

## TRANSITIONAL JUSTICE AND ONGOING CONFLICT

Dr Par Engstrom

Institute of the Americas, University College London

[p.engstrom@ucl.ac.uk](mailto:p.engstrom@ucl.ac.uk) | <http://parengstrom.wordpress.com>

Remarks for a book launch

*Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*

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Thanks to Olga Martin-Ortega for organising this event, and to all the editors for the kind invitation to contribute to the book we are launching today.

My chapter in the book explores the normative expansion of transitional justice towards the pursuit of accountability – mainly in the form of prosecutions – in situations of ongoing conflict. Such TJ efforts in the absence of an apparent transition are mainly driven by three trends:

First, the development of an increasingly far-reaching international human rights order; second, the rise of victims' movements and their NGO support networks worldwide; and third, the intractability of much of contemporary armed conflict.

The combined effects of these three inter-related trends have moved international judicial proceedings forward, with interventions taking place not after but during ongoing conflict. The practice of international judicial interventions is also spearheaded by the practical constraints posed by the ICC's temporal limitation in investigating cases only after July 2002. As a result, through the application of transitional justice in ongoing conflict, TJ has become an integral part of the political and legal context in which conflict resolution and peacebuilding strategies are formulated and implemented.

The chapter goes on to highlight a number of particularly pressing challenges in international judicial interventions in ongoing conflict, including:

1. the absence of robust empirical evidence to support the belief held by many advocates of judicial interventions; namely that the tool of indictments and the threat of prosecution can alter the prospects for achieving peace;
2. the risks of undermining local accountability processes inherent in international interventions, particularly in situations characterised by ongoing conflict and institutional fragility; and

3. the privileged status of retributive forms of justice and the judicialization of TJ strategies at the expense of other potentially complementary strategies.

My more limited remarks here today will focus on the second and third points, that is: the dominant emphasis on international and judicial approaches to TJ in the context of efforts to pursue accountability strategies during ongoing conflicts.

But, since I do not want to convey an unjustifiably gloomy picture, I will conclude with some brief reflections on what a prudent, incremental and politically attuned set of strategies of TJ engagement with ongoing conflict may look like.

### **Internationalization of Transitional Justice**

The early TJ efforts of the 1980s, particularly in Latin America, were distinctly local in origins and primarily driven by local actors. However, the internationalization of TJ activities since the 1990s has created significant tensions between international and local agency.

Firstly, as has been widely argued, the considerable influence of international actors in the TJ field jeopardises local ownership of and participation in TJ processes. International donors and consultants in the field of TJ, although with good intentions, wield considerable influence in ways that risk the 'crowding-out' of local actors. In particular, decisions to judicially intervene in ongoing conflict are likely to be taken by outsiders and may therefore undermine local ownership of justice initiatives.

Moreover, international interventions are often overly ambitious and their ultimate objectives are rarely explicit. This is partly because there is little agreement on what constitutes success, but also the expectations on what TJ processes *can* possibly achieve are often exaggerated.

There is also the problem of the coercive and highly politicised character of international judicial processes. As the vast literature on 'humanitarian intervention' repeatedly points out, politicisation and selectivity are inherent in the practice of intervention. This can be seen, for example, in the uneven character of international responses to some of the most recent high-profile humanitarian/human rights crisis and conflict situations: Syria (weak condemnation and piecemeal UN sanctions regime); Libya (forceful and immediate ICC/NATO intervention); and Sri Lanka (delayed investigations).

Another problem is related to the potential of international (judicial) interventions to alter power balances and thereby the relative power of the parties to the conflict. Such interventions are of course highly political. As seen in international judicial interventions in,

for example, Libya, Sudan/Darfur, and Uganda, interventions are not perceived as neutral or driven by legal considerations of selecting situations and cases to investigate in accordance with the Rome Statute.

The problematic effects of international judicial pressures are often exacerbated by domestic institutional fragility. In conflict situations, local capacity to implement accountability strategies is particularly limited. The sheer number of perpetrators in societies afflicted by mass atrocity would overwhelm even a well-functioning judicial system. In Liberia, as pointed out by Rosalind Raddatz in her contribution to this volume, the capacity of the domestic legal system to try alleged perpetrators remains constrained. Similarly, the delivery of TJ, particularly when administered in conjunction with peacebuilding programmes such as demobilization, is institutionally very complex and burdensome (as highlighted by the case of Colombia discussed by Jemima Garcia-Godos in this volume). Trial justice, for example, requires robust domestic justice institutions, which in most (post-)conflict societies are absent. In addition, the pursuit of TJ in weakly institutionalised environments is particularly subject to political manipulations (as Stephen Brown's chapter on Kenya in this volume illustrates).

