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Life & Peace Institute

Kungsängsgatan 17
753 22 Uppsala, Sweden

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About Life & Peace Institute

Since its formation, LPI has carried out programmes for conflict transformation in a variety of countries, conducted research, and produced numerous publications on nonviolent conflict transformation and the role of religion in conflict and peacebuilding. The main focus of our work has been on Africa, with the Horn of Africa Programme being established and well-known in the 1990s, not least our work in Somalia. Other initiatives have been carried out in Congo-Brazzaville, Croatia, Sri Lanka and East Timor. We have strengthened the capacity of our civil society partners to address the conflicts in their own context, in some of the most difficult and war-torn countries.

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Introduction

Solomon Dersso

Tim Murithi

The late Kofi Annan, a Ghanaian former United Nations Secretary-General, correctly observed in his 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, the transitional context is ‘marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population’.¹ Thus, countries emerging from violent conflicts or repressive authoritarian rule and seeking to transition into a more peaceful and democratic dispensation, face the inevitable challenge of designing and implementing justice, reconciliation and peacebuilding measures. Despite the complementary and interdependent nature of the pursuit of these measures they do ‘present societies in transition with major policy dilemmas and implementation challenges.’² This Horn of Africa Bulletin (HAB) edition is dedicated to assessing these dilemmas with a focus on the nexus between transitional justice, peacebuilding and reconciliation.

The successful implementation of transitional justice and how it interfaces with reconciliation and peacebuilding is broadly speaking a product of two factors, the structural and contextual factors as well as the agency of actors. The structural and contextual factors relate to the institutional, socio-economic, historical, ethnocultural and security conditions of the transitional setting. Underscoring the importance of these factors, Daly states ‘only institutional mechanisms that are tailored to the specific attributes of the local society at the time of transition can hope to deal with the problems that characterized the society’s dysfunction.’³

By agency, we refer to the role of actors, particularly those that are in a position of decision-making, and their ability to frame, design and drive transitional justice processes, typically through peace agreements or political settlements. Specifically, the agency of actors is relevant because they are involved in creating the ‘balance of power that produces the agreement and continues to influence its implementation.’⁴ In other words, the overall framing of transitional justice processes requires the agency of actors who make decisions about the most

appropriate processes for their particular context. Ideally, such decisions should be based on broad consultations and suggestions drawn from the wider society. In addition, the agency of actors is crucial to mitigate against what Annan’s report called ‘a lack of political will for reform.’⁵

It is thus evident, that at one level, the agency of actors is vital in terms of addressing the policy dilemma and implementation challenges that societies face in pursuing the objectives of transitional justice, reconciliation and peacebuilding. This Horn of Africa Bulletin edition includes a range of articles that offer insights into how these policy dilemmas and implementation challenges manifest themselves in specific transitional processes across the African continent. In particular, the articles also discuss the modalities of sequencing and balancing of these processes as articulated in the African Union Transitional Justice Policy. The contributions also offer useful perspectives on how transitional justice, reconciliation and peacebuilding intersect.

At another level, the agency of actors is also vital in terms of driving the implementation of transitional justice processes in a manner that engages the structural and contextual factors that can contribute towards reconciliation and peacebuilding. In this regard, Murithi’s article, in this edition, discusses the challenges relating to the limited implementation of the AUTJP and provides many suggestions including the centrality of the agency of state and non-state actors. Nzovu’s and Agonga’s articles discuss the importance of youth and women agency in addressing the gap in the implementation of the Kenya Truth, Justice and Reconciliation Commission (TJRC). Dersso’s article critically interrogates how the absence of political agreement among the major political and social forces in Ethiopia, as well as the flaws in the design of the Reconciliation Commission has undermined its implementation. Agwanda’s provides a critique of the lack of progress in the implementation of Chapter 5 of the South Sudan peace agreement, which outlines the transitional justice provisions. Finally, Verjee’s personal reflection questions the

1. Kofi Annan, *The rule of law and transitional justice in conflict and post-conflict societies : report of the Secretary-General*, 23 August 2004, S/2004/616, available at: <https://www.refworld.org/docid/45069c434.html> [accessed 6 November 2020]
2. ACHPR, *Study on Transitional Justice and Human and Peoples’ Rights in Africa* (ACHPR: Banjul, 2018) 21.
3. Erin Daly, *Transformative justice: Charting a path to reconciliation*, (2002) 12 *International Legal Perspectives*, 78.
4. Christian Bell, (2006). *Negotiating Justice? Human Rights and Peace Agreements*. Versoix, Switzerland: International Council on Human Rights Policy. 75
5. Annan, *supra* note 1

utility of the term transitional justice and makes the case for a more transformative form of justice in Sudan. These articles highlight the enormous impact of the agency of actors in determining the degree of success or failure of transitional justice processes.

The first article by Murithi examines strategies for the implementation of the AUTJP with a focus on the role of key actors. The article not only highlights the role that the AUTJP entrusted to various actors at the national, the AU and regional levels but also on the need for and how these actors operationalise their role to enhance full engagement with and utilisation of the AUTJP to guide the transitional justice and peacebuilding processes of member states. In addition to the development of implementation strategies by RECs and the pursuit of regional reconciliation, the article also proposes 'the creation of a continental network of transitional justice practitioners and analysts' as important platform for providing timely and relevant technical support for implementation the AUTJP in member states.

The second article by Beatrice Kizi Nzovu, assess the gaps in Kenya's transitional justice process including its lack of due consideration for the concerns and grievances of the youth and their role not only as perpetrators but also as victims. The article interrogates the nexus between transitional justice and peacebuilding with specific reference to the role of youth affected by violence. In considering the unfulfilled promises of transitional justice in Kenya, Nzovu discusses youth engagement in North-East Kenya. She identifies the potential of community-based peacebuilding strategies - dialogue and community engagement in which the youth exercise agency- as a pathway to fill the gaps in the national transitional justice process, as well as to achieve locally-driven forms of peacebuilding which can lay the foundation for communal forms of redress and the restoration of human dignity.

The third article by Solomon Dersso, examines the interface between transitional justice, reconciliation and

peacebuilding regarding the case of the Ethiopian Reconciliation Commission. The article examines how the model of transitional justice approach established through Proclamation No. 1102/2018 represents an attempt to crafting an institutional response 'tailored to the specific attributes of the local society at the time of transition' and geared principally for achieving reconciliation and peacebuilding. The analysis in this article also shows how the transitional justice process has failed to take off the ground on account of the absence of public participation in its making, the flaws in the makeup of the Commission and the absence of a political settlement, and how this undermines reconciliation and peacebuilding in the country.

The contribution by Aly Verjee focuses on the transition in Sudan and interrogates why and how the demand for transitional justice may be more helpfully reframed as the pursuit of transformative justice, that is premised on foregrounding societal and community concerns. Against the background of the failed promises of previous transitions, and in the face of the daunting challenges for achieving the promises of the current transition, the article proposes a two-track approach. This consists in local-level reconciliation, truth-telling and community dialogue processes and national level processes, which are segmented into manageable periods as opposed to a single process that seeks to deliver justice for all at one go.

In her contribution on the gendered dimension of Kenya's transitional justice process, Aquinata Agonga discusses the adverse consequences of the non-implementation of the report of the Kenya Truth, Justice and Reconciliation Commission (TJRC), on victims of violence in the Mount Elgon region conflict in general, and women victims of in particular. The failure to pursue and ensure redress for women victims and survivors for the harms they endured, has led to a loss of trust in government. Speaking to the theme of this HAB edition, the article also highlights how the lack of follow up by the Government of Kenya on the recommendations of the TJRC Report has, in addition to

curtailing the hopes of women victims for justice, frustrated the reconciliation and peacebuilding promises and potential of the Kenya transitional justice process, including in transforming unjust gender relations by affirming the voice of women victims.

Finally, the last article, by Billy Agwanda, reflects on transitional justice in South Sudan in the context of the 2018 Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS). This article examines how the particular structural and contextual factors in South Sudan including, the fragility of the peace process, continuing conflicts, and the COVID-19 pandemic affect the implementation of the transitional justice chapter of the R-ARCSS, indicating the dependence of the transitional justice component on the implementation of the power-sharing (political level reconciliation) and security (peacebuilding) dimensions of the peace agreement. The discussion on the lack of leadership and national ownership of the process underscores the critical role of the agency of actors as a success factor in

pursuing transitional justice.

This HAB edition presents some of the most current transitional justice processes where the various themes articulated in the AUTJP are assessed through ongoing country cases, with a focus on the importance of the agency of actors in ensuring the implementation of redress and accountability. This edition is unique not only in the diversity of transitional justice processes examined in the various contributions but also the insights that each offers on how transitional justice intersects with reconciliation and peacebuilding. This is a timely publication which is relevant to all those interested in understanding how to operationalise the African Union Transitional Justice Policy, as well as acquire insights into the various factors and forces that affect the implementation of transitional justice on the continent. The articles in this HAB edition provide rich content and analysis, which will increase the knowledge and understanding of readers on the challenging process of implementing transitional justice, peacebuilding and reconciliation in Africa.

About the Authors

Dr Solomon Ayele Dersso, a founding director of Amani Africa (Ethiopia-based pan-African policy research, training and consulting think tank), is the Chairperson the African Commission on Human and Peoples' Rights. At the African Commission, Dr Dersso serves as the focal point of the Commission for two thematic portfolios, Transitional Justice and Human and Peoples' Rights and Human Rights in Conflict Situations. In this capacity, he served as the lead drafter of the two most recent African Union instruments on transitional justice - the AU Policy on Transitional Justice and the African Commission's Study on Transitional Justice and Human and Peoples' Rights. Adjunct Professor at the College of Law and Governance Studies of Addis Ababa University, Dr Dersso serves as an editorial board member of various journals including the International Journal of Transitional Justice and the African Journal of Conflict Resolution.

Professor Tim Murithi is the Head of the Peacebuilding Interventions Programme at the Institute for Justice and Reconciliation, in Cape Town and Extraordinary Professor of African Studies, at the Centre for African Studies, University of Free State, South Africa. He has over 25 years of experience in peace, security, governance, transitional justice and development in Africa. Professor Murithi is the editor of 11 books and authors of several books on peace, security and transitional justice. He can be reached through E-mail: tkmurithi@hotmail.com; Twitter: [@tmurithi12](https://twitter.com/tmurithi12).

Strategies for the Effective Implementation of the African Union Transitional Justice Policy

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 approach to addressing the past, as a necessary pathway to building more inclusive and stable societies in the future. However, despite its adoption, this article will discuss how both governmental and societal actors in AU member states have not fully engaged and implemented the

Policy at the national level. Similarly, Regional Economic Communities (RECs) have not sufficiently engaged with the AUTJP and developed their regional strategies to advise and guide their member states, which can contribute towards stabilising their countries and forging more inclusive and democratic societies. The article will also discuss 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 fifty-five 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.

Adoption of the AU Transitional Justice Policy

The African continent remains afflicted by the terrible toil of violent conflicts, civilians continue to suffer disproportionately from human rights violations including gender-based violence, violent extremism, illicit trafficking of weapons, narcotics and people through globalised exploitation. These processes fuel the displacement of people across the continent and perpetuate humanitarian crisis. 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 policy informed by intentionally confronting, the underlying grievances that have fueled decades of animosity and violence on

the continent.

The **formal adoption of the AU Transitional Justice Policy**, in February 2019, has provided 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. Civil society actors were closely involved in working with the African Union Department of Political Affairs to provide technical support and input that led to the formal adoption of the AUTJP.

The fact is that 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 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.

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. Several African countries have adopted and implemented transitional justice processes and designed institutions to guide their national processes, such as in Burundi, Côte d'Ivoire, Gambia, Ghana, Liberia, Kenya, Mauritius, Rwanda, Sierra Leone, 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 sectarian crisis in Cameroon,

as well as the escalation of violent extremism in northern Mozambique's Cabo Delgado region. Furthermore, there is a need to further stabilise the situation in countries such as the Central African Republic (CAR), Democratic Republic of the Congo (DRC), Mali, South Sudan, Sudan, and Zimbabwe, which have attempted to implement fledgling transitional justice processes. In some instances, African countries need to establish new institutions to promote and sustain national reconciliation, such as in Lesotho, Libya, and Somalia which continues to be affected by instability despite the long-standing presence of the AU Mission in Somalia (AMISOM).

