

African Union
and
Transitional Justice

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Transitional Justice
*Healing the Past and
Restoring Human Dignity*

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Edited by
Professor Tim Murithi

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Contents

Acknowledgements	vii
About the Contributors	ix
Acronyms and Abbreviations	xv
1. Introduction: The African Union Transitional Justice Policy and its Contribution to Peace and Security – <i>Tim Murithi</i>	1
Part 1: Conceptual and Theoretical Issues	
2. The Dimensions of Africa's Transitional Justice – <i>Tim Murithi</i>	29
3. The Politics of Transitional Justice in Africa – <i>Tim Murithi</i>	51
4. Environmental Transitional Justice: A Critique of yhr African Union Transitional Justice Policy – <i>Munini Mutuku</i>	65
Part 2: National Transitional Justice Initiatives	
5. Central African Republic and the Implementation of the African Union Transitional Justive Policy – <i>Amanda Lucey and Peter Knoope</i>	75
6. Zimbabwe and Civil Society Leadership in Leveraging the African Union Transitional Justive Policy – <i>Dzikamai Bere</i>	87
7. Burundi and the Memorialisation of Past Violations: Insights from the African Union Transitional Justive Policy – <i>Patrick Hajayandi</i>	101
Part 3: Continental and Regional Transitional Justice Initiatives	
8. The AU System and the African Union Transitional Justice Policy – <i>Shingirai Mtero</i>	115

9. The AU Transitional Justice Policy and the African Court of Justice and Human Rights – <i>Selemani Kinyunyu</i>	127
10. The Intergovernmental Authority on Development and the African Union Transitional Justice Policy: The Development of a Reconciliation and Dialogue Index – <i>Aleu Garang and Tim Murithi</i>	135
Part 4: Strategies for Implementing the African Union Transitional Justice Policy	
11. The AU Transitional Justice Policy as the Missing Sixth Pillar of the African Peace and Security Architecture – <i>Refilwe Makgopela</i>	145
12. The Role of Youth Actors in Implementing Transitional Justice in Southern Africa – <i>Dzikamai Bere</i>	153
13. Capacity Building and Training Initiatives to Implement the African Union Transitional Justice Policy – <i>Ferdinand Kwaku Danso</i>	167
14. Covid-19 and the Limitations of the Implementation of the African Union Transitional Justice Policy: The Case for a Transformative Justice Approach – <i>Nancy Chepkwony</i>	179
15. The Pan-African Reconciliation Network – <i>Tim Murithi</i>	193
16. Conclusion: African Union’s Transitional Justice Initiatives: Healing the Past and Restoring Human Dignity – <i>Tim Murithi</i>	203
Notes	207
Select Bibliography	225
Index	231

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About the Contributors

DZIKAMAI BERE is the national director for the Zimbabwe Human Rights Association (ZimRights). Before his current role, he was with the Zimbabwe Human Rights NGO Forum (the Forum) as well as the National Transitional Justice Working Group (NTJWG) where he played critical roles in coordinating the transitional justice agenda. He was an IJR Transitional Justice in Africa Fellow in 2015. He holds a Bachelor's degree in History and Law and a Master's degree in Peace and Conflict Transformation.

NANCY CHEPKWONY is a lawyer and human rights advocate with seven years' professional experience in victims' rights, transitional justice, international human rights, child rights and international criminal law. She is a legal professional with a Master's degree in Advanced Studies in Transitional Justice, Human Rights and the Rule of Law from the Geneva Academy of International Humanitarian and Human Rights Law, a Bachelor of Law degree from Moi University and a postgraduate diploma from the Kenya School of Law. She was a 2021 IJR PAREN Transitional Justice Fellow.

DR FERDINAND KWAKU DANSO is the head of the Training for Peace Program at the Kofi Annan International Peacekeeping Training Centre (KAIPTC). Kwaku holds an MSc in African Studies from the University of Edinburgh and a BA (Hons) in Political Science from the University of Ghana. His research interests include political violence, human security, conflict transformation and Africa's emerging security architecture. Prior

to joining the KAIPTC, Kwaku served briefly as a volunteer trainer with the Darfur Training Committee, a UK-based NGO, where he worked actively with colleagues to organise the first conference aimed at finding a political settlement to the Darfur crisis. He also worked as a tutorial and research assistant at the Political Science Department of the University of Ghana.

DR ALEU GARANG is Director: Mediation Support Unit of Intergovernmental Authority on Development (IGAD) in Djibouti and also head of the mission of IGAD to the Republic of South Sudan. Dr Garang has served in the Ministry of Justice, formally known as the Ministry of Legal Affairs and Constitutional Development, in various capacities from junior to senior positions from 2002–2013. He has served as senior legal counsel and legal/policy advisor to several public institutions including ministries, commissions, universities and international negotiation teams. His previous responsibilities have included service in various legal capacities as prosecutor, legal drafter, legal advisor and litigator at various assignments by the Ministry of Justice to departments of the Government of Sudan and South Sudan. Dr Garang holds an LLB (Cairo University) in Law, LLM General in Law, a PhD in Public International Law (Elziem Elazhari University) and an MA (MAPSA) in Peace and Security Studies from Addis Ababa University.

PATRICK HAJAYANDI is Senior Project Leader: Great Lakes Region of Africa at the Institute for Justice and Reconciliation, Burundi. The Great Lakes Region project contributes towards developing young people's leadership and ownership for peacebuilding processes in a context of regional reconciliation. He has worked as a lecturer at the National School Administration in Bujumbura, Burundi, as a consultant and researcher for Transitional Demobilisation and researcher for the Transitional Demobilisation and Reintegration Program at the World Bank. His publications focus on conflict transformation, peacebuilding, electoral processes and transitional justice. Patrick holds a Master's degree in Political Science from Rostov University in Russia. He is author and editor of *Reconciliation Regionale: Defis et Opportunités dans la Région des Grands Lacs* and *Dreaming of Peace and Cohesion in the Great Lakes Region*.

SELEMANI KINYUNYU is Senior Policy Officer: Political and Legal Matters at the African Union Advisory Board on Corruption based in Arusha, Tanzania. He is a lawyer and development practitioner specialised in Africa-focused policy research, advocacy and outreach, strategy development and programme management. He has worked for the East Africa Law Society (EALS) and Pan African Lawyers Union (PALU) and has consulted on legal, human rights and rule of law assignments for the African Union (AU), East African Community (EAC), the United States Agency for International Development (USAID) and German Organisation for International Cooperation (GIZ) among others. His research interests include international justice, regional integration and the role of African organisations in an increasingly multipolar world. He is an advocate of the High Court of Tanzania and holds a Bachelor of Laws degree from Tumaini University and a Master of Laws degree in Transnational Criminal Justice from the University of the Western Cape. He is also completing a doctorate in International Anti-Corruption Law.

PETER KNOOPE is an IJR Senior Research Fellow and a Brussels-based independent expert with around 30 years of experience in diplomacy and international cooperation. He currently holds fellowships in four institutions in the areas of human security, conflict and terrorism prevention, peacebuilding and justice (The Hague and Cape Town, South Africa). Through the fellowships, he has, for example, carried out analyses on drivers of radicalisation and designed and delivered training programmes on preventing radicalisation and conflicts in Sudan, Yemen, Iraq and Nigeria and Cameroon. He has also provided advisory services on conflict resolution in Central African Republic targeting for politicians, national and local authorities and practitioners. He has experience across the humanitarian-security-development cooperation nexus from high-level bilateral and multilateral cooperation to designing of national and country-specific cooperation strategies, research, public relations and diplomacy in the areas of justice, security and human development. From 2005–2009 he served as the Deputy Director (Policy and Strategy) in the National Coordinator for Security and Counter Terrorism in the Ministry of Justice, The Hague. He is the founder of the International Centre for Counterterrorism (ICCT) in The Hague and served as the director of ICCT from 2009–2014.

AMANDA LUCEY is Senior Project Leader for Preventing Violent Extremism at the Institute for Justice and Reconciliation. She has over 17 years of experience in peacebuilding and an extensive publications record. As a consultant, she has worked with a range of clients, including various UN entities, the EU, GIZ, Oxfam South Africa and the World Bank. Prior to this, she was a Senior Researcher at the Institute for Security Studies. She has also worked as a Political Affairs Officer for the United Nations mission MONUSCO in the DRC, and as a Rule of Law Officer in South Sudan. She holds a Master's degree from the University of Cape Town.

REFILWE MAKGOPELA is a PhD candidate in Politics and International Relations at the University of Johannesburg. She is keen to analyse peace and security to test and formulate theories in order to achieve inclusive peace mechanisms within the continent. In her current studies, she probes issues surrounding contested citizenship from a gender perspective, with the intent to examine the role of marginalised grassroots female activists during the Sudanese Revolution and its subsequent political transition. Her studies aim to unearth the structural and normative elements that deny women access to basic human rights, reparations and equal access to and inclusion as full citizens in Sudan's transitional justice processes.

DR SHINGIRAI MTERO is a post-doctoral fellow at the Nordic Africa Institute and Uppsala University. A former lecturer at the Department of Political and International Studies at Rhodes University, her teaching and research areas include: African feminism(s), African gender studies, international criminal justice, human security and African peace and security. Her PhD research focused on the politics of international criminal justice with a particular focus on the International Criminal Court's cases in Kenya and the African Court of Justice and Human Rights. She was a 2018 Mandela Washington Fellow and a 2017 Visiting Research Fellow at the Danish National Research Foundation's Centre of Excellence for International Courts at the University of Copenhagen. She holds a Master's degree in International Studies [Cum Laude] from Rhodes University and a Bachelor of Sciences degree in Microbiology from the University of Cape Town.

PROFESSOR TIM MURITHI is Head of Programme: Peacebuilding Interventions, Institute for Justice and Reconciliation and Extraordinary Professor of African Studies, Centre for African and Gender Studies, University of Free State and at the Strategic Institute for Leadership and Governance Leadership in Africa, Stellenbosch University. He is also Research Associate, Institute for Democracy, Citizenship and Public Policy in Africa, University of Cape Town. He is a board member of the African Union Leadership Academy (AULA) and a former member of the Technical Committee of the Tana High-Level Forum on Security in Africa. He was previously the head of the Peace and Security Council Report Programme at the Institute for Security Studies, in Addis Ababa; Senior Research Fellow at the Department of Peace Studies, University of Bradford, United Kingdom; Senior Researcher, Centre for Conflict Resolution, University of Cape Town, South Africa; and Programme Officer, United Nations Institute for Training and Research (UNITAR), in Geneva. He has worked with the African Union, including the Political Affairs, Peace and Security departments. He is author and editor of 12 books, including: as author – *The African Union: Pan-Africanism, Peacebuilding and Development*; as editor – *The Politics of Transitional Justice in the Great Lakes Region of Africa* and *Routledge Handbook of Africa's International Relations*; and as co-editor of *Elections, Violence and Transitional Justice in Africa*.

MUNINI MUTUKU is a doctoral researcher at the Wangari Maathai Institute for Peace and Environmental Studies, University of Nairobi, and a Senior Programme Officer: National Cohesion and Integration Commission. She is also a member of the Bosch Alumni Network and Africa Director of the Environmental Peacebuilding Association. She is a Fellow of the IJR Pan-African Reconciliation Network at the Institute for Justice and Reconciliation South Africa, a Fellow of the Historical Dialogue and Accountability Programme at Columbia University in New York, an alumni of the Geneva Centre for Security Policy, amongst other associations. Her areas of work have focused on communities and natural resource-based conflicts, mediation and reconciliation dialogues, diversity and social cohesion, women and youth in peace and security, minority and indigenous peoples' rights, economic and social cultural rights, amongst other thematic areas. As a transitional justice and peacebuilding practitioner,

her current project focuses on the environment. She has authored a Supplementary Note to the African Union Transitional Justice Policy on Environment and Natural Resources in Transitional Justice Processes and Mechanisms. She holds a Master's degree in Intercultural Conflict Management from Alice-Salomon University in Berlin (Germany) and a Master's degree from the European Inter-University Centre for Human Rights and Democratization in Venice (Italy) and University of Vienna (Austria). She is currently a PhD student at Wangari Maathai Institute for Peace and Environmental Studies at the University of Nairobi, Kenya.

About the IJR

The Institute for Justice and Reconciliation, established in 2000, is a Pan-African organisation, which works collaboratively with governments, and intergovernmental and civil society actors to contribute towards building fair, democratic and inclusive societies across the continent through transitional justice and peacebuilding interventions. The IJR's work is informed by the insights gained from working with governmental stakeholders and grassroot communities in countries such as Burundi, Central African Republic, Ethiopia, Eastern DRC, South Sudan, South Africa and Zimbabwe. Historically, the IJR has worked on interventions in Ghana, Kenya, Nigeria, Rwanda and Uganda. Further afield, IJR has provided strategic and technical advice to stakeholders in Colombia, South Korea, Sri Lanka, Thailand, UK and USA. The IJR is a trusted advisor to key decision-makers and intergovernmental actors on transitional justice and peacebuilding initiatives, and engages with the AU, SADC, EAC, IGAD, ICGLR, EU and the United Nations system. The IJR has partnered with the UN Development Programme (UNDP) and GIZ on a number of in-country interventions in Africa. IJR has positioned itself as a provider of reliable qualitative data on public perception in the areas of peace and security. The pioneering South African Reconciliation Barometer enables the IJR to be the leading African think-tank in terms of providing public opinion data in these areas. We welcome collaboration with like-minded partners and invite you to find out more about our work on our website: www.ijr.org.za.

Acronyms and Abbreviations

ACHPR	African Commission on Humans and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AfCHPR	African Court on Human and Peoples' Rights
AGA	African Governance Architecture
APPR-RCA	Political Agreement for Peace and Reconciliation in CAR
APRM	African Peer Review Mechanism
APSA	African Peace and Security Architecture
AQIM	Al-Qaeda in the Islamic Maghreb
ASF	African Standby Force
AU	African Union
AUC	African Union Commission
AUPF	African Union Peace Fund
AUTJP	African Union Transitional Justice Policy
CAR	Central African Republic
CBO	community-based organisation
CEWS	Continental Early Warning System
CIIR	Catholic Institute for International Relations
CPA	Comprehensive Peace Agreement
CSO	civil society organisation
CSVR	Centre for the Study of Violence and Reconciliation
CTRH	Commission for Truth, Reconciliation and Healing
CVJRR	Commission for Truth, Justice, Reparations and Reconciliation
DDR	Disarmament, Demobilization and Reintegration

DRC	Democratic Republic of the Congo
EAC	East African Community
ECOSOCC	Economic Social and Cultural Council
ECOWAS	Economic Community of West African States
EWS	early warning system
GIZ	German Agency for International Cooperation
GIZ	German Organisation for International Cooperation
HIGJ	Hague Institute for Global Justice
ICGLER	International Conference on the Great Lakes Region
ICT	information and communications technology
IDP	internally displaced person
IGAD	Intergovernmental Authority on Development
IGADD	Intergovernmental Authority on Drought and Development
IJR	Institute for Justice and Reconciliation
ITCJ	International Centre for Transitional Justice
KAIPTC	Kofi Annan International Peacekeeping Training Centre
MIPAREC	Ministry for Peace and Reconciliation under the Cross
MRP	Mthwakazi Republic Party
NEPAD	New Partnership for Africa's Development
NGO	non-government organisation
NPRC	National Peace and Reconciliation Commission
NTJWG	National Transitional Justice Working Group
ONUB	United Nation's Burundi Office
PAP	Pan-African Parliament
PAREN	Pan-African Reconciliation Network
PoW	Panel of the Wise
PSC	Peace and Security Council
R-ARCSS	Revitalized Agreement on the Resolution of Dispute in South Sudan
RCC	regional coordinating centre
REC	regional economic community
RM	regional mechanism
SADC	Southern African Development Community
SCC	Special Criminal Court

SGBV	sexual and gender-based violence
SPLM/A	Sudan People's Liberation Movement/Army
THARS	Trauma Healing and Reconciliation Services
TJRC	Truth, Justice and Reconciliation Commission
ToT	Training of Trainer
TRC	Truth and Reconciliation Commission
UN	United Nations
UNDP	United Nations Development Programme
UNSCR 2250	United Nations Security Council Resolution 2250
WHO	World Health Organization

CHAPTER ONE

Introduction: The African Union Transitional Justice Policy and its Contribution to Peace and Security

Tim Murithi

Introduction

In February 2019, the African Union (AU) Assembly of Heads of State and Government, formally adopted the African Union Transitional Justice Policy (AUTJP), which outlines a broad range of processes for addressing the legacies of past violations and mechanisms for building inclusive societies. The AU's adoption of this policy is a unique innovation, as it is the first time in its history that the African continent has enumerated and institutionalised its own approach to addressing the past, as a necessary pathway to building more peaceful, inclusive and stable societies in the future. However, despite its adoption, this book assesses the extent to which both governmental and societal actors in AU member states have engaged and implemented the policy at the national level. In addition, the book discusses the need for regional economic communities (RECs) to engage with the AUTJP in a more deliberate manner by developing their own regional strategies to advise and guide their member states, which can contribute towards stabilising their countries and forging more inclusive and democratic societies. The book engages with case studies,

which illustrate how national transitional justice processes, policies and mechanisms are aligned to the provisions stipulated in the AUTJP. The book also discusses key strategies to enhance the implementation of the AUTJP focusing on operationalising national implementation mechanisms as well as building the capacity of key actors to lead in key interventions on transitional justice and peacebuilding on the continent. This introductory chapter provides an overview of the function of transitional justice to discussing the AU's engagement with the field and the trajectory that led to the adoption of the AUTJP.

The persistence of violent conflict in Africa

The African continent remains afflicted by the terrible toil of violent conflicts, and civilians continue to suffer disproportionately from human rights violations, including gender-based violence, violent extremism, and illicit trafficking of weapons, narcotics and people through globalised exploitation. These processes fuel the displacement of people across the continent and perpetuate humanitarian crises. In the past two decades, there has been a proliferation of mechanisms to address past violations in war-affected countries and regions. It is now evident that it is vitally important to improve our understanding of how to ensure the durability and sustainability of national processes for reconciliation, peace and security interventions. There is now a recognition that the cyclical nature of conflict points to the critical need to move beyond temporary stalemates and ceasefires, peacekeeping deployments and military operations, that are so common in this era, towards a continental transitional justice policy informed by intentionally confronting the underlying grievances that have fuelled decades of animosity and violence on the continent. The formal adoption of the AUTJP provides a framework to engage national governments, RECs, civil society networks, analysts and other stakeholders on the importance of implementing processes that will contribute towards sustaining peace and security in Africa.

The emergence and evolution of transitional justice

The term transitional justice remains largely a misunderstood notion. The adoption of the AUTJP provides a common African set of policy

guidelines, which national governments and societal actors can utilise to plan, design and implement their own in-country process to promote redress and accountability for past grievances. The AUTJP also illustrates the link between transitional justice, peacebuilding and security, specifically relating to the connection between bringing together former enemies in a process of sustained dialogue, ensuring redress for past wrongs, as a pathway towards developing a common vision to shape a new inclusive future. Furthermore, the AUTJP demonstrates that transitional justice is now understood as involving a broad spectrum of interventions that are embedded in peacebuilding and developmental processes.

As far as its emergence and evolution is concerned, transitional justice is an umbrella term that brings together a wide range of interventions that seek to enable societies that are emerging from violent conflict or authoritarian rule to pursue redress and accountability for past violations in order to establish healthy state–society relationships, which are vital ingredients for peaceful and resilient societies. Transitional justice processes are crucial for maintaining civic trust in the aftermath of political tension or suppression. Dealing with the past includes establishing processes of justice and redress as a means to promoting peacebuilding and reconciliation.

Contextualising transitional justice

Transitional justice strives to address challenges that emerge from historical violations and affect countries as they strive to transition from war or authoritarian rule to fair, inclusive and democratic societies.¹ More often than not such societies are emerging from a past of brutality, exploitation and victimisation. The 2004 UN Secretary-General's report, entitled *The Rule of Law and Transitional Justice in Post-Conflict Societies*, notes that transitional justice processes are premised on confronting the atrocities of the past and undertaking certain judicial and quasi-judicial measures to safeguard against the potential recurrence of similar abuses in the future.² In particular, transitional justice seeks to advance processes and establish mechanisms and institutions to confront the past and to address the key issues that have sustained political repression or fuelled conflict. Transitional justice seeks to address challenges that confront societies as they move from an authoritarian state to a form of democracy,

and more often than not such societies are emerging from a past of brutality, exploitation and victimisation. In this context, transitional justice does not seek to replace criminal justice, but rather it strives to promote a broader approach to the pursuit of justice and accountability that includes establishing an account of the truth of past injustices with a view to engaging perpetrators in addressing the grievances of victims and survivors, which contributes towards creating fairer, more just and inclusive societies.

The broadly accepted purpose of a process of transitional justice is to establish a quasi-judicial framework to undo the continuing effects of the past. It is also necessary not to lose sight of the fact that transitional justice is just that, a “transitional process”, and it should not be viewed as a permanent solution to addressing the atrocities of the past. It is rather a transient process that will have to give way to the rule of law and the restoration of a constitutional order that will manage and resolve the social, political and economic tensions within society.

Transitional justice is complicated by a number of dilemmas, including how to balance the demands of the elements pursuing peacebuilding on the one hand, and the pursuit of judicial and criminal prosecutions for those who have committed atrocities on the other. In particular, the needs of victims and survivors to achieve redress, accountability and healing for the violations and atrocities that they have endured is often counter-posed by the agenda of states to maintain order and stability. This requires the balancing of two imperatives, namely the restoration of the political authority and the rule of law and the rebuilding, restoration and reconciliation of human relationships in post-conflict or post-authoritarian societies. In this context, reconciliation can be understood as the cumulative outcome of the broad-based application of transitional justice processes. Concretely, reconciliation processes require that the affected parties:

1. recognise their *interdependence* as a prerequisite for consolidating peace;
2. engage in genuine *dialogue* about questions that have caused deep divisions in the past;
3. embrace a *democratic attitude* to creating spaces where they can disagree; and

4. work jointly to implement processes to address the legacies of *socio-economic exploitation and injustices*.³

At the heart of reconciliation are the achievement of the principles of justice and equity. Consequently, transitional justice is viewed as an intermediary set of processes that gradually and over time lead towards the promotion of reconciliation. Civil society in this regard can play an important function in promoting healing and reconciliation, after the truth and reconciliation commissions and special courts have delivered their reports and issued their verdicts.

The importance of transitional justice to Africa

It is evident that across Africa there is an urgent need to enhance the capacity of national institutions and societal actors to promote transitional justice, peace and security. A number of African countries have adopted and implemented transitional justice processes and designed institutions to guide their national processes, such as in Burundi, Côte d'Ivoire, Ethiopia, Gambia, Ghana, Liberia, Kenya, Mali, Mauritius, Rwanda, Sierra Leone, Seychelles, Togo, Tunisia and Uganda. In addition, some countries are still deeply affected by crisis and have not even attempted to establish the necessary transitional justice frameworks at the national level to guide their in-country processes, such as the militarised conflict in Sudan, sectarian crisis in Cameroon, as well as the escalation of violent extremism in northern Mozambique's Cabo Delgado region, as well as in the Sahel region of northern Africa. Furthermore, there is a need to further stabilise the situation in countries such as the Central African Republic (CAR), Ethiopia, Democratic Republic of the Congo (DRC), Mali, Somalia, South Sudan and Zimbabwe, which have attempted to implement fledgling transitional justice processes. In some instances, a number of African countries need to establish new institutions to promote and sustain national reconciliation, such as in Eswatini, Lesotho, Libya and Mozambique.

The ultimate purpose of a process of transitional justice is to establish frameworks to confront the legacies of the past and enable societies to map a pathway to improve the wellbeing and livelihood of their constituents. At the heart of the transitions in the Gambia, Liberia, Kenya, Sierra Leone

and South Africa was the need to deal with a past through procedures that were acknowledged and accepted by the key interlocutors who were affected by the deep divisions of the past. It is also necessary not to lose sight of the fact that transitional justice is just that, a “transitional process” and it should not be viewed as a permanent solution to addressing the atrocities of the past. It is rather a transient process that will have to give way to the rule of law and the restoration of a constitutional order that will manage and resolve the social, political and economic tensions within society. Bodies such as truth and reconciliation commissions and special courts are temporary and time-bound institutions and should not be considered as a permanent solution to the issues that afflict and divide societies.

The trajectory of the African Union Transitional Justice Policy

The AU has sought to advance norms related to transitional justice in its bid to provide guidance to its member states emerging from conflict. In 2000, Article 4(h) of the AU Constitutive Act ascribes “the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, crimes against humanity and genocide”.⁴ Furthermore, Article 4(o) stipulated the AU’s “rejection of impunity” as a key normative principle. The AU was in effect ahead of its time in terms of enshrining a normative right to intervene to address these international crimes, which have since been incorporated into the framing of international transitional justice norms. In this regard, Africa has played a leading role in the transformation, innovation and diffusion of global transitional justice norms. The continent of Africa has been a terrain for the innovation and experimentation of transitional justice norms, processes and institutions, which has had both positive and negative consequences. Africa was not the creator of transitional justice norms: in fact, the continent borrowed a number of ideas and practices from around the world. As the field emerged and began to grow in the mid-1990s, there were efforts to import transitional justice norms into Africa. Through its experiences, the continent did not only demonstrate the limits of “traditional” transitional justice norms,

it innovated in the implementation of a broader range of transitional justice standards, including shifting the focus from punitive to restorative justice approaches, which has in turn influenced contemporary theory and practice within the field.

More specifically, in the mid-1990s, transitional justice originated from a legalistic tradition, with a biased emphasis on the use of judicial processes to address civil and political violations in countries undergoing rebuilding processes. Africa’s experience demonstrated that traditional notions of transitional justice needed to be re-thought and re-framed. Specifically, in order to effectively address the real concerns of victims of past violations, African actors pushed for the expansion of transitional justice norms beyond their narrow civil and political focus, to include socio-economic and psycho-social issues. Consequently, transitional justice is now understood as involving a broad spectrum of interventions that are embedded in peacebuilding and developmental processes. These ideas have been mainstreamed into contemporary transitional justice discourses and practices.

One of the central dilemmas of transitional justice, namely the tension between peace and justice, has played itself out in the majority of post-conflict situations in Africa. Specifically, South Africa, Rwanda, Uganda, Kenya, Sierra Leone and Liberia adopted processes and institutions that sought to address the violations of the past, without allowing the potential tension that could have been generated by an orthodox approach to transitional justice to overwhelm the society and undermine efforts to build sustainable peace. South Africa’s, Kenya’s and Sierra Leone’s truth and reconciliation commissions (TRCs) operationalised amnesty provisions, which sought to directly address the peace versus justice dilemma faced by these countries. The experiences of these countries have been analysed, modified and adopted by other states around the world. The adoption of the AUTJP demonstrates Africa’s role in transitional justice norm-setting and norm diffusion.

The adoption of the African Union Transitional Justice Policy

Between 2010 and 2019, the African Union became the first regional organisation to actively work on developing a specific policy relating to

transitional justice. In November 2018, the AU Extraordinary Summit of Heads of State and Government in Kigali, Rwanda, formally approved the Draft AU Transitional Justice Policy. In February 2019, the African Union Transitional Justice Policy (AUTJP) was formally adopted by the African Union Assembly of Heads of State and Government in Addis Ababa, Ethiopia. The purpose of the AUTJP is to encourage member states to broaden their understanding of justice beyond retributive justice to encompass restorative and transformative measures found in traditional African systems. The AUTJP recommends that member states enacting transitional justice measures incorporate socio-economic rights and encourages states to design reparation programmes that would address the structural nature of economic and social rights violations and that non-state actors and beneficiaries should be encouraged to participate in such programmes. The efforts by the African Union to push the boundaries of the way in which transitional justice has been conceived to include social and economic rights rectifies an oversight that was internalised by the dominant legal framework, which defined the field, despite the articulation of the need for reparation. The economic and social dimension of transitional justice processes is now emerging as a key driver of sustainable transformation for societies that have experienced violations. In addition, the AUTJP recommends the promotion of reconciliation by addressing legacies of past violence and oppression, reconstructing broken relationships and finding ways for individuals and communities to live together.

Key aspects and elements of the AUTJP

The AUTJP is a 28-page document, with 13 pages of annexes. It is divided into four sections which outline:

1. Introduction, Goal and Objectives, Rationale, Definitions and Principles;
2. Indicative Elements of Transitional Justice;
3. Cross-cutting Issues; and
4. Actors, Processes and Implementation Mechanisms.

Principles of transitional justice

In term of the principles, Section One of the AUTJP highlights the centrality of:

1. African Leadership;
2. National and Local Ownership;
3. Inclusiveness, Equity and Non-Discrimination;
4. African Shared Values;
5. Context Specificity;
6. Synergising, Sequencing and Balancing Transitional Justice Elements;
7. Due Regard to Gender and Generational Dimensions of Violations and Transitional Processes;
8. Cooperation and Coherence; and
9. Capacity Building and Sustainability.

In Section Two, the AUTJP then focuses on the “Indicative Elements” of transitional justice, which it identifies as including:

1. Peace Processes;
2. Transitional Justice Commissions;
3. African Traditional Justice Mechanisms;
4. Reconciliation and Social Cohesion;
5. Reparations;
6. Redistributive and Socio-Economic Justice;
7. Memorialisation;
8. Diversity Management;
9. Justice and Accountability;
10. Political and Institutional Reforms; and
11. Human and Peoples’ Rights.

The “Cross-Cutting Issues” listed in Section Three emphasise the importance of addressing the concerns and needs of:

1. Women and Girls;
2. Children and Youth;
3. Persons with Disabilities;
4. Internally Displaced Persons, Refugees and Stateless Peoples; and
5. Older Persons.

The fourth and final section identifies the “Actors, Processes and Implementation Mechanisms”, which includes:

1. Actors, who are further disaggregated into National Level/State Responsibility; Regional Level; Continental Level; Non-State Actors;
2. Resource Mobilisation;
3. Knowledge Management and Advocacy; and
4. Monitoring, Reporting and Reviewing.

Strategies for the effective implementation of the African Union Transitional Justice Policy

AUTJP’s implementation provisions at the national level

The AU has a track record of the non-implementation of its broad range of policy documents, which is why the AUTJP anticipates this challenge and dedicates the whole of Section Four of the policy to identify “Actors, Processes and Implementation Mechanisms”.⁵ Specifically, the AUTJP identifies four actors who should take responsibility for the its implementation including:

1. AU member states;
2. Regional economic communities (RECs);
3. AU institutions; and
4. Non-state actors, including members of civil society.⁶

Concretely, the AUTJP states that AU “member states shall have the primary responsibility with respect for pursuing transitional justice processes” and that “they bear the responsibility for removing political and social impediments to the effective pursuit of transitional justice processes”.⁷ The AUTJP also stipulates that member states have the responsibility for “guaranteeing the space for debate and advocacy on transitional justice and mobilising the support of all sections of society across political lines”.⁸ The AUTJP is an outcome of process that recognised the right of citizens to participate in framing transitional justice processes, specifically in the manner that it solicited and engaged the views of Africans across the continent. The AUTJP is framed in a manner that pre-emptively acknowledges that there will be inherent resistance from governments when it comes to genuinely confronting the violations

and injustices that were perpetrated in the past and putting in place processes that will address grievances as a means of preventing the cyclical recurrence of tension and conflict in societies. The AUTJP anticipates that governments may not readily create and sustain societal spaces for African citizens to engage with issues relating to transitional justice, evident on its appeal to state actors to remove political and social obstacles as well as to commit to “guaranteeing space for debate and advocacy”. Therefore, AU member states should adopt strategies that will facilitate national dialogue on transitional justice in an open and inclusive manner. AU member states should also adopt strategies that can domesticate the provisions of the AUTJP into national legislatures and embed its recommended processes within permanent national institutions so as to ensure the sustainability of transitional justice initiatives at the national level. In effect, the AUTJP places a significant amount of responsibility on AU member states to oversee, plan and execute the implementation of the policy.

The AUTJP states that “regional economic communities (RECs) should encourage all national actors to pursue transitional justice processes”.⁹ In terms of the continental level, it calls for “key AU organs and institutions to provide leadership in the implementation of the AUTJP, including the African Union Commission” as well as the “AU Peace and Security Council, African Court of Human and Peoples Rights, African Development Bank, African Capacity Building Foundation” and the Pan-African Parliament.¹⁰ At the societal level, the AUTJP states that “civil society members, community-based organisations and the media should campaign for and facilitate the emergence of the necessary public national conversations and debates on pursuing transitional justice processes”.¹¹ Furthermore, the policy stipulates that “provision should be made for enabling these and other actors to play their role in creating forums for the documenting and reporting on transitional justice processes”.¹² In effect, the AUTJP recognises the central role that African citizens will play in pursuing and sustaining the implementation of transitional justice processes at the communal, national and regional levels.

Despite the existence of these clearly demarcated roles for governments, intergovernmental and civil society actors, the AUTJP has not been fully engaged with, and it is currently not being sufficiently utilised, by AU member states to guide their own internal transitional

justice and peacebuilding processes. The uptake for the AUTJP has faltered, particularly due to the unprecedented pressures that the Covid-19 pandemic imposed upon governments and societies in terms of mitigating against the effects of the virus and addressing its effect on society and economic well-being across the continent. Covid-19 also fuelled and deepened trauma due to its amplification of already existing inequality and poverty on the African continent. The AUTJP can be utilised in combination with socio-economic programmes to alleviate the psycho-social effects of the pandemic, and strengthen the inherent ability of African citizens to rebuild their societies and countries.

Regional reconciliation and AUTJP implementation

Africa's RECs have not sufficiently engaged with the AUTJP and developed their own regional strategies to advise and guide their member states, which can contribute towards stabilising their countries and forging more inclusive and democratic societies. Section Four of the AUTJP states that "RECs play a key role in helping address the *regional and trans-boundary dimensions of conflicts or violent regression*, through promoting the normalisation of relationships between affected neighbouring countries and creating a common understanding of transitional justice processes".¹³ In effect, the AUTJP recognises that, since conflicts, atrocities and violations are situated across borders, we have to determine how reconciliation can also take place through "regional and trans-boundary" processes.

This would require implementing processes of truth recovery, accountability and redress across borders as preliminary processes to the pursuit of regional reconciliation.¹⁴ The practicalities of how we operationalise regional reconciliation are challenging but not impossible to institute. The reluctance of nation-states to devolve their sovereignty and to adopt processes that fall outside of their sphere of authority and control – through the establishment of cross-border institutions – will be the primary obstacle to implementing regional reconciliation. The AUTJP's championing of a policy of regional and trans-boundary transitional justice is a recognition of the limitations of retaining a state-centric approach towards dealing with the past and ensuring redress and accountability.

Applying a regional lens to transitional justice and reconciliation processes requires that the war-affected states and communities in close proximity to each other recognise their regional interdependence. Furthermore, these states and communities need to engage in a genuine regional dialogue, based on a democratic attitude, in order to identify the issues that have caused deep divisions and generated violence in the past. Ultimately, the states and communities need to actively work in a collaborative manner to address the legacies of socio-economic exploitation. Like in processes for promoting reconciliation nationally or locally, regional reconciliation mechanisms require the creation of spaces to develop inclusive narratives on the past and shared visions for the future. There is a need to move beyond transitional justice and reconciliation processes, which have been largely state-led and restricted to national borders. Consequently, despite the growing acknowledgment of regional conflicts, regional reconciliation has *not* been the norm. The emphasis has been on pursuing national solutions, or inward-looking state-centric solutions, to problems that require the adoption of a more expansive regional perspective. Consequently, governments and intergovernmental organisations could adopt regional and trans-boundary transitional justice initiatives as a strategic objective of their policies that focus on stabilising and promoting inclusive societies.

In practical terms, regional actors have to find collective solutions to the conflicts contained in their sphere of influence by leveraging the AUTJP to guide countries to implement their own localised national processes. Consequently, RECs should develop regional strategies to ensure a coordinated approach to promoting regional and trans-boundary transitional justice and reconciliation processes. Specifically, it is necessary for RECs to develop their regional strategies for the implementation of the AUTJP, to complement their existing peace and security frameworks. However, the lack of resources and capacity means that these mechanisms remain incapable of promoting and sustaining regional peace, justice and reconciliation.

Civil society, network-building and the implementation of the AUTJP

The AUTJP states that "it is imperative that national and local actors take the lead in planning, implementing, monitoring, evaluating and

reporting on lessons learned in all phases of the implementation” of the policy.¹⁵ In addition, it proposes that “the process for national dialogue, reconciliation and healing should enable faith leaders, traditional and community leaders, not only to play an active part in such processes ... but also pursue intra- and inter-community dialogue, reconciliation and healing at local levels”. In effect, the AUTJP mandates local actors, including community leaders, to play a proactive role in the implementation of the AUTJP and in the creation of national spaces for dialogue on the approach that will be appropriate for specific countries and communal groups. The AUTJP presents an opportunity for the African continent to recalibrate the legacy of the enduring adversarial relationship between state and society, by assigning specific tasks to non-state actors, civil society organisations, faith and traditional leaders. Specifically, the shared implementation of the AUTJP between state and non-state actors will encourage closer collaboration on the promotion of peacebuilding and reconciliation, which can have a positive side-effect in terms of forging platforms that can increase the interaction and exchanges between the state and society.

The AUTJP also envisages a technical role for civil society and think-tank actors to “support the production of relevant research and studies” through processes that systematically “collect best practices and facilitate the sharing of such best practices with societies contemplating or pursuing transitional justice processes”.¹⁶ Therefore, it is important to create a continental network of transitional justice practitioners and analysts, from civil society, think-tanks and governments, who can provide technical support and guidance to all of the continent’s 55 countries all of which require some form of transitional justice intervention, if they have not already done so, in order to sustaining peace in the future. African civil society actors need to take advantage of the opportunities presented in the AUTJP to establish a Pan-African network of enablers, who can provide strategic advice to AU member states, intergovernmental and civil society organisations on the implementation of the provisions of the AUTJP.

The omissions and limitations of the AUTJP

Dealing with trauma and psycho-social issues in the African context

The AUTJP tangentially mentions the need for a commitment by member states and societies to addressing trauma and woundedness, which is an issue that is often swept under the carpet, with the mistaken belief that the issues will remain under the carpet. In particular, the AUTJP advocates for the importance of coming “to terms with the traumas of slavery, colonialism, apartheid, systemic repression and civil wars” as a necessary precursor to “achieving sustainable peace, justice, reconciliation, social cohesion and healing”.¹⁷ However, the policy does not outline what a framework for providing psycho-social support would entail, and this remains an omission that needs to be further elaborated upon. The ability of war-affected individuals and societies to cope with extraordinarily painful experiences and with the developed mistrust and fear remains a persistent challenge across Africa, and elsewhere around the world. Civilians continue to suffer disproportionately from human rights violations, including gender-based violence, violent extremism, and illicit trafficking of weapons, narcotics and people through globalised exploitation. These processes fuel the displacement of people and perpetuates humanitarian crisis, which weakens the social fabric that governs relationships and the capacity for recovery. The breakdown of coping strategies is often caused by traumatic experiences, and the natural ties, norms and bonds between people and within communities that strengthen coping and resilience are often destroyed or weakened.

Even though the AUTJP mentions the importance of addressing trauma through psycho-social support, it does not provide guidance on how integrating mental health and psycho-social support processes into transitional justice and peacebuilding interventions can contribute towards the restoration of the social fabric of societies that have been damaged by war and conflict is vital to peacebuilding. In particular, trauma-healing and psycho-social support interventions can contribute towards rebuilding societies in a manner that mitigates against the future outbreak or escalation of conflict, by helping people recover from their disruptive experiences and re-establish social bonds with others; recreating the feeling of connectedness to other people is essential for

building trust and sustainable peace. Increasingly, there is a recognition that “wounded” individuals, families, communities and leaders who have not processed their responses to their traumatic experiences are less likely to be able to resist the political, economic, cultural and social pressures that can perpetuate cycles of violence. If trauma-healing and psychosocial support processes are integrated into existing and new peacebuilding frameworks and programmes across Africa, and if stronger partnerships are built between mental health and peacebuilding practitioners, then this should lead to greater peace of mind and wellbeing for conflict-affected individuals and communities, which will ultimately lead to sustainable peace. The work of mental health and psycho-social support workers as well as peacebuilders to heal and restore the social fabric that binds and supports people within their communities is essential for breaking cycles of violence and building sustainable peace.

Environmental transitional justice

It is evident that environmental destruction and degradation occur during conflicts and war. More specifically, during conflict, violence is also directed at the environment and natural resources. Therefore, environmental crimes, abuses, harm, loss and death are also implicated and are the outcome of violent conflicts. The common practice is for environmental issues to be forgotten, neglected and undressed through a transitional justice prism in the aftermath of violent conflict. For example, the Sierra Leonean Truth and Reconciliation Commission acknowledged physical violence resulting from resource extraction, but it did not focus on other related environmental harms. Similarly, the Liberian Truth and Reconciliation Commission also identified environmental degradation due to conflict as having caused economic harm. The AUTJP also does not elaborate on an approach to pursuing environmental transitional justice, which remains a significant policy gap given the salience of the damage and destruction of natural habitats in the context of war. Concretely, it is necessary to expand the definition of “victim” to include the environment. In particular, the environment has a right to exist and to also undergo, maintain and regenerate vital natural cycles of life. Furthermore, the environment has a right to redress for past harms. The notion of environmental restorative justice is emerging as a framework to address environmental crimes

through redress for environment, community, victims, perpetrators, as well as future generations. On this basis, environmental restoration is a practical approach to making amends for past transgressions and restore the original integrity and health of environmental terrains.

Decolonising transitional justice in Africa

The AUTJP briefly mentions the importance of addressing the legacies of colonialism, but is mute on how such a project might unfold. To historicise the origins of the crisis of states in Africa, we have to locate the narrative in the forces of colonisation, which left a statist imprint that persists to this day. The imposition of the nation-state presaged its subsequent malformation and failure to deliver public goods, which are expected of state constructs. Specifically, African nation-states were, and remain, programmed with the colonial logic of control, dominion, dehumanisation, subjugation, oppression, exploitation and manipulation. Colonialism sought and achieved dominion over the political, economic and social spheres of conquered African societies. The colonial project sought to replace the cultural, educational, political and economic systems of target countries with a logic imposed by the foreign conquering power.¹⁸ Through dominion over cultural, educational, political and economic spheres, the colonial logic of empire would create false replicas of its own image. This colonial logic still persists in the way the post-colonial African state interacts with its citizens and also how it interacts with other states on the continent. To heal the Pan-African body politic it will be necessary to decolonise its culture, society, economy and politics. More specifically, it will not be possible to achieve sustainable peace in Africa without remedying the effects of this colonial project through transitional justice interventions designed to advance a decolonial agenda, for example, questioning and problematising the artificial grafting of the nation-state on to the Pan-African continental landscape. Specifically, a decolonial transitional justice project has to contribute towards dismantling the state structures that this colonial logic left behind in Africa. In addition, it requires problematising the imposed notion of sovereignty, with a view to reconfiguring political community beyond the false construct of the nation-state in Africa. Therefore, it is necessary to assess the nexus between decolonisation and transitional justice in Africa.

If the objective of transitional justice interventions is to address past violations to create a new society, then decolonisation is a necessary pathway towards achieving this outcome in Africa. Decolonisation is concerned with remedying and eradicating the effects of the persistence of the colonial logic of dominion, dehumanisation and exploitation within African societies. Transitional justice seeks to address the deep divisions within societies that the violation or exploitation of communities by other actors, including external colonial empires, has generated. Africa's historical experiences suggest that it will not be possible to achieve redress for the historical violations that its peoples have endured without remedying and eradicating the effects of the exploitation and dehumanisation of colonialism. Consequently, there is a natural synergy between efforts to promote decolonisation and efforts to pursue transitional justice outcomes. Decolonisation is an intermediate pathway towards future-oriented transitional justice interventions, which requires addressing the consequences and effects of slavery and colonialism as a pre-requisite to laying the foundations for confronting past and present violations. In effect, it is necessary to heal the Pan-African body politic by decolonising its culture, society, economy and politics.

Some view decolonisation as a threatening project, particularly those whose politics and ideology draw on the traditions of former colonial powers. For some, the idea of decolonisation evokes the potential for violence. This sentiment is based on their experience of the decolonisation processes that unfolded in Africa in the late 1950s and early 1960s. A number of liberation movements in Africa fought wars of independence, notably in Algeria against the French, in Kenya against the British, in what is now Zimbabwe against the Rhodesian government, and in South Africa against the apartheid regime. Consequently, resuscitating the decolonisation project evokes memories of these violent periods in the continent's history. However, fulfilling the incomplete project of decolonisation does not have to be a violent undertaking. Using the framework for pursuing transitional justice outcomes, described above, it is possible to avoid the threat of violence, which remains with latent potential. More specifically, applying the principles of transitional justice and implementing its processes through a broad array of institutions – at interpersonal, communal and national levels – could lay the foundations

to achieve and fulfil the decolonisation project in Africa.

How do we implement the decolonisation process to create the necessary pathway to achieving transitional justice outcomes? In terms of transitional justice in Africa, how do we envisage the road ahead using this framework or prism of decolonisation? Given the intersectional nature of past systems of oppression and subjugation, national transitional justice interventions within individual African states cannot be achieved without concurrently advancing a concomitant decolonisation of the Pan-African body politic. By extension, interpersonal, gendered and communal reconciliation cannot be achieved without decolonising interpersonal, gendered and communal relationships. In effect, interpersonal, gendered, communal and national reconciliation in Africa can only be achieved by decolonisation of the power relationships that manifest themselves at these different levels of society. Consequently, the national transitional justice interventions in Africa should be underpinned by the process of decolonising society, the economy and politics, which remain infused with the colonial logic of aggression, exploitation, dominion and power over the other. In terms of its societies, economies and politics, the colonial logic of power and dominion is hardwired into the African continent's operating system. It is necessary to continue with the incomplete project of replacing this operating system with a new one based on a new logic of human equality and freedom, which are the principles that underpin transitional justice interventions. In this regard, national transitional justice interventions in Africa are predicated on achieving and fulfilling the incomplete project of decolonisation. The important innovation here is the convergence between the pursuit of transitional justice outcomes and fulfilment of the incomplete project of decolonisation.

