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## Bespoke transitional justice at the International Criminal Court

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This chapter grapples with the question of whether the International Criminal Court (ICC) should be conceptualised as a mechanism of transitional justice. Most theorists insist that transitional justice is either an inappropriate or an unrealistic goal for the Court. Some scholars have proposed that the Court might more accurately be theorised as seeking to achieve political goals through ‘juridified diplomacy’. Others suggest that the Court should speak to a global, rather than local, audience. A third school of thought criticises international criminal law as insufficiently focused on the preferences of societies affected by mass violence. Going one step further, some theorists suggest that the Court should be set aside in favour of mechanisms that are more responsive to local preferences. Although the incorporation of the ICC into a locally owned transitional justice paradigm faces substantial challenges, this chapter draws on a theory of ‘bespoke transitional justice’ to suggest ways in which this knotty relationship might be better designed.

This chapter proceeds in three parts. It begins by laying out three alternate theories by which we might explain the purpose of the ICC: global justice, ‘juridified diplomacy’ and transitional justice. Each of these theories is held up to scrutiny by exploring the limits of its explanatory power and accuracy. The chapter then presents a theory of bespoke transitional justice that I have presented in greater detail elsewhere, but with particular attention to the role of the ICC in ‘locally owned’ transitional justice efforts.<sup>1</sup> In particular, I expand upon definitions of ‘local’; that is, who are the local stakeholders in transitional justice situations and how do we define their interests and priorities? I also elaborate upon concepts of ‘ownership’; that is, what does it mean to have a stake in the

<sup>1</sup> J. Ramji-Nogales, ‘Designing Bespoke Transitional Justice: A Pluralist Process Approach’, *Michigan Journal of International Law*, 32 (2010), 1.

Court's work? The chapter ends with concrete suggestions as to the potential role of the ICC in locally owned transitional justice efforts.

In short, a bespoke transitional justice approach to the ICC reminds us that international prosecutions may not be appropriate in all contexts, and argues that the views of members of conflict-affected societies should play a central role in determining whether or not the Court should intervene in a given situation. This means that the Office of the Prosecutor (OTP) should carefully study the appropriateness of prosecution in specific cultural and societal contexts before proceeding. If international prosecution will aid some of the affected society's transitional justice goals, it may be appropriate to open a case.

But international justice proponents, including those who speak on behalf of the OTP, should recognise the limitations of the Court in meeting all transitional justice goals and manage expectations accordingly. This entails clearly communicating the circumscribed nature and impact of Court interventions and, where appropriate, working alongside other transitional justice mechanisms that may better achieve goals enumerated by members of the society that has suffered mass violence. Moreover, in cases in which such intervention does not respond to local interests, international prosecution should not be pursued.

### Conceptualising the ICC's purpose

The theoretical aims of the ICC are deeply contested, with at least three different schools of thought struggling for prominence. The first theory, which I will label 'global justice', defines the goals of the Court as creating international legal standards aimed at ending impunity for the crimes laid out in the Rome Statute.<sup>2</sup> Theorists in this school by and large view the Court as a legal entity that is above the political fray. In their view, the central aim of the ICC is to establish international norms of criminal justice; repairing conflict-affected societies is a secondary goal. This might be labelled the 'trickle-down' approach to international justice;

<sup>2</sup> See, e.g., M. Cherif Bassiouni, 'International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 131, 131; A. Cassese, 'The Rationale for International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 123, 127; W.A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (New York: Cambridge University Press, 2006), 68.

proponents suggest that once these norms take root on the international level, they will be adopted, enforced and complied with on the national level. To the extent that the Court's efforts benefit members of the conflict-affected society, they are thought to prioritise the interests of victims.<sup>3</sup>

The second theory by which the role of the ICC might be conceptualised is that of 'juridified diplomacy', a phrase coined by Gerry Simpson and described in greater detail by David Koller in this volume.<sup>4</sup> Theorists of this school suggest that the Court's goals are to achieve international peace and security and, in some cases, political self-interest. According to this theory, the ICC is inherently political and works primarily as an instrument of international diplomacy. The role of the Court is therefore not to empower national institutions. It aims instead to assist in resolving conflicts through the use of referrals as a threat of punishment. The independent prosecutor can also be viewed as a route for domestic elites to outsource difficult political decisions.<sup>5</sup> This theory focuses on the global political impact of the Court rather than on local outcomes. Following this approach, domestic political elites would be the main local beneficiaries of the Court's efforts.

