

TRANSITIONAL JUSTICE IN AFRICA, A BRIEF SURVEY OF THE DYNAMICS

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ABSTRACT

Justice is necessary in order to instil peace and order in any given community, however, the effectiveness and ability for justice to prevail is not always guaranteed, particular in states and societies that emerge in the wake of insecurities, hardship and wars. In such situations, the kind of justice which prevails is known as transitional justice. Transitional justice is a form of administering justice in a particular and fragile context. This sort of justice has constantly prevailed on the African continent for over 3 decades due to insecurities and conflicts within its various countries. This paper will attempt first attempt to make sense of the concept of transitional justice relying from institutional perspectives notably that of the United Nations and the African Union. Next, the work will map out some of dynamics in terms of practice and administration of transitional justice in Africa with an analysis of various forms and occurrences in different countries. It will continue discuss different transitional justice practices after violence and conflicts in 3 different case studies. Finally, in conclusion, the paper proposes some way forward cognizance of the two predominant perspectives of transitional justice on the African continent.

INTRODUCTION

Over the last 3 decades, armed conflicts worldwide have witnessed a significant shift from being what was predominantly inter-state to now being intrastate. Pockets of armed conflicts in various sovereign states are now rampant more than ever before. During these kinds of armed conflicts, there are usually gross human rights violations committed against civilians and other persons not taking part in the hostilities. Situations in the wake of wars/ conflicts which are often characterized by devastated institutions, exhausted resources, diminished security and a traumatized and divided population (United Nations, 2010, p. 3)ⁱ. As such, in post-conflict situations, it becomes imperative that justice and reconciliation be restored; there is the need to re-establish the rule of law and confront the past and draw lessons for the future. It is in such context that transitional justice and its various mechanisms set in.

Transitional justice as defined by the UN is “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” (United Nations, 2010, p. 4)ⁱⁱ. Transitional justice is not some sort of special form of justice, rather it is justice adapted to the often address unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs. (What is Transitional Justice: A Bckgrounder, 2008)ⁱⁱⁱ Transitional justice encompasses several mechanisms which could be both judicial and non-judicial such as truth-telling initiatives, prosecution initiatives, reparations processes, cultural interventions, vetting and institutional reform or an appropriate combination thereof. It is important to note that although transitional justice is often times only looked as an issue of justice and reconciliation, whereas it is equally a political one. The very fact that a country chooses whether or not to go through the path of transitional justice is the outcome of political will, and its success would depend so much on the latter.

The focus of this paper is to highlight the UN and AU respective stands on transitional justice, briefly look at a few examples of transitional justice mechanisms in Africa, and to point some ways forward in which they can promote sustainable peace.

THE RATIONALE AND CHARACTERISTICS OF TRANSITIONAL JUSTICE

Often in post conflicts and/ or long dictatorships, there is usually a prevalence of corrupt or devastated institutions, limited resources, diminished security and a traumatized and divided population which lacks trust in the state. More so, even the existing the judiciary may be ineffective, since the majority of police, prosecutors, and judges may be too weak or corrupt, or too few in number, to be able and willing to act in the public interest and ensure victims' rights to justice. (What is Transitional Justice: A Bckgrounder, 2008, p. 4)^{iv} Aside from the question of whether the judiciary has the capacity to redress gross violations of human rights, there is also the question of whether they are adequate, by themselves, to doing so. A transitional justice approach has the tools and mechanisms to both administer justice and ensure reconciliation in situations of post-conflict taking into account the inclusiveness of the victims. In an Africa context for instance, they often include traditional justice systems which are often being presided by community leaders with large public participation by community members.

In order for a transitional justice approach to be effective, it would need to take into account certain factors. These factors include local context/ ownership, participation and inclusive process, outreach, timing and sequencing and the coordination with other sectors. (GSDRC, 2019)^v

The international community has the tendency in the aftermath of conflicts where there has been a gross violation of human rights to seek justice and accountability. This trend has led to a huge investment in the international criminal order, hence the establishment of the international criminal court in 2002. Although justice is key in to the post-conflict reconstruction of any given state, reconciliation which is crucial as well, is often times not given as much attention as justice. It is imperative that national reconciliation be treated at the same level as justice.

