

TENSIONS IN TRANSITIONAL JUSTICE

Phil Clark, Zachary D. Kaufman and Kalypso Nicolaidis

Introduction

Transitional justice resembles the minefields it is meant to transcend. Whether for analysts or practitioners, this field requires both extreme prudence and bold risk-taking. While this volume explores a range of themes, including the history and memory of the genocide, post-conflict reconstruction and reconciliation, this final chapter focuses on transitional justice because we view this as the volume's primary theme, into which the others are crucially drawn. As this book demonstrates, transitional justice is a nascent yet dynamic field in which key concepts and their bearing upon concrete conflict and post-conflict situations are constantly defined and redefined. Daily realities in war-torn societies demand nuanced and specific responses attuned to the peculiar stories that have plagued and haunted them. Yet, in all of these cases, the same key themes or goals always seem to recur: reconciliation, peace, justice, healing, forgiveness and truth. The complex contours of transitional justice research can be seen as reflecting the diversity of interpretations of these concepts and the multitude of practical approaches to conflict and post-conflict situations, often as a result of these different interpretations. In such a landscape, the Rwandan genocide and its aftermath may stand as a unique and momentous landmark in confronting atrocities, but they also exhibit the tensions that we find in transitional justice around the world and throughout history.

The purpose of this chapter is to tease out such key tensions from the rich material provided in this volume. A better awareness and understanding of these tensions, we believe, is a necessary prerequisite for more effective study and practice of transitional justice. Some of these tensions may be avoidable, if instances of theoretical or operational ambiguity can be navigated, often by prioritising one objective over another. Other tensions are inevitable because of the inherent complexity of the conflicts under examination and because post-

conflict recovery may involve objectives of equal value. In all cases, the tensions must be identified and addressed.

This chapter proceeds in four stages. First, we analyse tensions *within* the six specific transitional justice themes explored by the authors in this book. Second, we examine tensions *among* those themes. Third, we turn to the tensions caused by the practical operation of transitional justice institutions. Finally, we discuss the appropriateness of the term “transitional justice” to describe the range of concepts and processes explored in this volume.

Tensions within transitional justice themes

Seldom is it clear to stakeholders and observers what particular concepts, such as “justice” or “reconciliation,” mean and how (or even whether) they can be operationalised. One simple way to frame, if not resolve, these difficulties is to highlight the tensions inherent in each of the goals, ideals or “themes.”

Tensions within every term: aspiration v. capability. The tension between ideal and practical means of achieving particular objectives is not unique to transitional justice. Yet it is particularly acute in this field, as the very problem that actors seek to address greatly inflates both sides of the equation. Aspirations literally bound up with “life after death” cannot but reach for ultimate redemption and atonement, at least in their initial incarnation. However, post-conflict countries often have limited capabilities to fulfil these aspirations, and these capabilities are further crippled by past or even ongoing conflict. Other factors, such as the traumatised condition of the population after mass violence—as Buckley-Zistel, Gasana and Steward discuss in their chapters regarding the psychosocial effects of the genocide on Rwandans—heavily influence what objectives can and should be pursued.

In the case of Rwanda, as Schabas, Ngoga, and Bergsmo and Webb note in this book, there were few qualified attorneys available after the genocide, as many of the country’s lawyers were killed, disappeared or fled during the violence. The criminal justice infrastructure, including courtrooms and staff, which even before the genocide was modest, had been decimated. We could examine the gap between desirable and feasible outcomes within each of our broad themes, namely reconciliation, peace, justice, healing, forgiveness and truth. If we take, for instance, the issue of justice, many survivors and observers aspired to bring all suspected *génocidaires* to justice, but the sheer number of those who allegedly committed crimes against people or property, and the limited judicial staff and infrastructure, presented a formidable obstacle to doing so. As Bergsmo and Webb argue in chapter 18, the limited resources of transitional justice institutions such as the ICC mean that they must be highly selective in choosing which criminal cases to pursue. Kaufman shows in chap-

ter 12 how, given the political context in Rwanda at the time, only suspected perpetrators of the most egregious crimes during the genocide were to be dealt with through an international criminal tribunal established by the Chapter VII powers of the UN Security Council. As a result, as described by President Kagame, Schabas, Clark and Ngoga, *gacaca*, the ancestral institution of local justice, was resurrected in a modified form to address, among other objectives, the need to prosecute the huge number of individuals suspected of participating in the genocide who were not being—and probably could never be—tried through the ICTR or Rwanda’s national judicial system. Is it better to prosecute large numbers of (particularly low-level) suspects through a controversial judicial system such as *gacaca* than not to prosecute them at all? On the whole, we believe so, as it provides for more rapid justice which the victims themselves can own. However, we must also seriously consider the arguments of critics who stress the due process imperfections and pressure for forgiveness and reconciliation that may come with *gacaca*.

