

CONTINENTAL TRANSITIONAL JUSTICE FORUM:

The State of Transitional Justice in Africa



The content of this publication is protected by copyright. Readers are, however, invited to freely use the information as published here, subject to acknowledging the Centre for the Study of Violence and Reconciliation and the “State of Transitional Justice in Africa” report as the source.

Acknowledgements:

Report written by Dr Sebatso Manoeli

Edited by Dr Ambassador Salah Siddig Hammad, John Gbodi Ikubaje, Annah Moyo and Dr Hugo van der Merwe

Layout/design by Digipaper

Published October 2018

CONTINENTAL TRANSITIONAL JUSTICE FORUM:

The State of Transitional Justice in Africa

Johannesburg, South Africa

19–21 October 2017

*Written by **Dr Sebatso Manoeli***

TABLE OF CONTENTS

Acknowledgements.....	1
Acronyms	2
Executive Summary.....	3
Introduction.....	5
Objectives of the Forum	5
Issues Addressed by the Forum	6
Structure of the Report.....	7
 1. Background and Context: The State of Transitional Justice in Africa.....	 7
 2. Evaluating the Discourse of Transitional Justice in Africa	 13
 3. The Balancing Act: Negotiating Timing, Sequencing and Context.....	 15
Realities in Formulating Transitional Justice in Africa	15
 4. Key Issues	 16
4.1. Inclusivity	16
4.2. The Practicalities of Transitional Justice	22
 5. Key Stakeholders: Towards a Continental Transitional Justice Community of Practice.....	 24
5.1. AU Member States, AU Organs and RECs	24
5.2. National Human Rights Institutions	26
5.3 Civil Society Organizations.....	28
 6. Recommendations	 29
The Forum recommends that the AU Member States:	29
The Forum recommends that the AU and its Organs:.....	30
The Forum recommends that RECs:	30
The Forum recommends that CSOs:.....	31
The Forum recommends that academics:.....	32
The Forum recommends that donors:.....	32
 7. Bibliography	 32
Articles and Books	32
African Union Resolutions, Policies and Documents	34
United Nations Documents	34
Other Documents	34

ACKNOWLEDGEMENTS

The African Union Commission Department of Political Affairs (AUC-DPA) represented by Her Excellency Minata Samate Cessouma, Commissioner of Political Affairs, and the Centre for the Study of Violence and Reconciliation (CSVN) represented by Tefo Raditapole, Chairperson of the CSVN Board of Directors, express great appreciation to all participants who attended the inaugural Continental Transitional Justice Forum from 19–21 October 2017. Heartfelt appreciation goes to the government of South Africa for hosting this first AU Continental Transitional Justice Forum and for the hospitality demonstrated to all the participants.

Gratitude is extended to the Distinguished Members of the AU-STC on Justice and Legal Affairs' Task Force on Transitional Justice, AU organs, national human rights institutions, regional economic communities, transitional justice experts, civil society organizations and CSVN staff members. Special gratitude is extended to the MacArthur Foundation for supporting the Forum and for attending this inaugural event. Without contributions from all the various participants and their generosity with their reflections, insights and expertise, this event would not have been as robust and engaging as it was.

AUC-DPA and CSVN look forward to yearly convenings to further explore, interrogate and discuss the state of transitional justice in Africa, to learn from our past and present, and to shape future interventions. The Forum is a platform for continuously sharing our learnings and good practices to shape an Africanist transitional justice discourse.

ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court of Human and People's Rights
APSA	African Peace and Security Architecture
AU	African Union
AUC	African Union Commission
AUCIL	African Union Commission on International Law
AUTJP	African Union Transitional Justice Policy
CNDH	<i>Conseil National des Droits de l'Homme</i> (Moroccan NHRI)
CPA	Comprehensive Peace Agreement (Sudan)
CSO	Civil Society Organization
CSVVR	Centre for the Study of Violence and Reconciliation
DPA	Department of Political Affairs of the AUC
ECOWAS	Economic Community of West African States
ICC	International Criminal Court
NHRI	National Human Rights Institutions
NGO	Non-Governmental Organization
REC	Regional Economic Community
SCSL	Special Court of Sierra Leone
SGBV	Sexual and Gender-Based Violence
TJ	Transitional Justice
TJM	Traditional Justice Mechanism
TRC	Truth and Reconciliation Commission

