

LECTURE: THE STATE OF TRANSITIONAL JUSTICE IN AFRICA - *Between wide application and deep contestation.**

Speaker: Commissioner Solomon A Dersso, African Commission on Human and Peoples' rights

INTRODUCTION

A very good morning to you all, distinguished participants and organizers of this inaugural continental forum on transitional justice in Africa. I would like to start off by expressing my appreciation to the African Union (AU) Department of Political Affairs and the Centre for the Study of Violence and Reconciliation for all the work that they have put into organizing this event.

I would also like to congratulate them on a job well done in successfully convening this event. As the presence of so many stakeholders from academia, Member States of the AU and civil society organizations (CSOs) attests, the theme of the continental platform is of huge significance across the continent. It is indeed of paramount importance that we accord the issue of transitional justice in Africa such high-level attention.

I am particularly delighted to be here this morning to deliver this lecture laying out the framework for the three days of conversation on the state of transitional justice in Africa. Through this lecture, I hope not only to offer an appraisal of the state of transitional justice on the continent, but also an analysis that will hopefully trigger debate and critical reflection on the Africanization of the discourse around and practice of transitional justice in Africa.

A BIRD'S-EYE VIEW OF THE TRANSITIONAL JUSTICE LANDSCAPE IN AFRICA

Transitional justice has become an established component of the processes implemented to move towards the settlement or resolution of armed conflicts or authoritarian rule. It is deployed as a vehicle for moving affected societies from conflict to peace or from authoritarian rule to democratic order. It has become part of the template of post-conflict or post-authoritarian reform or peace building efforts.

It is deployed as a vehicle for moving affected societies from conflict to peace or from authoritarian rule to democratic order. It has become part of the template of post-conflict or post-authoritarian reform or peace building efforts.

* This lecture was delivered at the "The State of Transitional Justice in Africa" Continental Forum, 19 – 21 October 2017 in Johannesburg, South Africa.

Almost all countries that experienced violent conflicts or violent authoritarian rule have put in place or are putting in place one or another form of transitional justice process. Since the 1990s, various forms of transitional justice processes have been implemented in diverse African countries. Many countries have implemented transitional justice mechanisms or passed laws for the implementation of such mechanisms or included stipulations for such mechanisms in peace agreements or other legal instruments. These include Angola, Algeria, Burundi, Chad, Cote d'Ivoire, the Democratic Republic of the Congo (DRC), Ethiopia, Ghana, Kenya, Liberia, Mozambique, Nigeria, Namibia, Rwanda, Sierra Leone, South Africa, Sudan and Uganda.

Commonly used mechanisms are prosecutions or criminal trials. In countries such as Ethiopia and Sudan/Darfur, these are implemented using national criminal justice institutions that rely on special prosecution bodies. International, hybrid or a combination of national and international criminal processes or regional criminal trials have been used in cases in Chad, Central African Republic, Liberia, Rwanda, Sierra Leone, Uganda and DRC.

Although designed and located differently, truth and reconciliation commissions (TRCs) or commissions of inquiry are also commonly used mechanisms. These have been used with more or less success and under various institutional settings in South Africa, Morocco, Ghana, Liberia and Chad, among other places.

In countries such as South Africa, DRC, Uganda and Algeria, transitional justice processes additionally involved the use of amnesties. In South Africa, the TRC Act stipulated that those who disclosed what they knew about violations and their role in such violations were eligible to apply for and receive amnesty for revealing the truth. Uganda's Amnesty Act of 2000 granted amnesty to Lord's Resistance Army (LRA) members on condition that LRA soldiers surrendered and renounced armed violence.

Despite their limited scope and application, traditional justice mechanisms have also been used in Rwanda through the Gacaca process, in northern Uganda, in Sierra Leone and in Mozambique.

It is clear that there is a rich wealth of experience in designing transitional justice processes on the continent, and the use of transitional justice is ongoing. In recent periods, transitional justice has featured in the discourse, policy debates and planning efforts for resolving ongoing conflicts or violent authoritarian rule. Indeed, countries seeking to come out of conflicts, such as the Central African Republic and South Sudan, and those emerging from repressive authoritarian rule, such as Tunisia and The Gambia, are at various stages of putting in place or pursuing transitional justice processes.

At the continental level, the AU is now completing the building of what I call the trinity of architectures, with the latest addition of a justice architecture to its two existing architectures – the African Peace and Security Architecture and the African Governance Architecture.

At the continental level, the AU is now completing the building of what I call the trinity of architectures, with the latest addition of a justice architecture to its two existing architectures – the African Peace and Security Architecture and the African Governance Architecture.

The emerging African Justice Architecture is being organized around various AU normative commitments and policy and institutional frameworks. Normatively, apart from the provisions in the AU Constitutive Act, there is a draft African Transitional Justice Policy that the AU policy-making bodies are expected to review and adopt.

Within the African human rights system, the African Commission on Human and Peoples' Rights is at the end of the process of elaborating a study on transitional justice and human and peoples' rights in Africa.