As such, TJ, on its own and without broader institutional and political reforms, is unlikely to assist where it is needed the most. Attempts to implement TJ in inhospitable conditions, including the pursuit of justice initiatives in the absence of any discernible political transition, may mean reaching for the most difficult.

### **Judicialization of Transitional Justice**

The second main point that I would like to raise is related to the dominance of legal and judicial strategies in the field of transitional justice.

For proponents, the increase in international prosecutions, even in the context of ongoing conflict in recent years, demonstrates that law can prevail over politics, and that the criminal prosecution of abuses can assist in breaking the 'wall of impunity'.

Yet, there are, of course, significant limits to what legal and judicial mechanisms can achieve in relation to transitional justice outcomes. In the first instance, there are the limits inherent in the recourse to judicial procedures and logics in addressing complex social and political problems; these are the common challenges inherent in any process of judicialization. In response to the complex objectives of contributing to conflict resolution, increased political stability, combating impunity and promoting reconciliation, any positive contributions of trial-based approaches to accountability are likely to remain modest.

Moreover, the international criminal justice system, as encapsulated by the ICC, aims primarily at the prosecution and punishment of individuals, and retribution and deterrence have been promoted as the primary objectives of punishment. The development of international criminal justice has taken place, as pointed out by many, at the expense of restorative approaches of justice and of broader notions of human rights accountability.

Despite the prevalence of claims of effectiveness of the international criminal justice regime in terms of deterrence, there is an absence of empirical evidence documenting such claims. Also, especially in the context of large-scale organised political violence, there are inherent limitations in retributive approaches to criminal justice. As mentioned before, simply given the vast number of cases in such contexts, attempts to establish individual criminal responsibility tend ultimately to be unsatisfactory. To focus on a handful of cases may invite accusations of selectivity and further contribute to the politicisation of the judicial system. Although the prosecution of individual cases may be symbolically very significant, criminal prosecutions are not likely to bring about political reconciliation.

The judicialization of TJ also risks obfuscating politics in ways that almost invariably benefit elite interests. Clearly, judicial interventions do not cancel out politics; they are both fundamentally driven by politics, and in turn, shape politics. In other words, Moreno Ocampo's aspiration that the ICC statute would result in a move "from a world based on power to one based on law"<sup>1</sup>, veers towards an attempt at depoliticisation. As seen in Uganda, for example, the intervention of international tribunals can be manipulated by local elites for their own political ends. Hence, the potential of dislocation of politics that processes of judicialization entails may lead to elite capture and local power structures to condition the impact of TJ processes.

### **Way forward...**

As I mentioned at the outset, I do not want to come across as too gloomy. The final part of the chapter outlines some possible ways for the TJ field to reformulate its engagement with ongoing conflicts.

In the first instance, as I argue in the chapter, there is a need to recognise the values of prudence and incrementalism, particularly in the context of ongoing conflicts. These values need recognition in the management of expectations of what TJ policies can realistically achieve; in the acknowledgement of the limits of the 'transitional' paradigm when applied to ongoing conflicts; and in the realisation that consensus is unlikely and probably undesirable when considering the inherent complexities of the TJ field.

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<sup>1</sup> Moreno Ocampo, "Transitional justice in ongoing conflicts", p. 8.

Let me conclude, therefore, by very schematically outlining five considerations at the core of any attempt to develop a ‘strategy’ of transitional justice:

First, any morally defensible strategy of TJ would include not only legal considerations, but also the inherently **political context in which the strategy is developed and implemented**. True, this is a tricky endeavour. Some argue that international judicial actors, and particularly the Office of the ICC Prosecutor (OTP), should openly admit the political nature of their activities. This would enable them to make more informed political decisions, the argument goes. Yet, most advocates of international criminal justice tend to maintain that their role is to operate autonomously from political influences. Clearly justice actors and institutions are both affected by and effect politics. The law, however, and the interests and normative preferences of its practitioners, cannot be simply reduced to politics. Developments in international law fundamentally shape the normative environment in which political actors operate.