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".¹ Specifically, the AUTJP identifies four actors who should take responsibility for its implementation including:

- i. AU member States;
- ii. RECs;
- iii. AU institutions, and
- iv. Non-State actors, including members of Civil Society²

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."³ 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."⁴ The AUTJP is an outcome of a 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

1. African Union Transitional Justice Policy, 'Actors, Processes and Implementation Mechanisms', Section Four, African Union: Addis Ababa, 2019, p.25.

2. African Union Transitional Justice Policy, pp.25-26.

3. African Union Transitional Justice Policy, pp.25.

4. African Union Transitional Justice Policy, pp.25.

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, openly and inclusively. 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 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 also states that “RECs should encourage all national actors to pursue transitional justice processes.”⁵ 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.⁶ 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.”⁷ 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.”⁸ 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 demarcated roles for governments, inter-governmental 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 internal transitional justice and peacebuilding processes. The uptake for the AUTJP has faltered, particularly in 2020 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 psychosocial 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 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 normalization of relationships between affected neighbouring countries and creating a common understanding of transitional justice processes.”⁹ 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

5. African Union Transitional Justice Policy, pp.26.

6. African Union Transitional Justice Policy, pp.26.

7. African Union Transitional Justice Policy, pp.26.

8. African Union Transitional Justice Policy, pp.26.

9. African Union Transitional Justice Policy, p.26.

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.¹⁰ 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 close 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, to identify the issues that have caused deep divisions and generated violence in the past. Ultimately, the states and communities need to actively work collaboratively 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 acknowledgement 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 inter-governmental 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 localized national processes. Consequently, RECs should develop regional strategies to ensure a coordinated approach to promoting regional and trans-boundary transitional justice and reconciliation processes. However, the lack of resources and capacity means that these mechanisms remain incapable of promoting and sustaining regional peace, justice and reconciliation. Therefore, it is necessary for RECs to develop their regional strategies for the implementation of the AUTJP, to complement their existing peace and security frameworks.

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.¹¹ 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

10. Tim Murithi and Lindsey McClain Opiyo. “Regional Reconciliation in Africa: Policy Recommendations for Cross-Border Transitional Justice Policy Brief no. 14, No.14, 2014, Cape Town: Institute for Justice and Reconciliation.

11. African Union Transitional Justice Policy, p.25.

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 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.”¹² 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 fifty-five countries all of which require some form of transitional justice intervention, if they have not already done so, to sustain 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, inter-governmental and civil society organisations on the implementation of the provisions of the AUTJP.

12. African Union Transitional Justice Policy, p.28.

Conclusion

The AU declared 2014-2024 the Madiba Nelson Mandela Decade of Reconciliation in Africa, so it is timely and prescient that the AUTJP was adopted during this period. However, the continent still has a way to go to stabilise all of its regions and consolidate peace and security for its people. This article assessed the most effective strategies to implement the AUTJP, as a pathway to promoting peace and security, at a communal, national, regional and continental level. The fact that all countries around the world need to engage in some form of introspection to address the existing grievances in their societies means that the AUTJP stands out as a global example for

other regions to follow.

The AUTJP is a welcome addition to the arsenal of policy documents that can contribute towards identifying key strategies to prevent the recurrence of violence and to sustain peace and security initiatives. 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 forging and building stable communities across the continent.

About the Author

Tim Murithi is Extraordinary Professor of African Studies, Centre for African and Gender Studies, University of Free State, and Head of Programme, Peacebuilding Interventions, Institute for Justice and Reconciliation. He is also Research Associate, Institute for Democracy, Citizenship and Public Policy in Africa, University of Cape Town. He is author and editor of eleven books, including the author of *The African Union: Pan-Africanism, Peacebuilding and Development*, published by Ashgate, and editor of *The Politics of Transitional Justice in the Great Lakes Region of Africa*, published by Jacana Media and editor of the *Routledge Handbook of Africa's International Relations*.

Email: tkmurithi@hotmail.com; tmurithi@ijr.org.za
Twitter: @tmurithi12

An Elusive Dream? Transitional Justice, Peacebuilding, and the Youth in Kenya

Beatrice Kizi Nzovu

Introduction

“Do not let the shadows of your past, darken the doorstep of your future”
(author unknown)

Transitional Justice has been advanced by the United Nations (UN) and the African Union (AU), as a holistic and inclusive process that seeks to redress past violations and injustice through a range of truth-seeking, accountability and reconciliation processes and mechanisms.¹ According to the African Union Transitional Justice Policy (AUTJP), the implementation of transitional justice can contribute towards transformative processes,²

Kenya’s History of Violence

There are several epochal periods in Kenya’s history which deserve the attention of transitional justice processes. These include the era of colonial domination by Britain, notably the period during Kenya’s war of independence up to 1963, when the first President, Jomo Kenyatta, could have launched initiatives to address the violations and injustices of the colonial era.⁴ There is also the period between 1963 and 1969 when a war of secession was fought in the Somali region of Kenya, a conflict that was also known as the ‘Shifita war’.⁵ In 1984, the Wagalla Massacre was perpetrated by government forces killing over 500 Somalis, and torturing an unknown number of victims by state authorities.⁶ The era of President

The Limitations of Transitional Justice Process in Kenya

In the aftermath of the 2007 post-election violence in Kenya, there were calls by civil society and other actors for accountability and redress through the slogan ‘no justice, no peace’.¹⁰ There is an acknowledgement that peace and justice are not mutually exclusive but reinforce each other.¹¹ However, in the Kenyan example, the decision to pursue retributive justice and to refer the post-election violence atrocities to the International Criminal Court

however, they can also be manipulated by regressive political regimes. In particular, the AUTJP states that youth actors should be included in both the design and implementation of transitional justice processes within their country.³ Kenya has adopted transitional justice processes to address its unresolved violations which have been historically transferred from one transition to the next. This article will seek to engage with the nexus between transitional justice and peacebuilding, with a focus on the role of youth actors in contributing to this agenda.

Daniel Arap Moi’s reign saw the widespread use of torture chambers to punish mutinous armed military soldiers who attempted to perpetrate a coup d’état in 1982.⁷ Also, during Moi’s era, there was state-sponsored repression of multiparty democracy activists including assassinations, illegal arrests, torture, and recurrent election-related violence from 1992, when pluralism was introduced in the country.⁸ In 2007 and 2008, Kenya endured one of its worst periods of human rights violations, through post-election violence, which led to approximately 1300 people dead, hundreds of thousands injured, including victims of gender-based violations, and over half a million people internally displaced.⁹

(ICC), was met with criticism by some Kenyan leaders, who argued that other restorative and less punitive transitional justice processes should have been explored for the sake of ‘peace’.¹² Interestingly, before the names of those to be taken to the ICC had been publicised, political leaders had been vocal on the need for justice with the clarion call, ‘Don’t be vague, let’s go to the Hague’.¹³ Initiatives to consider other options including the establishment of a Special

1. Pablo De Greiff. “Theorizing Transitional Justice,” *Nomos*, 51, 31-77. (2012). Accessed September 20, 2020. <http://www.jstor.org/stable/24220123>
2. African Union Transitional Justice Policy. 2019. Accessed October 22, 2020. https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf. P.5 Article 23.
3. Ibid. Articles 39, 73, 94.
4. Agatha Ndonga. “Kenya: Still Grappling with a Stalled Transition Mandate,” (2018). Accessed September 20, 2020. <https://www.ictj.org/news/kenya-still-grappling-stalled-transitional-justice-mandate>
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7. Nanjala Nyabola. “Nyayo House: Unraveling the Architecture and Aesthetics of Torture,” (2017). Accessed September 20 September 2020. <https://www.theelephant.info/ideas/2017/08/17/nyayo-house-unraveling-the-architecture-and-aesthetics-of-torture/>
8. Agatha Ndonga. “Kenya: Still Grappling with a Stalled Transition Mandate,” (2018). Accessed September 20, 2020. <https://www.ictj.org/news/kenya-still-grappling-stalled-transitional-justice-mandate>
9. Kenya National Commission on Human Rights. “Reflections in the Mirror: An Introspection of the KNCHR 2007-2008 Experience,” (2017). Accessed September 20, 2020. https://www.knchr.org/Portals/0/CivilAndPoliticalReports/2017_Reflections%20in%20the%20Mirror_An%20Introspection%20of%20the%20KNCHR%202007-2008%20Experience.pdf?ver=2018-06-06-161737-963
10. Onyango Oloo. “No Justice, No Peace: The wrong-headed ‘Save Our Country’ Media Blitz,” (2008). Accessed 20 September 2020. <https://www.pambazuka.org/human-security/no-justice-no-peace>.
11. Fabrice Tambe Endoh & ML Melvin Mbao. “Political Dynamics in Kenya’s Post-Electoral Violence: Justice Without Peace or Political Compromise?”, *African Security Review*, (2016): 25:3, 275-287, DOI: 10.1080/10246029.2016.1188834). Accessed September 20, 2020 from <https://www.tandfonline.com/doi/full/10.1080/10246029.2016.1188834?scroll=top&needAccess=true>
12. Ibid.
13. Chrispin Mwakideu. “Ruto Verdict a Slap in the Face for the ICC,” (2016). Accessed September 20, 2020. <https://www.dw.com/en/opinion-ruto-verdict-a-slap-in-the-face-for-the-icc/a-19167280>

Tribunal to prosecute perpetrators domestically were met with deaf ears, as some observers criticised this as a way to let the perpetrators evade with impunity.¹⁴ In effect, there was limited faith among the Kenyan populace in the execution of justice within its existing judicial system. Kenya was just coming out of a disputed election that had resulted in over a thousand deaths

and with allegations of extrajudicial killings by state authorities, as well as armed militia in the country, which are mostly populated by young men.¹⁵ The alleged perpetrators of the most serious crimes appeared at the ICC docket in The Hague, but the 'justice' that was sought then, is yet to be realised to date and therefore it remains for the time-being an elusive dream.

A Transitional Justice Train off Its Rails?

Kenya has endeavoured to develop transitional justice processes and established a range of institutions. Historically, in its quest for transitional justice, the country has had a long history of commissions of inquiry set up to address past human rights violations against its citizens. These have included the Ouko Commission of Inquiry (1990-91) established to look into the brutal murder of Kenya's Foreign Affairs Minister Robert Ouko, on 13 February 1990, which to date remains unresolved;¹⁶ the Akiwumi Commission (1998-99) into Ethnic Violence that had resulted in over 800 deaths and 130,000 internal displacements between 1991 and 1994, specifically looking into the root causes of the clashes and the role of state actors, however recommendations from this body have never been implemented;¹⁷ the Commission of Inquiry into the Land Law Systems of Kenya (1999) that looked at illegal acquisitions and the lack of a policy framework and made recommendations to reform land processes, including revocation of erroneously acquired title deeds, that are yet to be fully implemented;¹⁸ the Commission of Inquiry on Post-Elections Violence (2008)¹⁹ to look into the surrounding circumstances and the role of state actors; and the Kriegler Commission (2008)

set up to assess Kenya's electoral systems and practices which made recommendations that subsequently have not been implemented.²⁰

The most significant of these was the Truth, Justice, and Reconciliation Commission (2008) that sought to look at all the historical injustices in Kenya since independence and make recommendations on how best to address them.²¹ Paradoxically, this report remains in stasis on the "shelves", and its recommendations have not been formally implemented; or are perhaps not implementable, because it directly cites the violations committed by key members of the political and business class in Kenya. More importantly, the armed militias that perpetrated the violence were populated by youth actors, and the issue of how they can be engaged in transitional justice processes has not been sufficiently followed through in Kenya. This is a confirmation that when it comes to transitional justice, Africa has been and remains a mixed bag of unfulfilled promises and inconclusive efforts.²² The Kenyan situation is no exception since efforts to redress past violations have been met by delaying tactics, and have created conditions for violations to continue.