The third possible conceptual approach to the ICC's role is the theory of transitional justice. As discussed in more detail in the next section, scholars of transitional justice view the Court's central goal as repairing societies that have suffered mass violence. Rather than situating the Court entirely within the political or legal realm, a transitional justice approach views the Court as a legal institution enmeshed in a field of political interests. From this starting point, theorists of this school think about how to manage the political dimensions of the Court in a way that prioritises the interests of rank-and-file members of the affected society (as opposed to local political elites). This theory gives precedence to local

<sup>3</sup> For an incisive critique of the concept of victimhood before the ICC, see S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', *Law and Contemporary Problems*, 76 (2014), 235.

<sup>4</sup> See further Chapter 3 by Koller in this volume, citing G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 1.

<sup>5</sup> For a thoughtful exploration of how this phenomenon has played out in Uganda and Sudan, see S. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941.

perceptions of the Court's legitimacy over international legal or political outcomes.

This schematic highlights the different ways in which these three schools of thought define the purposes of the ICC:

	Goals	Focus	Source(s) of legitimacy	Societal beneficiaries
<b>Global justice</b>	International criminal standards	Legal	International legal community	Victims
<b>Juridified diplomacy</b>	International peace and security	Political	International diplomatic community	Political elites
<b>Transitional justice</b>	Repairing affected societies	Legal and political	Local society	General populace

In practice, the ICC does not wear any of these mantles well. None of the theories is a perfect fit; they each have significant descriptive and explanatory flaws. The Court's efforts to create international legal norms have been foiled by politics, the outcomes of its political interventions have been unpredictable and its record on addressing the needs of local populations has been decidedly mixed.

The global justice theory has proved incapable of contending with the inescapably political nature of the ICC. The Court is engaged in deeply politicised situations and requires substantial political support on many fronts in order to succeed. The politics of the Court must be addressed head-on in any serious effort to theorise its goals.<sup>6</sup> Perhaps because many of its actors view themselves and their work as above the political fray, the Court has struggled to control the narrative around its work, particularly in Kenya and Sudan. Political elites in both of those countries have managed to depict the ICC, at least in some quarters, as a neocolonialist tool that prosecutes only African defendants. Setting to one side the question of whether this depiction is fair, the fact that it has gained traction with at least some local audiences stymies efforts to create international criminal law norms.

<sup>6</sup> *Ibid.*, 946. Nouwen and Werner argue that analysts of the ICC must begin by understanding and acknowledging its inherently political nature.

The Court's individualist and adversarial approach to complex political situations creates further problems for the adoption of the international standards it promulgates.<sup>7</sup> Given their zero-sum nature, international criminal trials are not well suited to situations of mass violence in which the 'truth' is violently disputed. Those who disagree with the Court's selection of winners and losers may simply reject the trials as 'victor's justice'.<sup>8</sup> This depiction of the Court's work may resonate deeply with portions of the affected society, who will similarly reject the international criminal law standards the Court is intent upon promoting. Moreover, the ICC's focus on individual criminal accountability overlooks the broader structural roots of mass violence, both national and international.<sup>9</sup> Again, local populations, who may have a much more nuanced perception of the causes of conflict, may be sceptical of ICC decisions that appear to be divorced from the broader context. Some segments of the affected society may, on this basis, refuse to accept the Court's pronouncements, as Hellman's contribution to this volume recounts. The 'global justice' theory is therefore limited by its failure to engage sufficiently with the political aspects of the Court's work.

