

CHILDREN AND TRANSITIONAL JUSTICE

*Truth-Telling, Accountability
and Reconciliation*

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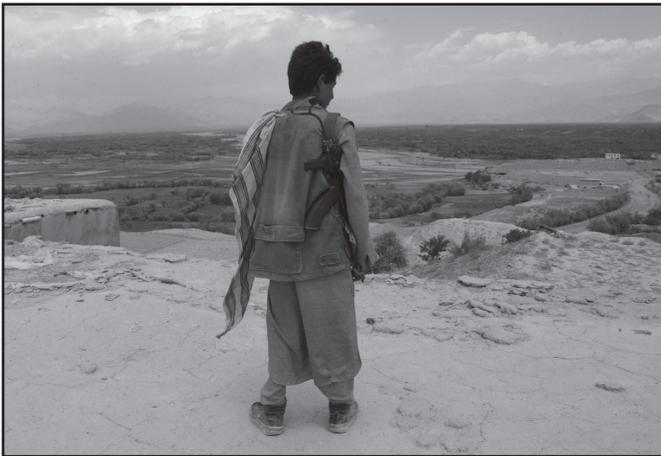
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CHAPTER 2

BASIC ASSUMPTIONS OF TRANSITIONAL JUSTICE AND CHILDREN

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INTRODUCTION

The targeting of children during armed conflict is not new: children have been victims of crimes under international law for centuries and have also been used as the vehicles through which adults commit crimes. What is new is the increasing attention being paid to this issue. The world is beginning to say “enough”: enough destruction of young lives; enough unconscionable and unnecessary suffering; enough loss of childhood; enough political expediency that allows these things to continue. Underneath it all, enough impunity for all of these things, because with impunity comes more suffering, as violations are tacitly or explicitly approved and allowed to continue.

This chapter looks at a number of the basic assumptions of transitional justice as it affects children. Perhaps the most basic assumption of all is that transitional justice mechanisms are the best vehicle to achieve an end to impunity, through criminal prosecutions and other accountability and truth-seeking strategies.² Experience demonstrates the validity of this assumption: from the tribunals in Nuremberg and Tokyo after the Second World War, to the truth commissions addressing the conflicts of the 1980s and 1990s in Latin America, to the permanent International Criminal Court (ICC) which became operational in 2002, transitional justice has signaled a break with the past and assisted societies throughout the world to move forward. However, there is less empirical data for making such an assessment regarding children, since they have been involved only recently in transitional justice processes and their participation has been something of an “add-on.”

² See, for example, D. F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime,” *The Yale Law Journal* 100 (8) June 1991:2537-2615. The author states at page 2542: “Above all, however, the case for prosecutions turns on the consequences of failing to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future?” See also L. E. Fletcher and H. M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24 2002:573-639, at 578.

Yet there is an emerging consensus that transitional justice is important for children: they are important members of society, and the children of today's transitions are also the adults of tomorrow, inheriting the results of transition. Furthermore, children and young people far outnumber adults in many countries requiring transitional justice; excluding them may exclude the majority of the affected population, which is both counterintuitive and unproductive. As the Sierra Leone Truth and Reconciliation Commission noted, "The reconciliation process in Sierra Leone demonstrates how children, as active partners in the process, can help break the cycle of violence and re-establish confidence in the rule of law."³

This chapter therefore considers why and how children's perspectives should be woven into the fabric, design and operations of transitional justice mechanisms and processes.

Transitional justice often starts with consideration as to which of the existing models or variants would be best suited for a particular country. In the aftermath of mass violence, there is an almost reflexive assumption that society will need some kind of truth commission and some kind of criminal justice process. Even while these discussions almost invariably maintain that each situation is different and there is no "one size fits all," in fact the recommendations emanating from those discussions also almost invariably advocate the use of models that have been adopted elsewhere. Since children's perspectives have not often figured prominently in transitional justice to date, this approach may leave children sidelined.

This chapter examines the "who, what, when, where, why and how" of transitional justice and children in order to rethink some of the basic assumptions about transitional justice and children. By breaking this broad issue into its constituent components, the chapter aims to outline some common questions that need to be addressed. Instead of taking a descriptive approach – listing what mechanisms have been used and the effect, impact and results they

³ Preamble to the *Truth and Reconciliation Commission Report for the Children of Sierra Leone*, at 7, available from www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf.

have had on and for children – the chapter promotes a more analytic approach. It presents a framework for analysis of different mechanisms, their objectives, and their strengths and weaknesses, so that transitional justice mechanisms and processes can respond more effectively to the needs of children, as well as other stakeholders.

WHAT DOES TRANSITIONAL JUSTICE MEAN?

The most commonly accepted definition of transitional justice was provided in the 2004 report by the United Nations Secretary-General on the rule of law and transitional justice. It defines transitional justice as: “The full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”⁴

This chapter follows the Secretary-General’s definition, taking the broad view that transitional justice refers to any number of mechanisms or processes that can be used to “ensure accountability, serve justice and achieve reconciliation,” particularly following periods of massive violence or widespread abuse. Inherent in the definition of “transitional” is the temporary nature of the mechanisms and processes, which are designed to provide a bridge from the present to the future – from war to peace, from human rights violations to human rights protection, from dictatorship to democracy. They are therefore generally designed to conclude or lapse after fulfilling their objective.

⁴ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, at p. 4, para. 8.

It is worth highlighting that the work of the ICC is sometimes referred to as “international justice” rather than “transitional justice” because it is a permanent court with a forward-looking jurisdiction. This chapter takes the view that since the ICC is and will be employed for a limited time period in the countries where it is operational during times of transition and ongoing conflict, it is properly described as a transitional justice mechanism, at least vis-à-vis the population of the country where it is operating.⁵

The overarching definition in the United Nations Secretary-General’s report may appear to lack precision, but its utility more than compensates for any lack of specificity. There is a certain constructive ambiguity in leaving such a widely used term broad and non-exhaustive, as it encourages societies in transition to adopt the mechanisms that suit their needs and are most likely to meet their goals, without feeling they have to “do what country X did.” It encourages the kind of creative thinking that gave birth to transitional justice, back in the 1980s and 1990s when family members who had survived the violence in Latin America had a desperate need to know what had happened to their family members and loved ones who were “disappeared,” and even in the period after the Second World War when there was a widespread and burning desire not to let the Holocaust go unchallenged and its architects go free. The truth commissions developed in Latin America and the tribunals at Nuremberg and Tokyo were, at the time, novel approaches to extraordinary situations, responding to unprecedented levels of violations with political determination to see that the affected societies could make the transition to sustainable peace.

The fact that different approaches were chosen in those situations illustrates one basic assumption about transitional justice: one size does *not* fit all. The challenge is how to act on this assumption and identify which mechanisms or processes are the

⁵ Similarly, national courts can form part of a transitional justice process when they are charged with prosecuting crimes or hearing civil claims relating to violations that took place in the past, since they are being employed as a tool to assist society to move forward through the transition.

most appropriate for a particular country. The answer may be found in rethinking the aims of transitional justice. The most often-stated aims are those most sought after: promoting peace, achieving reconciliation within and between divided societies, strengthening the rule of law and enhancing respect for human rights. Additional purposes that transitional justice is called upon to fulfill include restoration of a society's confidence in state institutions; mending relationships between individuals, between countries in the region or with the international community more generally; or even simply being able to say "something was done" thereby closing (or attempting to close) a chapter on the past.

