



## *QUESTIONS & ANSWERS ON THE INTERNATIONAL CRIMINAL COURT AND TRANSITIONAL JUSTICE*

### ***What is transitional justice and what are its aims?***

There are numerous transitional justice mechanisms (TJMs) but all are a form of justice that adapts to the unique conditions of societies that are undergoing changes from repressive regimes involved in conflicts that result in human rights abuses, to systems that promote peace, justice and reconciliation.

TJMs have two main aims: first, to provide redress to victims; and second, to create or enhance opportunities for the transformation of political systems, conflicts, and other conditions that may have been at the root of these abuses. In order to achieve these ends, transitional justice combines elements of criminal, redressive, and social justice.

### ***Which are the most commonly used transitional justice mechanisms?***

Criminal justice mechanisms, which include conventional courts, and traditional methods, such as the Rwandan genocide-Gacaca Courts, are the most commonly used transitional justice measures because of the desire to hold accountable those responsible for crimes. However, judicial proceedings may suffer from caseload difficulties and inadequate structures and resources.

Truth commissions are temporary ad hoc institutions of inquiry, usually government sponsored, which aim to investigate and report on major human rights abuses. Truth commissions are not judicial bodies and, thus, they have no authority to punish. They can only make recommendations to remedy the abuses and prevent their recurrence, but they may lead to criminal prosecutions such as those of Junta leaders in Argentina in the early 1970s. However, whether these recommendations are implemented relies entirely on political will. Sometimes truth commissions may incorporate conditional amnesties, as the South African Truth and Reconciliation Commission did. Many have criticized the use of these because perpetrators can tell their stories without fear of punishment.

Reparation programs are also state sponsored initiatives that usually distribute a mix of tangible and symbolic benefits to victims, such as financial reparation and official apologies. These programs, such as those in Colombia, aim to redress the victims by contributing to repair, on a large scale, the material and psychological consequences of abuse and by recognizing the immorality of the atrocities committed against them.

Security systems legitimately support and enforce the work of other justice mechanisms. They often must be reformed to transform the military, police, judiciary and related state institutions from instruments of repression and corruption into instruments of public service and integrity so that a society regains trust in them.

Institutions to preserve the public memory of victims and to raise moral consciousness help to prevent the recurrence of human rights abuses. The Kigali Genocide Memorial Centre remembers all the victims of the 1994 Rwandan genocide.

### ***Is the justice that the ICC does a form of transitional justice?***

Yes. While some perceive that transitional justice mechanisms cannot be used if the International Criminal Court is investigating or prosecuting, they are in fact complementary. Justice by the ICC is one form of criminal prosecution included within transitional justice mechanisms. The Court serves the same aims as other TJMs: accountability, redress victims and deterrence of future atrocities. Moreover, the ICC only acts when domestic mechanisms are unwilling or unable.





### ***How is the ICC compatible with transitional justice measures?***

The ICC is compatible with other transitional justice measures because its jurisdiction is limited. First, the Court can only try the most serious crimes of concern to the international community: genocide, crimes against humanity and war crimes. Furthermore, the Court only tries those individuals who bear the greatest responsibility. The Court may only hear cases of crimes that took place after July 1, 2002, when the Rome Statute entered into force. In addition, the Court may only exercise its jurisdiction if the case has been referred by a State Party, by the Security Council or when the Prosecutor initiates an investigation with the approval of a three judge panel. Therefore, the ICC leaves a large space for other mechanisms to address those crimes that do not fall within its jurisdiction. There is a division of labor between the Court and other transitional justice mechanisms.

One example of the compatibility between the Court and domestic transitional justice mechanisms is Uganda, which referred its situation to the Court in 2004. The government has also passed Amnesty Bills, used traditional reconciliation rituals, such as *matu oput*, and is planning domestic criminal trials for crimes committed in Northern Uganda.

### ***Are there any difficulties between transitional justice mechanisms and the justice that the ICC carries out?***

Yes. The ICC does not recognize amnesties and thus may try an individual granted amnesty by a government or a truth commission. Nonetheless, the ICC only tries those bearing the greatest responsibility. Therefore, it is unlikely that there will be cases in which an ICC investigation will extend to a person who has been granted amnesty. Also, societies that have experienced atrocities are usually willing to forgive low ranking officials or foot soldiers but not to grant amnesties to those most responsible.

### ***Does the ICC support national judicial systems in carrying out transitional justice?***

Yes. The Rome Statute establishes that it is among the objectives of the Court to promote domestic accountability systems. In addition, the founders of the Court intended the ICC to complement national systems and, thus, it is required to defer to them to handle alleged crimes which would fall within the jurisdiction of the ICC. As Christine Chung, former senior trial attorney appointed at the Office of the Prosecutor, emphasized in her remarks at a seminar on International Criminal Justice (May 19, 2009, UN Headquarters), one of the major goals of the Court is to encourage States to establish the appropriate institutions to hold accountable those responsible for the most serious crimes of international concern. In addition, the ICC facilitates domestic proceedings because law-enforcement personnel and court staff can work together with the Office of the Prosecutor (OTP) gathering evidence, exchanging knowledge and receiving training. Also, national courts may be able to take advantage of evidence gathered by the OTP unless it has been obtained under confidentiality agreements. The Court also serves as an example for domestic judicial proceedings and encourages their fairness and effectiveness.

### ***What are the advantages and disadvantages of transitional justice mechanisms?***

By holding accountable those most responsible for atrocity crimes, transitional justice mechanisms serve the major goal of ending impunity and are intended to have a deterrent effect. These mechanisms, as the Lubanga trial has shown, give redress to victims, are a vehicle to establish the truth and set the necessary grounds for reconciliation, healing and capacity-building domestically.



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Since TJMs revisit past abuses, they may destabilize ongoing or potential peace processes and unsettle victims' feelings. Moreover, there can be a perceived or actual politicization of how the prosecutor uses his discretion to make decisions. The safeguards against these dangers are transparency and consistency. Also, international involvement usually provides greater legitimacy.

As Archbishop Desmond Tutu said "We must deal effectively, penitently with our past or it will return to haunt our present and we won't have a future to speak of."

*Researched and drafted by Ana Gómez Rojo  
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