The juridified diplomacy theory recognises the political nature of the ICC, focusing on its role in promoting international peace and security. Its flaws lie in the messy and unpredictable nature of international political outcomes. The idea that the ICC can be used as a tool to resolve conflicts assumes that the Court's impact on a given conflict can be forecast and measured with some accuracy. The Kenya situation provides an example of the unexpected and complicated outcomes of Court interventions.<sup>10</sup> The prosecutor's *proprio motu* investigation into the mass violence surrounding Kenya's 2007 election led to the laying of charges against six individuals, including Uhuru Kenyatta and William Ruto, now president and deputy president, respectively, of the country as of the time of writing. Kenyatta and Ruto had been political rivals during the 2007 elections, but became allies soon after they were indicted in 2011. In December 2012, they formed a coalition

<sup>7</sup> See, e.g., M. Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 32.

<sup>8</sup> See, e.g., M. Damaška, 'What Is the Point of International Criminal Justice?' *Chicago-Kent Law Review*, 83 (2008), 329, 336–337, 345.

<sup>9</sup> See, e.g., M. Koskenniemi, 'Between Impunity and Show Trials', *Max Planck Yearbook of International Law*, 6 (2002), 1.

<sup>10</sup> See S. Kendall, "'UhuRuto" and Other Leviathans: The International Criminal Court and the Kenyan Political Order', *African Journal of Legal Studies*, 7 (2014), 399.

party unified around opposition to the ICC prosecutions. Presenting themselves as a party of reconciliation, Kenyatta and Ruto won the 2013 elections. This outcome underscores the point that the effects of ICC interventions are impossible to predict.

Perhaps the only predictable consequence of outsourcing difficult political decisions to the prosecutor is that it will enable political elites to manipulate the ICC to suit their interests.<sup>11</sup> In the case of Uganda, President Yoweri Museveni requested Court intervention to issue arrest warrants against the Lord's Resistance Army (LRA) in 2003. Needing Museveni's assistance to hunt down indicted LRA leaders, the prosecutor has not yet sought – and is unlikely ever to seek – to prosecute the Ugandan military (Uganda People's Defense Force or UPDF). The Court's decision sent the message that the UPDF was not responsible for the many atrocities it committed during its decade-long conflict with the LRA.<sup>12</sup> This manoeuvre also helped Museveni's government to obtain military aid and international legitimacy. Uganda thus became a 'golden child' of the international criminal law community, hosting the first review conference for the Rome Statute in 2010. But in 2013, Museveni decided that the Court was no longer a valuable political tool, vocally opposing the prosecution of Kenyatta and Ruto and threatening withdrawal from the Rome Statute.<sup>13</sup>

Given the unpredictable nature of political outcomes, the goal of international peace and security becomes problematic. This term means different things to different people, and the debate over the best methods to achieve it is highly politicised. Even if one could say with any certainty what the impact of ICC interventions might be, it is not clear that external intervention in the form of expressed international criminal norms is sufficient to stabilise a society recovering from mass violence. Attention must also be paid to methods of creating sustainable peace within affected communities.

The transitional justice theory prioritises the preferences of local populations in determining when, and how, the ICC should intervene. A central problem with this approach is the question of measurement of

<sup>11</sup> See further Koller (Chapter 3); Kendall and Nouwen, 'Representational Practices'.

<sup>12</sup> For a critique of this claim, see A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (New York: Oxford University Press, 2011).

<sup>13</sup> L. Akande, 'How Nigeria, Others Averted AU's Withdrawal from ICC', *Nigerian Guardian*, 16 October 2013, reprinted by Open Society Foundation for South Africa, South African Foreign Policy Initiative, available at [www.safpi.org/news/article/2013/how-nigeria-others-averted-au-s-withdrawal-icc](http://www.safpi.org/news/article/2013/how-nigeria-others-averted-au-s-withdrawal-icc).

these preferences. As the Kenya example demonstrates, population preferences shift over time – even over a relatively short period of time. As late as December 2010, nearly 80 percent of Kenyans supported the Court’s investigation of the perpetrators of post-election violence.<sup>14</sup> Just over two years later, Kenyans voted two of those indicted perpetrators, Kenyatta and Ruto, into their country’s two highest public offices. In part, these shifts occur because local populations are composed of many different groups with many different, and often competing, preferences. It is a tall order to understand and represent these different preferences in decisions in determining whether to proceed with prosecutions.