EXECUTIVE SUMMARY

This report is a reflection of the inaugural three-day Continental Forum on Transitional Justice that was organized by the Department of Political Affairs (DPA) of the African Union Commission (AUC) and the Centre for the Study of Violence and Reconciliation (CSVR) in Johannesburg, South Africa, from 19–21 October 2017. The Forum brought together the following representatives of the AU Member States: Congo-Brazzaville, Egypt, Ethiopia, Gabon, Nigeria, Sierra Leone, South Africa, Sudan and Zambia; AU Organs – the DPA of the AUC, the Peace and Security Department of the AUC, the Women, Gender and Development Directorate of the AUC, the African Commission on Human and Peoples' Rights (ACHPR), and the African Court on Human and Peoples Rights (AfCHPR); the African Union Commission on International Law (AUCIL); the Regional Economic Communities (RECs) – the Economic Community of West African States (ECOWAS), the National Human Rights Institutions (NHRIs) – the Network of African National Human Rights Institutions Secretariat, the Burundian Human Rights Commission and the South African Human Rights Commission; civil society organizations (CSOs); academics, independent experts on transitional justice, and representatives from the CSVR, South Africa.

The objectives of the Forum were to create a platform to discuss transitional justice in Africa, to shape the discourse on transitional justice and to take stock of the developments in transitional justice thus far. It also sought to find solutions to the current challenges plaguing transitional justice processes on the continent and to focus on meeting the needs of victims more effectively. The Forum aimed to reflect on African approaches to transitional justice, and to become a resource hub on transitional justice in Africa. Accordingly, the participants deliberated on the current gaps in the design and delivery of transitional justice in Africa. The various stakeholders exchanged learnings and reflected on the successes and shortcomings in their conceptualization and implementation of transitional justice. In light of the multiplicity of actors in the transitional justice space in Africa, participants deliberated on how to practically enhance collaboration on the continent.

As participants examined the state of transitional justice in Africa, they noted that the content of transitional justice and the conditions that make for its success remain open to interpretation. The definitions and implications of the term “transitional justice” were problematized, as participants probed the boundaries of “transition” and the orientation of “justice”. Participants criticized a perpetrator-centric approach to transitional justice that stems from a primarily juridical framing, calling instead for a multidisciplinary approach that allows for an expanded definition. The limitations of a legalistic approach that participants highlighted include its inability to adequately meet the needs of victims. Given that mass atrocities are rooted in structural and socioeconomic systems that produce dynamics of exclusion and violence, individual prosecutions alone cannot disrupt the cycle of violence and repression. Yet, these systems remain unexamined in mainstream transitional justice processes.

An expanded view of transitional justice conceptualizes violations in ways that exceed corporeal harm. It also embraces a more elastic approach to timeframes, avoiding a fixation on a narrow period of time in the past; this view of transitional justice considers the present and future potential for violence or repression. Its preventative orientation encourages the creation of inclusive and democratic societies. Further, the meeting noted that transitional justice processes approached merely as technical exercises are ill-equipped to address the

divergent and competing political interests that prompt violence. Participants also highlighted the gap in the provision of psychosocial support to post-conflict and post-authoritarian societies. The dangers associated with unaddressed trauma were expounded upon. Moreover, the participants highlighted the need for institutional reform to help societies to effectively break the patterns of violence and repression.

While examining the histories of transitional justice, participants complicated the mythology of the Nuremburg trials that are often upheld as prototypes. In so doing, participants noted that transitional justice processes are most effective when they are sensitive to the context of their application, rather than when following a template. In an interrogation of the discursive framing of transitional justice in Africa, participants noted that transitional justice enables a range of interpretations and lends itself to localization.

Participants deliberated on the key debates surrounding the formulation of transitional justice processes. These include questions of sequencing peace, justice and reconciliation, as well as those of balancing international and local values. While differing views emerged, it was agreed that the priorities of transitional justice processes in Africa ought to reflect each country's contextual realities. It was advised that the competing interests and demands of the various stakeholders be taken into account and that compromises be reached. Ultimately, participants described the balancing act of transitional justice processes as the ability to satisfy the justice needs of victims without triggering a recurrence of violence or repression.

The report highlights two sets of key issues addressed at the Forum. The first includes the vital importance of victim participation, youth engagement, gender-responsiveness and the value of traditional justice mechanisms (TJMs). The second set focuses on the practical challenges associated with different transitional justice funding models.

