



# United States Department of State TRANSITIONAL JUSTICE INITIATIVE CRIMINAL PROSECUTIONS



*This policy paper series was developed to reflect U.S. policy understanding of a range of transitional justice (TJ) mechanisms related to peace-building, accountability, human rights, and reconciliation in post-conflict and post-authoritarian transitions. They were created by the State Department's Office of Global Criminal Justice, Bureau of Democracy, Human Rights, and Labor, Bureau of International Narcotics and Law Enforcement Affairs, Bureau of Conflict and Stabilization Operations, and USAID's Center for Excellence on Democracy, Human Rights and Governance.*

## THE IMPORTANCE OF CRIMINAL PROSECUTIONS FOR ATROCITY CRIMES

The investigation and prosecution of atrocity crimes—including crimes against humanity, war crimes, and genocide—is fundamental to a transitional justice strategy in countries dealing with legacies of pervasive abuses. Criminal trials can build adherence to the rule of law, reinforce the unacceptability of the crimes committed, demonstrate that impunity will not be tolerated, and deter future harm by punishing perpetrators. Trials can also help transitional societies come to terms with their own histories and rebuild stable, democratic institutions. Evidence presented in court can help to establish a historical record of atrocities and rebut denials by victimizers and their political allies that such atrocities ever occurred. Finally, criminal trials can also help to restore the dignity of victims and their families by providing a public acknowledgment of the gravity of the wrongs done to them.

Despite their importance, criminal prosecutions alone are not sufficient to fully redress atrocities, restore rule of law, and establish stability in transitional societies. Criminal trials should be complemented by other mechanisms, such as reparation programs, truth commissions, and other guarantees of non-recurrence as part of a holistic transitional justice strategy.

## MASS ATROCITY CRIMES

War crimes, crimes against humanity, and genocide are considered some of the most serious crimes of international concern. These crimes have technical legal definitions defined in the treaties and statutes of specific international courts and tribunals but can be roughly characterized as follows:

- **War crimes** are serious violations of the laws of war (also known as international humanitarian law). International humanitarian law is established and reflected in treaties (notably the Geneva Conventions of 1949) and rules of customary international law.
- **Crimes against humanity** include specific acts when committed as part of a widespread or systematic attack directed against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit the attack. Crimes against humanity can take place during times of peace or during armed conflict.
- **Genocide** is defined to encompass a range of acts committed with the specific intent to destroy, in whole or substantial part, an ethnic, racial, national, or religious group as such. There is a Convention on the Prevention and Punishment of Genocide.

These crimes may be investigated and prosecuted by the International Criminal Court, where it has jurisdiction, but they are also penalized in the domestic laws of many countries. Even when domestic laws do not outlaw these crimes specifically, perpetrators can often still be prosecuted in domestic courts for related domestic crimes, such as murder or torture.

## FORUMS FOR TRIALS OF ATROCITY CRIMES

Historically, atrocity crimes have been prosecuted before domestic courts, before “mixed” or “hybrid” domestic/international tribunals, and before international courts and tribunals, such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the International Criminal Court (ICC).



### DOMESTIC COURTS

Prosecutions for crimes have the greatest potential impact when they are conducted domestically, within the society in which the crimes occurred. Holding trials in local courts where national judges apply the law helps to ensure that parties understand the law, witnesses have easy access to the courts, and public awareness is maximized. However, societies in transition may lack the political will or institutional capacity to fairly, impartially, and effectively address these difficult and sensitive crimes through domestic courts. Examples of domestic trials include: the trial of former Presidents Augusto Pinochet, Alberto Fujimori, and Efraim Rios Montt, in Chile, Peru, and Guatemala, respectively.



### “MIXED” OR “HYBRID” INTERNATIONAL/DOMESTIC COURTS

“Mixed” or “hybrid” courts combine domestic and international elements. They may be staffed by a mix of international and domestic judges, prosecutors, and court officials, and they may apply elements of both international and domestic law. “Mixed” or “hybrid” courts seek to give the affected country substantial “ownership” of the process while also addressing some of the challenges of domestic prosecutions of atrocity crimes by providing international support in the form of expertise and standards, and providing a degree of international legitimacy and credibility. They can be created domestically or by an agreement between the affected country and a regional or international body, and they usually are located in the country where the atrocities took place. Examples of “mixed” or “hybrid” tribunals include the Bosnian War Crimes Chamber, the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Timor Leste, and the Extraordinary Chambers in the Courts of Cambodia (ECCC).