Second, and building on this last point, the **complexities of sequencing and timing** of TJ interventions must be better understood. In the first instance, further research on the causal effects of TJ mechanisms – including indictments and amnesties – on the dynamics of ongoing conflict is required. Recent research findings suggest that the timing of TJ mechanisms matter, but it remains unclear exactly how and why this is the case.<sup>2</sup> Indeed, Article 53 of the Rome Statute provides that the ICC Prosecutor may desist from opening an investigation if it appears to him/her that this would be in the “interests of justice”.<sup>3</sup> However, the Rome Statute gives little guidance on what criteria the OTP should apply to determine what these constitute. Beyond the obligation to consider the gravity of the crime and the interests of victims, the Rome Statute makes no reference to the interests of peace and security for example. Still, the notion of the interests of justice suggests that there is a strong rationale to defer prosecutions, i.e. delay justice, in times of political instability.

Third, TJ strategies must be **clearer on objectives**. What objectives do and should TJ mechanisms accomplish and for whom? In terms of TJ policies there are some hard questions that need to be addressed: what are they for, what social and political functions should the particular approach adopted fulfil and what actors are – and should be – the beneficiaries? Does the specific mechanism actually deliver what it is set out to deliver?

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<sup>2</sup> Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington: United States Institute of Peace, 2010).

<sup>3</sup> Article 53(1)(c) of the Rome Statute expressly recognizes that a prosecutor must consider whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

There are many complex issues involved in addressing these questions. A wide variety of mechanisms are now included in the TJ 'toolkit' – investigations to establish the truth and identify perpetrators, reparations programmes to the victims of human rights violations (financial and symbolical in terms of memory sites), institutional measures to establish mechanisms to prevent recurrence of violations, and of course prosecutions and trials. However, the last few decades of accumulated TJ experience show that it is often not a simple matter of choosing between different transitional justice mechanisms.

Fourth, when engaging with ongoing conflicts TJ advocates might consider a stronger **focus on rights-abusing behaviour in conflict** rather than on the broader political dynamics of the conflict itself. True, international criminal law targets the type of behaviour (war crimes, crimes against humanity, genocide) that is the result of planning and systematic execution. Hence, it might not be easy to separate individual crimes from the broader conflict dynamics. Yet, making the case for accountability for perpetrators of grave human rights crimes does not have to lead advocates to exaggerated claims that TJ can end or prevent armed conflicts.

Finally, there is a strong normative case that some form of **accountability ought to be part of efforts to end ongoing conflict and to build peace**. Many TJ advocates argue that peace is not sustainable without some form of accountability. Although there is a lack of compelling evidence to support this claim, the key point to note here however is that accountability measures can take different forms. Non-retributive TJ mechanisms such as truth commissions and other alternative mechanisms – including appropriately designed amnesties – also have potential accountability effects.

Accountability measures may indeed complicate immediate efforts to reach an end to an armed conflict. But without any type of accountability measures as part of a peace settlement, serious doubts are likely to be cast on the character of the 'peace' obtained. In particular, there is a need to expand the focus beyond individual criminal accountability. For example, the relative advantages of human rights mechanisms over criminal justice mechanisms in the context of post-conflict societies include: locating victims at the centre; a demonstrated capacity to deal with a larger case-load; and a focus on state accountability, rather than individual accountability. From this perspective, redress goes beyond the individual case and highlights the needs of broader institutional and structural reforms.<sup>4</sup>

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<sup>4</sup> On this point see further: Antoine Buyse, "Hybrid human rights mechanisms in post-conflict transitions: the experience of the Bosnian human rights chamber" in Oxford Transitional Justice Research (OTJR) (eds.), *Critical Perspectives in Transitional Justice* (Antwerp: Intersentia, 2012).

Yet, certain measures are neither legitimate nor appropriate. This raises the question of what criteria should be used to evaluate legitimacy.

At the minimum, accountability measures should be sensitive to local contexts, and must be driven by and respond to local demands and needs. An emphasis on local needs does not, however, exclude international efforts. On the contrary, this may demand such efforts in order to support local attempts to push accountability against entrenched interests.

As a final, final, point: TJ has indeed become an integral part of the political and legal context in which conflict resolution and peacebuilding strategies are both formulated and implemented. I have highlighted some of the many challenges inherent in the pursuit of accountability strategies during ongoing conflict.

However, it is important to recognise that the TJ field is continually evolving and the practice of judicial intervention in ongoing conflict is fairly recent. It is precisely for this reason that it is an opportune conjuncture to reflect on what prudent, incremental, and politically attuned strategies of TJ engagement with ongoing conflict may look like.

Thank you.