Confronting the implementation gap

The omissions and limitations of the AUTJP notwithstanding, it is important to note that the African continent has been a terrain of experimentation in terms of the roll-out of a broad range of transitional justice approaches. In this regard, the emergence of the AUTJP is an important innovation for the continent and also proffers insights for the rest of the world. Despite the broad range of initiatives that have been adopted and implemented, a persistent and recurring challenge in

the majority of countries across the continent has been the failure to implement specific nationally generated recommendations on transitional justice processes. In particular, governments have tended to resort to the political expediency of avoiding intrusive and excavational transitional justice processes and interventions, which might unearth and reveal the malfeasance of the political and business elites in African countries. The AUTJP does not sufficiently outline the prospective sanctions that the AU system can impose on countries that effectively try to avoid addressing the human rights violations for political reasons. This is therefore clearly a limitation of the policy when it comes to confronting and closing the implementation gap.

The contribution of the AUTJP to peace and security in Africa

The reality of the lived experience of societies is that military and security interventions may contribute to stabilisation of war-affected crisis situations on the African continent. Even though a security approach is necessary at the outset, it is ultimately not sufficient, and a policy and programmatic link with transitional justice processes and interventions is vital to sustaining peace. The cyclical nature of conflict points to the critical need to move beyond temporary stalemates and ceasefires, peacekeeping deployments and military operations, that are so common in this era, towards a regional policy informed by intentionally confronting the underlying grievances that have fuelled decades of animosity and violence on the continent. The challenging work of winning the hearts and minds of local populations through transitional justice interventions that contribute towards the transformation of societies is equally important and a vital complement to the security initiatives in these war-affected regions. Consequently, this aspect of transforming societies still remains the elusive dimension of peace and security interventions.

Even though the link between peacekeeping, peace support operations and peacebuilding through transitional justice interventions is self-evident at the conceptual level, this does not translate into concrete complementarity on the ground. There is a troubled nexus between peace support operations and peacebuilding through transitional justice

at the institutional level as witnessed by the experiences of the African Union, as well as the United Nations, on the ground. Well-intentioned platitudes at the policy and decision-making levels, about the urgency of promoting synergy between peacekeeping and peacebuilding processes, have become routine and banal. This is not unique to the AU Mission in Somalia (AMISOM) nor to the UN's Force Intervention Brigade (FIB) interventions in the eastern DRC, but replicated elsewhere across the African continent, as well as around the world in other UN peace operations. Ultimately, despite the rhetoric of the need for synergy between peacekeeping, transitional justice and peacebuilding, both the UN and AU struggle to effectuate this on the ground. Consequently, this creates a silo effect when it comes to the interventions, with the peacekeepers and peacebuilders virtually operating in isolation from each other, even when they are in the same vicinity. Paradoxically, implementing effective peacebuilding interventions through transitional justice processes is a necessary pre-requisite to any exit strategy for a military-based peacekeeping intervention. In the case of the eastern DRC, the absence of well-grounded peacebuilding transitional justice interventions will leave grievances unaddressed, which precipitates the phenomenon of shifting alliances among the fragmented armed militia in the region. If the underlying societal drivers of conflict in a particular country or region are not undressed through processes of transitional justice, then violence will remain a feature within this territory.

Regional reconciliation as a vehicle for an exit strategy for peace support operations

Since conflicts, atrocities and violations are situated across borders, we have to determine how reconciliation can also take place across borders. Then it becomes clear that we are talking about processes for which we do not have any precedent at the level of Africa's international relations and in particular Pan-African transitional justice and reconciliation processes. This would require implementing processes of truth recovery, accountability and redress across borders as preliminary processes to the pursuit of regional reconciliation. The practicalities of how we operationalise regional reconciliation are challenging but not impossible

to institute. The reluctance of nation-states to devolve their sovereignty and to adopt processes that fall outside of their sphere of authority and control – through the establishment of cross-border institutions – will be the primary obstacle to implementing regional reconciliation. Articulating the compelling case for a policy of regional reconciliation exposes the limitations of retaining a state-centric approach towards dealing with the past and ensuring redress and accountability.

When we apply a regional lens to reconciliation, this would require that the war-affected states and communities in close proximity to each other recognise their regional interdependence. Furthermore, these states and communities need to engage in a genuine regional dialogue, based on a democratic attitude, in order to identify the issues that have caused deep divisions and generated violence in the past. Ultimately, states and communities need to actively work in a collaborative manner to address the legacies of socio-economic exploitation. Like in processes for promoting reconciliation nationally or locally, regional reconciliation mechanisms require the creation of spaces to develop inclusive narratives on the past and shared visions for the future. There is a need to move beyond transitional justice and reconciliation processes, which have been largely state-led and restricted to national borders. Consequently, despite the growing acknowledgment of regional conflicts, regional reconciliation has *not* been the norm. Regions have to find collective solutions to the conflicts contained in their sphere of influence through a new policy framework of regional political reconciliation.

It is therefore increasingly evident that regional reconciliation is required to ensure consolidated peace. Even though Africa has a growing number of regional and sub-regional organisations, the absence of a coordinated approach to regional reconciliation, the lack of resources and capacity means that these mechanisms remain incapable of promoting and sustaining regional peace, justice and reconciliation. It is necessary to interrogate the strategies that governmental, intergovernmental and civil society institutions can adopt and implement to more effectively promote and consolidate regional reconciliation in Africa. Specifically, regional reconciliation initiatives in the eastern DRC should also focus on transforming the unequal power structures based on gender ascriptions, as well as confronting the discriminatory cultural and social attitudes and practices which undermine the status of women and girls in the region.

Regional reconciliation as the fulfilment of the decolonisation project

One of the fundamental consequences of colonisation was the imposition of artificial borders throughout the African continent. If we accept the premise that the pursuit of national reconciliation is linked to achieving the incomplete project of decolonisation, then a central task of the project is the progressive disruption and gradual dismantling of the artificial borders that continue to afflict the continent as open wounds and sores that need to be healed. The dismantling of Africa's artificial colonial borders is aligned to the project of decolonising the continent, which as we have seen above is a pathway to national reconciliation. By dismantling Africa's artificial borders through the project of decolonisation and linking this to the initiative to pursue national reconciliation, both processes will contribute to creating the conditions for pursuing regional reconciliation, across the illusory barriers imposed by colonialism. Specifically, regional reconciliation seeks to establish cross-border or trans-boundary processes of redress and accountability. Consequently, regional reconciliation can be understood as being necessary for the fulfilment of the project of the decolonisation of the African continent.

Structure of the book

This book is divided into four parts, including an assessment of the conceptual and theoretical issues relating to transitional justice in the first part. The second part of the book engages with the insights and experience drawn from national transitional justice initiatives. The third part of the book adopts a wide lens and assesses the continental and regional transitional justice initiatives. The fourth and final section examines the strategies that can be deployed to enhance and consolidate the implementation of the African Union Transitional Justice Policy.

The first part of the book includes three chapters and begins with an engagement with a number of conceptual and theoretical issues relating to transitional justice in Africa. In particular, Murithi's opening chapter assesses the dimensions of transitional justice through an engagement with a range of debates relating to the trade-off between the pursuit of peace and the administration of justice. He also assesses the dilemmas

relating to the provision of amnesty and the cultural processes that have been deployed in addressing the past. In the following chapter, Murithi interrogates the political dimension of transitional justice in Africa, by drawing upon some illustrations of processes that have been politicised on the continent. The third chapter, by Mutuku, adopts an alternative prism and assesses the issue of environmental transitional justice, which is not fully elaborated on in the AUTJP, and makes a number of recommendations on how the issue can be addressed more comprehensively by governments and societies.

The second part of the book assesses three national case studies on efforts to promote transitional justice. Lucey and Knoope examine the Central African Republic's initiative to establish and operationalise transitional justice processes with a number of recommendations on how this can be pursued. Bere's chapter assesses the role of civil society actors in framing and driving transitional justice processes in Zimbabwe. Hajayandi's chapter concludes this part of the book by interrogating the practical function of memorialisation processes with a focus on the initiatives that have been implemented in Burundi.

The third part of the book adopts a wider perspective and assesses continental and regional transitional justice initiatives. Mtero's chapter examines how the wider African Union system can contribute towards supporting the implementation of the AUTJP. Kinyunyu's chapter adopts a judicial perspective and interrogates the points of convergence that exist between the guidelines of the AUTJP and the legal statutes of the African Court of Human and Peoples' Rights. Garang and Murithi conclude this part of the book with an examination of the initiatives by the Inter-Governmental Authority on Development to establish and operationalise a Reconciliation and Dialogue Index, which draws upon the guidelines provided by the AU Transitional Justice Policy.

The fourth and final part of the book focuses on the strategies that can be deployed to enhance the prospects for the implementation of the AUTJP. Makgopela's chapter makes a convincing case for the AUTJP to be integrated more comprehensively as a sixth pillar of the African Peace and Security Architecture (APSA), which will mainstream its uptake and implementation at the sub-regional and national levels. Bere's chapter assesses the role of youth actors in driving and leading on the

implementation of transitional justice processes in the Southern Africa region, with illustrations drawn from South Africa and Zimbabwe. Danso's chapter assesses the capacity constraints that currently afflict African countries when it comes to initiating and consolidating the implementation of the provisions of the AUTJP, and makes the case for enhancing research, training and the use of indigenous approaches to address the violations of the past. Murithi's chapter, which rounds off this part of the book, assesses the role of civil society actors in supporting the implementation of transitional justice processes. In particular, his chapter discusses the establishment of a Pan-African Reconciliation Network (PAREN) as a platform of transitional justice and peacebuilding practitioners and analysts that creates a pool of change-makers, enablers and champions who can provide guidance to all 55 African countries on the implementation of the AUTJP. The book concludes by highlighting the key issues emerging from the broad spectrum of issues discussed in the chapters.

Conclusion

The African Union declared 2014 to 2024 the Madiba Nelson Mandela Decade of Reconciliation in Africa, so it is timely that the AUTJP was adopted in 2019, half-way through this designated period. However, the continent still has a way to go to stabilise all of its regions and consolidate peace and security for its people through national and regional reconciliation. I AUTJP is a welcome addition to the arsenal of policy documents that can contribute towards the promotion of peace and security, but it is not a panacea or a magic bullet that will solve the continent's problems. As subsequent analysis in this book will illustrate, governments and societies will have to undertake the challenging, arduous, painstaking and excavational work of addressing the violations and exploitation of the past through transitional justice interventions, which is vital towards forging and building stable communities across the continent.

The African Union and its societies have played a leading role in the global promotion of transitional justice norms. Africa in this sense has contributed additional dimensions to the global discourse of transitional justice by advancing its own home-grown approach to dealing with the

violations of the past. Africa's experimentation with a broad range of norms has re-affirmed the necessary complementarity between transitional justice interventions and the quest to reconfigure and decolonise African societies from the debilitating and harmful vestiges of colonialism, epitomised by the implantation of artificial predatory and violent nation-state constructions, which continue to fuel the will to power and the manipulation of identity politics, and persistently continue to undermine efforts to promote and sustain peace across the continent.

Africa will continue to innovate on the development of transitional justice norms, due to the fact that a number of countries on the continent will be emerging from conflict in the next decade and beyond. By extension, Africa will continue to be a thought-leader, norm-setter and norm entrepreneur in terms of transitional justice processes and institutions and the perplexing challenge of addressing the violations of the past.

PART ONE

CONCEPTUAL AND THEORETICAL ISSUES

CHAPTER TWO

The Dimensions of Africa's Transitional Justice

Tim Murithi

Introduction

This chapter argues that the multiple dimensions of Africa's experiences in addressing the violations of the past have played a leading role in the transformation, innovation and diffusion of the ideas, norms and practices of transitional justice interventions. More specifically, the continent of Africa has been a terrain for innovation and experimentation in the field known as transitional justice, which has had both positive and negative consequences. Africa was not the creator of transitional justice norms; in fact, the continent borrowed a number of ideas and practices from around the world. As the field emerged and began to grow in the mid-1990s, there were efforts to import transitional justice norms into Africa. Through its experiences, the continent did not only demonstrate the limits of "traditional" transitional justice norms, it innovated in the implementation of a broader range of transitional justice dimensions, including shifting the focus from punitive to restorative justice approaches, which has in turn influenced contemporary theory and practice within the field.

In the mid-1990s, transitional justice originated from a legalistic tradition, with a biased emphasis on the use of judicial processes to address civil and political violations in countries undergoing rebuilding processes. Africa's experience demonstrated that traditional notions of

transitional justice needed to be re-thought and re-framed. Specifically, in order to effectively address the real concerns of victims of past violations, African actors pushed for the expansion of transitional justice norms beyond their narrow civil and political focus, to include socio-economic and psycho-social issues. Consequently, transitional justice is now understood as involving a broad spectrum of interventions that are embedded in peacebuilding and developmental processes. These ideas have been mainstreamed into contemporary transitional justice discourses and practices.

One of the central dilemmas of transitional justice, namely the tension between peace and justice, has played itself out in the majority of post-conflict situations in Africa. Specifically, South Africa, Rwanda, Uganda, Kenya, Sierra Leone and Liberia adopted processes and institutions that sought to address the violations of the past, without allowing the potential tension that could have been generated by an orthodox approach to transitional justice to overwhelm the society and undermine efforts to build sustainable peace through socio-economic and psycho-social redress. South Africa's, Kenya's and Sierra Leone's truth and reconciliation commissions (TRCs) operationalised amnesty provisions, which sought to directly address the peace versus justice dilemma faced by these countries. The experiences of these countries have been analysed, modified and adopted by other states around the world. This in effect demonstrates Africa's role in transitional justice norm-setting and norm diffusion.

This chapter begins by contextualising norm-setting and articulating a working definition of transitional justice. It briefly assesses how the United Nations (UN) has framed the norms of transitional justice, prior to problematising key aspect of its processes. The chapter then assesses Africa as a terrain of norm experimentation and the continent's contribution to addressing norm divergence between the aspirations of peacebuilding and administration of justice. The chapter discusses Africa's engagement with the amnesty norms, as well as its efforts to integrate cultural and cross-border norms into its approach to addressing the violations of the past. The chapter analyses Africa's contribution to the promotion and institutionalisation of global transitional justice norms. The chapter concludes by suggesting that Africa will continue to innovate on the development of transitional justice norms due to the fact that a number

of countries on the continent will be emerging from conflict in the next decade and beyond. By extension, Africa will continue to be a thought-leader, norm-setter and norm entrepreneur in terms of transitional justice processes and institutions and the perplexing challenge of addressing the violations of the past.

The evolution of transitional justice and its introduction to Africa

The processes that the field of transitional justice embodies have been implemented for as long as there have been conflicts and efforts to deal with the past. However, as a field of academic study, transitional justice began being systematically analysed during the transitions from authoritarian regimes in Latin America in the 1980s.¹ The Latin American approaches placed an emphasis on truth recovery as a prerequisite to enabling victims and their family members to find closure for the violations that they suffered. However, efforts to promote psycho-social healing and reconciliation did not feature significantly in the Latin American experience, and the effort to integrate this agenda within Africa's processes is discussed below. The genocides in Rwanda in 1994 and in Srebrenica in 1995 further crystallised the quest and need to understand how societies that had endured mass atrocities could establish processes and mechanisms to deal with such a brutal past and enable a society to move forward. Concurrently, in 1994, South Africa's liberation from the yoke of a white supremacist apartheid regime to a system of democratic governance also generated a broad range of insights and experiences that could be analysed and documented, on how to operationalise transitional justice. South Africa introduced a number of innovations to its normative transitional justice framework, which was a significant departure from the Latin American experience, as is discussed further below. There are still perplexing challenges such as the issue of whether transitional justice processes can be implemented in the absence of a "transition" or regime change.² There is no definitive satisfactory response to this conundrum and more often than not it is necessary to begin laying the foundations for transitional justice even in the absence of a transition or in the midst of a violent conflict.

The idea of transitional justice emerged from the legal sphere through a primary concern for ensuring that perpetrators of human rights violations were held accountable for their crimes and punished, ideally through a court of law and in accordance with international standards. The originators and custodians of these “international standards” however are less clear and remain unspecified in the field of transitional justice, even with the UN’s framing of the field. The notions that initially animated transitional justice drew heavily upon legalistic doctrines of “the duty/right to punish” and the unitary role and function of prosecutions in the context of human rights violations.³

The reality of implementing transitional justice through an exclusively prosecutorial framework, as was the case in Latin America and the Balkans, was soon confronted by a proliferation of social, economic and political contradictions, which undermined the narrow focus of legally inspired transitional justice norms. For example, when confronted with situations in which perpetrators were also erstwhile victims, such as child soldiers who were abducted and subsequently became war-makers and violators of human rights, the knee-jerk prosecutorial approach is to punish the most recent crime. In this particular case, the historical violations committed against the now perpetrator go unpunished, and consequently a condition of injustice and moral contradiction prevails. The legal field remains ambivalent about addressing such moral conundrums and prefers to cast aside such questions in a narrow-minded commitment towards ensuring that the duty to punish is pursued above all else. As an example, a senior Lord’s Resistance Army (LRA) commander, Brigadier Dominic Ongwen, was abducted in 1999 by the LRA when he was a ten-year-old child in northern Uganda. Ongwen was a victim of the LRA militia, but subsequently went on to command its ranks. As a member of the command team of the LRA, Ongwen was therefore individually culpable for the human rights violations that the militia perpetrated against innocent children whom it abducted. Therefore, Ongwen stands accused of being a perpetrator of human rights violations, yet his historical grievances for harm done to him as a child also are valid and in need for redress and accountability. Ultimately, the Ugandan government of Yoweri Museveni decided to send Ongwen to the International Criminal Court (ICC) to face charges for his most recent atrocities. However, the

situation exposed the limits of a tool narrowly focused on a normative approach to transitional justice.

The legal approach to transitional justice is also generally unable to effectively provide redress for societal violations and economic crimes that historical victims have endured because these effects are less visible to the eye and are much more complex to quantify in terms of the specific transgressions perpetrated against victims. Moreover, for situations in which a particular ethnic or racial group benefitted from the economic exploitation of another, the culpability is wide-spread across the society from the political leaders who implemented the policies to the constituencies that voted or supported them. In such a context it is much more difficult to pin-point the violators that should be prosecuted for economic crimes. More often than not, processes that have to be adopted to promote redress would include a broad range of interventions, which are clearly located outside the scope of a punishment model of transitional justice.

At the outset, gender exclusion was also a prevalent feature in the conceptualisation and implementation of legalistic transitional justice interventions. Consequently, additional normative pressures have emerged relating to how transitional justice deals with gender issues. Authoritarian rule and violent conflict affect women and men in different and context-specific ways. Specifically, gender-based violence is a common atrocity that has to be considered in a transitional justice process. Around the world, engagement has witnessed women being traditionally marginalised and excluded from the defining and framing of transitional justice processes. From the ideas relating to how to frame transitional justice processes, to legislative initiatives to codify these processes in law, to the implementation of these interventions through states and societal institutions, the phenomenon of patriarchy continues to marginalise the participation of women. Because political leadership around the world is dominated by men, when it comes to operationalising transitional justice, women’s views are generally overlooked. For example, Sigsworth and Valji highlight the limitations in contemporary South Africa of transitional justice processes in entrenching accountability and preventing a recurrence of the forms of violence that were targeted at women during apartheid.⁴ Historically, transitional justice processes have tended to pay lip-service

to gender sensitive interventions. Consequently, African women and men need to ensure that the voices of women are incorporated into the design and framing of transitional justice processes. This requires the active participation of African women in the political negotiations that define the orientation of transitional justice processes and the nature of its institutions.

Another defining feature of the evolving norms of the field has witnessed contemporary transitional justice processes becoming more political than legal in orientation. For example, efforts to undertake truth recovery, which are central to any effort to initiate redress for past violations, are often fraught with political manipulation. Other dimensions of transitional justice, such as accountability processes, reparations and the reform of institutions are also subject to political interference. Consequently, the politicisation of transitional justice in some instances trumps the legal approach to dealing with the past. The challenge is one of mitigating against political interference that undermines efforts to promote democratic inclusion, heal the divisions in society and put in place measures to achieve reconciliation. For example, in Kenya, efforts to implement a truth recovery process through the Truth, Justice and Reconciliation Commission was progressively distorted by the politicisation of the work of the body.⁵ Similarly, efforts to pursue a prosecutorial path in Kenya through the ICC have similarly become hostage to the political machinations of the country's leaders.

As an over-arching issue, transitional justice is understood as relating to processes that are driven by the state and state actors. Contemporary approaches to transitional justice have an almost exclusive focus on national processes. Yet the national focus of transitional justice processes is increasingly unsustainable particularly in situations where conflicts, and their effects, spill over across borders. In addition, most conflicts are increasingly cross-border in nature and are in some instances sustained by cross-border support and resources. Consequently, efforts to redress violations that emerge as a result of these conflicts are incomplete if they only focus on national actors and state-driven processes. It is necessary to find a way to pursue and promote transitional justice across borders. This raises the challenge of the prospects for institutionalising cross-border and regional reconciliation approaches to transitional justice.

The United Nations' foray into transitional justice norms

The UN's foray into transitional justice was in response to the emerging conditions on the ground in countries like Rwanda, South Africa and the Balkans. Africa's experiences contributed towards the development of the emerging norms of this field. In 1997, Louis Joinet formulated the principles relating to addressing impunity in his *Final Report on the Administration of Justice and the Question of Impunity*, which he submitted to the United Nations (UN) sub-commission within the Commission on Human Rights. In 1999, the UN Commission on Human Rights adopted a Declaration on the Right to Restitution for Victims of Gross Human Rights Violations. It is significant that this Declaration was issued while the Ghanaian Kofi Annan was UN Secretary-General, illustrating how Africans in positions of leadership have also encouraged the development of transitional justice norms.

In 2004, United Nations Secretary-General Annan issued a report entitled "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", which defined the field as relating to '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'.⁶ The report further suggests that transitional justice processes "may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparation, truth-seeking, institutional reform, vetting and dismissals or a combination thereof".⁷ Following this definition, transitional justice has been viewed through a legal prism and has been viewed as a special form of justice that enables societies to make the transition from authoritarian rule or violent conflict. However, all transitional justice processes should be contributing to some form of progress towards reconciliation.

In 2005, the UN Commission on Human Rights revised the Joinet Principles to identify the mechanisms, modalities and procedures for the implementation of existing legal obligations under international humanitarian law and international human rights law.⁸ This review was conducted by Diane Orentlicher who enumerated what are now known as the Joinet/Orentlicher principles. These principles include:

- The right to know;
- The right to justice;
- The right to reparation; and
- The guarantee of non-recurrence.

In December 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These include a range of options: prosecutions, truth commissions, reparation, memorials and institutional reforms.⁹ In December 2006, the UN General Assembly approved the Convention on the Protection of all Persons from Enforced Disappearance. In May 2012, the UN Human Rights Council appointed the first UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence to promote the engagement with these issues within member states. The UN's foray into transitional justice further concretised the normative framework for engaging with the notion, despite the fact that it remains an essentially contested terrain.

Transitional justice in Africa: Modalities, practices and challenges

Transitional justice is operationalised through a wide range of institutions that seek to frame and catalyse the broad range of processes through which societies that have been affected by violent conflict or authoritarian rule can address the violations of the past as a precursor to laying the foundations for building more inclusive societies. Consequently, from its predominantly legalistic origins in the mid-1990s transitional justice has confronted a range of societal, economic and political pressures that have precipitated a more expansive framing and understanding of its normative parameters. A significant number of these pressures emerged from processes that were unfolding on the African continent, which placed the continent at the forefront of experimentation with norms of transitional justice.

The normative pressures on the legal remit of transitional justice exerted by the grassroots experiences of African societies emerging from

conflict compelled the scope of transitional justice to expand significantly. Transitional justice is now faced with a broad range of challenges including administering justice in a manner that can restore societal trust and promote reconciliation in deeply divided communities. Furthermore, the demands for socio-economic justice have pushed the normative boundaries of transitional justice beyond the confines of its historical origins within the legal sphere. The calls for reparations and restitution have demanded new approaches to operationalising transitional justice, which linked it to the peacebuilding and development fields. The requirement of reforming institutions has also compelled transitional justice to expand its parameters to begin to address issues of constitutionalism and democratic governance.

Africa was not the initiator of transitional justice norms, and in fact the continent borrowed a number of ideas and practices from around the world, notably Latin America. As the field emerged and began to grow there were efforts to import transitional justice norms into Africa. The initiatives to implement transitional justice on the African continent have challenged the traditional and legalistic framing of transitional justice norms. More specifically, African societies and countries have innovated in the implementation of a broader range of approaches and development of home-grown standards for dealing with the past, which are beginning to influence contemporary theory and practice within the field of transitional justice.

The sequencing approach to transitional justice

Africa's experiences have demonstrated that transitional justice processes are operationalised predominantly in post-conflict situations, in which the imperative to pursue peacebuilding is just as necessary as the demands to deliver justice to the victims. Consequently, there is a perceived norm-divergence between the pursuit of peace and the requirements of justice. This means that the norms that guide the pursuit of peacebuilding, the healing of relationships and the restoration of human dignity are in tension with the norms of administering justice, which are focused on the prosecution and punishment of former participants in wars. Peacemaking and peacebuilding is future-oriented in the sense that it is striving to prevent violence that could recur and cause the death of further innocent

civilians if conditions in the country remain unchanged. International criminal justice by definition is concerned with the prosecution of human rights violations that have already transpired through the application of due process, while upholding certain legal criteria and issuing a judgment for past transgressions. Consequently, there is a tension between these two processes, and trying to undertake them in tandem can occasionally generate a conundrum. Individual responsibility for mass atrocities in war situations, more often than not, resides with the leaders of factions or military organisations, who might simultaneously be involved in peacemaking processes.

The notion of justice remains an essentially contested concept. In fact, there are multiple dimensions to justice. Retributive justice seeks to ensure prosecution followed by punishment for crimes or atrocities committed.¹⁰ Restorative justice strives to promote societal harmony through a quasi-judicial process of truth telling, acknowledgement, remorse, reparations, forgiveness, healing and reconciliation. Retributive or punitive justice is generally administered by a state-sanctioned legal institution or through the remit of international law. Restorative justice draws upon a range of mechanisms including truth commissions and other societal reconciliation institutions.

Both retributive and restorative justice have a central concern with preventing the impunity of perpetrators who have committed atrocities. Retributive justice, however, has a more direct impact on the condition of the perpetrators because it summarily imposes a punitive sentence, which is evident for all to witness. The impact of restorative justice is more elusive, as victims and perpetrators are often engaged in a series of face-to-face interactions designed to achieve the objectives highlighted above. The fact that the outcome of restorative justice processes is generally less dramatic than those of retributive justice means that their efficacy is generally more suspect and unquantifiable to external observers. However, both forms of justice address the issue of impunity. Impunity in this context is understood as the condition in which there has been no redress or reckoning of the past atrocities and injustices committed by a perpetrator. Retributive justice prevents the immediate impunity of the perpetrator of crime through punishment and serves as a warning for those who may be inclined to commit atrocities in the future. Restorative

justice also addresses impunity by compelling the perpetrator to undergo a revelatory and confessional process of transformation, which means that he or she has not “got away” with the crimes that they committed but rather atones for them.

The experiences in Sierra Leone and South Africa demonstrated that the debate over whether a retributive or restorative approach to justice should be deployed in the aftermath, or at the point of a conclusion of a war, has not been resolved definitively. Nor can this debate be resolved definitely because the type of justice that might be appropriate in the context of one country cannot be transplanted to another. In this regard, there is a certain degree of context-specificity in the administration of justice. A combination of retributive and restorative processes of justice can be deployed to address the needs of a society in transition.

The sequence in which either retributive or restorative justice processes are initiated is also not a precise science. In the majority of cases, retributive and restorative justice processes might be instituted and operationalised simultaneously. In some instances, the failure of a government or a society to embrace a restorative approach to justice and reconciliation can require the establishment of an international retributive/punitive justice process. In other instances the demands of a restorative justice process with its emphasis on truth telling and the collective psychological transformation of promoting forgiveness and reconciliation means that efforts to administer punitive measures may need to be carefully sequenced so as not to disrupt these healing processes. In the case of the Darfur crisis in Sudan, as well as in the conflict in northern Uganda, individuals and leaders who have been accused of planning, financing, instigating and executing atrocities against citizens of another group, all in the name of civil war, can be investigated by the ICC if the respective country is a state party to the ICC or if the issue is referred to the Court by the United Nations (UN) Security Council. In the Darfur and northern Uganda contexts, these individuals and leaders are the very same people that are called upon to engage in a peace process that will lead to the signing of an agreement and ensure its implementation. Characteristically, most peace agreements will have provisions for peacebuilding and within this process, a framework for promoting restorative justice through the form of truth commissions as a means for promoting national reconciliation.

A punitive approach to justice cannot deal with the grievances that often underpin structural violence, identity conflict and the economic marginalisation of the majority of people in war-affected countries and thus establish a sustainable basis for peace.¹¹ It will, however, prosecute key individuals who had the greatest responsibility for committing atrocities. In spite of the available option of pursuing prosecutions for the human rights violations that were committed during apartheid, South Africa deliberately chose the path of placing greater emphasis on implementing a restorative transitional justice model. The option of prosecution was available during the country's transition in the mid to late-1990s and is still viable even to this day. The fact that South Africa adopted its own unique path still distinguishes it as a norm-setter. The model South Africa adopted is constantly being analysed and scrutinised for its important insights even though the country, like other countries around the world, has not yet addressed all of its challenges emanating from its past. In effect, South Africa's response to its situation advanced important transitional justice insights. The South African insights particularly on strategy to ensure sequencing how a punitive approach is instituted in the context of transitional justice norms have influenced prevailing transitional justice norms.

Sequencing in transitional justice requires the deliberate operationalisation of a coordinated retributive or restorative justice process in order to ensure that stability and ultimately peace is achieved in a given country-context. In the international justice arena, at least two camps have emerged, namely those that adopt a fundamentalist approach to prosecution and those that advocate for a more gradual approach predicated on giving time to peacebuilding and reconciliation to take root. Prosecutorial fundamentalism is not a misguided school of thought and its intentions are noble as far as they attempt to ensure that those who bear the greatest responsibility for war crimes, crimes against humanity and genocide are summarily brought to book. However, prosecutorial fundamentalism, like all other fundamentalisms, can be blighted and become subsumed by a narrow, legalistic desire to bring the accused to justice. For example, Tunisia and Liberia placed more emphasis on adopting and implementing a restorative model rather than adhering to the prosecutorial fundamentalism, which was being advocated for

by external actors, notably international human rights organisations. A more nuanced approach would suggest that there is a time and a place for prosecution and, in the context of a civil war, it may not always be immediately after the cessation of hostilities between the belligerent parties. At this point in time the tension within the country tends to be uncharacteristically high and any attempt to prosecute individuals and leaders can often be, and sometimes is, seen as an attempt to deliberately continue the 'war by other means' by targeting the main protagonists to a conflict. Effectively what is called for in these situations is a period of time in which the belligerents can pursue the promotion of peace. In such a situation the efforts to promote peace, including its restorative justice dimension, would have to be given precedence to the administration of punitive justice. This is with a view to laying the foundations for the stability of the society. For example, the Acholi community of northern Uganda have resisted efforts to implement across the board prosecutions for perpetrators involved in the regional conflict, and relied extensively on the use of a culture and tradition-based justice process known as *mato oput* to frame an exchange between victims and perpetrators in the crisis. Ultimately, the perceived norm-divergence between peace and justice is based on an artificially constructed false dichotomy between the pursuit of peace and the administration of justice.

The amnesty approach to transitional justice

One of the central dilemmas of transitional justice, namely the tension between peace and justice, has played itself out in the majority of post-war countries in Africa. Specifically, South Africa, Rwanda, Uganda, Kenya, Sierra Leone, Liberia, Tunisia, Côte d'Ivoire, the Democratic Republic of the Congo, Burundi, Mauritius, Uganda and Zimbabwe adopted processes and institutions, which sought to address the violations of the past, predominantly through truth commissions, with a view to addressing the violations of the past and building societies and sustainable peace. There is also legislation to adopt the transitional justice institutions in South Sudan, following its 2013 crisis, which culminated in a 2015 peace agreement.

South Africa's, Kenya's, Sierra Leone's and Liberia's truth and reconciliation commissions (TRCs) operationalised the amnesty norm,

which sought to directly address the peace versus justice dilemma faced by these countries. These amnesty provisions were not intended to gloss over the violations of the past, but were rather supposed to be granted on the basis of a confessional process of truth-telling. For example, South Africa's TRC convened an amnesty sub-committee, whose task was to test the veracity of the claims made by those who submitted applications. The primary criterion was the need to demonstrate that the violations that individuals perpetrated were "politically" motivated in a broad interpretation of the term. Of the close to 6,000 amnesty applications that the South African TRC sub-committee received, it only validated approximately 1,000 applications, which means that a substantial majority was rejected. Some even ended up being directed to the South African judiciary on the basis that they were not deemed to fall under the rubric of political crimes. Kenya, Sierra Leone and Liberia similarly adopted the amnesty norm in the framing of their own truth commissions, and this has contributed towards influencing how the provision is understood and implemented across the continent and around the world.

Both within Africa and internationally, amnesty has vociferous critics, notably in the legal profession that claims it encourages impunity. Yet African actors have pioneered an approach to amnesties as a part of transitional justice that addresses these charges due largely to a carefully sequenced process, which includes: acknowledgement of harm done; a request for mercy; and a process of reparation where amnesty contributes directly towards addressing the impunity of the perpetrator. The fact that the perpetrator is not "locked up" is not an indicator of the lack of veracity of a transitional justice process for redress.

The important factor is that African states' norm-setting innovations with the amnesty provision have been borrowed, modified and adopted in other countries around the world. Specifically, the TRC of the Philippines issued its report in 2016 and the Canadian TRC issued its report in 2015. These commissions drew insights from Africa's experience based on the engagement with issues that were generated by the African commissions. Sri Lanka adopted the path of convening a Lessons Learned and Reconciliation Commission, but is now in the process of promoting a truth recovery process by drawing insights from the South African example. This in effect has demonstrated Africa's role in norm entrepreneurship and norm transfer.

The cultural approach to transitional justice

In contrast to other transitional justice processes in Latin America and the Balkans, for example, African states have also experimented with culturally informed processes to address the violations of the past. Due to the limitations of internationally imposed ideas of transitional justice, there was a need to draw upon Africa's knowledge systems, its traditions and culture of jurisprudence to articulate and document indigenous norms of transitional justice.

There have always been customary rules, social sanctions and ethical precepts to regulate African societies. While each society has its own specific approach to dealing with social problems, some common themes emerge across societies. In the majority of African communities, the individual is not considered a separate, autonomous entity but always part of a larger collective of human beings. Family groupings give way to the formation of clan communities and then ethnic nations. These groupings had a responsibility to maintain social harmony. Due to the importance of maintaining harmony, peaceful approaches to resolving disputes were generally preferred to more confrontational and belligerent strategies, though these were also occasionally utilised. Most African societies have developed rich cultural norms of transitional and restorative justice as well as reconciliation for preserving harmony, making and building peace and maintaining this peace by cultivating group solidarity and avoiding aggression and violence.¹²

Some of these practices have been mobilised by African states in transitional justice processes. For example, Rwanda's *gacaca* courts and Uganda's *mato oput* reconciliation framework operationalised indigenous norms of restorative justice. An extensive treatment of these approaches is beyond the scope of this chapter, but as the seminal book *When Law Meets Reality: Forging African Transitional Justice* illustrates, the utilisation of indigenous norms of restorative justice was a significant innovation that challenged how transitional justice was predominantly conceived and understood.¹³ There have been criticisms of such inclusions, which have often included the suggestion that these cultural processes do not live up to international standards. However, the converse in fact has become more evident, in that African states have demonstrated that the esoteric and elusive notion of an arbitrary "international standard" or norm should

not constrain countries that are attempting to address the violations of the past in their own specific context.

Some African conceptions of the individual, and their role and place in society, can provide an alternative normative framework for establishing more harmonious political and economic relations at local, national, continental and even global levels.¹⁴ Through commonly found African emphasis on the value of social harmony and non-adversarial dispute resolution, there are lessons that can be learned and applied to contemporary conflict situations. It is necessary to question the notion of a universal conception of justice that can be advanced by a “world court”, like the International Criminal Court. This universalising tendency is often driven by a “civilising” and “modernising” imperative, which self-evidently marginalises the “other’s” conception of justice. It regrettably assumes that there is one way of conceptualising justice, which is erroneous at best and coercive and alienating at worst. Instead, we need to embrace the idea that notions of justice can be locally specific and culturally defined. As highlighted at the beginning of this chapter, the purpose of justice is to ensure accountability for harm done. If cultural forms of justice can achieve this in a way that does not rely exclusively on a prosecutorial imperative, then it is vital to draw lessons from such approaches. As discussed above, African norms of transitional justice emphasise communal harmony over the general tendency within mainstream notions of justice to prioritise individual culpability. The key point is that Africa is innovating when it comes to transitional justice norms and consequently providing normative examples of how countries can draw upon their cultural practices to address the violations of the past (see the chapter by Lühe and Jones, in this volume).

The cross-border approach to transitional justice

In Africa, as in other parts of the world, inter-state wars in the region have largely been replaced by intra-state conflicts. However, these intra-state conflicts, more often than not, have an inter-state or regional dimension in the way that they are resourced and executed. In the Great Lakes region of Africa, for example, there is an intimate link between the crisis in Burundi, the eastern DRC and Rwanda, which can be situated in its historical origins in the Belgian colonisation of all three countries. Decades

of misrule, combined with kleptocratic relationships between the rulers of these countries and their governmental and corporate accomplices outside the country, has generated economic crimes, which have fuelled the crisis and violent conflict in the region. Attempts to address the crisis in one country in isolation of the dynamics of neighbouring countries will at best deliver incomplete outcomes. It is increasingly evident that regional reconciliation is required to ensure consolidated peace. The national focus of transitional justice processes is increasingly becoming unsustainable, particularly in situations where conflicts spill across borders, as seen in the Somali crisis conflict, which has drawn in Ethiopia, Eritrea, Uganda and Kenya.

The absence of a coordinated approach to regional reconciliation in Africa has generated innovative community-based interventions, which have invoked new norms of cross-border transitional justice.¹⁵ Thus, even though the international focus has been on national reconciliation, there are ongoing processes across Africa which suggest the need to talk about regional reconciliation norms.

Regional reconciliation norms would require framing a way to implement processes of truth recovery, accountability and redress across borders as preliminary processes. The practicalities of how to operationalise regional reconciliation are challenging but not insurmountable. The reluctance of nation-states to devolve their sovereignty and adopt processes that might be seemingly outside of their sphere of authority and control through the establishment of cross-border institutions will be a primary obstacle to implementing regional reconciliation. Articulating the compelling case for a policy of regional reconciliation exposes the limitations of retaining a state-centric approach to dealing with the past and ensuring redress and accountability. This is an initial first step by African norm entrepreneurs to once again break with the constraining normative silos of the past, and regional economic communities are already engaging with this new norm through policy formulation debates, illustrated in particular by the prospective African Union Transitional Justice Policy.

A regional reconciliation norm would draw in state actors into cross-border processes, which could potentially reduce the prospects for the internal political control and manipulation of transitional justice. A regional reconciliation norm would typically require the negotiation

between governments of how to frame and operationalise transitional justice processes. This requirement of cross-border negotiation would mitigate against each individual state manipulating transitional justice processes. However, such a normative shift inevitably has limits, because cross-border transitional justice processes can also become prey to inter-state politics and can equally be subject to corruption. Therefore, the notion of regional reconciliation is affected by policy challenges in terms of how to operationalise the structures and institutions that can underpin its implementation.

The people-to-people exchanges are already a common feature of the regional reconciliation landscape and are happening in some parts of Africa, notably in the borderlands of eastern DRC, Rwanda and Burundi, as well as historically in the Mano River Union countries of Sierra Leone, Liberia and Guinea. People-to-people approaches to regional reconciliation can be convened by civic, academic, business and cultural leaders without the approval of the states, though they can benefit from the support of governments. Consequently, people-to-people processes are developing new norms of cross-border transitional justice.

Arguably the most prominent instance of people-to-people regional reconciliation have occurred in the Horn of Africa. The region has endured the debilitating effects of violent conflict for several decades, notably as a result of the South Sudan-Northern Uganda conflict nexus and the Somali conflict system. Despite policy frameworks and the utilisation of significant resources to stabilise affected countries, conflicts in the region have remained resistant to resolution. The Horn of Africa's crises demonstrate that conflicts have a tendency to spill across borders, affecting communities in more than one country. They also demonstrate that intra-state conflicts usually have a regional dimension, as they include more than one state as either the primary or secondary actor.

While the implicated state actors have not adopted a coordinated regional strategy to promote and consolidate peace, non-state actors have taken more transnational approaches. The first approach, for example, involves the Karamoja Cluster Project, which works across the Kenyan and Ugandan borders to promote people-to-people regional reconciliation and peacebuilding.¹⁶ This cross-border initiative brings together the Karamoja communities of eastern Uganda and western

Kenya, which have endured cyclical violence related to livestock theft and violent conflict over limited scarce resources and access to land. The initiative establishes people-to-people dialogue platforms in order to address key concerns and raise pertinent issues. These platforms can take the form of social engagement activities like cross-border sports, which draw participants from the different conflicting communities, and exchanges such as women-led cultural events. In addition, the initiative convenes educational and training programmes to raise awareness among members of the Karamoja community as to how to promote effective strategies to ensure that the livelihood of all members is protected. In addition, the people-to-people regional reconciliation initiatives are also driven by women-led peacebuilding initiatives, in order to increase the focus on how the violent conflicts and the destruction of the social fabric of societies affects the women of the Karamoja Cluster differently to their male counterparts.

The Karamoja Cluster Project should be understood as a work-in-progress rather than a *fait accompli* in terms of its efforts to promote people-to-people regional reconciliation across borders. The initiative, however, demonstrates that the adoption of regional reconciliation mechanisms is in fact already taking place, which bolsters academic and policy analysts' advocacy for the norm and thus promotes international recognition of this potentially emerging norm. If the insights drawn from the Karamoja Cluster Project can be replicated in other border regions of the Horn of Africa, this would further promote norm creation. This people-to-people initiative also demonstrates that higher-level and elite-driven regional reconciliation process can also draw normative insights from the manner in which former enemies can come together in the spirit of addressing common concerns and developing joint solutions to enhance the livelihood of citizens of the Horn of Africa.

The second kind of cross-border transitional justice process is judicial in nature, and involves the Special Court of Sierra Leone in the prosecution of Charles Taylor, who was the former president of neighbouring Liberia. The Special Court was established by the government of Sierra Leone, however, international actors and donors played a significant role in operationalising its activities. Taylor had committed a range of human rights violations through his tacit support of armed militia in Sierra

Leone. The Special Tribunal was initially convened in Freetown, Sierra Leone, but was subsequently relocated to The Hague where a ruling against Taylor was issued, imprisoning him for 50 years in jail.¹⁷ The Taylor ruling has set precedence for cross-border judicial redress for the victims in Sierra Leone.

Similarly, the African Union's Extraordinary Chambers in Senegal was convened to prosecute the erstwhile dictator of Chad, Hissène Habré, for his individual culpability in overseeing a state system of repression and violence, which was estimated to have killed 40,000 people, and torturing as well as committing gender-based violence on hundreds of thousands of others. The Habré ruling has also set a precedent for cross-border judicial redress for the victims in Chad. The African Union's Extraordinary Chambers in Senegal could well make a new era for Pan-African justice, and it has set another normative example for the world.

The AU has sought to advance norms related to transitional justice in its bid to provide guidance to its member states emerging from conflict. In 2000, Article 4(h) of the AU Constitutive Act ascribes "the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, crimes against humanity and genocide".¹⁸ Furthermore, Article 4(o) stipulated the AU's "rejection of impunity" as a key normative principle. The AU was in effect ahead of its time in terms of enshrining a normative right to intervene to address these international crimes, which have since been incorporated into the framing of international transitional justice norms.

Conclusion

Africa has played a leading role in the global promotion of practices and norms of justice and reconciliation. Africa in this sense has challenged the artificial normative strictures of the global discourse of transitional justice and advanced its own home-grown norms to dealing with the violations of the past. Africa's experimentation with a broad range of norms and practices has re-affirmed the interface between justice, peacebuilding and reconciliation. Several countries are emerging from conflict and the challenge of peacebuilding is immediately confronted by the demands for justice for the victims of human rights atrocities. Traditionally, the pursuit of justice in international relations was considered detrimental

to achieving peace and reconciliation, which are inherently political processes. However, Africa's experiences have challenged this presumption and demonstrated the necessary nexus between transitional justice and peacebuilding processes.

This chapter has assessed how transitional justice originated from the legal tradition, with a biased focus on the judicial processes to address civil and political violations, during transitions to lay the foundations for the post-transition rule of law. Africa's experience demonstrated that traditional notions of transitional justice needed to be re-thought and re-framed. Specifically, in order to address the real concerns of victims of past violations effectively, transitional justice norms had to be expanded beyond their narrow civil and political focus, to include socio-economic and psycho-social issues. The chapter discussed how transitional justice is now understood as involving a broad spectrum of interventions that are embedded in peacebuilding and developmental processes.