The Forum emphasized the complementary and indispensable roles played by key stakeholders. Representatives of various AU Member States shared their transitional justice best practices and limitations. AU Organs and RECs noted the need to uphold the principle of subsidiarity in Africa and to increase collaboration in order to deliver effective transitional justice on the continent. The unique role of NHRIs as independent organs that can remedy human rights violations, facilitate reparations and provide victims with various forms of support was highlighted. Among other things, participants noted the fruitful outcomes of CSOs collaborating with each other and with governments so as to adequately serve victims.

The meeting concluded by raising recommendations for the various actors in Africa's transitional justice processes. For Member States, the Forum cautioned that transitional justice processes could inadvertently politicize and permanently encode the identities of victims and perpetrators. Thus, participants emphasized that the goal of transitional justice efforts ought to be to transform both former victims and perpetrators into citizens who can live alongside one another. Participants recommended that the AUC, the AU Organs and the RECs foster coherence and cooperation among the various actors in transitional justice processes in Africa and avoid redundancy and duplication of efforts. The NHRIs were advised to provide services for unrecognized victims and seek to mainstream their agenda in national government. The Forum recommended that CSOs advance the cause of inclusive, victim-centred, citizen-led transitional justice. Academics were advised to collaborate with CSOs to document the various transitional justice processes in Africa and help establish a repository of knowledge that practitioners and policy-makers can consult as they design new transitional

justice mechanisms. Finally, donors of transitional justice processes were encouraged to be context-specific in their funding strategies, and to commit to entire processes rather than earmarking funding for only certain projects. In conclusion, it was acknowledged that the Forum represents the deepening consensus around transitional justice in Africa.

INTRODUCTION

On 19–21 October 2017, the inaugural Continental Forum on Transitional Justice was convened by the Department of Political Affairs (DPA) of the African Union Commission (AUC) and the Centre for the Study of Violence and Reconciliation (CSVR) in Johannesburg, South Africa. The Forum gathered representatives from AU Member States, AU Organs, the Regional Economic Communities (RECs), the National Human Rights Institutions (NHRIs), civil society organizations (CSOs), academics and independent experts on transitional justice.

Ambassador Salah S. Hammad, Senior Human Rights Expert and Acting Head of the African Governance Architecture Secretariat at the DPA, on behalf of H.E. Minata Samate Cessouma, the Commissioner for Political Affairs of the AUC, launched the event by stating that the DPA envisioned the Forum as a gathering that would pave the way for the implementation of the African Union Transitional Justice Policy (AUTJP), which is currently pending adoption. He reiterated that, at its core, transitional justice is about ensuring that victims attain the justice they need. Expressing the DPA's support of both the Forum and the AUTJP, John Ikubaje of the department's Human Rights and Transitional Justice Unit stated that in keeping with Agenda 2063, transitional justice has the potential to facilitate the realization of a peaceful, secure and politically united Africa. The Executive Director of the CSVR, Nomfundo Mogapi, affirmed that the Forum represents a platform upon which Africans can exercise their agency to create a healed, just and reconciled Africa. In a demonstration of commendable collaboration, the DPA and the CSVR's shared passion for peace led to the establishment of the first-ever Continental Forum on Transitional Justice.

OBJECTIVES OF THE FORUM

Key Objective	Background
Create a Platform for TJ in Africa	The primary objective of the Forum was to create a platform upon which the diverse array of experiences of transitional justice on the African continent can be exchanged.
Shape the TJ Discourse	It aimed to facilitate a process of shaping the discourse on transitional justice in Africa. Premised on the notion that a great deal of information is yet to be documented regarding transitional justice processes on the continent, this Forum sought to begin to address this lacuna.

Key Objective	Background
Take Stock of Developments in TJ	The Forum aimed to take stock of the developments in transitional justice processes in Africa. The participants engaged with the historical trajectory of these processes in Africa, exploring the experiences of Liberia, Sierra Leone, Ghana, Rwanda and South Africa in the 1990s, throughout the new millennium to the current ongoing processes in Mali, the Central African Republic, South Sudan, Sudan and Burundi, as well as the recent case of The Gambia. The Forum presented a platform for sharing learnings, including both setbacks and successes, in order to enable a fuller understanding of the various conflicts and transitional justice processes unfolding in Africa at present.
Find Solutions to Current Challenges	With this broad repertoire in mind, participants sought to find solutions to the challenges facing transitional justice processes on the continent and to probe lingering questions at both the conception and implementation phases.
Reflect on an African Approach to TJ	The Forum also sought to shape Africa's approach to transitional justice in a way that speaks to the context and lived experience of ordinary African people. It aimed to ensure that the processes are effectively designed to meet the needs of African people at every level of intervention. The Forum privileged the African experience in a bid to avoid importing ideas that are disconnected from the continent's realities.
Focus on the Needs of Victims	It also focused on the importance of documenting the experiences of victims and ensuring that transitional justice efforts pivot on the needs of victims and are victim centred.
Become a Resource Hub	In future, this dynamic platform aims to become a resource hub for communities of practitioners and experts. In addition to convening annual meetings with the foremost practitioners of transitional justice in Africa, an online platform has been created to allow ongoing interaction beyond the Forum.