A locally driven transitional justice process also presents two major risks: elite capture and domination. Much like a juridified diplomacy approach that prioritises the political, a transitional justice approach celebrates ‘the local’ risks being captured by local elites, whose priorities may be quite different from those of the general populace. Such a process must take measures to prevent elites from using transitional justice mechanisms, including ICC proceedings, to further their own political ends. An approach that relies on local population preferences to determine when the Court should intervene risks entrenching societal patterns of domination and exclusion.<sup>15</sup> Significant time and effort must be devoted to ensuring that the voices of marginalised groups are heard and included in decision-making processes.

### **Bespoke transitional justice: a focus on local ownership**

This chapter presents a theory of bespoke transitional justice, namely that effective accountability mechanisms are those that successfully reconstruct local social norms opposing mass violence.<sup>16</sup> The process of repairing extant norms and creating new norms must be performed within and throughout the affected society in order to fully take root.<sup>17</sup> As a result, transitional justice must be primarily locally driven and

<sup>14</sup> ‘The Kenya National Dialogue and Reconciliation Monitoring Project, South Consulting Review Report April 2011’, Annex I, National Baseline Survey, 7. The December 2010 survey used a nationwide multi-stage cluster sampling methodology, with a random selection of households and respondents. The sample size was 9,200 and the survey was conducted in all forty-seven counties of Kenya.

<sup>15</sup> D. Sharp, ‘Addressing Dilemmas of the Global and the Local in Transitional Justice’, *Emory International Law Review*, 29 (2014).

<sup>16</sup> Ramji-Nogales, ‘Designing Bespoke Transitional Justice’, 11.

<sup>17</sup> The term ‘affected society’ refers to the society primarily affected by the mass violence; that is, the society in which the mass violence occurred.

precisely tailored to particular events and societies; hence, bespoke. Though the ICC has faced significant criticism for failing to adequately account for local perspectives in practice, the Court itself is not inconsistent with a theory of bespoke transitional justice.

This chapter defines transitional justice as any mechanism that accounts for mass violence, thereby beginning the process of reconstituting justice, broadly defined, within the society affected by such atrocities.<sup>18</sup> Mass violence, the widespread commission of criminal acts throughout a society, is enabled by the manipulation of social norms by an insurgent power structure.<sup>19</sup> In order to adequately address mass violence, then, a transitional justice mechanism must restore upended social norms that oppose mass violence.

The process of norm reconstruction will be most successful if societal stakeholders view the norms promulgated by the transitional justice mechanism as legitimate. Though legal legitimacy, which equates lawfulness with legitimacy, is important, this chapter affords primacy to sociological legitimacy, which requires that the relevant public perceive an institution as worthy of respect 'for reasons beyond fear of sanctions or mere hope for personal reward'.<sup>20</sup> When a transitional justice mechanism achieves sociological legitimacy, members of the relevant society internalise the social norms it promulgates. In other words, these norms begin to define how societal stakeholders conceive their own interests.<sup>21</sup> Such internalised compliance is the most effective method of building a law-abiding society, particularly in transitional societies, where enforcement mechanisms are likely to be weak.<sup>22</sup>

Disaggregating the concept of the 'relevant society', at least three groups of internal stakeholders should perceive an institution as

<sup>18</sup> See, e.g., R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000); R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002).

<sup>19</sup> Drumbl, *Atrocity, Punishment, and International Law*, 32. This contrasts with domestic crimes, the perpetrators of which violate social norms established by a stable power structure.

<sup>20</sup> R.H. Fallon, Jr., 'Legitimacy and the Constitution', *Harvard Law Review*, 118 (2005), 1787, 1795.

<sup>21</sup> I. Hurd, 'Legitimacy and Authority in International Politics', *International Organization*, 53 (1999), 379, 388.

<sup>22</sup> See, e.g., D. Bodansky, 'The Concept of Legitimacy in International Law', in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008), 309, 310; T.R. Tyler and J.M. Darley, 'Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law', *Hofstra Law Review*, 28 (2000), 707, 714–717.



legitimate for it to be considered effective: victims of the mass violence, perpetrators of the atrocities and societal elites. At least one group of external stakeholders, international justice proponents who offer financial and technical support for transitional justice projects, must also find the institution acceptable. Of course, the perceptions and preferences of these groups are likely not only to differ but also to conflict, giving rise to difficult questions of prioritisation.