THE UN/ AU APPROACHES TO TRANSITIONAL JUSTICE

The UN has been in involved with transitional justice since its earliest forms in the Post World War II era, and its emergence in the 1980/90s. It has the mandate to do so by virtue of the UN

Charter, which make it a key aim of the organization the maintenance of international peace and security.^{vi} The UN, its organs and agencies as a whole have recognized the role and fundamentalism of human rights at the core of transitional justice. Reason why, the Secretary-General's decision on the rule of law in November 2006 designated OHCHR as the lead entity within the United Nations system in the area of transitional justice (see A/61/636-S/2006/980). As such, OHCHR is responsible for policy development, standard-setting, substantive guidance, capacity-building, and coordination with actors within and outside the United Nations system on transitional justice issues (United Nations, 2009, p. 5)^{vii}. OHCHR has been actively supporting transitional justice in more than 20 different countries. Its support includes ensuring that human rights and transitional justice considerations are reflected in peace agreements; engaging in the design and implementation of inclusive national consultations on transitional justice mechanisms; supporting the establishment of truth-seeking processes, judicial accountability mechanisms and reparations programmes; and enhancing institutional reform. The UN Human Rights agency provides dedicated transitional justice programmes at the country level; conceptual and policy support at headquarters; and partnerships with multiple actors, including national authorities, national human rights institutions, civil society and other United Nations departments and agencies (UNDP, 2006, p. 4).^{viii} Closely related to the activities of OHCHR on the issue, is the United Nations Development Programme (UNDP). UNDP has also been actively working on issues of transitional justice. It has as comparative advantages its global reach, ability to deploy in-house expertise and outside consultants where and when needed, ability to coordinate and conduct rapid baseline needs assessments, and ability to mobilize resources in a quick and effective manner. Also, UNDP represents the institutional strengths of neutrality; an ability to work with all societal actor; with over 60 years of experience in capacity development; a gain trust of governments and other actors; and the universality of its field presence with over 136 country offices and over 166 country programmes. (UNDP, 2006, p. 5)^{ix} All these institutional strengths are particularly vital in post-conflict and transitional contexts. The fact that UNDP has a wide range of establishment in-country presence, enables it to react quickly and flexibly to arising needs that often require a fast response to seize windows of opportunity. This asset has been used by the UN and its organs and agencies to offer coordinated support to states undergoing transitional periods. This was evidenced as OHCHR and UNDP collaborated for instance on the development of a transitional justice toolkit in 2010. Additionally, in March 2010, the

UNSG adopted Guidance Notes on the United Nations Approach to Transitional Justice. In these notes, were the guiding principles, the components and the ways further strength UN transitional justice activities.

In Africa, post conflict reconstruction has been viewed increasingly differently as there is a greater appeal for issues of reconciliation and national healing to be among the priorities in transitional justice mechanisms. The African Union (AU) has the mandate to oversee issues of post conflict reconstruction on the continent as safeguarded in provisions in its Constitutive Act and also by virtue of the AU PSC Protocol in Article 3. More so, at the regional level, the AU has been working on a continental transitional justice policy framework since 2011. It is important to note that the AU Policy Framework on Transitional Justice is yet to be fully constituted. The AU saw the need to address the issue at a continental level and to take into account the African specifics in post conflict reconstruction. Thus the aim of this policy framework, is the affirmation of the sanctity of human life and the recognition that past wrongs, whatever their form and whoever the perpetrator, ought to be acknowledged, those responsible for them brought to justice, and, where appropriate, restitution paid to the victims (Jeng, 2014)^x. The AU Policy attempts to enforce a departure from the dominance of current retributive justice order, providing valuable pointers in articulating a transformational and holistic transitional justice approach. The origins of the AU position lies in the Consultation Report abstracted from the African Union Commission Consultation with African Union Member States on Transitional Justice.^{xi} While the Consultation report recognizes the primacy of states in the responsibility of dealing with past wrongs and abuses through transitional justice modalities, which is rooted in the traditional assumption that states have the capacity, willingness, and interest to oversee transitional justice processes. It also acknowledges the crucial role of the AU in the adoption and implementation of transitional justice in Africa through normative and institutional frameworks as well as by means of mediation and other methods.^{xii} The AU transitional justice framework has as constitutive components four themes which are complemented by sets of principles. The themes include; is the co-optation of social, economic, and cultural rights into transitional justice processes as a way of moving beyond the traditional focus on civil and political rights; propelling gender justice onto the front burner of transitional justice; the value of reparations and their correlation with development assistance; and finally, calibrating the African framework around accountability as well as making it reflective of traditional transitional justice mechanisms.^{xiii} It important to underscore that the efforts done