Culture gives distinctiveness to a particular society's way of doing things. There is a need to draw upon Africa's knowledge systems, its traditions and culture of jurisprudence to articulate and document indigenous norms of transitional justice. However, such an activity has to be informed by the fact that Africa is not a homogenous entity and within its societies there is a vast array of different approaches to dealing with the issues of peace and justice.

Africa's experiences have also evoked the need to scale up transitional justice processes from their country-specific focus towards a normative shift based on a regionalised approach to dealing with the past. Despite the growing acknowledgment of regional conflicts, regional reconciliation has *not* been the norm. Africa will continue to innovate on the development of transitional justice norms, due to the fact that a number of countries on the continent will be emerging from conflict in the next decade and beyond. By extension, Africa will continue to be a thought-leader, norm-setter and norm entrepreneur in terms of transitional justice processes and institutions and the perplexing challenge of addressing the violations of the past. In effect, this chapter argued that the notion of transitional justice is today much more expansive in terms of what is being practised on the ground, due in part to the influence of norms and practices that were operationalised and implemented in Africa.

The AU declared 2014–2024 the Madiba Nelson Mandela Decade of Reconciliation in Africa, so it is timely that the AUTJP was adopted in 2019, almost half-way through this designated period. However, the continent still has a way to go to stabilise all of its regions and consolidate peace and security for its people. The AUTJP is a welcome addition to the arsenal of policy documents that can contribute towards the promotion of peace and security, but it is not a panacea or a magic bullet that will solve the continent's problems. Governments and societies will have to undertake the challenging, arduous, painstaking and excavational work of addressing the violations and exploitation of the past, which is vital towards building stable and peaceful communities across the continent.

CHAPTER THREE

The Politics of Transitional Justice in Africa

Tim Murithi

Introduction

This chapter analyses the politics of transitional justice, especially how the contested nature of transitional processes complicates efforts to deal with the past. Through an engagement with a working definition, this chapter illustrates how the scope of transitional justice has expanded significantly over the last two decades. The chapter also discusses the key provisions that the African Union Transitional Justice Policy outlines for countries to operationalise their own national processes to address the violations of the past and work towards building inclusive societies. Contemporary transitional justice processes have become more political than legal in orientation. For example, efforts to undertake truth recovery, which are central to any effort to initiate redress for past violations, are often fraught with political manipulation. This chapter discusses how gender exclusion is also a prevalent feature of the implementation of transitional justice interventions. Other dimensions of transitional justice, such as accountability processes, reparations and the reform of institutions, are also subject to political interference. Consequently, the politicisation of transitional justice processes in a manner that undermines efforts to promote democratic inclusion and heal the divisions in society prevents

efforts to achieve reconciliation. In addition, this chapter discusses how the national focus of transitional justice processes is increasingly unsustainable, particularly in situations where conflicts cross borders. This chapter also inquires on the possibility of institutionalising regional reconciliation processes, particularly in the Great Lakes region.

As discussed earlier in this book, transitional justice is operationalised through a wide range of institutions that seek to frame and catalyse the broad range of processes through which societies that have been affected by violent conflict or authoritarian rule can address the violations of the past as a precursor to laying the foundations for building more inclusive societies. Consequently, from its predominantly legalistic origins in the mid-1990s, transitional justice has confronted a range of societal, economic and political pressures that have precipitated a more expansive framing and understanding its normative parameters. A significant number of these pressures emerged from processes that were unfolding on the African continent, which placed the continent at the forefront of experimentation with norms of transitional justice.

The legal origins of transitional justice

The idea of transitional justice emerged from the legal sphere through a primary concern of how to ensure that perpetrators of human rights violations were held accountable for their crimes and punished, ideally through a court of law and in accordance with international standards. The originators and custodians of these “international standards”, however, is less clear and still remains unspecified in the field of transitional justice, even with the UN’s framing of the field. The notions that initially animated transitional justice drew heavily upon legalistic doctrines of “the duty/right to punish” and the unitary role and function of prosecutions in the context of human rights violations.

Socio-political pressures on the legal remit of transitional justice

The normative pressures on the legal remit of transitional justice exerted by the grassroots experiences of Africa societies emerging from conflict compelled the scope of transitional justice to expand significantly.

Transitional justice is now faced with a broad range of challenges including administering justice in a manner that can restore societal trust and promote political reconciliation in deeply divided communities. Furthermore, the demands for socio-economic justice have pushed the normative boundaries of transitional justice beyond the confines of its historical origins within the legal sphere into the realm of politics. The calls for reparations and restitution have demanded new approaches to operationalising transitional justice, which has linked it to the political, peacebuilding and development fields. The requirement of reforming political institutions, in particular, has also compelled transitional justice to expand its parameters to begin to address issues of constitutionalism and democratic governance.

Gender exclusion in the transitional justice processes

Some of the contestation around transitional justice relates to the way in which it deals with gender issues. The politics of transitional justice should therefore ensure that the voices of women are incorporated into the design and framing of transitional justice processes. This requires the active participation of women in the political negotiations that define the orientation of transitional justice processes and that nature of its institutions. Political interference has to be constrained to ensure that women’s and men’s voices are heard, when dealing with issues of gender-based violence.

Extending the parameters of transitional justice

The increasing interest and focus of governmental and intergovernmental organisations in the challenges of post-conflict redress precipitated the institutionalisation of transitional justice. However, the overt legal orientation of transitional justice is now being questioned as traditional peacebuilding challenges come to the fore. In particular, the need to establish forward-looking frameworks for societal transformation that focuses on rebuilding relationships between groups within society, as well as between society and state actors and institutions, are not readily addressed through the gamut of transitional justice processes and mechanisms. Nevertheless, there is an emerging process of institutionalisation, which is increasingly

manifest in the field of transitional justice.

The framing of the African Union Transitional Justice Policy (AUTJP) encourages countries and societies to broaden their understanding of justice beyond retributive justice to encompass restorative and transformative measures found in traditional African systems of redress and accountability. The AUTJP further recommends that states enacting transitional justice measures incorporate economic and social rights and encourages states to design reparations programmes that would address the structural nature of economic and social rights violations and that non-state actors and beneficiaries should be encouraged to participate in such programmes. The efforts by the AU to push the boundaries of the way in which transitional justice has been conceived to include social and economic rights rectifies an oversight that was internalised by the dominant legal framework, which defined the field, despite the articulation of the need for reparation. The economic and social dimension of transitional justice processes is now emerging as a key driver of sustainable transformation for societies that have experienced violations. The AUTJP recommends the promotion of reconciliation as a profound process that entails finding a way to live that permits a vision of the future, the rebuilding of relationships, coming to terms with the past acts and enemies, and involves societies in a long-term process of deep change.

On politics and politicking: The dimensions of transitional justice

The propensity for state actors to instrumentalise process, mechanisms and institutions to advance their own self-serving agendas is common across the African continent, as well as around the world. Political actors are not averse to shaping political outcomes that protect themselves and their cronies. Regrettably, the infusion of ethics in politics is more of an exception than the rule in the majority of human societies. Consequently, efforts to deal with the past come to be held hostage or undermined by the nature of contemporary politics. On the specific issue of dealing with the past, the political intention is more often than not to mould transitional justice processes in a way that is politically advantageous, as opposed to framing it in a way that is most

relevant to enabling countries to deal with the past and chart a course for transforming societies.

The orientation of transitional justice processes, and the nature of the formal institutions that are established to advance truth recovery, administer justice or facilitate reparations, is generally determined by the political formations that govern a particular country. For example, truth commissions that are tasked with efforts to oversee truth recovery, which are central to any effort to initiate redress for past violations, are often fraught with political manipulation. In Kenya, the chairperson of the country's Truth, Justice and Reconciliation Commission (TJRC), Bethuel Kiplagat, a political appointee, was a senior bureaucrat when the government was accused of having executed citizens in the 1984 Wagalla massacre in the former North Eastern Province. In other situations, following a transitional justice process, such as a truth and reconciliation commission or a special tribunal, the political interest in ensuring that reparation programmes can decline. For example, in South Africa, the compensation amounts paid are only a fraction of what the TRC recommended. Furthermore, the South African government ignored the implementation of a broad range of other TRC recommendations, which were considered politically untenable. The danger is that such processes become labelled disingenuous processes, which serve as a smoke screen for enabling the perpetrators – such as the authors and executors of the apartheid regime – including the powerful political elites, to avoid making the necessary restitution for the past atrocities that they may have committed. Such sentiments have been expressed about the South African, Ghanaian and Liberian truth and reconciliation commissions.

Informal and tradition-based transitional justice processes and mechanisms, such as the *gacaca* courts of Rwanda or the *mato oput* process in Uganda, might be exempt from the effects of politicisation, but they are not immune to being distorted by dominant authority structures, such as patriarchy, through which they are operationalised. Such a state of affairs can undermine the transitional justice institutions even prior to them being established, which has consequences for the wider society and all future efforts to stabilise the society. Transitional justice processes are at their core about redesigning societies and as such they will infringe

upon the vested interests of political and business elites in the country. Therefore, the politicisation of transitional justice processes can sabotage efforts to redesign and re-imagine societies, and ultimately contaminate peacebuilding initiatives.

Re-affirming the interface between transitional justice, reconciliation and peacebuilding

In order to decrease the saliency of the politicisation of transitional justice processes, it is necessary to re-affirm the interface between reconciliation, peacebuilding and transitional justice. Several countries are emerging from conflict and the challenge of peacebuilding is immediately confronted by the demands for justice for the victims of human rights atrocities. Traditionally, the pursuit of justice in international relations has been considered detrimental to achieving peace and reconciliation, which are inherently political processes. This has precipitated the politicisation of reconciliation processes, along the lines of the politics of transitional justice. As far as the interface between transitional justice, reconciliation and peacebuilding the best way to grapple with this common issue of politicisation is to consider peace and justice as mutually inclusive and complementary. In addition, it is useful to disaggregate the different dimensions of reconciliation, so as not to over-emphasise its overtly political nature.

Political reconciliation

Reconciliation is often viewed as an individual and inter-subjective process, but today it has moved into the political realm.¹ Following the political settlement of a conflict, efforts are also made to put in place an institutional framework to advance reconciliation. However, the notion leaves open the question as to whether inter-group reconciliation is possible. One can point to populations, countries and governments that were once bitter enemies who currently enjoy improved relations.

Social reconciliation

Social reconciliation refers to the importance of establishing dialogue, understanding, forgiveness and ultimately healing between actors in a

social context. All societies have tensions inherent in their structures and among their members. When this tension is inappropriately managed, societies can fragment and even implode. The efforts required to bring about a restoration of societal harmony requires a process of social reconciliation.

Economic reconciliation

Violent conflict or protracted authoritarian rule creates economic conditions in which there are huge disparities between the beneficiaries, who gained from a previous historical circumstance, and the victims. Reconciliation cannot exclusively be consolidated by a social and political rapprochement between victims and perpetrators, as it also requires a deliberate policy of economic distribution of global, national or communal resources in order to assuage the grievances that were committed in the past. Hence economic reconciliation is an integral part of the healing process and would generally take several decades or generations or centuries to implement.

Linking the accountability discourse to inclusive reconciliation

These multiple dimensions of reconciliation point to the necessity of expanding the parameters through which we contemplate, plan and design engagements. One of the elements that are core to reconciliation is the need for stakeholders to articulate a common, forward-looking vision that links the political, social and economic spheres. An inclusive reconciliation process is forward-looking in the sense that it implicitly suggests and proposes a new vision for relationships within society and the state, as well as contributing to a deeper process of social transformation. Preventive reconciliation can be understood as the process of constructing a new society through rebuilding previously damaged relationships between people, as well as forging a new framework of legitimacy between people and the state in order to prevent the escalation of tension and violence. Consequently, as a means to expand its remit, reconciliation should be embedded in a preventive discourse, which is forward-looking and future-oriented. This would reframe the function of reconciliation beyond the

retrospective or remedial approach leading in the transitional justice field, which has dominated the accountability discourse. More specifically, this approach would expand the parameters of the discourse of reconciliation, beyond the accountability discourse dominant in transitional justice, towards a more transformative approach predicated on envisioning a new future. In other words, inclusive reconciliation is in essence about recognising the inherent interdependence and interconnection between people, which will be progressively re-established in the future. Through the interventions to progressively re-establish the interdependence and interconnectivity between people, the quality of peacebuilding gets enhanced and prevents the recourse to violent confrontation. In practical terms, reconciliation is predicated on actualising and acting upon the commonality that unites us all as human beings. By extension, one can then argue convincingly for the necessity to “invest” in inclusive reconciliation due to a recognition of our common humanity and its appeal to solidarity with others in times of need.

Reframing reconciliation along these lines provides stakeholders and their partners with the conceptual clarity to target their preventive interventions more effectively. Reconciliation as a future-oriented process provides a framework for multi-actor and multi-level operational engagement that can be demarcated with intermediary, short-term objectives in the lead up to the longer-term aspirational goal of achieving reconciliation. Consequently, there is a need to broaden the scope of programmatic entry points for reconciliation, so that a broad range of stakeholders can contribute towards achieving integrated and coordinated multiple interventions at different levels, in a way that links short-term objectives to longer-term goals. A transformative approach is forward-looking and predicated on rebuilding relationships in deeply divided societies as part of a social reconstruction process, with a view to constructing a new future society.

Containing the influence of politics on transitional justice and reconciliation processes

Given the nature of human society, it is unlikely that one can eliminate the influence of politics on transitional justice and reconciliation. In fact,

it might be a truism to state that transitional justice and reconciliation processes are inherently political, and that the best we can aspire to is to ensure that they are premised and implemented through the promotion of the politics of inclusion. Consequently, in situations where there has not been a “transition”, defined in this instance as regime transformation, then vested political interests will inevitably frame and potentially corrupt transitional justice and reconciliation processes. This is the reality that has unfolded and persists in the Great Lakes region of Africa.

In terms of the way forward, an important aspect of sustaining the politics of inclusion in the implementation of transitional justice and reconciliation processes is to maximise the opportunities to ensure victims’ participation. Regrettably, the institutionalisation of transitional justice has led to the instances in which those most affected by the violations of the past are not in control of the processes that are designed and implemented to deal with their past. As such these victims become unwilling “spectators” in the “theatre of transitional justice” that is directed in many cases by governmental actors in collusion with intergovernmental institutions and international donors. In effect, this leads to the denial of victim ownership of the design and implementation of transitional justice and reconciliation processes. This is particularly salient when it comes to ensuring the inclusion of women’s experiences and interests in transitional justice and reconciliation processes.

Beyond national transitional justice processes and the prospects for regional political reconciliation

A secondary strategy could be to scale up transitional justice processes from their country-specific focus towards a regionalised political approach to dealing with the past. The national focus of transitional justice processes is increasingly unsustainable, particularly in situations where conflicts spill across borders, for example in the eastern DRC, Rwanda and Burundi. This means institutionalising regional political reconciliation processes, particularly in the Great Lakes region.

A regional reconciliation approach would draw in state political actors into cross-border processes, which could potentially reduce the prospects for the internal political control and manipulation of transitional justice.

A regional political reconciliation approach would typically require the negotiation between governments of how to frame and operationalise transitional justice processes. This requirement of cross-border political negotiation would mitigate against each individual state manipulating transitional justice processes. However, such an approach inevitably has limits because cross-border transitional justice processes can also become prey to inter-state politics and can equally be subject to corruption. Therefore, the notion of regional reconciliation is affected by policy challenges in terms of how to operationalise the structures and institutions which can underpin its implementation.

The AUTJP's framing of the politics of transitional justice

The AUTJP's efforts to push the boundaries of the way in which transitional justice has been conceived to include political, social and economic rights rectifies an oversight that was internalised by the dominant legal framework, which defined the field, despite the articulation of the need for reparation. The socio-political and economic dimension of transitional justice processes is now emerging as a key driver of sustainable transformation for societies that have experienced violations.

The AUTJP recommends the promotion of reconciliation as a profound process, which entails finding a way to live that permits a vision of the future, the rebuilding of relationships, coming to terms with the past acts and enemies, and involves societies in a long-term process of deep change. Specifically, the AUTJP advocates for the importance of coming "to terms with the traumas of slavery, colonialism, apartheid, systemic repression and civil wars" as a necessary precursor to "achieving sustainable peace, justice, reconciliation, social cohesion and healing".² In this regard, the AUTJP is also path-breaking in terms of providing a political framework, for addressing trauma and woundedness, which is an issue that is often swept under the carpet, with the mistaken belief that the issues will remain under the carpet. The key challenge is to ensure that AU member states engage and utilise the AUTJP to guide their own national processes, as well as inform regional reconciliation processes going forward.

Conclusion

This chapter has assessed how transitional justice originated from the legal tradition, with a biased focus on the judicial processes to address civil and political violations, during transitions to and lay the foundations for the post-transition rule of law. Africa's experience demonstrated that traditional notions of transitional justice needed to be re-thought and re-framed. Specifically, in order to address the real concerns of victims of past violations effectively, transitional justice norms had to be expanded beyond their narrow civil and political focus, to include socio-economic and psycho-social issues. The chapter discussed how transitional justice is now understood as involving a broad spectrum of interventions that are embedded in political, peacebuilding and developmental processes.

This chapter further discussed how transitional justice processes can be instrumentalised for political purposes. It assessed how certain dimensions of transitional justice, such as accountability processes, reparations and the reform of institutions, are also subject to political interference. The politicisation of transitional justice leads to actors manipulating and moulding processes and institutions to their advantage. Consequently, this chapter highlighted the importance of context specificity and acknowledging what the political forces will permit when it comes to designing and implementing transitional justice and reconciliation processes. The politicisation of transitional justice processes in a manner that undermines efforts to promote democratic inclusion and heal the divisions in society prevents efforts to achieve reconciliation.

Africa has played a leading role in the global promotion of practices and norms of transitional justice. Africa in this sense has challenged the artificial normative strictures of the global discourse of transitional justice and advanced its own home-grown norms to dealing with the violations of the past. Africa's experimentation with a broad range of norms and practices has re-affirmed the interface between politics and transitional justice. Several countries are emerging from conflict and the challenge of peacebuilding is immediately confronted by the political demands for justice for the victims of human rights atrocities. Traditionally, the pursuit of justice in international relations was considered detrimental to achieving peace and reconciliation, which are inherently political processes. However, Africa's experiences have challenged this presumption

and demonstrated the necessary nexus between transitional justice and political processes.

Africa's experiences have also evoked the need to scale up transitional justice processes from their country-specific focus towards a normative shift based on a regionalised political approach to dealing with the past. Despite the growing acknowledgment of regional conflicts, regional political reconciliation has *not* been the norm. Africa will continue to innovate on the development of transitional justice norms, due to the fact that a number of countries on the continent will be emerging from conflict in the next decade and beyond. By extension, Africa will continue to be a thought-leader, norm-setter and norm entrepreneur in terms of transitional justice processes and institutions and the perplexing challenge of addressing the violations of the past. In effect, this chapter argued that the notion of transitional justice is today much more expansive in terms of what is politically being practised on the ground.

CHAPTER FOUR

Environmental Transitional Justice: A Critique of the African Union Transitional Justice Policy

Munini Mutuku

Introduction

The twenty-first century has witnessed a significant number of African countries resolving their civil wars and conflicts through the utilisation of transitional justice processes.¹ Conflicts have long been fuelled by diverse triggers, including disputes over access and control of natural resources that are either “high-value” or non-extractive. These efforts by African states have been strengthened by the support of regional institutions like the African Union and the African Commission on Human and Peoples’ Rights, amongst others. Formulation and adoption of human rights instruments and policies that promote mechanisms geared towards establishing peace and stability, such as the AU Policy on Post-Conflict Reconstruction and Development of 2006 and the African Union Policy Framework on Transitional Justice of 2019, have provided guidance to national legal and policy frameworks.

In the search for peace and stability, transitional justice has become a common feature of peacebuilding efforts with its various mechanisms being adopted in diverse forms to help society come to terms with the past.

These efforts are heavily anchored on the need to address the dual objective of justice and reconciliation in a mutually supportive way.² Through a set of judicial and non-judicial measures that have retributive and restorative elements, transitional justice has been used to address historical injustices and empower affected countries in the process of transformational justice. It has sought to establish inclusive political and socioeconomic systems that are able and willing to enforce human and peoples' rights.³ There is a growing need to pursue a sustainable development agenda to justice, which is anchored on the three pillars focused on social, economic and environmental aspects. This will inevitably provide redress for the negative impacts suffered by the environment, which is the "silent victim" of armed conflicts and war.

The African Union Transitional Justice Policy Framework (AUTJP) does not elaborate on the provisions that explore the relationship between transitional justice and environmental protection and restoration. In its current formulation the AUTJP does not provide guidance on how we can achieve post-conflict environmental justice through protection, remediation, clean ups and rehabilitation. This chapter makes the case that environmental damage and crimes that emanate from periods of violent conflicts and war are issues that need to be engaged through transitional justice efforts, mechanisms and policy frameworks. In particular, this chapter seeks to generate a debate on the omissions of environmental transitional justice in the AUTJP with a view to mapping out a conceptual approach to ensuring that it is factored into national and regional processes for redress and accountability. The chapter will propose strategies and recommendations that can be adopted in the implementation of the policy to achieve justice for the environment as a victim, and for other victims who are injured as a consequence of environmental damage and crimes suffered during war and conflicts.

Environmental damage and transitional justice

Violent conflicts and war have often caused significant destruction and degradation to the environment, the ecological communities and the human societies that depend on natural resources for sustenance. For instance, the civil wars in Angola (oil, diamonds), Congo-Brazzaville (oil), the Democratic Republic of the Congo (copper, coltan, diamonds,

gold, cobalt), Liberia (timber, diamonds, iron, palm oil, cocoa, coffee, cannabis, rubber, gold), Sierra Leone (diamonds) and the Sudan (oil).⁴ Coupled with the collapse of institutions that provide essential services, direct and indirect environmental damage often leads to environmental risks that threaten people's lives, health, livelihoods and security, thus exacerbating poverty and inequality well after transitional justice processes have yielded cease fire and "normality".⁵ These impacts are an indication that the toll of violent conflicts and warfare reaches far beyond human suffering, displacement and damage to homes and infrastructure. Beyond the physical harm to both humans and the natural resource base is the evident injury to ecological communities that make up the non-human biota, the disrupted relationship that exists between the communities and their environment, including their sense of place, and the passing of intergenerational burdens from the current generation to the future generations.⁶

Besides the environmental impacts that are related to war and violent conflicts, the direct and indirect targeting of the biophysical environment by the various actors is inevitable and comes to light when the environment and its natural resources are used: as a weapon where it is "weaponised" and used to wield violence or injury against another; as a victim where it is illegally exploited and looted or polluted with weapons of war; or as a beneficiary where areas are set aside as peace zones or "off-limit" territories and consequently protecting them from damage and crime.⁷

In the aftermath of violent conflicts and war, these scenarios exacerbate damage to the ecological systems when forests, land, water sources amongst other natural resources and elements of nature are further exploited to support post-conflict social and economic recovery efforts. They affect the survival rights of communities such as the right to life, health and to clean and safe water and food. Populations are again left to deal with "freshly" degraded and contaminated environmental resources (including pollution of water and land), and depleted environmental resources (including the deforestation and other livelihoods dependent on natural resources).⁸ This ultimately undermines post-conflict transitional justice efforts since there can be no durable transition to peace and stability if the environment that hosts natural resources that sustain life, livelihoods, development and economic growth is damaged, degraded and destroyed. Thus, the need

for the implementation of transitional justice processes that prioritise environmental transitional justice through various means, including rehabilitation, clean ups, remediation and sound recovery programmes and policies that support restoration.

Despite the fact that the AUTJP provides benchmarks and standards of redistributive socio-economic justice,⁹ its implementation should consider the inclusion of restorative justice, especially that which relates to addressing environmental damage as a violation or even a crime. In its efforts of transformation, restorative justice facilitates restorative and reparative outcomes for the environment thereby affirming fundamental principles that support ecological sustainable development and restoration.¹⁰ This would highlight the importance of environmental remediation and reparation within transitional justice approaches and also strive to incorporate economic, social and cultural rights, especially as they relate to historical environmental injustices and environmental damage in the post-conflict context.¹¹ The use of these processes in dealing with environmental damage and crime should target restorative processes that use participatory methods to engage the victims, offenders, communities and the environment.¹²

At another level, implementation should take cognisance of the fact that distributive environmental justice and procedural environmental justice are two elements of justice associated with environmental justice. They form key pillars in the quest for environmental transitional justice. The latter recognises that everyone has a right to a healthy and safe environment and this forms part of the human right to a dignified life. The former requires that citizens need to be informed about and involved in decision making.¹³ They need to be enabled to identify and stop acts that breach environmental laws and cause environmental injustices, an aspect that helps uphold distributive environmental justice.¹⁴

Environment and transitional justice

The AUTJP carries with it the core norms and standards of transitional justice, which include the duty to prosecute, the right to the truth and the right to remedy and reparations.¹⁵ Since the 1990s, a number of African countries have implemented transitional justice processes guided by these norms and standards that are contained in various instruments like the

African Charter on Human and Peoples' Rights, the Constitutive Act of the African Union and the African Union Policy on Post-Conflict Reconstruction and Development, amongst others.¹⁶ The efforts by corresponding regional institutions and mechanisms have attempted "ending impunity caused by past and present human rights violations, achieving compensation for the victims of the violations and preventing the recurrence of such abuses in the future"¹⁷ with a dimension on environmental justice.

In relation to the conflict in Sudan, the African Commission on Human and Peoples' Rights noted that during the war, destruction and poisoning of water sources not only posed a risk to the people but also to the very environment that communities depended on. The Commission's recommendations highlighted the need to rehabilitate the economic and social infrastructure, including water and agricultural services in order to provide conditions for return in safety and dignity.¹⁸ Even though the Commission did not explicitly state the dimension of environmental rehabilitation and remediation, which was paramount to social healing, based on the recognition that social and environmental justice are interrelated, the Commission set a platform for transitional justice mechanisms and relevant post-conflict peacebuilding efforts to provide strategies for remediation, clean ups, rehabilitation and removal of environmental threats to provide a healthy and satisfactory environment.

In the case of Liberia, the Truth and Reconciliation Commission (TRC) was mandated to investigate, amongst other issues, economic crimes which include the exploitation of natural or public resources and their role in perpetuating armed conflicts. The Liberia TRC report provided recommendations relating to the environment, natural resources, and the equitable, sustainable use and management of land and other natural resources.¹⁹ The Commission mainly addressed social, economic, cultural and political recommendations with minimal focus on environmental concerns. The environmental concerns that the report highlighted focused on exploitation and benefit sharing emanating from access and control over natural resources. The recommendation did not explore the possibilities of remediation of an environment that had been ravaged by war, clean up of land mines and other explosives and debris emanating from weapons of war, rehabilitation and restoration of

damaged natural resource livelihoods and conservation.

In its communication concerning the Democratic Republic of the Congo and the role of Burundi, Rwanda and Uganda in the illegal exploitation and looting of natural resources, the African Commission on Human and Peoples' Rights recommended that adequate reparations be paid for and on behalf of the victims of the violations.²⁰ This recommendation brings to the picture environmental victims who are, as defined by Williams, "those of past, present or future generations who are injured as a consequence of change to the chemical, physical, microbiological, or psycho-social environment brought about by deliberate or reckless, individual or collective human act or omission".²¹ The object of reference in this definition is the human being, ecological communities, the biosphere and non-human biota, which have intrinsic value independent of their utilitarian or instrumental value for humans. When injured by environmental damage and crime, ecological communities, the biosphere and non-human biota become victims whose protection and healing is paramount. This recognition though not referenced in this communication "gives the environment and its non-human biota a voice, validity and respect"²² and redefines humanity's relationship with the environment and its natural resources.²³

Greening the implementation of the African Union Transitional Justice Policy

The integration of environmental aspects and principles in the implementation of the African Union Transitional Justice Policy Framework provides for broader political value as it recognises the links between environmental change and social justice. Incorporating an environmental dimension to transitional justice processes provides a much broader post-conflict legal and political landscape, and acts as a catalyst for broader legal and regulatory reforms. In effect, such an integration processes "provides a scope for enhanced consideration of environmental rehabilitation, remediation, restoration and reparation particularly as regards historical environmental injustices and inequalities especially when these inequalities have been a causal factor in exacerbating violent conflicts and war".²⁴

Conclusion

This chapter assessed how the incorporating of a "green" approach to broaden and expand on the provisions enumerated in the AUTJP will provide a platform for triple-win development policies and programming that regenerates the global commons by integrating social development with economic growth and environmental sustainability.²⁵ The chapter also assessed how the pursuit of an emphasis on the sustainable management of the environment and its natural resources ensures its sustainability and existence, regenerates its vital cycles while applying a "nature-focused rights" approach and not only a "human-centred duties" approach.²⁶ It also enables society to avert the recurrence of resource-based conflicts that are brought about by the lack of attention to governance reform concerning the very natural resources that were the root cause of the conflict.²⁷ Ultimately, it will give opportunity for the actualisation of a human rights framework as a tool for addressing environmental damage in the post-conflict context.

As various African countries seek to adopt transitional justice mechanisms as guided by the AUTJP, the need to provide for platforms where victims of environmental harms and crimes can participate through various methods cannot be understated. As noted in the chapter, the submission of environmental victim statements, hearings before the Truth and Reconciliation Commission on environmental injustices, creation of "green" tribunals, creation of dispute resolution platforms that focus on natural resources and the environment are amongst some of the ways environmental transitional justice can give "a voice" to communities, the non-human biota and the environment.

It is the obligation of the states to cooperate in addressing environmental impacts that are related to war and violent conflicts with the realisation that some conflicts are interconnected, especially if the same concern disputes over shared utilisation of natural resources like waters (lakes and rivers), forests or the allocation and exploitation of "fugitive" marine resources in transboundary areas and those that are outside national jurisdiction.²⁸ Hence, transitional justice mechanisms should be set up in cognisance of the fact that environmental damage and crime could extend beyond the borders of the countries in focus and qualify as regional or transnational abuses.

The emerging right to a healthy and satisfactory environment stipulated in legal and policy frameworks at the national levels and within the African Charter on Human and Peoples' Rights recognises that environmental damage can have both direct and indirect impacts on the enjoyment of a wide range of human rights and is itself a violation of human rights laws. The implementation of the AUTJP should thus be in tandem with these provisions to ensure that the full range of processes and mechanisms associated with a society's attempt to come to terms with the legacy of large-scale past abuses in order to ensure redress and accountability in a manner that contributes towards environmental transitional justice and reconciliation.²⁹

PART TWO

NATIONAL TRANSITIONAL JUSTICE INITIATIVES

CHAPTER FIVE

Central African Republic and the Implementation of the African Union Transitional Justice Policy

Amanda Lucey and Peter Knoope

Introduction

The Central African Republic (CAR) has had a recurring need for transitional justice as expressed in the outcomes of high-level meetings, such as the Bangui Forum. In 2020, a law was passed establishing a Commission for Truth, Justice, Reparations and Reconciliation (CVJRR) with commissioners being appointed to undertake the challenging task of guiding the country through the process of redress and accountability. This chapter considers the commission's mandate and makes recommendations for how its work can be most effective, based on lessons from past commissions and the application of the African Union Transitional Justice Policy (AUTJP). Among these, a victim-centred approach and broad outreach strategy will be paramount, while building on past efforts to document and analyse cycles of violence. In this regard, the chapter will provide a brief historical context to transitional justice efforts in the Central African Republic, and then assess the mandate of the CVJRR, as stipulated in the law promulgating its establishment. This chapter will then examine the AUTJP, its general principles and indicative elements,

as well as lessons learned from past truth commissions. The chapter will conclude by highlighting key recommendations for consideration in setting up the CVJRR.

Central African Republic: Contextualising transitional justice initiatives

CAR remains beset by cycles of violence that span ethnic, religious and communal divides. The United Nations (UN) now estimates that 2.8 million people (over half the population) require humanitarian assistance.¹ At a political level, the December 2020 presidential and legislative elections were marred by controversy over the electoral process. This included the invalidation of former president François Bozizé's application. Bozizé came to power in 2003 and was ousted in 2013, but continues to have a significant following. The rejection of his candidacy resulted in offensives and obstruction by armed groups. Faustin-Archange Touadéra was re-appointed in January 2021, but ongoing conflict and a lack of inclusive dialogue remain a severe threat to the long-term resolution of conflict.

The Political Agreement for Peace and Reconciliation in CAR (APPR-RCA) was signed by the government and 14 rebel groups in the country in February 2019, but has already been criticised for lacking inclusivity and has been stalled. Security remains a major concern – especially along the north-west and south-east borders, and the trust deficit in the state is growing. Meanwhile, a multiplicity of actors continue to manipulate ethnic and religious identities to ensure their access to power. Sectarian violence has promoted recent waves of violence, although addressing these issues is complex and often neglected.²

CAR is now at a critical juncture in determining its path to peace. For peace to be sustained, it will be vital to ensure accountability for the perpetrators of political violence, to promote reconciliation and justice rather than revenge, and to ensure the creation of a national inclusive identity. In this context, the calls for transitional justice in the country have a historical precedence. The UN extensively mapped human rights violations in multiple conflicts between 2003 and 2013, with clear recommendations on a sequenced and comprehensive approach to transitional justice. This includes the need to establish a truth commission

and a prosecutions strategy for the Special Criminal Court (SCC).³

The Bangui Forum, held in 2015, also cited the need to balance accountability with truth and reconciliation.⁴ This was a national conference that brought together over 600 participants from government, civil society, political parties, the media, the diaspora and faith-based organisations. It is considered one of the most inclusive efforts to build a roadmap to peace, but many of its recommendations have fallen by the wayside.⁵ A monitoring committee was established to ensure the implementation of recommendations that arose from the forum, but it suffers from a lack of resources and political buy-in.⁶

Another mechanism is the National Recovery and Peacebuilding Plan (2017–2021), which prioritises different pillars of peace. Pillar one speaks to restoring peace, security and reconciliation; pillar two refers to renewing the social contract between the state and the population; and pillar three outlines how to strengthen the economy and the productive sectors. Currently, the return of security in some parts of the country has created some normalcy, but much more can be done to promote a narrative of social cohesion.

The mandate of CAR's Commission for Truth, Justice, Reparations and Reconciliation and its relation to the AUTJP

In early 2020, a law was passed that established the Commission for Truth, Justice, Reparations and Reconciliation (Commission Vérité, Justice, Réconciliation et Réparation, or CVJRR). By the end of the year, President Touadéra had confirmed the nomination of 11 commissioners, five of whom are women. The commissioners were sworn in on 2 July 2021, and their appointment presents an opportunity to consider the factors critical to their success.

As detailed in the law on its establishment, organisation and functioning, the CVJRR is tasked with analysing the circumstances, factors and motivations for the conflict, reaching back as early as 29 March 1959 and ending on 31 December 2019. It was intended to provide a space for listening, honouring the memory of victims and generating collective healing. The CVJRR is non-judicial in nature, but instructed to carry out

activities that complement those of the ordinary justice system and the SCC, which was set up in 2015 and became operational in 2018.⁷

The Commission had a four-year period in which to carry out its activities, with the option to extend this mandate by an additional 12 months at its request.⁸ The Commission has four objectives, namely, to:

1. Determine the truth of past violations;
2. Research on the options for pursuing justice;
3. Restore the dignity of the victims; and
4. Promote national reconciliation.

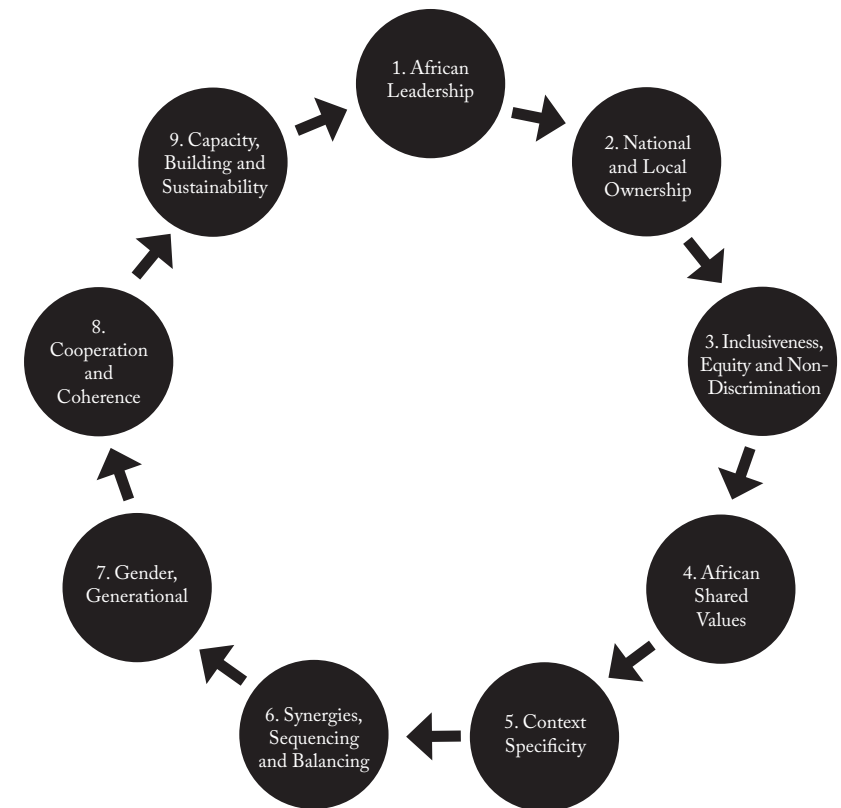
The CVJRR had the mandate to make recommendations on the way forward and to establish both individual and collective non-judicial responsibilities. The country's legislation outlined the Commission's ability to establish a reparations fund and to propose a system of reparations, while also developing a programme of action to promote reconciliation using traditional and non-traditional mechanisms. The legislation also guides the Commission to assess issues of injustice, inequality, corruption, tribalism, nepotism, exclusion and memorialisation.⁹

The CVJRR was composed of a plenary assembly, a bureau and sub-commissions. The four sub-commissions are: truth, justice, reparations and reconciliation. The provision was designed to enable any individual to lay a complaint before the Commission, and the Commission itself can also raise pertinent issues and organise thematic engagements.¹⁰ In this regard, given the broad nature of this mandate, the Commission sought to develop an overarching strategy and to consider what factors will ensure its success. In this regard, lessons from past truth commissions, such as those that were instituted in South Africa, Rwanda and Sierra Leone, are critical.

Applying the African Union Transitional Justice Policy

The African Union adopted a transitional justice policy based on extensive consultations and lessons learned from past experiences with truth commissions. The AUTJP identifies nine key principles, as shown in Figure 5.1.

Figure 5.1: Key principles in the AUTJP



Source: *African Union Transitional Justice Policy*

On the first principle, namely African leadership, the policy insists that transitional justice remains the responsibility of African governments, while the AU can provide strategic leadership and leverage its position to involve multiple actors.¹¹ It is worth noting that commissioners from truth commissions in South Africa, Sierra Leone, Liberia and Kenya have also previously emphasised the importance of political will in ensuring the success of a commission. Since the CVJRR is mandated to make recommendations, it is important that these recommendations are implemented.¹²

The second principle, national and local ownership, is critical to promote a common understanding. National ownership can also contribute to the rebuilding of legitimate state authority.¹³ Partnerships

are critical, including those with non-state actors. Indeed, past experiences with truth commissions have stressed the importance of involving citizens at all stages of the process, and engaging civil society in the design and implementation of all projects and activities to ensure popular and informed participation.

It is also imperative that the process be decentralised and localised to reach victims across the country, and to ensure the greatest level of participation and representation.¹⁴ In a similar vein, since exclusion and discrimination are often among the root causes of conflict, a key principle refers to promoting inclusiveness, equity and non-discrimination.¹⁵

African shared values are important in promoting transitional justice and there is no one-size-fits-all approach. This means that transitional processes should be context specific, drawing on the nature of the conflict as well as broader systemic issues.¹⁶ Moreover, past experience has demonstrated the importance of focusing on patterns of abuse rather than isolated incidents to develop a holistic and cohesive analysis of the past, with tailored recommendations that consider the systemic nature of the abuses.¹⁷

In terms of synergies, it is critical that a balance be found between peace and reconciliation on the one hand, and responsibility and accountability on the other. This means that transitional justice measures should be comprehensively planned, in collaboration with the SCC and the ordinary justice system, while programmes to impact on socio-economic development should also complement such measures. This also relates to the principle of cooperation and coherence between the various stakeholders at local, national and international levels.¹⁸

The AUTJP stresses the importance of considering the gendered dimensions of violence and in paying attention to patterns of inequality, while adopting measures for women and youth. The final principle of the policy refers to building the capacity of society to support national and local processes that can prevent a return to violence.

The AUTJP also contains several indicative elements, which cover the following:

- Peace processes (involving transitional justice in all peace agreements and negotiations);
- Transitional justice commissions (the establishment of independent, legal bodies with a fact-finding mandate);

- AU transitional justice mechanisms (incorporating community accountability and resolution mechanisms);
- Reconciliation and social healing (building trust and ensuring full redress/reparation);
- Reparations (consisting of financial and non-financial redress);
- Retributive (socio-economic) justice (forward-looking measures to address structural inequalities, marginalisation and exclusion, including opportunities for youth);
- Memorialisation (public acknowledgement of victims and institutionalising societal dialogue, including commemorative activities);
- Diversity management (race, ethnicity, colour, sex, language, religion, political or any other opinion);
- Justice and accountability (formal and traditional legal measures for addressing crime, including African traditional justice mechanisms);
- Mitigation of sentences (no limitation to the investigation and prosecution of serious violations, especially sexual and gender-based violence, but consideration of other cases if for the purposes of truth-telling, investigation and prosecution);
- Amnesties (only for the purpose of preventing further violence and truth-telling, and with the consent of communities);
- Political and institutional reforms (institutions of the state, accompanied by democratic practices); and
- Human and people's rights (restoring human dignity).

Cross-cutting issues include women and girls, children and youth, persons with disabilities, internally displaced people (IDPs), refugees and stateless persons, and older persons.

It should also be noted that the AUTJP has benchmarks for all of these indicative elements. Some of these benchmarks are considered in the next section in terms of their relevance to the CVJRR in the CAR, with recommendations for the way forward.

A few other points relevant to CAR's transitional justice processes are noteworthy from past experiences. Firstly, ensuring security for all victims while testifying is paramount and, as such, clear strategies should promote the participation and protection of witnesses and victims. This includes considerations to avoid revealing their identities, the protection of

testimonies and options for private testimonies, and the accompaniment of psycho-social support. Commissions should also be able to subpoena any person to testify and have the power to seize evidence.¹⁹ Perhaps most importantly of all is the fact that transitional justice should be survivor and victim-centred, and all survivors and victims should be considered throughout the design and implementation of transitional justice processes and mechanisms.²⁰

This approach is particularly necessary considering their experience of subordination – not only by the act itself – but also in terms of other factors that may have prompted their marginalisation, such as poverty, gender or ethnicity.²¹ Ensuring that victims have agency and a voice in the transitional justice process is therefore critical to ensure that victims' perspectives are not further undermined, and to prevent a feeling of powerlessness from being reinforced.

In this regard, mental health and psycho-social support is critical to prevent the perpetuation of trauma and underlying attitudes, and to restore a social fabric.²² Some practical guides exist, notably emphasising the need for a contextualised approach, the importance of investing in a thorough needs assessment, tailoring activities to an evolving situation, developing strategies for secondment and building sustainability.²³ The following section outlines some key considerations relating to the operationalisation and work of the CVJRR.

Key considerations for the operationalisation and work of the CVJRR

Victim-centred needs in CAR

As noted above, a victim-centred approach is essential for the CVJRR. The International Centre for Transitional Justice (ICTJ) and Cordaid have already conducted some research on the needs of victims in the CAR based on 68 qualitative interviews,²⁴ which provides guidance on the way forward. The research suggests that victims' needs have evolved over time and are linked to the provision of justice systems and the socio-economic situation. The report notes that criminal accountability is paramount, especially for victims in Bangui, but that reparations are also a key concern

– especially for those outside of the capital. The notion of social justice was also raised, with many citing hunger as a vital concern. In addition, most interviewees expressed the need for meaningful participation and for a unifying outreach and communication strategy.

The research found two major preliminary challenges to the implementation of transitional justice: ongoing conflict that impacts on the ability to provide justice and deep polarisation along religious lines. Those interviewed expressed concerns that the Commission may not sufficiently acknowledge issues of identity and ethnicity. Sexual and gender-based violence (SGBV), as well as more structural gender challenges also came to the fore, as well as the interests of children and youth. The report emphasised key hindrances to implementation as being a lack of coordination between the SCC and the Bangui Court of Appeal, a reliance of informal justice, and the fact that the CVJRR was a non-judicial mechanism.²⁵

If the Commission is to promote a victim-centred approach, it will have to ensure that it begins its outreach with citizens immediately to define the types of narratives on ethnicity and identity it will investigate, as well as discussions on gender. Beyond this, it will need to consider how it will address the structural challenges of injustice, inequality and exclusion.

As described in the law establishing the CVJRR, the focus is broad and ambitious – covering a period of 60 years. The Commission needs to incorporate the broad range of voices across the country as well as ensure that it does not alienate certain groups. The Commission would also take into account dialogues between different religious, political and community leaders. Further, policies and regulatory measures were considered to promote national cohesion and combat hate speech. The Commission addressed thematic topics important to the general population, in order to devise strategies to engage pastoral communities who may operate across borders.