14. Ibid.
15. International Criminal Justice Program. "Kenya: Investigating Post-Electoral Violence-January-March 2008," (n.d.). Accessed September 19, 2020. <http://www.npwj.org/ICC/Kenya-investigating-post-electoral-violence.html-0>
16. Eliud Kibii. "Commissions or Omissions of Inquiry? Why Kenya has Failed to Address Historical and Other Injustices," (2018). Accessed September 20, 2020. <https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/>
17. Ibid.
18. Ibid.
19. The Waki Report (Commission of Inquiry into Post-Election Violence. Accessed October 22, 2020. <https://www.theelephant.info/documents/the-waki-report-commission-of-inquiry-into-post-election-violence/>
20. Summary of the Kriegler Commission 2007 Election Report. Accessed October 22, 2020. <https://www.theelephant.info/wp-content/uploads/2018/04/Elephant-Kriegler-Table.pdf>
21. Eliud Kibii. "Commissions or Omissions of Inquiry? Why Kenya has Failed to Address Historical and Other Injustices," (2018). Accessed September 20, 2020. <https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/>
22. ICTJ. "Conflict and Transitional Justice in Africa," (2009). Accessed September 19, 2020. <https://www.ictj.org/sites/default/files/ICTJ-Africa-Conflict-Facts-2009-English.pdf>

Kenyan Youth and the Double-Sided Facets of 'Transitional/Justice'

Kenya's history of unfulfilled promises when it comes to delivering on transitional justice raises the question of the youth and how they can engage with these processes. In terms of demographics, 75% of Kenya's population falls into the "youth" category.²³ In addition to facing high levels of unemployment, lack of adequate political representation, frustration around their agency, and feelings of exclusion from the mainstream as decision-makers and contributors to the economy, the youth bear the brunt of extrajudicial killings.²⁴ The other side of the coin though is that youth are also perpetrators of violence,²⁵ often manipulated by political leaders and others to undertake acts of violence on their behalf or 'in their name'.²⁶ In the 2007-2008 post-election violence, youth gangs were reactivated for

engagement in political violence which ranged from intimidation, the destruction of property, rape, and killings.²⁷ The political manipulation of the youth through financial incentives places them in the category of both victims of political exploitation as well as perpetrators of violence. This reveals the double-sided nature of injustice towards the youth, in the sense that if they are not being killed, then they are being used to commit crimes. Kenya's transitional justice processes have not been able to address this double-sided nature of injustice that is endured by the youth. The dominant approach has been to categorise youth actors, who have actively engaged in an armed militia, almost exclusively as perpetrators, rather than also as victims and survivors of a manipulative political culture.

Peacebuilding as the Pathway to Transitional Justice in Kenya

The manipulation of Kenyan youth and the limited ability of the transitional justice processes implemented so far, to provide the victims and survivors with redress and accountability creates a continuous vicious cycle in terms of the denial and delay of restorative justice. This gap presents an opportunity for state and non-state actors to utilise peacebuilding processes that target and engage young people through processes that can contribute towards gradually laying the foundations for redress and the restoration of human dignity. Article 50, of the AUTJP, calls for the reclaiming of the historical experiences of youth as victims and perpetrators, and the role played by state and non-state actors in promoting reconciliation and healing through the establishment of commissions.²⁸

Traditionally, young people were viewed as the custodians of culture, societal morals, stability, and youthful dynamism which can be harnessed to impact positively on communities.²⁹ The legacy of colonialism has resulted

in the labelling of Kenyan youth as a proverbial 'problem'.³⁰ This attitude effectively undermines efforts to proactively engage the youth as agents of positive change within the Kenyan community. Despite this challenge, Kenyan youth have emerged as leaders in the peacebuilding sphere, working towards the realisation of justice but from a transformation perspective.

Since 2015, the Life & Peace Institute (LPI) has engaged with female and male youth in Kenya, specifically in Nairobi's urban and informal settlements and the North Eastern counties of Garissa, Mandera, and Wajir. LPI's interventions have demonstrated that transitional justice processes are being implemented daily by the youth of Kenya. However, these youth interventions, as discussed further below, do not follow the trajectory of traditional transitional justice processes, such as truth commissions, prosecutorial justice, or reparations. Instead, in line with the AUTJP, and its emphasis on community dialogues,³¹ the Kenyan

23. D Odoni . "Challenges Facing Young People in Kenya," (2017). Accessed September 20, 2020. https://www.ohchr.org/Documents/Issues/Youth/D_Odoni_Kenya.pdf
24. Human Rights Watch. "Kenya: No Let Up in Killings by Nairobi Police," (2020). Accessed September 21, 2020. <https://www.hrw.org/news/2020/02/20/kenya-no-letup-killings-nairobi-police>
25. Kenya National Commission on Human Rights. "Still A Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Elections," (2018). Accessed September 20, 2020 from <https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Still-a-Mirage-at-Dusk.pdf?ver=2018-05-23-123451-723>
26. Kenya National Commission on Human Rights. "Reflections in the Mirror: An Introspection of the KNCHR 2007-2008 Experience," (2017). Accessed September 20, 2020. https://www.knchr.org/Portals/0/CivilAndPoliticalReports/2017_Reflections%20in%20The%20Mirror_An%20Introspection%20of%20the%20KNCHR%202007-2008%20Experience.pdf?ver=2018-06-06-161737-963
27. Ibid
28. African Union Transitional Justice Policy (AUTJP) (2019). Accessed October 22, 2020. https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf. P.10 Article 50
29. National Crime Research Centre. d.). Perspectives of Youth Criminality in Kenya. Retrieved on 20 September 2020 from <http://crimeresearch.go.ke/wp-content/uploads/2019/11/Youth-Perspectives-on-Crime.pdf>
30. Ibid
31. AUTJP (2019). Accessed October 22, 2020. https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf

youth are convening processes at the local level using dialogue and community engagement that can ultimately create the conditions for peacebuilding and transitional justice. These key initiatives include the following:

Building Youth Agency

As noted above, young people in Kenya are often left out of the decision-making processes, and the peace and security sectors are no different. These sectors include but are not limited to the community policing initiatives (Nyumba Kumi³²) and Peace Committees at the communal level, which are also affiliated to the national government. These institutions are significant in terms of the role that they play in promoting early warning and early response as well as in shaping the peace and security agenda at several levels. The reality is that young people largely remain excluded from these sectors and structures. Since 2017, LPI has observed and supported Kenyan youth to advocate for their inclusion and representation in these sectors and structures. Their inclusion in these sectors and structures has resulted in a critical shift in how youth issues are addressed so that they are not perceived as the 'problem'. This approach can contribute by creating a pathway for youth to become actively engaged in community conversations, which can draw them in as agents who can contribute towards the betterment of the community. This has resulted in youth actors actively engaging in communal processes through the arts, music, and entrepreneurship, as well as leading community conversations on peacebuilding, and being called upon to intervene when human rights violations occur.

Youth-Security Actor Engagement: Case of North-Eastern Kenya

Kenyan youth and security actors have had a tense relationship which has often escalated to violent confrontations, particularly within

informal settlements, and the economically depressed regions of North Eastern Kenya. The youth in these regions have taken the initiative not to avoid but work directly with the security actors. In this way, there has been an improved understanding from both sides through 'listening to, hearing and appreciating the other's point of view'. This has been achieved through dialogues between youth and state security actors. The AUTJP states that dialogue is a necessary aspect of justice, healing, and reconciliation at local, intercommunal, intergenerational, and national levels.³³ In particular, joint community action has created critical entry points for the state security actors to engage with communities, where they were previously viewed with suspicion. Consequently, the flow of information between the community and security actors has improved, and the levels of trust have increased. It is worth noting that the AUTJP recognises local processes and dispute resolution mechanisms including community dialogue as useful transitional justice avenues "to address the justice, healing and reconciliation needs of affected communities..."³⁴ If similar approaches to peacebuilding can be pursued, then this can create a pathway to reducing the violence between the state security actors and the youth. This will, in turn, have an impact on reducing the illegal and unnecessary extrajudicial killings, which would require activating the formal national level transitional justice processes to confront impunity and achieve accountability. In this regard, these peacebuilding processes can create a pathway to building the foundations for addressing the grievances within these affected communities.

Youth Actors Leading from the Front

The distinguished freedom fighter and practitioner of nonviolence, Mahatma Gandhi, advised those who are interested in bringing about

32. Community Policing Information Booklet. P.3. Accessed October 22, 2020. file:///C:/Users/Admin/Downloads/NPS%20Community%20Policing%20Information%20Booklet1.pdf

33. AUTJP. Articles 18,71, 74,129

34. AUTJP, Article 4.

transformation to “be the change you want to see in the world”.³⁵ This slogan resonates with Kenyan youth today who have established their community-based organisations to contribute towards resolving some of the issues that their communities face. The focus of these organisations includes the protection of human rights, with an emphasis on gender equality, transitional justice, peacebuilding, nonviolent action, safeguarding the environment, developing youth talents, prevention of sexual and gender-based violence (SGBV), and youth empowerment through crafts. The AUTJP states that addressing SGBV requires special measures including affirmative action to support youth and ensure their physical, psychosocial rehabilitation, and social integration as well as their participation in transitional processes.³⁶ It also calls upon investigation and prosecution of SGBV perpetrators as well as the support to survivors including livelihood and educational support.³⁷ In this way, the youth can “lead from the front” and articulate their concerns on the issues that matter to them.

Championing for Peaceful Elections

The link between politics and violence has been a recurrent feature in Kenya, particularly during the electoral period. Since 2017, youth actors have been collaborating with LPI to promote peaceful elections by undertaking peace education and edutainment (entertainment for education purposes) in their communities. This has illustrated that youth actors no longer want to be manipulated to engage in violence that harms them and others. By adopting this stance as “agents of peace” in their communities, their vulnerability to recruitment into violence is reduced significantly. This is achieved by promoting a culture of peacebuilding through which young people make a daily commitment to choose peace and cast their votes, rather than using violence.

Shaping the Agenda – Advocating for change

The current reality is that young people in Kenya are still excluded from key decision-making processes and are in effect denied a seat “at the table”. However, as Alyssa Chassman states, “If you can’t get a seat at the table, build your own”.³⁸ Kenya’s youth actors have taken the initiative to create spaces where their voices can not only be heard but also accepted in terms of shaping the agenda. In 2019, a Kenyan youth, Ms. Hafsa Ahmed, had the rare opportunity to brief the UN Security Council on Youth, Peace, and Security issues from her perspective.³⁹ This moment has influenced her life in other ways, as she has since been included in the community policing initiative, is now called upon by local administrators to assist in resolving community issues, and is frequently asked to join national, regional, and global discussions on governance, peace and security issues. In effect, young people in Kenya are demonstrating the importance of creating and occupying new spaces to pursue advocacy at all levels, which can contribute to sustaining peace and engaging in transitional justice processes.

Changing the Narrative

The question of who constitutes “youth” remains contested, however, it is necessary to adopt a much broader perspective. In 2017, LPI published a study based on an analysis of over 20,000 youth actors working across the Horn of Africa, which revealed that young people are diverse and live in complex situations.⁴⁰ They are interested in broader societal issues, and want to be engaged in shaping policy now, and are willing and able to change the narrative. In the context of Kenya, youth actors are determined to address past and present injustices, but they need an enabling environment to achieve that, which can be supported by transitional justice processes.⁴¹ The AUTJP states that youth actors need to be included holistically in transitional justice processes from design to implementation.⁴²

35. Dhiman, Satinder. “Be the Change You Want to See in the World: The Leadership Art of Mahatma Gandhi,” (2011). 10.1057/9780230370432_70. Accessed October 22, 2020. https://www.researchgate.net/publication/304648048_Be_the_Change_You_Want_to_See_in_the_World_The_Leadership_Art_of_Mahatma_Gandhi
36. AUTJP. Article 39
37. Ibid. Article 103
38. Alyssa Chassman. “Don’t Have a Seat at the Table? Build Your Own Table,” (2017). Accessed September 21, 2020. https://www.huffpost.com/entry/dont-have-a-seat-at-the-table-build-your-own-table_b_59ca42b9e4b08d66155045a5
39. Hafsa Ahmed. “My Experience Addressing the United Nations Security Council: The Advocacy Powers of a Youth Peacebuilder from Kenya,” (2019). Accessed September 21, 2020. <https://life-peace.org/blog/my-experience-addressing-the-united-nations-security-council>
40. Life & Peace Institute. “Being and Becoming A Peacebuilder: Insights from 20,000 hours of Youth-Led Dialogues in the Horn of Africa,” (2017). Accessed September 21, 2020. https://assets.ctfassets.net/jzyrkiixci-m/2dJzrCsFXWyF38gxyLr1W/7e68cb20d-6532f7c29b310993a4eae3a/Being_And_Becoming_A_Peacebuilder_LPI_YPS_Submission_-_Final_copy.pdf
41. Ibid
42. AUTJP. Article 39. Accessed October 22, 2020. https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf

Conclusion

This article has discussed the role of youth actors in promoting peacebuilding, to address the gaps that have been created by the failure of Kenya's transitional justice processes to promote redress and accountability. The article argues that youth-led peacebuilding processes at the community level have emerged to address this gap and need to be recognised as part of the larger national transitional justice framework and efforts in line with the AUTJP.