Institutionally, apart from the complex web of actors involving the African Union Commission, the Peace and Security Council and the AU human rights bodies, in June 2014, the AU Summit in Malabo, Equatorial Guinea, adopted the Protocol Establishing the Criminal Jurisdiction of the African Court on Human and Peoples' Rights.

Transitional justice has also become an established component of the advocacy, policy research, training and public outreach activities of various national and regional CSOs. As part of this process, there are now large numbers of experts and practitioners engaging in this field. As the next phase in this process, it is not far-fetched to expect an evolution towards the establishment of a continental platform of transitional justice CSOs, researchers and practitioners – a platform not only for sharing experiences and taking stock of the state of transitional justice in Africa, but also for facilitating the implementation and operationalization of the emerging African Justice Architecture.

As the next phase in this process, it is not far-fetched to expect an evolution towards the establishment of a continental platform of transitional justice CSOs, researchers and practitioners – a platform not only for sharing experiences and taking stock of the state of transitional justice in Africa, but also for facilitating the implementation and operationalization of the emerging African Justice Architecture.

Clearly, transitional justice has achieved wide recognition in the process of national transitions, in continental policy-making processes and in the work of CSOs. In light of the foregoing, it is tempting to ask whether those advocating for transitional justice should pat themselves on the shoulder and declare victory. After all, transitional justice is no longer a matter that countries coming out of conflict or violent state repression may opt for. Rather, it has become part of the tapestry of mechanisms that are commonly used to achieve settlement after conflict or state repression.

LIMITS OF THE CURRENT CONSENSUS ON TRANSITIONAL JUSTICE IN AFRICA

The wide recognition in continental policy processes, civil society advocacy works as well as in peace processes certainly represents deepening consensus around transitional justice. The first area of consensus is that a society emerging from violent conflicts or authoritarian repression should properly reckon with the violations occasioned in the course of the conflicts or under authoritarian rule. Without such reckoning, goes the argument, the society risks the recurrence of the violations. The second area of consensus, related to the first, is that there has to be a break from the violent past. This calls for establishing accountability as a means to break the cycle of impunity.

Beyond these two areas, one would be hard pressed to find consensus on transitional justice in Africa.

Despite being commonly used in African societies in transition and its emergence into the mainstream of the discourse on peace and security and the work of

Despite being commonly used in African societies in transition and its emergence into the mainstream of the discourse on peace and security and the work of policy-makers and advocacy groups, the level of consensus around the conceptual, normative and operational content and scope of transitional justice, as well as conditions for its success, leaves a lot to be desired.

policy-makers and advocacy groups, the level of consensus around the conceptual, normative and operational content and scope of transitional justice, as well as conditions for its success, leaves a lot to be desired. Despite the expanding, rich experiences with transitional justice on the continent, or perhaps because of these experiences, the essence of transitional justice and what it means and involves remains open.

The current debate on transitional justice in Africa revolves around questions such as: What is transitional justice? What justice? Whose justice?

Mainstream practice and discourse on transitional justice conceptualizes justice principally in terms of legal and juridical processes. Modelled on the experience of the Nuremberg trials of the Nazis after World War II,¹ the vehicle of choice for the mainstream traditional practice of or discourse on transitional justice is criminal prosecution. This is often called adversarial or retributive justice, whose orientation is to prosecute, on the basis of fair trial standards, those believed to be responsible for human rights and humanitarian law violations. In its expanded form, it also includes truth commissions, which ordinarily use legal techniques and instruments.

Whether it takes the form of prosecutions or truth processes, or a combination thereof, juridical and legal forms of justice principally involve the documentation of human rights violations and the establishment of accountability for the violations through legal investigation methods and processes.

There certainly is a role for juridical and legal forms of justice for violations in African societies affected by or experiencing violent conflicts or authoritarian repression. However, the premium put on such forms of justice by traditional mainstream transitional justice approaches suffers from various flaws, rendering these forms of justice utterly inadequate to address the justice demands of the African transitional setting.

First, juridical and legal forms of justice manifest the liberal tradition's bias towards individualism. Accordingly, there is a tendency to individualize responsibility for large-scale violations of human rights and mass atrocities. This is inadequate in the sense that the aim of criminal processes is thus to apportion blame and punish the "guilty". This is done in an individualized way. As Emeritus Justice Albie Sachs, a leading justice of the South African Constitutional Court, explains, juridical and legal forms of justice "are concerned with accountability in a narrow individualised sense. They deal essentially with punishment".²

This individualization of responsibility is not limited to criminal trials but is also a feature of truth commissions. As Mahmood Mamdani observes, "the TRC was less an alternative to Nuremberg than an attempt at a surrogate Nuremberg. It shared a critical premise with Nuremberg, the assumption that all violence is criminal and responsibility for it is individual".³

In the African transitional setting, where group and community identity is deeply embedded in the cultures of the people and the multinational or multicultural make-up of the African state, this focus on the individualization of violations and responsibility is problematic.