The CVJRR also took into account how best to work with the broader justice system to ensure a balance between criminal accountability, reparations and reconciliation. It should be noted that the SCC was tasked with focusing on the most horrendous human rights violations.

The organisation and operation of the CVJRR

As noted in the AUTJP, synergising, sequencing and balancing, as well as cooperation and coherence are key principles. As such, the CVJRR considered issues such as the structuring of the sub-commissions, as well as detailing the role of the sub-commissions and how these sub-commissions engage with one another, particularly in terms of cross-cutting issues. The Commission's work was decentralised to ensure widespread consultation, localised to include the work of local peace committees, and convening in a politically neutral space.

To achieve maximum impact, the CVJRR needed to consider its overarching goals and objectives and indicators for success, along with measures for monitoring its progress. It was tasked with drawing together a broad range of narratives to promote an overarching, cohesive national identity. The CVJRR also made provisions for its volumes of information to be stored in a way that ensures the protection of testimony. Critically, the Commission considered how it would collaborate with other national institutions – such as the SCC, the regular justice system and human-rights commission – to promote truth-telling, such as through subpoenas. The Commission would also consider amnesties, vetting, lustration and the nature of policing in the post-conflict era.

Beyond this the CVJRR was mandated to engage experts, including psycho-social experts and mental health professionals. The Commission also pursued strategies to address thematic areas, such as for resourcing the reparations fund, communications and for the dissemination of reports.

Strategies for the promotion and participation of witnesses and victims

As far as transitional justice processes are concerned, ensuring the promotion and participation of witnesses and victims is key. The CVJRR considered how to protect and preserve identities, as well as testimonies, including the classification of participants as “witnesses”. Truth-telling in itself is considered a form of recognition and justice for victims,²⁶ and the CVJRR made an effort to address different types of denial.²⁷ Justice can also take several forms, such as prosecutions, lustration (or a ban from holding public office), reparations, and institutional and constitutional

reforms. Within this, the Commission was mandated to consider if victims and communities would be able to engage in appropriate sentencing or alternative forms of punishment (such as community service, public redemption, or local and historically rooted systems). Moreover, in addition the Commission had the mandate to consider land reform/property rights, and whether affirmative action packages need to be considered.

In terms of reparations, these can be moral or symbolic. Examples of reparations can include cash payments, official public apologies, pensions, free health care, free psychological care, educational support, return of property, compensation for lost relatives, museums and memorials, and days of commemoration. The Commission was mandated to develop an approach to reparations from a perspective that takes resourcing into consideration, examines the limits of what is achievable and sets clear coordination guidelines. In effect, reparations should take into account the needs of victims and ensure that they are transformative, non-discriminatory and participatory.

Regarding reconciliation, the CVJRR was mandated to consider if forgiveness was a pre-requisite, examine localised models of forgiveness and link this to national-level initiatives. To promote longer-lasting reconciliation, programmes should be set up to institute social cohesion, coexistence and reconciliation, as well as address structural marginalisation, exclusion and other forms of inequalities, such as education.

Furthermore, as noted in the AUTJP, memorialisation is an important aspect of transitional justice – but critically needs to promote inclusion. This requires a common understanding of underlying dynamics. This common understanding can promote intergenerational dialogue and education.

The inclusion of victims and survivors

A key element of the Commission's mandate was to consider sexual and gender-based violence (SGBV) and more systematic gender issues, including the provision of psycho-social support to victims and survivors. The Commission would need to address gender-specific material obstacles to participation, including ensuring sufficient financial resources and enabling witnesses to engage the hearings. Similarly, the Commission

targeted the concerns from children and youth actors, in line with the provisions of the AUTJP as well as with the African Charter on the Rights and Welfare of the Child, to promote youth-specific programmes, including support to those who have lost their parents. The CVJRR developed strategies for the inclusion of those with disabilities, IDPs, refugees and stateless persons and specific measures of redress.

Conclusion

This chapter has outlined the highly challenging context of the environment in which the CVJRR will need to operate, as well as its broad and ambitious mandate. The Commission embarked on a process of learning from the experiences and lessons learned from truth commissions from across Africa as well as around the world. The chapter has also illustrated that the CAR CVJRR drew specific insights from the AUTJP, and was engaged through extensive consultations with experts convened by the African Union and partner institutions. The Commission has to ensure that it sustains its outreach and communications strategy to ensure the broadest level of participation across society, and to promote forward-looking narratives on social coherence. The Commission has a responsibility to reach out to societies across the country through a decentralised and localised strategy for engaging local peace committees.

The African Union will continue to provide technical support to the CVJRR in applying the provisions of the AUTJP, including emphasising the importance of a victim-centred approach and traditional African approaches to justice, reparations and reconciliation. In particular, it is necessary for CAR to participate in knowledge sharing with transitional justice experts from across the African continent.

International partners will also need to ensure that they coordinate their interventions and support initiatives based on their comparative advantage to achieve specific outcomes. In addition, international partners need to provide facility to channel resources in a manner that addresses national priorities, such as the provision of psycho-social support. In addition, international partners can contribute towards raising awareness of the transitional justice initiatives in CAR to enable and facilitate an exchange of knowledge with other efforts across the continent and around the world.

CHAPTER SIX

Zimbabwe and the Role of Civil Society in Leveraging the African Union Transitional Justice Policy

Dzikamai Bere

Introduction

In February 2019, the African Union adopted the African Union Transitional Justice Policy (AUTJP)¹ after almost a decade of advocacy efforts by civil society. The AUTJP is expected to act as a guideline for member states in their quest to confront and address past injustices. The adoption of the AUTJP is the first step in a continental drive to implement a coherent transitional justice mechanism that can be applied to different contexts. Just as the role of civil society was critical in the development of the AUTJP, similar proactive civil society leadership will be required to ensure the implementation of transitional justice at national level in AU member states.

This chapter draws upon the experiences in Zimbabwe to discuss a model of how civil society can play an effective proactive leadership role in pushing for the implementation of transitional justice. The chapter outlines the civil society-led process in Zimbabwe that moved the transitional justice agenda from the early stages of isolated solution-seeking initiatives like the report *Breaking the Silence, Building True Peace:*

*A Report on the Disturbances in Matabeleland and the Midlands, 1980 to 1988*² produced in 1997; more organised consensus-building processes such as the 2003 Johannesburg Symposium on Civil Society and Justice in Zimbabwe³; establishment of a broad civil society coordination framework named National Transitional Justice Working Group (NTJWG)⁴; and the adoption of the 2013 Constitution of Zimbabwe, which laid down a number of transitional justice measures, including the establishment of the National Peace and Reconciliation Commission (NPRC). This chapter will focus on how the experiences and models developed in Zimbabwe can be used and adapted for other countries around Africa and other parts of the world, to ensure that civil society can play a proactive role in leading transitional justice efforts.

The AUTJP and civil society actors

The AUTJP was adopted unanimously in February 2019 after almost a decade of advocacy work. The AUTJP brings what has now become a global practice in post-violent conflict situations back to Africa, in line with African values of *ubuntu*. The AUTJP covers both retributive justice and restorative justice, and is anchored upon the nine principles that constitute the basic minimum values and standards across processes.

The key guiding principles of the AUTJP include:

1. African Leadership
2. National and Local Ownership
3. Inclusiveness, Equity and Non-Discrimination
4. African Shared Values
5. Context Specificity
6. Synergising, Sequencing and Balancing Transitional Justice Elements
7. Due Regard to the Gender and Generational Dimensions
8. Cooperation and Coherence
9. Capacity Building for Sustainability

Key among the principles is the principle of African leadership, which makes it clear that implementation of transitional justice is a responsibility of African governments. The other and equally important principle is national and local ownership, which states that partnerships, particularly at the national level between beneficiaries and the government, state and

non-state actors, are critical to nationally driven successful transitional justice processes. It is in this principle mainly that the role of civil society is acknowledged as critical to ownership of the process. This is also linked to the principle of equity, inclusivity and non-discrimination. The principle is in line with the global best practices. The United Nations High Commissioner for Human Rights has pointed out that “transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future”⁵.

Efforts to promote transitional justice in Southern Africa

The story of Africa is a story of the liberation of a people burdened by the legacy of oppression dating back to the time of slavery, the slave trade and later colonialism and apartheid, as well as experiences of post-independence human rights violations. In Southern Africa, the burden of apartheid and post-colonial repression created a legacy, which continues to haunt the region. Significant steps were made in the initial days of independence. Most notable was the Truth and Reconciliation Commission (TRC) established by Nelson Mandela in South Africa. While its success remains debatable, the TRC led to the birth of a vibrant global transitional justice movement, which documented key lessons and practices that were adopted in many other contexts. What has necessitated the current push has been the relapse of many African states into repression and the mere failure by even non-autocratic states to adequately confront the legacy of colonialism. These include the failure to dismantle the colonial architecture of violence, failure to provide rehabilitation to the many victims of the wars of liberation, failure to promote inclusive economic growth, widening inequality, creating an increase in social tensions as well as the continued marginalisation of women and perpetuation of systems that prolong harmful power relations. These failures present a threat to Africa’s continuing liberation agenda. It is this legacy, which, if not addressed, will create a risk of instability in the region socially, economically and politically.

It is on the background of this legacy that the AUTJP presents an opportunity for Southern Africa to begin an honest conversation about its past. The AUTJP allows Africans to knit together experiences from

various jurisdictions for a progressive transitional justice agenda that enhances the potential for justice, peace and reconciliation.

The trajectory of transitional justice in Zimbabwe

Zimbabwe's transitional justice question goes as far back as the colonial era, and specifically during the liberation war when organisations like Amnesty International and Catholic Institute for International Relations (CIIR) documented the atrocities committed by the Rhodesian regime.⁶ Historians have also documented violations committed by oppressive colonial forces and the liberation war fighters against civilians, and their victims have had to endure shocking levels of trauma in post-independence times. While there were some piecemeal overtures at addressing the legacy of the pre-independence atrocities, there was no comprehensive transitional justice programme. In 1980, the Zimbabwe government proclaimed the policy of national reconciliation. The government also passed the War Victims Compensation Fund in 1982 to provide compensation to victims of the liberation war violence. Despite having a policy of national reconciliation in place, by 1983, Zimbabwe had fallen into Gukurahundi massacres when the government unleashed the military in the Midlands and Matebeleland provinces in which it is estimated that over 20 000 people were killed.⁷ Later, many more atrocities were committed by the government, including police brutality against rioters in 1998,⁸ farm invasions from 2000 to 2008 political violence and Operation Murambatsvina which displaced over 700 000 people.⁹

Civil society's efforts in leveraging transitional justice in Zimbabwe

While the state is equipped with the necessary resources and infrastructure for the implementation of transitional justice, civil society as a representative of various communities of interests brings wide participation and the technical expertise necessary to ensure the process is done according to the best practices. It is necessary to promote the participation of survivors and victims of past violations, to ensure the principles of equity, inclusivity and non-discrimination are upheld.

Thus civil society plays its leadership role within the parameters of these principles while acknowledging that the responsibility of implementation is with respective African governments. From 2003, civil society began leading transitional justice dialogue at the Johannesburg Symposium that identified a number of transitional justice priorities that were ultimately adopted in the 2013 Constitution. In 2014, the National Transitional Justice Working Group (NTJWG) came into existence as a broad coalition of civil society actors, eager to see the implementation of transitional justice provisions of the Constitution.

The evolution of the current transitional justice movement in Zimbabwe can be reduced to five key steps. These are:

- Conceptualisation and consensus building;
- Establishment of a coordination framework;
- Building the transitional justice community of ordinary people;
- Developing a national strategy; and
- Implementation.

An assessment of these steps will be discussed below.

Conceptualisation and consensus building on transitional justice in Zimbabwe

In Zimbabwe, the transitional justice conversation was triggered by politically motivated violence which accompanied the 2000 and 2002 parliamentary and presidential elections, respectively. From the frustration of the growing number of neglected victims, civil society actors began the building of an alternative platform that sought to advance the needs of the victims of past atrocities. This inspired the Zimbabwe Human Rights NGO Forum in collaboration with the Southern Africa Trauma Coalition to convene a major meeting in Johannesburg called "Civil Society and Justice in Zimbabwe". This meeting was attended by over 68 organisations from Zimbabwe with whom a comprehensive transitional justice programme was conceived.

Delegates at the symposium were unanimous that "civil society must play a central role in the development and ownership of processes that explore transitional [justice] options and solutions, and that an elite 'deal' must be avoided and countered wherever possible. In this regard, many participants stressed the necessity of engaging a broader cross-section of

Zimbabwean civil society, to develop awareness and lay the foundations for legitimacy”.¹⁰

Public outreach: Cascading the message on transitional justice

Civil society organisations charged themselves to develop awareness for transitional justice and lay the foundations for legitimacy, through a process of civic education and public consultations. The Zimbabwe Human Rights NGO Forum was given the task to bring this vision into fruition. In 2009, the Forum launched the Taking Transitional Justice to the People Programme. The first phase of the programme consisted of mainly civic education, with the convening of a total of 52 meetings held across the 10 provinces of Zimbabwe. The meeting objectives were two fold: firstly, they provided communities with education on what transitional justice is and important information on the unfolding events in Zimbabwe that made it a necessity;¹¹ secondly, they were consultative in the sense that they allowed members of the public to share their vision on how they expected the crisis in Zimbabwe to be resolved.

An outreach report was published which captured the views of the communities. Additionally, a community education tool on transitional justice, *The Peoples' Guide to Understanding Transitional Justice*,¹² was produced. It unpacked the concepts of transitional justice in a manner easy to understand and relatable for most communities. In particular, the policy recommendations were extracted in these reports and presentations were made to the Parliamentary Select Committee working on reform of the Constitution. This became the second level of the outreach, targeting policymakers with recommendations on transitional justice policy for Zimbabwe.

In May 2013, a new Constitution came into effect in Zimbabwe, capturing some of the policy proposal presented by stakeholders. These included the establishment of the National Peace and Reconciliation Commission (NPRC), the provision for the establishment of an Independent Complaints Mechanism to handle complaints against the security sector, among many others.¹³

A key lesson at this stage is on how civil society can mobilise community participation in policy formulation and ensure that the important transitional justice issues find themselves on the important policy discussion and ultimately in an official document.

A transitional justice coordination framework: Designing the rules of the game

Following the adoption of the 2013 Constitution in August 2013, the Forum in collaboration with the Institute for Justice and Reconciliation (IJR) together with the Hague Institute for Global Justice (HIGJ) convened the Second International Conference on Transitional Justice in Zimbabwe.¹⁴ The conference was a theatre of imagination on how the transitional justice measures in the Constitution could be envisioned in reality. It focused on the constitutional requirements on establishment and operationalisation of the National Peace and Reconciliation Commission (NPRC) and how stakeholders could work to ensure that these measures are implemented faithfully. It was at this conference that a major resolution was made for the establishment of a transitional justice coordination framework. This came in the form of the National Transitional Justice Working Group (NTJWG).

The role of the NTJWG as a coordinating platform was mainly to establish the rules of the game, coordinate transitional justice advocacy and provide interface between civil society and official mechanisms. The NTJWG was established before any of the official transitional justice bodies came into being. It thus became the precursor to the constitutionally mandated NPRC-led transitional justice process in Zimbabwe. The group dedicated a lot of time to developing standards and guidelines for specific transitional justice processes.

Developing a national transitional justice strategy

A critical step that must be taken deliberately is the development of a national strategy as an advocacy tool and a rallying point for demanding the implementation of transitional justice. In November 2018, the NTJWG, in collaboration with the Centre for the Study of Violence and Reconciliation (CSVR), convened a Transitional Justice Policy Symposium to begin the process of developing a National Strategy for Zimbabwe.¹⁵ The symposium brought together over 113 delegates from different sectors of society, including civil society leaders, independent commissions, parliamentarians, international experts, local victim groups and experts from the African Union who has been working on the

AUTJP. Two propositions came out of the symposium and the subsequent reflective sessions: the Civil Society Transitional Justice Strategy and a Framework for a National Transitional Justice Policy.

The efforts to operationalise transitional justice: A transformative advocacy approach

In pursuit of the identified objective, civil society strategy used the transformative advocacy approach. Transformative advocacy is a proactive approach that pursues principled direct interaction and engagement with the systems to influence positive transformation, inside out and outside in.

- From outside, societies and communities' good practices and success stories can persuade policymakers to adopt certain models to achieve social change. A case study for such an approach is Sierra Leone's Fambul Tok programme, which used community approaches to make a reality some of the recommendations of Sierra Leone's Truth Commission.¹⁶ From this approach, building networks for knowledge sharing and communities of practice for observation and learning is critical. Such communities can be domestic or global.
- From inside, advocates can supply policymakers with sufficient knowledge and evidence to influence transformative decision making. Such supply may include field visits, exchange programmes and reflective meetings. An example of this approach is the NTJWG's engagement with parliamentarians ahead of the passage of the NPRC Act from 2016 to 2017, giving adequate information for lawmakers to pass good laws.¹⁷

"Working with the grain" and leveraging transitional justice opportunities

The "working with the grain" approach provides an opportunity for pursuing transitional justice in the "now" with available resources rather than wait for a perfect opportunity "tomorrow". To many activists, the insistence on transitional justice in a non-transitional state seems folly and miscalculated. For them, transitional justice is a very straightforward

task. All you need is an end or collapse of the old order, some international frameworks and a toolkit for vetting, lustration, institutional reform, an international tribunal to try some perpetrators for international crimes, put the bad guys in prison, have a truth commission, and generate the kind of publicity that South Africa generated through its Truth and Reconciliation Commission (TRC). And soon, the nation is on a path to healing and recovery. The presumption is, as Brian Levy¹⁸ puts it, that there is a best practice out there that once identified could – given "political will" – be adopted, cookie-cutter-like, as the solution to the problems of our countries.

Levy argues that in social transformation there is no need to wait for perfect conditions but we must start working with what we have in the now. He calls this approach "Working with the grain"¹⁹ and describes the approach as follows:

A with-the-grain approach conceives of change in evolutionary rather than engineering terms and so directs attention away from the search for "optimal" policies and toward the challenges of initiating and sustaining forward development momentum. Its point of departure is that a country's economy, polity and society – and the institutions that underpin each of these – are embedded in a complex network of interdependencies. To be successful, reforms cannot be reengineered from scratch but need to be aligned with these realities. They need to be compatible with the incentives of a critical mass of influential actors, so that they have a stake in the reforms and are willing to champion them in the face of opposition from those who benefit from the pre-existing arrangements. The aim is to nudge things along, seeking gains that, though useful, often are initially likely to seem quite modest but can, sometimes, give rise to a cascading sequence of change for the better.²⁰

In its strategy, NTJWG recognises that there is some grain, spaces for entry, which can be utilised to catalyse great transformative processes without need to wait for perfect conditions. This approach, together with a number of transformative advocacy tools underlines NTJWG's National Transitional Justice Strategy.

Building a critical mass

Following the successful convening of the 2018 Transitional Justice Policy Symposium in Bulawayo, delegates realised the potential that lies in uniting different actors for action. One of the delegates said:

Transitional justice won't happen unless it becomes not only a concept and a program, but a social movement. I saw that beginning to happen in Bulawayo and saw that this movement not only includes the strategically invited participants from various institutions around the country, but also the community members and leaders we met on our field visits; we are now all in this together.

What she expressed here forms the third pillar of the NTJWG National Transitional Justice Strategy. Transitional justice will not happen when only one of two voices are heard. It will only happen when there is a critical mass, demanding it and civil society leadership modelling it. This builds on the primacy of participation. Gladwell notes that although the world “may seem like an immovable, implacable place ... it isn't ... with the slightest push – in just the right place – it can be tipped”.²¹ In this regard, the critical mass approach requires that conversations on critical matters break open the doors and windows of the conference room, and go beyond twitter into the streets, motivating people to take action on matters they care for. Building on the success of the previous interventions in laying down the principles and clarifying the message for communities, the NTJWG approach sought to influence conversations and actions in multiple ways to build the critical mass to make transitional justice unavoidable. While the “working with the grain” approach and the transformative advocacy approach target process, the critical mass approach focuses on movement building. In the absence of a political will, a critical mass can create or activate political will.

Strategies to enhance civil society engagement

Every society has to develop its own strategy depending on context and tools available. Once the key elements of a strategy are agreed by all key

sectors, specific actions will have to be undertaken to move strategy into action and results. Implementing a national strategy is an ongoing process which may take various forms under the three pillars outlined above. In Zimbabwe, these actions have been implemented in various forms.

As far as the SADC region is concerned, the creation of expert partnerships with civil society organisations built upon the development and adoption of the AUTJP, which was a partnership between intergovernmental agencies and civil society actors. The SADC Secretariat can draw lessons from this process and begin building synergies with civil society in SADC so as to kick-start the process and begin pushing for implementation in the SADC region. Countries in the SADC region can also document success stories of transitional justice implementation. In South Africa, the story of the TRC and the continuing legacy of national dialogue visible in many sites of memory across the country are examples that can be used for the advancement of transitional justice in the region. In addition, it is necessary to place transitional justice on the SADC agenda. A lot of work has been put into decentralising the transitional justice agenda at African Union level. This momentum provides an opportunity for the SADC Secretariat to tap into the regional drive and bring the conversation into SADC.

National governments can accelerate transitional justice implementation and mobilise other actors to support such initiatives. In this regard, it is necessary to create government departments that have a focus on transitional justice. More specifically, governments should contemplate creating special units to manage transitional justice processes. This will allow for a specialised focused approach, which can then spearhead the government way of mainstreaming transitional justice. By creating a special unit within government, it provides a framework for identifying and securing technical and financial support for national transitional justice processes.

In line with the principle of inclusivity, governments will be able to draw upon the expertise of civil society and other non-state actors, which will anchor national ownership and generate citizen buy-in for transitional justice processes. By drawing upon the AUTJP, civil society can begin producing domestic policy models which governments can make use of in implementing transitional justice. There are policy champions in many

governments and transitional justice bodies who desire to implement transitional justice according to the law and the best practices but they fail to do so due to lack of expertise. In Zimbabwe, when the Parliament of Zimbabwe was making amendments to the NPRC Bill in 2017, NTJWG worked the individual parliamentarians to draft amendments relating to gender in the Bill. These were introduced successfully leading to the current Section 9 provisions of the NPRC Act.

In line with Section 4 of the AUTJP, civil society actors can also contribute to monitoring the processes, assessing and evaluating the impact of transitional justice processes. In this regard, it is necessary to capacitate local actors in monitoring transitional justice processes. This can be done through the introduction of a National Reconciliation Barometer for every country in the region so that they take stock of how they are doing and identify the gaps, drawing upon the experience and expertise of the South African Reconciliation Barometer.

Transitional justice processes are resource intensive, and attempts to rely on quick-fix solutions are bound to fail. Furthermore, transitional justice is increasingly a knowledge-intensive field with a broad range of frameworks applied in different contexts. In this regard, it relies on sourcing its insights from a wide range of different disciplines including law, history, political science, sociology, psychology, art, pathology and others. In this regard, countries should ensure that they develop sustainable knowledge generation and management processes, by collaborating and supporting research and tertiary education institutions. There are a range of programmes that can be developed through partnerships with universities on research, developing transitional justice internships and fellowships, hosting public lectures series and senior knowledge exchange programmes. Such programmes will assist transitional justice bodies with expertise needed and will deepen the community discourse on transitional justice, as well as contributing towards building a transitional justice knowledge economy.

Transitional justice processes must mainstream gender justice, due to the fact that in a significant number of African countries, the legacies of violence are not merely linked to militarised states but also the harmful power relations and patriarchal systems that sustain repressive gender-biased power relations. Transforming these relations requires deliberate

targeted investments in the area of gender justice. In Zimbabwe, efforts were made to ensure that in the enabling Act for the NPRC, gender was treated as having both a cross-cutting dimension as well as a separate issue for deliberate focus and engagement.

Conclusion

This chapter assessed how transitional justice interventions and responses to massive human rights violations often depend on the nature of the context. However, it is important not to wait for conditions to become ideal as there is foundational work that can be done to prepare for the formal establishment of institutions and mechanisms.²² The AUTJP is an important innovation for the African continent and offers a sufficiently broad range of guidelines and suggestions from which individual countries and their societies can draw upon. In this regard, this chapter assessed how it is unlikely that transitional justice processes will succeed if civil society is not actively involved and engaged in developing, implementing and monitoring the processes. Even under progressive governments like the Mandela government in South Africa, civil society participated in the active engagement with transitional justice processes, providing valuable input. In some cases, civil society experts were appointed to the official national institutions, such as the truth commission, and contributed in providing leadership to the transitional justice process. There are no limits to what role civil society is expected to play. The role of civil society in Zimbabwe's efforts to deal with the legacy of its past highlights the importance of early engagement with societal actors in the process to ensure that the design and expertise is secured to lay the foundations for implementing transitional justice processes.

CHAPTER SEVEN

Burundi and the Memorialisation of Past Violations: Insights from the African Union Transitional Justice Policy

Hajayandi Patrick

Introduction

For a certain period in recent history, memorialisation was not considered an important tool to be used in fostering transitional justice processes. But the situation is gradually changing and memorialisation as part of instruments to address the traumatic past is gaining momentum. Brandon Hamber, a prominent expert on transitional justice, defines memorialisation as a combination of various processes and forms of collective remembrance. He also insists that this process is fundamental for a society trying to recover from trauma and atrocity.¹

The African Union Transitional Justice Policy (AUTJP) has also brought memorialisation to the forefront as it highlights its important role as part of measures that go beyond the immediate transitional period. These measures are like stepping stones towards truth recovery, reconciliation and healing within societies that are grappling with legacies of a violent past. Memorialisation is considered as one of the indicative elements of this policy, which offers guidelines for countries trying to engage in transitional justice processes.

The AUTJP stresses the importance of memorialisation by showing that it allows people to acknowledge the victims of violence and their pain. Memorialisation, as a long-term process, institutionalises the societal dialogue across generations and strongly contributes to the fight against impunity in the national discourse.²

Drawing from Burundi's transitional justice process, this chapter shares insights from this country on what works and what doesn't work in dealing with memorialisation. Burundi has been affected by decades of inter-ethnic violence between the Hutu and the Tutsi ethnic groups, and this situation has led to the emergence of antagonistic memories and contradicting perceptions of the past. In this regard, the history of Burundi is highly controversial and the different events that are connected to the violent past are recounted and interpreted through different narratives, as Manirakiza notes.³

One of the most important insights is therefore the need to be inclusive in order to create a space for all the contradicting voices to be heard and different perceptions of the traumatic past to be voiced out. The success of a memorialisation process relies heavily on the ability of the political leadership to transcend existing divisions within a society trying to address the violent past and to lead from a resolutely uniting position, that allows everyone to be on board. An exclusion stance will lead to the failure of a memorialisation, especially when the process is set to take place in a society divided along identity lines.

Memorialisation: A conceptual framework

Memorialisation can take various forms of remembrance and commemoration. It can be viewed as a process and as an initiative at the same time but, in reality, it can even go beyond. It is an integral part of transitional justice tools despite the fact that it tends to be forgotten or left behind. By definition, memorialisation "is a process that satisfies the desire to honor those who suffered or died during conflict and becomes a means of examining the past".⁴

According to the African Union Transitional Justice Policy (AUTJP), "memorialization entails the measures beyond the immediate transitional period that are necessary for truth, reconciliation and healing, involving public acknowledgment of the victims and institutionalizing both societal

dialogue across generations and non-impunity in national discourse".⁵ This underlines the fact that memorialisation, despite the fact that it is part and parcel of transitional justice tools or mechanisms, in reality does go beyond the transitional period and continues to play a role, for instance in educating younger generations and in fostering the protection of human rights.

When memorialisation takes place in a society that is emerging from years of traumatic past events, its importance and relevance is appreciated differently. There is a tendency to always observe a controversy around what memorialisation should be about and even why it should happen in the first place.

A divided society will generally have pros and cons vis-à-vis the process of memorialisation. In such a society, antagonistic views on and conflicting perceptions of the past are inevitable: we often find that on the one hand there are people who think it is important to remember what happened in order to prevent its repetition by younger generations. On the other hand, there are those who think it is preferable to leave the past behind or to simply forget about it, sweeping whatever related to it under the rug. However, to remember is part of who human beings are. It is almost impossible to prevent people from remembering the past and how it affected them.

According to Mahr et. al, "the ability to remember allows humans to distinguish knowledge about the past that they acquired on the basis of their own experience from that acquired in other ways. This ability constitutes the basis for testimony about the past: An act of testimony is an account about the past that is claimed to be based on first-hand experience."⁶ In the Burundian context, those who support the idea about leaving the past behind or those who do not want "to dig up what is rotten" (a popular saying in Kirundi which is: "*Kuzura akaboze*"), are generally connected directly or indirectly to past crimes. Therefore, their push back against memorialisation is a protection mechanism. Once the historical facts are determined, they may find themselves in an uncomfortable position.

At the same time, while promoting memorialisation as a necessary step towards community healing, it is equally important to develop a strong leadership that insist on reconciliation and on restoring the social fabric

that was torn apart by violent conflict, ethnic strife or hatred and different forms of repression and discrimination. When a space is created to allow the contradictions to come out through a constructive dialogue related to memorialisation, a new social foundation can be established thus allowing for genuine reconciliation to take place. According to Barsalou et al., “memorialization represents a powerful arena of contested memory and offers the possibility of aiding the formation of new national, community and ethnic identities”.⁷

As the AUTJP shows, the process of memorialisation encompasses a lot of activities that can complement the work of truth commissions, particularly with regard to collecting data and dealing with historical facts about committed crimes. This is a principle of complementarity according to which memory initiatives can “foster transformative justice and build on and take forward the complementary work of mechanisms of truth, justice, reparation and non-impunity”.⁸ Memorialisation plays a role in education programmes that contribute to ensuring the non-repetition of atrocities. It is through activities such as visiting museums, hearing victims sharing their stories or learning about what happened that the new generations learn to say, “never again”. If someone visits the Genocide Memorial in Kigali, for example, there is always a sense of awareness that arises regarding the need to prevent such horrors from happening. Such an effect is difficult to achieve in a normal classroom. The awareness is linked to the encounter with such a unique memorialisation experience.

Dealing with the traumatic past through memorialisation

Implementing memorialisation projects and other related initiatives offers the advantage of involving in transitional justice processes large numbers of people from different categories of ages and layers of the society. Memorialisation can have both top-down and bottom-up approaches as it can be initiated either by governments or communities, in particular those of victims. Memorialisation is by essence an inclusive and democratic process when it is not distorted for political reasons.

One common feature for memorialisation and connected historical facts in general is that they are highly contested in most cases. Especially within societies divided along ethnic, racial, religious or any other lines or form of identities, it is not surprising to find differing or even antagonistic

narratives about the past atrocities and who played a key role in them. When a society attempts to address the legacy of violence in its history, there is always a group of people who seem to be unhappy about such an initiative. But memorialisation is a necessity for similar societies. An inclusive memorialisation process can create spaces where the underlying problems behind the antagonistic narratives could be addressed and where a common ground for dialogue and healing could be established.

In the context of Burundi, memorialisation has been one of the most controversial processes when one looks at the transitional justice dynamics and how they play out. With regard to the above, the main problem was and remains the existence of antagonistic narratives and perceptions about who is a victim and who is a perpetrator in the violent conflicts that occurred in Burundi since independence in 1962. From the assassination of the first prime minister, Prince Louis Rwagasore, to the killings that took place in Muramvya in 1965 after the assassination of a second prime minister, Pierre Ngendandumwe; from the execution of Hutu officers in 1969 to the Hutu genocide in 1972; and from the Ntega and Marangara massacres in 1988 to the assassination of President Ndadaye in 1993 and the nationwide violence that followed, there has never been a shared narrative or a consensus on how the events unfolded, who was the real victim and who was a real perpetrator. The two main ethnic groups – the Hutu and the Tutsi – keep accusing each other of the committed crimes. Members of each ethnic group try to show that they have been the only victims while attempting to play down the pain incurred by other groups. In such circumstances, it has become important to create spaces for collective memory, for shared narratives to be brought forth and for people to confront the difficult issues through an honest dialogue.

A need for memorialisation in Burundi: The historical context

Burundi is a nation of wounded memories and contested histories. Its historical trajectory since the struggle for independence back in the '60s has been marked by violence and crimes which have never been addressed. This historical path took a sharp turn when Prince Louis Rwagasore – the first prime minister of the Kingdom of Burundi – was brutally assassinated

on 13 October 1961. His death set in motion a series of tragic events that would finally culminate in the mass killings that occurred a decade later, when around 300 000 Hutu intellectuals were massacred between 1972 and 1973, under the compliant eye of the international community.⁹

The following years saw the Ntega and Marangara massacres in 1988 in the north of the country. Despite being confined only within the limits of two districts, the 1988 crisis was just like a rehearsal of what happened in 1993. Following the assassination of the first Hutu President – Melchior Ndadaye – on 21 October 1993 by the armed forces in the bloodiest coup the country has ever known, Burundi's foundations as a nation were shaken. Just like Rwagasore's death led to ethnic cleavages among the political elite, the sudden and brutal death of Ndadaye led to inter-ethnic massacres of an unprecedented magnitude.

The military coup and the assassination of President Ndadaye and his close collaborators plunged the country into violence, chaos and anarchy. Hundreds of thousands of people – both Tutsi and Hutu – lost their lives in the mass violence and killings that were triggered by the coup and the decimation of the political leadership. On the one hand, thousands of Tutsis were brutally killed by angry and furious mobs of Hutu, who believed that they were avenging Ndadaye's death but in reality were committing heinous and atrocious crimes against humanity. On the other hand, the army, which at the time was considered monoethnic, attacked in retaliation and massacred hundreds of thousands of Hutu in the hills. For the Hutu involved in killing Tutsi, it is undeniable that Ndadaye's death triggered the committed crimes. However, it would be wrong to explain their actions by only the simple willingness to revenge a beloved president. There were other triggering factors that came into play, some of them stretching back into history such as the 1965 and 1969 massacres and executions of Hutu leaders, and the 1972 genocide against the Hutu. Outrage and frustration pushed peasants to launch fierce attacks against Tutsi. They used machetes, knives, clubs and torches and lashed out against anyone they perceived as an enemy. Across the country, homes were burned, and families and individuals were massacred. The army, surprised by the turn of events, went out with all its arsenal to retaliate, killing tens of thousands of Hutu peasants. With helicopters, mortars, machine guns, the army indiscriminately massacred Hutu, burned entire

villages, and looted any home that held anything of value. In total, an estimated 2.5% of the population was slaughtered by both sides.¹⁰

Challenges to memorialisation in the Burundi context

The politics of memory and the way narratives of traumatic events are used in a given society can shape individual and community perceptions of the past, especially when that past is characterised by contradictions on what happened and who played which role. In such a context, memorialisation represents both a promising and a risky instrument in the hands of the political elite, particularly those tasked with the national reconciliation process. If adequately used and in an inclusive manner, memorialisation holds the promise of bringing a divided society together around contested issues with the objective of finding a common ground. However, when used in a partisan and exclusive way, memorialisation can be risky and could undermine the very reconciliation process for a society attempting to come to terms with the past. This is one important challenge that needs to be considered whenever initiatives focused on dealing with a violent past are being planned.

The second challenge that tends to undermine not only memorialisation, but also the transitional justice process as a whole, is when perpetrators of past atrocities are still powerful enough to influence the political dynamics of a nation attempting to address the past. In the Burundi context, the signing of the Arusha Peace and Reconciliation Accords allowed some alleged perpetrators to enjoy a sort of blanket amnesty. These are people thought to have played an important role in the violence that took lives of tens of thousands of people during the civil war that erupted in 1993. Unfortunately, following a decade of atrocities, the main concern for the facilitators' team was not to arrest those who committed crimes but to be able to reach a ceasefire and ultimately bring an end to violent clashes between the armed movements and Burundi armed forces. As a result, a number of those suspected of fostering violence were rather rewarded with key positions in government. One of the direct consequence was the delay in implementing the clauses related to the establishment of transitional justice mechanisms in Burundi. For instance, from August 2000 when the Arusha accords were signed, the decree institutionalising the Truth and Reconciliation Commission was only signed in 2014. Obviously, this

long delay is explained by a number of factors which include the fact that Burundi continued to struggle with insecurity long after the signing of the ceasefire. However, the lack of political will also played a role in delaying the creation of the TRC and other related transitional justice mechanisms.

Initiatives undertaken to address the past in Burundi

Initially, the implementation of transitional justice mechanisms in the Burundian context was led by a structure known as the tripartite steering committee. It was in operation between 2008 and 2010. The tripartite steering committee was made by the United Nations Burundi Office (ONUB), the Burundi government (GoB) and civil society as they teamed up to exchange and decide on which transitional justice mechanisms would be best for Burundi.¹¹ The differing views and lack of consensus between the three actors resulted in delaying the implementation of the Arusha agreement, with regard to the transitional justice processes. It was only in 2014 when the Truth and Reconciliation Commission (TRC) was established. Since then, the Institute for Justice and Reconciliation has accompanied the work of the Burundi TRC in various capacities and forms. The first activity was the organisation of a study tour aimed at familiarising the commissioners with the transitional justice processes by learning from former South African TRC members. This activity was followed by the training of media staff on how to report on the work of the Burundi's TRC. Currently, there are several initiatives focused on memorialisation that have been completed or are underway. The main initiatives include the production of a documentary film called *Broken Hearts: 1972*¹² containing testimonies on what happened in 1972 and the publication of a photobook featuring both pictures and stories of people who protected or saved others during the civil war in 1993. The film has played (and is still playing) an important role in breaking the silence on issues considered taboo during the military regimes under Micombero, Bagaza and Buyoya.

The book, *Faces and Traces: Paying a Tribute to Unsung Heroes*, brings in the voices of simple people in the general debate on the traumatic past of Burundi with a focus on acts of goodness in troubled times. The book contains extraordinary stories of ordinary people who stood firmly in

their values and did what was needed to save lives: offering shelter, food and medical care; hiding targeted victims of violence; and accomplishing various act of kindness. These are the people to whom this book is dedicated.

By narrating the stories of people who helped or saved others, of those who accepted to put their lives on the line during the troubled time, of those who manifested the spirit of *ubuntu* in the simplest but most dedicated way, the book pays a tribute to their noble deed – acknowledging that they stand as living examples of what true humanity should be, in good times and bad. The film and the book are both tools for memorialisation. The process of memorialisation through these projects looks at the present and the future at the same time. On the one hand, it brings in the present what happened during the troubled years of ethnic violence and which the young generation does not know about. On the other hand, the film and the book help in archiving the told stories, thus holding the memory for the generations to come.

Conclusion

This chapter has assessed the importance of memorialisation in laying the foundations for effective transitional justice processes by drawing insights from the African Union Transitional Justice Policy. Memorialisation in Africa depends heavily on the political leadership's attitude and commitment to creating new foundations for a society in need of healing and restoration. For societies experiencing ethnic, racial, religious or other divisions, it is necessary for all stakeholders and actors involved in the transitional justice process to ensure that memorialisation is as inclusive as possible. It is always important to remember that memorialisation initiatives “reflect and represent not just society's history but more specifically how that history is viewed”.¹³ A fact that is valid for Burundi and other nations attempting to address the legacy of a violent past is that memorialisation is a process that seeks to pay tribute and manifest some respect to those who suffered or lost their lives during traumatic events. As noted in the AUTJP, these may include, for instance, violent conflicts or repressive actions of a dictatorial, colonial and/or any other brutal political regime. In the Burundi context, memorialisation is proving to be an important tool that can be used in examining the past and in

addressing contemporary issues regarding how to deal with the past. This chapter assessed how the process of memorialisation through storytelling has ignited new debates on topics which used to be considered taboo or politically sensitive in Burundi. The documentary film *Broken Hearts: 1972* is a perfect example of how stories from victims, widows, orphans and witnesses of mass atrocities can be used to break silence on decades of trauma, uncovered truths and historical facts.

The chapter emphasised the fact that political leadership is paramount in ensuring the success of transitional justice processes, particularly memorialisation. Depending on who is leading such a process, memorialisation can either promote social recovery after a violent conflict and other forms of human rights abuse, or it can crystallise a sense of victimisation, injustice and discrimination and the desire for revenge. For this reason, when a government is engaged in establishing transitional justice mechanisms, it is important to listen to what the people have to say, in particular those who have been affected by the past atrocities.

The chapter illustrated that establishing of transitional justice mechanisms in Burundi has shown that the governments and especially the political leadership need to ensure that there is a sense of ownership of the memorialisation process. For a society confronted with the issue of divisions and antagonistic narratives, there is always a need to ensure a buy-in from all sides. For Burundi, this means that the government has to ensure that both Hutu and Tutsi feel that the way transitional justice processes are being implemented takes into consideration their interests, fears and expectations.

The governments should encourage public participation and contribution. The general trend shows that the implementation of transitional justice processes tends to have a top-down approach, which leaves no space for public opinion. With regard to memorialisation, this attitude is counterproductive. The people, especially the victims of past atrocities, need to have a say and be able to give their suggestions on what could be done. This approach reinforces the sense of community empowerment and ownership of the process.

Civil society organisations play a vital role in fostering transitional justice. In Burundi, organisations such as the Ministry for Peace and Reconciliation under the Cross (MIPAREC), Trauma Healing and

Reconciliation Services (THARS) and many more have been to the forefront of the work around transitional justice. Their prime focus has been to empower people at the grassroots level so that they can fully participate in transitional justice processes. The example from Burundi shows that civil society organisations should focus on establishing channels through which the suggestions from community members reach the decision-makers, especially the political leadership in charge of implementing the memorialisation process. This will ensure that the top-down and bottom-up approaches go hand in hand.

This chapter noted that given the fact that the victims tend to be left behind, the civil society should invest in the creation of spaces for commemoration in a way that promotes the acknowledgement of the pain every victim experienced, no matter which side of the power they are on. When discussions started around how to address the issues pertaining to transitional justice in Burundi, the United Nations organisation played a significant role. However, it became obvious that its agenda was different from the government's one. There ensued a sort of conflicting perception of what should be considered as a priority. Fortunately, it was in part because of the involvement of the UN as a member of the Burundi's tripartite steering committee that a national consultation on transitional justice mechanisms was realised. At the same time, the case of Burundi showed that the international partners should commit themselves to supporting the memorialisation process through finance and other means. Contrary to other aspects of transitional justice processes, which may be relatively limited in time, the memorialisation is always a long-term project. For countries dependent on international support, this process can prove to be very costly. The financial and moral support from the international community is therefore necessary to make sure that memorialisation contributes to the rebuilding of a torn-apart society.

The international partners should accompany governments and civil society in the difficult task of restoring the social foundations destroyed by crimes, violence and all committed atrocities. At the same time, this allows the international community to be in a position to hold these actors accountable and ensure that they reach positive outcomes. It is equally important for international partners to avoid the temptation of controlling or dictating how the process should be implemented. In

different contexts, the negative or lack of outcomes has been linked to the fact that international partners attempted to lead such processes. Often, the failure comes from the fact that they do not have a proper understanding of the local realities. When international partners try to play a leading role, they prevent the local and national communities from taking ownership of the process.

In conclusion, it is worth noting that apart from ensuring inclusiveness at all levels of decision-making, governments also should encourage the creation of conditions that lead to improved relations across the divided society. This means that memorialisation processes need to include a space for dialogue to foster inclusive narratives and critical reflection on the past. This enables wounded communities to honestly face the unsettling and ugly truths about their history. The outcome would be the change of perceptions and development of empathy towards those previously considered to be enemies, as the case of Burundi so aptly illustrated.

PART THREE

CONTINENTAL AND REGIONAL TRANSITIONAL JUSTICE INITIATIVES

CHAPTER EIGHT

African Union System and the African Union Transitional Justice Policy

Shingirai Mtero

Introduction

The adoption of the African Union Transitional Justice Policy (AUTJP) by the African Union (AU) heads of state and government in February 2019 was a vital step towards further consolidating sustainable peace and justice on the continent. Prior to its adoption, the continent lacked a unified African policy on transitional justice that could be used as a guide and benchmark across the continent. Due to the continent's deep legacy of colonial wars, civil wars and its continued struggle with governance and human rights violations, the adoption of the AUTJP was not only overdue but also essential. The AUTJP is meant to serve as a continental guideline for AU member states to develop their own context-specific comprehensive policies and strategies towards democratic and socio-economic transformation, sustainable peace, justice, reconciliation, social cohesion and healing.¹ This chapter will assess the opportunities and challenges towards implementation of the AUTJP. This chapter will pay particular attention to the utility of the wider AU system in implementing the policy, affirming the assertion of the AU that, "the implementation of the AUTJP will not be successful without the overall strategic political leadership of the AU at the continental level".² The chapter will conclude

by identifying some recommendations on how the wider AU system can contribute towards supporting the implementation of the AUTJP.

The utility of the AUTJP for Africa and the role of the AU system

The AUTJP's key objective is to provide policy parameters on holistic and transformational transitional justice in Africa, and to offer guidelines, benchmarks and practical strategic proposals for the design, implementation, monitoring and evaluation of processes.³ The AUTJP is ground-breaking in its multifaceted approach to justice and reconciliation, its articulation of victimhood, its detailed focus on gender and its aspiration of cross-sectional multi-actor justice mechanisms. Notwithstanding these positive factors, the implementation of this policy within states and across the continent will undoubtedly face challenges. The persistent threat of terrorist attacks, the recurrent eruption of violence in the aftermath of elections and the deplorable use of violence by states against their own citizens has created a unique climate of insecurity in Africa. These security concerns are further compounded by significant human security and development deficits. As such, though the AUTJP possesses great potential, its implementation also faces significant impediments.