Reconciliation is another core theme in the transitional justice constellation that highlights acute tensions between aspirations and capabilities, or perhaps between different sources of aspirations. Reconciliation entails the renewal of fractured relationships and the capacity for sustained interactions between parties after conflict. As Kayigamba argues in chapter 2, many genocide survivors find it emotionally impossible to pursue renewed relationships with those who killed or injured their loved ones: this is simply asking too much. Reconciliation often implies imposing the aspirations of local or foreign elites on the population at large. Is it not enough, ask individuals or communities who have suffered mass violence, to pursue peaceful coexistence, the long-term cessation of hostilities? It may be less ambitious than reconciliation but is nonetheless a remarkable achievement after conflict. Should post-conflict societies aim for reconciliation, which requires sustained and often harrowing engagement between avowed enemies, as they come to terms with the root causes of their conflicts? As such forms of confrontation may in fact fuel tensions, should they not settle for peaceful coexistence?

We believe that while individuals and societies should strive for reconciliation, some are more prepared than others, for a host of social, cultural, religious, economic and political reasons. For instance, Gasana, Steward and Clark all highlight how the Christian beliefs of many Rwandans have inspired their pursuit of healing and reconciliation after the genocide, helping them overcome—or at least find ways to manage—their deep-rooted fears and animosity. In other societies, reconciliation may indeed be asking too much, especially of survivors, who must contend with their personal anguish before considering whether to seek to rebuild broken relations with those who have caused their pain. Undoubtedly, questions of reconciliation are riddled with the tension be-

tween what is desired and what is achievable. The key is to recognise that in some instances, reconciliation is both sought *and* practical. In such cases, to dismiss reconciliation as a fantasy is to quash the aspirations of those who, against incredible odds, seek to build a new and more engaged, cooperative future with their erstwhile enemies.

Tensions within specific terms: retributive v. deterrent v. restorative justice. Tensions can also be specific to an individual theme, as with the tension among retributive, deterrent and restorative justice. As stressed by Clark in chapter 10, while these variants all assume that punishment is a necessary response to crimes, they differ on the question of what justice is ultimately designed to achieve and, consequently, what form it should take. Retributive and deterrent justice hold only that perpetrators should be punished, usually by sentencing them to pay financial restitution to the state or victims, or to serve prison terms or suffer capital punishment. The primary intention of retributive justice is to voice the community's disapproval of perpetrators' actions, while deterrent justice tries to persuade potential criminals that it would be too costly to initiate or repeat such crimes. Retributive justice holds that perpetrators should be punished to a degree commensurate with the severity of their crimes. Deterrent justice, on the other hand, holds that perpetrators be punished to a degree that deters them or others from committing crimes in the future—a punishment that may be of a greater, lesser or commensurate degree compared with their crimes. In other words, the degree of punishment should not necessarily be related to the severity of the crime; it must simply be harsh enough to discourage individuals from offending in the future. In contrast to deterrent and retributive justice, restorative justice holds that in some instances it is necessary to alter the form or degree of punishment to help rebuild relations between perpetrators and victims and therefore to gradually restore the fabric of society as a whole. Proponents of restorative justice therefore do not necessarily oppose the need for punishment, but rather argue that in some cases there may be a compelling need to shape punitive measures towards more reconciliatory ends.

Depending on the context, these different conceptions of justice may be mutually supportive or mutually exclusive. In chapter 2, Kayigamba argues that reconciliation in Rwanda is impossible without retributive justice—giving convicted *génocidaires* the form and degree of punishment that Kayigamba and many others believe they deserve—because, otherwise, victims of the genocide will not feel that justice has been done and therefore will not be willing to reconcile with perpetrators, an attitude that may lead to further conflict. Schabas, on the other hand, argues in chapter 11 that retributive justice after the genocide “is probably not the best way forward” because of the practical and social costs, especially regarding reconciliation (a term Schabas also scrutinises), of attempting to prosecute the vast numbers of genocide suspects. It is

difficult to decide what justice is supposed to achieve after conflict but, as these authors show, even if we can agree on the ultimate objective to which justice should contribute—for example, reconciliation—it is not immediately clear which form of justice is best equipped to achieve that end. Whatever the case, it seems that the ICTR privileges retributive and deterrent justice over restorative justice. As Bergsmo and Webb argue that the ICC has drawn much from the ICTR's design and experience, it appears that the aftermath of the Rwandan genocide has contributed to establishing an international system where restorative justice takes second place, which may be problematic given the emphasis placed on restorative justice in many post-conflict societies.