Other aims that fall more generally within the criminal justice context, such as punishment and vengeance, can be addressed through mechanisms that contribute to deterrence, incapacitation, rehabilitation and retribution.⁶ One basic assumption is that responses to criminal behavior are best met through a response by the state in accordance with predefined law, rather than by individual members of a society taking matters into their own hands, with no certainty about what behavior is prohibited or what the consequences might be.⁷ The dangers of individuals taking matters into their own hands are magnified when children are concerned, particularly when it comes to promoting child participation in transitional justice processes, which requires careful planning to ensure their physical and psychological protection. The

⁶ These four purposes are often described as the basic principles of (domestic) criminal justice, which fit equally well in a transitional setting; *see, for example*, G. S. Bridges, J. G. Weis, and R. D. Crutchfield, eds., *Criminal Justice* (Thousand Oaks, CA: Pine Forge Press, 1996), pp. 43-48.

⁷ *See, for example*, article 15 of the International Covenant on Civil and Political Rights, which states: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; and: Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

dangers are further magnified when it comes to alleged child perpetrators and appropriate avenues for addressing their accountability.⁸

The kind of mechanism or process most appropriate for a country in transition depends on its goals: if the aim is to assign individual criminal responsibility, then criminal justice processes are likely to be most appropriate; if the aim is to assist as many victims as possible in telling their stories, then nonjudicial processes are likely to be more effective. As such, transitional justice can (at the risk of becoming all things to all people) encompass a very broad range of mechanisms and processes, including criminal trials, either national or international; truth commissions; commissions of inquiry, like the one established to look into the Bloody Sunday incident in Northern Ireland; restitution or reparations; educational reform; and so on. A mechanism can be instigated by the state or on some other official basis, or it can be instigated by civil society or private individuals. Transitional justice mechanisms may also include other less structured or institutionalized approaches, such as national days of memory, apologies and the construction of monuments to memory or peace.

INTERNATIONAL LAW

One basic assumption is that the general rules are reasonably clear: international and national laws govern conduct at all times, whether during war or peace, and these laws can be appealed to and applied by transitional justice processes. They are equally applicable to children, who also benefit from the protection of a specific legal framework set forth in the Convention on the Rights of the Child (CRC) and other instruments. This general legal framework, concerning crimes under international law and the protection of fundamental human rights, is both fairly well established and fairly comprehensive. It has taken root in several international legal

⁸ See, for example, Cécile Aptel, "International Criminal Justice and Child Protection," Chapter 3 of this volume.

instruments and norms that apply to most states and, in some cases, to all of them.⁹ General and specific human rights principles and prohibitions on the commission of crimes under international law are also included in numerous regional human rights instruments; in the statutes and case law of international criminal courts and tribunals; and in international guidelines and instruments governing the rights of victims. The most notable of these is the 2005 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,¹⁰ which provides that victims of such abuses, including children, have a right to prompt, adequate and effective reparation.

Most of these international and regional treaties expressly require states to implement and enforce the rights outlined at the domestic level; the ICC, in fact, is built on the concept that states have the primary responsibility to investigate and, where appropriate, prosecute crimes under international law.¹¹ The

⁹ These international legal instruments include the Geneva Conventions, the Hague Conventions and the Additional Protocols, which cover most of the war crimes; the Genocide Convention; and most recently the Rome Statute for the International Criminal Court, which codifies the law relating to crimes against humanity. General human rights principles are covered by the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and the conventions of the International Labour Organization. Specific rights that subsist for specific groups, such as children, also form part of other human rights treaties, including the CRC, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women.

¹⁰ Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005, available at www2.ohchr.org/english/law/remedy.htm.

¹¹ This principle, called the principle of complementarity, is reflected in the preamble to the Rome Statute, which states that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ... [and] emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” See also article 17(1)(a) of the Rome Statute, which sets out the grounds for admissibility of a case, providing that a case cannot be heard before the ICC when it is “being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.”

challenge lies in ensuring proper implementation and enforcement of the law at domestic, regional and international levels and in the early identification and filling of gaps, such as those related to the conscription, enlistment and use of children to participate actively in hostilities or the crime of forced marriage.¹²

THE ROLE OF CHILDREN IN TRANSITIONAL JUSTICE MECHANISMS AND PROCESSES

Within the overall legal framework that binds and guides transitional justice mechanisms, several provisions relate specifically to children, including a whole treaty regime: the CRC and its Optional Protocols. These provisions set out the broad rights that children possess, guide how those rights might be exercised and lay out what can and cannot be done with regard to children, such as prohibiting the conscription, enlistment or use of children for or directly in hostilities. Article 3 of the CRC, for example, provides that the best interests of the child should be a primary consideration underpinning every action taken in relation to children, as well as in the implementation of the rights contained in the CRC itself. In addition, the CRC specifically provides that children have the right to participate in decisions affecting their lives¹³ and to redress for harms committed against them, by obligating States parties to promote the “physical and psychological recovery and social

¹² *Prosecutor v Brima, Kamara and Kanu* (AFRC Case, Case No. SCSL-2004-16-A), Special Court for Sierra Leone, Appeals Chamber Judgment of 22 February 2008, paras. 181-203. There is ongoing debate regarding whether the term “forced marriage” adequately reflects the situation in which parents give their consent for the marriage of underage daughters, who may or may not consent. In the context of crimes under international law, however, the crime of forced marriage does reflect the experiences of hundreds of girls who are often referred to as “bush wives,” in that it refers to a specific set of circumstances in which girls were abducted from their villages, often in situations of extreme violence, and subsequently held in captivity and forced to perform domestic services and provide sexual services for commanders of the forces that had abducted them.

¹³ CRC, article 12(2).

reintegration of a child victim...in an environment which fosters the health, self-respect and dignity of the child.”¹⁴ The CRC also provides for the rights of children accused of having committed crimes and is complemented by other international instruments, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“Beijing Rules,” 1985).¹⁵

The implementation of this well-developed framework – much like the implementation of international law more generally – lags far behind the examination and articulation of its theoretical and conceptual underpinnings. It is only fairly recently that the *right* of a child to participate in transitional justice processes (which also includes the right not to participate) has been explicitly articulated,¹⁶ and the number of transitional justice processes and mechanisms that have expressly built children’s participation into their standard operating procedures remains limited. This matches the relatively limited attention (with some notable exceptions) paid to children’s experiences by transitional justice processes. This situation has begun to change, following the charges brought at the Special Court for Sierra Leone in relation to crimes committed during the country’s conflict. These crimes included numerous and varied crimes specifically against children and a focus on the crimes of the conscription, enlistment or use of children under the age of fifteen, which was also the focus of the first case of the International Criminal Court against Thomas Lubanga Dyilo.