In reference to the AU system, the chapter will focus on the role of AU member states, AU organs and AU protocols and policies (see Figure 8.1), noting that each can play a critical role in ensuring the AUTJP implementation and success. The brief will begin by exploring the impediments towards AUTJP implementation and then move on to explore the ways the AU system can be utilised to create opportunities for the successful implementation of the AUTJP. A core argument of this chapter is that strategic leadership and collaboration is required across sectors to provide support and to encourage AU member states to commit to implementing transitional justice initiatives.

Figure 8.1: Engaging the wider AU system for AUTJP implementation



Towards implementing the AUTJP: Challenges and constraints

The AU system presents key challenges to the implementation of policy initiatives such as the AUTJP, particularly in the areas of justice and accountability. The AU's heavy reliance on external partners to fund its personnel and programmes means that the implementation of all policies and programmes continues to face challenges of resource mobilisation. These financial limitations continue to constrain the dedicated and focused implementation of the AUTJP within the AU member states, particularly in the aftermath of civil unrest or war.

A key impediment to generating a commitment to the implementation of transitional justice processes is the nature of the nation-state in Africa and the central role that governmental actors have within the AU system. While the political climate of global governance has become increasingly influenced by the liberal peace discourse, and the global values of human rights, cooperation and interdependence, many of the classic realist prescriptions regarding statehood still persist. In this regard, while many African states acknowledge the primacy of transitional justice initiatives and the indispensable need for accountability in this area, when faced

with the demands of sovereignty, state survival and self-interest, the aspirations for justice and accountability are often side-lined, abandoned and sacrificed in the altar of political expediency. This is evident in member states' selective uptake and support of AU initiatives aimed at increasing accountability in the areas of governance.

For instance, many African states with significant security and governance weaknesses, such as Burundi, the Democratic Republic of the Congo and Libya, have not submitted themselves to the African Peer Review Mechanism (APRM), Africa's self-monitoring mechanism for good governance. Zimbabwe, whose record for the use of the security sector against its own citizens spans decades, has signed up for the APRM, but there have been no significant changes in terms of governance outcomes. There is also scepticism as to whether African governments are committed to these policy processes, based on the fact that countries such as Equatorial Guinea signed up to the APRM, but due to a lack of accountability measures, the work of the APRM has had a minimal effect on the governance structures of the country.⁴ This is largely because these institutional mechanisms, such as the APRM, only require states to volunteer themselves and subsequently cooperate with the AU to ensure implementation. In effect, since there are no enforcement measures for accountability and if the state in question lacks sufficient political will to be accountable to the recommendations of the AU policies or protocols, then there are no immediate repercussions for the government in question.

One of the prescriptions of the AUTJP is the establishment of Transitional Justice Commissions to "examine and address violations and abuses ... [to] identify victims and perpetrators, as well as the role of various State and non-State institutions, and to provide for measures of reconciliation and healing".⁵ These commissions would play a critical role in providing a platform for truth-telling and documenting past violations, which is necessary for the victims and survivors to undertake their journey towards healing and peacebuilding. The establishment of such commissions would undoubtedly require significant state support; however, in the case where the leading political regime or incumbent government is culpable or complicit in the injustices under investigation, state support will not be forthcoming.

In the aftermath of the 2018 Zimbabwean elections, state military

personnel opened fire on citizens in Harare. Though the state facilitated the establishment of a commission of inquiry, led by former South African President Motlanthe, the commission did not result in the admission of guilt by the state, or the prosecution of individuals responsible for killing unarmed civilians. Beyond documenting the events leading to the deaths, the commission was unable to enforce any accountability measures and compel the government to account for those who lost their lives.⁶

This inability to hold governments accountable for their actions also implicates the state-led AU organs that are tasked with managing and maintaining governance, peace and security. In particular, the AU Commission (AUC), the Peace and Security Council (PSC), the African Court on Human and Peoples' Rights (AfCHPR), the APRM and the Pan-African Parliament (PAP) are all led by or capacitated through states. Hence, given the complicity of African states in human rights violations, wars and violent conflicts, this makes the pursuit of justice and state sovereignty a much more challenging mission.

In the case of the AfCHPR, Rwanda and Tanzania withdrew the right for its citizens and non-governmental organisations (NGOs) to file applications against the state. This reduced the jurisdiction of the court, while simultaneously reducing the ability of citizens to access justice against their particular state. Even though it is yet to be fully operationalised, the proposed African Court of Justice and Human Rights (ACJHR) already provides immunity from prosecution for heads of state and senior government officials in its statutes. This creates a negative vacuum within the justice architecture of the continent, as current and potential perpetrators of international crimes will be able to avoid prosecution. This vacuum is informed by contradictions within and between the policies and protocols of the AU.

In response to the persistence of threats against citizens and communities, the AU adopted the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (AfCHPR). In particular, within the same protocol the AU provides, through Article 34(6), the provision for states to accept the competence of the court to receive cases from individuals and NGOs.⁷ A state can choose to not make this declaration, or to withdraw this

declaration. This means citizens can only bring cases against their own state if their state allows them to.⁸ Of the 30 states that are members of the AfCHPR only 10 of them have made an Article 34(6) declaration, while two states (Rwanda and Tanzania) withdrew their declarations. Essentially the AU drafted and adopted a protocol that allows states to opt in and opt out of justice and accountability, while simultaneously placing the keys for victims to access justice in the hands of potential perpetrators. This fundamental flaw is a significant impediment to establishing a strong culture of justice and, by extension, successfully implementing the AUTJP.

In another case, the African Court of Justice and Human Rights, which is yet to be ratified, has Article 46A bis of the Malabo Protocol,⁹ which grants immunity to heads of state, governments and senior government officials from the international criminal jurisdiction of the court. The AU, notably its Commission and Peace and Security Council, is fully aware that state governments are the key perpetrators of war crimes, crimes against humanity and genocide in Africa, yet their ability to act to prevent, mitigate and respond to these atrocities remains constrained by the asymmetrical power that states wield in the wider continental system.

In this regard, the institutions that can contribute towards promoting and ensuring effective transitional justice processes, as far as justice and accountability is concerned, are in effect incapacitated or severely constrained from fulfilling their own mandates. These contradictions are informed by the inherent incongruity between the methods that many African states are willing to employ to survive and retain power, contrasted to the principles of democratic governance, which they are meant to champion. The inconsistencies within its stated AU transitional justice policies and the ability to effectuate outcomes in reality is indicative of the conflicting compromises the AU has to make, as a state-led governance body.

These dynamics noted above point to a fundamental weakness at the core of governments across the continent, namely, the absence of upholding and respecting democratic values. It is evident that, given the persistence of violent conflict on the African continent, a significant number of AU member states do not fully prescribe to or value the fundamental democratic principles that underpin democratic governance and justice. In this regard, key transitional justice values, which are referenced in

the AUTJP, such as accountability, transparency, the respect of human rights, the provision of necessary basic services and equitable access to state economic resources are only practised if they are to the benefit of the governing class. South Africa stands as a case in point despite its prominent role in a number of AU institutions. It also has had a history of violence in the post-apartheid era, including the 2012 state-led Marikana massacre, the exponential levels of rape and the persistent eruption of xenophobic violence, which expose the country's governance deficits. Justice and accountability, and more importantly accountability in the provision of a transitional justice, requires genuine uptake by governmental and societal actors, including a dedication to the principles that inform policy frameworks such as the AUTJP. A state cannot facilitate and uphold principles it does not genuinely subscribe to regardless of how well articulated and intentioned the policy may be. In effect, and ironically, the chief impediment to the successful implementation of the AUTJP are AU member state governments themselves.

Opportunities for promoting successful AUTJP implementation

The AU system holds immense potential to promote the successful implementation of the AUTJP, as the various branches of the AU, together, create an enabling environment for sustainable peace and security. The AU as an organisation has a plethora of rich normative instruments aimed at ensuring good governance, peace and security. These protocols and policies function as normative and legal enablers and reinforcement for the continent, and cover a range of sectors from democratic governance, human rights, gender, public health, child welfare, migration and environmental protection.¹⁰ These laws, policies and protocols are of particular importance to the practice of transitional justice as they can function as blueprints or continental standards for the establishment of national transitional justice initiatives and institutions. In line with the recommendations of the AUTJP, they can be used as foundations for transitional policies where they previously did not exist or as standards of reform for systems that require restructuring in the aftermath of conflict.

As prescribed by the AUTJP, when transitional justice commissions are

established, their role is to not only identify perpetrators and victims, but also make recommendations for the reform of institutions, laws, policies and practices that enabled abuses to occur. These recommendations can be instituted in ways that harmonise existing laws with existing continental protocols, or create new laws that align with continental protocols and standards.¹¹ This will not only allow for the synchronisation of national and continental transitional justice frameworks, but also provide continental benchmarks for citizens, social movements and civil society organisations to measure their states against and demand accountability. The probability of the success of these reforms guided by the AUTJP is high in the post-conflict peacebuilding phase, as there is often significant political will to rebuild the governance and justice structures in the aftermath of a conflict.

Key AU organs and institutions have the capacity to aid in the implementation of the objectives of the AUTJP. The members of the African Governance Architecture (AGA) platform are especially well positioned to support transitional justice efforts as they are collectively mandated to spearhead continental efforts towards good governance and democracy. As noted in the AUTJP, synchronisation of efforts at various levels is necessary to successfully achieve its objectives.¹² As such, the AGA holds the most capacity to assist and support national and regional transitional justice efforts at the continental level. The PSC, AUC, RECs, APRM, the African Commission for Human and Peoples Rights (ACHPR) and the AU's New Partnership for Africa's Development (NEPAD) have well established institutional resources and networks to disseminate information and knowledge, and raise awareness and advocacy for the AUTJP. These institutions are well suited to facilitate strategic communications with relevant local, national, regional and international actors, lead research and knowledge production, and share best practices pertaining to transitional justice research and initiatives.¹³ They also have the capacity to offer technical and diplomatic support to RECs and individual states that require assistance in their transitional justice efforts.

The Peace and Security Council has a central role to play in advancing and promoting transitional justice because it is often the institution that is mandated to initiate and monitor the implementation of peacemaking, peacebuilding and peace support operations prior to, during and after a

conflict. It therefore has critical knowledge regarding specific conflicts and established relationships with key actors from the conflict who would play a significant role in initiating transitional justice processes and ensuring their success. The AU Commission is best suited to lead monitoring, reporting and reviewing the continent's progress towards implementing the AUTJP. As stipulated in the AUTJP, the AUC has an important role to play in evaluating continental transitional justice processes and assessing the participation and role AU bodies have assumed in these processes.¹⁴ As noted in the AUTJP, the AUC also has the responsibility of compiling and submitting an annual report to key AU organs regarding the continent's progress in meeting transitional justice efforts, noting the challenges, successes, the progress of specific nations and the actors involved. Finally, the African Union Department of Political Affairs, Peace and Security, within the AUC, has an important supervisory and coordinating role within the commission by tracking inputs and ensuring inter-departmental collaborations and the contributions of relevant AU organs with mandates involving transitional justice.

In the sphere of accountability, the work of the AUC can be complimented by the PAP, the ACHPR, the AfCHPR, the APRM and the AU Advisory Board on Corruption, which all have significant expertise in holding individual states and regions accountable to the objectives of the AU, this can extend to the AUTJP and specific transitional justice programmes.

The most significant technical challenge African states face in pursuing transitional justice initiatives is in the area of resource mobilisation. Specific AU bodies can play a key role in mobilising funds, resources and future financing of transitional justice programmes. The African Development Bank, the African Capacity Building Foundation, the Economic, Social and Cultural Council and NEPAD have decades of expertise and extensive networks that can be harnessed to mobilise funds towards both national and regional transitional justice programmes.

These institutions, together with the leadership of the AUC, needs to mobilise AU member states to generate their own resources to finance the work of the Union, including in the promotion and implementation of transitional justice interventions. In particular, the AUTJP stipulates the requirement for the AUC to establish an African transitional justice

fund to ensure availability of resources. This fund must have clear budget guidelines to ascertain and allocate appropriate funds to nations and regions in need of transitional justice assistance.¹⁵ The AUC can also draw on specific initiatives of the AU to support this fund, for example, a percentage of fines and tariffs generated from the newly introduced Continental Free Trade Area could be allocated to the transitional justice fund.

Similarly, the AfCHPR could consider the introduction of a mandatory financial payment to the transitional justice fund from guilty parties in cases where financial compensation or reparations are ordered. As argued in the AUTJP the successful implementation of the policy is predicated on a concerted multi-level multi-actor led effort towards transitional justice and harnessing the capacity of key AU institutions and organs is central to this goal.¹⁶

The AUTJP asserts that it is the primary responsibility of individual states to lead and implement their own transitional justice processes. However, the efforts of states are often compromised if there is a lack of political will or inadequate resources to ensure the success of transitional justice processes.¹⁷ As such, strategic collaboration between international, regional and national CSOs and the governments of AU member states are necessary to ensure the successful implementation of the AUTJP within states.

Key CSOs have played a significant role in drafting transitional justice policies, pushing governments to adopt these policies, holding governments accountable and assisting citizens and victims to access justice in the aftermath of conflicts.¹⁸ Through strategic partnership in key areas, the AU system can be mobilised towards implementing the AUTJP. For instance the drafting, advocacy and campaigning for the adoption of the AUTJP was led by the Centre for the Study of Violence and Reconciliation (CSV), working with other civil society actors such as the Institute for Justice and Reconciliation (IJR), both based in South Africa. The Pan-African Lawyers Union played a pivotal role in providing legal guidance in the structuring and drafting of the Malabo Protocol that enables the establishment of the ACJHR. Often civil society organisations (CSOs) are capacitated with experts, resources and networks that enable them to function as efficient partners for policy formulation and adoption.

These networks also work very effectively in creating regional networks

of like-minded CSOs, leading to strategic collaborations, synchronisation of agendas and policy cohesion. This is especially useful in the field of peace and security as security threats have the potential to spill over national borders, impacting the region. This multi-level (national, regional and continental), multi-actor approach increases the reach and depth of transitional justice initiatives and also reduces the burden on the government to spearhead and capacitate all transitional justice initiatives. It also promotes ownership on behalf of the states, the CSOs and the communities they work with. This ownership not only allows for context-specific justice to take place, but also reduces the likelihood of a community relapsing into a cycle of violence. CSOs are strategically positioned to understand and respond to context-specific drivers of conflict and violence such as ethnicity and gender. The AUTJP plays specific attention to gender in conflicts, noting that wars are gendered and disproportionately affect women and children more than any other demographic.¹⁹

The gendered nature of warfare in Africa is not sufficiently understood as many women function in what Carolyn Nordstrom describes as “vanishing points”: the often invisible zones at the intersection of public and private spaces, where women’s lives and work often exist.²⁰ As such, peacekeeping missions neglect women in Disarmament, Demobilization and Reintegration (DDR) processes and post-conflict reforms don’t respond to the specific ways women are affected by armed conflict. CSOs in post-conflict zones are thus uniquely placed to inform international aid agencies, continental bodies and governments about the specific gendered needs of the community. Their positioning in the provision of healthcare, food, water and other developmental needs also provides them with unique knowledge that governments may not have access to, that would assist in successfully implementing transitional justice programmes for reconciliation, restoration and reparations.

Grassroots CSOs are also able to do the long-term work of educating and shifting the perceptions of communities after conflicts. The presence of sexual and gender-based crimes in times of war, or during elections, are indicative of embedded violent patriarchal social and cultural beliefs. These sorts of beliefs take time to be addressed and corrected, thus long-term collaborations between CSOs and governments are most effective in this regard. Furthermore, CSOs function as strong accountability partners

with citizens. CSOs that have strong communal bases and wide national and regional networks have the ability to hold undemocratic governments and leaders accountable, as seen with the work of KPTJ and ICJ-Kenya following both the 2007 and 2017 Kenyan elections.²¹

The AUTJP is groundbreaking in its acknowledgement of cultural and traditional justice mechanisms. It notes that local processes, including rituals, customary or clan courts, communal dialogues and other established community-based norms and practices used for adjudicating disputes and for restoring the loss caused through violence, form an important part of the AUTJP conception of TJ.²² This is important as justice and the process of accessing justice operates within a specific sociological construct; that is, what justice means and what justice should constitute is context and culture specific. Therefore, communities, alongside CSOs and governments must take an active role in structuring and employing these context-specific forms of justice when necessary. In this regard this multi-actor approach allows for different types of justice to exist, thus not limiting or forcing victims to engage in formal judicial processes that may be of little cultural or personal relevance to them.

Conclusion

This chapter has assessed why the AUTJP is a vital and innovative addition to the practice of transitional justice in Africa. The unique approach of the AUTJP towards transitional justice in Africa allows for multiple conceptions of justice, and multiple mechanisms for the provision of justice and peace that are not limited to criminal justice alone. More importantly, through engagement with the wider AU system, the continent can employ multi-sector, multi-level and multi-actor approaches to implement transitional justice processes as guided by the AUTJP. Ultimately the successful implementation of the objectives of the AUTJP requires strategic and effective collaborations between AU member states, AU organs, African CSOs and the affected communities. This will ensure meaningful access to justice in the aftermath of a conflict and reduce the probability of a relapse of violence. This will also increase accountability in the transitional justice space, which will ultimately create a more sustainable peace across the African continent.

CHAPTER NINE

The African Union Transitional Justice Policy and the African Court of Justice and Human Rights

Selemani Kinyunyuu

Introduction

In November 2018, the African Union Assembly of Heads of State and Government formally adopted its African Union Transitional Justice Policy (AUTJP), which includes a broad range of interventions designed to address the atrocities and violations of the past. In addition, the Malabo Protocol, which when ratified will empower the African Court of Justice and Human Rights (ACJHR) with jurisdiction over international crimes, provides an alternative site for addressing the atrocities of the past. This chapter will discuss how the AUTJP makes reference to the term “survivor”, without further elaborating how it can be defined. The chapter will illustrate that there are two areas by which a more inclusive and survivor-centred approach is achieved through the Malabo Protocol. These are the wide range of crimes within the court’s jurisdiction and the multiple pathways to justice that will be afforded to survivors by virtue of the ACJHR’s position in the wider African Union architecture. This chapter’s examination of these aspects is preceded by an examination of the place of survivors in the Malabo Protocol, and concludes with some reflections and recommendations.

Survivors, victims and the international criminal tribunals

The terms “survivors” and “victims”, while utilised interchangeably in transitional justice discourse, are not synonymous for the purpose for international criminal justice. The term “survivor” is defined as “... all those who were affected directly or indirectly by conflict, war, and mass atrocities, and survived”.¹ The term is not found in the statutes of the major international criminal tribunals. On the other hand, the term “victim” means persons who have suffered harm as a result of the commission of crimes. This term has also been extended by international criminal tribunals to include organisations or institutions that have sustained direct harm to property which is dedicated to religion, education, art or science or charitable purposes, and to historic monuments, hospitals and other places and objects for humanitarian purposes.² The above definition suggests that the term survivor includes a much broader range of persons as the causal link to harm need not be direct. Indeed, in situations where societies have undergone serious violations of their rights, including war or mass atrocities, entire communities or even societies in countries could constitute survivors.

One of the mechanisms that has gained currency over the last decade in redressing rights violations in Africa is international criminal justice. International criminal justice includes the broad set of responses that communities use to address mass atrocities and human rights violations. They may include international tribunals, hybrid courts and international investigative and quasi-judicial bodies. International criminal trials in particular are touted as providing recourse for survivors of mass atrocities where no other pathway to redress and accountability exists. These judicial interventions have been used widely in societies that have experienced severe violence, conflict and strife.

A detailed examination of international criminal trials as they are currently conducted, however, reveals that they are not victim-centred or let alone survivor-centred. One of the aspects leading to the lack of inclusivity is the fact that in international trials, the prosecutor pursues justice in the name of a narrow set of survivors and this is often without the express authority of all survivors. This has led to many debates around case selection where international prosecutors prioritise investigation and

prosecution of certain categories of crimes over others, creating different classes of victims. In other cases, prosecutions are conducted against the wishes of survivors who may choose restorative justice and reconciliation processes, or are inclined towards other forms of accountability for past abuses, as outlined in the AUTJP. In other instances, the absence of sufficient evidence or the limited temporal or geographic scope of the tribunal may inhibit the cases of certain survivors from being brought forward. This creates manifest tensions between the ambitions of international criminal justice mechanisms, the demands of victims and the need to prosecute cases that stand the highest chance of a conviction.

However, where this tension manifests itself most evidently is in the development of narratives about conflicts. International criminal justice mechanisms often produce narratives that are narrow or incomplete from those of all survivors. This has a negative impact on legacies of a conflict, creates challenges to appropriate memorialisation and can even lead to double victimisation of certain categories of survivors who may feel ignored and abandoned. The challenges have led some to argue that international criminal justice is essentially victor’s justice.

The AU considered some of these challenges where developing its own response to the shortcomings of international criminal justice mechanisms, as articulated in the justice and accountability provisions of the AUTJP. In addition, when examining the extent to which the Protocol on Amendments to the Statute of the African Court of Justice and Human and Peoples’ Rights (hereinafter the Malabo Protocol) delivers survivor-centred justice, it is appropriate to consider the above factors and also the eco-system within which the African Court will operate.

The place of survivors in the Malabo Protocol

As discussed above, the term “survivor” is not found in the Malabo Protocol, keeping to script with the instruments of other international criminal tribunals. The Malabo Protocol, however, establishes a victims and witnesses unit in the court’s registry, which shall provide in consultation with the court and the office of the prosecutor protective measures and security arrangements, counselling and other appropriate assistance for witnesses and victims who appear before the court and others who are at risk on account of testimony given by such witnesses.³ The Malabo

Protocol goes on to state that the African Union Assembly shall, by a decision, establish, within the jurisdiction of the court, a trust fund for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.

In a practice that echoes other international criminal tribunals, the Malabo Protocol adopts a narrow definition to survivors as being those who serve as witnesses or have provided testimony in proceedings before the court. With respect to the establishment of a trust fund for victims, again the Malabo Protocol suggests that this is limited to those survivors who are directly impacted by crimes and to their families.

A broader scope of crimes

The first aspect that will provide the court greater latitude to adopt a more survivor-centred approach is the broader range of crimes under the jurisdiction of the court. In addition to the core crimes (war crimes, crimes against humanity, aggression and genocide), the Malabo Protocol also provides the court with jurisdiction over other international and transnational crimes namely:

1. the Crime of Unconstitutional Change of Government;
2. Piracy;
3. Terrorism;
4. Mercenarism;
5. Corruption;
6. Money Laundering;
7. Trafficking in Persons;
8. Trafficking in Drugs;
9. Trafficking in Hazardous Wastes; and
10. Illicit Exploitation of Natural Resources.

The court will also be empowered with addressing the crime of corporate criminal liability. This “expanded jurisdiction” over what is regularly seen in international trials may assist the court to be able to receive a greater window of information or evidence. It may also assist the court to investigate and prosecute a broader range of crimes than are traditionally considered in contemporary trials. This is an important aspect as often non-core crimes such as corruption, terrorism and trafficking are enabling

crimes that lead to the commission of war crimes, crimes against humanity and genocide. While these crimes may form important precursors to full-blown conflict, they have been neglected and their victims ignored by most international crimes. The expanded scope of crimes under the court’s jurisdiction will ensure that a larger number of survivors gain access to legal proceedings as witnesses and victims.

The expanded nature of the crimes under the jurisdiction of the court may also assist the court with a better understanding of a conflict, which may have multiple dimensions and drivers. More specifically, prosecutors may be required to examine and present to the court a much broader socio-cultural and political context to the conflict. This may serve to alleviate perceptions of prioritisation of victims and survivors of particular crimes. In line with the overall ethos of the AUTJP, this will assist in shaping a much broader and nuanced narrative about conflicts.

Assessing multiple pathways to justice

The second area in which the court will contribute to a more survivor-centred approach is the tri-jurisdictional nature of the court. The court will consist of three chambers, namely an international criminal law chamber, a general affairs chamber and a human rights chamber. The international criminal law chamber will be further constituted of a pre-trial chamber, a trial chamber and an appellate chamber.⁴ While international criminal trials will only be conducted in the criminal chamber, the court will benefit from the cross pollination of judges, staff, information and jurisprudence between the courts. International criminal law and international human rights law are essentially two sides of the same coin and there is a clear, visible cross-pollination between international criminal law, international humanitarian law and international human rights law.⁵ In particular, international criminal law deals with individual criminal responsibility, while international human rights law addresses state responsibility. It is feasible for a prosecutor to receive information that has been submitted or has been adjudicated by the human rights section to open an investigation in the international criminal law section. On the other hand, survivors and victims could rely on information that has been obtained in the international criminal law section to file cases in the human rights section. These intersections can assist to promote a more rounded approach to

accountability for human rights violations, as proposed by the AUTJP, by ensuring there are no gaps in ensuring accountability for violations and that a broader range of survivors find redress.⁶

The court will also benefit from working in an eco-system that includes other AU institutions like the African Commission on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child, the Pan African Parliament and the Peace and Security Council and the Panel of the Wise. These institutions will work under similar normative and policy frameworks including the Human Rights Strategy for Africa,⁷ the African Peace and Security Architecture,⁸ the African Governance Architecture,⁹ the African Humanitarian Policy Framework¹⁰ and the recently unveiled AUTJP.

These frameworks and normative standards will greatly assist the court and the institutions it works with to enhance and coordinate policy responses to human rights violations and conflict, ensure effective implementation of human rights instruments and decisions, and increase promotion and popularisation of African human rights norms. The AUTJP is particularly informative as it places a greater emphasis on balancing retributive and restorative justice as a means of ensuring sustainable peace and development in post-conflict communities.¹¹ Examples of coordination between these institutions include the ability of the African Commission on Human and Peoples' Rights and African intergovernmental organizations to seize the African Court with cases. In turn, the African Court is empowered to transfer cases to the African Commission. The African Commission can oblige to bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council. This complementary relationship ensures that the respective bodies leverage on their comparative institutional advantages to mitigate conflict and redress human rights violations.

Conclusion

The provisions of the AUTJP and the Malabo Protocol are reflective of Africa's nuanced appreciation of accountability in Africa. The Malabo Protocol attempts to broaden the understanding of human rights violations and accountability through the inclusion of a wider set of crimes

than other international criminal tribunals. The Protocol empowers the African Court with jurisdiction over corporate criminal liability. In this way, a greater number of survivors will have access to the court and will be able to have their voices and stories heard in proceedings before the court. This will contribute and assist the court and the international community developing a holistic and rounded understanding and narrative to conflicts and violence in societies. The potential increase in the number and type of survivors will greatly contribute to putting survivors more at the centre of the criminal accountability process.

The fact that the African Court will be constituted of three chambers and will further be operating within the broader framework of the AU will ensure greater information exchange and coordinated approaches to dealing with conflict and mass atrocities. In situations in which the international criminal chamber of the court may not be best placed to deal with certain violations, the processes and mechanisms outlined in the AUTJP as well as the institutions within the broader AU framework may be able to address the particular contentious issue. The complementary function between the judicial interventions of the African Court and the provisions stipulated in the AUTJP will create a wider safety net for survivors and will ensure a more purposeful and multi-dimensional approach to dealing with conflict and the legacy of human rights violations in a manner that addresses the needs of victims and survivors.

CHAPTER TEN

The Intergovernmental Authority on Development and the African Union Transitional Justice Policy: The Development of a Reconciliation and Dialogue Index

Aleu Garang and Tim Murithi

Introduction

The Horn of Africa region has been persistently afflicted by the scourge of violent conflict, which has had a significant impact on destabilising the region, fuelling an increase in refugee flows and triggering the internal displacement of millions of people. The African Union Transitional Justice Policy (AUTJP) notes that regional economic communities (RECs) have not sufficiently engaged with the AUTJP and developed their own regional strategies to advise and guide their member states, which can contribute towards stabilising their countries and forging more inclusive and democratic societies. This chapter will assess the initiatives that the Intergovernmental Authority on Development (IGAD) has developed to frame its sub-regional approach to the provisions that are outlined in the AUTJP. IGAD has drawn insights from the development of the AUTJP, and is now developing a sub-regional reconciliation framework. This

chapter will assess the trajectory of IGAD's Reconciliation and Dialogue Index and highlight some of its key provisions and the prospects for their implementation.

IGAD and the Horn of Africa's regional conflict systems

Regional conflict systems are notoriously difficult to stabilise. Affected state actors need to adopt a coordinated regional strategy to promote and consolidate peace, security and improved governance in the Horn of Africa. Regional and international security, as well as cross-border peacebuilding and stability, has been affected in terms of the spill-over of refugees and armed militia into neighbouring countries, as well as the hijacking of seafaring vessels in the Indian Ocean in the form of maritime insecurity.

The Intergovernmental Authority on Drought and Development (IGADD) was established in 1986 and was ostensibly tasked with the mandate to address issues pertaining to drought and desertification.¹ However, there was a gradual realisation that it would be counter-factual to pursue developmental initiatives without addressing the issue of conflicts in the sub-region. On 21 March 1996 the heads of state and government of the African Union met during the IGADD's Second Extraordinary Summit in Nairobi, and resolved to adopt a new charter, and name of the organisation. The institution was re-named the Intergovernmental Authority on Development and three areas of cooperation were identified as: conflict prevention, management and resolution, and humanitarian affairs; infrastructure development; and food security and environmental protection. The Horn of Africa was, and continues to be, plagued by inter-state tension and suspicion, which required IGAD to adopt a different strategy to address some of its fundamental problems.

IGAD's mandate gradually expanded to address political, peace and security issues. Article 7 (g) of IGAD's Treaty notes that a key objective of the organisation is to promote regional peace primarily through political dialogue. A conference was convened in Khartoum from 1 to 3 October 2005 to launch an IGAD Strategy on Peace and Security. The Consensus Document that emerged from that meeting stated that "the IGAD Strategy on Peace and Security is based on the primary responsibility of governments to provide peace and security for their citizens".² The key objectives of this strategy included the "facilitation of the development

of appropriate national-level mechanisms to promote national peace and security" as well as to review the "structures and mechanisms for conflict early warning, management and resolution within the region and across its boundaries".³ Therefore, there is at the very least a tacit commitment within IGAD to intervene in its member states and promote the conditions for peace.

The AUTJP and regional economic communities

The AUTJP emphasises the importance of implementing transitional justice in order to "assist societies with legacies of violent conflicts and systemic or gross violations of human and people's rights in their efforts to achieve transition to the future of justice, equality and dignity".⁴ AUTJP dedicates the whole of Section Four of the Policy to identify "Actors, Processes and Implementation Mechanisms".⁵ Specifically, the AUTJP identifies four actors who should take responsibility for the its implementation including:

1. AU member states;
2. Regional economic communities (RECs);
3. AU institutions; and
4. Non-state actors, including members of civil society.

Concretely, the AUTJP states that AU "member states shall have the primary responsibility with respect for pursuing transitional justice processes" and that "they bear the responsibility for removing political and social impediments to the effective pursuit of transitional justice processes".⁶ The AUTJP also stipulates that member states have the responsibility for "guaranteeing the space for debate and advocacy on transitional justice and mobilising the support of all sections of society across political lines".⁷ In addition, the AUTJP also states that "regional economic communities (RECs) should encourage all national actors to pursue transitional justice processes".⁸ In terms of the continental level, it calls for "key AU organs and institutions to provide leadership in the implementation of the AUTJP, including the African Union Commission" as well as the "AU Peace and Security Council, African Court of Human and Peoples' Rights, African Development Bank, African Capacity Building Foundation" and the Pan-African Parliament.⁹

Section Four of the AUTJP states that “RECs play a key role in helping address the *regional and trans-boundary dimensions of conflicts or violent regression*, through promoting the normalisation of relationships between affected neighbouring countries and creating a common understanding of transitional justice processes”.¹⁰ In effect, the AUTJP recognises that since conflicts, atrocities and violations are situated across borders, then we have to determine how reconciliation can also take place through “regional and trans-boundary” processes. This would require implementing processes of truth recovery, accountability and redress across borders as preliminary processes to the pursuit of regional reconciliation.¹¹ The practicalities of how we operationalise regional reconciliation are challenging but not impossible to institute. Applying a regional lens to transitional justice and reconciliation processes requires that the war-affected states and communities in close proximity to each other recognise their regional interdependence. Furthermore, these states and communities need to engage in a genuine regional dialogue, based on a democratic attitude, in order to identify the issues that have caused deep divisions and generated violence in the past. Ultimately, the states and communities need to actively work in a collaborative manner to address the legacies of socio-economic exploitation. Like in processes for promoting reconciliation nationally or locally, regional reconciliation mechanisms require the creation of spaces to develop inclusive narratives on the past and shared visions for the future.

IGAD’s Reconciliation and Dialogue Index

IGAD drew from the AUTJP on its initiative to develop its Reconciliation and Dialogue Index, which targets stocktaking of transitional justice mechanisms and reconciliation initiatives within member states and examine all these with the aim to develop a guide to help member states advance such mechanisms. In 2019, IGAD Mediation Support Unit, working in partnership with civil society actors, conducted country consultations within the IGAD region throughout 2019 with the aim of developing a regional reconciliation framework. The focus of the consultations was documenting instances of:

- National reconciliation processes;
- Political reconciliation processes;

- Community reconciliation initiatives; and
- Symbolic and inter-personal reconciliation;

Through these consultations, IGAD targeted documenting and examining practices related to peacebuilding and reconciliation within its member states, and linking peace agreements, implementation and post-conflict activities to the agenda of sustaining peace. The country consultations within the IGAD region went to great depth interviewing public servants, representatives of public institutions, faith-based groups, civil society organisations working in areas of conflict prevention, management and resolution in addition to faith bases institutions active in the fields of mediation, reconciliation and peacebuilding.

The consultations aimed to:

- Assessing dialogue efforts that have been or are being undertaken or need to be undertaken in the region;
- Identifying existing reconciliation frameworks for promoting and achieving dialogue and reconciliation at national levels;
- Framing and outlining a methodology for developing and operational dialogue index and reconciliation framework; and
- Identifying how to institutionalise reconciliation and dialogue, and understand the objectives, challenges, as well as role of different stakeholders in dialogue and reconciliation.

IGAD member states are at different levels of experience in terms of dialogues, healing and reconciliation. Some countries had already conducted peace and reconciliation dialogues, others recognise the need for it, while others implemented limited interventions for reconciliation or recognition of atrocities followed by limited reparations for certain communities. The underlining position is that the region has made great strides towards achieving reconciliation and unity at national building fronts and that can be ground for a regional framework.

Previous IGAD mediation efforts in Sudan and Somalia in the 1990s did not include realisation of institutionalising dialogue in a post-conflict scenario as part of the peace agreements or other tools such as healing and truth-telling mechanisms. It might have been viewed by the collective will of member states to be a space for national reconciliation, debates to build a nation that was presumably left for each member state to constitute.

The January 2005 IGAD-mediated Comprehensive Peace Agreement (CPA) between north and South Sudan between the Government of the Sudan (GoS) and the Sudan People's Liberation Movement/Army (SPLM/A) outlined some recommendations for establishing peace institutions, such as the South Sudan Ministry of Peace and CPA Implementation. The re-escalation of crisis in 2013, and subsequently in 2015, led to the adoption of the Agreement on the Resolution of Conflict in South Sudan. In 2018, following the persistence of tensions a Revitalized Agreement on the Resolution of Dispute in South Sudan (R-ARCSS) was adopted, which stipulated the establishment of a Commission for Truth, Reconciliation and Healing (CTRH) with a mandate of spearheading efforts to address the causes of conflicts, promote peace, national reconciliation and healing. In addition, South Sudan established its National Dialogue processes where individuals, communities, institutions and regional groupings were invited to share their views on the crisis afflicting the country as well as the interventions that would contribute towards nation-building, unity and reconciliation. The processes went well and provided a platform for those in power to listen to the concerns of citizens and receive a roadmap on the way forward, addressing grievances of the past and working towards unity and reconciliations.

Across the Horn of Africa region, there were efforts to broker peace, such as the 2019 rapprochement between Ethiopia and Eritrea, which had a spin-off effect on laying the foundation for addressing the issues between Eritrea and Djibouti as well as between Eritrea and Somalia. In Kenya, the so-called "handshake" between rival political formations, which was threatening to undermine stability in the country, reduced the incidence of overt violent confrontation in the country.

The AUTJP and IGAD's Reconciliation and Dialogue Index

The Reconciliation and Dialogue Index and its national consultations within the IGAD region illustrated the relevance of the provisions of the AUTJP to efforts to promote redress and accountability for societies that have endured human rights violations, in particular gender-based

violence. It is necessary to realise that peace must be addressed within each member state before engaging regionally given some of the predicaments there affect relations within or with other countries. It is evident that the majority of IGAD's member states lack the institutionalisation of truth and reconciliation processes, and need to develop their own programmes to dealing with the past gross human rights violations, atrocities or sexual violations during conflict. In this regard, IGAD's Reconciliation and Dialogue Index will have an important function, in the absence of national strategies to promote transitional justice interventions and to address tensions within societies and to heal communities that have been affected by conflict.

The AUTJP and IGAD's Reconciliation and Dialogue Index need to be popularised across the Horn of Africa region in order to positively change its policies and commence the work of building up institutions that will address the legacy of past violations. In this regard, IGAD can utilise its good offices to advance the agenda for truth, reconciliation and accountability, including alternative dispute resolution mechanisms in order to provide sustainable peacebuilding mechanisms to its member states. As a practical measure, it is also necessary for the societies and communities within Horn of Africa countries to also engage and develop an understanding of the AUTJP and the Reconciliation and Dialogue Index, to ensure societal buy-in and local ownership of the processes.

Conclusion

This chapter has assessed the importance of regional actors identifying collective solutions to the conflicts contained in their sphere of influence by leveraging the AUTJP to guide countries to implement their own localised national processes. Consequently, RECs should develop regional strategies to ensure a coordinated approach to promoting regional and trans-boundary transitional justice and reconciliation processes. Specifically, it is necessary for RECs to develop their regional strategies for the implementation of the AUTJP, to complement their existing peace and security frameworks. This chapter has assessed how there is a need to further develop and enhance the capacity of the IGAD member states and its secretariat to contribute towards raising awareness and sensitising its member states on the provisions of the AUTJP and the Reconciliation

and Dialogue Index. In this regard, it is necessary to ensure that IGAD's Secretariat staff are professionally trained to understand and subsequently provide transitional justice advice and support to all Horn of Africa member states. This will require developing strategic partnerships with the international community as well as civil society. The primary responsibility for maintaining international peace and security is claimed by the United Nations, and continentally the AU plays a pivotal role. However, IGAD has demonstrated that it is appropriate and necessary for sub-regional actors to also engage with crisis situations in the sub-region. In particular, IGAD has demonstrated a willingness to continue attempting to resolve the crisis through a transitional justice and reconciliation lens.

PART FOUR
SUPPORTING THE
IMPLEMENTATION OF
THE AFRICAN UNION
TRANSITIONAL JUSTICE POLICY

CHAPTER ELEVEN

The African Union Transitional Justice Policy as the Missing Sixth Pillar of the African Peace and Security Architecture

Refilwe Makgopela

Introduction

The adoption of the African Union Transitional Justice Policy (AUTJP) in February 2019 was a momentous step on the part of the African Union (AU) in delivering on its mandate to end violent conflicts on the continent and ensure sustainable peace. The AUTJP is a decisive move by the AU to use context-specific transitional justice mechanisms to address nation-building and reconciliation in the aftermath of violence and mass atrocities on the continent. This chapter argues that for the AUTJP to gain an enduring foothold in Africa, it needs to become the guiding normative framework as the sixth legal pillar of the African Peace and Security Architecture (APSA). This chapter argues that the idea behind the establishment of this transitional justice pillar is to ensure that it will work in conjunction with other vital AU organs at all levels. As part of this work, this chapter argues that it will be necessary for context-specific transitional justice guidelines to be disseminated to the various regional economic communities (RECs) and regional mechanisms (RMs), which

will, in turn, inform and support country-specific proceedings. This encourages a feedback loop into the rest of the APSA pillars, such as knowledge-gathering by the Continental Early Warning System (CEWS), mediation by the Panel of the Wise (PoW), and decision-making by the Peace and Security Council (PSC) in terms of its overall mandate in this regard.

Given the increasing cyclical nature of conflict on the African continent, the AU adopted the AUTJP.¹ The AUTJP is designed to fill a gap identified by the African Union Panel of the Wise (PoW) in its 2011 report originally entitled, “Non-Impunity, Truth, Peace, Justice, and Reconciliation in Africa: Opportunities and Constraints”.² The findings of the report highlighted fundamental issues regarding how member states dealt with, and shared experiences of, transitional justice. This laid the foundation for the development of a transitional justice policy for AU member states, a process largely spearheaded by civil society actors. This was mostly a collective effort directed towards combating impunity by ensuring that AU peacebuilding efforts addressed matters of justice, reconciliation and healing in the aftermath of violent conflict and systematic and gross human rights abuses.

The role of the AU on the continent cannot be overstated given the predominance of various conflicts across the region. To combat this phenomenon, APSA was assigned the mandate of ensuring the prevention, management and resolution of election-related conflicts and political violence. This organ consists of several pillars that cooperate in addressing issues such as civil unrest, genocide and ethnic cleansing, as well as political violence and related electoral violence.

The African Peace and Security Architecture

As a first step in ensuring the commitment of the newly founded AU and in delineating its role, the Protocol Relating to the Establishment of the Peace and Security Council of the AU was adopted in 2002, which outlines the various components and responsibilities of African Peace and Security Architecture (APSA).³ The APSA serves as the organisational structure mandated to “anticipate and prevent conflicts”, and to undertake peacemaking and peacebuilding through diplomatic and coercive means.⁴ As one of the chief mechanisms of the AU’s institutional structure,

the APSA was founded on, and informs the basis of, the AU’s 2002 commitment to non-indifference, a commitment that makes it responsible for intervening in the internal affairs of member states in situations of impunity and human rights violations, including imminent threats to peace, security and stability on the African continent.

The APSA supports the AU’s mandate to intervene in conflicts. It provides the AU, the RECs and the RMs with all the support necessary to fulfil the tasks and carry out the mandate as set out in the constitutive Act of the AU and the founding protocol of the PSC. All the processes of the AU with regard to conflict management are implemented through the APSA. The primary responsibility of the APSA and its associated pillars has been to resolve conflicts, and most of this work has been done through mediation. The APSA consists of five pillars, which are:

- The PoW, which is tasked with taking on preventive diplomacy missions by engaging in conflict mediation and brokering peace agreements between warring parties;
- The CEWS, which is responsible for the timely collection of information on evolving conflicts in order to anticipate and prevent conflicts on the continent;
- The AU Peace Fund (AUPF), which is the principal instrument for financing the peace and security endeavours of the AU on the continent;
- The African Standby Force (ASF), which is a multidisciplinary peacekeeping force with military, police and civilian contingents mandated to intervene in a conflict at the request of a member state; and
- The PSC, which is the key pillar of the APSA and the apex decision-making organ of the AU for the prevention, management and resolution of conflicts on the continent.

A yawning gap remained in this APSA structure with respect to justice needs and healing components after the resolution of conflicts. In this regard, the AUTJP is aptly configured to fill this gap.

The African Union Transitional Justice Policy

In terms of the AUTJP, transitional justice “refers to the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process,

adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation".⁵ The rationale underlying the AUTJP is to outline a transitional justice process that will allow governments, faith leaders, community leaders and society at large to come together as a transitional force before, during and after conflicts, in order to ensure justice, equality and dignity for a country and its people in the future.

Human rights and transitional justice are significant areas of concern in all post-conflict societies. Human rights are an essential consideration in enforcing peace agreements, protecting refugees and internally displaced persons, ensuring capacity-building in respect of civil society so that leaders may be held accountable, and in the establishment and functioning of truth and reconciliation commissions (TRCs). The primary goal is to transform patterns of destructive relationships into constructive and healthier patterns of interaction, cooperation and coexistence. Since the 1990s, various forms of transitional justice processes have been implemented in different African states, including Angola, Algeria, Burundi, Chad, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Ethiopia, Ghana, Kenya, Liberia, Mozambique, Nigeria, Namibia, Rwanda, Sierra Leone, South Africa, Sudan and Uganda. The transitional justice processes employed in an attempt to heal and move these post-conflict nations forward include criminal justice trials, TRCs and bargaining for amnesty between victims and perpetrators.⁶

Transitional justice is crucial in order to address the legacies of past injustices and human rights violations as a conduit for building sustainable peace. "Transitional justice embodies an attempt to create ... sustainable peace after conflict, mass violence or systemic human rights abuse."⁷ The field encompasses not only state-building or stabilisation activities, but also activities that aim to strengthen the social fabric of society, rebuild trust and bring about cohesion. The adoption of the AUTJP allows the continent to address the various implementation gaps that have occurred with regard to how individual, post-conflict states put into effect transitional justice processes. This is evident in cases such as that of Uganda where political elites under President Museveni, in order to garner international donor funds and validation, agreed to implement substantive transitional justice mechanisms with no intention of moving forward in respect of their obligations.⁸ One minister even went so far as to state that "it is important

to dress these justice things up for international credibility".⁹ Actions such as this have led to the slow enactment of transitional justice laws to the extent that such laws are rarely implemented or, when they are, being poorly executed.