The article recommends that a shift is needed in viewing youth as part of Africa's solution towards the realisation of inclusive, effective, and sustainable transitional justice processes, rather than as the problem. The youth constituency which constitutes most of Africa's population is a critical actor in shaping the

continent's future and the recognition of this by the AUTJP provides an opportunity to be harnessed by national governments including Kenya.

The complexities of attaining transitional justice in Kenya, particularly when it comes to addressing the concerns of the youth, requires placing more of an emphasis on the adoption of a peacebuilding approach. This allows young people to contribute towards leading on peacebuilding processes, by shaping the agenda and creating a future that they desire, one that is not haunted by the atrocities of the past or tainted by the violations of the present. It is only in this way that they will be able to memorialise and acknowledge their history, as well as create their narratives of the future.

About the Author

Beatrice Kizi Nzovu is the current Kenya Country Manager and Head of Office, Nairobi at the Life & Peace Institute. She is a peacebuilding practitioner and African feminist scholar whose areas of interest include Peacebuilding; Youth, Peace and Security; African Feminism; Women, Peace and Security; and Violent Extremism. Email: beatrice.nzovu@life-peace.org / bnzovu@gmail.com

Insights from Ethiopia's Reconciliation Commission for Transitional Justice, Peacebuilding and Reconciliation

Solomon A. Dersso

Introduction

As part of the political reform process initiated following Abiy Ahmed Ali's rise to become Ethiopia's Prime Minister, the House of People's Representatives of Ethiopia adopted the proclamation establishing the Ethiopian Reconciliation Commission.¹ Viewed through the transitional justice prism, the Reconciliation Commission, established under Proclamation No. 1102/2018, represents the model of transitional justice framework proposed for the country. The review of the contents of the Proclamation shows that the approach and purpose of the transitional justice model are oriented towards serving the objectives of reconciliation and peacebuilding in Ethiopia.

This article will present insights on the interface between transitional justice and reconciliation and peacebuilding, using the case of Ethiopia's model of transitional justice. To this end, the article uses a legal method of textual analysis of the proclamation. This methodology is key because the process of the drafting and adoption

of the proclamation were free from public consultation. Additionally, the article assesses what the trajectory of the transitional justice model of Ethiopia tells us about the gap between the promise of the objectives entrusted to the Commission and the reality of the plethora of challenges to reconciliation and peacebuilding in the country.

Arguably, as it will be shown further below, Ethiopia's case shows that the transitional justice approach, as a part of the process of transition in the country, is meant to underpin principally the aspiration of transitioning away from the authoritarian and divided past characterised by increasing authoritarianism and social tension, towards a more democratic and peaceful state. Indeed, it as such represents a transitional justice approach that is geared towards the objectives of reconciliation and peacebuilding identified in AU's conception of transitional justice.²

Ethiopia's Model of Transitional Justice and its Interface with Peacebuilding

As indicated in the nomenclature of the Commission itself, much of the focus of the Proclamation seems to be on the 'reconciliation' pillar of the mandate of the Commission. Unlike similar bodies in other countries where truth or truth and justice were used along with reconciliation in the nomenclature of such a body, only 'reconciliation' is used in designating Ethiopia's transitional justice body. The Proclamation defines under Article 2(3) reconciliation to involve "establishing values of forgiveness for the past, lasting love, solidarity and mutual understanding by identifying reasons of conflict, animosity that are (sic) occurred due to conflicts, misapprehension, developed disagreement and revenge."

Article 5 of the Proclamation states

that the "objective of the Commission is to maintain peace, justice, national unity and consensus and also reconciliation among Ethiopian peoples." As these terms make clear, there is a particular premium that is put on the peace and reconciliation dimension of the work of the Commission.

While the Proclamation does not provide details on how this pillar is to be implemented, there are many indications contained in it. First, there is the element of truth which is one of the themes used more than once in the preamble to the Proclamation. Paragraph 1 of the preamble indicates that the reconciliation process is to be based on "truth". Preambular Paragraph 4 also states that the Commission is established on account

1. Reconciliation Commission Establishment Proclamation, Federal Negarit Gazette of Federal Democratic Republic of Ethiopia (25th Year, No 27. Addis Ababa, 5 February 2019)

2. African Union Transitional Justice Policy, p.7.

of the necessity to have a “free and independent institution that inquire and disclose the truth of the sources, causes and extent of conflicts.”

Apart from the dimension of the Commission’s mandate that focuses on what the Proclamation calls “societal and political conflicts”, the second pillar of the mandate of the Commission addresses gross human rights violations. Preambular Paragraph 2 highlights the need for identifying and ascertaining “the nature, cause, and dimension of the repeated gross violations of human rights’ as a means not only for ensuring respect for human rights but also for ‘reconciliation’.” No direct reference is made to this pillar of the mandate of the Commission under Article 5 which outlines the objective of the Commission. However, Article 6, which outlines the powers of the Commission, stipulates under Sub-Article 4 that the Commission has the power to “make examination (sic) to identify the basic reasons of ... violations of human rights by taking into consideration of political, social and economic circumstances and the views of victims and offenders.”

It emerges from the holistic reading of Proclamation No. 1102/2018 that both the “societal and political conflicts” and the “gross human rights violations” dimensions of the mandate of the Commission are to be addressed in a mutually reinforcing and complementary fashion. While the technical methods to be used for the two are different, the process for both is oriented towards establishing “truth” as the measure for achieving the overall goals of the Proclamation (set out in the preamble and Article 5). Understandably, there may not be a single truth about conflicts or gross human rights violations. As the South African Truth and Reconciliation Commission (TRC) highlighted, truth does not consist only of factual/ forensic/scientific truth. It can also consist of personal/narrative truth, social/dialogical truth and healing/restorative truth.³

The methodologies that may be used for addressing the “societal and political conflicts” dimension may include analysis of primary and secondary documents on patterns, manifestations and causes of conflicts in Ethiopia, statement taking, convening of hearings and submissions from experts such as historians and political scientists. As outlined in Article 5(2) and (10), the Commission will be responsible for convening inter-community dialogue and reconciliation forums to chart ways of establishing reconciliation, harmonious coexistence and national unity. As stipulated in Article 5(3) – the Commission will be responsible for codifying shared principles and values of various communities in the country through inter-community discussion forums as the bases for national reconciliation.

In terms of the “gross human rights” dimension, the methodology to be used involves appropriate legal methods of collecting and analysing various sources of evidence. These methods could include statement taking, forensic investigations, interviews, undertaking visits to places or institutions for inspecting materials or documents, subpoenaing any individual or institution for having the production of any relevant information or document, and convening public or closed individual, thematic or institutional hearings.

What happens after establishing the “nature, cause and dimension of” gross violations of human rights? There are two words used in the Proclamation that offer guidance for answering this question. The first term is ‘justice’ and the other is ‘truth’. The term justice is used principally in two places. The first is in preambular Paragraph 1 and the second is in Article 5 of the Proclamation. In both instances, the term ‘justice’ is used in relation to reconciliation, peace, national unity and consensus. Accordingly, the term is used to describe the end state of the work of the Commission, namely to achieve, among others, justice in the

3. Lambourne, *supra* n 3, p.39.

relationship among Ethiopian peoples.

All indications from the reading of the Proclamation is that the term “truth”, as used in the Proclamation, is the main avenue for both the accountability of perpetrators and for redress for victims of gross violations of human rights. Instead of retributive accountability, the form of accountability envisaged in the Proclamation is one of establishing the truth about violations. This can be gathered from

Preambular Paragraphs 2, 3 and 4 as well as Article 6(4) & (9). Similarly, the remedy envisaged is that of giving a hearing to victims and public acknowledgement of the harm done to the victims and the suffering they endured. For example, preambular Paragraph 2 envisages that the Commission is established to provide “victims of gross human rights abuses in different time and historical event (sic) with a forum to be heard.”

The Checkered Trajectory of Ethiopia’s Transitional Justice Process

It is true that compared to the laws of similar institutions of other countries, Proclamation 1102/2018 lacks depth, hence leaving, for example, the material and temporal scope of the transitional justice process.⁴ Despite these limitations, the substantive content of the Proclamation defines the essential features of Ethiopia’s restorative and peacebuilding model of transitional justice, whose elements include the rebuilding of social cohesion and peace through reconciliation and accountability and providing a form of redress for victims through both establishing the truth and reconciliation. This model avoids pursuing a retributive justice approach.

While the transitional justice model espoused in the Proclamation establishing the Reconciliation Commission is suitable for moving the country into a more democratic and peaceful state, the two years trajectory of Ethiopia’s transitional justice process leaves a lot to be desired. The Reconciliation Commission was inaugurated in February 2019 for three years, however, it has yet to take any tangible steps in implementing its core mandate beyond preparatory activities.⁵

Various factors account for this lack of delivery. The first two factors involve the foundational deficiencies in the formation of the Ethiopian model of transitional justice. One of these relates to the total disregard of the process component of transitional justice, which is as constitutive an element for success as the substantive dimension. The other concerns the lack of a political settlement through

which the foundations for transitional justice processes are ideally established. The other major factor is the political and security context which affects the operation of the Commission.

Foundational Deficiencies

After reviewing the legislative contents of the legal instruments that make up the African Human Rights system, the African Commission on Human and Peoples’ Rights in its study on Transitional Justice and Human and Peoples’ Rights in Africa concluded that “the legitimacy of TJ [transitional justice] processes consists of both procedural and substantive components/principles.”⁶ As enunciated in the study, this covers, among other things, “consultation with all affected individuals and groups, to ensure that the transitional process is the result of and reflects the will of all the people’ and ‘the existence of the necessary environment and space for debate and discussion through which citizens shape the process of elaborating TJ processes and participate in these processes.”⁷

When measured against the background of these standards, the process adopted in developing and adopting the Ethiopian transitional justice model falls short of this standard. Indeed, one of the striking features of the establishment of the Commission is the conspicuous absence of a participatory process. This is true with regards to the planning for, and preparation of, the law establishing the Reconciliation Commission, as well as the appointment of the members of the body. First, as

4. Solomon Dersso, Ethiopia’s transitional justice framework: Defining the boundaries of the mandate of the Ethiopian Reconciliation Commission, available on https://www.usip.org/sites/default/files/20190923-Dersso_Presentation-AC.pdf

5. The Commission held various consultations with various state stakeholders including the Attorney General, Addis Ababa City Administration and various regional governments. It has issued some statements. It has also identified seven conflict situations to work on, although clarity is lacking on the selection and approach on these.

6. ACHPR (2018), Study on Transitional Justice and Human and Peoples’ Rights in Africa (Banjul: ACHPR) p.57.

7. Ibid

highlighted in a recent publication, “the initiative on the Commission and its establishment was managed as an affair that concerned the Prime Minister, his Cabinet and the Parliament.”⁸ It goes on to note that “[t]here was no public consultation on the law establishing the Commission.” Second, “there was inadequate transparency on the background to and the process for the formation of the Commission.”⁹

Explaining this further, it states “there was neither a public process nor clear criteria on the composition of the members of the Commission. In other words, the establishment of the Commission suffers from what may be called a process of legitimacy deficiency.”¹⁰ Indeed, even members of the Commission found out about their membership from the media. Accordingly, the approach adopted deprived victims of the opportunity for them to regain their agency and to have a degree of healing through participation in the process for designing a transitional justice process which purports to accord them a central place.

This lack of participatory process should not have been beyond mitigation if the Commission adopts a more participatory approach in implementing its mandate. Yet, no attempt has either been made to open for public participation the preparation of the regulation that was initiated for implementing the Proclamation. Two years after its establishment, the Commission has as yet to achieve common strategic understanding about its role and mandate among its own 41 members, drawn from diverse backgrounds. Members of the Commission include notable political figures who have a direct interest in the outcome of the process which raises questions about whether it has the integrity required of such institutions. Apart from the amorphousness of the size of the Commission, all its members also operate on a part-time basis.

The other foundational deficiency concerns the absence of a political settlement. From South Africa’s post-apartheid transitional justice that gave

worldwide prominence to the use of the truth and reconciliation commission as a framework of transitional justice to the experiences in Liberia, Sierra Leone, and Kenya, the choice of the transitional justice framework has emerged as one of the instruments for the implementation of a new political settlement between rival political formations.¹¹

There is no indication that the Ethiopian transitional justice framework anchored in the Reconciliation Commission is founded on an identifiable political agreement or negotiated political settlement. With no negotiation or dialogue among the political forces of the country, there has been no new settlement that can be deemed as “replacing the post-1991 political settlement that collapsed”¹² following the handover of power from Hailemariam Dessalegn to Abiy Ahmed Ali.