There are numerous other tensions that we cannot address here, for example between the sometimes competing methods of achieving retrospective and prospective or short-term and long-term objectives. Specifically, short-term and long-term peace in a post-conflict society may be in tension, as when amnesty and a secure exile are afforded a former perpetrator so that he or she will leave a conflict region, or when authorities delay, perhaps indefinitely, the issuance of indictments and arrest warrants so that peace negotiations can commence or continue. Such actions may contribute to short-term stability but, if punishment of suspects is forfeited in the long term, they may not achieve a lasting peace.

Tensions among transitional justice themes

Transitional justice initiatives often fail to take a holistic approach to post-conflict reconstruction, whereby rebuilding individual and communal lives, contributing to reconstruction in both the short and the long term, and holding offenders accountable are seen as interconnected goals. Holism refers to the need to rebuild entire societies, responding to the various needs of individuals and groups after conflict, which in turn correspond to the key goals identified at the outset of this chapter, namely reconciliation, peace, justice, healing, forgiveness and truth, as well as the more operational translations of these various goals. It is no surprise that the simultaneous pursuit of these goals often produces tensions among them. The hope is to find approaches that can effectively combine multiple objectives, reflecting the complexity of the practical situations to which they respond.

Tensions among terms generally: profound v. pragmatic objectives. Transitional justice may ultimately be about achieving sustainable peace through reconciliation between yesterday's intimate enemies and by healing the wounds of the many victims of fratricidal conflict, but these grand goals do not constitute the bulk of its day-to-day vocabulary. Indeed, Clark stresses in his work the

fundamental tension between “profound” and “pragmatic” objectives.¹ Profound objectives relate to complex issues of rebuilding individual lives and relationships between parties previously in conflict. Pragmatic objectives consist in solving the various practical problems that arise after violence. In Rwanda, such pragmatic objectives include addressing the country’s massively overcrowded prisons, dealing with children growing up without parents, and facilitating economic development in remote areas of the country. Limits to available resources (such as time, money, staff) unavoidably lead to setting priorities between profound and pragmatic objectives which may ultimately prove to be mutually exclusive. Where should a post-conflict society such as Rwanda begin: with the physical rebuilding of a shattered society, providing physical and psychological healthcare to survivors and reconstructing homes and roads, or with social reconstruction, pursuing the aims of justice and reconciliation? The needs of a population that has experienced mass violence range from profound to pragmatic concerns, so that governments and key actors must constantly juggle different categories of needs.

Tensions among specific terms: reconciliation v. truth v. justice. The aims of reconciliation, truth and justice ought to be viewed as one single whole. Yet, this is where we find some of the most intractable tensions. Truth commissions, which often employ amnesty as a way of discovering the “truth” and, in the case of the South African Truth and Reconciliation Commission, as a way of facilitating reconciliation, may produce results considered unjust at least by those who subscribe to the retributive view of justice. Critics of truth commissions often question whether it is morally justified to forfeit punishment for the sake of truth or reconciliation. In this volume, Lemarchand, Hintjens, Buckley-Zistel, Gasana, Steward and Clark all explore tensions between truth and reconciliation in the Rwandan context. Each in his or her own way considers the fraught politics of post-genocide memory, where discovering and debating difficult historical truths may often prove to be initially contentious and thus appear to threaten prospects of reconciliation. All of these authors argue, however, that genuinely confronting the truths about Rwanda’s past is vital to fostering reconciliation after the genocide, though they highlight the immense challenges in pursuing truth and reconciliation concurrently.

On the other hand, as Jallow argues in chapter 13, the ICTR holds that it is necessary to punish perpetrators in order not only to fulfil a moral and legal obligation—bringing them to account—but also to contribute to national peace and reconciliation. Trials such as those at the ICTR, however, may not always reveal the truth of past atrocities, especially if, as is often the case, perpetra-

1 P. Clark, “Justice without Lawyers: The *Gacaca* Courts and Post-Genocide Justice and Reconciliation in Rwanda”, unpublished PhD thesis, University of Oxford, 2005, 27-8.

tors are unwilling to offer incriminating testimony; if witnesses are murdered or otherwise die, or are unwilling to testify; if evidence is lost or destroyed; or if the legalistic nature of trials bars disclosure of crucial emotional “truths” related to past crimes. Furthermore, the investigation, prosecution and punishment of alleged perpetrators may not promote genuine reconciliation among antagonists, especially if the imprisonment of convicted perpetrators separates them physically from victims of violence and the rest of the population, thus minimising the capacity of offenders and victims to engage, and reconcile, with each other. If not conducted with sensitivity and the approval and cooperation of survivors, trials may cause additional trauma. Furthermore, if suspects seek to avoid arrest or feel they have been wrongly accused, efforts to bring them to justice may also foment further conflict.