### THE INTERNATIONAL CRIMINAL COURT (ICC)

The ICC was established by a treaty (the Rome Statute of the International Criminal Court) to investigate and adjudicate cases of individuals accused of responsibility for war crimes, crimes against humanity, and genocide. There are a number of preconditions to the ICC’s jurisdiction. First, the ICC can exercise jurisdiction only over crimes committed after July 1, 2002 (when the Rome Statute entered into force). In addition, for the ICC to have jurisdiction, either the State of nationality of the accused or the State on whose territory the crime(s) occurred must be a party to the Rome Statute; a State must have otherwise accepted the Court’s jurisdiction over its nationals and territory (which it can do on an ad hoc basis); or the UN Security Council must have conferred jurisdiction through a Chapter VII resolution. The ICC is intended to be a court of last resort; under its “complementarity” principle, domestic courts are supposed to undertake genuine investigations and prosecutions in the first instance. The ICC can thus only investigate and prosecute when relevant domestic authorities are unwilling or unable to genuinely do so. Furthermore, the ICC can only investigate crimes that reach a certain gravity threshold. Thus, consistent with the ICC’s principle of “complementarity,” even where the ICC is engaged in investigations or prosecutions, there will be work that remains for domestic courts and other transitional justice processes. The ICC has no police force and relies on states to arrest and transfer accused individuals. Although the United States is not a party to the Rome Statute, the U.S. engages with States Parties to the Rome Statute on issues of concern and supports the ICC’s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law. To date, the ICC has initiated investigations and/or prosecutions in Kenya, the DRC, Uganda, CAR, Mali, Sudan, Libya, Côte d’Ivoire, and Georgia.

## KEY CONSIDERATIONS AND COMMON CHALLENGES



- **Independence and impartiality.** Criminal processes must be independent and impartial. Appropriate authorities should investigate and prosecute those responsible for serious crimes regardless of what side they were on during a conflict, their political affiliation, or their position of authority. If, by contrast, trials are used as political tools imposing “victor’s justice” against only certain groups of people, they can perpetuate conflict or give rise to new grievances. This is a common challenge for domestic trials, which can take place in highly-charged transitional contexts where members of the government or security services may themselves be implicated in past crimes.
- **Due process.** Trials must include procedural protections to ensure that all those accused receive a fair trial. One of the key outcomes of conducting trials (as opposed to dealing with alleged criminals extra-judicially) is to reinforce the norm that each person, regardless of his or her position, is subject to the rule of law and benefits from legal protections. A process that does not treat every defendant fairly and equally does not impart this important value, which is essential to strengthening the rule of law. This is a common challenge for domestic prosecutions in countries where the judiciary lacks adequate independence and where there are not well-established traditions of due process.
- **Resources.** Trials of atrocity crimes can be time-consuming and expensive due to the complexity of the crimes and the challenges of collecting relevant evidence. Investigations and proceedings can last for months or years. Domestic trials can be cheaper and quicker than hybrid models, which typically require hiring and compensating international staff. Both may be less resource intensive than trials before international tribunals and the ICC, which require international travel for investigators, witnesses, and attorneys as well as support for the other full-time staff based at the location of the court. At the same time, both the international community, and particularly countries in transition, have limited resources, and there is considerable competition to prioritize limited funds.
- **Capabilities.** Investigating and prosecuting atrocity crimes—which are often legally and factually complex—requires investigators, judges, prosecutors, and defense lawyers with specialized knowledge and skills. Such specialized knowledge and skills are often in short supply in transitioning countries. This poses a challenge to conducting effective and fair domestic trials for atrocity crimes.
- **Witness and victim protection.** Trials for atrocity crimes commonly implicate former or current high-level officials. The combination of the high stakes of these trials, the defendants’ access to resources and powerful allies, and the weak security situation creates an environment that can be dangerous for potential witnesses and victims. Therefore, any criminal justice initiative regardless of forum needs to make special allowances for the protection of victims and witnesses.



- **Sexual violence investigations and prosecutions.** As is the case under ordinary circumstances, it is challenging to successfully prosecute sexual violence crimes. Victims of sexual violence may be reticent to come forward to testify due to fear of stigmatization, re-traumatization, or aggressive questioning that might challenge their credibility or insinuate that they were somehow responsible for their victimization. The evidence of such acts may be lost or difficult to find or preserve. All potential criminal justice actors need to take steps to balance the defendant's due process rights with the needs of victims of sexual violence. This often includes sensitivity training for investigators and court officials as well as increased security and confidentiality for victims.
- **Managing expectations.** Criminal trials are not a panacea for all the wrongs committed during periods of mass abuse. There are limits to what they can do and how many people they can investigate and prosecute. They also have to follow fair trial rules and procedures that on their face may not make sense to victims, witnesses, or the general public. Victims, communities, and governments can be disappointed with criminal trials that lead to acquittals or where convictions appear to be more pervasive for actors on a certain side of a conflict. Individuals involved in criminal processes—whether domestic, hybrid, or international—should take steps to manage the expectations of victims, witnesses, and the general public through outreach and awareness-raising activities to ensure that the trial process and its outcomes are understood as a positive step toward justice.