In the African transitional setting, where group and community identity is deeply embedded in

1 Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa", *Politics and Society* 43(1) (2015): 61–88.

2 Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009), 84.

3 Mamdani, *supra* n 1 at 63.

the cultures of the people and the multinational or multicultural make-up of the African state, this focus on the individualization of violations and responsibility is problematic.⁴ Indeed, as the recent experience of South Sudan shows, often armed conflicts or violent instability take ethnocultural lines, and in such contexts an approach with a focus on individualism would prove entirely inadequate. We thus need a conception of human rights that takes due account of the group and collective dimension of violations and responsibilities.

Second, the individualist bias of the Nuremberg-inspired transitional justice tends to misplace the locus or source of the violations. It places too much focus on individuals as the source of the problem rather than exploring the much deeper sources of mass atrocity crimes. In most instances, mass atrocity crimes are rooted in the structures of political, socioeconomic and cultural power of the state, and the use and distribution of such power among various sections of society. As Justice Sachs observes, the result of such a judicial process is that “[t]he social processes and cultural and institutional systems responsible for the violations remain (or are left) uninvestigated”.⁵

It places too much focus on individuals as the source of the problem rather than exploring the much deeper sources of mass atrocity crimes. In most instances, mass atrocity crimes are rooted in the structures of political, socioeconomic and cultural power of the state, and the use and distribution of such power among various sections of society.

A more substantive issue is whether criminal justice is the justice that victims primarily seek. In its report *Darfur: The Quest for Peace, Justice and Reconciliation*,⁶ the AU High-Level Panel on Darfur shows that for victims and Darfuris, while supportive of the International Criminal Court (ICC) process, the prosecution of a few individuals is not their only or immediate concern. According to the report, “[t]heir most immediate demand was for protection and security guarantees, followed by a political settlement that can lead to an equitable distribution of wealth, development, the rule of law and a political system that gives them a significant say over their own affairs within Darfur”.⁷

Further issues animating the debates about transitional justice concern its objectives and scope. Is transitional justice about the punishment of perpetrators and hence non-impunity? Is it about the moral and material reparation and restoration of victims? Is it about rebuilding societal cohesion that was broken by violence – horizontal reconciliation and healing? Is it about (re)building the state–society relationship – vertical reconciliation and healing? Is it about addressing the root causes of violence and the democratic reformation and reconstitution of the society concerned?

Is transitional justice about the punishment of perpetrators and hence non-impunity? Is it about the moral and material reparation and restoration of victims? Is it about rebuilding societal cohesion that was broken by violence – horizontal reconciliation and healing? Is it about (re)building the state–society relationship – vertical reconciliation and healing? Is it about addressing the root causes of violence and the democratic reformation and reconstitution of the society concerned?

In the current practice and discourse on transitional justice, the focus is defined narrowly on how to address the violations of the past, with an emphasis on human rights violations.

4 Makau Mutua, “A Critique of Rights in Transitional Justice: The African Experience”, in *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, ed. Gaby Oré Aguilar and Felipe Gómez Isa (Cambridge: Intersentia, 2011).

5 Sachs, *supra* n 2 at 84.

6 Report of the African Union High-Level Panel on Darfur (2009).

7 *Ibid.*, para. 203.

Irrespective of the form it takes, transitional justice is thus concerned with identifying those acts that are considered violations within the human rights framework.

In other words, this approach to transitional justice aims at holding those responsible for violations legally accountable, either criminally or through truth processes. At the very least, this approach concerns itself with punishing the wrong and (at best) reaffirming the rule of law. This narrow focus is a result of a number of factors.

First, it comes from the historical antecedent – the Nuremberg trials – to which the conceptualization and modelling of transitional justice owes its origin. Second, as an extension or by-product of the human rights movement, spearheaded and championed predominantly by western players, transitional justice draws on the liberal tradition of accountability for crimes, which promotes an adversarial, retributive model of formal legal justice.⁸ Third, as a field that has largely been dominated by lawyers and human rights advocates, this narrow focus of transitional justice is also a product of their professional bias.

A number of issues arise from this narrow focus and scope of the traditional mainstream approach to transitional justice in Africa. The first concerns its conception of the nature of violations, which are mostly defined in terms of physical violence and hence focus on violations of the rights to life, physical security and liberty.

Without a doubt, there is value in seeking vindication of political and civil rights and freedoms through juridical and legal forms of justice. Yet, as South Africa has demonstrated, they can be of limited utility in addressing the indignation and injustice resulting from past and ongoing structural inequalities and socioeconomic deprivations. In this context, our conception of violations that take place in conditions of armed conflict or violent authoritarianism should not be limited to violations of civil and political rights only. It should also cover the various socioeconomic deprivations and unjust power relations that affect various sections of society and that create and recreate inequities.