Strategies to establish transitional justice as a pillar of the APSA

The AUTJP should be adopted as a treaty of the AU and, in essence, become the sixth legal instrument of the APSA. In this regard, it will then constitute the cornerstone of the AU's emerging African Justice Architecture.¹⁰ This would place responsibility on the AU to intervene and implement the organisation's protocols on transitional justice rather than merely make recommendations that are left to member states to adopt or reject. It would also result in the AUTJP becoming a binding AU protocol on all transitional justice processes. For sustainability and consistency in applying transitional justice, the AU has to take the lead. Although a context-based approach will inform every transitional justice process of a member state, there needs to be continuity and consistency in how the process is rolled out. This can only be achieved if transitional justice is a core function of APSA, that is, if, as stated in the AUTJP, there are "strategic proposals for the design, implementation, monitoring and evaluation of African TJ processes".¹¹ Here, the key emphasis is that the document is a proposal and that its impact will not be complete until it becomes the guiding principle of the AU's Protocol on Transitional Justice across the continent.

In terms of the practical pathways to implement this approach, the mandate, in terms of the AUTJP, should be delegated to the RECs, which can then act as conduits through which the continental protocol on transitional justice is communicated, and by means of which it is aligned to regional and country contexts. The proximity of the RECs to member states increases the possibility of uptake of the AUTJP principles and makes it more likely that compliance will be directed and monitored.

In terms of key institutions to achieve this objective, the AU Panel of the Wise (PoW) could play a key role in the implementation of the AUTJP. An advocacy role for the PoW is essential in order to effectively

promote and reinforce guiding principles on the rule of law and transitional justice across the continent. In the last decade, for instance, the PoW has contributed to intervening to resolve several conflict situations in the region. Entities similar to the PoW exist at the REC level, which makes for a coordinated and complementary role at the regional level in terms of providing guidance for implementation. As an organ tasked with preventive diplomacy and mediation, and given its role of diplomacy and experience in interlocution, the PoW should act as the “champion” and key change-maker with regard to transitional justice on the African continent. Championing transitional justice would align with African values and would be based on the African tradition of mediation that is entrusted to elders. Through the intelligence gathered by way of the CEWS and the early warning systems (EWSs) of the various RECs on country-specific conflict triggers and affected parties, information can be collected timeously with the aid of the PoW and be fed into the AU transitional justice database.

To ensure the compliance with the normative guidance provided in the AUTJP, the AU can develop a knowledge-based strategic communication and advocacy network or community of practice in pursuit of transitional justice. A continent-wide network of information-gathering, including indigenous-based conflict-resolution mechanisms across the spectrum, is a pre-requisite for the successful implementation of transitional justice policy. In this regard, information and communications technology (ICT) platforms will be essential for the quick dissemination and sharing of intelligence and relevant information across the CEWS, the EWSs and the RECs.

A study on the gendered nature of truth and peacebuilding found that the involvement of women in civil society groups and peace negotiations makes the resulting peace agreements 64% less likely to fail.¹² Centralising the AU’s transitional justice in the form of a sixth pillar to the APSA would ensure that all transitional justice processes delegated to the various RECs and member states would stay true to the need for including women in framing context-specific transitional justice processes. This would determine, and standardise, the terms of reference relating to what constitutes a human rights crime (for example, what constitutes sexual violence), as well as ensure that women have meaningful roles in peace negotiations, in peace agreements and in determining what a peaceful

future for a state would embody.

Women, children and other vulnerable groups are also the worst affected by any conflict. Sudan’s conflict in Darfur, for instance, reveals how women are systematically raped, killed and displaced – and it is these women who are also tasked with the heavy burden of “picking up the pieces” once the conflict has subsided, of rearing children and of sustaining livelihoods under dire circumstances. Regardless of this, women are still largely absent from peace processes. For example, Sudanese women played a pivotal role in the pro-democracy protests that forced former President Omar al-Bashir to step down in April 2019. Now, these women find themselves sidelined and almost entirely excluded from peace and transition negotiations in Sudan. A gender-sensitive AU transitional justice process fills the gap, marked by the many missed opportunities, for fragile countries to achieve lasting peace, as it addresses the perspectives, needs and concerns of women and other vulnerable groups.

Conclusion

The AUTJP is indeed a game-changer, as it has the potential to move Africa in the direction of sustainable peace and development. This chapter has argued that in its current form, the AUTJPR does not make it mandatory for member states to implement transitional justice processes according to its principles and propositions. For member states to comply with it, the AUTJP should not be a mere policy but ought to be converted into the guiding framework for the establishment of the sixth legal instrument of the APSA and become the central organ informing the AU’s emerging justice architecture. This sixth pillar will be the central organ of the AU dealing with transitional justice, mandated to ensure the resolution of past violent conflicts on the continent, and will be binding on all member states. This organ will work in tandem with all other pillars of the APSA – particularly the PoW, the EWSs, the CEWS, the RMs and the RECs – in order to achieve the resolution of conflict, mass human rights violations and state repression. Making transitional justice central to the peace and security mandate of the AU will ensure the consistent and unbiased implementation of transitional justice processes by member states. In this way, the AU will strengthen its position with regard to guaranteeing peace, justice and reconciliation on the African continent.

CHAPTER TWELVE

The Role of Youth Actors in Implementing Transitional Justice in Southern Africa

Dzikamai Bere

Introduction

Since time immemorial, young people have been at the centre of historic transformation processes, including the armed struggle in Southern Africa. This chapter will argue that the legacy of young people leading transformations provides a solid foundation for young people to lead transitional justice processes in Southern Africa. The chapter highlights key aspects of the African Union Transitional Justice Policy (AUTJP), with a view to locating the role of young people in implementing this policy. The chapter identifies the key roles that young people can play as well as the key principles and policy recommendations for youths, policy, and advocates and practitioners in Southern Africa.

Contextualising the youth demographic in Africa

A significant number of leaders in Southern Africa were young when they joined politics. In South Africa, youth activism has been credited as the “backbone” of the anti-apartheid struggle.¹ At the age of 22, South Africa’s

most celebrated young person, Solomon Mahlangu, sacrificed his life in the pursuit of freedom, and his political consciousness has inspired thousands of young people across the world. Many of Mahlangu's generation are credited with amplifying the struggle against apartheid as thousands of school children stood up against white domination. The 1976 Soweto uprising has become a symbol of youth resistance to oppression. Later in history, youths would lead the Arab Spring in 2010, the Rhodes Must Fall Movement in 2015 and the Black Lives Matter movement that originally started in 2013 but only came into global prominence in May 2020, sparked by the police murder of George Floyd in the United States. The 2020 Mo Ibrahim report refers to young people as Africa's greatest asset.² Schwartz notes that youth constitute a reservoir of energy in conflict and post-conflict situations³ and asserts that youth can play either negative or positive roles in post-conflict societies, but specifically emphasised young people's positive contributions as community leaders, with their ability to raise a "coordinated political voice ... through spontaneous motivation".⁴

With a median age of 19.7 in 2020, Africa's population is already the youngest in the world.⁵ Between now and 2100, Africa's youth is expected to grow by 181.4%, while Europe's will shrink by -21.4% and Asia's by -27.7%. By 2100, Africa's youth will be equivalent to twice Europe's entire population and almost one half of the world's youth will be from Africa.⁶ However, in this youth bulge, Southern Africa will experience the lowest population growth of the continent. The population is expected to increase to nearly 261 million in 2050 and 435.5 million in 2100.⁷ Transitional justice processes by their nature are future-oriented, hence the most important actors in that process are young people who, if not effectively mentored, could be mobilised to fuel and cause instability. Conversely, if youth actors are equipped with knowledge and skills in transitional justice they could become the continent's resource for peace and development. In effect, promoting youth participation and agency is key to harnessing this peace potential and advance transitional justice.

The AUTJP and the role of youth actors

The AUTJP was adopted unanimously in February 2019 after almost a decade of advocacy work. The policy brings what has now become a global practice in post-violent conflict situations back to Africa, in line with

African values of *ubuntu*. According to the AUTJP, transitional justice refers to the range of formal and traditional or non-formal measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.⁸ In line with this definition, the AUTJP covers both retributive justice and restorative justice. It is anchored upon the nine principles that constitute the basic minimum values and standards across processes.

The key principles guiding the AUTJP are:

1. African Leadership;
2. National and Local Ownership;
3. Inclusiveness, Equity and Non-Discrimination;
4. African Shared Values;
5. Context Specificity;
6. Synergising, Sequencing and Balancing Transitional Justice Elements;
7. Due Regard to the Gender and Generational Dimensions;
8. Cooperation and Coherence; and
9. Capacity Building for Sustainability.

Key among the principles is the principle of African leadership, which makes it clear that implementation of transitional justice is a responsibility of African governments. The other and equally important principle is national and local ownership, which states that partnerships, particularly at the national level, between beneficiaries and the government, state and non-state actors, are critical to nationally driven successful transitional justice processes. It is in this principle mainly that the role of civil society is acknowledged as critical to ownership of the process. This is also linked to the principle of equity, inclusivity and non-discrimination. The principle is in line with the global best practices. The United Nations High Commissioner for Human Rights has pointed out, "transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future".⁹

The AUTJP is expected to act as a guideline for member states in their quest to confront and address past injustices. The adoption of the AUTJP is the first step in a continental drive to implement a coherent transitional

justice mechanism that can be applied to different contexts. Among many other aspects that are covered by the AUTJP, there is at various intervals sufficient reference to the roles that young people can play.

Youth participation in implementing the AUTJP

One of the nine principles outlined in the AUTJP is the principle of inclusiveness, equity and non-discrimination. The AUTJP states that this principle is fundamental in addressing exclusion and the inequitable distribution of power and wealth, which have traditionally been amongst the root causes of conflict. It then states that transitional justice processes should promote participation and address the needs of marginalised and vulnerable groups that include youths. In this regard, youth actors have a primary role in raising awareness and sensitising the wider society, including governmental actors, on the need to implement the provisions of the AUTJP.

Youth actors as victims

The AUTJP defines victims as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.¹⁰ In one of the key principles, the AUTJP states that due regard must be given to gender and generational dimensions of violations. It further states that transitional justice processes should envisage special measures to support youths as victims of conflicts.¹¹ However, from their positionality as victims of conflicts, youth actors can nevertheless play a role as peacebuilders and healers of their war-affected societies.

Youth actors and truth recovery

In discussing transitional justice commissions, the AUTJP gives emphasis on the need to establish a full historical record of the past, including various experiences of such groups as youth.¹² In this regard, youth actors need to be proactively engaged in the design, operationalisation and

proceedings of transitional justice institutions, particularly those that relate to the recovery and documentation of the truth. This will ensure that youth actors will become a source and repository of the legacies of the past, which will empower them to advocate for more equitable and inclusive societies in the future.

Youth actors and reparations

The AUTJP also acknowledges the need to pay attention to the needs and interests of youth actors when considering collective reparations programmes, which seek to restore the human dignity of those who were victimised by past injustices.¹³ In terms of education, youth actors would be the primary beneficiaries of a system that redresses and restores their right to quality of education, particularly early childhood development initiatives. Similarly, youth actors who are among the most vulnerable members of society must be provided with access to adequate healthcare provisions so as to enable them to flourish in their daily activities.

Youth actors and memory

In discussing benchmarks and standards for successful memorialisation, the AUTJP notes that by their nature, memorialisation programmes should foster inter-generational dialogue and involve commemoration activities targeting children and youths.¹⁴ The transmission of information and knowledge about the violations of the past to the younger generation is necessary for them to become conscious actors in enabling and supporting the society to heal and restore the dignity of victims, survivors and their descendants.

Transitional justice is focused on rebuilding broken and deeply divided societies and healing its wounds. It is a future-looking process and in this regard it implicates and requires the active participation of youth actors. In fact, it would be a major oversight for any society to attempt to implement transitional justice processes, interventions and programmes without the active participation of youth actors. In this regard, youth actors play a range of multiple roles in the context of transitional justice processes. On the one hand, youth actors are inevitably active agents in violent conflicts, often as the co-opted and willing executioners of the plans of political

entrepreneurs. Concurrently, they are also the victims and survivors of these same conflicts. In addition, youth actors can play the role of leaders and active participants of communal and national transitional justice processes.

Youth as victims and survivors

In contemporary society new struggles and arenas for contestation are emerging with youth actors as key agents of change as well as victims and survivors of oppression and suppression. A challenge is the need to strategise on how transitional justice processes and interventions can be designed in a manner that enables youth actors, who have been afflicted by the woundedness of past and current struggles, to address their own trauma and embark on a pathway towards healing. As transmitters of memory, youth actors play a crucial role in breaking the inter-generational cycle of violations.¹⁵ This process must begin with acknowledgement of past violations as they relate to young people. The AUTJP refers to this matter in the principle on the generational dimensions of violations and transitional justice processes. Specifically, the policy states that “transitional justice processes should envisage special measures of support for women and youth as victims to ensure their physical and psycho-social rehabilitation and social reintegration”.¹⁶

The engagement of youth as victims and survivors of past violations needs to cut across all elements and processes of transitional justice. For example, the full extent of how youths were affected by a conflict may never be known unless such bodies as truth commissions engage youths themselves not only as a marginalised group as is often the case leading to the ticking of the boxes, but rather as a key group seeking equitability as recovery of truth. This engagement process allows youth perspectives and experiences to form part of the “national” truths as young people are able to tell their “truths”. It is possible that the historical violations that some of the countries in the Southern Africa region are dealing with now appear to be far-removed and distant from young people who did not have the direct experience of the conflicts. In this regard, a key role for youths is to actively engage and find entry points to learn and internalise narratives of the past, so that they can be empowered to actively participate in redress, accountability, reparation and rehabilitation

processes, including healing the trauma generated by past violations. In the case of Zimbabwe, militant groups like the Mthwakazi Republic Party (MRP) have often felt that they are victims of Gukurahundi and yet they have not been fully acknowledged or engaged as survivors of this atrocity. A significant number of the members of MRP may be too young to have directly witnessed Gukurahundi, but the legacy of this historical violation was transmitted to their parents and elders and they have in turn vicariously internalised the harm that was caused by this atrocity. In addition, there should be acknowledgement that the devastating effect of Gukurahundi left many young people orphaned and millions impoverished.

Future victims of past violations

A youth actor speaking at the Zimbabwe National Transitional Justice Working Group’s 2018 Transitional Justice Policy Symposium observed that “today’s economic policies are creating victims in the future. How can transitional justice provide compensation for future generations?”¹⁷ The capacity for the crime of genocide to generate a legacy of continuing violations requires the interrogation of the historical roots of collective group-based violence and its future impact.¹⁸ While transitional justice must investigate and surface the truth of what transpired in the past, in order to understand the past and ensure non-recurrence, the processes of transitional justice must also investigate the effect of violations in order to ensure a just and fair compensation and reparations programme. The crime of genocide has the potential to eradicate the culture and traditions of communities. In this regard, it is a violation of cultural rights, which has inter-generational ramifications and a significant impact on the future of the affected communities. By extension, through the transmission of inter-generational trauma, the young people who are born into these communities also become victims and survivors of this atrocity of which they did not have any direct physical experience.

Post-apartheid South Africa is a good example of a country engaged in the conversation on responding to the inter-generational transmission of trauma and violations. The conversation on economic transformation and how the economy that has in the past worked for the minority white population needs to more directly address the impact of apartheid

on the previously disadvantaged. The emergence of the Rhodes Must Fall and Fees Must Fall social movements in 2015 shed light on the continuing need to dismantle the legacy of apartheid by taking action to address the concerns of those who were subjugated by the apartheid system. In this regard, social justice programmes need to be focused on the future and how they can create pathways for young Africans to empower themselves to become active participants in the economic growth of their societies and countries. The 2019 SA Reconciliation Barometer Survey found that less than a third of South Africans think that their personal socio-economic situation, including safety and security, had increased since 1994.¹⁹ This is a significantly low number given the period of time that has lapsed since South Africa's transition to independence in 1994. Consequently, the quest for transformation of South African society will continue for younger generations who remain affected by the reality of apartheid which they did not directly prior to 1994. Young South Africans need to remain engaged with the legacies of the past and could even play the role of bridging the past and the future, through memorialisation processes, in order to ensure that the historical reality of apartheid is not lost or distorted.

The 2018 Zimbabwe National Transitional Justice Working Group Symposium highlighted the appeal from youth actors for the stories of the past to be preserved and taught in their schools. One participant tweeted that:

Today I got to spend the day at the Transitional Justice Policy Symposium. And one of the speakers gave a presentation on "Taking Stock of Zimbabwe's Transitional Justice Journey" and I really think they should teach that in our high schools as Zimbabwean History.²⁰

In this expression, there is a greater awakening to the use of new media to make transitional justice an everyday conversation that fits into the everyday lives of young people. Social media comes in as a tool through which these stories can spread faster, accelerating a wider societal awareness and buy-in among young people.

Youths as participants in the transitional justice processes

The role of youth in transitional justice processes must not be limited to those who identify as victims but to all youths who are involved in different parts of the victim-survivor-healer spectrum. The AUTJP states that "transitional justice processes promote the participation and address the needs of marginalised and vulnerable groups such as women and girls, the elderly, disabled and youth, especially child soldiers". By extension, given the demographic analysis for Africa's population, it is critical that young people are actively engaged in transitional justice processes. Schwartz argues that communities and governments need to support young people engaged in positive roles, so that they do not become a "resource for perpetuation of violence".²¹ Schwartz further notes that the alienation and marginalisation of children means that they can become apathetic towards the reconstruction process, and are always susceptible to being recruited as child soldiers. Schwarz advised that young people need empowerment programmes to "provide skills to be productive in their community," as well as to boost their sense of belonging.²² The African Youth Charter cements this view by providing that every young person shall have the right to participate in all spheres of society. The Charter goes further to breakdown the spheres of participation that include Parliament, and many other civic duties.²³ Article 17 is more explicit to transitional justice as it states:

In view of the important role of youth in promoting peace and non-violence, and the lasting physical and psychological scars that result from involvement in violence, armed conflict and war, State parties shall strengthen the capacity of young people and youth organisations in peace building, conflict prevention and conflict resolution, through the promotion of intercultural learning, civic education, tolerance, human rights education and democracy, mutual respect for cultural, ethnic and religious diversity, the importance of dialogue and cooperation, responsibility, solidarity and international cooperation.²⁴

These speak directly to the specific aspects of how young people can

actively participate in the transitional justice discourse. The areas of participation listed in the Charter are areas that look towards building positive peace. By listing positive acts of inclusion, the Charter seems to acknowledge that the lack of children and youth participation in decision-making processes at all levels is also a form of structural violence. Del Felice observes that as far as youth actors are concerned, “decisions are often made *for* them, but not *with* them, losing their valuable perspectives and insights”.²⁵ Del Felice notes that there are many youth who are peacebuilders, as well as being pro-active agents in their communities, in their schools, workplaces, sports teams, youth groups and universities. These are clear positive roles that youths can play in advancing transitional justice in Africa.

Youths as leaders in transitional justice processes

Youth actors can take on leadership roles in transitional justice processes and also function as role models of others to emulate. The leadership of youth in transformative processes is not a new phenomena on the continent. It is young people who led and mobilised a significant number of liberation struggles across the Southern Africa region. In South Africa, youth actors and students drawn from the secondary and tertiary levels of the educational system were active members and participants in the struggle against apartheid at a time when almost the entire ANC leadership was in prison. In Zimbabwe, it was university students who led the building of the coalition that demanded the adoption of a new Constitution in the 1990s. The Southern Africa region is now faced with the important task of advancing transitional justice, and youth actors must play effective leadership roles and not only wait at the periphery of the processes. Specifically, youth actors can take the leadership as mobilisers of social movements, knowledge generators or policy influencers. There is an urgent need to home-grown knowledge creation across the African continent and young people need to take advantage of opportunities to empower and express themselves as content experts of transitional justice. In addition, youth actors need to take on key roles in transitional justice institutions. Similarly, they can work with grassroots communities to ensure that transitional justice processes do not end up being exclusively elitist top-down processes. In order to achieve this, it is vital for governments to

invest in their younger populations through quality education, health and the improvement of livelihoods. As McEnvoy²⁶ notes, this leadership is already in place, but perhaps there is need for more deliberate investments, to ensure that youth actors become the primary actors in grassroots community development initiatives as well as being on the frontlines of peacebuilding.²⁷ This is an understanding of the role of young people that is aligned with the United Nations Security Council Resolution (UNSCR) 2250, adopted on 9 December 2015, relating to youth, peace and security, which recognises that “young people play an important and positive role in the maintenance and promotion of international peace and security”.²⁸

Key principles for healing, participation and leadership of youths

The discussion above highlights key principles that underline the role of young people in transitional justice. These are not detached from proposals proffered by the AUTJP as well as the UNSCR 2250, but the Southern African context and legacy requires some degree of nuance when it comes to the situation of youths. This is worsened by the growing exclusion in the region that creates a desperate economic situation for young people, facing the triple challenges of poverty, unemployment and inequality. In this regard, youth actors are by far the most important demographic group in transitional justice processes. A successful transitional justice process in Southern Africa has the potential to create a safe region for 200 million young people. A failed transitional justice process leaves traumatised and wounded generations that may make the region a potential incubator for violence. Transnational issues are key to youth-centred transitional justice programmes. Southern Africa’s colonial legacy has created a highly interconnected region where emerging issues have no respect for borders. In the manner through which the liberation movement spread across the borders, transitional justice processes will need effective coordination in order to be effectively cascaded across the entire region, as well as the rest of Africa. Specific issues such as trans-national human rights, for example, as it relates to migrant labour, must be handled as a priority for economic justice for previously deprived communities of youths. The processes of healing and reconciliation for young people can never be limited to the

current generation. Even though the trauma of the past remains anchored and rooted in those who were directly affected as victims, the inter-generation of trauma means that it also affects the immediate descendants of victims as well as the future unborn offspring as discussed above.

Strategies for empowering youth actors to engage in transitional justice

The adoption of the AUTJP provides a basis for the further enumeration of regional guidelines for youth engagement in transitional justice. Along similar lines, it is necessary to create resource centres for youths in the member states. Youth organisations can partner with universities in Southern Africa to generate and curate the knowledge required to advance the capacity of young people to lead in researching and writing on transitional justice processes. This will include creating and expanding leadership development programmes in the region, such as the Pan-African Reconciliation Network (PAREN) Fellowship Programme, which is convened by the Institute for Justice and Reconciliation (IJR) based in Cape Town, South Africa. There is a need to adopt creative approaches to engaging with transitional justice processes to ensure that more young people are drawn into the conversations that will harness the narratives of the past and utilise them effectively to build inclusive societies. In this regard, information technology can be utilised to leverage digital tools to preserve memory and catalyse future-oriented dialogues, which can, for example, link transitional justice programmes directly to economic transformation.

Young people must lead the transformation of academic curriculum as an important part of preserving history while making it appealing to future generations. As more transitional justice knowledge outputs are generated in the region, it is vital to ensure that they are easily accessible and readily incorporated into the educational curriculum. In this regard, a user-friendly rendition of the experiences of the South African Truth and Reconciliation Commission can become a powerful teaching tool for youth actors. In this regard, the use of digital technology to make the processes relating to the Commission, as well as its findings, more readily accessible to younger generations would be an important activity to

encourage youth actors to engage with its content directly. Along similar lines, the use of social media presents an important opportunity to make transitional justice palatable in everyday language, culture and lifestyle, with campaigns that would be purposefully designed to capture wider audiences. In this regard, a youth-focused social media strategy would be vital to ensure wider buy-in for the AUTJP.

Conclusion

The youth have an important role in advancing transitional justice in Southern Africa. This chapter has discussed how the region's past history and legacy have created solidarity platforms that allow for a coordinated approach to youth leadership in transitional justice. The African Youth Charter has laid a firm foundation on the role of youths not as mere participants but as leaders, change-makers and champions. The AUTJP is explicit on the role of youth actors, and it needs to be reinforced by additional strategies, guidelines and programmes that will ensure a wider buy-in of the policy by youth actors across the Southern Africa region. It has been cemented by the AUTJP which identifies several avenues for youths. The development of such programmes would serve as a catalyst for positive change, which can draw in more than 200 million young people, as healers of society rather than instruments of violence. In this regard, youth actors have a pivotal leadership role to play in building sustainable peace through justice and reconciliation in Southern Africa.

CHAPTER THIRTEEN

Capacity Building and Training Initiatives to Implement the African Union Transitional Justice Policy

Ferdinand Kwaku Danso

Introduction

One of the critical challenges confronting post-conflict or conflict-affected countries in Africa, as they make the transition from war to lasting peace, is how to deal with the past. In many parts of the continent, countries are grappling with the question of how to address past injustices that occurred or were exacerbated during conflict or authoritarian rule.¹ If these injustices are not redressed and estranged individuals and groups reconciled, it is unlikely that peaceful, democratic and inclusive societies would be established. This chapter assesses the importance of creating the conditions for the promotion of justice and reconciliation, through training and capacity building. In particular, it is for this reason that the “capacity of national and local actors in the country concerned” coupled with political commitment and leadership is identified as a determinative factor of the success of the AUTJP.² In particular, paragraph 41 of the AUTJP states that transitional justice processes “should, as a matter of priority, build and/or strengthen national and local capacities”.³ This chapter builds upon this provision and assesses the need for training and

capacity building to support the implementation of the AUTJP across the African continent. The chapter will present a brief overview of the capacity constraints that typify countries seeking to restore justice in the aftermath of armed violence or authoritarian rule. Secondly, the chapter demonstrates how the deficit of capacity is exacerbated by the exclusion of indigenous capacities in the context of transitional justice. Thirdly, the chapter assesses the range of training and capacity-building options that support the implementation of the AUTJP. The chapter concludes with some key recommendations on how the implementation of the AUTJP can be supported.

Situating capacity building

The UNDP defines capacity development as “the process through which individuals, organisations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time”.⁴ Capacity building, which underpins the principles of national ownership and sustainability, is understood to transcend the conduct of specific training programmes to include support strategies for accountability and long-term investment in education and learning, although training is considered as the basic engine for capacitation.⁵ The UNDP identifies five basic steps of the capacity development as follows:

1. Engage stakeholders on capacity development;
2. Assess capacity assets and needs;
3. Formulate a capacity development response;
4. Implement a capacity development response; and
5. Evaluate capacity development.⁶

Depending on the specific needs of transitional countries, these steps may have relevance for the processes of capacity building that include capacity creation, which entails the construction of new capacities; capacity utilisation, which involves the effective mobilising and use of existing capacities; and capacity retention, which relates to the development and sustainability of capacity beyond the initial interventions.⁷

The AUTJP and the need for capacity building

The AUTJP, which offers guidance for dealing with the past in Africa, underscores this point when it calls on AU member states “to address the dual objective of justice and reconciliation in a mutually supportive way”.⁸ It is necessary for African countries to respond to this guideline by ensuring that they have the relevant capacities to lead on policy articulation and national ownership of their transitional justice processes. This is necessary if states and societies in transition are going to empower themselves to implement contextualised strategies that recognise and respond to their unique experiences and needs. In this regard, it is vital that:

1. All transitional justice processes have a capacity-building component that strengthens the capabilities of the society to support and legitimise national processes;
2. Transitional justice processes ought to utilise local expertise and, where it is weak, leverage relevant African capacity at the regional and continental levels, as well as from the diaspora; and
3. There is clarity and guidance on modalities of international engagement in building local capacity in transitional justice processes.

These provisions will ensure that transitional justice processes are anchored in the countries and societies in which they are being implemented. This is particularly important due to the increasing levels of religious and ideologically driven radicalisation, violent extremism and terrorism that is afflicting the Horn of Africa, the Sahel and the Lake Chad Basin regions of the African continent. To further promote national ownership and sustainability, the AUTJP places particular emphasis on the “primacy of national resources and capacities”, including “traditional judicial and non-judicial resources and capacities that the society can mobilise at the national and local levels for justice and reconciliation”.⁹

African countries in transition often face capacity challenges precisely because it is exactly the very capacities required to lead on transitional justice that authoritarian regimes or violent conflicts destroy. In particular, the societal, civic leaders, as well as national institutions that could lead on transitional justice in a post-conflict or post-authoritarian context are often silenced, neutralised or undermined. A real paradox in transitional African contexts, therefore, is that many states embark on transitional

justice processes, for which they neither have the requisite technical capacity nor the financial wherewithal to prosecute. As a consequence, there is a tendency to relinquish ownership of transitional justice to external agency and actors. This capacity deficit is accentuated by the negation or refusal to utilise indigenous and cultural approaches to address the legacies of the past, and to incorporating them in transitional justice programming. Against this backdrop, training and capacity building constitute critical short-term and intermediate objectives in ensuring the implementation of the AUTJP.

The crisis of capacity in transitional contexts

In Africa, conflicts have generally taken place in the context of eroded state capacity, marked by the absence of effective formal institutions. As a consequence, capacities are generally limited in countries making the transition from armed violence to peace. Indeed, state capacity weakness has remained a major source and outcome of conflict on the continent. Most countries emerge from conflict with dysfunctional physical and institutional structures that include the system of knowledge production and diffusion as well as the criminal justice system.¹⁰ For example, the transitional context in Liberia, following the termination of the 14-year civil war in 2003 was characterised by “the lack or absence of courts, resources, lawyers, penal institutions and police officers, in large parts of the country”.¹¹ As of January 2006, nearly three years following the signing of the comprehensive peace accord that ended the conflict, the “entire prosecution system had only two fully qualified prosecutors available, six of Liberia’s fifteen counties had no prosecutors at all, and several counties did not have any functioning criminal court”.¹²

Violent conflicts generally compel some members of the professional sector, which includes experts that might be proficient in transitional justice, to relocate and undertake self-exile. The violence and brutality that characterise many of these conflicts means that those who seek refuge in foreign countries are usually too traumatised to contemplate returning even after the termination of the conflict.¹³ The skilled public servants who fled but were implicated in the violence often fear possible arrests and prosecution after the cessation of violence. In addition, some of those who did not emigrate but are viewed as loyalists of the collapsed regime

are usually not trusted by any incoming state administration.¹⁴ In addition to this, during war and authoritarian rule, the media tends to be co-opted and neutralised as an independent source of reliable information, and civil society actors are threatened and suppressed, which in effect silences their ability to engage with issues such as addressing the violations of the past.

In the execution of violent conflict and authoritarian rule, state institutions, including the institutions of the criminal justice system, namely the police, the statutory courts of law and the correction services, are usually implicated and directly involved in violating human rights, and therefore they become discredited or delegitimised due to their politicisation. In other words, formal state institutions are in effect also casualties of violent conflict or authoritarianism. These legacies are factors that cause the absence of national capacity in transitional settings.

The marginalisation and exclusion of indigenous justice and reconciliation mechanisms from mainstream transitional justice programmes feeds into the challenges of capacity constraints. The AUTJP recognises the role of tradition-based justice and reconciliation mechanisms including “clan or customary courts and community-based dialogue”, which should be utilised “alongside the formal mechanisms to address the justice, healing and reconciliation needs of affected communities”.¹⁵ The next section discusses the salience of traditional approaches to justice and reconciliation as a complementary source of transitional justice capacity, as well as assessing how their exclusion influences transitional justice processes. Subsequently, the last section explores ways in which indigenous mechanisms might reinvigorate and unleash latent capacities in transitional justice contexts.

Indigenous resources and capacities of justice and reconciliation

Conflicts in Africa generally occur in contexts in which relationships matter, and cultural practices acknowledge the importance of redress for maintaining societal links. Transitional justice and peacebuilding is anchored on the restoration of relationships. In the context of intrastate conflict, the perpetrators, victims and survivors of war-time atrocities often live together after complex political emergencies, typified by

high levels of civilian victimisation.¹⁶ In addition, most conflicts are embedded in deep-seated cleavages with conflicting histories, so that violence is often channelled into settling old scores.¹⁷ Furthermore, in relational communities where strong kinship ties and a shared sense of community prevail, injustice is thought of as a fundamental source and consequence of “damaged and acrimonious social relations”.¹⁸ Therefore, transitional justice measures “must work to repair those [damaged] relations” in communities.¹⁹ Retribution alone is inadequate for restoring a sense of justice in such context, as punishment forms only part of the efforts towards administering justice, and other processes are required to contribute towards healing and restoring relationships.

Moreover, it is often difficult to distinguish between victims and perpetrators in the context of civil war in Africa where “everybody fought” and everyone was a victim.²⁰ Thus, the focus of transitional justice interventions need to transcend the focus on punishing the small minority of perpetrators, predominantly state agents and ex-combatants,²¹ and focus more broadly on victims, survivors and their communities, in the pursuit of reparative collective justice.²²

A significant number of African states are legally plural in that they are based on hybrid justice orders or plural legal systems that embody multiple legal systems coexisting in the same social field. There is, therefore, more to law or justice than state law,²³ for example, in Liberia, where about 90% of people seek justice through indigenous mechanisms.²⁴ Local forums, such as the Palava Hut and Fambul Tok practised in Liberia and Sierra Leone respectively, are preferred not only because the ability of the African state government to extend its extension to the whole country, notably the rural areas, is severely limited. Despite the efforts by belligerents on all sides to destroy or undermine them, indigenous mechanisms often survive the aftermath of violent conflict and authoritarianism, which suggests that they are more resilient than they appear. The majority of indigenous mechanisms have a basis in communal interaction and exchange and therefore they tend to eschew the zero-sum adversarial or confrontational processes that mark judicial interventions.

As home-grown and context-specific processes rooted in local norms, values and culture, indigenous mechanisms are presided over by trusted and respected elders of integrity or panel members from within the

community, imbuing them with a high degree of legitimacy. Not only are they conducted in a language understood by all, they are also decentralised ongoing (and less *ad hoc*) processes taking place within communities, thereby enabling direct and greater participation. Furthermore, they are comparatively cheaper financially, more accessible and less prone to official manipulation. They also have the restoration of justice and broken relationships in communities as a prime objective.²⁵ In this regard, indigenous forums possess significant and unique potentials that can complement and reinvigorate the justice systems in transitional contexts. Indigenous mechanisms are also more effective frameworks for building the capacity of communal and national actors in promoting justice and reconciliation as they are grounded in local ethos and institutions that facilitate direct engagement with local actors.²⁶

The dominance of punitive and retributive justice within the mainstream of transitional justice processes has led to the marginalisation of indigenous mechanisms. There is an erroneous perception that indigenous mechanisms are only suited to addressing localised disputes relating to land, marriage and petty theft and may, therefore, not be suitable for addressing war-related injustices. However, as noted above, there is scope for some of these mechanisms to be adapted to addressing the needs of victims, survivors and their communities in the aftermath of violent conflict. In addition, there is in some of these processes a cultural bias that excludes women and children from participating in deliberations and discussions, which is a violation of their human rights. These exclusions can be reversed through the gradual engagement and participation of women and children as active agents of change in their communities. In spite of these limitations, indigenous processes are integral to holistic and transformational approaches to transitional justice, which revolve around “the right to know”, “the right to justice”, “the right to reparations” and “the guarantee of non-recurrence”.²⁷ Their utilisation in the contemporary context, particularly as frameworks for building the national capacity to address the violations of the past, is also bound to have a transformative effect on the way they are configured and implemented, which will contribute towards supporting the implementing of the key provisions of the AUTJP. This suggests that national constitutions and institutions need to make a more deliberate effort to acknowledge and

utilise indigenous mechanisms as part of their broad range of transitional justice processes.

Building transitional justice capacities to implement the AUTJP

The deficit of capacity that characterises most African countries in transition means that the majority of AU member states lack adequate capability to implement the AUTJP. This section explores alternate options for building the capacity of relevant stakeholders to enable them to meet the challenges of restoring justice and promote reconciliation after armed violence.²⁸ Although the crisis of capacity remains a major challenge in most AU member states, the magnitude of the challenge differs from country to country. Thus, specific country situations may trigger different aspects of the AUTJP at different points in time. However, effective implementation of the AUTJP requires comprehensive and holistic approaches to transitional justice that is underpinned by research in order to identify the relevant gap and potentials.

The need for research to enhance transitional justice interventions in Africa

Research is critical for the identification of needs as a means to develop strategies to enhance and maximise the capacity potentials of national actors. Effective and sustainable approaches to transitional justice are based on effective analysis and understanding of national needs and available capacities. Research also has an important function in conceptualising and formulating appropriate responses, identifying local expertise and the need for institutional reforms to consolidate peace and rule of law. Research conducted for this purpose may take the form of analytical baseline assessments on the current status of access to, and the administration of, justice in transitional societies in order to identify the necessary gaps and to define the problems that need to be addressed. Research is also vital in ensuring the regular review of legislation, and the continuous process of actor and stakeholder mapping, the survey of structural and institutional frameworks, the assessment of the nature and

scope of violations and the definition of existing or ongoing programmes instituted to restore justice. In summary, research is vital in order to:

1. Understand the nature and scope of the problem;
2. Define the problems that need to be addressed;
3. Identify current status of justice delivery and ongoing efforts to restore justice;
4. Specify existing capacities and gaps;
5. Identify relevant stakeholders requiring capacity – state and non-state;
6. Identify the type of capacity required;
7. Identify institutions for training and capacity building support; and
8. Determine whether or not external partners will be required.

The initiatives to enhance research will be vital in broadening expertise and providing relevant policy support to AU member states, intergovernmental agencies and non-governmental actors, that would be involved in articulating the strategic national policy and its operationalisation. It goes without saying that research will be required to inform policy guidelines, relevant benchmarks and practical strategic proposals for the design, implementation, monitoring and evaluation of the AUTJP. The publication and dissemination of research-based knowledge products is essential for effective training and capacity-building interventions.

The central role played by local agency in the delivery of justice and the promotion of reconciliation in Africa necessitates the conduct of ethnographic studies and workshops at the communal and national levels, involving non-formal justice practitioners, including cultural leaders and community leaders to discuss and document the range of indigenous approaches that might serve as transitional justice measures. This is necessary for enhancing local agency and participation in processes of transitional justice. Ethnographic studies are also critical for identifying the weaknesses internal to indigenous justice and reconciliations that relate to human rights violations and forms of exclusion based on gender and generational categories. They may also help to map out existing indigenous justice mechanisms across the country, how they relate and differ, and how they could be transformed to align with basic human rights norms in order to enhance their national relevance.

A major challenge confronting the frontline states in preventing

and countering violent extremism is how to institute transitional justice interventions and to rehabilitate as well as reintegrate extremists who choose to defect from jihadist groups such as Boko Haram, in north-eastern Nigeria, the Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), in Mali, Burkina Faso, and other parts of the Sahel. Existing counter-terrorism strategies generally overlook the fundamental question of the underlying causes of grievance and alienation, and the lack of a restorative pathway to preventing violent extremism. In the absence of effective transitional justice and rehabilitative interventions, it is unlikely that former extremists will be effectively held accountable for their violations and reintegrated into local communities and the gradual management and reduction of mistrust. In fact, unsuccessful reintegration may impel low-risk extremists to revert back to violence as they are driven further back into alienation and desperation. There is currently a dearth of empirical research that explains how transitional justice may be conducted in the fluid context of violent extremists. The implementation of the AUTJP in such contexts should, therefore, be preceded by the conduct of systematic baseline assessments that enhance knowledge and understanding of the kind of transitional justice intervention that is required.

Training as the engine for capacity building

Based on results from research or baseline studies, training and capacity-building support may be developed to enhance capacities both at the national and local levels. This may revolve around such transitional justice issues as war crime prosecutions, truth and reconciliation, reparation, documenting, relational justice, symbolism and memorialising, judicial reforms, human rights and the rule of law, vetting and lustration, local justice mechanisms, advocacy and documenting human rights violations including monitoring and reporting. The targeted personnel for training may include judges, prosecutors, indigenous justice practitioners, media practitioners, women's groups, students, faith-based organisations and broader civil society activists. Depending on specific local situations, course models may take the form of in-person workshops and trainings, web-based individual or group trainings, conferences and workshops and community change academies.

Training of Trainer (ToT) programmes may be designed for trainers

targeted for providing training and capacity-building assistance for transitional justice issue areas where larger numbers of personnel are required, following the piloting of courses. Capacity-building programmes may also involve high-level knowledge exchange and executive briefings for the sharing of lessons learned among local, national and international actors. This may provide useful opportunities for participants to compare experiences and explore the possibility for sub-regional cooperation on the implementation of the AUTJP.

Training and capacity-building support may be coordinated at the regional and national level such as the ECOWAS or SADC, with embedded focal persons or points serving as regional coordinating centres (RCC) for the implementation of the AUTJP. By extension, the RCC may coordinate training programmes delivered by regional training centres such as the Kofi Annan International Peacekeeping Training Centre (KAIPTC) based in Ghana. Training processes may involve the convening a conference of experts to validate the finding of specific research, after which, and based on the specific gaps and needs identified, experts may be identified to develop training manuals for capacity-building courses in specific areas of transitional justice. The experts may themselves be trained in special pedagogical skills such as collaborative problem-based learning to enable them to develop the requisite skills for training.

The use of exchange programmes and study visits will enable key decision- and policy-makers to confer with their professional counterparts to experience different approaches and share experiences. Specific parameters for impact assessment, evaluative research and monitoring and evaluation should be defined for quality assurance purposes, but to also ensure the training programmes contributing to intended purposes, while minimising potential unintended consequences.

Conclusion

The adoption of the AUTJP marks a critical step towards efforts to redress the injustices of the past, as a pathway to the promotion of reconciliation and inclusive communities after armed violence or authoritarian rule in Africa. The policy offers guidance for dealing with the past and underscores the need to address the dual and mutually reinforcing objectives of justice and reconciliation. This chapter has noted

that while this is useful for overcoming the limitations inherent in the current approaches to transitional justice, AU member states generally face multiple capacity constraints because it is exactly the very capacities required that authoritarian regimes or violent conflicts destroy. The chapter also discussed how prevailing capacity weaknesses are compounded by the exclusion of indigenous mechanisms, which is a cultural resource, from supporting national transitional justice processes. These challenges may be addressed through the inclusion of a capacity-building component in all national and regional transitional justice interventions, as well as the incorporation of traditional mechanisms in processes for dealing with the past. This, in turn, requires the conduct of research, including ethnographic studies that enhance the national relevance of traditional mechanisms, as the development of tailored courses to maximise capacities at both the national and local levels. This chapter concluded that capacity building and training is a vital dimension to any strategy to contribute towards the implementation of the AUTJP.

CHAPTER FOURTEEN

Covid-19 and the Limitations of the Implementation of the African Union Transitional Justice Policy: The Case for a Transformative Justice Approach

Nancy Chepkwony

Introduction

There are a number of criticisms levelled at transitional justice processes, including the observation that it has not been as effective in addressing deep-rooted structural inequalities. Between 2020 and 2022, the Covid-19 pandemic¹ further exposed these frailties and limitations of transitional justice processes. This chapter sets out transitional justice gaps as has been exposed by the pandemic in Africa. The chapter contextualises the way in which the African Union Transitional Justice Policy (AUTJP) has been unable to address deep-rooted structural causes of violations and subsequently unable to solve ongoing violations in the wake of the pandemic. This chapter reviews these limitations and explores prospective solutions based on lessons learned during the pandemic on what has worked. It proposes the incorporation of different innovative mechanisms employed successfully in the continent, which are not necessarily in the mainstream transitional justice norms. The chapter argues for an alternative approach, notably a transformative justice approach, which has

the potential of catering for everyday justice needs as well as addressing structures of inequalities and economic, social and cultural violations that have been perpetuated in the past. The chapter assesses transitional justice efforts in Africa and the fragilities exposed by Covid-19. The chapter then assesses how the provisions of the AUTJP highlight its strengths and limitations as a foundation for assessing the benefits offered by a transformative justice and leadership approach. The chapter also proposes and recommends the importance of an adaptive leadership to implement this new agenda of transformative justice across the African continent to respond to the real justice needs and aspirations of the African people.

Contextualising transitional justice

Transitional justice has been accepted as the conventional norm for addressing legacies of human rights violations in the context of political transitions over the last few decades.² One of the indicators of its acceptability is the recent availability of official and quasi-official documents on transitional justice,³ which has led to its institutionalisation in international law.⁴ Africa has been on the forefront in advocating for transitional justice as a vehicle for addressing the legacies of past violations.⁵ These efforts to promote redress and accountability have been influenced by the spread of norms and standards by international actors, and consequently there is a strong Eurocentric bias in the way transitional justice has been framed in Africa.⁶ The former UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence Pablo de Grief acknowledges that transitional justice mechanisms have a limited outreach and that “no transitional country can legitimately claim great success in the field”.⁷ Thomas Hansen argues that transitional justice has a limited window of opportunity,⁸ and that limiting the temporal scope has a negative consequence on efforts to address structural and systemic violations that have their roots in the formation of nation-states. In this regard, transitional justice often ignores, reproduces or aggravates conditions of structural violence.⁹ The mainstream transitional justice initiatives have not been as successful in addressing horizontal inequalities and structural violations, which also undermines its ability to address contemporary transgressions,¹⁰ and is thus ill-suited for addressing systemic injustices.

Covid-19 and the persistence of structural inequalities in Africa

The Covid-19 pandemic further exposed the frailties and inequalities across Africa, highlighting the underlying and deep-rooted layers of structural inequalities that transitional justice has been unable to address. These structural injustices include social, economic, cultural and ecological inequalities, which are a result of previous underlying and systemic violations. History has illustrated that pandemics offer the opportunity for a break with the past and to serve as a catalyst for addressing structural and systemic inequalities and injustices.¹¹

On 11 March 2020, the World Health Organization (WHO) declared the novel Coronavirus disease (Covid-19) a global pandemic.¹² This pandemic swept across all nations indiscriminately threatening “peace and development”¹³ and “exposing the frailties and inequalities of our societies”.¹⁴ These inequalities are often deep-rooted and with multiple structural layers of economic, social and cultural violations. Some of the inequalities exposed by the pandemic in Africa included:

1. Lack of social security and protection for those in informal sectors and low paying jobs;
2. Children falling behind in education;
3. Lack of adequate housing;
4. Food insecurity;
5. Lack of adequate healthcare; and
6. Lack of water and sanitation, among others.