At a more individual level, the search for some degree of healing may also in turn conflict with truth and justice gains. For the sake of their emotional or psychological wellbeing, some victims may prefer to ignore calls to pursue the punishment of those guilty of crimes, especially if they were committed by individuals who have subsequently died or fled the region. Similarly, perpetrators may want to avoid the stigma of accepting blame, if they must return to be neighbours of their former victims, who may remain vengeful. Some victims may prefer to avoid the potential retraumatisation associated with justice processes that involve addressing difficult truths about the past, including painful memories and feelings. To what extent should transitional processes address the past, and to what extent should they allow victims and perpetrators to simply “move on”? Who has the moral authority to make such difficult tradeoffs and how can they be translated into institutional frameworks? What if the response given to these questions varies geographically and across different local realities? None of these questions can simply be addressed through broad and vague concepts such as “justice” or “reconciliation.”

Tensions caused by the practical operation of transitional justice institutions

In addition to the tensions manifest between various transitional justice themes, there are those regarding the actual design and operation of transitional justice institutions themselves: Where should they be based? How should they work?

Tensions in the location of transitional justice institutions. In designing transitional justice institutions, one of the first decisions that must be made is where to locate the institution. There is in fact a simple choice: whether or not to situate the institution close to the site of the atrocities concerned. For example, the ICTR is located in Arusha in Tanzania, which is adjacent to Rwanda; *ad hoc* war crimes tribunals for Cambodia, Iraq and Sierra Leone are all located within

the states where crimes under their jurisdiction are alleged to have been committed; and the ICTY and the ICC are located in The Hague in the Netherlands, far from the sites of the atrocities they address. There may be compelling reasons for these decisions concerning the relative proximity of institutions to the conflict zones concerned, and certain decisions will appeal to particular stakeholders. For example, the decision to locate a transitional justice institution away from the site of the atrocity being addressed is often linked to security concerns. In the aftermath of an atrocity, as in Rwanda, and especially if an atrocity is ongoing, as in the case of the ICTY—which was created while the conflict in the Balkans still raged—those designing the transitional justice institution may only consider it safe for the institution's infrastructure, staff, witnesses and even suspects to locate the institution away from the conflict zone. Furthermore, having a transitional justice institution operate in or near the site of an atrocity may trigger further unrest if, for example, the supporters of a suspect who has been detained by the institution seek to disrupt the proceedings.

Conversely, there are often compelling reasons to establish a transitional justice institution in or at least close to the scene of the alleged crimes it is mandated to address. The practical operation of a transitional justice institution depends on access to witnesses, evidence, suspects and experts, all of which may be facilitated by having the institution situated close to the atrocity site. Furthermore, the presence of the transitional justice institution in or near the location of the crime is often critical to post-conflict reconciliation and reconstruction. A common criticism levelled by, among others, Ngoga (in chapter 16) at the ICTR—an institution located closer to the atrocity site concerned than, for example, the ICC (at least with respect to its first cases), but still considered by many to be too far (physically and in the minds of the national population) from Rwanda—is that, because of physical distance and its lack of an effective outreach programme, the ICTR has little relevance for everyday Rwandans, who are unable to attend hearings or gain regular and useful information concerning developments at the Tribunal. Given the ICTR's claimed objective of contributing to national reconciliation in Rwanda, its physical distance and apparent detachment from social realities in Rwanda make its location highly problematic.

Locating transitional justice institutions far from the atrocity sites concerned is also potentially damaging if we consider that a purpose—or at least a side effect—of some transitional justice institutions is to help jump-start the legal system of the state in question. Accordingly transitional institutions may employ survivors, not only to use their expertise but also to train them in the investigation, prosecution and adjudication of mass crimes. The institutions may also initiate campaigns, through publicising of investigations, convictions and sentences, and may themselves be the subject of local reports, which raise local

public awareness about the utility and desirability of international justice. Such public education efforts are especially critical in societies with low literacy rates, poor education and/or a lack of access to mainstream media—all of which are common in areas where atrocities are perpetrated and may indeed have also been among the contributing factors to the outbreak of heinous crimes in the first place. Demonstrating the importance of accountability can facilitate, and be a critical component of, broader post-conflict reconstruction and nation-building, which may in turn enable post-atrocity communities themselves to better prevent heinous crimes.