Another major drawback of the narrow focus of the traditional mainstream transitional justice discourse is that it focuses much more on the past than on the present and the future. Certainly, victims of violence wish to see justice done and that those responsible for serious violations are not left unpunished.

For societies that experienced armed violence and the devastations of mass atrocity crimes, there is additionally the much broader interest in charting out an inclusive, just and democratic order that guarantees stability and peace, promotes national reconciliation and cohesion and secures the interests of all members of society. An approach to transitional justice that is confined to punishing past wrongs is unlikely to operate as a suitable framework for addressing demands to transform the structures and relations of power underlying violent conflicts or authoritarian rule.

The narrow focus of transitional justice on legal accountability in the individualized sense places more attention on the perpetrator than on the victim, and on the past rather than on the present and future demands of those affected by violence.

Third, the narrow focus of transitional justice on legal accountability in the individualized sense places more attention on the perpetrator than on the victim, and on the past rather than on the present and future demands of those affected by violence.

⁸ W. Lambourne, "Transitional Justice and Peacebuilding after Mass Violence", *International Journal of Transitional Justice* 3(1) (2009): 28–48.

As Makau Mutua rightly points out, while “sanctions against perpetrators – whether criminal, civil or political – are important in any transitional justice concept ... they are not at the core victim centred”.⁹ They are, by their design and impact, perpetrator centred. They only serve the purpose of mollifying society at large for the breach of societal norms that the violations constitute, hence affirming the rule of law, but may do nothing for the victim.

Besides the issues relating to the conceptual and normative content and scope of transitional justice, the wide application and increasing recognition of transitional justice processes in Africa has become formulaic. Much of the focus has therefore been on identifying the mechanics of the design and implementation of one or a combination of instruments that are identified as transitional justice mechanisms. Using this formulaic approach to transitional justice, the August 2015 peace agreement for the resolution of the conflict in South Sudan incorporated a transitional justice architecture consisting of a hybrid court; the Commission for Truth, Reconciliation and Healing; and a reparations commission.

This formulaic approach not only transforms transitional justice into a technical exercise but also involves the legal abstraction of certain issues from the wider context. This transformation of transitional justice into technical exercise renders it blind to or unable to reconcile with the complexities, dilemmas, tensions and contestations in transitional settings. As a result, transitional justice processes or mechanisms are proposed and designed, and attempts made to implement them in all kinds of conditions, irrespective of the existence of the objective conditions necessary for their design and implementation. Brian Kagoro,¹⁰ Mamdani and Chidi Odinkalu¹¹ note the futility of such an approach to transitional justice. According to Kagoro, transitional justice in Africa has to face “the messy reality of centuries of colonial domination and exploitation, decades of plutocratic and kleptocratic rule, deeply held social pathologies that are anti-national, notorious ethnic chauvinism and gender and class apartheid”.¹²

Instead of being inherently political in its essence, this template or formulaic approach gives transitional justice an apolitical thrust that is mainly associated with Nuremberg’s shadow over transitional justice, despite the specificities of the African post-conflict or post-authoritarian setting. Mamdani thus notes that Nuremberg redefines the problem and the solution. The problem is extreme violence – radical evil – and the question it poses involves responsibility for the violence.

“The solution encapsulated as ‘lessons of Nuremberg’ is to think of violence as criminal, and of responsibility for it as individual – state orders cannot absolve officials of individual responsibility. Above all, this responsibility is said to be ethical, not political.”¹³

Related to the above is what has been described as the implementation gap. Despite the fact that it has now become fashionable or common to propose or

Despite the fact that it has now become fashionable or common to propose or even adopt transitional justice processes in African states coming out of conflict or authoritarian rule, they are at best poorly implemented and at worst not implemented at all.

9 Mutua, supra n 4 at 38.

10 Brian Kagoro, “The Paradox of Alien Knowledge, Narrative and Praxis: Transitional Justice and the Politics of Agenda Setting in Africa”, in *Where Law Meets Reality: Forging African Transitional Justice*, ed. Moses Chrispus Okello, Chris Dolan, Undine Whande, Nokukhanya Mncwabe and Stephen Oola (Cape Town: Pambazuka Press, 2012).

11 See, Chidi Anselm Odinkalu, “Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa”, *Journal of African Law* 47(1) (2003): 1–37.

12 Kagoro, supra n 10 at 7.

13 Mamdani, supra n 1 at 62.

even adopt transitional justice processes in African states coming out of conflict or authoritarian rule, they are at best poorly implemented and at worst not implemented at all.

Where criminal trials have been attempted, they have either been implemented or pursued as instruments to legitimize the new order or their scope has been highly limited. In Ethiopia, Rwanda and even Chad, the resort to criminal trials by one of the parties to the conflict served as a form of victor's justice, legitimized the new emerging order and set in motion processes for establishing a break from the past. Even when international or hybrid courts have been used, as in Rwanda and Sierra Leone, their reach was limited and they were very expensive, with no meaningful legacy in the affected societies beyond their contribution to international criminal jurisprudence. While the International Criminal Tribunal for Rwanda indicted 80 people, with 20 convictions and three acquittals, the hybrid tribunal of Sierra Leone indicted only 13 people.