The basic assumption is that these developments, acknowledging and highlighting crimes against children, have had a positive impact. For example, since prosecutions (or the threat of prosecutions) before international courts – and similarly, the exposure of crimes in transitional justice processes – can have a deterrent effect, a focus on crimes committed against children should help deter the commission of crimes against them. However,

¹⁴ CRC, article 39.

¹⁵ CRC, articles 37 and 40.

¹⁶ See No Peace Without Justice and UNICEF Innocenti Research Centre, *International Criminal Justice and Children*, 2002, p. 49.

specific caveats need to be borne in mind. As discussed below, when a transitional justice mechanism addresses crimes committed against children and involves them as victims and witnesses, it needs to ensure that proper protection is in place. Without such protection, children's participation becomes limited at best or damaging at worst. There is also a risk of "showcasing" specific kinds of violations, such as child soldiers or child victims of sexual violence. While this may help raise awareness of children's issues in transitional justice processes, care must be taken not to replicate the objectification, marginalization or stereotyping that children (particularly girls) have already suffered, but instead to reflect the totality of their experiences.

Recent developments to involve children in transitional justice processes still need to be matched by proper rules and procedures guiding their participation. There have been some successes, such as the involvement of children in the work of truth commissions in Sierra Leone and Liberia, through the development of child-friendly materials and specific sessions devoted to engaging children's perspectives. Yet there has been a lack of thoroughness in understanding precisely what children require to help them participate fully and effectively, including what kind of protection can help facilitate that participation.

One example was the first witness before the International Criminal Court in its very first trial: a child giving testimony against the defendant, Mr. Lubanga, who had also been the witness's commanding officer. After testifying against Mr. Lubanga in the morning, the witness, a former child soldier, returned after the lunch break and recanted his testimony. The most likely reasons for this were fear and lack of preparation. In particular, the protective measures employed in the courtroom did not include shielding the witness from seeing the accused, and the prosecution was prohibited from proofing the witness¹⁷ due to an earlier ruling by the chamber. This caused serious problems, not least of which was the distress suffered by the child, who had recanted due to his

¹⁷ Reviewing a witness's testimony before he or she gives evidence ("witness proofing") is standard practice in many domestic courts and in other international courts.

reaction when he saw – and was seen by – Mr. Lubanga in the courtroom. Later, witness protections were put in place and the witness returned to the stand and completed his testimony against the defendant.

The ICC has taken steps to prevent these kinds of problems from arising in the future, including reviewing its court procedures for vulnerable witnesses. Nevertheless, the experience illustrates the need for all transitional justice mechanisms and processes to establish protection procedures for child victims and witnesses, to employ experts in children's issues and to ensure that all relevant persons have appropriate training in children's rights and specific needs.

A basic assumption of children's involvement in transitional justice processes is that they are victims and witnesses of crimes. Nevertheless, a major issue and a cause of ongoing debate concerns children accused of crimes under international law. There is a general agreement that international criminal justice mechanisms are not an appropriate venue for addressing crimes allegedly committed by children. This is because children should be considered primarily as victims. In addition, such mechanisms focus on persons who bear the greatest responsibility for the crimes, which is understood not to include children, who lack the capacity to plan, instigate, order and implement widespread or systematic crimes.¹⁸ However, it is difficult to justify this approach to individuals who may have witnessed the killing of family members by children who did not appear to be acting under the direction of an adult.

Similarly, if the goals of transitional justice include deterrence, breaking a cycle of violence and demonstrating that actions have consequences, it is difficult to state as an absolute certainty that children who commit crimes under international law should never be held accountable for their actions. That runs the risk of designating special classes of people to whom the rules do not apply, which is anathema to the rule of law more generally. What is

¹⁸ See, for example, No Peace Without Justice and UNICEF Innocenti Research Centre, *International Criminal Justice and Children*, 2002, pp. 54-56.

therefore needed is more consideration of the most appropriate forum for achieving accountability for children accused of crimes under international law. This will depend on the specific circumstances of the crime, the overall goals of transitional justice in that situation and the individual circumstances of the child, based on his or her best interests and rights.

One question worth asking is why there has been such a limited focus on the rights of children in transitional justice processes. Children are often disproportionately affected by crimes or violations, whether they are specifically targeted or not; children have the right to participate in decisions affecting their lives, the right to redress for the wrongs committed against them and the right to access to justice. Children are full members of today's societies and, as adults, will have to manage the system that is put in place as a result of the transition. Therefore, they have an important role to play.

Nevertheless, it is only within the last twenty years or so that society has begun to reconceptualize the position and role of children, turning away from the idea that they are passive objects in need of protection and shifting toward an understanding of children as rights-holders who need assistance in exercising their rights, appropriate to their stages of development.¹⁹ Previously it was assumed that children should not participate actively in transitional justice processes and mechanisms, as their experiences would be subsumed within society's experiences, to which adults could speak on behalf of children. With the adoption of the CRC and the reconceptualization of the child as a rights-holder, it is recognized that transitional justice processes and mechanisms need to hear the voices of children, expressing their thoughts and needs from their own unique perspectives. The engagement and expression will vary from child to child, depending on the developmental stage and the individual desire to participate. The participation of children in transitional justice processes is founded

¹⁹ See, for example, *A World Fit For Children*, UN General Assembly Resolution of 11 October 2002, UN Doc. A/RES/S-27/2, which emphasizes the obligations due to children as rights-holders, including taking measures to assist children in realizing those rights.

on the human rights-based approach, which should inform the thinking of those who are involved in designing and operating transitional justice mechanisms and processes.

AN INVESTIGATIVE APPROACH TO BASIC ASSUMPTIONS OF TRANSITIONAL JUSTICE AND CHILDREN

Analyses of the mechanisms and processes of transitional justice and the role of children have tended to focus on what has and has not worked in different instances and then using those findings to guide efforts undertaken elsewhere. This is an extremely useful approach and has benefited both conceptual thinking about transitional justice and the development of new approaches, including techniques to engage children's participation. The risk, however, is that basic assumptions may remain unchallenged. This approach also runs the risk of falling into the "one size fits all" trap, leading to adopting certain processes and procedures because they worked well in a previous situation.

This points to a crucial premise: whereas the fundamental principles and legal framework of transitional justice are standard and not negotiable, including as they apply to children, the mechanisms and processes need to be adapted to the specific context. This is because different societies have different needs that have arisen in different political, cultural and socioeconomic environments, as well as different ways of engaging with their youth.

Adopting an investigative approach²⁰ to look at basic assumptions of transitional justice and children can help increase the efficiency of meeting this challenge. The objective of such an

²⁰ The investigative technique, which is employed in criminal investigations from routine domestic crimes to the most complex and widespread crimes under international law, seeks to examine all aspects of a situation with a view to constructing a blow-by-blow narrative of a particular incident or set of incidents. Police officers and investigators around the world use this technique to ensure that they obtain the full story and that there are no gaps or missing information when it comes to reconstructing events and putting together their case.

analysis is to increase the effectiveness²¹ of children's participation in transitional justice processes. This approach is based on the six "Ws" – namely why, who, what, when, where and how. This "bottom-up" approach can help in examining the building blocks of transitional justice, encouraging scrutiny of the basic assumptions with respect to transitional justice and children and assessing how the foundations of transitional justice might be either validated or revised. It is also useful in considering how the perspectives, expectations, needs and rights of children might be woven into their fabric, so as to make whatever mechanism or process comes from or within it as strong and effective as possible, particularly for children.

