



The ICC and Transitional Justice

CHAPTER 8

This chapter explores the strategy toward transitional justice and where the ICC fits into this. Furthermore, it is described how this work can be supported at different stages of conflict.

8.1 Transitional justice: options and challenges

Political transition is a point of change from one regime to another. Often there are choices about the mechanisms countries in transition can use to deal with past atrocities perpetrated by previous regimes. Although decisions about which mechanism are often taken by governments - religious leaders, faith-based organisations and NGOs share a mutual interest in ensuring that the process is effective.

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.

How a government chooses to deal with past atrocities is often strongly informed by both the political situation and the extent of political will, or interest in action by the new government. An outright victory of one side of a conflict for example, may



favour 'victor's justice'. The role of civil society is the key to ensuring that justice is done and past atrocities are not overlooked.

8.2 Dilemmas in transitional justice

Transition offers opportunities to deal with the past but does not offer prescriptions of how to do it. When considering which mechanisms are best for transitional justice in any given situation, there are a number of underlying questions and dilemmas which should be considered.

Both justice and reconciliation are important, and neither can succeed without the other

1. *Justice vs reconciliation*

Following civil conflict, every society faces the difficult challenge of balancing the demands of justice with the need for reconciliation. Prosecution discourages impunity, while truth and reconciliation processes promote healing and social cohesion. However, in the short term, the pursuit of justice through prosecution may encourage powerful factions to resist disarmament, and thus threaten social stability as well as the survival of ruling elites.

Truth and reconciliation processes are motivated by the need for healing and reconciliation. It is said that if trauma is left out it will persist among victims and society at large. But is this always so? Following this argument then, all Africans would be in serious trouble given the abuses from slavery and colonialism, yet it appears that other coping mechanisms exist. Thus what is more important to emphasise: justice through criminal prosecutions or reconciliation/healing but with the risk of impunity? Clearly both justice and reconciliation are important, and neither can succeed on their own.

2. *The dilemma of scale*

In war, where atrocities are committed on such a wide scale, how do we deal with the multitudes on all sides who have committed atrocities? Also, who should be charged when a state is accused of war crimes? This poses a moral dilemma. What court systems would be most practical in this case? Criminal trials require evidence, but evidence may be lacking. What role can traditional approaches to justice and peace play in



combination with international and national systems of justice? What lesson can we draw from the grassroots *gacaca*-cases in Rwanda?

Perhaps what we need is a multi-track approach, which deals with the leaders, as well as the role of society in perpetrating the atrocities. A combination of traditional, religious approaches and criminal prosecutions may be required where the ICC focuses on leaders, and national criminal law deals with the rest.

3. Who perpetrated the “most serious crimes”?

The Rome Statute of the ICC requires that the Office of the Prosecutor determine who bears the greatest responsibility for the most serious war crimes in any situation. How does the prosecutor decide what are the most serious crimes? How does the Court deal with the public’s expectations, in particular when they may perceive the situation differently from the Office of the Prosecutor at the ICC?

It is important to consider how justice is understood by ordinary people so that international prosecutions can be most effective and in harmony with the local context. In Sierra Leone for example, apart from human rights activists there are few citizens in favour of the Special Court. The former Chief Prosecutor, David Crane said: “Justice must be done”, but ordinary people say: “It must be done, and *seen* to be done!”

4. Competing expectations

After conflict, there may be different and sometimes competing expectations about what needs to be done. In Kenya, for example, different groups have different expectations about what choices for transitional justice should be made. In 2002 a task force was formed to set up a Truth and Reconciliation Commission but the name was then changed to a Truth, Justice and Reconciliation Commission. Many Kenyans thought the process should involve the naming and shaming of perpetrators. Others thought it was pay-back time, and should involve criminal trials. And some people wanted to trace crimes as far back as those against the Mau Mau which fought against colonial rule.



In Liberia, civil society organisations came together to address the different expectations from different parts of society. From a survey conducted, the different expectations were collected, and a national consensus was presented to the transitional government and the UN in an attempt to harmonise the different views. A transitional justice forum has been established to continue the process.

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5. *Who pays the bill?*

Whether it be justice or reconciliation, often it boils down to compensation: expectations of ordinary people are often material. This is understandable as ordinary people may have lost breadwinners, and all their belongings. This raises the question who will pay compensation – and how it will be calculated? Will the compensation be collective on a community basis, or to individuals who have particular claims? How can such a process be managed so as not to cause more conflict in a reparations process?

8.3 Choosing tools for transitional justice – other examples

How can the various tools of transitional justice be employed to deal with reconciliation: consecutively or simultaneously? There is need for a systematic approach which can recognise and respond to the various needs and interests.

The choice of tools to use is admittedly political, as long as the process is controlled by a government, and the same applies to the question of timing: when should action be taken. It is often not the seriousness of the violation that dictates the choice, but the survival needs of the new regime. Therefore, popular involvement is of utmost importance to help limit partisan interests concerning these choices.

In addition to the tools mentioned above, there is the tool of *silence*. People may be afraid of victimisation if they participate in a truth-telling process. They were victimised when the crimes took place, and they may feel reluctant to expose themselves by telling their stories.



Victims come forward in truth commissions hoping they will feel better after speaking their truth. While this is not always the case, the empowerment and centrality of the victim can help, for example:

- During the popular meetings, it has helped to have the victims seated at the centre of the room and the commissioners seated at the side;
- Enable the victims to talk as long as they want to (as in the Peruvian Truth and Reconciliation Commission);
- Not to make it too judicial, nor within strict time limits (Ghana Truth and Reconciliation Commission);
- Respect the victims' truth (at the Nigerian Oputa Commission people were told that they were lying).