Similarly, the performance or pursuit of truth commissions has not been any more satisfactory. The challenges here relate not only to the process, composition and methods of investigation of such commissions, but also to the scope of issues and actors covered, the publication of the reports and the follow up and implementation of the reports' recommendations. Even the South African TRC, which made truth commissions popular on the world stage, has been criticized for a number of reasons, including failure to refer cases for prosecution; inadequate implementation of recommendations, including those relating to reparations; and failure to probe the legacies of apartheid in the social and economic realms. The recommendations of such mechanisms have been ignored in Kenya, Liberia and Sierra Leone.

These challenges with implementing transitional justice mechanisms, even in their narrow formulation, cannot be divorced from the template or formulaic approach adopted. Often these processes were proposed or pursued without regard to the “messy realities” that occasioned the violations and the transitional context. Indeed, transitional justice processes in Africa have been proposed or designed without addressing the following fundamental questions:

What constitutes a “transition” in Africa? Is the transition marked simply by the political choice to use rhetoric of justice and reconciliation, even in a context of minimum breach from the past...? Can a country have a succession of transitions and apply transitional justice measures each time? Are these measures appropriate in the context of weakly institutionalized states without a history of Western-style democratic tradition? Or is it possible that new governments adopt the now-common language of transitional justice to compete for resources on an international stage?¹⁴

Another factor for non-implementation is the tendency to implement transitional processes on the basis of what I call an “à la carte” approach rather than as a package. A great deal of attention and effort is put into political power settlement and security sector processes, with little attention to the narrow transitional justice mechanisms.

This has been the case in Burundi, for example, where the transitional justice components of the Arusha Accord have been left unimplemented, and is also a factor behind the freezing of the transitional justice dimensions of the peace process in South Sudan.

¹⁴ Lydiah Kemunto Bosire, “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa”, *SUR-International Journal on Human Rights* 5(3) (2006): 75–76.

There are also emerging challenges resulting from the gaps left by the transitional justice processes pursued in various countries. In South Africa, despite the political transition and the TRC truth-seeking initiatives, the country is in the grip of festering social crises and socioeconomic and political malaise. While reconciliation has been registered in the political sphere, no measure of emotional settlement has been achieved. Those who suffered various forms of physical, psychological or structural violence still carry with them the trauma of that violence. Similarly, South Africa is still in search of social reconciliation and social justice.

There are also emerging challenges resulting from the gaps left by the transitional justice processes pursued in various countries. In South Africa, despite the political transition and the TRC truth-seeking initiatives, the country is in the grip of festering social crises and socioeconomic and political malaise.

In Kenya, despite the measure of institutional justice achieved with the adoption of the 2010 constitution, involving the devolution of power and provision of robust guarantees of judicial independence, the 2017 elections show that the country still suffers from the kind of political instability and tension that erupted into major violence in the aftermath of the 2007 general elections. As in other contexts of a limited (or no) break with the past – as in Burundi, where the spectre of violence remains – developments since the 2010 constitution and Kenya’s current conditions raise this fundamental question: Can transitional justice or constitutional reform achieve its objectives while the political elite and the economic vested interests of the old regime remain in control of political power, with no transformation of power relations?

HISTORICIZATION OF TRANSITIONAL JUSTICE IN AFRICA

The foregoing highlights that the “messy realities” that occasion violations, and the nature of the violations and Africa’s transitional setting, do not lend themselves to the diagnosis or solutions offered by the traditional mainstream transitional justice frame of analysis. The pursuit of transitional justice in Africa does not occur in a historical and political vacuum. Rather, it happens “against the background of a long history of colonial and post-colonial repression, political instability and economic pauperization of the continent and its peoples”.¹⁵ At the heart of this is the history and constitutional set-up of the problems that inform and occasion the violations that transitional justice seeks to address, namely the making and evolution of the “modern” African state.

The pursuit of transitional justice in Africa does not occur in a historical and political vacuum. Rather, it happens “against the background of a long history of colonial and post-colonial repression, political instability and economic pauperization of the continent and its peoples”.

As Mamdani,¹⁶ Basil Davidson,¹⁷ Mutua,¹⁸ Kagoro, Odinkalu, and Solomon Dersso¹⁹ point out, the modern African state, as a product of colonial rule, is not only a colonially contrived artificial entity but also extractive and repressive in its organization and exercise of power. The violations that transitional justice seeks to address are not the product simply of Africa’s authoritarian, ethnoculturally unequal and highly corrupt post-colonial regimes.

15 Odinkalu, supra n 11 at 9.

16 M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996).

17 Basil Davidson, *The Black Man’s Burden: Africa and the Curse of the Nation-State* (New York: Times Books, 1992).

18 M. Mutua, “Putting Humpty Dumpty Back Together: The Dilemmas of the Post-Colonial African State”, *Brooklyn Journal of International Law* 21(2) (1995): 505–536.