by the Union in the coming up of this framework is one which is very much “people-centrist” and one which underpins the importance of traditional justice mechanism, and of placing justice and reconciliation as sides of the same coin being - indistinguishable. The potential of the evolving framework hints on the possibility of offering a kind of alternative that can achieve what Alexandra Boraine calls “a deeper, richer and broader vision of justice, which seeks to confront perpetrators, address the needs of victims and assist in the start of a process in reconciliation and transformation” (Boraine, 2006).^{xiv}

CASE STUDIES

Prior to the AU’s Policy Framework on Transitional Justice, some African states which were in the wake of wars, set up varied transitional justice systems to confront the past and move forward. As such, in the 1990s and early 2000s, the African continent witnessed various kinds of transitional justice mechanisms. Some of these efforts were found in countries such as: Rwanda, which had more or less traditional justice systems in the form of the Gacaca courts and also International Criminal Tribunal for Rwanda; Ethiopia, which had the Special Prosecutor’s Office; and Sierra Leone in the establishment of a Special Court and Truth and Reconciliation Commission. All these various models served as various forms of transitional justice varied by the different local context. A brief analysis would be done on each of these mechanisms, and their impact on achieving sustainable peace.

Rwanda

Rwanda witnessed one of the worse episodes in modern day history in 1994. One in which several hundreds of thousands of lives were lost. The Rwandan genocide that occurred between April - July 1994, and at had led to the killing of more than 800000 people, was a combination of several factors mainly based on the differentiation of the Hutu and Tutsi ethnic groups. The aftermath of the genocide witnessed significant efforts by the international community to ensure that the perpetrators be held accountable and be brought to justice. Over the years, there have been five different transitional justice processes that have been set up in efforts to address the wrongs and gross human rights violations of the civil war and the genocide. These mechanisms include a National Unity and Reconciliation Commission, an International Panel

of Eminent Personalities to investigate the 1994 genocide, the Gacaca courts, the International Criminal Tribunal for Rwanda and the International Commission of Investigation on Human Rights Violations in Rwanda (Fombad, 2017).^{xv}

The International Criminal Tribunal was set up by the UNSC to with the responsibility to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda from 1 January 1994 to 31 December 1994. It comprised of three trial and one appeals chamber composed of 16 judges elected by the UN General Assembly. The tribunal was expected to complete its mandate by 2008. The ICTR however proved to be insufficient in handling the large numbers of persons who were deemed to have taken part in the genocide, as such the government of Rwanda in 2001 introduced the Gacaca Courts. They were established by the Gacaca laws of March 2001 and had as mandate the following: The mandate of these courts was:

- i) to reveal the truth;
- ii) to speed up trials;
- iii) to put an end to the culture of impunity;
- iv) to reconcile the people of Rwanda;
- v) to revive traditional forms of justice;
- vi) to demonstrate the ability of local communities to resolve their own problems; and
- vii) to solve problems caused by the genocide.^{xvi}

The Gacaca law defined different categories of crimes: Category 1 – those who planned or directed genocide; Category 2- those who committed crimes with the intention to kill; or whose actions led to death; Category 3 – those who committed crimes which led to serious assaults against a person; Category 4 – offences against property. The Gacaca courts are responsible for crimes which fell in the categories 2 to 4. This system is closely linked to the national prosecutor's office.^{xvii} Till date, more than a million people have been tried by the Gacaca courts. Although the courts have come under huge pressure by the international community that it lacked international standards, and some have even called some of its forms of punishment (community services) a disgrace to the survivors of the genocide.