Contextual Factors

The transitional justice process in Ethiopia is also hugely affected by the prevailing context of the country. At the political level, the national context is characterised by an intense power struggle that has reduced the reform process to a zero-sum politics of the winner takes all approach to power. In the absence of a process of rapprochement and accommodation between the various political forces underwriting the work of the Commission, there is inadequate political foundation for implementing an effective transitional justice process that will contribute to peacebuilding in Ethiopia.

Another contextual factor relates to the security sphere and the resurgence of violence across different regions that uses ethnicity as a cover. The absence of an agreed political roadmap led to “the resurgence of ethnonationalism and centrifugal forces with the establishment of new ethnic-based movements or parties. While not completely new, the demand for a status of regional statehood (as the vote by the Sidama for such status illustrate) has

8. Solomon A. Dersso (2020), *Transitional Justice and Reconciliation in Ethiopia’s Hybrid Transition: The Case of the Reconciliation Commission*, in Melaku Geboye Desta, Dereje Feyissa Dori, and Mamo Esmelealem Mihretu (eds.) *Ethiopia in the Wake of Political Reforms* (Tesehai Publishing).
9. Ibid
10. Ibid
11. Opalo, K. (2017) *The Contingent Role of Political Parties in Transitional Justice Processes*. In: Duthie, R. and Seils, P. (eds.) *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies*. New York: International Centre for Transitional Justice, pp.278-301.
12. Solomon A. Dersso, *Addressing Ethiopia’s winter of despair: Abiy’s homework*, Addis Fortune, 19 October 2019, available on <https://addisfortune.news/ethiopia-between-spring-of-hope-and-winter-of-despair/>
13. Solomon A. Dersso (7 August 2018), *Ethiopia’s Spring of Hope and Winter of Despair*, available on <https://solomondersso.wordpress.com/2018/08/07/ethiopias-spring-of-hope-and-winter-of-despair/>

acquired new momentum.”¹³ One of the issues that understandably faces the Commission, considering that the Proclamation establishing it has not defined the temporal scope of the mandate of the Commission, is whether it can or should play a role without further undermining its standing given the direct link between these conflicts and the struggle for power between political formations in the country.

Conclusion

Two key issues emerge from the foregoing analysis of Ethiopia’s model of transitional justice anchored in the Reconciliation Commission. Firstly, the intention was to use the Commission as a mechanism for pursuing the objectives of nation-building and mobilisation of national consensus for the transition. With an absent deliberative participatory process, the textual analysis of the Proclamation illustrates that Ethiopia’s transitional justice process is more future-oriented, and the principal role envisaged for the Commission is to facilitate and contribute towards promoting peaceful coexistence and building the nation. Second, the departure of the Proclamation from the templates of mainstream practices of transitional justice can contribute towards an alternative understanding of these processes. Specifically, rather than focusing on one form of accountability involving the apportioning blaming and punishment, the Proclamation opted for an alternative form of accountability through the public acknowledgement of wrongdoing, provision of hearing to victims and the documentation of as accurate and full historical account possible of “the social and political conflicts” and “gross human rights violations.” Instead of focusing on perpetrator-centered accountability with its focus on punishing perpetrators, the proclamation adopts an approach that brings victims to the centre, by emphasising on the pursuit of truth, the provision of hearing for victims and acknowledgement of those affected by violations. Instead of treating violations in isolation, the Proclamation opted for an approach that interrogates the historical, political and socio-economic conditions that led to the conflicts and gross violations. This model that accords prime place to national ownership and context-specific application of transitional justice, despite not fitting the mainstream template, is backed by the latest transitional justice normative document, namely the AUTJP.

This article has made four key observations. Firstly, the existence of a transparent and participatory process in the planning and preparing of the law and the designing of the transitional justice mechanism is critical both for its legitimacy and effectiveness. Secondly, in the absence of a political settlement or agreement among various

political forces and constituencies, any process of transitional justice suffers from the lack of a robust foundation from which to proceed. Thirdly, the make-up of a reconciliation commission is also a key factor in the successful operationalisation of a transitional justice process anchored on a reconciliation commission. Finally, the prevailing political and social context, if not optimal and involves fierce power contestations among contending political forces accompanied by an upsurge of violence often along ethnic lines, can be detrimental to the proper execution of the transitional justice process, thereby undermining efforts for reconciliation and peacebuilding.

It is apparent from the analysis in this article that the deficiencies of the Ethiopian Reconciliation Commission are such that it may not be possible for it to successfully operate as a vehicle for transitional justice, reconciliation and peacebuilding in Ethiopia short of reconstituting it afresh. Instead of its current rather incoherent and amorphous size, it should be made up of nine to eleven members following the example of more successful experiences. Unlike its current working arrangement, all its new members should work on a full-time basis. Significantly, its reconstitution should be based on a transparent, inclusive and participatory process in which members are to be appointed on the basis of relevant meritocratic qualifications and a vetting process. This may entail amending the Proclamation and presents an opportunity for allowing public participation in its revision. Even then, it is of paramount importance for its proper functioning that there is shared strategic clarity about the mandate and modus operandi of the Commission among members of the Commission. Equally importantly, the prevailing political contestation and power struggle that continues to trigger major incidents of ethnic-based violence should be resolved based on inclusive national dialogue that guarantees protection for the interests of all sectors of society. It is only with such critical changes that the objectives of the reconciliation Commission as a transitional justice mechanism for achieving reconciliation and peacebuilding based on the accountability of perpetrators and healing of victims through investigation and disclosure of truth.

About the Author

Dr Solomon Ayele Dersso, a founding director of Amani Africa (Ethiopia-based pan-African policy research, training and consulting think tank), is the Chairperson the African Commission on Human and Peoples' Rights. At the African Commission, Dr Dersso serves as the focal point of the Commission for two thematic portfolios, Transitional Justice and Human and Peoples' Rights and Human Rights in Conflict Situations. In this capacity, he served as the lead drafter of the two most recent African Union instruments on transitional justice - the AU Policy on Transitional Justice and the African Commission's Study on Transitional Justice and Human and Peoples' Rights. Adjunct Professor at the College of Law and Governance Studies of Addis Ababa University, Dr Dersso serves as an editorial board member of various journals including the International Journal of Transitional Justice and the African Journal of Conflict Resolution.

Transitional or Transformative Justice? The Prospects for Sudan

Aly Verjee

Introduction

As I write these words in mid-October 2020, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, is making a historic, first official visit to Khartoum. In the words of the office of the Sudanese Prime Minister, Abdalla Hamdok, “the visiting delegation will discuss methods of cooperation between the Government of Sudan and ICC and concerning the suspects against whom the ICC has issued arrest warrants.”¹ While this low-key statement downplays a potential landmark moment, the symbolic and practical value of handing over the

former president, al-Bashir, and his associates to the ICC, is not enough to answer the many other pressing questions of justice in Sudan. This article argues that the demand for transitional justice may be more helpfully reframed as the pursuit of transformative justice, which could more profoundly respond to societal and community concerns. In light of the many disappointments of previous political settlements in Sudan, this article discusses how aspirations for justice could be realised in the country today.

The Limits of the Significance of Cooperation with the ICC

For Sudanese and followers of Sudan, it is hardly necessary to mention that the “suspects” the ICC has indicted and against whom it has issued arrest warrants are al-Bashir, its former minister of defence Abdel Raheem Muhammad Hussein, and Ahmed Haroun, the former governor of South Kordofan state.² All three were leading figures of the now-banned National Congress Party (NCP), the entity that dominated Sudan’s politics for the last thirty years. All three are now in detention, prisoners of the hybrid civilian-military Transitional Government in power.

Ten years ago, al-Bashir used the ICC’s action against him as a campaigning prop to secure his election to the presidency. In October 2020, al-Bashir still waits to see whether he will have his day in an international courtroom, after years of calls for his prosecution, from both the Sudanese people, particularly Darfuris, as well as the international community. Reminiscent of the notorious American mobster Al Capone, who despite ordering the deaths of dozens of his enemies, went to prison for tax evasion, al-Bashir has so far only been sentenced by a domestic court to two years in detention for financial crimes, rather than for any of the many atrocities his regime committed.³ Most victims of the al-Bashir regime would not see

his current conviction as sufficient punishment, let alone redress for the harms they have endured.

The possibility of al-Bashir’s international prosecution raises the question, as the transitional justice scholar Sarah Nouwen has asked, of the extent to which international criminal justice is part of transitional justice?⁴ For Nouwen:

On the one hand, you can say, yes, it is part of it, in the sense that transitional justice has this one component, accountability. Accountability can be done at various levels, including the international level. On the other hand, the two are somewhat separate in this, if you regard transitional justice as a society’s attempt to deal with the past. Because what an international court does cannot be controlled by that society. An international court pursues or prosecutes in the interest of international rule of law. Not necessarily in the state in which it intervenes... I don’t think [the ICC] is, from a Sudanese perspective, its instrument of transitional justice.

Whether al-Bashir and his collaborators are handed over to the ICC or not has both practical and symbolic importance. However, this decision will not respond to the many other pressing questions of justice, and injustice, that continue to confront Sudanese society. In the same week that the ICC’s Bensouda was visiting Sudan, the British

1. <https://twitter.com/SudanPMO/status/1317404959072202753> (accessed 18 October 2020)

2. <https://www.icc-epi.int/darfur> (accessed 18 October 2020)

3. Al Jazeera. 2019. “Sudan’s Omar al-Bashir sentenced to two years for corruption,” <https://www.aljazeera.com/news/2019/12/14/sudans-omar-al-bashir-sentenced-to-two-years-for-corruption> (accessed 18 October 2020)

4. Radio Dabanga, 2020. “Prof Sara Nouwen interview: The possibility of transitional justice in Sudan,” <https://www.dabangasudan.org/en/all-news/article/interview-prof-sara-nouwen-the-possibility-of-transitional-justice-in-sudan> (accessed 18 October 2020)

Broadcasting Corporation (BBC) aired a graphic documentary, filmed undercover over eighteen months, exposing “systemic child abuse and evidence of sexual abuse inside Islamic schools in Sudan.”⁵ For these children, life in the post-al-

Bashir era continues to be brutal and unjust; little is different compared to life before the revolution. For these young victims, and for many others, the promise of Sudanese social transformation remains far from being realised.

Lessons from Sudan’s Past Peace Agreements and Political Settlements

Sudan’s 2019 constitutional declaration, calls for, among other things, “striving to implement measures to achieve transitional justice, fight corruption, recover stolen funds, reform the national economy, achieve a state of prosperity, welfare and social justice, reform institutions of the state and public service, strengthen the pillars of social peace, deepen the values of tolerance and reconciliation between the components of the Sudanese people and rebuild trust between all the people of Sudan.”⁶ The declaration is ambitious. However, this is not the first time that moments of political transition in Sudan have seen comparable calls for justice. Several prior peace agreements made explicit promises to deliver on demands for justice but did not.

lasting peace in Darfur and are essential for upholding the rule of law,” and further called for the “adoption of transitional justice mechanisms for remedies and the legal accountability of perpetrators of acts of violence related to the armed conflict in Darfur.”⁸ Gene Carolan argues that Sudan’s most important recent peace deal, the 2005 Comprehensive Peace Agreement (CPA), “maybe tentatively regarded as a transitional justice instrument,” noting that the CPA pledged to “replace ... war not just with peace, but also with social, political and economic justice which respects the fundamental human and political rights of all the Sudanese people,” but that the CPA’s mechanisms “secured transition but squandered transformation.”⁹

The 2006 Eastern Sudan Peace Agreement between the then al-Bashir-led Government of Sudan, and the Eastern Front, proclaimed that “the State shall develop policies and strategies to ensure social justice among all the people of Sudan.”⁷ In 2011, the Doha Declaration for Peace in Darfur stated that “justice and reconciliation are integral and interlinked elements for achieving

The mere fact of the Sudanese popular revolution and the text of the 2019 constitutional declaration illustrates how aspirations for justice and the commitments of previous peace agreements remain unfulfilled. These earlier attempts and disappointments in implementing accountability and redress initiatives are important in situating what could be done in the area of justice in future.