Tensions among principles to which transitional justice authorities subscribe when administering various institutions. Besides the issue of location, transitional justice authorities must make decisions on the basis of principles that might also turn out to be contradictory. Thus, for instance, many Western legal scholars and human rights activists have argued that the Rwandan government, in apparently failing to include certain elements of due process in *gacaca*, violates international standards of judicial procedure, including those recognised in international treaties that the Rwandan government has signed, for example the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.² This may again be an instance of the aspiration-capacity gap discussed earlier, between what the Rwandan government is legally bound to provide, such as ensuring that genocide suspects are tried by an impartial judiciary in *gacaca*, and what it may have the resources to achieve. The Rwandan government may thus be faced with a choice of whether to (continue to) violate international agreements or to formally withdraw from them. Government officials may also believe themselves that leaving the *gacaca* process to follow a life of its own will facilitate the healing or reconciliation process. Such a conflict between principles to which a transitional justice authority (in this case, the Rwandan government) subscribes and practices in different contexts may cause that authority to incur costs in terms of its international reputation, but these costs in turn must be weighed against internally generated tradeoffs and decisions.

Other examples of tensions relating to the practical operation of transitional justice institutions include problems arising from the use of plea-bargaining in the investigation and prosecution of suspected atrocity perpetrators. Plea-bargaining can be used to expedite a backlog of cases, especially when, as in Rwanda, there are tens of thousands of genocide suspects, and to reintegrate these individuals more rapidly into society, in the cause of reconciliation, or to gather evidence from foot soldiers against more high-level targets of investiga-

2 See discussion in Clark's chapter 15; see also Amnesty International, "Gacaca: A Question of Justice", AI Index AFR 47/007/2002, 12 December 2002, 30.

tion. Plea-bargaining can also lead to false confessions when suspects believe—or are intimidated into believing—that the evidence against them is sufficient to convict them and that, consequently, they will receive much harsher sentences than if they cooperate before trial.

Clearly then, tensions can occur when a single actor administers a single transitional justice institution, or when multiple actors (for example community-level authorities, the Rwandan government, the United Nations) simultaneously or sequentially employ multiple transitional justice institutions, perhaps involving the same suspects, witnesses, evidence and even objectives. Such tensions can be welcome and beneficial, by forcing a society or various authorities, whether working together cooperatively or independently, to prioritise among them and to set clear and achievable goals. These tensions, though, can also frustrate and cause conflict among key actors, such as the international community, human rights organisations, government officials and survivors, who may disagree about which goals should be prioritised and therefore disagree further about which transitional justice institutions or processes should be promoted in order to achieve them. In the end, success will depend on the capacity of actors and society to peacefully negotiate compromises among their respective conceptions of life after conflict.

Conclusion: appropriateness of “transitional justice”

“Transitional justice” has recently become a popular term to describe the field of judicial and non-judicial mechanisms used to respond to atrocities, and the tensions raised in doing so. But is “transitional justice” really an appropriate term for such a wide and heterogeneous range of mechanisms? Should we not question some of the very assumptions that underpin this book and the field more broadly?

First, what do we actually mean by “transitional”? The mechanisms in question will help societies to move from one state of affairs to another, and will at the same time be made obsolete by such evolution. In the process, however, attempts to promote, for example, accountability and reconciliation may be merely aspirational and fail to encourage genuine transition. They may even create perverse effects by exacerbating or indirectly causing renewed conflict. Individuals may have preferred to suppress memories of atrocities, or may, through the work of transitional justice institutions, learn new information, either of which may prompt new unrest. In short, in a context that does not result in any sort of transition, the transitional aspect of “transitional justice” may be a misnomer.

Second, is it appropriate to prioritise *the idea of “justice”* over all other themes? For example, some actors or observers would argue that in cases where

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these two objectives are not complementary, the stability of a society must be prioritised over justice. As discussed above, there are many facets in the “justice agenda”, and some approaches, especially in the realm of retributive or deterrent justice, may further inflame feelings of revenge in a society and thus prove detrimental to any genuine transition away from conflict. Even short of this worst case, “justice” cannot be made to capture all of the other goals pursued in the aftermath of a conflict.

In short, the phrase “transitional justice” will often be a poor description of the actual dynamics of post-conflict societies as it fails to capture the tensions among the many goals pursued by different actors or the various outcomes—intended or unintended—which may prevail. It may sometimes be more useful to use the phrase “post-conflict reconstruction”, which does not purport to make predictions or to prioritise any single transitional justice theme. If the fundamental challenge for theorists and practitioners alike is to navigate the tensions that arise from dealing with an impossible but all too recent past, it may be desirable to stress that the prize will be long-lasting, sustained reconstruction: a new beginning.