.
- Issue arrest warrants, to be executed by the international community and States Parties

ICC cannot:

- deal with all most serious crimes, due to inevitable budgetary and capacity limitations
- deal with “minor” crimes, such as theft, arson and incidental murder cases (to be dealt with by national courts)
- deal with crimes committed before 1 July 2002, although these facts will be used to establish widespread patterns
- apply the death penalty
- be involved in reconstruction of society-intervene in the conflicts using military means
- engage in peace talks
- rule out every contact with the local government, because the ICC needs security, logistics and data in order to work
- adapt its procedures to local conflict resolution practices because it uses one common standard (the Rome Statute)
- get in touch with everybody; therefore the role and commitment of local non-governmental organisations and communities to work on ICC issues is very important;
- execute arrest warrants by itself, as the ICC has no police force
- operate without the cooperation of governments to enforce its decisions.



See chapters 4 and 5

Non-governmental Organisations (NGOs) have been highly influential in shaping the ICC, drawing particular attention to victims and witness protection and participation, and to the special needs of women and children. For example, in part through NGO advocacy efforts, the ICC has jurisdiction over various gender-based crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation.

Recognising the valuable input from NGOs, both the Office of the Prosecutor and the Registry maintain an ongoing dialogue with international NGOs. The ICC staff also realises that it is crucial to engage the local population as much as possible. After a period of establishing the Court, the ICC now intends to accelerate its efforts to conduct more effective outreach and communication in the countries concerned.

In March 2005, after a delegation of the Ugandan Acholi traditional and religious leaders visited the Court, Mr. Ocampo (the ICC's Prosecutor) declared that he is mindful of traditional justice and reconciliation processes and sensitive to the leaders' efforts to promote dialogue between different actors in order to achieve peace.

It is up to the local and international organisations and networks to consistently remind the ICC to put its principles into practice. Through critical but constructive dialogue local faith-based NGOs can inform the Court about the local context and cultures, so that the ICC may incorporate that knowledge into their policies and procedures.

2.3 Ethical aspects of justice and reconciliation

Legal justice – the rule of law, and respect for and obedience to the law – is essential for lasting peace between societies and nations. In many cultures and religions, however, justice in legal terms is merely one stage on the way to the more fundamental aim of reconciliation when resolving conflicts.



See chapter 9

Reconciliation is a process of restoring broken relationships and, moreover, of re-creating proper relationships between individuals and peoples. It does not automatically occur when

the judge's gavel sounds. It does not necessarily follow from a confession of guilt by an offender, nor even from a sincere plea for forgiveness. Instead, reconciliation requires continuous efforts, initiatives of encounter, support to victims and reconstruction of society. Thus, the circle of reconciliation is always open, never closed.

The concept of justice that says everybody has got to be punished, the concept of retributive justice, is not the only kind of justice

As has been said by Archbishop Tutu, when heading the Truth and Reconciliation Commission in South Africa, and reiterated by the Acholi people in northern Uganda: “The concept of justice that says everybody has got to be punished, i.e. the concept of retributive justice, is not the only kind of justice”. Instead, from the African perspective, the concept of restorative justice is essential. This focuses on restoring the dignity of victims and perpetrators alike, and the restoration of equitable human relations within and among communities through efforts of mediation, truth-telling, rituals, accompaniment and remembrance.



However, this is certainly not how many transitional governments have approached the matter. They have tended to sacrifice or limit justice in favour of amnesty programs in the name of order and internal security – a process which they then named “national reconciliation”. In this respect, the notion of forgiveness by the victims is regarded as an important element of reconciliation. Unfortunately, forgiveness is sometimes portrayed as a “quick fix” for reconciliation. It is almost always demanded from victims by politicians and others so that the society can move on. Thus the burden of reconciliation is placed primarily upon the survivors of genocide to forgive without an equal demand upon the perpetrators to repent. The experience of faith-based communities suggests, however, that acts of forgiveness and repentance should be seen as a private moral and religious matter, though with wider social implications.

The justice provided by the ICC should therefore be understood within the broader context of a comprehensive strategy that should be undertaken by all parties. This encompasses security, dialogue for peace, humanitarian help, justice, development and reconciliation. All these tracks are equally important and should be directed to restore and reconstruct the society.

To this end, religious leaders and organisations, local and international human rights NGOs, humanitarian organisations, the ICC, the international community and its organisations all have a role to play and should collaborate in the best possible way.



2.4 Key questions

1. In what way is the work of the ICC important for transitional justice in your particular situation?
2. In what ways will the ICC aim to complement and not take over the role of national courts?
3. Why do the ICC staff liaise with local leaders and how do they do this? Could this be improved?