19 See, Solomon Dersso, “Constitutional Accommodation of Ethno-Cultural Diversity in the Post-Colonial African State”, *South African Journal on Human Rights* 24(3) (2008): 565–592.

Rather, both the crises and these regimes are the result and manifestation of the profound crisis of the failure of the post-colonial African state to transform the structures and legacies of the colonial African state. As Odinkalu points out, the “colonial background is important because its legacies continue to determine, often conclusively, the contest for rights and access to power in Africa and the long and painful history of instability that has accompanied the transition from independence”.²⁰

The “colonial background is important because its legacies continue to determine, often conclusively, the contest for rights and access to power in Africa and the long and painful history of instability that has accompanied the transition from independence”.

Despite the end of direct colonial rule and the ensuing hope for a better post-colonial order, in many places the euphoria of liberation was short lived. The promise of independence turned into nightmare as many African states, instead of achieving democratic and socioeconomic transformation, descended into one-party dictatorship, military rule and/or internecine violence, civil wars, military coups and armed insurgencies. This sad experience has repeated itself in the most recent transitions in Eritrea and South Sudan.

Incidents of crimes against humanity, war crimes, genocide and other forms of mass human rights violations cannot simply be reduced to rogue or criminally violent individuals holding the reins of power. These violations are traced back to and cannot be dissociated from the nature of the making and organization of the colonial African state and how it has operated since independence. These violations have to be put (and problematized) within the context of the repressive and police structure and culture of the colonial state, its extractive economic system, the lack of checks on and accountability of power, and the unequal power relations of its ethnoculturally diverse populations.

Apart from the post-colonial authoritarian regimes that perpetuated the structures of the colonial state, further conditions of violence and violations emerged with the upsurge of civil wars on the continent, especially in the 1990s. Serious democratic deficits and pervasive socioeconomic deprivations, gender disparities and militarization of the youth have also created the conditions for widespread violations and abuses of human rights and international humanitarian law, with severe effects on the social fabric of societies.

Clearly, for transitional justice to have a prospect of success in the African context, it should interrogate and articulate avenues for rectifying the structural illegitimacy and flaws of the modern African state and lay the ground for its democratic and socioeconomic transformation.

It is thus indeed correct, as Kagoro states, that “the question of state architecture is important, not just for the institutional reform agenda, but also the larger nation building and state-reconstruction that is a pre-requisite for a truly reconciled and sovereign nation”.²¹

Accordingly, the pursuit of transitional justice in Africa has to be pursued as part of and within the framework of the reconstitution of the basic structures of the state, with processes and arrangements that ensure political inclusion and equality and equitable distribution of resources among various sections of society.

Accordingly, the pursuit of transitional justice in Africa has to be pursued as part of and within the framework of the reconstitution of the basic structures of the state, with processes and arrangements that ensure political inclusion

²⁰ Odinkalu, supra n 11 at 9–10.

²¹ Kagoro, supra n 10 at page.

and equality and equitable distribution of resources among various sections of society. Given the historically conditioned patterns of violation, transitional justice should be pursued in a way that does not politicize and permanently institutionalize the identities of victims and perpetrators. Transitional justice should rather be designed and implemented in a way that transforms victims and perpetrators into citizens.²² It should thus be formulated as part of the historical, political, socioeconomic, institutional and social measures that address the conditions that perpetuate different classes of citizenship or that deprive some of the benefits of equal citizenship.

Transitional justice should rather be designed and implemented in a way that transforms victims and perpetrators into citizens.

CONCLUSIONS

Transitional Justice beyond Juridical and Legal Forms of Justice

In the African context, the conditions and historical context of violations demand a comprehensive and more substantive conception of transitional justice that goes beyond juridical and legal forms of justice.

Such a conception of transitional justice consists of what Mutua calls principles that “are guided by their ability to heal; put victims at the centre; seek cooperation with perpetrators; understand abominations as injuries to social relations; de-emphasize the punitive or criminality of offenses and emphasize the causes of the abominations”.

Such a conception of transitional justice consists of what Mutua calls principles that “are guided by their ability to heal; put victims at the centre; seek cooperation with perpetrators; understand abominations as injuries to social relations; de-emphasize the punitive or criminality of offenses and emphasize the causes of the abominations”.²³

Drawing on traditional justice approaches emphasizing conciliation, community participation and restitution, this conception of transitional justice seeks to address African concerns around violent conflicts and impunity through a holistic policy that considers the particular context and cultural nuances of affected societies, and the gender, generational, ethnocultural and socioeconomic as well as development dimensions of both peace and justice. It recognizes the need for and necessity of institutional and procedural innovation rather than the application of particular models or scripts of criminal justice and peace processes. This entails holistic, victim-centred, multidisciplinary and integrated transitional justice strategies and approaches that treat the following as part of the same continuum: accountability, truth, political reconciliation, healing and emotional settlement, and social reconciliation involving equitable socioeconomic settlement within a framework of sustainable development.