ISSUES ADDRESSED BY THE FORUM

The Forum provided a context to deliberate upon and answer the following questions: What are some of the gaps in the design and delivery of transitional justice in Africa? What mistakes have stakeholders made? How can we improve transitional justice in Africa? What lessons can we glean from the various African experiences of transitional justice? Does an African conception of transitional justice exist? How has transitional justice responded to Africa's history of colonialism and its legacies? How can we practically enhance collaboration among the various actors in order to create a coherent and contextualized continental transitional justice agenda?

STRUCTURE OF THE REPORT

The report begins with an examination of the state of transitional justice in Africa. It assesses the progress that has been made as well as the conceptual and practical concerns that remain. It evaluates and interrogates the discursive framing of transitional justice and the implications of the conceptual approaches, drawing on several cases. In an intricate exploration of the critical debates concerning the formulation and implementation of transitional justice processes, the report highlights the importance of context and timing. The first key issue it highlights is the vital importance of encouraging victim participation, incorporating traditional justice mechanisms, and creating gender-responsive and generationally inclusive transitional justice processes. The second issue that the report highlights is that of the practical implications of various transitional justice funding models. The complementary roles of the AU Member States, AU organs, RECs, NHRIs and CSOs are examined in depth. The report concludes with recommendations for the stakeholders of transitional justice processes in Africa.

1. BACKGROUND AND CONTEXT: THE STATE OF TRANSITIONAL JUSTICE IN AFRICA

Across the continent, armed conflicts, political instability and contestations over inclusion and recognition of identities are rife. Where conflicts have ceased, urgent effort is required for post-conflict reconstruction and to rebuild state–society relations. In light of the proliferation of large-scale atrocities, the timely need to establish a transitional justice community of practice in Africa becomes all the more apparent. Indeed, transitional justice has become a vehicle to not only resolve armed conflict, but also move societies from war or repressive rule to peaceful good governance and stability.

The African continent has a long history of deploying the mechanisms of transitional justice to overcome the legacies of colonialism, authoritarianism and violent conflict. A wide range of countries have embarked on processes of transitional justice, including Angola, the Central African Republic, Chad, the Democratic Republic of Congo, Ethiopia, Ghana, Liberia, Morocco, Mozambique, Nigeria, Rwanda, South Africa, Sierra Leone, South Sudan, Sudan and Uganda. The mechanisms ranged from criminal prosecutions to the establishment of special courts or hybrid courts, truth commissions – with some adopting a truth-for-amnesty formula – and traditional or quasi-traditional justice processes. The continent has a wealth of experience of designing and implementing transitional justice processes with varying levels of success.

Taking the lead on a continental level, the AU has developed the AUTJP, which currently exists in draft form and awaits adoption. Once adopted, the Policy will form part of the AU's tapestry of mechanisms designed to address post-conflict, authoritarian and post-repression challenges and transitions towards sustainable peace. Reflecting the long process of consultation and raising awareness about transitional justice, this monumental, continent-wide Forum represents the deepening consensus around transitional justice in Africa.

There is a broad acceptance that societies emerging from conflict have to break the violent patterns of the past and establish systems of accountability. Moreover, there is a consensus forming based on the realization that societies emerging from violent conflict should contend with that experience, as the absence of an honest reckoning risks the return to violence or repression.