Why Pursue Transitional Justice?

The question of "why transitional justice" does not refer to the broader questions of why it is needed – such as to strengthen the rule of law or to contribute to sustainable peace – although the broader question of "why" has particular resonance for children, since one purpose of transitional justice is to make the country a better place for future generations.

In this context, the question of "why" refers to the immediate, concrete goals of transitional justice mechanisms and processes. They are established for many reasons, among them obtaining redress for victims, including children; establishing a record of the past; preventing denial of crimes or human rights violations; providing justice; preventing exaction of revenge by vigilantes; securing funding or preventing the withdrawal of aid or the imposition of sanctions (as was the case with Serbia and the International Criminal Tribunal for the former Yugoslavia);²²

²¹ A very basic assumption incorporated into the fabric of this paper is that those who set up, operate and support transitional justice mechanisms and processes want them to be effective.

²² V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), p. 62.

removing human rights violators from state institutions or the government or preventing their appointment or election; and reforming institutions such as health care and education, both of which are particularly relevant for children.

Legal obligations on states also need to be considered when elaborating the reasons why transitional justice might be appropriate. For example, states have an obligation either to extradite or to prosecute serious crimes under international law,²³ and they also have an obligation to provide effective remedies, including reparations for victims of human rights abuses, including children.²⁴ The stated aim may well be different from the actual aim: a state may say it wants transitional justice to create a better future for children, while in reality it simply wants to reinforce its own legitimacy or cover up its past wrongdoings. Understanding these motivations is important for managing policy decisions on operational issues, but once the decision to set up a transitional justice mechanism has been made, its implementation, whether judicial or nonjudicial, may provide unforeseen opportunities. For example, a truth commission set up for cosmetic reasons may provide opportunities to instigate institutional reform, thereby improving children's health and access to education.

The reasons for seeking transitional justice and the intended goals are as diverse as the situations themselves. Indeed, the motivation in any given situation is generally not a single objective but a mix of objectives that may or may not be shared by all stakeholders or by all those involved in the design and operation of transitional justice mechanisms and processes. What is clear, however, is that children are always stakeholders – because they are the victims and witnesses, often disproportionately affected; because they are active members of society; and because they will inherit

²³ See, for example, M. C. Bassiouni and E. M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1995).

²⁴ UN Basic Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, 16 December 2005.

and have to implement the results of the transitional process. The perspectives of children therefore need to be woven into the very fabric of transitional justice processes, to ensure that the “why” of transitional justice includes a focus on children’s rights and issues. To this end, there is a clear need for consultation with children and other stakeholders to determine their goals and aspirations and to ensure that the process that is adopted addresses all those goals and is as responsive to children as it can be.

Identifying as clearly as possible the precise aims of transitional justice is critical in determining the choice of mechanisms and how they should operate. For example, if the purpose of a transitional justice process is to prevent human rights violators from holding public office and taking charge of educational reform, an inquiry into individual responsibility for human rights violations is needed, rather than an exclusive focus on general trends or root causes. This goal could be met in many ways, including prosecutions, compiling a report that “names names,” a commission of inquiry into individual responsibility and so on. On the other hand, an initiative that memorializes victims or a national monument to peace is intended to achieve other goals and will thus do little to keep human rights violators from holding public office.

Identifying the goals – the “why” of transitional justice in any given situation – will also help in determining whether more than one mechanism is needed and avoid the risk of placing too high a burden on any single process. The Sierra Leone Truth and Reconciliation Commission, for example, was mandated “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered,” with a specific mandate to focus on the experiences of children.²⁵ It was able to make progress toward each of these goals and even quite advanced progress toward some of them, in

²⁵ *Truth and Reconciliation Act 2000*, section 6(1).

particular incorporating and addressing the experiences of children. However, it is questionable whether the Commission was, in the end, able to fulfill its statutory mandate. Operationally, it was plagued by a range of problems, including a lack of dedicated resources,²⁶ but the burden of this long list of mandated goals certainly contributed to its inability to fulfill them completely.²⁷ This could have been avoided by a more realistic concept of what a truth and reconciliation commission is best suited to achieve and what goals would have been better addressed by other mechanisms, such as the Special Court for Sierra Leone (SCSL).²⁸

Echoing an analogy used by then-Registrar Robin Vincent to describe the role of the SCSL,²⁹ TRC Commissioner and Professor William Schabas has likened the transitional process in Sierra Leone to building a house. He described the TRC as the plumber and the SCSL as the electrician, concluding that “nobody would want to live in a finished house that lacked either electricity or plumbing.”³⁰ Similarly, nobody would want to live in a finished house where the electricity was installed by the plumber and the plumbing was installed by an electrician; the potential for error is

²⁶ See, for example, W. Schabas, “The Sierra Leone Truth and Reconciliation Commission,” in E. Skaar, S. Gløppen and A. Suhrke, *Roads to Reconciliation* (Lanham, MD: Lexington Books, 2005), p. 149.

²⁷ See, for example, B. K. Dougherty, “Searching for Answers: Sierra Leone’s Truth and Reconciliation Commission,” *African Studies Quarterly* 8 (1) fall 2004 (unpaginated), available at <http://web.africa.ufl.edu/asq/v8/v8i1a3.htm>; and No Peace Without Justice, *Closing The Gap: The Role of Non-Judicial Mechanisms in Addressing Impunity*, forthcoming 2010, 113.

²⁸ The Government of Sierra Leone, in a briefing paper prepared for the Management Committee’s visit to Freetown prior to the signing of the Special Court Agreement in January 2002, advocated for the two institutions to define their relationship more formally in part to meet this objective; see www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html.

²⁹ Personal recollection by the author. Robin Vincent often described the SCSL as an important brick in the house that Sierra Leone was rebuilding, which strengthened and was reinforced by other bricks, like the Truth and Reconciliation Commission and the Peace-building Commission.

³⁰ W. Schabas, *op. cit.*, note 120.

too high. One of the warning flags raised by the Sierra Leonean experience is the need for the earliest possible articulation of goals and a careful matching of those goals to the potential capacity of transitional justice mechanisms and processes. A good relationship between various mechanisms is critical to the overall success.

Who are the Stakeholders in Transitional Justice?

In domestic justice processes, those who benefit from justice can be identified as the victim, who is the individual with a stake in receiving acknowledgment and redress, and society, which has a stake in strengthening the rule of law through a justice process. With transitional justice mechanisms, however, a far wider range of stakeholders is affected, both individually and collectively. This is well illustrated by a cursory examination of the constitutive instruments of transitional justice mechanisms. These refer to the fact that crimes under international law shock the conscience of humanity, the need to put an end to impunity for the perpetrators of large-scale or systematic abuses,³¹ providing redress for victims³² and addressing the public's right to know the truth.³³ The range of potential stakeholders extends to entire communities and countries, and each situation requires careful examination to identify who they are and how they could or should benefit from a transitional justice process.