Victims of mass violence are likely the first group of stakeholders that comes to mind when envisioning a transitional justice process. In order to successfully reconstruct social norms, such mechanisms must incorporate the perspectives of these victims. To be sure, the preferences of victims within a particular society will differ. Several factors might impact these variations, including how directly the victims suffered from the violence and how stark the disparities were between the victims' socio-economic positions prior to the violence.<sup>23</sup> Nonetheless, transitional justice mechanisms should at least acknowledge the victims' various perspectives, even if they are not able to fully address each preference. This is a task to which the ICC is not particularly well suited, given legal relevance restrictions on the scope of testimony, not to mention the cost and effort involved in bringing victims before the Court.

The widespread nature of mass violence may make it difficult to distinguish clearly between victims and perpetrators. The same individual who was subject to violence may also have perpetrated violence, in some cases because their participation was coerced or forced, and in other cases simply because of the broad societal participation in these crimes.<sup>24</sup> The interests of these individuals must also be incorporated into a successful transitional justice process.

The same holds true for perpetrators of mass violence. Any institution that hopes to shift social norms must ensure the participation of as many

<sup>23</sup> See, e.g., H. Weinstein, L.E. Fletcher, P. Vinck, and P. Pham, 'Stay the Hand of Justice: Whose Priorities Take Priority?', in R. Shaw et al. (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010).

<sup>24</sup> For example, in a study of the attitudes of judges and prosecutors in Bosnia to war crimes trials, Laurel Fletcher and Harvey Weinstein found that all participants identified their national group as a victim group. L. Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', *Human Rights Quarterly*, 24 (2002), 602. See also Post-Conflict Reintegration Initiative for Development and Empowerment (PRIDE) and the International Center for Transitional Justice, 'Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone' (2002), 11, 13.

perpetrators as possible.<sup>25</sup> There are many challenges inherent in engaging perpetrators, including denial or justification of criminal acts and significant conflict with victim preferences. Yet, a transitional justice mechanism that excludes perpetrators' interests will be incomplete and unstable.<sup>26</sup>

Perpetrators have unique knowledge of the commission of atrocities that is crucial in creating a complete historical record. Perhaps most importantly, if most perpetrators reject the legitimacy of such a mechanism, a post-conflict society will face duelling social norms, supporting and opposing mass violence. This will likely exacerbate divisions created by the conflict, and impede the reconstruction of society. Similarly, perpetrators must be reintegrated in order to shift social norms effectively; if they are to denounce their prior participation in mass violence, they must view as legitimate the relevant transitional justice mechanism and the norms it propounds. To date, ICC indictments and prosecutions have favoured one side of a conflict over the other; they have generally failed to represent the perspective of multiple perpetrators.

Political elites in the affected society must also perceive the accountability institution to be legitimate. If they do not, they may capture, undermine or reject the transitional justice process. These elites may use a mechanism to gain political advantage over competitors or enemies, as the above example from Uganda demonstrates.<sup>27</sup> They may support the mechanism in part but aim to prevent themselves and/or their allies from being tried. If public acceptance is low, elites may try to increase their own political power by denouncing the mechanism's legitimacy. In order to forestall the various methods through which elites may stymie a transitional justice mechanism, a fine balancing act is required. In some cases, it may simply not be possible to eliminate elite meddling in the process.

These significant challenges should not deter efforts to ensure elite perceptions of legitimacy, which, even if imperfect, will increase a mechanism's effectiveness. There is much room for improvement on this front on the part of the ICC. Simple recognition of, and engagement

<sup>25</sup> See, e.g., J.N. Clark, 'Genocide, War Crimes and the Conflict in Bosnia: Understanding the Perpetrators', *Journal of Genocide Research*, 11 (2009), 421.

<sup>26</sup> See, e.g., R. Shaw, 'Linking Justice with Re-integration? Ex-Combatants and the Sierra Leone Experiment', in Shaw *et al.* (eds.), *Localizing Transitional Justice*, 11, 131–132.