The Case for Transformative Justice

In 2020, Sudan’s political transition is still at an early stage. This perhaps explains the desirability of a tangible demonstration of action such as prosecuting al-Bashir and his collaborators, whether at home or abroad. But what, beyond this, is possible, in terms of achieving transitional justice, even if there was a shared understanding of what transitional justice might mean in the Sudanese context? This question

becomes even more pointed in light of Christine Bell’s proposition that “transitional justice does not constitute a coherent ‘field’ but rather is a label or cloak that aims to rationalise a set of diverse bargains in relation to the past as an integrated endeavour, so as to obscure the quite different normative, moral and political implications of the bargains.”¹⁰ Bell’s argument is worth considering

5. BBC, “Sudan khalwas: Undercover in the schools that chain boys,” <https://www.bbc.com/news/av/world-africa-54571814> (accessed 20 October 2020)
6. “Constitutional Charter for the 2019 Transitional Period,” 2019, <http://constitutionnet.org/sites/default/files/2019-08/Sudan%20Constitutional%20Declaration%20%28English%29.pdf>
7. Art. 19 (47), Eastern Sudan Peace Agreement, 2006.
8. Art. 55 (277-278), Doha Document for Peace in Darfur, 2011.
9. Gene Carolan, “Transition Without Transformation: The Legacy of Sudan’s Comprehensive Peace Agreement,” *International Journal of Transitional Justice*, 2020, 14, 340–359, doi: 10.1093/ijtj/ijaa010; Art. 1.5.2, Machakos Protocol, Comprehensive Peace Agreement, 2005.
10. Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’”, *The International Journal of Transitional Justice*, 2009, 3, 5–27, doi: 10.1093/ijtj/ijn044

in the context of Sudan because while the scholarly and practitioner debates on the definitions and parameters of transitional justice will no doubt continue, the success of Sudan's transition depends on continued bargaining between the civilian and military components of its interim state authorities. Apart from the settling of a few mutual scores, most observers are, at best, cautiously optimistic, if not moderately sceptical, of how much consensus there maybe when it comes to matters of justice, transitional or otherwise, and in what comprises the "cloak" for civilian and military actors in Sudan. Rather than the plain white, or off-white, jellabiya wore by the archetypal Sudanese male, justice in Sudan probably looks more like the archetypal Sudanese woman's toub, colourful and multi-patterned, different for every person, and often different every day. Critically, most analysts have a limited sense of what the Sudanese – beyond the elites with whom we largely engage – want in matters of justice, either.

In all political transitions where such questions arise, there is a temptation to borrow from the transitional justice templates of elsewhere. Some borrowing may, of course, be appropriate. But, if the focus is only on institutions of transitional justice rather than ideas and ideals of justice at all levels of society, then the risk becomes, as Carolan has warned, that once again, a transition will happen without transformation.¹¹ For this reason, and given the many past disappointments of previous transitional arrangements in Sudan, I suggest the possibility of reframing the call for transitional justice as instead a call for transformative justice in Sudan. This appeal to reframe how justice may be pursued is more than a matter of semantics. To borrow from the work of Paul Gready and Simon Robins, transformative justice is instead about "a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns."¹² Such an

approach may go some way towards some of the principles of informal and indigenous approaches partially articulated in the African Union Transitional Justice Policy (AUTJP).¹³ Such an approach may also take off some of the strain on the overburdened, and politically fraught transitional government, while delivering something meaningful to more Sudanese of all walks of life. To make this tangible, let me return to the case of the abused boys recently profiled by the BBC. Clearly, little will make these children whole and erase the psychological and physical wounds they now bear. Prosecuting the leaders of some of these educational institutions may satisfy some calls for justice and are well within the grounds of Sudanese domestic law; the framework is in place for such investigations and prosecutions to be undertaken today. However, if we situate these horrors in the broader context of a society where violence has become systematically integrated into the social and public spheres of life, then perhaps transformative justice offers something else for these boys and for the society in which they live. Perhaps this means the chance to go to a secular school, where a future national curriculum acknowledges the violence committed in the name of the society and the state. Perhaps this means the parents who, in good faith, sent these boys to schools in the hopes of comprehensive religious education, should be assisted to re-accommodate them at home and be financially, practically, and morally assisted to do so. Perhaps the parents should be asked what justice would mean to them. Certainly, the boys should be asked what justice would mean to them, both now and in the future. For those that have suffered a lifetime of injustice, the road to justice may be equally long. So, for there to be genuine transformation, the hopes and aspirations articulated by the victims, survivors, and their families need to be at the centre of the response, rather than be defined by national and international political actors far removed from the lived reality of the victims, and operating

11. See footnote 9 above.

12. Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *The International Journal of Transitional Justice*, 2014, 8, 339–361, doi:10.1093/ijtj/iju013

13. Annah Moyo, "African Union's Consolidation of the Transitional Justice, Reconciliation and Peacebuilding Nexus," *Horn of Africa Bulletin*, Aug-Sept 2020, 32, 1, 6-12.

on very different time horizons.

Across the country, in every state of the country, many similar discussions could be held, among Sudanese of all ages, genders, classes and political persuasions. Such processes may not be linear, and they may not be brief. Many old wounds may be opened. In matters of social and political reform, there is often talk of bottom-up approaches. The Sudanese transition could be an opportunity

for this clichéd jargon to become real. Starting to talk about painful truths need not begin in Khartoum, and only with the imprimatur of the state authorities. There is no reason why the engine for the transformation of Sudanese society cannot also be generated well beyond the capital, much like the revolution which permitted this political transition to occur in the first place.

Conclusion

In just over three years, when Sudan's current political transition is due to end, there are likely to be many metrics for measuring the success of the present governmental structures, including its judicial institutions. Many transitional objectives are likely to remain works in progress. Both the Sudanese people, and many outsiders, may be disappointed, and disappointed in different ways. The possibility that this interim administration will, as outlined in the agreement establishing the transitional power-sharing government, be replaced by a responsive, capable, and democratic government may not come to pass. Demands for justice may go unanswered, as in the many previous unimplemented commitments of past agreements. Therefore, if at least a partial step towards justice is to be taken, at the very least the military and civilian elements of the government could and should work to find consensus on facilitating, rather than frustrating, local demands and desires for reconciliation, truth-telling, and even just the act of beginning to acknowledge local histories. Such efforts at justice may offer the possibility of transformation while not threatening today's evolving political order.

Nationally, because there is so much to be done, and the scale of trauma, violence, and wrong-doing so extensive, no single action or process can deliver justice for all in one go. Therefore, a starting point might be to segment the recounting, understanding, and documenting of the three decades of the NCP's rule into more manageable periods, for example in intervals of five or ten years, while events remain in living memory. This might enable a more focused process of acknowledging the harms of the past as a means of building a more inclusive society. It might also enable Sudanese society to undertake processes that are more achievable, more digestible and also, at least initially, less threatening to some of those at the apex of power today. In any case, demands for criminal accountability of those in Sudan that bear the greatest responsibility for the worst offences is part of this discussion, but it should not be the only subject for discussion if genuine transformation is to be pursued. Transformation is, of course, not an end in itself; but for Sudan to be a more peaceful and inclusive society, it remains a desperately needed task.

31. Xinhua, South Sudan launches consultations on truth and reconciliation, Juba 2015.
32. Nhial, Kwesi Sansculotte, and Emile Taban, *Reconciliation without Regret*, South Africa, ACCORD, 2013. <http://www.accord.org.za>.
33. Arthur Page 2009.
34. Ibid.
35. Amnesty International 2019.

About the Author

Aly Verjee is a senior advisor to the Africa program at the U. S. Institute of Peace. In 2019, he received the Oslo Forum PeaceWriter Prize “for bold and innovative responses to today’s peacemaking challenges,” for his work on reforming ceasefire monitoring. Previously, he was deputy and then acting chief of staff of the Joint Monitoring and Evaluation Commission, overseeing the implementation of the 2015 peace agreement in South Sudan. From 2014-2015, he was senior advisor to the chief mediator of the Intergovernmental Authority on Development (IGAD)-led peace process for South Sudan. He lived and worked in Sudan from 2005-2010 and returned in 2011 as a chief political analyst for the European Union (EU) observation of the South Sudan independence referendum.

The Injustice of Transitional Justice: Gender Exclusion in the Mt. Elgon Conflict of Kenya

Aquinata Agonga

Introduction

Transitional Justice comprises the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability and serve justice that would lead to peacebuilding and reconciliation.¹ The African Union Transitional Justice Policy (AUTJP), took into account the aspect of gender to ensure that there is an inclusive approach to the process, accountability and redress.² The AUTJP emphasised the role of gender in transitional justice and the importance of immediate redress for victims of gender violence as a significant aspect of peacebuilding and reconciliation.³ The specific attention paid to gender was to ensure that gender considerations are mainstreamed into all components of an effective transitional justice framework.⁴

This article reflects on the priority accorded by the international community to transitional justice, and how this can be utilised to promote lasting peace through reconciliation and peacebuilding.⁵ The article looks at the transitional justice process of the Truth, Justice, and Reconciliation Commission (TJRC) of Kenya and specifically how it addressed the women's rights and justice priorities.

This article seeks to present this analysis based on the case study of the Mt. Elgon conflict and the atrocities committed that left members in the society maimed, traumatised, displaced with several dead.⁶ The government's failure to implement the TJRC recommendations that would have given justice to the victims of violence, notably gender violence, in Mt. Elgon, left the community divided.

Transitional justice has come to be considered as the channel that allows for accountability of gross human rights violations and ensures that impunity and atrocities carried out in times of war do not happen again. The process offers those considered enemies, a platform for reconciliation and peacebuilding.⁷ Behind the setting up of the transitional justice process in Kenya, was the desire to deal with the root causes of conflict and use the recommendations to bring about reconciliation, peacebuilding and national cohesion.⁸ The TJRC allowed the victims of violence to share their side of the story and hope for justice to prevail through the implementation of the recommendations of the report.⁹ However, the government's failure to act on the report has left the victims disillusioned and has ramifications for the reconciliation process in Mt. Elgon.

Gender and Violence in Mt. Elgon in the Context of 2007 Disputed Elections

Violence across Kenya broke out after the announcement of the results of the 2007 December elections, that declared the incumbent, Mwai Kibaki, the winner.¹⁰ The country, on the brink of a civil war, was brought back to sanity through the intervention of the international community that established a mediation process chaired by the late former Secretary-General of the United Nations (UN), Kofi Annan.¹¹ The two political parties in conflict accepted a power-sharing deal, known as the National Dialogue and Reconciliation

Agreement of 2008,¹² that created three commissions; the Independent Review Commission on the General Elections held on 27 December 2007, a Truth, Justice and Reconciliation Commission, and a Commission of Inquiry on Post-Election Violence which came to be known as the "Waki Commission".¹³ The Truth, Justice and Reconciliation Commission was established in 2008 by an Act of Parliament and mandated to collect and document facts on the injustices and gross human rights crimes. The violence in Mt Elgon had

1. Mohochi, Samwel Mukira. "African Union Mediated Peace'-The Case of Kenya 2008." Available at SSRN 1898936 (2011)
2. Kanyinga, Karuti, and Sophie Walker. "Building a political settlement: The international approach to Kenya's 2008 post-election crisis." (2013)
3. Wamai, Njoki. "The 2008 Kenyan mediation process: Lessons and dilemmas for conflict prevention in Africa." In *The Palgrave Handbook of Peacebuilding in Africa*, pp. 119-135. Palgrave Macmillan, Cham, 2018
4. Klopp, Jacqueline M. "Kenya's unfinished agendas." *Journal of International Affairs* 62, no. 2 (2009): 143-158
5. Obel Hansen, Thomas. "Kenya's power-sharing arrangement and its implications for transitional justice." *The International Journal of Human Rights* 17, no. 2 (2013): 307-327
6. Musila, Godfrey M. "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions."
7. Brown, Stephen, and Chandra Lekha Sriram. "The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya." *African Affairs* 111, no. 443 (2012): 244-260
8. Rawlence, Ben, and Chris Albin-Lackey. *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*. No. 1. Human Rights Watch, 2008
9. Brown, Stephen. "13 The national accord, impunity, and the fragile peace in Kenya." *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (2012): 238
10. Rawlence, Ben, and Chris Albin-Lackey. *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*. No. 1. Human Rights Watch, 2008
11. Khadiagala, Gilbert M. "Forty days and nights of peacemaking in Kenya." *Journal of African Elections* 7, no. 2 (2008): 4-32
12. Obel Hansen, Thomas. "Kenya's power-sharing arrangement and its implications for transitional justice." *The International Journal of Human Rights* 17, no. 2 (2013): 307-327
13. Khadiagala, Gilbert M. "Forty days and nights of peacemaking in Kenya." *Journal of African Elections* 7, no. 2 (2008): 4-32

escalated in the election season in 2007. The easily available small arms and light weapons from neighbouring Uganda contributed and made the perpetrators of violence bolder and more destructive.¹⁴ The formation of armed groups such as the Sabaot Land Defense Force did not help the already tension-filled environment.¹⁵ This armed group began making inflammatory statements and demands for land and the eviction of certain ethnic groups. Tension and fear spread as the group destroyed property, burning houses, and killing or kidnapping those viewed as opponents, causing thousands to flee their homes.¹⁶ The government denied reports of insecurity at first but was later forced to acknowledge and send the military to calm down the situation. As violence erupted in what came to be known as the post-election violence of 2007/2008, the conflict in the area peaked.¹⁷