The most obvious stakeholder is the population affected by the violations. The affected population could best be described as the primary stakeholder in any initiative set up to assist with working through that transition, yet was somewhat overlooked in the initial operations of the ad hoc tribunals for Rwanda and the former Yugoslavia. The role of the affected population as the primary

³¹ See, for example, the preamble to the Rome Statute for the International Criminal Court.

³² See, for example, the preamble to South Africa's *Promotion of Reconciliation and National Unity Act 1995*.

³³ See, for example, the Mexico Agreements establishing the El Salvadoran Truth Commission, signed at Mexico City 27 April 1991, at para. 2.

stakeholder has achieved greater recognition more recently, with an emphasis on the need to integrate outreach to affected populations within the standard operating procedures of transitional justice mechanisms and processes, most recently at the ICC.³⁴

Within the population going through the transitional period are several overlapping subgroups, each of which is a stakeholder in its own right, with specific perspectives and aspirations. Children have been recognized as a key subgroup, not only because they are the next generation, but also because they have specific perspectives on what has happened, as well as specific needs and rights, including the right to participate in processes affecting their lives, the right to redress and the right to access to justice. The participation of children requires greater effort on the part of those designing and operating transitional justice mechanisms and processes.

It is important to distinguish between girls and boys when considering the needs and aspirations of children and how to facilitate their rights. Their experiences are often different, given the different roles they are forced to perform and the different cultural norms and expectations they face as they attempt to reintegrate into society. The gender perspective of children, both in their experiences and perspectives and in how they can be supported as participants in transitional justice, needs to be addressed at the earliest possible stage. Similarly, specific attention is needed for other groups of children who may have particular needs, such as children who are orphaned, ill or have disabilities.

Another subgroup within affected populations is comprised of victims of violations, both direct victims and their families and other loved ones. There are specific obligations to victims as demonstrated, for example, in the United Nations Basic Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of

³⁴ See, for example, *External Audit, Internal Audit, Programme Budget for 2007 and Related Documents*, ICC-ASP/5/32, 1 December 2006, para. 28; *Strengthening the International Criminal Court and the Assembly of States Parties*, Resolution ICC-ASP/6/Res.2, 14 December 2007, para 20 (*inter alia*); and the NGO Communications Team of the Coalition for the International Criminal Court, *Comments and Recommendations to the Seventh Session of the Assembly of States Parties*, 6 November 2008.

International Humanitarian Law. It asserts that victims of abuses have a right to prompt, adequate and effective reparation,³⁵ thereby implying a duty to ensure such reparations are undertaken.³⁶ Yet another subgroup is the country's political actors, who are often included because of their responsibility for negotiating the design of transitional justice mechanisms and implementing their outcomes, including through legislative measures. The main responsibility of political actors is to respond to the needs of others within society in a sustainable way and to protect their rights, including the rights of children. Political actors are often targeted during the pre-transitional period because of their positions,³⁷ thereby making them primary victims and important stakeholders in their own right.

Affected populations typically have numerous groups of stakeholders,³⁸ and a process of consultation with local

³⁵ The establishment of the Victims Trust Fund by States parties to the Rome Statute of the International Criminal Court to provide compensation for victims of crimes within the ICC's jurisdiction is an important affirmation of this duty.

³⁶ See, for example, D. Orentlicher, "Addressing Gross Human Rights Abuses: Punishment and Victim Compensation" in L. Henkin and J.L. Hargrove, eds., *Human Rights: An Agenda for the Next Century* (Washington DC: American Society of International Law, 1994), 425-426; H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (Oxford: Clarendon Press, 1996); and M. Minow, *Between Vengeance and Forgiveness* (Boston, Beacon Press, 1998).

³⁷ In Morocco, for example, it is estimated that the security forces were responsible for the "disappearance" of hundreds of political opponents. (P. Hazan. "Morocco: Betting on a Truth and Reconciliation Commission," USIP Special Report 165, July 2006, p. 2).

³⁸ While the affected population and its many subgroups are the primary stakeholders for transitional justice mechanisms and processes, a range of other actors also have a stake, as illustrated by the brief elaboration of some of the stated aims of transitional justice mechanisms. Depending on the country situation, additional stakeholders may also include neighboring countries or countries in the region, for example, due to the breakdown of a state into separate states (as happened in the former Yugoslavia), or because of the involvement of neighboring countries (such as Rwanda's involvement in the conflict in Uganda or Liberia's in the conflict in Sierra Leone) or in the interests of peace and stability in the region. Additional stakeholders can include foreign states with a particular political or economic interest in a specific country or the international community as a whole, for example, because a situation may represent a threat to international peace and security or the commission of serious crimes shocks the "conscience of humankind" and so every state has an interest in seeing them addressed.

communities, including children, is one of the most important prerequisites to identifying them and establishing their specific perspectives and needs. This can have as big an impact on the design and operation of transitional justice processes as the reasons for their establishment. For example, a village ritual of reconciliation might be an appropriate mechanism for individual victims and/or perpetrators, but it is unlikely to have much effect on a neighboring country that also has a stake in the transitional period and its outcome. There needs to be careful consideration of the potential beneficiaries of transitional justice to ensure that stakeholders are engaged appropriately and that mechanisms are established that meet the needs of all. Particular care is needed to ensure that the “voiceless,” including children and marginalized groups, are heard and taken into account.

What Transitional Justice Mechanisms or Processes Should be Employed?

Transitional justice is not the sum of the mechanisms adopted; rather, it is a process that assists stakeholders in moving through a transitional period so as to meet immediate and concrete goals, with a view to achieving broader aims of accountability and reform. As such, it is not enough to establish a criminal justice process and a truth commission and to dedicate a day of remembrance and healing, and then claim that transitional justice is done. These endeavors may meet the trappings of transitional justice – and if the aim is to say “something was done,” this may be all that is required – but the question of whether they will provide effective and efficient transitional justice is another matter altogether.

The question of what transitional justice mechanism(s) and/or process(es) to adopt will necessarily be shaped by the goals, the stakeholders, and the political, social and cultural contexts. The design of transitional justice mechanisms and processes should be creative enough to meet potentially competing aims and to avoid sending the wrong signals and messages, particularly to children. In Kenya, for example, one early response to the violations committed during the postelection violence in 2007 was to call for a truth and

reconciliation commission, possibly coupled with amnesties.³⁹ Without discussion of the goal of ending impunity for political violence, the talk about the choice of mechanism and how it should operate obscured any message that violence would no longer be acceptable as a tool to achieve political power in Kenya. Instead, such talk reinforced the message that violence might continue to be rewarded. This is particularly relevant to the children of today and to those who were children in 1992.⁴⁰ In the absence of accountability, the lesson from Kenya's election cycles is that violence is an acceptable tool to gain political power.