<sup>27</sup> Drumbl, *Atrocity, Punishment, and International Law*, 13; J. Ku and J. Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?', *Washington University Law Review*, 84 (2006), 777, 817–819.

with, the political nature of the Court's work may improve its track record, but a more sophisticated strategy must be implemented in order to minimise elite interference as far as possible.

Finally, a successful transitional justice mechanism must be viewed as legitimate in the eyes of at least one group of external stakeholders – international justice proponents. This term is used here to refer to international organisations with great investment and participation in transitional justice efforts. This group includes international advocacy and funding groups such as Amnesty International, Human Rights Watch and the Open Society Foundations, as well as UN staff and some scholars of international law. Most international justice proponents focus on procedural fairness questions – fairness, impartiality, transparency and independence – that at times conflict with the interests of domestic populations. While these concerns are valid and important, they must be carefully balanced with the perspectives of internal stakeholders to ensure that as many actors as possible view the transitional justice mechanism as legitimate.

The ICC generally receives high marks on this front, which is an important consideration for 'local ownership' theorists. Though the Court has shortcomings in its ability to address local needs, it draws with it a great deal of international recognition, not to mention funding. While it may be tempting to write off the Court as a transitional justice failure, such an approach may be short-sighted. Engagement with the Court through a bespoke approach to transitional justice can harness its power and make it more responsive to local preferences.

Given that stakeholder perspectives are likely to conflict, a theory of transitional justice must offer a framework for prioritising among competing preferences. Most importantly, a theory of bespoke transitional justice aims to ensure that as many voices as possible are heard, and that prioritised preferences do not repeat past patterns of domination. A pluralist process approach eschews universal truths in favour of institutions and procedures that resolve conflict fairly.<sup>28</sup> While accepting a broad range of beliefs, this approach limits behaviours, specifically the imposition of a substantial conception of justice through domination.<sup>29</sup> Domination can be defined as the illegitimate exercise of power to

<sup>28</sup> S. Hampshire, *Justice is Conflict* (Stanford, CA: Stanford University Press, 2000), 40.

<sup>29</sup> *Ibid.*, 41; I. Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999), 234; I. Shapiro, 'Group Aspirations and Democratic Politics', in I. Shapiro and C. Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge: Cambridge University Press, 1999), 210, 220.

'shap[e] agendas, constrain ... options, and ... influenc[e] people's preferences and desires'.<sup>30</sup> In order to avoid domination, an inclusive process is helpful, but must include specific protections designed to ensure that the voices of particularly vulnerable groups are heard and prioritised.<sup>31</sup>

### Designing bespoke transitional justice at the ICC

To be successful as a transitional justice mechanism, non-elite local populations must perceive the ICC as legitimate. Perceptions of institutional legitimacy derive from at least three factors: the source from which it has been constituted, the procedure by which it has been adopted and the substance of the rule itself.<sup>32</sup> From this theory, we can draw out three principles and three methods for increasing the perceived legitimacy of the Court.<sup>33</sup>

Beginning with principles, in order to strengthen the legitimacy of the source of the ICC's authority, it should affirm norms opposing mass violence that are endogenous to the affected society. The Court can improve the legitimacy of its constitutive procedure by making it participatory and inclusive. It should, for example, take perpetrators' perspectives into account, so they are not marginalised, and delve into atrocities committed by all parties, not just those who are on the losing end of the conflict. Finally, offering realistic goals to an affected population could improve the legitimacy of the substance of the norms that the Court presents. Recovery from mass violence is a slow and difficult process; the ICC is but one component of a long-term effort, not an immediate remedy. Effective public education campaigns are an essential component of achieving that goal.

The first two principles – affirming community norms and offering an inclusive design process – should be implemented through concrete methods that aim to successfully incorporate local perspectives and authorities into ICC interventions. Relevant norms and stakeholder

<sup>30</sup> I. Shapiro, *The State of Democratic Theory* (Princeton, NJ: Princeton University Press, 2003), 4.

<sup>31</sup> D.L. Markell and T.R. Tyler, 'Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement', *University of Kansas Law Review*, 57 (2008), 1, 33; Shapiro, *The State of Democratic Theory*, 36.