But giving the limited resources Rwanda had at the end of the genocide, perhaps the implementation of varied forms of transitional justice systems and particularly the implementation of the Gacaca system of community justice has perhaps helped in a extend, to guarantee substantial reconciliation among Rwandan citizens. Although more than 25 years have gone by since those horrific events, and the scares of the past still leave amongst various communities, but Rwandans are increasingly more united, though they can never forget their tragic past but do not want to be defined by it. The older generation already know all too well the cost of failure, but a majority of the population, born post-genocide, has inherited the possibility of a different future (The Guardian, 2014).^{xviii}

Ethiopia

Ethiopia's history includes wars and political violence. The most recent violent ones being the military 1974 coup d'etat against the imperial reign of Emperor Haile Selassie I, and the 1991 defeat of military junta - Derg of Colonel Haile-Mariam by the Ethiopian People's Revolutionary Democratic Front (EPRDF). In the first case, political violence occurred after the regime change, when the military leadership used terror and purges to consolidate its power after ousting Emperor Selassie. Meanwhile second case, the use of military force and political violence helped the EPRDF top the Derg and achieve regime change. (Kjetil)^{xix} The Derg regime was responsible for gross human rights violations and the deaths of more than 150000 lives in a totalitarian rule from 1974 to 1991. When the EPRDF came into power in 1991, they wanted to restore justice and show the Ethiopian people that no official can commit gross human rights violations and go without being accountable. To that effect, in 1992 it established a Special Prosecutor's Office to investigate and prosecute the massive human rights that occurred during the Derg era. The Office had among other things, the main objectives being to prosecute officials of the Derg regime responsible for thousands of killings; and to record the atrocities by compiling all the written evidence available and by soliciting oral testimonies from victims and victims' families. It divided the accused into three groups: policy makers and senior government and military officials of the junta; military and political field commanders who carried out orders and passed them on; and the individuals "on the ground" who carried out the brutal human rights violations^{xx}. Importantly, all the accused were tried based on the Ethiopian Laws and using the Ethiopian legal systems. The Office divided the accused into three groups: the first group included top level policy makers and senior government and

military officials of the junta; the second included military and political field commanders who carried out orders and passed them on; and the third was composed of individuals “on the ground” who carried out the brutal human rights violations.

Although the Office managed to try more than 6000 accused, including the former leader of the Derg regime - Mengistu Haile Mariam (in absentia), it, together with the EPRDF regime had equally put in place other mechanisms to help provide the justice to the victims, these included lustration measures, restitution of property and reconciliation initiatives.

The Ethiopian case of transitional justice has been quite different from the usual truth commission model as used by many countries to address issues of mass human rights violations. Although this model might not have yielded the most victim-centered results, but often transitional justice reflects the local and political will and context of any given country. The recognition of the said violations and the readiness to confront them and address them should and cannot be undermined. More so, the fact that country had used its national law, including the Ethiopian Penal Code to prosecute the members of the Derg regime strengthens the opinion that if the national resorts are used effectively, indeed justice can still be achieved.