In the aftermath of the 2007/2008 violence, the government declared a state of emergency in Mt Elgon District.¹⁸ There was displacement from homes, loss of lives and sexual violence meted on civilians. The

The Transitional Justice Process in Mt. Elgon Case and its Impact

As noted in the preceding section, established as part of the Annan mediation, the TJRC had been tasked with the fact-finding mandate to enable the government to create structures for the development of justice mechanisms.²⁵ It was to set strategies that would be responsive to the needs of the women and prioritise them in the area of justice.²⁶ The Commission had statement collection, public hearings and sittings in Mt. Elgon, with special sessions set aside for the women that were conducted on camera, where the women were given a platform to tell their side of the story.²⁷ Contrary to

women became targets for the militia groups that used rape as a weapon to humiliate their enemies and portray them as having failed as protectors.¹⁹ However, the use of women as tools to revenge on the enemies also stemmed from the traditional view of women as being part of the property of men.²⁰

This gender-based discrimination in Kenya did not start with the conflict in the post-election violence in 2007/2008. Kenya, being a patriarchal society, has a history of excusing violence against women.²¹ Matters of sexual and gender-based violence and cases of rape are rarely taken seriously if women are the victims.²² During the conflict and even after, the victims of sexual violence could not speak out because of fear of stigmatisation from the family and community.²³ The perpetrators of sexual crimes took advantage of the fact that individuals were unprotected and conflicts create environments where perpetrators get away with the crime.²⁴ The government's failure to act on the TJRC report exposed women's vulnerability and created a loophole for reprisal.

the expectation that victims, perpetrators and the public would engage together, in a reconciliation-focused process, only the victims came out; the perpetrators and the broader public did not participate. Some key witnesses testified in a special session in Nairobi which made it difficult for the reconciliation and healing process to begin.²⁸ Transitional Justice was not utilised to bring perpetrators to face their crimes and apologies for the said crimes.²⁹ The impact of the TJRC process on the victims of violence in the Mt. Elgon conflict, was therefore non-effective and dismal.³⁰

14. Wamai, Njoki. "The 2008 Kenyan mediation process: Lessons and dilemmas for conflict prevention in Africa." In *The Palgrave Handbook of Peacebuilding in Africa*, pp. 119-135. Palgrave Macmillan, Cham, 2018
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16. Wakhungu, Judi W., Chris Huggins, and Elvin Nyukuri. "Land tenure and violent conflict in Kenya." *African Centre for Technology Studies, Nairobi Kenya* (2008).
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The Injustice Stain and the Victims of Violence in Mt. Elgon.

The sense of vulnerability for women was aptly described by the victims as being shaped by male chauvinism with a demeaning attitude towards women.³¹ The emotional trauma caused by sexual violence and the fear that one may never get justice leaves the victims with no hope. Those interviewed in Mt. Elgon spoke of experiencing such distress and deep pain that would push them to the brink of feeling suicidal. Others described a deep physical depression, that always left them feeling tired with no desire to get up and move on with life.³² The state's failure to act on the report and ensure that the victims got justice, has created mistrust of

the government and accusations of political manipulation and interference with the system.³³ The state's apathy in addressing violence has been evident in every region where violence was experienced.³⁴ The TJRC process did not bring the anticipated justice since there was no accountability from the perpetrators and no public apology.³⁵ It failed to provide a forum or a platform for the perpetrators and participants of the gross atrocities who desired to confess. The process emerged as a manipulated project, that unfortunately failed to achieve justice for the victims or amnesty for the perpetrators.³⁶

Conclusion

The TJRC was established in 2008 by an Act of Parliament and mandated to collect and document facts on the injustices and gross human rights crimes from 1963. The Commission had prior knowledge that the post-election violence was a manifestation for underlying problems. It had an expansive mandate to investigate injustices that dated back to the time Kenya became independent. From 2009 to 2012, the commission went around the country, documented its report and handed it over to the government. Once the TJRC Report

was in the hands of the government, it went silent on the implementation. The government has failed to provide justice to the victims that would lead to reconciliation. For Mt. Elgon, the creation of the TJRC looked like a step that would usher in justice for victims, as the report revealed part of the realities of the extent of injustices committed. The recommendations could serve as the basis for the pursuit of justice, healing and reconciliation. The government's failure to act on the TJRC Report has left a stain of injustice on the country's history.

Recommendations

The TJRC report was not implemented and justice for the victims of violence has not been realised. The civil society in collaboration with the academia should work to strengthen local capacities to implement transitional justice towards healing and reconciliation. The two should join forces to look at the AUTJP and see what can be integrated into the national policy that would provide redress for gender injustices. This should facilitate the implementation

of the TJRC report, particularly as it relates to Mt. Elgon. The academia with assistance from the government should set up a team that would explore the available cultural gendered mechanisms for healing and reconciliation and work with the victims of violence to implement structures that will protect future generations. The government, civil society and academia should initiate and implement programmes to address past injustices.

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About the Author

Aquinata Agonga is a Researcher at the Jesuit Historical Institute in Africa, Lecturer and Coordinator at Karachiel Community Center, based in Kenya. E-mail: nanyonjo@gmail.com; LinkedIn: linkedin.com/in/aquinata-agonga-34708931; Twitter: @AgongaAquinata

Transitional Justice and State-building in South Sudan in the Context of the 2018 R-ARCSS

Billy Agwanda

Introduction

In 2013, South Sudan experienced an outbreak of violence between forces supporting the government and opposition groups. The extensive impact of the conflict necessitated urgent response through conflict resolution. To establish resilient peace, transitional justice was identified as a cornerstone of peacebuilding processes in the country. However, since the signing of the Revitalised Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) in 2018,

its implementation concerning the clauses on transitional justice (TJ) has been dismal. In examining the challenges, this article identifies weak leadership, financial constraints, and the outbreak of the COVID-19 pandemic, as obstacles that have derailed the operationalisation of institutions of transitional justice mandated to facilitate the peace processes by ensuring accountability and seeking redress of injustices committed during the conflict.

South Sudan and the Need for Transitional Justice

The attention given to transitional justice in South Sudan is largely due to the recognition of unresolved historical injustices and violation of human rights that date back to the country's struggle for independence. The outbreak of violence in 2013 only served to aggravate the existing difficulties following a period of turmoil for over four decades. Between 2013 and 2018, the conflict led to the death of over 400,000 people and displaced approximately 4.2 million while exposing over 7 million people to a severe humanitarian crisis.¹ The manipulation of political differences by political actors, led to the instrumentalisation of ethnic differences by actors who executed random and targeted violence in the society, thereby threatening the survival of the state. In the lead up to independence, optimism for peace was prevalent not only within South Sudan but also amongst the international community.

The initial optimism was not, however, followed through by the forging of political consensus which has since derailed the peacebuilding and development needs of South Sudan. Instead, the country has degenerated into a fragile society where impunity, disregard for human rights, corruption, and insecurity have replicated the challenges that existed during the war of independence.

While the regional and international community have made significant contributions in bringing the conflict to a halt through mediation, there is a renewed focus on transitional justice as a core component of the post-conflict state-building agenda, to guide the country through addressing its legacy of past human rights violations. The African Union Transitional Justice Policy (AUTJP) recognises that transitional justice is not only vital for the advancement of human rights and justice, peace and security, good governance and development, but also provides an opportunity for perpetrators of violence to break with the past and be reintegrated back into the society.² Transitional justice is therefore a fundamental pillar of peacebuilding that aims to establish positive transformation and create practical insights that are useful for addressing both contemporary and future challenges in fragile societies.³ In post-conflict peacebuilding, the implementation of transitional justice is dependent on several factors including the establishment of key institutions of justice and the installation of a national authority. As such, cognisant of these factors, this article aims to explore the status of transitional justice as a component of peacebuilding in the context of the R-ARCSS.

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Transitional Justice in the 2018 R-ARCSS

The 2018 Agreement was the culmination of four major peace agreements and eight other treaties on secession of hostilities that were all violated between 2013 and 2018.⁴ The R-ARCSS reflects the latest effort by the domestic, regional and international community to reconcile combatants in the conflict. Reconciliation is a prominent concept in peacebuilding particularly in the consolidation of post-conflict state-building.⁵ Reconciliation initiatives incorporate both bottom-up and top-down processes,⁶ which operate concurrently and are designed to address the grievances of the past and build more inclusive societies in the future.⁷

The R-ARCSS brought together the Transitional Government of National Unity (TGoNU), Sudan People's Liberation Movement/Army-In Opposition (SPLM/A-IO), Other Political Parties (OPP), Former Detainees (FDs) and the South Sudan Opposition Alliance (SSOA).⁸ Under the guidance of the Inter-Governmental Authority on Development (IGAD) and the international community, this Agreement established an ad-hoc coalition constituted of government and opposition groups, to implement the peace agreement in two phases that included a pre-transitional phase of nine months, and a transitional phase of three years. Consistent with the first pillar of the AUTJP,⁹ the short-term objective of the Agreement was to guarantee that peace, security, and stability are restored so that internally displaced persons and

refugees, can safely return and contribute to state-building. Chapter 5 of R-ARCSS is dedicated to promoting and facilitating transitional justice through the establishment of the Hybrid Court for South Sudan (HCSS), Commission for Truth, Reconciliation and Healing (CTRH), and the Compensation and Reparation Authority (CRA).¹⁰ These institutions that were due to be established with the assistance of African Union (AU), United Nations (UN) and the African Commission of Human and People's Rights (ACHPR) have been mandated with promoting reconciliation, justice, and compensation of victims. Whereas the other chapters in the R-ARCSS have been designed in a manner that ensures the operationalization of a caretaker government, the establishment of a ceasefire, management of resources and creation of a new constitution, it is Chapter 5 that will seek to establish permanent healing, reconciliation and justice in a manner that will guarantee peace and security for posterity. However, despite the provisions of Chapter 5, key legislations and institutions mandated with promoting transitional justice are yet to be established. The implementation of these institutions has lagged behind schedule and continues to create desperation and dissatisfaction amongst South Sudanese. Instead, pockets of violence have continued to be experienced in various parts of the country thereby, emphasising the existence of an incapacitated and dysfunctional leadership cohort both in the government and opposition.

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Table 1: Implementation of Chapter 5 of the R-ARCSS as of October 2020¹¹

Article	Mandate	Responsible Organ	Timeframe	Status
Articles 5.1.4 & 5.1.5	Design, implementation and facilitation of HCSS, CRA, & CTRH	R-TGoNU Support from AU, UN and African Commission on Human and People's Rights	May 2020	Incomplete**
Articles 5.2.1.2 & 5.1.3	CTRH to be established via Legislation promulgated by Transitional National Legislative Assembly (TNLA) and the Presidency	Ministry of Justice and Constitutional Affairs (MOJCA) TNLA	May 2020	Incomplete
Article 5.2.3	Appointment of CTRH Commissioners & Operationalisation	R-TGoNU AU Commission Chair UN Secretary-General TNLA	June 2020	Incomplete
Articles 5.3.3.1, 5.3.1 & 5.3.3.3	Establishment of HCSS through Statute with the concurrence of R-TGoNU	AU Commission	August 2020	Pending**
Articles 5.4.1 & 5.1.3	Establishment of Compensation and Reparations Authority and the Compensation and Reparations Fund (CRF)	R-TGoNU TNLA	August 2020	Pending

**note- Incomplete in this context denotes that the process has begun but not yet completed.

Pending denotes that the process has not yet been initiated.