<sup>32</sup> Hurd, 'Legitimacy and Authority in International Politics', 381.

<sup>33</sup> Ramji-Nogales, 'Designing Bespoke Transitional Justice', 61–67.

interests are difficult to discern, and may be manipulated in ways that undermine, rather than strengthen, the legitimacy of the Court. A three-pronged approach should be used to gain a comprehensive and nuanced understanding of these norms and preferences: empirical surveys of the perceptions of local populations, studies of local moral traditions and the participation of local moral leaders.<sup>34</sup>

Empirical population surveys, or 'stakeholder assessments', should be performed at least three times during the lifespan of an ICC intervention – at the investigation phase, during the prosecution and after the verdict – to measure the preferences of local populations regarding accountability. Given its neutral position, the Registry would likely be the appropriate entity within the Court to conduct such surveys. Whichever body undertakes such surveys will face numerous challenges in ensuring accurate and reliable measurement given the cross-cultural context. As a result, deep cultural knowledge is a crucial component not only in crafting surveys, but also in determining when the Court should intervene.

Country experts may be able to determine how the Court can incorporate local norms and practices, or how these can work alongside an ICC prosecution. They can also prevent potential conflicts with local norms in the Court's work. Finally, indigenous moral authorities should be included in the process of determining whether the ICC should play a role in transitional justice efforts. Cultural experts should assist in determining the identity of such leaders and identifying patterns of domination. The ICC can play an important role in limiting domination and corruption, and increasing capacity throughout the transitional process.

At this point, these suggestions are little more than a vision, as the OTP currently employs few of these methods to measure local preferences prior to initiating an investigation.<sup>35</sup> In practice, however, a bespoke transitional justice approach for the ICC would prioritise the careful and thoughtful selection of situations. It would begin from the premise that societies impacted by mass violence are unique and therefore require differentiated approaches to accountability. As described before, the

<sup>34</sup> For further discussion of the inclusion of traditional leaders with moral authority in transitional justice mechanisms in ways that minimise domination and replace a single-minded focus on law as moral authority, see Ramji-Nogales, 'Designing Bespoke Transitional Justice', 66.

<sup>35</sup> The OTP does engage in some discussion with local populations before deciding whether to undertake an investigation, but such efforts could be more scientific and systematic, and focused more on the perspectives of non-elite members of the affected society. See, e.g., 'Report on Preliminary Examination Activities', The Office of the Prosecutor, International Criminal Court (13 December 2011).

Court would undertake serious efforts to gauge local preferences concerning its intervention. In addition, it would measure baseline levels of capacity and assess the need for international involvement from the perspective of strengthening local institutions.<sup>36</sup> The Court would likewise collaborate with local moral authorities to situate its work within a broader transitional justice context, determining how international prosecutions might be sequenced alongside other mechanisms.

The Court's reparations decision in the *Lubanga* case offers an example of how local preferences might be incorporated.<sup>37</sup> In assessing reparations, the Court approved a five-step implementation plan proposed by the Trust Fund for Victims (TFV). According to this plan, the TFV, along with the Registry, the Office for Public Counsel of Victims, and a group of experts, is responsible for selecting the areas involved in the reparations process. In those areas, the TFV will be responsible for a process of consultation and the team of experts will undertake a harm assessment. The TFV will then hold discussions in each area to engage the public in the reparations process with an eye to managing victim expectations. Finally, each locality will develop proposals for collective reparations to be presented by the TFV to the Chamber for its approval.

Though the inclusiveness of the process is to be commended, it would benefit from a more scientific and systematic investigation of local preferences, as well as more specific requirements of deep cultural knowledge among the experts group (rather than simply 'representatives of the DRC', who might represent political elites with little moral authority in the affected communities).<sup>38</sup> The importance of engagement with alleged perpetrators should be underscored in order for reparations efforts to take root in the DRC. Moreover, the Court's engagement with efforts should begin much earlier in the lifecycle of a case.<sup>39</sup>

As David Koller notes in his contribution to this volume, it is impossible for the ICC to be single-handedly responsible for all transitional justice efforts in an affected society. Situating the Court within a bespoke

<sup>36</sup> M. Sirleaf, 'The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies', *Cardozo Law Review*, 35 (2014), 2263.