Clearly articulating goals – the “why” of transitional justice – is essential to avoid placing the transitional justice eggs in the wrong basket and to avoid weighing down any single mechanism with all the laudable goals of the transitional period. If the stated objective is to provide a forum for victims, including children, to participate as witnesses in a safe and protective environment and to document their experiences, a criminal justice mechanism alone is unlikely to achieve it. Fortunately, the possible mechanisms are numerous and diverse, including criminal trials, truth commissions, commissions of inquiry, restitution/reparations, national days of memory, public apologies, and museums or monuments to memory or peace. The approaches that could be adopted are limited only by the creativity of those involved in their designs and the question of how responsive they might be to the needs and aspirations of the affected communities, particularly children. In this respect, it is worth reiterating that consultation with local communities, including children and young people, will be one of the most important prerequisites both in establishing who the stakeholders are and in

³⁹ Author's personal observations and discussions with political and opinion leaders in Kenya, January to June 2008. See also, P. Opiyo and T. Too, “TJRC ‘Won't Recommend Amnesty’ for Major Poll Crimes,” *The Standard*, 25 May 2009; P. Basham, “How Should Kenya Confront the Past?,” *African Press International*, 21 March 2008.

⁴⁰ The 2007 postelection violence in Kenya was not the first use of violence as a tool for gaining political power; the same patterns and character of violence have occurred during every election cycle in Kenya since 1992. See Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence*, pp. 3 and 17, available at www.knchr.org/dmdocuments/KNCHR%20doc.pdf.

determining their needs and priorities. Children's views are essential to this process and to deciding whether one mechanism is better suited to their needs.

An additional question regarding the choice of approach relates to whether there is a need for official or state involvement. If the purpose is to provide official acknowledgment of past events, for example, then state involvement is critical, whether through a judicial or a nonjudicial mechanism or process. In Australia, indigenous and nonindigenous individuals and civil society groups had long recognized that a serious violation – possibly genocide – had been committed against Australia's Aboriginal people by the systematic removal of children from their families for placement with white families between 1869 and the 1970s.⁴¹ Yet recognition for the "Stolen Generations" only became official when the newly elected government issued an apology on 13 April 2008. This single act had a major impact on reconciliation between Australia's indigenous and other communities, an impact that was heightened because the previous government had officially refused to apologize for over a decade.⁴²

The involvement of the state is not always critical or even desirable. If the goal, for example, is to create a record of the past and to provide a forum in which victims can voice their stories, a civil society initiative might fully meet those aims. This will depend largely on the prevailing circumstances in the country and the strength of will of its political leaders. In Bahrain, a civil society process has been proposed to investigate incidents of torture committed over the past twenty-five years. The state has declined to

⁴¹ Australian Human Rights and Equal Opportunity Commission, "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families," April 1997; for a discussion on genocide, *see* part 4, chapter 13; *see also* the Reconciliation Network on the Stolen Generations, available at <http://reconciliation.org.au/nsw/education-kit/stolen-generations/>.

⁴² Remarks by Jack Beeton, indigenous Australian educator, at the Pacific Roundtable Discussion on Non-Judicial Accountability Mechanisms organized by No Peace Without Justice and the Fiji Women's Rights Movement in Nadi, Fiji, on 24-27 June 2008, available at www.npwj.org/No+Peace+Without+Justice/International+Criminal+Justice/ICJP+Activities/Fiji+Roundtable+2008.

commit time and resources to establishing such a process, although it seems quite willing to allow one led by civil society.⁴³ Similarly, NGO documentation efforts – including the establishment of archives, such as those in Cambodia and elsewhere – can help preserve information until a transitional justice process or mechanism can be established and can also help generate political will for it.

When Should Transitional Justice Take Place?

The question of when transitional justice mechanisms and processes should be established has recently been a very contentious issue, with particular importance for children. One of the most-asked questions in the “peace and justice debate” is whether justice should be pursued before or after cessation of hostilities. Many argue that, as a practical matter, transitional justice mechanisms cannot operate during armed conflict; others argue that peace is a more important imperative than justice, so efforts should be focused on achieving peace; and still others argue that thinking about transitional justice is unrealistic when those responsible for human rights violations are still in power. The risks and opportunities for children to participate vary.

Simplifying the question of “when” overlooks the potential role of transitional justice mechanisms and processes in facilitating the transition itself. The lull in fighting and the temporary reduction in criminal activity in Bosnia and Herzegovina in 1998 have been linked to the issuance of an indictment against President Slobodan Milošević by the International Criminal Tribunal for the former Yugoslavia. In contrast, the prosecutor’s announcement that she did not have the capacity to open investigations into crimes allegedly being committed in Kosovo may have been a factor in the continuation of violations there.⁴⁴

⁴³ Conversation by the author with members of Bahrain civil society, Manama, June 2007.

⁴⁴ Author’s discussions with former Bosnian officials, July 2003.

Categorical assertions as to whether transitional justice should take place before or after peace fail to take into account the complexities of any given situation. In the Sudan, for example, there is no consensus as to whether at any given time and place there is ongoing conflict or whether the situation is “pre-conflict” or “post-conflict.” Another example is Sierra Leone, where peace – or at least an absence of conflict – existed in pockets of the country as early as mid-2000, when the President requested the assistance of the international community to establish the Special Court for Sierra Leone, although the conflict did not officially end until January 2002.

The question of “when” to apply transitional justice typically elicits the response “as soon as possible.” If one goal is deterring crimes, including underage military recruitment, the best time to achieve deterrence may be while the crimes are ongoing, as happened in the Democratic Republic of the Congo.⁴⁵ If the goal is demonstrating that actions have consequences, a particularly important message for children, action is needed as soon as possible. If the goal is recording a collective history of what has happened or is happening, stories should be gathered from people without delay. If the goal is making individual perpetrators accountable for their violations, again the best time is when people’s memories are fresh about who did what, when and where. On the other hand, the passage of time may bring stability, allowing people to feel more comfortable discussing violations of the past. Thought should also be given to other processes, for example whether transitional justice should be pursued within the context of a disarmament, demobilization and reintegration process.

One very important issue regarding the timing of transitional justice mechanisms is the potential effect on children who are at a critical developmental stage when the violations are committed. The

⁴⁵ Recruitment of persons under age eighteen into the Congolese armed forces officially ended in 2003, the year following the entry into force of the Rome Statute, which criminalizes the conscription, enlistment or use of children under the age of fifteen to participate actively in hostilities. From 2005 the United Nations reported a reduction in child soldier recruitment and use by armed forces and groups; see www.childsoldiersglobalreport.org/content/congo-democratic-republic.

very public discussion of amnesties in Kenya while the violence was ongoing during the national election sent a message that violence to achieve political aims may be rewarded, which did little to help the deterrent effect produced by the involvement of the International Criminal Court. Of greater concern, however, is the fact that the next generation of Kenya's political leaders, many of whom are preparing to enter politics in 2012, have no example to follow other than the fact that violence before, during and after elections is an effective tool to gain political power. This will be the lasting message unless there is quick follow-up to the accountability efforts undertaken to date.⁴⁶

Where Should Transitional Justice Mechanisms or Processes Take Place?