Sierra Leone

Sierra Leone is a country rich in natural resources including diamond. Yet, they are amongst one of the poorest countries in the world. A civil war that lasted from 1991 to 2002 saw a more than 75,000 fatalities, 10,000 people who had their limbs brutally chopped off; 5,000 children who were forced to fight beside adults; and many more who were abducted to be sex slaves is one of the worse of its kind on the continent (Pearce, 2012).^{xxi} With pressure from West African states through - ECOMOG, and the reaction of the international community at large, the Revolutionary United Front (RUF) was defeated by 2002. While the government of Sierra Leone set up a Truth and Reconciliation Commission, the transitional justice scenario in Sierra Leone had another mechanism, in the form of a Special Court established by the UN. This provided a unique experience as while the TRC was seeking “restorative” justice, the Special Court was created by the UN to carry out criminal prosecutions against those who had the greatest responsibility for the crimes against humanity, war crimes and the gross human rights violations during the civil war in a bid to bring “retributive” justice.^{xxii} Both institutions were mandated to carry out the investigation on the violations that occurred from 1991 -1999. The

Special Court in March 2003 brought the first of 13 indictments against leaders of the RUF, the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF), and then-Liberian President Charles Taylor.^{xxiii} In 2013, it became the first court to complete its mandate and transition to a residual mechanism. The Residual Special Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone to oversee the continuing legal obligations of the Special Court for Sierra Leone after its closure in 2013. These include witness protection, supervision of prison sentences, and management of the SCSL archives.^{xxiv}

On the other hand, the TRC was established by the government to address impunity; respond to the needs of victims; promote healing and reconciliation; and prevent a repetition of such events in Sierra Leone. It operated between 5 July 2002 and October 2004, and came up with a series of recommendations at the end of its mandate including the need to fight against corruption, the creation of a new bill of rights developed in a participatory constitutional process, the independence of the judiciary, strengthening the role of parliament and more tight control of the security forces (Fombad, 2017).^{xxv} As a result of the TRC recommendations, The National Commission for Social Action (NaCSA) had been established by the government. Its main aim was to implement the recommendations of the TRC, particularly with respect to reparations.^{xxvi}

WAYS FORWARD FOR TRANSITIONAL JUSTICE TO ACHIEVE SUSTAINABLE PEACE

More than half of the countries on the African continent have undertaken the paths of transitional justice in the wake of tough times in their varied experiences. Transitional justice is always bound to be context and country specific. Although various systems, mechanisms and/ or models have proven to record varied amounts or percentages of success, one must not fail to recognise that the very decision to go down the paths of transitional justice is one which cannot be undermined by more technical issues like what kind of mechanisms should be put in place. The way forward on the transitional justice as pointed out by the AU in its ongoing Policy framework and the UN in its guiding principles on transitional justice should be one with a holistic approach. It should be rights inclusive and most must strike the balance between

justice and reconciliation. It has been clearly stated in the UN Guiding Principles that the future of the organisation's activities would rest on three key issues; the inclusiveness of human rights in transitional justice being one. The UN approach to transitional justice emphasises as a way forward that transitional justice mechanisms should be more comparative, reinforcing each other, that they should include more participation of human rights experts and they should pay attention to harms inflicted on women and children in peace processes. Also, the UN in its basic principles on the use of restorative justice programmes in criminal matters, suggest that justice could move from being punitive to being more restorative and comprehensive, one involving more participation of both the victims and the perpetrators (United Nations, 2002).^{xxvii} It also call for more consultation and collaboration of criminal justice prosecutors and restorative justice programmes.

The AU on its own side has increasingly been advocating for justice and reconciliation to be given the same importance in transitional justice systems and mechanisms. It emphasises on the promotion of justice and reconciliation as two sides of the same coin, and the quest for one need not undermine the other. Through its evolving policy framework on transitional justice, it also argues that justice should not be limited only to retributive justice, but it should be more holistic, engulfing distributive and restorative aspects while being victim centered. The Union has also called for traditional justice systems to be strengthened during transitional processes, as this can facilitate reconciliation. It also recognises and emphasises on the importance of these transitional systems to have local ownership, victim oriented, to encompass the right of the victim to know, command strong need for accountability and be context and timing specific.