Rather than being a reference to a particular time period, transition in this context refers to the journey of societies with legacies of violent conflicts and systemic or gross violations of human and peoples’ rights towards a state of sustainable peace, justice and democratic order.

²² One good example that has crafted such an approach is the Colombia Peace Agreement of 2016, discussed in the concluding section.

²³ Mutua, supra n 4 at 41.

Rather than being a reference to a particular time period, *transition* in this context refers to the journey of societies with legacies of violent conflicts and systemic or gross violations of human and peoples' rights towards a state of sustainable peace, justice and democratic order.

This conception of transitional justice recognizes that juridical and legal forms of justice, including that of truth commissions, cannot on their own help to heal the wounds of affected communities and families. Juridical and legal forms of justice, whatever form they may take, may be necessary but are never enough, either for victims or for establishing respect for the rule of law. It is of paramount importance to put in place the conditions for establishing various platforms for victims to pursue narrative justice through revealing their wounds and sharing their experiences of violence, and for dialogue with suspected perpetrators. This conception of transitional justice recognizes the importance of symbolic justice and traditional or religious ritual processes, as well as culturally and socially relevant forms of reparations (in addition to psychosocial and medical support), acknowledgement of the suffering of victims, and the expression of remorse by perpetrators and their collaborators.

In conditions where violence has disrupted victims' source of livelihood and resulted in conditions of dislocation, this conception of transitional justice demands prioritization of the most immediate pressing basic survival needs of all affected groups, not just those who suffered direct physical violence.

Transitional Justice as Political Rather than Technical Process

The inherently political nature of transitional justice is associated with the process and nature of “the political settlement” within which transitional justice processes are proposed or designed. “In transitions to democracy, the political context depends on the way in which the end of an authoritarian regime comes about, whether through negotiation or collapse, and the balance of power that results. In transitions to peace, the political context depends on the way in which the war ends, whether through military victory or negotiated agreement, and the resulting balance of power.”²⁴

Where political settlement is lacking or weak, or where the parties are not committed to the political settlement, or where transitional justice is designed with no regard to the political settlement, there is little prospect for successful follow-up and implementation of transitional justice measures.

Where political settlement is lacking or weak, or where the parties are not committed to the political settlement, or where transitional justice is designed with no regard to the political settlement, there is little prospect for successful follow-up and implementation of transitional justice measures. Indeed, in various settings where transitional justice was pursued with few or no adequate political processes of consultation, public negotiation and wide political and public support, the mechanisms proposed or designed as technical processes did not succeed. Burundi's Arusha Accord articulated the details of the country's truth commission at the peace negotiation table without broad civil society and public involvement. Similarly, in the DRC, the truth commission was proposed by members of the Inter-Congolese Dialogue as part of the peace negotiations. The proposed institution, with its far-reaching aspirations, was born out of an elite (and perhaps morally questionable) consultation in which victims did not participate broadly.

²⁴ Roger Duthie, “Introduction”, in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Centre for Transitional Justice, 2017), 21.

More recently, the transitional justice architecture of the 2015 South Sudan peace agreement was drafted by experts and adopted with little input by the negotiating elites and, importantly, with no participation of and consultation with the wider public, including civil society and victims.

The recognition of transitional justice as principally a political exercise necessitates that conditions are created for an inclusive and participatory process of general and targeted consultations. Besides the elite-based bargaining and negotiating around the establishment of transitional justice mechanisms, the participation of all sections of society, irrespective of their political or ideological affiliation, is crucial in order to identify and build consensus on the set of transitional justice mechanisms relevant for the society in question. The wider public – civil society, victims, women’s groups, religious and transitional leaders and associations, intellectuals – should be afforded the opportunity to deliberate on and consultatively negotiate the scope of and tools for implementing transitional justice measures. Where it is feasible, as done in South Africa, it should be certified through a popular referendum or a similar form of democratic decision-making.

The participation of all sections of society, irrespective of their political or ideological affiliation, is crucial in order to identify and build consensus on the set of transitional justice mechanisms relevant for the society in question.

Context Specificity of Transitional Justice

This African conception of transitional justice also rejects a one-size-fits-all approach to transitional justice. The choice of transitional justice processes should be context-specific, drawing on society’s conceptions of and needs for justice and reconciliation and having regard to:

This African conception of transitional justice also rejects a one-size-fits-all approach to transitional justice.

- i. The institutional context, covering the constitution and the laws, the nature of the legal system and the traditional and local justice structures and processes, their technical and functional capacities and their legitimacy, as well as the process through which transitional justice measures are designed;
- ii. The nature of the conflict and the range of violations it occasioned, the scale of members of society involved and affected, the vertical or horizontal character of violence, and the requirements of the conflict context for its effective settlement; and
- iii. The social and economic structural context.