The question of the location for transitional justice processes is usually an issue only when the international community, or possibly another state, is involved. If the pursuit of transitional justice is primarily a domestic effort, any mechanism or process is likely to be established in the country where the violations took place. For example, there was no question that any of the Latin American truth commissions would take place anywhere but in the countries themselves, and the same has held for Fiji, Morocco, Timor-Leste and other countries where the pursuit of transitional justice was a homegrown, home-led effort.

By contrast, when the international community is involved, the question of "where" may become a burning and sometimes contentious issue. The question of whether a transitional justice mechanism or process should be convened in the country where the violations were committed may not adequately take into account

⁴⁶ Namely, this follow-up acting on the documentation of violations that were carried out by the Kenya National Commission on Human Rights and No Peace Without Justice and the Commission of Inquiry into the Post-Election Violence (the Waki Commission). Both commissions recommended establishing a special tribunal and a truth commission for Kenya. At the time of this writing, the Kenya Truth, Justice and Reconciliation Commission had recently been established, a bill to establish a special tribunal had stalled in Kenya's Parliament, and the prosecutor of the ICC had filed a request to open an investigation into the situation in Kenya. As such, it is still too early to judge whether these measures will be successful.

considerations of why transitional justice is being pursued at all, or for whom. The answer may instead turn on issues of security, as was the case with the transfer of the trial of Charles Taylor from Freetown to The Hague and the establishment of the Special Tribunal for Lebanon, also in The Hague. This has been a challenge for the ICC, located in The Hague, which is seeking to strengthen its field presence.⁴⁷

The location of a transitional justice process will depend on why and for whom it is being pursued. If the objective is to provide redress for victims or an opportunity for affected populations, particularly children, to contribute to a shared history, the mechanism needs to be close at hand. Hosting a transitional justice process far from the place where crimes were committed decreases its effectiveness and efficiency, limits engagement and increases the cost. This is of particular relevance for children, whose ability to participate and follow what is happening falls dramatically with distance from the process. It is also important to keep in mind the relativity of distance; to children in Bunia, Democratic Republic of the Congo, the country's capital Kinshasa can seem as far away as The Hague.

This was one of the singular lessons learned by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone (particularly in relation to the trial of Charles Taylor) and the International Criminal Court. The cost of conducting work at a distance affects all aspects of the effort, including investigations, outreach, hearings and trials.⁴⁸ It slows the process, increases the financial burden and raises the psychological cost to witnesses, who have to travel to give testimony in an

⁴⁷ See, for example, remarks by ICC Registrar Silvana Arbia at the ICC's Fifteenth Diplomatic Briefing in The Hague on 7 April 2009, available at www2.icc-cpi.int/NR/rdonlyres/1E5F488B-2FA9-40F4-9378-A386AF6CBA6E/280246/Compilation_of_Statements_15_DS.pdf, p. 11.

⁴⁸ For a more detailed look at the issue of international courts and their presence in the field, see No Peace Without Justice International Criminal Justice Policy Series No. 3, "The International Criminal Court's Field Presence," 23 November 2009, available from www.npwj.org.

unfamiliar environment far from their homes. This has a potentially severe impact on children, even when protection procedures are in place.

When the Government of Sierra Leone and the United Nations were considering the location of the Special Court, considerable weight was given to the aims of the Court and those for whom it was being established. In his letter to the United Nations Secretary-General of 12 June 2000, the then President of Sierra Leone highlighted the need for the Special Court to sit “on Sierra Leonean soil.”⁴⁹ The Security Council agreed implicitly, only requesting the Secretary-General to report back to them on “a possible alternative host State, should it be necessary to convene the special court outside the seat of the court in Sierra Leone.”⁵⁰ In his report on the establishment of the Court, then United Nations Secretary-General Kofi Annan said, “In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused.”⁵¹ The answer to the question of “where” was Sierra Leone itself, in the vicinity most affected by the crimes under investigation.

The questions of “why” and “for whom” should always guide those seeking an answer to the question of “where” transitional justice processes should be located. If the decision is nevertheless taken to locate the mechanism far from the stakeholders, additional efforts will be needed to ensure that it is able to meet the needs of all, especially those most affected by the transition. This can take place through sustained outreach efforts that engage affected

⁴⁹ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, p. 3.

⁵⁰ UN Security Council Resolution 1315 of 14 August 2000, UN Doc. S/RES/1315 (2000), at operative para. 7.

⁵¹ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, at para. 54.

populations, including children, or other methods that will be able to explain to affected populations what is happening and why.

How Can the Transitional Justice Mechanism or Process Meet its Goals?

A perfectly conceptualized and designed transitional justice system that fails to link the aims and the operational means of the mechanism can seriously compromise the ability of the entire system. If the means by which the mechanism operates fail to provide adequately for the protection of children, the mechanism will fail to engage their participation, reflect their perspectives and protect the exercise of their rights.

The *gacaca* courts of Rwanda provide a notable example of the potential pitfalls when there is a disconnect between the aims of transitional justice and the design of its delivery processes. These courts were established to promote reconciliation by implementing a massive, nationwide system of community “trials” for the large number of people, including several thousand children, awaiting trial for genocide in Rwanda’s courts. They evolved from traditional courts used to adjudicate disputes between families concerning marriage, property and personal injury. *Gacaca* courts were not used traditionally for serious crimes such as murder; however, the Rwandan Government decided to adapt them to provide some form of accountability for the hundreds of thousands of people held in detention throughout the country who could not be processed through the normal criminal courts. Despite the enthusiasm of the international community for local solutions to local problems, the *gacaca* system has been heavily criticized for failing to protect the rights of victims and perpetrators and for failing to achieve its stated aims of ending impunity and bringing reconciliation to Rwanda. Children were especially vulnerable, as *gacaca* courts did not comply with international juvenile justice standards, in particular the protection of the identity of children accused of having committed crimes.

One complication for the *gacaca* courts has been the political environment in which they have operated. The 2003 Constitution,

which states that the 1994 genocide was perpetrated, organized and supervised by “unworthy leaders,”⁵² provides that “revisionism, negationism and trivialisation of genocide are punishable by the law.”⁵³ While the 2003 Constitution is somewhat vague about whom the “unworthy” leaders might be, the official website of the Rwandan Government is very clear: among those responsible it lists former government and local officials, the *Interahamwe* and the Hutu in the general population,⁵⁴ while seeming to excuse the actions of the Rwandan Patriotic Front (RPF).

The *gacaca* courts also have no authority to deal with war crimes. As a result, crimes committed by the RPF were excluded from the process, which caused resentment of the *gacaca* process in areas where large numbers of RPF crimes were committed. While this is grounds for concern, as no members of the RPF have been held accountable for their crimes, the scale of crimes committed by each side is vastly different; the RPF had about twenty-five thousand to forty-five thousand victims as compared with more than ten times that number who were victims of the genocide.⁵⁵ Where a conflict results in an asymmetrical distribution of victims, transitional justice mechanisms and processes cannot simultaneously give equal weight to each victim and apportion equal responsibility to all parties to the conflict.