The pre-Covid-19 world was already afflicted by deep-rooted layers of structural inequalities, which were further amplified by the pandemic. For example, South Africa has been applauded for having one of the most comprehensive and carefully thought through transitional justice processes. South Africa, however, was afflicted by deep structural inequalities, including lack of access to housing, healthcare, sanitation, schooling and infrastructure for the vast majority of the population, due in part to the structural injustices left behind by the legacy of apartheid.¹⁵ Covid-19 further exacerbated these structural inequalities and amplified the gap in terms of access to digital infrastructure,¹⁶ including the ability to procure devices, data and electricity to continue participating in the pandemic-affected economy.¹⁷

In 2013, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) identified the persistence of economic marginalisation and the denial of socio-economic rights as a primary driver of the post-electoral violence that the country endured in 2007–2008.¹⁸ In the face of the pandemic, the most marginalised communities in Kenya were afflicted by the challenge of access to education.¹⁹ The other gap that has been highlighted by the pandemic was the phenomenon of police brutality, particularly through the abuse of curfew orders. In Kenya, the National Police Service has been on the spot for use of excessive force while applying controversial partial lockdown orders resulting in 15 reported deaths.²⁰ In Uganda, there was the use of excessive force to enforce measures, for example, the physical abuse of women street vendors and motorcycle riders in the urban areas.²¹

Across the continent, the pandemic has also exposed fragilities of global health systems.²² These inequalities have been caused by a lack of political will and, more so, failure to invest in health systems and health-related industries, which has been laid bare by Covid-19 across Africa. Nigeria had lacked political will in establishing health systems way before the pandemic struck.²³ Tunisia actively excludes migrants, refugees and asylum seekers from the national healthcare system. They have also been excluded from any form of government and social welfare programmes.²⁴

The foregoing scenarios illustrate how inequalities are embedded in the existing problematic and discriminatory systemic structures, which were further augmented by the Covid-19 pandemic. On a continental level, the AU needs to press the “reset button” by capitalising on this unprecedented period to spur African leaders into political action. This crisis should be used to kickstart transformative justice efforts.

Transitional justice and the case for a transformative approach

Africa has been pioneering in human rights and transitional justice through innovative ideas, policies and frameworks.²⁵ Indeed, Africa’s promise and potential are unparalleled in modern history.²⁶ The AUTJP remains predominantly normative, aiming to promote the right to truth, justice, reparations for victims and institutional reform. It is also paramount

that the mandates of an effective transitional justice policy include social, economic, cultural and ecological rights. The value-add of the AUTJP is its success in incorporating political, civil, socio-economic and cultural rights grounded on context-specific transitional justices processes.²⁷ The AUTJP has managed to maintain a balance between holding perpetrators accountable and promoting sincere peace, healing and reconciliation.²⁸ The AUTJP has also creatively and positively provided for the promotion of socio-economic rights and gender justice.

The AUTJP is, however, not without weaknesses. First, the policy provides that it does not seek to create any “new obligations for AU Member States”²⁹; rather, its objective is to provide guidance to the AU statutory instruments and policies on transitional justice. On this basis, the AU cannot hold member states accountable for failing to adhere to the provisions of the policy.

There are significant gaps in the AUTJP in terms of how it intends to address colonial injustices. The issue of how African governments and societies can address the political, economic and social injustices perpetrated by colonialism is an issue that is increasingly coming to the fore. A recent case study is the Talai community in Kericho, Kenya, which has suffered severe socio-economic inequalities over the years as a result of colonial violations, including dispossession of land.³⁰ The Talai community has not been able to achieve any socio-economic and reparative redress for the atrocities that they endured during the colonial period in Kenya. Moyo provides a compelling critique that transitional justice, in its “liberal form cannot be effective since it has no mandate over structural injustices which occurred during the colonial period”.³¹ This confirms Waldorf’s argument that “transitional justice is inherently short-term, legalistic and corrective” and is thus not pragmatically suitable when addressing historically constructed injustices and inequalities.³²

Many scholars have raised concerns about the risk of overburdening transitional justice processes.³³ The AU creatively crafted its AUTJP, carefully referring to “context specificity” and “context-based approaches” focused on socio-economic and cultural transformation.³⁴ Greedy and Robins also argue that transitional justice should aim to be transformative and be anchored by having earlier advanced an argument that for transitional justice to be transformative, then the approach should be

“context-dependent” and “driven by the local and particular understanding of rights in any context”.³⁵ The AUTJP falls short on outlining how to address deep-rooted systemic inequalities, which subsequently became magnified by the harm caused by the Covid-19 pandemic.

The case can be made for a transformative justice approach, which will leverage on the dynamic, innovative and successful measures taken by the different African countries as they underwent transition. In particular, such an approach can be disaggregated into the dimensions of:

1. socio-economic justice;
2. cultural justice;
3. metaphysical justice; and
4. ecological justice.

Socio-economic justice

Socio-economic justice is derived from socio-economic rights, which include the right to food, housing, healthcare and education. In this regard, socio-economic justice or distributive justice encompasses the redistribution of necessary resources to victims, thus promoting the realisation of their rights.³⁶ In transitional justice settings, socio-economic justice aims at addressing the underlying causes of conflict. Transitional justice has, for a long time, focused on civil and political justice, neglecting social and economic justice.³⁷ Arbor rightly argues that socio-political violations of human rights are inexplicably connected to socio-economic and cultural rights violations.³⁸ Arbor further notes that if we are to achieve social transformation, then “identification of root causes of previous conflicts is paramount, addressing these issues through legitimate terms to prevent the likelihood of the occurrence of another conflagration”.³⁹ Failure to address the structural layers and root causes would, in effect, be similar to “powder kegs” waiting to explode.⁴⁰

As such, socio-economic justice should form an integral part of the transitional justice plan. The AUTJP advocates for the development of socio-economic programmes both in countries undergoing transition and fragile post-conflict settings. In particular, Article 53 (viii), of the AUTJP provides that transitional justice commissions should address violations of socio-economic rights. Sierra Leone, Kenya, Tunisia and Liberia have successfully managed to innovatively include violations of socio-economic

rights in their TRC reports and recommendations. Furthermore, Article 54 of the AUTJP encourages states to adopt mechanisms that promote the promotion of socio-economic rights by women.

The AUTJP also makes the case for “redistributive justice”, which entails “socio-economic and development measures defined to rectify structural inequalities”.⁴¹ The policy in this regard provides standards that may be included in promoting redistributive justice to include:

1. land reform and property rights;
2. affirmative action; and
3. an all-inclusive fiscal and developmental strategies and resource sharing.⁴²

Specific limitations to the AUTJP include the lack of adequate guidance for addressing structural causes of corruption, malnutrition, hunger or poverty that continue to afflict African societies.

In terms of the practical steps to achieve transformative justice, the AU needs to advocate for judicial enforcement of socio-economic rights during conflict, during transitions and post-conflict. Advocating for judicial enforcement would also include training of judicial officers, lawyers and prosecutors on socio-economic rights, therefore promoting judicial strengthening.

There are practical challenges relating to the ability of citizens to initiate and commence judicial proceedings due to financial constraints. This gap could be bridged by human rights organisations and law societies collaborating in the provision of advice, guidance and pro-bono litigation services. States could also finance this process by ensuring that there is a dedicated budget line within the national budget for transitional justice. In situations where states are unable or unwilling to reinforce these rights due to weak judicial institutions and processes and to a weak judiciary, the AU can provide guidance to member states and African citizens on how they can draw upon the avenues for strategic litigation at the African Court on Human and Peoples’ Rights (ACHPR). Strategic litigation has worked well before; lessons should be drawn from it. A good example is the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*⁴³ (the Endorois case), which is a landmark case recognising the identity of indigenous people and acknowledging the violation of their economic,

social and cultural rights. This case was brought to the court through tactful strategic litigation at the ACHPR.

The AU can also provide guidance to member states and societies on the importance of including a robust bill of rights in countries that are reviewing and adopting new constitutions. Kenya⁴⁴ and South Africa⁴⁵ both developed new constitutions anchored in a bill of rights, which has enabled litigation for violations of economic, social and cultural rights. In addition to constitutional reform, statutory reforms are necessary and legislation can be purposefully designed to include socio-economic rights, for instance, legislation establishing systems that promote the right to health, water and food, among others.

The AUTJP should include provisions for reparations for violations endured by victims, survivors and communities of socio-economic rights. Reparations can be targeted at surfacing and identifying the actors, structures and institutions that have perpetuated historical violations. In Guatemala, the Plan de Sanchez⁴⁶ initiative obligated the state to implement reparations programmes for the atrocities that were endured by communities, including health, education and infrastructure programmes. South Africa, for example, has addressed some of the individual and isolated cases of historical dispossession through the restoration of home ownership and land restitution programmes.⁴⁷ Furthermore, the function of collective reparations is to address socio-economic inequalities for certain groups of people and communities who suffered injustices. Therefore, the AU should provide further guidance to its member states on the provision of reparation programmes for economic, social and cultural violations.

Cultural justice

The experiences across Africa illustrate that injustices in the socio-economic sphere are often mirrored in the cultural sphere. Africa is very rich in traditions and culture, which are clearly not homogenous, but manifest a significant degree of variance from region to region and from country to country. Article 18 of the AUTJP provides for a complementary justice system that includes traditional justice mechanisms, which includes rituals and community-based norms and practices. These community-based judicial practices promote healing and reconciliation, as has been seen in the *mato oput* cleansing ceremonies in Northern Uganda and the

Fambul Tok in Sierra Leone.⁴⁸ In this regard, criminal justice processes and procedures ought to draw from cultural legal resources. Article 128 of the AUTJP empowers non-state actors to consider promoting cultural practices that are associated with healing and reconciliation. Cultural practices can contribute towards healing and reconciliation, which is a key goal of transitional justice.

The AUTJP acknowledges the importance of considering cultural nuances that affect societies.⁴⁹ Harmful cultural practices that violate human rights are not permissible in the African Charter on Human and Peoples' Rights as well as in the AUTJP. Article 55 of the AUTJP explicitly provides that transitional justice commissions should pay attention to identifying, isolating and excluding harmful cultural practices. Article 76 of the AUTJP proposes the institution of educational programmes that promote respect for ethno-cultural diversity and cultural teachings for the children and the youth, including forms of art, storytelling, folklore, poetry, song and dance. This would serve to redress the legacy of colonialism, which decimated, destroyed and subjugated African cultures, in effect setting in motion the erasure of the continent's heritage. In this regards, Mani argues that transitional justice needs to go past the conventional transitional justice mechanisms and integrate cultural justice.⁵⁰ Mani further alludes that "... culture is the backbone of human society; their roots connect members of the community to their past, present and future".⁵¹ Hence, African societies and government would benefit from acknowledging and utilising their wide range of beliefs, values and norms in the development and operationalisation of context-specific and culturally nuanced transitional justice mechanisms.

Mani posits that without culturally embedded art, then it is challenging for societies to come to terms with the legacy of the past and to build sustainable peace.⁵² Mani further notes that that "art that emerges from the crisis is an expression of both the pain of conflict and the potential of renewal".⁵³ The AUTJP can also be leveraged to encourage the preservation and transmission of storytelling, because stories in Africa were passed down from one generation to the other orally as a means of maintaining the cultural memory bank of a society. In addition, poetry and music highlight governance issues and encourage societal actors to focus on structural inequalities. Wole Soyinka, Chinua Achebe and many

other Africans have written on the governance and structural issues in literary form. Erick Wainanina, a Kenyan musician, performed “Daima Mkenya” meaning “forever Kenyan” to promote peace and reconciliation in the country after the violence which ensued after the 2007 post-electoral violence. In this regard, art, music and storytelling play a role in promoting cultural justice and aims at achieving reconciliation which is a key objective of transitional justice processes.

Metaphysical Justice

The pursuit of metaphysical justice also speaks to our innate interconnectedness as human beings. In the African context, metaphysical justice is closely linked with cultural justice. One of the outstanding features of the majority of cultures across Africa are predominantly communal in nature, in the sense that “people are not independent and single-thought individuals, they are a part of a community, interdependent and valuable members of the community”.⁵⁴ The *ubuntu* worldview espouses the notion that “I am, because we are; and since we are, therefore I am”.⁵⁵ *Ubuntu* is a South African modification of the African philosophy of togetherness and community. Desmond Tutu explains that *ubuntu* “speaks of the very essence of being human”, that when someone has *ubuntu*, then they are “generous, hospitable, friendly, caring, and compassionate” and share what they have. Luhabe further argues that “our own African culture taught us concepts such as respect, trust, compassion, and above all, that we are a collective with the success of one person depending very much on the success of all”.⁵⁶ Using *Fambul Tok*, the Sierra Leonean spiritual leaders were concerned with rehabilitating and transforming perpetrators. They looked at their innate nature as human beings and Sierra Leoneans, who needed internal transformation that would result in them being good citizens and agents of positive change. The perpetrators who burned other’s houses walked together with the victims, and this resulted in repairing broken relationships as they rebuilt the houses. The AUTJP does not explicitly mention this very important notion of the African philosophy, yet it is a core element of transitional justice. In this regard, a homegrown African transitional justice approach should include the dimension of metaphysical justice.

Ecological justice

Environmental and ecological injustice is the injustice done on an ecosystem denying the individuals and communities the ability to survive and function as human beings. The ecosystem is part of our community; we are inter-connected with nature and the universe and, consequently, the environment is also entitled to ecological justice. Africa has suffered from a wide range of ecological injustices, related to the predatory and forced abduction and sale of African bodies during the transatlantic slave trade as well through colonialism, apartheid and extractive globalisation, which has left a trail of environmental destruction across the continent. Actions that destroy our environment and communities continue unrestricted to date, resulting in ecological injustices. Many citizens have been rendered victims due to these injustices and are usually the ones who deal with the effects of unjust environmental mutilation. Unfortunately, the AUTJP has overlooked this critical component.

Ecological injustices include excluding minority groups from major environmental policies, dumping of toxic waste, dispossession of ancestral or communal land, depletion of local natural resources such as clean water, air and land, and environmental degradation, among others. It has resulted in unequal share of resources, lack of recognition and participation in decision making, cultural assimilation and the destruction of food security.

The major contributors are governments and private and multinational companies, who misappropriate natural resources and stir conflict for their selfish gains. A noteworthy example is the DRC, where hundreds of foreign multinationals illegally extracted diamonds, gold, uranium and coltan.⁵⁷ Other examples are illegal timber extractions, which destroy forests and cause imbalance to the ecology.⁵⁸ Mining negatively affects communities, increasing violence, slavery, water pollution and deforestation. Dumping of toxic waste is also an ecological injustice Africa is grappling with. For example, toxic wastes have been exported to Nigeria, Equatorial Guinea, Egypt, Benin and Guinea Bissau by some American and European companies.⁵⁹ Environmental injustices have contributed to the contemporary climate refugee crisis, citizens forced to flee due to alterations in their natural environment which have resulted in extreme weather conditions, drought, and water scarcity.

In light of the ecological injustices that have been committed, the

AU needs to further elaborate on how it will address ecological injustice. This could be made possible by incorporating the following components in the AUTJP, including, firstly, encouraging member states to develop environmental policies and laws paying attention to the full participation of the affected populations, indigenous and marginalised communities. Most violators have often got away with the offense because of inadequate legal provisions, especially by member states in conflict or early post-conflict situations where the judiciary and other institutions are weak. Secondly, the AU should adopt the Principles of Environmental Justice as proposed by Vandana Shiva and incorporate them into the AUTJP. These principles revolve around the notion of the Earth's democracy, which occurs when we are conscious that "we may have local roots, but we are still globally connected".⁶⁰ The adoption of these principles will promote democratic participation in all matters, resulting in appreciation of the value of all species and 'people's cultures, and promote equal sharing of the natural resources. Shiva's Principle 17 reiterates that "environmental justice affirms the sacredness of mother earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction". The third principle also mentions "the interest of a sustainable planet for humans and other living things". And lastly, adopting the provisions of the Earth Charter⁶¹ provides for the respect and care of community life, ecological integrity, social and economic justice, democracy, non-violence and peace. The Earth Charter appreciates that "each human depends on another and all lives are valuable". It also links well with the socio-economic justice and cultural justice. It shows this interconnectedness and links with metaphysical justice and the spiritual potential of humanity.

The Covid-19 pandemic has shown us that if we take care of our ecology, we flourish because we are all interconnected with the universe. Everyone is intimately attached to the soil of the country.⁶² The continent needs a fundamental policy shift to enable its institutions to lead on this issue. In particular, the AU needs to address current and past ecological injustices. Wangari Maathai called for a radical shift in our thinking when, in her Nobel Peace Prize acceptance speech, she appealed for humanity to stop threatening and undermining our life support system, namely our environment. Maathai called upon all individuals and communities to assist

the earth in healing, and in the process heal the wounds we have inflicted on each other. To achieve this, it is necessary to identify as a member of the "larger community of life". In this regard, these integral components of transformative justice are interlinked and that transformation starts from within, based on the operationalisation of transformative leadership.

Transformative leadership and the implementation of the AUTJP

The AU can leverage the effects and consequences of the Covid-19 pandemic to revitalise its commitment and mobilise African leaders into political action, and the adoption of a transformative justice approach to addressing the continent's challenges. Specifically, African leaders should manifest some degree of urgency in pursuing fighting poverty, hunger, economic, social, and cultural violations, and ecological injustices. This would require focusing on immediate needs together with long-term needs, which will transform structural and systemic barriers that continue to reinforce inequality.⁶³ The AU needs to mobilise its leaders to pursue transitional justice-informed change, which develops ingenious transformative mechanisms, learning from what has already worked and focusing on the interests of victims and survivors, involving them in the consultative and decision-making process. This requires the creation of platforms for frank dialogue with intent to understand the underlying layers of inequalities and how these challenges can be addressed.

Conclusion

Transitional justice in Africa has been criticised for failing to address violations of economic, social and cultural rights, structural violations and everyday violations. Covid-19 further exposed structural inequalities within societies and this chapter made the case for a transformative justice approach in the African context through the AUTJP as a vehicle. The chapter argued that the legacy of the Covid-19 pandemic has created a window of opportunity to push for transformative justice, anchored on socio-economic, cultural, ecological and metaphysical justice in the AUTJP document. The AU should capitalise on innovative mechanisms

that have worked in the different continental contexts and include these mechanisms in the framework. The nature of the policy is that it is predominantly a top-down approach and is therefore bound to face challenges in its implementation. However, the policy can creatively navigate around these challenge by promoting societal engagement and consultation, which will empower local actors to drive the transitional justice agenda. Africa therefore needs transformative leaders to play a role in ensuring that the policy is grounded in context and that participation is all inclusive of a broad range of societal actors. These leaders can use this spur as a catalyst to change by holding consultation and getting solutions from the people. This will enable the AU, member states and societies across the continent to address some of the limitations faced when attempting to implement transitional justice processes.

The AUTJP continues to face the challenge of implementation, partly because of the overt avoidance of the policy but also because of the lack of awareness and popularisation of its guidelines.⁶⁴ In this regard, it is also necessary to decentralise the transitional justice processes to the communal level, to promote local ownership and local solutions that are grounded on the integral components of transformative justice. The effective implementation of the AUTJP could be ensured if national human rights commissions together with verified NGOs are linked to transitional justice processes. In addition, advocacy and capacity building for NGOs, CSOs, and state officials on integral justice at the beginning of the transitional justice process is important. In this instance, capacity building will include victims, perpetrators and bystanders who potentially will be agents of change. To finance the implementation of transitional justice, African countries can ensure that there is a dedicated national budget line for transitional justice, drawn from a certain percentage of the proceeds from their natural resources, which will anchor the reparations programmes as well as redress socio-economic, cultural and ecological violations.

CHAPTER FIFTEEN

The Pan-African Reconciliation Network

Tim Murithi

Introduction

This chapter will discuss the role of societal actors in the African Union (AU) member states in engaging and supporting the implementation of the African Union Transitional Justice Policy (AUTJP) at the national and regional level. The Constitutive Act of the African Union states that one of the objectives of the AU is “to build a partnership between governments and all segments of civil society” and to promote the “participation of the African peoples in the activities of the Union”.¹ This chapter argues that Africa’s transitional justice interventions have been predominantly driven by state actors, with the nominal support of non-state actors more often in *ad hoc* and ineffectively defined roles. In addition, these transitional justice interventions across the African continent have not had the necessary impact to produce transformative outcomes, in terms of peacebuilding and societal healing; this is partly due to the politicisation of state mechanisms and institutions. On this basis, the chapter also assesses the importance of the creation of a continental network of transitional justice practitioners and analysts who can provide technical support and guidance to all of the continent’s 55 countries – all of which require some form of transitional justice intervention, if they

have not already implemented a national process of addressing the past as a means of sustaining peace in the future. The chapter begins with an assessment of the nature of the relationship between governments and their civil society partners on the African continent. It then assesses the AU's stated commitment to deepen its engagement with civil society actors, prior to examining the case for the establishment of a Pan-African Reconciliation Network (PAREN). The chapter concludes with some suggestions as to how civil society actor networks can play a significant role in supporting the implementation of the AUTJP and enhancing the efforts of national and regional institutions to address the legacies of the past as a pathway of sustaining and consolidating peace on the continent.

Civil society and African state relations

A key challenge has been the relationship between the state and civil society in Africa. At the heart of the nation-state project in Africa has been the attempt to consolidate these artificial political communities through processes of nation-building and state-building. A key aspect of this attempt to forge states out of a plethora of "ethnic nations" has been the sphere of civic association and social mobilisation around issues of concern and interest.² Civic, and increasingly political, associations in colonial Kenya, Uganda, South Africa and Algeria were at the forefront of the struggles against "settler colonialism" in Africa. Over a period of time these civic associations, through their engagement and partnership with other formal groupings like unions and print media, became more organised and more focused on their campaigns for independence and against injustice. In response to the emergence of civic associations in Africa, which appeared to contest their authority, colonial states, for the most part, adopted even more repressive policies to contain the forces that were being fuelled by the social mobilisation activities of these civic and political associations. In turn, civic associations could appeal to the so-called "legal" processes proscribed and controlled by the colonial state or they could opt for more insurgent strategies, including armed rebellion and international engagement. Consequently, through their actions colonial administrations in Africa fostered a culture of mistrust, in which civic actors viewed the apparatus for the control and administration of their political communities with suspicion. It was at this point that the

"prism of mistrust" between the state and civic sphere was fomented and nurtured.

Since its establishment in 2000, the AU has, from the outset, articulated a normative commitment to engaging with civil society in the implementation of its objectives.³ The statutes of the AU Economic Social and Cultural Council (ECOSOCC) describe civil society as including social, professional groups, non-governmental organisations (NGOs), community-based organisations (CBOs), as well as voluntary and cultural organisations. However, this normative commitment has remained at the level of lip service and has not translated into a widespread engagement with civil society actors on a range of interventions, including the promoting of peacebuilding through transitional justice processes.⁴ This is partly due to the prism of mistrust that clouds the perception of governmental actors in terms of their relationship with their own civil society.

This prism of mistrust has further been exacerbated by the phenomenon of "state capture" that is increasingly prevalent across the continent, which is evidenced by encroaching authoritarianism, democratic reversals, constitutional manipulation and the closure of civic space in creating conditions, which then entrench crisis and tension as well as undermine the ability to implement transitional justice processes, which has a knock-on effect on the stability of states. A culture of complacency has afflicted the AU's African Peace and Security Architecture (APSA) and the African Governance Architecture (AGA) institutions in terms of their efforts to promote peacebuilding, transitional justice and reconciliation.⁵ In addition, the much-lauded AU campaign to "Silence the Guns by 2020" did not materialise as anticipated by the organisation's leadership, partly due to the failure to sustain wider societal peacebuilding and transitional justice interventions which address the legacies of the violations of the past and provide societies with better opportunities to quell the threat of internal violence. In fact, there was a precipitous increase in crisis situations punctuated with incidences of gender-based violence which have placed an emotional, mental and psychological strain on the people of the continent from Sudan, the Tigray region of Ethiopia, the Cabo Del Gado region of Mozambique, Sudan, as well as continuing destabilisation and military coups in the Sahel region, notably, in Burkina Faso, Chad, Guinea and Mali. The prevalence of violent extremism in the form of Al

Shabaab in Somalia, Boko Haram in Nigeria, Isis in the Greater Sahel (ISGS) and Al Qaeda in the Sahel and Lake Chad Basin is a persistent threat to the future peace and security of the African continent. In addition, there is ongoing recurring tension, violence and strife in the Cameroon, Central African Republic (CAR), Libya, the Darfur region of Sudan and the eastern Democratic Republic of the Congo (DRC). Furthermore, political and constitutional tensions have been escalating in eSwatini, Lesotho and Zimbabwe. Consequently, there is an urgency in promoting and supporting the agency of civil society actors across these countries to contribute towards enhancing peacebuilding through transitional justice interventions.

AUTJP and the role of civil society

The AUTJP was adopted in February 2019 by the AU Assembly of Heads of State and Government and is conceived as a continental guideline AU member states to develop their own context-specific comprehensive policies, strategies and programmes towards democratic and socio-economic transformation, and achieving sustainable peace, justice and reconciliation. A wide range of civil society actors from across the continent were involved from inception with the efforts to develop the content for the AUTJP. The AUTJP provides guidelines for addressing the legacy of violence, including colonial brutality, as well as confronting the governance and development deficits that continue to confront the African continent. The AUTJP advocates for an inclusive approach that ensures that a wide variety of stakeholders can be engaged and included in developing and implementing transitional justice interventions, in a forward-looking manner that contributes towards rebuilding and restoring the dignity of African citizens who have endured past violations.

Section Four of the AUTJP outlines its identification of “Actors, Processes and Implementation Mechanisms” to support the wide-spread utilisation of the policy. Specifically, the AUTJP identifies four actors who should take responsibility for the its implementation, namely:

1. AU member states;
2. Regional economic communities (RECs);
3. AU institutions; and
4. Non-state actors, including members of civil society.

The AUTJP stipulates that member states have the responsibility for “guaranteeing the space for debate and advocacy on transitional justice and mobilising the support of all sections of society across political lines”.⁶ The AUTJP is an outcome of process that recognised the right of citizens to participate in framing transitional justice processes, specifically in the manner that it solicited and engaged the views of Africans across the continent. The AUTJP anticipates that governments may not readily create and sustain societal spaces for African citizens to engage with issues relating to transitional justice, evident on its appeal to state actors to remove political and social obstacles as well as to commit to “guaranteeing space for debate and advocacy”.⁷

The AUTJP states that “it is imperative that national and local actors take the lead in planning, implementing, monitoring, evaluating and reporting on lessons learned in all phases of the implementation” of the policy.⁸ In addition, it proposes that “the process for national dialogue, reconciliation and healing should enable faith leaders, traditional and community leaders, not only to play an active part in such processes ... but also pursue intra- and inter-community dialogue, reconciliation and healing at local levels.” In effect, the AUTJP mandates local actors, including community leaders, to play a proactive role in the implementation of the AUTJP and in the creation of national spaces for dialogue on the approach that will be appropriate for specific countries and communal groups. The AUTJP presents an opportunity for the African continent to recalibrate the legacy of the enduring adversarial relationship between state and society, by assigning specific tasks to non-state actors, civil society organisations, and faith and traditional leaders. Specifically, the shared implementation of the AUTJP between state and non-state actors will encourage closer collaboration on the promotion of peacebuilding and reconciliation, which can have positive side effects in terms of forging platforms that can increase the interaction and exchanges between the state and society.

The AUTJP also envisages a technical role for civil society and think-tank actors to “support the production of relevant research and studies” through processes that systematically “collect best practices and facilitate the sharing of such best practices with societies contemplating or pursuing transitional justice processes”.⁹ Therefore, it is important

to create a continental network of transitional justice practitioners and analysts from civil society, think-tanks and governments, who can provide technical support and guidance to all of the continent's 55 countries all of which require some form of transitional justice intervention. African civil society actors need to take advantage of the opportunities presented in the AUTJP to establish a Pan-African network of enablers, who can provide strategic advice to AU member states, intergovernmental and civil society organisations on the implementation of the provisions of the AUTJP.

CSO regional network-building to implement the AUTJP

It is necessary to empower civil society actors to work at national and regional levels so that they can contribute more strategically to the transitional justice and peacebuilding outcomes that the continent aspires to achieve as enumerated in Agenda 2063.¹⁰ This will require rethinking the prism through which we understand and approach peace and security interventions. Traditionally, in Africa crises have been framed as national crisis, which need to be addressed at the state level primarily by state actors. However, the degree of cross-border interaction and exchange, as well as the deepening reach of globalisation, means that we now need to frame Africa's conflict situations as regional crises with national dimensions. In adopting this framework then it will be necessary from a strategic perspective to pursue regional transitional justice and peacebuilding interventions, which draw in and engage with all of the regional players who are implicated in a particular crisis. Civil society actors have to be empowered to also operate on a regional basis, through network-building and coalition formation. Specifically, this approach will be predicated on identifying in-country "anchor civil society actors" who will act as the focal points for regional interventions. Concretely, these regional anchor civil society actors will implement dedicated programmes to enhance the capacity of network partners, to directly engage with governmental and intergovernmental processes and institutions, in a manner that directly adds value to the transitional justice and peacebuilding interventions that are being pursued.

The Pan-African Reconciliation Network

In 2017, the Institute for Justice and Reconciliation (IJR), a Pan-African organisation, based in Cape Town, South Africa, which works with governments, intergovernmental and civil society actors to build fair, inclusive and democratic societies, established the Pan-African Reconciliation Network (PAREN). The network was established by the IJR's Peacebuilding Interventions Programme, to convene and sustain a continental and global platform for practitioners, policymakers and analysts working on transitional justice and peacebuilding, to provide technical support to governments and societies through the facilitation of dialogue interventions, policy analysis and the strengthening of national capacities to drive in-country processes. As noted earlier, the AUTJP emphasises the important role played by non-state actors and civil society organisations as key partners with government and intergovernmental actors, in the promotion of transitional justice and national and regional reconciliation. The objective of the PAREN Fellowship Programme will be to raise awareness and sensitise African stakeholders to engage and utilise the provisions of the AUTJP to develop and guide their own national reconciliation processes.

The adoption of the AUTJP has created a home-grown African approach to addressing the violations of the past and promoting redress with accountability for these injustices. There is a need across the African continent to create platforms for the exchange of insights as well as to enhance the awareness and understanding of transitional justice and reconciliation processes. In particular, it is necessary to encourage interaction among mid-level and senior-level decision-makers, government officials, diplomats, CSO practitioners, analysts, academics and intergovernmental actors, working on issues that relate to peacebuilding, transitional justice and national reconciliation across the African continent. The PAREN convenes interventions that provide opportunities for participants from countries affected by violent conflict or political tension, to engage in an intensive professional knowledge-sharing and exchange of views on strategies to implement the provisions of the AUTJP.

In terms of practical interventions, members of PAREN have been involved in working with societal and governmental actors in countries such as Burundi, Central African Republic, Ethiopia, Eastern DRC,

Lesotho, Mozambique, Nigeria, South Sudan, South Africa and Zimbabwe, as well as supporting interventions in Ghana, Kenya, Nigeria, Rwanda and Uganda. The members of PAREN also play an advisory role to key decision-makers and intergovernmental actors on transitional justice and peacebuilding initiatives, and have engaged and supported the work of the AU, the SADC, the IGAD, ECOWAS, the East African Community (EAC) and the wider UN system. In particular, PAREN members have provided technical support to the UN Development Programme (UNDP) on a number of in-country interventions in Africa. PAREN members are also involved in undertaking research and analysis through the collection of qualitative data on public perception in the areas of transitional justice, peacebuilding and security.¹¹

Strategies for enhancing civil society engagement with the AUTJP

African governments and intergovernmental actors need to recognise the value added by engaging civil society actors in designing and implementing national transitional justice processes, based on the guidelines of the AUTJP. In this regard, it is imperative for governments to convene nation-wide consultations and sustain citizen participation on the provisions of the AUTJP and how they are relevant to society. In addition, African governments can support the initiatives of local actors who are designing and driving the implementation of their own communal peacebuilding and reconciliation processes. Along similar lines, regional economic communities need to formally engage and include civil society actors in awareness-raising initiatives relating to the AUTJP, particularly during high-level summits and intergovernmental meetings. Furthermore, RECs can develop their own regional economic community strategies for the implementation of the AUTJP, to complement existing peace and security frameworks.

African civil society actors can accelerate efforts to sensitise, popularise and capacitate African governmental and intergovernmental actors to engage and implement the provisions of the AUTJP. In addition, CSO actors can develop an advocacy campaign targeting key stakeholders, principally the media, government, victims and the public around

awareness of the AUTJP and how it can be used in national contexts. To ensure a broad-based approach and engagement with the AUTJP, civil society actors can mobilise national and community-based organisations, specifically women and youth collectives, as well as the media, to campaign for, and animate, public national conversations and debates on adopting and pursuing the provisions of the AUTJP. This would create forums for the documenting and reporting on transitional justice processes, through the production of relevant evidence-based research and studies and collect best practices and share them with societies contemplating or pursuing transitional justice processes. Civil society actors can also utilise the provisions of the AUTJP to advocate for efforts to address the psycho-social trauma which has been exacerbated by the insidious effects of Covid-19, as part of the efforts to redress the legacies of historical injustices that have generated inequality and poverty in Africa. Ultimately, it is the responsibility of civil society actors to create a continental network of transitional justice practitioners and analysts, such as the Pan-African Reconciliation Network, with members drawn from non-governmental actors, social movements, think-tanks and governments, who can provide technical support and guidance to all of the continent's 55 countries.

In terms of the UN system, and in particular country teams, as well as other international actors, it is important to analyse and understand the provisions of the AUTJP, in order to adopt policies that effectively support national and civil society actors in promoting its implementation. Specifically, international partners should allocate resources in a manner that strategically supports civil society actors the implementation of the provisions of the AUTJP.

Conclusion

The centrality of the agency of civil society in supporting and implementing transitional justice and peacebuilding processes is of vital importance if the African continent is to genuinely address the grievances that continue to perpetuate the cyclical violence that is brutalising innocent civilians. The adoption of the AUTJP is a pioneering achievement for the continent, in terms of providing a guideline for countries and societies to design and drive their own processes of redress, accountability and healing for the harm done in the past. However, the AU member states and regional

institutions have not sufficiently engaged and utilised the provisions of AUTJP, across the multiplicity of conflicts which are afflicting the continent. This chapter assessed the role of civil society actors in their capacity as societal stakeholders, in taking the lead in sensitising, popularising and capacitating governmental and intergovernmental actors to engage with the provisions of the document. This chapter discussed the established Pan-African Reconciliation Network, as a forum to bring together key experts and CSOs working on transitional justice from other parts of Africa, to identify key entry points in AU member states to provide support for strategic advocacy, research and capacity building in order to promote the implementation of the provisions of the AUTJP. In addition, this chapter argued that the adoption of this regional transitional justice and peacebuilding approach will enable civil society actors to create a mutually supportive network of intervention, which will enhance the ability of these actors to effectuate positive outcomes in the pursuit of peacebuilding and reconciliation across Africa.

CHAPTER SIXTEEN

Conclusion: African Union and Transitional Justice: Healing the Past and Restoring Human Dignity

Tim Murithi

The adoption of the African Union Transitional Justice Policy (AUTJP) is a significant milestone for the continent, in terms of providing a guideline for countries and societies to design and drive their own processes of redress and accountability for the harm done in the past. However, the uptake by AU member states and regional institutions of their own transitional justice policy has been grudgingly slow, which means that non-state actors have had to take the lead in sensitising, popularising and capacitating governmental and intergovernmental actors to engage with the provisions of the document. This book has provided analyses of conceptual foundations for transitional justice in Africa, as well as an assessment of the significant gaps that remain in terms of a more holistic approach which, for example, includes an emphasis on environmental transitional justice. In addition, the book assessed transitional justice processes on the African continent, with a view to generating insights for countries and societies that seek to implement their own interventions relating to redress and accountability.

This book revealed that the African continent continues to be a

terrain of innovation in terms of the roll-out and experimentation with transitional justice approaches, as discussed in the national case studies of the Central African Republic, Zimbabwe and Burundi. However, a key challenge remains the failure by a number of governments, including Burkina Faso, Chad, Guinea, Libya, Mozambique and Sudan, to engage and utilise the AUTJP to design and implement specific nationally generated transitional justice strategies, due to the political expediency of avoiding intrusive, excavational and transformative interventions, which might unearth and uncover reveal the violations committed by members of the political and business elites in these African countries. Governments may delay and frustrate the process of pursuing redress and accountability, such as is the case in lack of implementation of the recommendations which have been issued by their transitional justice institutions, but they cannot prevent such processes from being implemented by other actors such as youth and women collectives, particularly through communal processes. Furthermore, the attempt by some state actors to control and design the national institutions for pursuing transitional justice, without adequately consulting and engaging their wider societies, means that they will launch processes which are structurally flawed in their design and incapable of delivering on the hopes and aspirations of victims and survivors of past violations.

Increasingly, African conflicts, atrocities and violations are situated across borders, and therefore there are limitations in terms of continuing to adhere to a state-centric approach to dealing with the past and pursuing redress and accountability. This book also discussed the importance and utility of regional reconciliation as a necessary strategy in order to contribute towards consolidating peace and security. Regional reconciliation as a deliberate and targeted approach does not have any precedence in terms of Africa's international relations, in general, as well as Pan-African transitional justice and reconciliation processes, in particular. As noted in this book, such an approach would require implementing processes of truth recovery, accountability and redress across borders as preliminary processes to the pursuit of regional reconciliation. The practicalities of how we operationalise regional reconciliation are challenging but not impossible to institute. The reluctance of nation-states to devolve their sovereignty and to adopt processes that are outside

of their sphere of authority and control – through the establishment of cross-border institutions – will be the primary obstacle to implementing regional reconciliation.

The book also assessed practical approaches to advancing environmental restorative justice, including environmental remediation and the removal of pollutants and contaminants from the soil, waterways and atmosphere. A practical example of this environmental remediation programme was implemented to redress the devastation by multinational corporations in the Ogoni land region in Nigeria. In addition, environmental conservation and rehabilitation is a necessary intervention to restore the functions of a damaged ecosystem and restore healthy existence of bio-diversity. In these processes, it is important to draw upon indigenous and cultural knowledge systems, which have key insights to heal and restore the integrity of environments. Concretely, it is therefore necessary to continue to raise awareness about environmental destruction and to surface the truth about the damage done in the past. A framework such as an Environmental Truth and Reconciliation Commission can be utilised to surface these violations of the past. In addition, it is necessary to integrate the notion of environmental transitional justice into the environmental governance and management systems and processes. Environmental transitional justice therefore focuses on restoring and repairing the relationship between people and their environment. In this regard, environmental reconciliation seeks to restore and reconfigure the human–environment relationship.

This book critically engaged with the utilisation of continental and regional institutions to reinforce and support the implementation of national transitional justice processes. The trajectory of international justice interventions over the last few decades has encouraged a necessary shift towards engaging with alternative forms of justice. In addition, the Malabo Protocol, which when ratified will empower the African Court of Justice and Human Rights with jurisdiction over international crimes and provide an alternative site for addressing the atrocities of the past. The analysis in this book interrogated whether survivor-centred justice processes, based on the inclusion of alternative forms of justice, can contribute towards confronting impunity and ensuring accountability, while also contributing towards the restoration of human dignity and the promotion of national healing, by addressing the social, economic and

cultural violations in oppressive regimes. In interrogating the victim–perpetrator dichotomy, the book also assessed how victims, perpetrators and beneficiaries can actively be incorporated into an accountability, redress and reconciliation framework which will promote political, social and economic justice in order to create the conditions for more cohesive political communities. This book assessed how such an approach can promote redress in a manner that contributes towards building more unified political communities in Africa.

The centrality of the agency of state, regional, continental and non-state actors is of vital importance if the African continent is to genuinely address the grievances that continue to perpetuate the cyclical violence that continues to be witnessed across its regions. As discussed above, this book also illustrated how, in the absence of state-driven transitional justice processes, local communal actors can take the initiative to design and drive the implementation of their own communal peacebuilding and reconciliation processes. Such processes will continue to emerge and evolve across African countries, because redress for harm done does not have to wait for state-led initiatives. These processes will also generate additional insights which can provide key insights and modalities for local actors in countries across the continent that are struggling to implement peacebuilding and reconciliation initiatives in communities.

Globally, Africa is playing a leading role in the innovation and development of transitional justice processes, mechanisms and institutions. Furthermore, through the adoption of the AUTJP, Africa has advanced its own homegrown approach to dealing with the violations of the past. Africa’s experimentation with a broad range of norms has re-affirmed the interface between transitional justice, peacebuilding and reconciliation. African countries emerging from conflict will be immediately confronted by the demands for justice for the victims and survivors, as well as the challenges of peacebuilding, and through additional research and analysis, they will be able to draw upon the experiences of their fellow countries. In terms of future trajectories, the field of transitional justice will become increasingly relevant in a world in which an emphasis on redress and accountability for past injustices is becoming more pronounced. This book has provided an important repository of knowledge and insight on transitional justice, peacebuilding and reconciliation efforts in Africa.