<sup>37</sup> Decision establishing the principles and procedures to be applied to reparations, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, ICC, 7 August 2012, paras. 281–286.

<sup>38</sup> *Ibid.*, para. 264.

<sup>39</sup> *Ibid.*, paras. 263–266. The Court envisions engagement with a variety of experts at the reparations phase pursuant to Rule 97 (2) of the ICC's Rules of Procedure and Evidence; such engagement should begin much earlier in the process and prioritise the participation of experts with deep understanding of the relevant cultural context.

transitional justice lens does not mean, however, that all transitional justice expectations should be placed upon the Court in countries in which a case is opened. If local perspectives indicate that international prosecution is necessary or useful, the limited role of the Court in achieving expressed societal goals should be clearly communicated by Court staff and other transitional justice actors. International prosecution may be a useful approach in certain situations, and it may create political space for other transitional justice efforts.<sup>40</sup> But the ICC by no means possesses the entire tailor's kit; expectations and strategies should be managed accordingly.

A bespoke transitional justice approach also suggests that the ICC should not intervene in societies in which local populations prioritise issues other than criminal justice. Population preference surveys might reveal greater concern around questions of development, including jobs, education and infrastructure, or establishing a historical record, including discussion of the root causes of conflict.

While even a generous reading of Article 17 of the Rome Statute might not support such an approach, the realities of the Court's limited resources suggest that such factors could be included in strategic decisions about which prosecutions to pursue.<sup>41</sup> The prosecutor might also look to Article 53's 'interests of justice' provision in situations where societal preferences suggest international prosecutions would not be appropriate, though, similarly, this approach does not fit well with current practice.<sup>42</sup> Yet if the ICC were to undertake such a bespoke transitional justice approach, its decision not to prosecute certain situations after carefully considering the factors above may well afford the Court greater legitimacy in the eyes of local populations.<sup>43</sup>

<sup>40</sup> See, e.g., J. Ciorciari and J. Ramji-Nogales, 'Lessons Learned from the Cambodian Experience with Truth and Reconciliation', *Buffalo Human Rights Law Review*, 19 (2012), 193.

<sup>41</sup> ICC Statute Article 17, focused on admissibility, requires that the Court decline cases in which the state with jurisdiction over that case is investigating or prosecuting the case, or has decided not to prosecute the case.

<sup>42</sup> Article 53 of the ICC Statute requires the prosecutor to determine whether 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'. The OTP has stated in that a decision not to investigate under this provision is a 'course of last resort'. See 'Policy Paper on the Interests of Justice' Office of the Prosecutor, International Criminal Court (September 2007), 9.

<sup>43</sup> A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court', *Virginia Journal of International Law*, 50 (2009), 117.

## Conclusion

Most scholars of the ICC claim that it is not and should not be a mechanism of transitional justice. This chapter argues that such theories have significant descriptive limitations. A 'bespoke transitional justice' theory affords a more accurate understanding of the Court and prescribes methods for better aligning its efforts with the preferences of local populations. Such an approach prioritises the reconstruction of social norms in societies recovering from mass violence, and recognises the numerous challenges in doing so. It suggests that the Court should affirm community norms and utilise an inclusive design process by undertaking empirical population surveys several times during the lifespan of a case and by engaging with cultural experts and local moral authorities.

The challenges of domination and exclusion must be anticipated and addressed. Expectations of the Court's role in transitional justice efforts should also be managed; it is important to recognise that international criminal prosecution cannot meet all transitional justice needs. This might mean that the Court works alongside other mechanisms, and, in some situations, chooses not to intervene based on the preferences of the local population. It is not an easy task to conceptualise the ICC as a transitional justice mechanism, but the 'bespoke transitional justice' method can be used to redesign the relationship between the Court and the populations most affected by mass violence. By increasing perceptions of the Court's legitimacy in such societies, such an approach offers the potential to more effectively entrench the norms it seeks to promulgate and promote peace and security in conflict-affected societies.