Additionally, the operation of the *gacaca* courts has left them vulnerable to criticisms of bias, corruption and incompetence as well as failing to protect due process rights and children’s rights more generally. Some of these criticisms have to do with operational issues, particularly related to corruption and incompetence, but the main problem is that the *gacaca* courts have scored very low marks

⁵² Constitution of Rwanda 2003, preambular paragraph 1.

⁵³ *Ibid.*, article 13.

⁵⁴ The official website of the Rwandan Government on Genocide: www.gov.rw/news.php?id_article=62.

⁵⁵ Human Rights Watch, “Rwanda: Tribunal’s Work Incomplete,” 17 August 2009, available at www.hrw.org/en/news/2009/08/17/rwanda-tribunal-s-work-incomplete.

for the “how” of transitional justice: defense rights are negligible; victims and witnesses have no protection; there are no rules of evidence and no guidance as to what is required to prove the elements of a crime; there are no legally trained judges or lawyers; there is no reference to the rule of law; and there are no special protections for children. Many Rwandans have felt distanced from the process and feel no more informed about *gacaca* than about trials at the International Criminal Tribunal.⁵⁶ These problems are largely due to a failure during decision-making to connect the goals of the courts with the operations to achieve those goals and a failure to consult with and engage the affected population. As a result, the *gacaca* courts have not reached the stated aim of reconciliation between the Hutu and Tutsi peoples.⁵⁷

The Special Court for Sierra Leone (SCSL) is an example of a transitional justice mechanism that has prioritized the “how” of its operations by reference to its goals. In terms of its political environment, post-conflict Sierra Leone grappled with corruption and nepotism. Many felt wary of this new institution, believing that it could prove to be a tool of those in power.⁵⁸ Both the Special Court itself and the Government of Sierra Leone responded to this potential challenge by consistently highlighting the independence of the SCSL. The Government took a hands-off approach, restating its commitment to cooperate with the SCSL and its determination that the SCSL would operate independently of the Government.⁵⁹

⁵⁶ T. Longman, “Justice at the Grassroots? Gacaca Trials in Rwanda” in N. Roht-Arriaza and J. Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century*, (Cambridge: Cambridge University Press, 2006), p. 209.

⁵⁷ L. Waldorf, “Mass Justice For Mass Atrocity: Rethinking Local Justice As Transitional Justice,” *Temple Law Review* 79(1) Spring 2006, p. 74.

⁵⁸ Discussions by the author with civil society and members of the general public in Sierra Leone, 2000-2002.

⁵⁹ See, for example, the remarks of then Attorney-General Eke Hallway on the execution of the first arrest warrants by the Special Court on 10 March 2003, including against then Deputy Defence Minister Chief Samuel Hinga Norman, in which Mr. Hallway said, “The non-interference of the government in the decisions of the special court is clearly reflected in the indictment against prominent members of the government.” Available at www.sierra-

In implementing its mandate, the Special Court is notable among transitional justice mechanisms, particularly international judicial institutions, in its early decisions to engage with members of the local bar in developing its Rule of Procedure and Evidence;⁶⁰ to hire Sierra Leoneans at all levels; to engage children in its work, including through calling children as witnesses to speak from their own experiences and perspectives; and to implement a countrywide outreach program that specified children as a target group and developed child-friendly materials at an early stage.⁶¹ By taking care to consider how the Special Court would achieve its aims of ending impunity and providing justice for the victims of the crimes and by linking its operating methods with its goals, including securing the engagement and involvement of children, the Special Court created a transitional justice mechanism that is largely succeeding in achieving those goals.

The “how” of transitional justice yields numerous examples that are instructive both for how they have achieved their aims and how they have not. The Special Court for Sierra Leone and the *gacaca* courts in Rwanda demonstrate that it is not sufficient to take a model that has worked elsewhere and hope it will achieve the same results. While the Special Court succeeded in engaging children, before calling children as witnesses careful thought must be given to how to identify children who may benefit from participation in a court setting, how to manage and maintain the engagement of children who may find a court setting distressing and how to ensure that children are protected at all stages of the process. More careful consideration is required about the goals of its operations so as to achieve them.

leone.org/Archives/slnews0303.html.

⁶⁰ This consultation took the form of a Rules of Procedure and Evidence Seminar, organized on 3 December 2002 by No Peace Without Justice, the Sierra Leone Bar Association and the Special Court. For a report see www.specialcourt.org/Outreach/LegalProfession/RulesSeminarReport.html.

⁶¹ See www.sc-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx.

CONCLUSIONS

Children are among those most affected by conflict and other types of transition, whether as direct victims of underage recruitment or use in hostilities, sexual violence or other crimes, or because of displacement or indirect impacts. Because transitional justice processes will invariably affect the lives of children, they have a right to participate in those processes. This is both a matter of common sense and a legal right, as reflected in the Convention on the Rights of the Child.⁶²

The legal framework on crimes under international law and the framework on the rights of the child are reasonably solid, and there have been numerous examples of how a range of actors have attempted to provide justice during times of transition. There is a temptation to take the successful models and introduce them elsewhere. However, an examination of the basic assumptions of transitional justice and how they relate to children illustrates very clearly that the full package of what works in one place will almost certainly not work elsewhere, given the many variables and contexts within which transitional justice mechanisms operate. Wrong assumptions are especially risky in the case of children. There are few examples of mechanisms in which children have participated fully and satisfactorily, and fewer still of mechanisms that have from the start built in the needs, aspirations and specificities of children and how their rights might be exercised.

These risks can be mitigated if policy makers and decision makers articulate more clearly the aims of transitional justice and undertake a thorough investigation of how they can be met, consulting broadly with all potential stakeholders, including children. To do so, they need to take a step back and examine the building blocks of transitional justice, what it seeks to achieve and why it is important to include the perspectives of children. By articulating clearly the answers to these questions, transitional justice mechanisms and processes can build a solid framework for

⁶² See article 12(2) of the CRC.

realizing the hopes, aspirations and rights of those affected by transition, including children.

A particularly important provision in considering these issues is the legal requirement in article 3 of the CRC that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁶³ Those designing transitional justice mechanisms and processes must take into account, as a primary consideration, the best interests of the child. One way to achieve that is to ask, at every stage, how children’s participation can be promoted and protected. The answers will assist in the analysis of how to design and implement a transitional justice process that is in the best interests of the individual child and of children as a group.

Transitional justice approaches need to be tailored to meet specific situations, but this does not mean that transitional justice is a free-for-all. Basic principles govern how justice is to be administered, including principles related to the involvement and participation of children, and they apply equally during times of transition. The challenge is to implement them creatively and effectively. The investigative technique of the “six Ws” can provide a useful starting point.

By examining the constituent components of transitional justice, this chapter has outlined some common questions that need to be addressed when policy makers and decision makers are contemplating how a new or existing mechanism can effectively and safely engage children and serve their best interests. Adopting an analytical, bottom-up approach to designing transitional justice mechanisms and processes, and keeping a firm eye on the perspectives of children, is one key way in which to meet the expectations, aspirations and rights of children during and after a transitional period.

⁶³ Article 3(1) of the CRC.