The failure to implement key provisions of Chapter 5 continues to undermine efforts to move forward with the peace processes, as both the government and opposition formations, which had both committed atrocities, advocate for the issuance of blanket amnesties.¹² Political and military actors in the conflict have been the beneficiaries of government appointments, while the demands for redress and accountability among victims in the population have been ignored, thereby, undermining the confidence of the wider population in the new political dispensation. Nonetheless, implementation of transitional justice mechanisms remains vital for any effort towards

the purposes of attaining political, economic and security reforms. Such reforms are important in transforming the country by addressing underlying structural drivers of conflict which have continued to manifest in the form of ethnic divisions and violence. The mechanisms provided for in Chapter 5 can help address exclusionary politics and the lack of both economic and political accountability that continue to fuel public grievances and sustain violence by not only addressing past violations but also, serving as a critical intervention for preventing any future atrocities.

11. Reconstituted Joint Monitoring and Evaluation Commission. Report on the Status of Implementation of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan

12. Human Rights Watch. (10 August 2018). South Sudan: No Amnesty for War Crimes. <https://www.hrw.org/news/2018/08/10/south-sudan-no-amnesty-war-crimes#:~:text=South%20Sudan's%20leaders%20have%20a,and%20fueled%20violence%20and%20abuses>

Implementing Transitional Justice: Emerging Challenges

Since September 2018, the implementation of the Agreement has been conspicuously slow, further threatening the sustainability of peace. There have been several instances of reported and alleged incidences of sporadic attacks by government forces, opposition groups, and attack on civilian populations. Between February and May 2019, reports by the UN Mission in South Sudan (UNMISS) indicate that 531 people were killed and 317 others injured in 152 conflict incidences.¹³ Additionally,

localised conflicts in the form of violent cattle raids have been associated with both individuals in government and factions belonging to SPLM/A-IO in regions such as Jonglei, Bahr el Ghazal and Unity State. The slow implementation of the Agreement, therefore, emboldens certain groups to carry out attacks, in the belief that they will not be held to account as it has been the norm for the country over the last nine years since gaining independence.

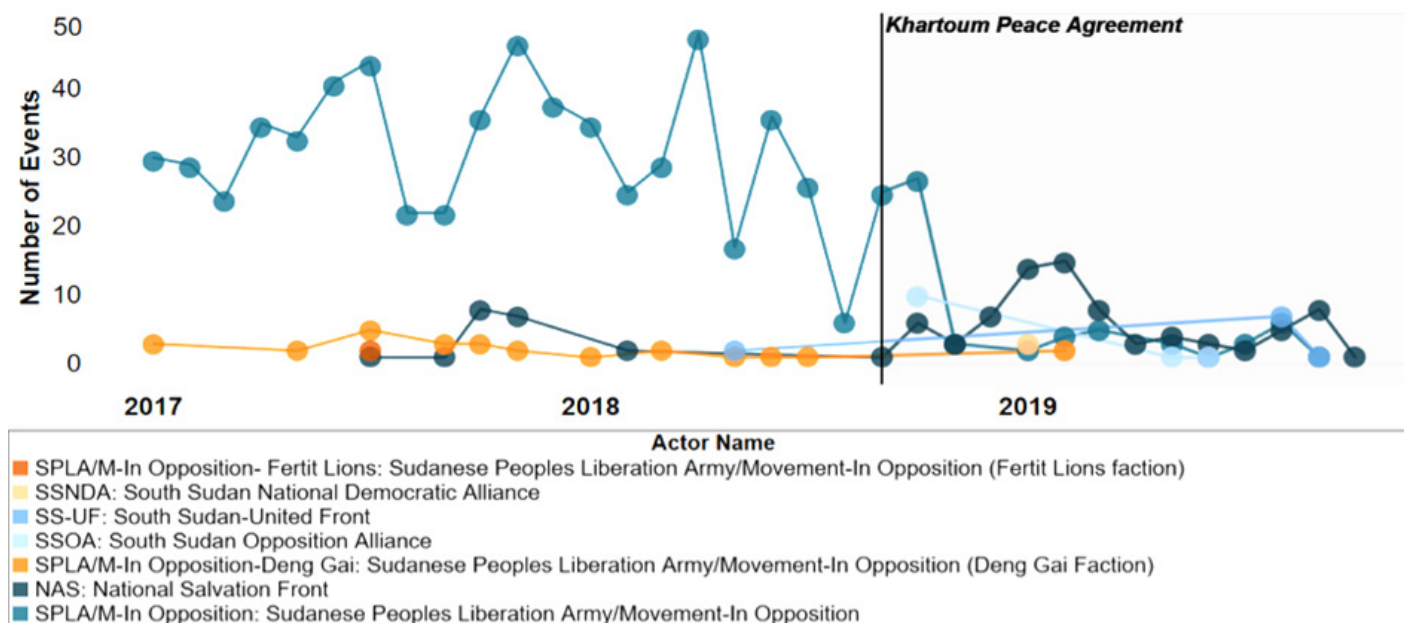


Figure 1: Violence by Actors (January 2017- October 2019)

Source: ACLED, 2020¹⁴

Another concern to the implementation of transitional justice in South Sudan is the emergence of the COVID-19 pandemic. The first case of the virus in South Sudan was identified on 5 April 2020 and as of 31 October 2020 there were 2,905 confirmed cases and 58 people reported to have died from the virus.¹⁵ The pandemic has emerged at a time when the country is grappling with serious challenges of a humanitarian crisis, weak public institutions, poor infrastructure and growing levels of localised violence. A report by the UN Human Rights Council highlights that since the first case of COVID-19 was reported in South Sudan, there has been a drastic increase in allegations of gender-based violence, largely committed against women and girls.¹⁶ The critical need to manage the pandemic has shifted government focus from facilitating

the implementation of the peace deal, particularly regarding the provisions on transitional justice, which are required to pave the way for the establishment of the institutions mandated to oversee the promotion of peace and reconciliation. The pandemic has also diverted the attention of regional and global actors, specifically the Troika group (US, UK, Norway, AU and UN) whose input is crucial to urge and support South Sudan authorities in the implementation of the Agreement. Facilitating transitional justice in fragile societies requires commitment from domestic political leadership and supporting partners. However, one of the emerging concerns in South Sudan is the tendency of signatories of the R-ARCSS to convene and discuss issues pertaining to the implementation of the Agreement only at the facilitation and

13. United Nations Human Rights Commission. (20 February 2020). Statement by Yasmin Sooka, Chair of the UN Commission on Human Rights in South Sudan, Johannesburg. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25582&LangID=E>
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16. United Nations Human Rights Council. Emerging Impacts of COVID-19 on the Human Rights Situation and Peace Process in South Sudan. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25987&LangID=E>

invitation of IGAD. In May 2019, the pre-Transitional period came to an end, however, it required IGAD's intervention to convene another meeting so that the period could be extended for another six months. A systematic approach to implementing this Agreement requires the National Pre-Transition Committee (NPTC), that was specifically established to oversee the transition, to take proactive measures in upholding its mandate effectively. This would demonstrate that leadership, willingness, ownership, and commitment of the parties towards the implementation of the Agreement, is maturing. Alternatively, while IGAD continues to play a crucial role in implementing this peace deal, the failure of domestic leadership reveals the crisis faced by national actors and shifts the responsibility for maintaining a commitment to IGAD, which should not be the case. The AUTJP emphasises that the role of regional actors is not to take over processes of transitional justice but to guide and support national actors. Despite the existing internal political, social and economic challenges facing

South Sudan, it nonetheless remains a sovereign state. Consequently, the continued over-reliance on IGAD and other partners in the administrative management of public affairs undermines the independence and sovereignty of the country, which does not augur well for consolidating sustainable peace in the future. Also, this situation illustrates that the status of the R-ARCSS is significantly fragile because political actors are not demonstrating their initiatives to promote reconciliation amongst themselves. Despite the government initiating a National Dialogue in 2016 that brought together actors including religious leaders, the continued outbreak of pockets of violence in various parts of the country undermine the process. In the absence of a national leadership cohort that is committed to driving the agenda of unity, peace and transitional justice through the development of progressive working relations, then efforts to uplift South Sudan from years of instability and uncertainty will continue to be postponed to a later point in time.

Policy Implications

In this regard, certain policy measures and actions must be adopted to support the existing efforts of peacebuilding and state-building in South Sudan. Firstly, there is a need to conduct a comprehensive assessment of available financial and human resources to determine existing gaps in the establishment of the proposed institutions of transitional justice and the necessary legislation required to make them operational. Secondly, whereas one of the challenges posed by COVID-19 is the inability to organise large gatherings, the TGoNU should continue encouraging public debate and participation on issues of transitional justice through other forms of public communication such as local radio programmes that emphasise on recognition of victims of conflict instead of blaming different factions of the community. Thirdly, the government should undertake gender-sensitive initiatives that are tailored to the experiences of men and women in the conflict. The incidences of gender-based violence discussed above, require that special attention in

terms of transitional justice processes is directed at war-affected women, girls and children. The AUTJP highlights that prevalence of gender-based violence necessitates transitional justice processes, to incorporate measures that protect the victims from social stigma and improve procedural and evidentiary requirements that may otherwise prevent effective prosecution.¹⁷ The South Sudanese government should also support traditional authorities at the grassroots level and work with them to complement transitional justice and reconciliation processes.

To the guarantors of the R-ARCSS such as the AU, UN and IGAD, an additional independent body should be established with the mandate of documenting evidence on new crimes perpetrated in South Sudan, as part of the groundwork laid for the operationalisation of the Hybrid Court. Additionally, at a time when the attention of the government is divided to manage the outbreak of COVID-19, more support should be directed towards civil society organisations to keep the

17. African Union Transitional Justice Policy, 2019

processes of transitional justice and reconciliation moving forward. This will also ensure that the whole process is owned not only at the high level of

policy and decision-makers but also by the grassroots, to ensure a lasting and sustainable legacy of justice and reconciliation.

Conclusion

Despite the existence of these challenges facing the implementation of the R-ARCSS, the potential opportunity it harbours in as far as restoring peace through its transitional justice mechanisms should be utilised. The experiences of other societies across Africa demonstrates that achieving reconciliation and transitional justice can often be protracted, as countries attempt to embrace and transform the legacies of conflict. However, effective implementation of peace agreements

is necessary to lay the foundations for sustainable post-conflict state-building. While South Sudan is continuing to grapple with a myriad of challenges, particularly in the face of COVID-19 pandemic, more resources and support should be channelled towards developing critical institutions, key among them being those mandated to oversee the implementation of transitional justice to meet the aspirations and needs of the South Sudanese people.

About the Author

Agwanda is pursuing a PhD in Political Science and International Relations at Marmara University and he is an assistant (Government Affairs) at World E-Commerce Forum G20. He has published with the African Centre for the Study and Research on Terrorism (ACSRT), The Palgrave Encyclopedia of Peace and Conflict Studies, Global Encyclopedia of Public Administration, Public Policy, and Governance, and the Commonwealth Journal of International Affairs. His interests include peace and conflict resolution, security, terrorism and counter-terrorism, and foreign policy. He can be reached via agwandabilly@gmail.com / billy@worlddef.net. Link to Twitter profile: https://twitter.com/billy_agwanda. Orcid: 0000-0002-8915-6057

Conclusion

Tim Murithi and Solomon Dersso

The adoption of the African Union Transitional Justice Policy is a significant milestone for the continent, in terms of providing a guideline for countries and societies to design and drive their processes of redress, accountability and reconciliation for the harm done in the past. However, the uptake by AU member states and regional institutions of their 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 inter-governmental actors to engage with the provisions of the document. This HAB edition has provided analyses of transitional justice processes on the African continent, which generate insights for countries and societies that seek to implement their interventions relating to redress and accountability.

This HAB edition illustrates that the African continent continues to be a terrain of innovation in terms of the roll-out and experimentation with transitional justice approaches. However, a key challenge remains the failure by some governments, such as Sudan and South 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 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 Kenya Truth, Justice and Reconciliation report recommendations, 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, as witnessed in Ethiopia, 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.

The centrality of the agency of state, regional, continental and non-state actors is also of vital importance if the African continent is to genuinely address the grievances which continue to perpetuate the cyclical violence that continues to be witnessed across its regions. As discussed above, this HAB edition also illustrated how in the absence of state-driven transitional justice processes local communal actors are taking the initiative to design and drive the implementation of their 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.

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 HAB edition also discussed the importance and utility of the notion of regional reconciliation is a necessary strategy 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 HAB edition, 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.

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 home-grown approach to dealing with the violations of the past and the divisions that conflicts and violent authoritarian rule sowed among members of society. 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 documents such as this HAB edition, 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 as part of the transition of societies into a more inclusive, peaceful and democratic dispensation is becoming more pronounced. This HAB edition has provided an important repository of knowledge and insight on transitional justice, peacebuilding and reconciliation efforts in Africa.