In view of the particular context, a society in transition may choose, through an inclusive consultative process, to put more or less emphasis on the reconciliation, healing or justice dimension of the combination of transitional justice measures required for its realities. Such emphasis on one or another element of transitional justice should be balanced and hence not result in either impunity or the full-throated revenge of victor’s justice.

Compromise, Balancing Competing Demands and Institutional Innovation: Lessons from Colombia’s 2016 Peace Agreement

Conflict-affected societies face the challenge of crafting a settlement which a) guarantees security in the present through cessation of hostilities and a negotiated end to armed conflict; b) confronts the wrongs of the past through restoring victims and holding perpetrators accountable, as well as rectifying the root causes; and c) engineers a common future through rehabilitated integration of

warring parties to mainstream politics (hence to positions of citizenship) and through democratic and socioeconomic transformation of the structures and relations of power and hence the state.

As recent experiences on the continent show, the dilemma is how to hold perpetrators of human rights violations accountable without compromising the possibility of negotiated settlements. For this challenge, sequencing is viewed as one way of achieving a balance but it remains problematic.

Although many point to the example of South Africa as another option, legal developments internationally with the emergence of the ICC and within the AU generally mean that the use of amnesty, even based on South Africa's model, is frowned upon, if not rejected as a licence for impunity. The result is that the question of peace and justice is often framed in stark "either-or", black and white terms.

the dilemma is how to hold perpetrators of human rights violations accountable without compromising the possibility of negotiated settlements. For this challenge, sequencing is viewed as one way of achieving a balance but it remains problematic.

As the 2017 spate of attempted African withdrawals from the Rome Statute show, such an antagonistic formulation of peace versus justice has become the hallmark of the controversy over the ICC in Africa.

Part of the problem is that no good model has been found of a peace settlement that successfully struck the right balance and compromise between peace and justice. However, Colombia's peace deal offers a useful model. The negotiated peace deal has offered Colombia the opportunity to end more than half a century of conflict that claimed the lives of hundreds of thousands and displaced millions. The peace deal serves the interests of justice by preventing the violations and victimization that the continuation of the war would unavoidably have created.

In terms of Africa's experience with transitional justice, Colombia's peace deal has many parallels to South Africa's negotiated transition. As in South Africa, Colombia's peace deal crafts a common political future for all sides in the protracted conflict. The Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) undertook to lay down arms, eradicate the illegal drug economy, remove landmines, admit responsibility for violations of humanitarian law and human rights, and offer reparations for victims. In return, the deal obliges the Colombian government to provide the FARC security guarantees and facilitate its reintegration into mainstream politics as a political party with ten seats in Congress for the next two terms. As in South Africa, despite the referendum setback, the peace deal is subject to democratic approval, in its revised form, at least by Congress.

In accord with the international and African legal developments, Colombia's peace deal corrects aspects of the limitations in South Africa's transitional justice. In a breath of fresh air to the discourse on transitional justice, Colombia's peace deal lays to rest the issue of amnesties and, unlike in South Africa, rejects the use of amnesty in exchange for truth. Accountability is framed to go beyond and above truthful confession of violations. Yet, Colombia's peace deal shows that for countries that seek to achieve a negotiated end to armed conflict, the alternative to amnesty is not retributive justice.

In addition to truth telling, accountability entails sanctions and obligations to redress victims. As one element of the peace deal, the truth and reconciliation process specifies that perpetrators of human rights and humanitarian law violations, from both FARC and government security forces, who confess their crimes are eligible for a reduced sentence of up to eight years of restricted liberty and community labour to repair damages to victims.

Those who do not comply with these conditions will face a special court and prison sentences of up to 20 years. Additionally, unlike criminal prosecution, which focuses on punishing the perpetrator, Colombia's peace deal has foregrounded victims by placing them at the centre of the peace process, emphasizing restorative justice and according them a major role in the transitional justice process. It is no coincidence that the peace deal received strong support from those parts of the country most affected by the conflict.

As Virginia M. Bouvier notes, “rather than throw criminals in jail (generally at a high cost [to society] without many positive results)”, the transitional justice system under the peace deal “seeks to establish a dialogue between victims and victimizers that satisfies the rights of the victim to truth, justice, reparation and non-repetition of the wrongs committed”.²⁵

It addresses the structural conditions underlying the armed conflict and ultimately aims at transforming both victims and perpetrators into citizens.

“Rather than throw criminals in jail (generally at a high cost [to society] without many positive results)”, the transitional justice system under the peace deal “seeks to establish a dialogue between victims and victimizers that satisfies the rights of the victim to truth, justice, reparation and non-repetition of the wrongs committed”.

Thank you all for your kind attention. As I wish us all a successful deliberation, I very much look forward to your questions, observations and counter-arguments.

²⁵ United States Institute of Peace, “The Accord: Colombia's Commitment to Peace”, 1 October 2016, <http://www.usip.org/olive-branch/2016/10/01/the-accord-colombia-s-commitment-peace> (accessed 17 March 2018).