It is important to highlight that in the 3 cases briefly discussed above, there were elements and initiates of prosecution, truth seeking and reparations. Reparations are key to any transitional justice process as it can return to victims some sense of moral worth and dignity; force a society to re-conceptualize its sense of identity; foster public trust in state institutions; help undermine perpetrator narratives that justified past atrocities; and promote a critical reinterpretation of a nation's history (Verdeja, 2006).^{xxviii} Although prosecutions are the clearest and most powerful way to identify past actions as violations and to undermine the ideologies of perpetrators, reparations also however do so, for identifying victims as worthy of recognition implicitly redefines certain events and actions as transgressions^{xxix} and strengthens the reconciliation process and nation building efforts.

Also, there is no denying that truth and reconciliation commissions and other transitional justice are viable, flexible and credible for laying down the foundations of a democratic society in Africa as well as resolving the numerous ongoing or past conflicts. They can help in taming, balancing and recasting the anger and desire for revenge in a positive direction that can provide progress, development, peace and prosperity. However, a number of changes need to be made to make the process worth the time and money expended on it.^{xxx} It is therefore paramount to be for there to be an increase participation in these processes by the victims and perpetrators as it would help to draw the root causes of the violations and help to avoid them in the future. This might also go a long way to help healing, allowing a shift in the type of justice from retributive to distributive and/ restorative justice. More so, there should be an increased corporation amongst transitional justice mechanisms when they exist more than one as their mandate lines might be increasingly blurred while seeking their objectives.

Impunity is universally unacceptable, and justice is a universally shared principle. But this does not mean that its applicability must be uniformed. It should reflect the context and realities of the situation. More so, justice without reconciliation is as dangerous as reconciliation with justice, and so the effectiveness of future transitional justice mechanisms on the continent, would depend on the how well they reconcile justice and reconciliation.

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ⁱⁱ Ibid.,p.4

ⁱⁱⁱ See *What is Transitional Justice: A Backgrounder* p.1 at

http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf

^{iv} Ibid.,p.3

^v See more at <http://www.gsdrc.org/topic-guides/transitional-justice/summary/>

^{vi} See more in article 17 of the United Nations Charter

^{vii} See more at ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL : Analytical study on human rights and transitional justice p.5 at

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^{viii} See more at UNDP and Transitional Justice: An Overview, January 2006 p.4

^{ix} Ibid.,p.5

^x See more at A. Jeng “Transitional Justice and Post conflict Reconstruction in Somalia: The Role of the African Union and pointers provided by it.” *Northeast African studies*, Volume 14, Number 2, 2014 pp. 46 - 72 (Article)

^{xi} Ibid

^{xii} Ibid

^{xiii} Ibid

^{xiv} Alexandra Boraine, “Transitional Justice: A Holistic Interpretation,” *Journal of International Affairs* 60 (2006)

^{xv} See more at Charles Manga Fombad “Transitional Justice in Africa: The Experience with Truth Commissions”

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^{xvi} Ibid

^{xvii} Ibid

^{xviii} See more at <https://www.theguardian.com/commentisfree/2014/apr/06/rwanda-genocide-beacon-hope-healing-nation>

^{xix} See Ethiopia case-study: Encyclopedia of Transitional Justice at p.g 168 at

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^{xx} Ibid

^{xxi} See more at <https://www.monash.edu/law/research/centres/castancentre/public-events/events/2012/sierra-leone>

^{xxii} Ibid

^{xxiii} See more at The Residual Special Court for Sierra Leone, website <http://rscsl.org/index.html>

^{xxiv} Ibid

^{xxv} See more at Charles Manga Fombad “Transitional Justice in Africa: The Experience with Truth Commissions” http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions.html#_Sierra_Leone

^{xxvi} Ibid

^{xxvii} See more at ECOSOC Resolution 2002/12: Basic principles on the use of restorative justice programmes in criminal matters <http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>

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^{xxix} Ibid.,p.g 463

^{xxx} See more at

http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html#_Appraisal_and_future