Truth commissions established by governments without popular support may lose credibility, especially if the government is composed of well-known perpetrators of war crimes. Power struggles and contests about the truth depend on whose truth we are talking about. In Kenya, for example, the opposition party used the Truth and Reconciliation Commission to threaten the regime then present.

Past experience shows that people prefer an end that will benefit them directly. For example, people would rather know where bodies were dumped, who killed whom, than be involved in a criminal tribunal. The lawyers involved in the Akayeshu case of the ICTR (where it was established that rape is a crime against humanity) were euphoric, the ordinary women involved did not really care. They are more enthusiastic about the Gacaca cases in Rwanda, which are held in their own communities and are more authentic to them.

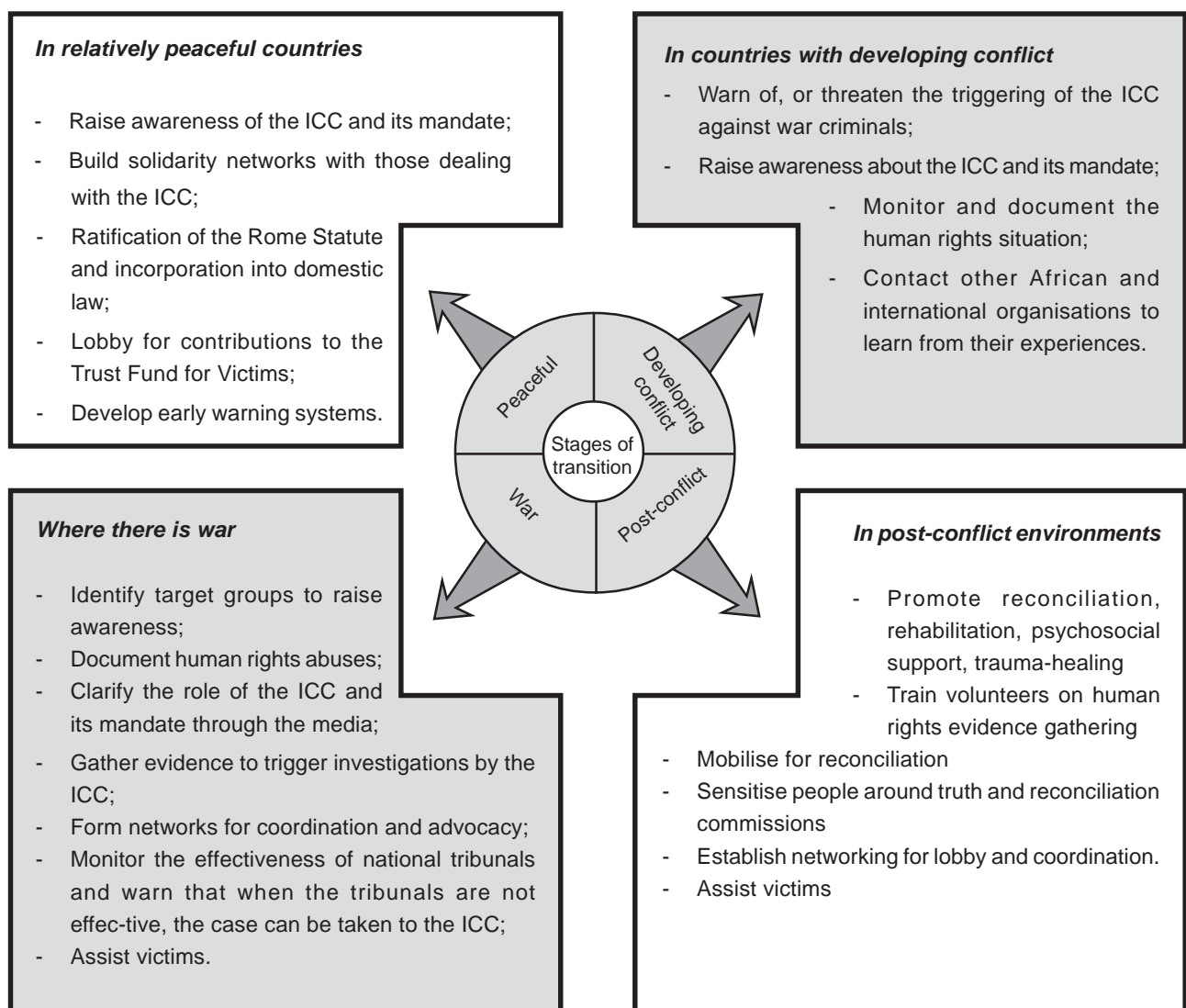
In Sierra Leone there is a lack of interest in truth and reconciliation processes because the Truth Commission and the Sierra Leone Special Court were closely connected. As a result people were reluctant to visit the Commission to testify or attend the hearings. Women had to be mobilised to attend the women's hearings. One of the reasons for this is the lack of acknowledgement by the governments' leaders of the role of state forces in the violence.



Another significant people's initiative is the REMHI project in Guatemala, where Catholic and Protestant churches jointly set up a truth and reconciliation process and all the facts were laid down in a comprehensive report. People throughout the entire country were involved. Such initiatives are important, especially where the government has no political will to start a process on the national level.

8.4 Supporting the ICC at different stages of conflict?

At the workshop in Nairobi, religious leaders discussed their role at different times, and at different stages of conflict. This can be summarised as follows:





8.5 Key questions

1. What opportunities exist to address past atrocities in your situation (prosecution, vetting, compensation or truth-telling)? What are the advantages and disadvantages of each?
2. What role could the ICC play in prosecuting war criminals? How can this fit in with other mechanisms for transitional justice?
3. What roles can faith-based communities play to support the work of the ICC at different stages of conflict?