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Index

- A**
accountability, 3, 4, 12, 21, 22, 23, 32, 33, 34, 35, 44, 45, 51, 57, 58, 61, 64, 70, 73, 74, 75, 78, 79, 80, 115, 116, 117, 118, 119, 120, 121, 124, 126, 127, 130, 136, 138, 139, 156, 166, 178, 197, 199, 201, 202, 203, 204
 discourse, 58
 partners, 123
ACHPR, 15, 120, 121, 183, 184
activists, 12, 92
Actors, Processes and Implementation Mechanisms, 135, 194
advocacy work, 86, 152
AfCHPR, *See* African Court on Human and Peoples' Rights
African Capacity Building Foundation, 11, 121, 135
African Charter on Human and Peoples' Rights, 67, 70, 117, 185
African Charter on the Rights and Welfare of the Child, 84
African civil society actors, 196
African Commission on Human and Peoples' Rights, 15, 63, 67, 68, 130
African Committee of Experts on the Rights and Welfare of the Child, 130
African continent, 1, 2, 7, 12, 14, 19, 20, 21, 23, 36, 37, 52, 54, 84, 97, 118, 124, 144, 145, 148, 149, 160, 166, 167, 178, 191, 192, 194, 195, 197, 199, 201, 204
African Court of Human and Peoples' Rights, 6, 11, 12, 15, 24, 117, 118, 125, 127, 130, 131, 135
African Court of Justice and Human Rights (ACJHR), 6, 12, 15, 117, 118, 125, 127, 129, 131, 203
African Court on Human and Peoples' Rights (AfCHPR), 15, 117, 183
African CSOs, 124
African Development Bank, 11, 121, 135
African Governance Architecture (AGA), 15, 120, 130, 193
African governments, 77, 86, 89, 116, 153, 181, 198
African human rights norms, 130
African Peace and Security Architecture (APSA), 130, 143
 sixth legal instrument, 147
African Peer Review Mechanism (APRM), 116
African people, 178
African philosophy, 186
African Standby Force (ASF), 145
African states, 19, 42, 43, 63, 87, 115, 116, 117, 118, 121, 146, 170
African TJ processes, 147
African tradition of mediation, 148
African traditional justice mechanisms, 79
African transitional justice approach, 186
African transitional justice fund, 121
African Union, 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18, 21, 23, 24, 25, 30, 32, 34, 36, 38, 40, 42, 44, 45, 46, 48, 50, 52, 54, 58, 62, 63, 76, 77, 82, 84, 85, 86, 91, 92, 95, 113, 114, 116, 117, 118, 120, 121, 122, 125, 127, 128, 130, 131, 133, 134, 140, 144, 147, 148, 149, 151, 186, 167, 176, 180, 181, 183, 184, 188, 190, 191, 192, 193, 194, 196, 198, 258
Advisory Board on Corruption, 121
Constitutive Act, 6
institutions, 10, 119, 122, 130, 135, 194
member state governments, 119

- member states, 11, 60, 85, 113, 114, 115, 121, 122, 124, 144, 172, 173, 194, 199, 200, 201
- organs, 11, 114, 120, 121, 124, 135, 143
- peacebuilding efforts, 144
- system, 20, 113, 114, 115, 119, 122, 124
- transitional justice mechanisms, 79
- transitional justice policies, 118
- African Union Assembly of Heads of State and Government, 8, 125
- African Union Commission (AUC), 15, 117, 120, 121, 122
- African Union Commission, 135
- African Union Department of Political Affairs, Peace and Security, 121
- African Union Peace Fund (AUPF), 145
- African Union Policy Framework on Transitional Justice (2019), 63, 64
- African Union Policy on Post-Conflict Reconstruction and Development, 67
- African Union Transitional Justice Policy, 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 23, 24, 25, 45, 50, 51, 54, 60, 64, 66, 69, 70, 73, 76, 78, 79, 82, 83, 84, 85, 86, 87, 92, 95, 96, 97, 99, 100, 102, 107, 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 125, 127, 129, 130, 131, 133, 135, 136, 138, 139, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155, 156, 159, 161, 162, 163, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200, 201, 202, 204
- African Union Transitional Justice Policy (AUTJP), 68
- key guiding principles, 86, 147
- African values, 86, 148, 153
- African Youth Charter, 159, 163
- AGA, *See* African Governance Architecture
- Agenda 2063, 196
- agents of change, 156
- Agreement on the Resolution of Conflict in South Sudan, 138
- Al Shabaab, 193
- al-Bashir, President Omar (former), 149
- Algeria, 18, 146, 192
- Al-Qaeda, 15, 174, 194
- alternative dispute resolution mechanisms, 139
- Amnesties, 79
- Amnesty International, 88
- amnesty provisions, 7, 30, 42
- ANC leadership, 160
- anchor civil society actors, 196
- Angola, 64, 146
- Ansar Dine, 174
- anti-apartheid struggle, 151
- apartheid, 15, 18, 31, 33, 40, 60, 87, 152, 157, 158, 160, 179, 187
- burden of, 87
- regime, 31, 55
- system, 158
- APRM, *See* African Peer Review Mechanism
- APSA, *See* African Peace and Security Architecture
- APSA pillars, 144
- Arab Spring (2010), 152
- armed
- conflict, 123, 159
- militia, 21, 47, 134
- movements, 105
- rebellion, 192
- struggle, Southern Africa, 151
- violence, 166, 168, 172, 175
- Arusha accords, 105
- Arusha Peace and Reconciliation Accords, 105
- ASF, *See* African Standby Force
- Assembly of Heads of State and Government, 1, 194
- asylum seekers, 180
- asymmetrical power, 118
- AU, *See* African Union
- AUC, *See* African Union Commission
- AUPF, *See* AU Peace Fund
- authoritarian regimes, 31, 167, 176
- authoritarian rule, 3, 35, 36, 52, 57, 165, 166, 169, 175
- authoritarian state, 3
- authoritarianism, 169, 170, 193
- AUTJP, *See* African Union Transitional Justice Policy
- B**
- Bagaza, 106
- Bangui, 73, 75, 80, 81
- Bangui Court of Appeal, 81
- Bangui Forum (2015), 73, 75
- Benin, 187
- best practices, 14, 88, 87, 96, 120, 153, 195, 199
- bio-diversity, 203
- biophysical environment, 65
- biosphere, 68
- Black Lives Matter (2013/2020), 152
- blanket amnesty, 105
- Boko Haram, 174, 194
- Bozizé, François, 74
- Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands*, 1980 to 1988, 86
- Broken Hearts: 1972*, 106, 108
- Bulawayo, 94
- Burkina Faso, 174, 193, 202
- Burundi, 5, 10, 14, 16, 5, 24, 41, 44, 46, 59, 68, 99, 100, 103, 104, 105, 106, 107, 108, 109, 110, 116, 146, 197, 202
- armed forces, 105
- Burundi Office (ONUB), 106
- Buyoya, 106
- C**
- Cabo Del Gado region, 193
- Cameroon, 11, 5, 194
- capacity
- building options, 166
- building, 165, 166, 168, 173, 176, 190, 200
- challenges, 167
- constraints, 25, 166, 169, 176
- creation, 166
- deficit, 168
- development response, 166
- development, 166
- retention, 166
- utilisation, 166
- CAR, *See* Central African Republic
- Catholic Institute for International Relations (CIIR), 88
- CBOs, *See* community-based organisations
- Central African Republic (CAR), 5, 11, 14, 15, 5, 24, 73, 74, 75, 77, 79, 80, 81, 83, 84, 194, 197, 202
- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 183
- Centre for the Study of Violence and Reconciliation (CSV), 15, 91, 122
- CEWS, *See* Continental Early Warning System
- Chad, 48, 146, 193, 202
- citizen buy-in, 95
- citizens, 12, 10, 11, 12, 17, 39, 47, 55, 66, 78, 81, 114, 116, 117, 118, 120, 122, 124, 134, 138, 183, 186, 187, 194, 195
- civic
- association, 192
- education, 90, 159
- leaders, 167
- trust, 3
- civil society, 2, 10, 11, 14, 15, 22, 24, 25, 75, 78, 85, 86, 87, 88, 89, 90, 91, 92, 95, 97, 106, 109, 135, 140, 146, 153, 191, 192, 193, 194, 195, 196, 198, 199
- activists, 174
- actors, 11, 14, 24, 25, 86, 89, 95, 96, 122, 136, 144, 169, 192, 193, 194, 196, 197, 198, 199, 200
- coordination framework, 86
- groups, 148
- leaders, 91
- leadership, 85, 94
- partners, 192
- “Civil Society and Justice in Zimbabwe”, 89
- Civil society organisations (CSOs), 14, 95, 108, 109, 120, 122, 123, 124, 137, 190, 195, 196, 197, 200
- Civil Society Transitional Justice Strategy, 92
- civil society-led process
- Zimbabwe, 85
- civil unrest, 115, 144
- civil war, 168, 170
- civil wars, 15, 60, 63, 64, 113
- civilian victimisation, 170
- civilians, 2, 38, 88, 117, 199
- classic realist prescriptions, 115
- climate of insecurity
- in Africa, 114
- coalition formation, 196
- collapsed regime, 168
- collective memory, 103
- collective remembrance, 99
- collective reparations programmes, 155
- colonial
- administrations, 192
- brutality, 194
- era, 88

- forces, 88
 legacy, 161
 logic, 17, 18, 19
 period, 181
 state, 192
 states, 192
 violations, 181
 wars, 113
- colonialism, 15, 17, 18, 23, 26, 60, 87, 181, 185, 187, 192
 legacy of, 87
- colonisation, 17, 23, 44
- commemoration, 83, 100, 109
 activities, 155
- commemorative activities, 79
- Commission and Peace and Security Council, 118
- Commission for Truth, Justice, Reparations and Reconciliation (Commission Vérité, Justice, Réconciliation et Réparation, or CVJRR), 15, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84
 bureau, 76
 plenary assembly, 76
 sub-commissions, 76
 victim-centred approach, 80
- Commission for Truth, Reconciliation and Healing (CTRH), 138
- Commission on Human Rights, 35
- communal
 interaction, 170
 processes, 202
 transitional justice processes, 156
- community
 accountability, 79
 -based organisations (CBOs), 193
 leaders, 14, 81, 146, 152, 173, 195
 reconciliation initiatives, 137
- complementary justice system, 184
- comprehensive peace accord, 168
- Comprehensive Peace Agreement (CPA), 15, 138
- conflict, 119
 -affected countries
 in Africa, 165
 prevention, 134, 137, 159
 resolution, 11, 159
 root causes of, 78
- Congo-Brazzaville, 64
- conquered African societies, 17
- Consensus Document, 134
- consensus-building processes, 86
- Constitution (2013), 91
- Constitution of Zimbabwe (2013), 86
- constitutional manipulation, 193
- constitutional tensions, 194
- constitutionalism, 37, 53
- Constitutive Act of the African Union, 67
- contemporary
 politics, 54
 trials, 128
- contextualised strategies, 167
- continental
 benchmarks, 120
 bodies, 123
 drive, 85
 efforts, 120
 protocols, 120
 transitional justice processes, 121
- Continental Early Warning System (CEWS), 15, 144, 145, 148, 149
- Continental Free Trade Area, 122
- Convention on the Protection of all Persons from Enforced Disappearance, 36
- Coronavirus disease, novel, 179
- corporate criminal liability, 128, 131
- correction services, 169
- Côte d'Ivoire, 5, 41, 146
- coup, 104
- Covid-19, 6, 12, 177, 178, 179, 180, 188, 189, 199
- Covid-19 pandemic, 12, 179, 180, 182, 188, 189
- CPA, *See* Comprehensive Peace Agreement
- crimes against humanity, 6, 40, 48, 104, 118, 128, 129
- criminal accountability, 81, 131
- criminal justice, 12, 4, 38, 124, 127, 185
 system, 168, 169
 trials, 146
- crisis situations, 20, 140, 193
- critical mass, 93, 94
- cross-border
 institutions, 12, 22, 45, 203
 peacebuilding and stability, 134
 political negotiation, 60
 processes, 59
- cross-sectional multi-actor justice mechanisms, 114
- CSOs, *See* civil society organisations
- CSV, *See* Centre for the Study of Violence and Reconciliation
- cultural bias, 171
- cultural justice, 182, 185, 186, 188
- cultural knowledge systems, 203
- cultural rights, 157
- CVJRR, *See* Commission for Truth, Justice, Reparations and Reconciliation
- D**
- Darfur, 10, 39, 149, 194
- DDR, *See* Disarmament, Demobilization and Reintegration
- Declaration on the Right to Restitution for Victims of Gross Human Rights Violations, 35
- democracy, 3, 120, 159, 188
- democratic
 governance, 31, 37, 53, 118, 119
 inclusion, 34, 51, 61
 practices, 79
 principles, 118
 reversals, 193
 societies, 1, 3, 12, 133, 197
 values, 118
- Democratic Republic of the Congo (DRC), 12, 14, 16, 5, 21, 22, 44, 46, 59, 64, 68, 116, 146, 187, 194
- developmental initiatives, 134
- diaspora, 75, 167
- digital
 infrastructure, 179
 technology, 162
 tools, 162
- Disarmament, Demobilization and Reintegration (DDR), 123
- discrimination, 78, 102, 108, 153
- distributive
 environmental justice, 66
 justice, 182
- Diversity management, 79
- Djibouti, 10, 138
- domestic policy models, 95
- Draft AU Transitional Justice Policy, 8
 DRC, *See* Democratic Republic of the Congo
- E**
- early childhood development initiatives, 155
- early warning systems (EWSs), 148, 149
- Eastern DRC, 197
- ecological
 communities, 64, 65, 68
 injustice, 187, 188
 justice, 182, 187
 sustainable development and restoration, 66
 systems, 65
- economic
 and social rights violations, structural nature of, 54
 growth, inclusive, 87
 justice, 161, 188, 204
 marginalisation, 180
 reconciliation, 57
 transformation, 157, 162
- Economic Community of West African States (ECOWAS), 16, 175, 198
- Economic Social and Cultural Council (ECOSOC), 16, 121, 193
- ECOSOC, *See* Economic Social and Cultural Council
- ECOWAS, *See* Economic Community of West African States
- education programmes, 102
- educational system, 160
- Egypt, 187
- election-related conflicts, 144
- electoral violence, 144
- elitist top-down processes, 160
- empirical research, 174
- empowerment programmes, 159
- Endorois case, the, 183
- environmental
 crimes, 16
 damage, 68, 69, 70
 destruction, 16, 187, 203
 injustices, 66
 justice, 66
 laws, 66
 policies and laws, 188
 protection, 119
 reconciliation, 203
 rehabilitation and remediation, 67
 remediation, 66, 203
 restoration, 17
 restorative justice, 16, 203
 terrains, 17
 transitional justice, 16, 24, 64, 66, 69, 70, 201, 203
 victim statements, 69
- Environmental Truth and Reconciliation Commission, 203
- Equatorial Guinea, 116, 187

- equity, 5, 78, 87, 88, 153, 154
 Eritrea, 45, 138
 eSwatini, 194
 ethics in politics, 54
 Ethiopia, 14, 5, 8, 45, 138, 146, 193, 197
 ethnic
 cleansing, 144
 identities, 74
 nations, 43, 192
 strife, 102
 ethno-cultural diversity, 185
 ethnographic studies, 173, 176
 Ethnographic studies, 173
 Eurocentric bias, 178
 Europe, 152
 EWSs, *See* early warning systems
 exchange programmes, 92, 96, 175
 exclusion, 53, 76, 78, 79, 81, 83, 100, 154, 161, 166, 169, 173, 176
 external partners, 115, 173
 extractive globalisation, 187
 Extraordinary Summit of Heads of State and Government (2018), 8
 extremists, 174
- F**
Faces and Traces: Paying a Tribute to Unsung Heroes, 106
 faith leaders, 14, 146, 195
 Fambul Tok, 92, 170, 185, 186
 programme, 92
 farm invasions (2000 to 2008), 88
 Fees Must Fall, 158
Final Report on the Administration of Justice and the Question of Impunity, 35
 financial compensation, 122
 Floyd, George, 152
 formal institutions, 55, 168
 Forum, the, 90
 Framework for a National Transitional Justice Policy, 92
- G**
gacaca courts (Rwanda), 55
 gender
 -based violence, 17, 2, 15, 33, 48, 53, 79, 83, 193
 -biased power relations, 96
 challenges, structural, 81
 exclusion, 33, 51
 generational dimensions of violations, 154
 issues, 33, 53, 83
 justice, 96, 97, 181
 sensitive interventions, 34
 general affairs chamber, 129
 generational dimensions of violations, 154
 genocide, 6, 40, 48, 103, 104, 118, 128, 129, 144, 157
 Genocide Memorial (Kigali), 102
 Ghana, 9, 10, 5, 146, 175, 198
 global
 commons, 69
 governance, 115
 health systems, 180
 pandemic, 179
 transitional justice norms, 6
 globalisation, 196
 good governance, 116, 119, 120
 governance outcomes, 116
 governing class, 119
 Government of the Sudan, 138
 governmental actors, 59, 115, 154, 193, 197, 199, 201
 grassroots
 experiences, 52
 communities, 160
 community development initiatives, 161
 Great Lakes region, 52, 59
 Greater Sahel (ISGS), 194
 green approach, 69
 Guatemala, 184
 Guinea, 46, 187, 193, 202
 Guinea Bissau, 187
 Gukurahundi, 88, 157
 massacres, 88
- H**
 Hague Institute for Global Justice (HIGJ), 16, 91
 Harare, 117
 healing, 7, 4, 5, 14, 15, 16, 31, 37, 38, 39, 56, 57, 60, 68, 75, 93, 99, 100, 101, 103, 107, 113, 116, 137, 138, 144, 145, 155, 156, 157, 161, 169, 170, 181, 184, 185, 189, 191, 195, 199
 High Commissioner for Human Rights, 153
 HIGJ, *See* Hague Institute for Global Justice
 historic transformation processes, 151
 historical
 environmental injustices and inequalities, 68
 facts, 101, 102, 108
 victims, 33
 violation, 157
 violations, 3, 18, 32, 156, 184
 Horn of Africa, 46, 47, 133, 134, 138, 139, 140, 167
 human dignity, 37, 79, 155, 203
 human rights, 70, 119
 atrocities, 56
 chamber, 129
 commission, 82
 crime, 148
 education, 159
 framework, 69
 instruments, 130
 laws, 70
 organisations, 41, 183
 protection of, 101
 violations, 2, 15, 20, 32, 38, 40, 47, 52, 67, 74, 81, 87, 97, 113, 117, 126, 128, 130, 131, 138, 139, 145, 146, 149, 173, 174, 178
 Human Rights Strategy for Africa, 130
 human societies, 64
 human society, nature of, 58
 human-centred duties approach, 69
 human-environment relationship, 203
 humanitarian assistance, 74
 humanitarian crises, 2
 humanitarian crisis, 15
 Hutu, the, 100, 103, 104, 108
 ethnic group, 103
 genocide (1972), 103, 104
 leaders, 104
 officers, execution (1969), 103
 hybrid
 courts, 126
 justice orders, 170
- I**
 ICT, *See* information and communications technology
 IDPs, *See* internally displaced people
 IGAD, *See* Intergovernmental Authority on Development
 IGADD, *See* Intergovernmental Authority on Drought and Development
 IJR, *See* Institute for Justice and Reconciliation
 illicit trafficking, 2
 inclusion, 12, 59, 66, 83, 84, 130, 160, 176, 203
 inclusive
 communities, 175
 consultative process, 145, 153
 reconciliation, 57, 58
 reconciliation process, 57
 societies, 14, 1, 4, 13, 36, 51, 52, 155, 162, 165
 inclusivity, 74, 87, 88, 95, 126, 153
 incoming state administration, 169
 Independent Complaints Mechanism, 90
 Indian Ocean, 134
 indigenous
 capacities, 166
 forums, 171
 justice and reconciliation mechanisms, 169
 justice mechanisms, 173
 mechanisms, 169, 170, 171, 172, 176
 individual criminal responsibility, 129
 inequality, 12, 65, 76, 78, 81, 87, 161, 189, 199
 inequitable distribution of power and wealth, 154
 informal justice, 81
 information and communications
 technology (ICT), 148
 information technology, 162
 injustice, 32, 76, 81, 108, 170, 187, 192
 injustices of the past, 87, 153, 175
 Institute for Justice and Reconciliation (IJR), 7, 9, 11, 13, 14, 16, 91, 122, 162, 197
 institutional
 mechanisms, 116, 145, 153
 reform, 35, 93, 180
 reforms, 79
 institutions of the state, 79
 interconnectedness, 186, 188
 intercultural learning, 159
 inter-generation of trauma, 162
 intergenerational burdens, 65
 inter-generational
 cycle of violations, 156
 ramifications, 157
 trauma, 157
 intergovernmental
 actors, 14, 197, 198, 200, 201
 agencies, 95, 173
 institutions, 59
 Intergovernmental Authority on Development (IGAD), 6, 10, 14, 16, 133, 134, 135, 136, 137, 138, 139, 140, 198

mediation efforts, 137
 Mediation Support Unit, 136
 member states, 137, 139
 region, 136
 Strategy on Peace and Security, 134
 member states, 139
 Treaty, 134
 Intergovernmental Authority on Drought and Development (IGADD), 16, 134
 inter-group reconciliation, 56
 internal displacement, 133
 internal violence, 193
 internally displaced people (IDPs), 79
 internally displaced persons, 146
 international aid agencies, 123
 International Centre for Transitional Justice (ICTJ), 80
 international community, 104, 109, 131, 140
 international credibility, 147
 international crimes, 6, 48, 93, 117, 125, 128, 129, 203
 International Criminal Court (ICC), 32
 international criminal
 jurisdiction, 118
 justice, 12, 126, 127
 justice mechanisms, 127
 law, 9, 129
 law chamber, 129
 trials, 126, 129
 tribunals, 126, 127, 128, 131
 international donors, 59
 international engagement, 167, 192
 international human rights law, 35, 129, 154
 international humanitarian law, 35, 129, 154
 international justice interventions, 203
 international law, 38, 178
 international partners, 84, 109, 110, 199
 international peace and security, 140
 international prosecutors, 126
 international support, 109
 international transitional justice norms, 6
 international trials, 126, 128
 international tribunals, 126
 inter-state politics, 60
 intra- and inter-community dialogue, 195
 intrastate conflict, 169
 Isis, 194
 Islamic Maghreb (AQIM), 174

J
 jihadist groups, 174
 Johannesburg, 12, 86, 89
 Johannesburg Symposium on Civil Society and Justice (2003), 86, 89
 Joinet/Orentlicher principles, 35
 judicial
 enforcement, 183
 interventions, 126, 131, 170
 reforms, 174
 strengthening, 183
 justice and reconciliation, 114
 justice architecture, 117, 149
 justice system
 broader, 81
 regular, 82

K
 KAIPTC, *See* Kofi Annan International Peacekeeping Training Centre
 Kenya, 9, 12, 14, 5, 7, 18, 30, 34, 41, 42, 45, 47, 55, 77, 124, 138, 146, 180, 181, 182, 198
 colonial, 192
 Kenyan Truth, Justice and Reconciliation Commission (TJRC) (2013), 180
 Kericho, 181
 Key principles in the AUTJP, 77
 Khartoum, 134
 Kigali, 8, 102
 Kingdom of Burundi, 103
 Kiplagat, Bethuel, 55
 Kirundi, 101
 knowledge generators, 160
 Kofi Annan International Peacekeeping Training Centre (KAIPTC), 9, 175
Kuzura akaboze, 101

L
 Lake Chad Basin, 167, 194
 leadership development programmes, 162
 legacies of the past, 5, 155, 158, 168, 192
 legal tradition, 61
 legalistic doctrines, 52
 Lesotho, 5, 194, 198
 liberal peace discourse, 115
 liberation
 agenda, 87
 movement, 161
 struggles, 160
 liberation war, 88

fighters, 88
 violence, 88
 Liberia, 5, 7, 30, 40, 41, 42, 46, 47, 65, 67, 77, 146, 168, 170, 182
 Liberian TRC report, 67
 Liberian Truth and Reconciliation Commission, 16
 Libya, 5, 116, 194, 202
 local justice mechanisms, 174
 localised national processes, 139
 lockdown orders, 180
 Lord's Resistance Army (LRA), 32
 LRA, *See* Lord's Resistance Army

M
 Mahlangu, Solomon, 152
 Malabo Protocol, 118, 122, 125, 127, 128, 130, 203
 Mali, 5, 174, 193
 Mandela government, 97
 Mandela, Nelson, 87
 Marangara massacre, 104
 marginalisation, 40, 79, 80, 87, 159, 169, 171
 marginalised groups, 154, 159
 Marikana massacre (2012), 119
 maritime insecurity, 134
 mass atrocities, 31, 38, 108, 126, 131, 143
 Matebeleland, 88
mato oput cleansing ceremonies, 184
mato oput process (Uganda), 55
 member states, 1, 6, 8, 10, 11, 12, 14, 15, 36, 48, 85, 116, 118, 133, 135, 136, 137, 139, 140, 144, 145, 147, 148, 149, 153, 162, 167, 172, 176, 181, 183, 184, 188, 190, 191, 194, 195, 196
 memorialisation, 5, 9, 24, 76, 79, 83, 99, 100, 101, 102, 103, 105, 106, 107, 108, 127, 155
 Burundi context, 107
 in Africa, 107
 process, 24, 100, 103, 108, 109, 110, 158
 programmes, 155
 projects, 102
 memorialising, 174
 mental health, 15, 16, 80
 professionals, 82
 metaphysical justice, 182, 186, 188, 189
 Micombero, 106
 Midlands, 86, 88
 migrant labour, 161
 migrants, 180

militant groups, 157
 militarised
 conflict, 5
 states, 96
 Ministry for Peace and Reconciliation under the Cross (MIPAREC), 108
 minority white population, 157
 Mo Ibrahim report (2020), 152
 moral conundrums, 32
 Motlanthe, President, 117
 Mozambique, 5, 146, 193, 198, 202
 MRP, *See* Mthwakazi Republic Party
 Mthwakazi Republic Party (MRP), 16, 157
 Museveni, President, 146

N
 Nairobi, 13, 14, 134
 Namibia, 146
 national actors, 11, 34, 135, 171, 172
 national building fronts, 137
 national dialogue, 11, 14, 195
 National Dialogue processes, 138
 national dialogue, legacy of, 95
 national discourse, 100, 101
 national governments, 2, 3
 national healing, 203
 national healthcare system, 180
 national inclusive identity, 74
 national institutions, 5, 11, 82, 97, 167, 202
 national ownership, 95, 166, 167
 National Peace and Reconciliation Commission (NPRC), 16, 86, 90, 91
 national peace and security, 135
 National Police Service, 180
 national reconciliation, 5, 19, 23, 39, 45, 88, 105, 137, 138, 197
 National Reconciliation Barometer, 96
 national reconciliation process, 105, 136
 national reconciliation, policy of, 88
 National Recovery and Peacebuilding Plan (2017–2021), 75
 national strategy, 91
 National Strategy for Zimbabwe, 91
 national transitional justice processes, 2, 95, 156, 176, 203
 National Transitional Justice Strategy, 93, 94
 National Transitional Justice Working Group (NTJWG), 9, 16, 86, 91, 92, 93, 94, 96
 national-level mechanisms, 135
 natural resources, access and control of, 63

- nature-focused rights approach, 69
 Ndayaye, Melchior, 103, 104
 NEPAD, *See* New Partnership for Africa's Development
 network of intervention, 200
 network-building, 13, 196
 new inclusive future, 3
 New Partnership for Africa's Development (NEPAD), 16, 120, 121
 Ngendandumwe, Pierre, 103
 NGOs, *See* non-governmental organisations
 Nigeria, 11, 14, 146, 180, 187, 194, 198, 203
 Nigeria, north-eastern, 174
 non-autocratic states, 87
 non-core crimes, 128
 non-discrimination, 78, 88, 154
 non-discrimination, 87
 non-formal justice practitioners, 173
 non-governmental actors, 173
 non-governmental organisations (NGOs), 117, 190, 193
 non-human biota, 68, 69
 "Non-Impunity, Truth, Peace, Justice, and Reconciliation in Africa: Opportunities and Constraints" (2011), 144
 non-judicial mechanism, 81
 non-state actors, 8, 10, 14, 46, 54, 78, 87, 95, 135, 153, 185, 191, 194, 195, 197, 201
 non-State institutions, 116
 non-transitional state, 92
 North Eastern Province, 55
 Northern Uganda, 184
 NPRC, *See* National Peace and Reconciliation Commission
 NPRC Act (2016 to 2017), 92
 NPRC Bill (2017), 96
 Ntega massacre, 104
 NTJWG, *See* National Transitional Justice Working Group
 NTJWG approach, 94
- O**
 official documents, 178
 Ogoni land region, 203
 Ongwen, Brigadier Dominic, 32
 Operation Murambatsvina, 88
 oppressed societies, 87, 153
 oppression, 8, 17, 19, 152, 156
 legacy of, 87
 oppressive regimes, 204
- P**
 Palava Hut, 170
 Pan-African Lawyers Union, 122
 Pan-African network of enablers, 14
 Pan-African Parliament (PAP), 117, 121, 130, 135
 Pan-African Reconciliation Network (PAREN), 6, 9, 13, 16, 25, 162, 191, 192, 193, 195, 197, 198, 199, 200
 PAREN Fellowship Programme, 162, 197
 pandemic, 12, 177, 179, 180
 -affected economy, 179
 in Africa, 177, 179
 Panel of the Wise (PoW), 16, 144, 145, 147, 148, 149,
 PAP, *See* Pan-African Parliament
 PAREN, *See* Pan-African Reconciliation Network
 partner institutions, 84
 past
 abuses, legacy of large-scale, 70
 injustices, 4, 85, 146, 153, 155, 165, 204
 violations, 1, 2, 3, 7, 18, 30, 34, 49, 51, 55, 61, 76, 88, 116, 139, 146, 153, 156, 157, 178, 194, 202
 pastoral communities, 81
 patriarchal
 social and cultural beliefs, 123
 systems, 96
 patriarchy, 33, 55
 peace
 agreements, 39, 78, 137, 145, 146, 148
 and reconciliation, 78
 institutions, 138
 negotiations, 148
 path to, 74
 processes, 78
 support operations, 20, 21, 120
 zones, 65
 Peace and Security Council (PSC), 13, 16, 11, 117, 120, 130, 135, 144, 145
 peacebuilding, 7, 10, 11, 12, 13, 14, 2, 3, 4, 12, 14, 15, 16, 20, 21, 25, 30, 37, 39, 40, 46, 47, 48, 49, 53, 56, 58, 61, 63, 116, 120, 137, 139, 144, 148, 161, 169, 191, 193, 194, 195, 196, 197, 198, 199, 200, 204
 and developmental processes, 7
 challenges, traditional, 53
 initiatives, 14, 47, 56, 198
 Peacebuilding Interventions Programme, 197
- peacemaking, 120
Peoples' Guide to Understanding Transitional Justice, The, 90
 Plan de Sanchez initiative, 184
 plural legal systems, 170
 police brutality, 88, 180
 policy
 articulation, 167
 formulation and adoption, 122
 influencers, 160
 Policy on Post-Conflict Reconstruction and Development (2006), 63
 political
 action, 180, 189
 and social impediments, 135
 associations, 192
 climate, 115
 commitment, 165
 communities, 192, 204
 dialogue, 134
 elite, 104, 105
 elites, 55, 146
 emergencies, 169
 expediency, 20, 116, 202
 interference, 51
 leadership, 33, 100, 104, 107, 108, 109, 113
 lines, 135
 manipulation, 34, 51, 55
 realm, 56
 reconciliation, 53, 136
 reforms, 79
 regime, 107, 116
 repression, 3
 tension, 3, 197
 transitions, 178
 violence, 9, 74, 88, 144
 will, 77, 93, 94, 106, 116, 120, 122, 180
 Political Agreement for Peace and Reconciliation in CAR (APPR-RCA), 74
 politics of inclusion, 59
 post independence times, 88
 post-apartheid era, 119
 post-conflict, 4, 37, 53, 64, 65, 66, 67, 68, 82, 123, 130, 137, 146, 152, 165, 167, 182, 183
 nations, 146
 peacebuilding efforts, 67
 peacebuilding phase, 120
 redress, 53
- reforms, 123
 scenario, 137
 societies, 146, 152
 transitional justice efforts, 65
 zones, 123
 post-electoral violence, 180
 post-violent conflict situations, 86, 152
 PoW, *See* Panel of the Wise
 power relations, 96
 pre-Covid-19 world, 179
 pre-independence atrocities, 88
 preventive discourse, 57
 preventive reconciliation, 57
 previously disadvantaged, 158
 Principles of Environmental Justice, 188
 prism of mistrust, 193
 procedural environmental justice, 66
 pro-democracy protests, 149
 Protocol on Amendments to the Statute of the African Court of Justice and Human and Peoples' Rights, 127
 Protocol on Transitional Justice, 147
 Protocol Relating to the Establishment of the Peace and Security Council, 144
 Protocol to the African Charter on Human and Peoples' Rights, 117
 PSC, *See* Peace and Security Council
 psycho-social
 experts, 82
 issues, 7
 support, 15, 16, 80, 83, 84
 punitive and retributive justice, 171
- Q**
 quality assurance purposes, 175
 quasi-judicial
 bodies, 126
 framework, 4
 measures, 3
 quasi-official documents, 178
- R**
 rapprochement between Ethiopia and Eritrea (2019), 138
 RCC, *See* regional coordinating centres
 reconciliation, 7, 10, 13, 2, 3, 4, 5, 8, 12, 13, 14, 15, 19, 21, 22, 23, 25, 30, 31, 34, 35, 37, 38, 39, 40, 41, 43, 45, 46, 47, 48, 49, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 75, 76, 79, 81, 83, 84, 88, 99, 100, 101, 102, 113, 116, 123, 136, 137, 139, 140,

143, 144, 149, 161, 163, 165, 167, 171, 172, 173, 175, 181, 184, 185, 186, 193, 194, 195, 197, 198, 200, 204
and justice, 74
initiatives, 22, 47, 136, 204
processes, 7, 4, 13, 21, 22, 56, 59, 61, 127, 139, 197, 198, 202, 204

Reconciliation and Dialogue Index (IGAD), 6, 24, 133, 134, 136, 138, 139

RECs, *See* regional economic communities

redistributive justice, 183

redistributive socio-economic justice, 66

redress, 3, 4, 12, 16, 17, 18, 21, 22, 23, 30, 32, 33, 34, 38, 42, 45, 48, 51, 54, 55, 64, 70, 73, 79, 84, 126, 130, 136, 138, 156, 169, 175, 178, 181, 185, 190, 197, 199, 201, 202, 203, 204

refugee flows, 133

refugees, 79, 84, 134, 146, 180

regional actors, 13, 139, 140

regional anchor civil society actors, 196

Regional conflict systems, 134

regional coordinating centres (RCC), 16, 175

regional economic communities (RECs), 1, 2, 10, 11, 12, 13, 45, 120, 133, 135, 136, 139, 143, 145, 147, 148, 149, 194, 198

regional institutions, 63, 67, 192, 201, 203

regional interventions, 196

regional mechanisms (RMs), 143, 145, 149

regional peace, 13, 22, 134

regional political reconciliation approach, 60

regional reconciliation, 12, 13, 21, 22, 23, 34, 45, 46, 47, 52, 59, 60, 133, 136, 202, 203
approach, 59
framework, 136
mechanisms, 136
processes, 52, 60

rehabilitation, 64, 66, 67, 68, 87, 156, 203

relational justice, 174

religious identities, 74

remembrance, 100

reparation, 8, 35, 36, 42, 54, 55, 60, 66, 68, 79, 102, 156, 174, 184

reparations, 9, 12, 15, 34, 37, 38, 51, 53, 54, 55, 61, 66, 68, 73, 75, 76, 79, 80, 81, 82, 83, 84, 122, 123, 137, 171, 180, 184, 190
examples of, 83

repression, 15, 48, 87, 102, 149

research-based knowledge products, 173

resolution mechanisms, 79

resource mobilisation, 115, 121

restoration, 4, 6, 15, 37, 57, 64, 66, 67, 68, 107, 123, 169, 171, 184, 203

restorative justice, 66, 127

retributive (socio-economic) justice, 8, 79

Revitalized Agreement on the Resolution of Dispute in South Sudan (R-ARCSS), 138

Rhodes Must Fall Movement (2015), 152, 158

Rhodesian regime, 88

rioters (1998), 88

rival political formations, 138

RMs, *See* regional mechanisms

roadmap to peace, 75

rule of law, 11, 4, 6, 49, 61, 148, 172, 174

Rule of Law and Transitional Justice in Post-Conflict Societies, The, 3, 35

Rwagasore, Prince Louis, 103, 104

Rwanda, 14, 5, 7, 8, 30, 31, 35, 41, 43, 44, 46, 55, 59, 68, 76, 117, 118, 146, 198

S

SA Reconciliation Barometer Survey (2019), 158

SADC, *See* Southern African Development Community

Sahel, the, 5, 167, 174, 193, 194

SCC, *See* Special Criminal Court

Second Extraordinary Summit, 134

Second International Conference on Transitional Justice (Zimbabwe), 91

security threats, 123

self-exile, 168

sentences, mitigation of, 79

sexual and gender-based crimes, 123

sexual and gender-based violence (SGBV), 81

SGBV, *See* sexual and gender-based violence

Sierra Leone, 5, 7, 30, 39, 41, 42, 46, 47, 48, 65, 76, 77, 92, 146, 182, 185

Sierra Leonean Truth and Reconciliation Commission, 16

Sierra Leone, 170

“Silence the Guns by 2020”, 193

slave trade, 87, 187

slavery, 15, 18, 87, 187
traumas of, 60

social coherence, 84

social cohesion, 13, 15, 60, 75, 83, 113

social context, 57

social fabric, 15, 16, 47, 80, 101, 146

social foundation, 102

social healing, 67, 79

social justice, 68, 81

social justice programmes, 158

social media, 158
strategy, 163

social mobilisation activities, 192

social movements, 120, 158, 160, 199

social reconciliation, 56, 57

social tensions, 87

societal
actors, 1, 3, 5, 97, 119, 185, 190, 191
awareness, 158
dialogue, 79, 100
harmony, restoration of, 57
links, 169
stakeholders, 200
transformation, 53
trust, 53
socio-economic
and cultural transformation, 181
development, 78
exploitation, 136
inequalities, 181, 184
issues, 7
justice, 37, 53, 182, 188
programmes, 12, 182
rights, 8, 180, 181, 182, 183, 184
situation, 80, 158
transformation, 113, 194
transformation, 146

socio-political violations of human rights, 182

solidarity platforms, 163

Somalia, 5, 21, 137, 138, 194

South Africa, 2, 6, 7, 11, 12, 13, 14, 18, 25, 30, 31, 33, 35, 39, 40, 41, 42, 55, 76, 77, 87, 93, 95, 97, 119, 122, 146, 151, 157, 158, 160, 162, 179, 184, 192, 197, 198, 206

South African Reconciliation Barometer, 14, 96

South African Truth and Reconciliation Commission, 162

South Sudan, 5, 10, 138, 198

South Sudan Ministry of Peace, 138

Southern Africa region, 25, 156, 160, 163

Southern Africa Trauma Coalition, 89

Southern African Development Community (SADC), 14, 16, 95, 175, 198
agenda, 95
region, 95

Secretariat, 95

sovereignty
demands of, 116

Soweto uprising (1976), 152

special courts, 5

Special Criminal Court (SCC), 16, 75, 76, 78, 81, 82

SPLM/A, *See* Sudan People's Liberation Movement/Army

state capacity weakness, 168

state capture, 193

state economic resources, 119

state governments, 118

state institutions, 116

state political actors, 59

state sovereignty, 117

state support, 116

state survival, 116

state-centric approach, 22, 45, 202

state-driven
processes, 34
transitional justice processes, 204

statehood, 115

state-led AU organs, 117

state-society relationships, 3

statutory courts of law, 169

structural
inequalities, 79, 177, 179, 183, 185, 189
injustices, 179, 181
marginalisation, 83
sub-regional
approach, 133
reconciliation framework, 133

Sudan, 10, 11, 12, 14, 16, 17, 5, 39, 41, 46, 65, 67, 137, 138, 146, 149, 193, 194, 202

Sudan People's Liberation Movement/Army (SPLM/A), 138

suppression, 3, 156

survival rights, of communities, 65

survivor, 80, 125, 126, 127, 129
survivor-centred
approach, 125, 128
justice processes, 203
justice, 127

survivors, 4, 80, 83, 88, 116, 125, 126, 127, 128, 129, 130, 131, 155, 156, 157, 169,

170, 171, 184, 189, 202, 204
 sustainable development agenda, 64
 sustainable peace, 7, 15, 16, 17, 30, 41, 60,
 113, 119, 124, 130, 143, 146, 149, 163,
 185, 194
 sustainable transformation, 60
 Symbolic and inter-personal reconciliation,
 137
 symbolism, 174
 systemic
 inequalities, 179, 182
 repression, 60
 systems of redress and accountability,
 traditional African, 54

T
 Taking Transitional Justice to the People
 Programme, 90
 “Taking Stock of Zimbabwe’s Transitional
 Justice Journey”, 158
 Talai community, 181
 Tanzania, 11, 117, 118
 terrorism, 11, 128, 167, 174
 THARS, *See* Trauma Healing and
 Reconciliation Services
 think-tank actors, 14, 195
 Tigray region, 193
 TJRC, *See* Truth, Justice and
 Reconciliation Commission
 tolerance, 159
 Touadéra, Faustin-Archange, 74
 traditional
 African systems, 8
 justice mechanisms, 124, 184
 tradition-based justice and reconciliation
 mechanisms, 169
 Training of Trainer (ToT) programmes,
 174
 transformative advocacy approach, 92, 94
 transformative approach, 58
 transformative justice
 approach, 177, 182, 189
 efforts, 180
 transitional African contexts, 167
 transitional countries, 166
 transitional force, 146
 transitional justice, 7, 9, 10, 12, 13, 14, 2,
 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,
 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26,
 29, 30, 31, 32, 33, 34, 35, 36, 37, 40, 41,
 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53,
 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65,
 66, 67, 68, 69, 70, 73, 74, 76, 77, 78, 79,
 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90,
 91, 92, 94, 95, 96, 97, 99, 100, 101, 102,
 103, 105, 106, 107, 108, 109, 113, 114,
 115, 118, 119, 120, 121, 122, 123, 124,
 126, 135, 136, 139, 140, 143, 144, 145,
 146, 147, 148, 149, 151, 152, 153, 154,
 155, 156, 157, 158, 159, 160, 161, 162,
 163, 165, 166, 167, 168, 169, 170, 171,
 172, 173, 174, 175, 176, 177, 178, 179,
 180, 181, 182, 183, 185, 186, 189, 190,
 191, 193, 194, 195, 196, 197, 198, 199,
 200, 201, 202, 203, 204
 advocacy, 91
 agenda, 85, 88
 and reconciliation processes, 136
 approaches, 19, 66, 202
 assistance, 122
 bodies, 91, 96
 capacity, 169
 commissions, 119, 154, 182, 185
 commissions, 78
 community, 89
 conversation, 89
 coordination framework, 91
 dialogue, 89
 dimensions of, 61
 discourse, 126, 160
 efforts, 73, 120, 121
 experts, 84
 field, 58
 frameworks, 5, 120
 gaps, 177
 implementation, 95
 initiatives, 11, 13, 23, 24, 74, 84, 114,
 115, 119, 121, 123, 178
 institutions, 41, 55, 155, 160, 202
 intervention, 14, 174, 191, 196
 interventions, 17, 18, 19, 20, 21, 25, 26,
 29, 33, 51, 97, 121, 139, 170, 174,
 176, 191, 193, 194
 issues, 90, 174
 knowledge economy, 96
 laws, 147
 legal orientation of, 53
 measures, 8, 54, 78, 86, 91, 170, 173
 mechanism, 85
 mechanisms, 67, 69, 105, 106, 108,
 109, 136, 143, 146, 178, 185
 movement, 89
 movement, global, 87
 national focus of, 52

norms, 6, 7, 25, 26, 29, 30, 32, 35, 37,
 40, 44, 48, 49, 61, 62, 177
 pillar, 143
 plan, 182
 policies, 122
 policy, 2, 76, 90, 144, 148, 181, 201
 practitioners, 14, 191, 196, 199
 process, 33, 42, 47, 55, 80, 91, 97, 100,
 105, 107, 146, 147, 149, 161, 190
 processes, 12, 3, 4, 5, 8, 10, 11, 12, 14,
 20, 21, 24, 25, 26, 31, 33, 34, 35,
 37, 43, 45, 46, 49, 51, 52, 53, 54,
 55, 56, 59, 60, 61, 62, 63, 65, 66,
 68, 79, 80, 82, 87, 91, 95, 96, 97,
 99, 102, 106, 107, 108, 109, 115,
 118, 121, 122, 124, 135, 136, 146,
 147, 148, 149, 151, 153, 154, 155,
 156, 159, 160, 161, 162, 165, 167,
 169, 171, 172, 177, 179, 181, 186,
 190, 193, 195, 198, 199, 201, 204
 programme, 88, 89
 programmes, 121, 123, 161, 162, 169
 programming, 168
 provisions, 89
 question, 88
 research and initiatives, 120
 space, 124
 standards, 7
 tools, 100, 101
 Transitional Justice Commissions, 116
 Transitional Justice Policy Symposium
 (2018), 91, 94, 157, 158
 transitional period, 99, 100, 101
 transitional processes, 51
 transitional societies, 172
 transnational crimes, 128
 trans-national human rights, 161
 Transnational issues, 161
 transparency, 119
 Trauma Healing, 108
 Trauma Healing and Reconciliation
 Services (THARS), 109
 TRC reports, 183
 TRCs, *See* truth and reconciliation
 commissions
 tri-jurisdictional nature, of the court, 129
 tripartite steering committee, 106, 109
 truth and reconciliation, 5, 6, 7, 55, 75,
 146, 174
 Truth and Reconciliation Commission
 (TRC) (South Africa), 67, 93
 truth and reconciliation commissions
 (TRCs), 5, 6, 7, 146
 Truth Commission (Sierra Leone), 92
 truth commissions, 36, 38, 39, 41, 42, 55,
 74, 76, 77, 78, 84, 102, 156
 truth recovery, 99
 Truth, Justice and Reconciliation
 Commission (TJRC), 55
 truth-telling mechanisms, 137
 Tunisia, 5, 40, 41, 180, 182
 Tutsi, the, 100, 104, 108
 ethnic group, 103
 Tutu, Desmond, 186

U
ubuntu, 86, 107, 153, 186
 Uganda, 5, 7, 14, 30, 32, 39, 41, 43, 45, 46,
 55, 68, 146, 180, 192, 198
 UNDP, 14, 17, 166, 198
 United Nations (UN), 12, 13, 14, 17, 21,
 30, 35, 39, 74, 87, 109, 140, 153
 United Nations High Commissioner for
 Human Rights, 87
 United Nations Security Council
 Resolution (UNSCR) 2250, 161
 United States, 11, 152, 212
 UNSCR, *See* United Nations Security
 Council Resolution

V
 victim, 16, 32, 59, 64, 65, 69, 73, 80, 81, 84,
 91, 103, 109, 126, 170
 victim-perpetrator dichotomy, 204
 victims, 9, 4, 7, 17, 30, 31, 32, 33, 37, 38,
 41, 48, 49, 56, 57, 59, 61, 64, 66, 67, 68,
 69, 75, 76, 78, 79, 80, 82, 83, 87, 88, 89,
 100, 102, 103, 107, 108, 109, 116, 118,
 120, 122, 124, 126, 127, 128, 129, 131,
 146, 154, 155, 156, 157, 159, 162, 169,
 170, 171, 180, 182, 184, 186, 187, 189,
 190, 198, 202, 204
 victims and witnesses unit, 127
 victim-survivor-healer spectrum, 159
 victor’s justice, 127
 violence
 colonial architecture of, 87
 legacy of, 103
 violent conflict, 2, 3, 16, 31, 33, 35, 36, 45,
 46, 47, 52, 102, 108, 118, 133, 144,
 169, 170, 171, 197
 violent conflicts, 2, 16, 47, 64, 65, 68, 69, 103,
 107, 117, 135, 143, 149, 155, 167, 176

violent confrontation, 58, 138
violent extremism, 2, 5, 15, 167, 174, 193
violent extremists, 174
vulnerable groups, 149, 154, 159

W
Wagalla massacre (1984), 55
war, 2, 3, 6, 13, 15, 16, 20, 22, 32, 38, 39,
40, 41, 48, 64, 65, 67, 68, 69, 88, 105,
106, 115, 118, 123, 126, 128, 136, 159,
165, 169
-affected societies, 154
crime prosecutions, 174
crimes, 6, 40, 48, 118, 128, 129
-related injustices, 171
-time atrocities, 169
War Victims Compensation Fund (1982), 88
warfare, 65
gendered nature of, 123
wars of liberation
victims of, 87
weapons of war, 65, 67
white domination, 152
white supremacist, 31
WHO, *See* World Health Organization
with-the-grain approach, 93
women
collectives, 202
voices of, 53
Working with the grain, 92, 93
working with the grain approach, 94
World Health Organization (WHO), 179
wounded communities, 110

X
xenophobic violence, 119

Y
young Africans, 158
young people, 10, 151, 152, 154, 156, 157,
158, 159, 160, 161, 162, 163
youth
activism, 151
actors, 24, 84, 152, 154, 155, 156, 158,
160, 161, 162, 163
demographic, 151
in transformative processes, 160
leadership, 163
resistance, 152
Youth organisations, 162
youth-specific programmes, 84

Z
zero-sum adversarial or confrontational
processes, 170
Zimbabwe, 5, 9, 14, 5, 18, 24, 41, 85, 88,
89, 90, 91, 95, 96, 97, 116, 157, 160,
194, 198, 202, 211
Zimbabwe government, 88
Zimbabwe Human Rights NGO
Forum, 9, 89, 90
Zimbabwe National Transitional Justice
Working Group (2018), 157, 158
Zimbabwe, Parliament of, 96
Zimbabwean elections (2018), 116