Despite the shared sense of the importance of transitional justice, there is little agreement on either the conceptual level or the practical application of transitional justice in Africa.¹ Due to the continent's rich and expanding experiences with transitional justice, the content of transitional justice and the conditions for its success remain open to interpretation. As a result, definitional challenges abound. What timescale and timeframe does “transitional” connote? Does it recognize the continuity between the past, present and future? As Brian Kagoro² noted, life is lived in a continuum. When does the transition commence and conclude? As Commissioner Solomon Dersso poignantly remarked: “Suffering is not time-bound and may last throughout the lives of victims. There is nothing transitional about their pain.”³ Complicating the problem of beginnings and endings, Advocate Vusumzi Pikoli⁴ raised the question of the extent to which conflict is merely a permanent feature of our complex societies. Similarly, what does “justice” actually mean? To whom? Whose justice? The absence of justice denotes the presence of victims and perpetrators, yet the definition of each of these categories is fraught with contestation and complexity.

Despite the United Nation's acknowledgement in 2004 that transitional justice comprises “the full range of processes and mechanisms” of society's attempts at attaining justice and reconciliation beyond legal ones, the mainstream discourse on transitional justice continues to conceptualize justice in legal and juridical ways by privileging retributive mechanisms such as criminal prosecution.⁵ In divergence from this narrow conceptualization of transitional justice, an expanded view includes, *inter alia*, mechanisms such as truth commissions, with or without prosecution, and the documentation of human rights violations. This form is borne from a recognition of the limitations of a legalistic conception of justice that is unable to adequately meet the demands of victims in African transitional justice contexts.⁶

The meeting noted that the liberal tradition's bias towards individualism is inadequate when grappling with mass atrocities. Given that criminal prosecutions purely aim to punish perpetrators, they fail to adequately grapple with collective guilt, conflicts organized around group identity lines, and violations rooted in a discriminatory and repressive social contract. The liberal tradition is exemplified in the Nuremburg trial approach. In such contexts, individuals become scapegoats for socially embedded patterns of violence. In order to address collective suffering, transitional justice mechanisms and related human rights mechanisms need to account for the corporate dimension. In countries like South Africa, this individualistic approach generally precluded a critical examination of the role of multinational corporations that operated in the country during apartheid.⁷ In other contemporary contexts,

1 Tim Kelsall, “An Introduction to Some Issues in Transitional Justice”, Nordiska Afrikainstitutet Lecture Series on African Security, <http://www.diva-portal.org/smash/get/diva2:610681/FULLTEXT01.pdf> (accessed 13 March 2018).

2 Comment made at the Continental Forum on Transitional Justice on 20 October 2017

3 Presentation by Commissioner Solomon Dersso at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

4 Comment made at the Continental Forum on Transitional Justice on 19 October 2017

5 “Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, UN Doc. S/2004/616 (3 August 2004).

6 Jasmina Brankovic and Hugo van der Merwe, “Transitional Justice in Post-Conflict Societies: Conceptual Foundations and Debates”, in *Moving Beyond: Towards Transitional Justice in the Bangsamoro Peace Process* (Davao City: forumZFD Philippines, 2014), 10–15.

7 See, Khadija Sharife, “Landmark Ruling Allows Apartheid Victims to Sue Multinationals”, *African Business*, 354 (2009): 34–36, 38.

this approach limits the scope of indictment of weapons manufacturers and arms dealers as active contributors to the conflicts on the continent.

The individualistic approach is not simply limited in scope; it also incorrectly apportions blame by placing the locus of the problem on the individual. Mass atrocities are rooted in structural, cultural, socioeconomic and institutional systems and dynamics of exclusion and violence. Yet these systems tend to remain uninvestigated. The narrow focus on individual perpetrators abets the concealment of these important dynamics. We need new tools to address collective, multidimensional and even passive culpability in order to disrupt cycles of conflict and coercive political control.

Further, criminal justice processes do not necessarily meet the justice needs of victims. For example, the victims in Darfur, Sudan, did not immediately demand individual prosecutions. Instead, their priorities included guaranteeing their corporeal security, as well as accessing economic opportunities and political inclusion.⁸ Jean-Baptiste Baribonekeza⁹, Chair of the Burundian Independent National Human Rights Commission (*Commission Nationale Indépendante des Droits de l'Homme*), noted that in Burundi, transitional justice is framed as a means of enshrining justice for all, rather than merely differentiating between victims and perpetrators.

The aims of transitional justice are multiple. As such, depending on a range of variables, which are explored in this report, the processes could encompass acts of restitution including both symbolic and material reparations, as well as acts of reconciliation that focus on rebuilding social cohesion. Some processes emphasize the need to restore state–society relations, while others aim primarily to introduce democratic reforms.¹⁰

Participants averred that the current mainstream conception of transitional justice still tends to narrowly seek to address violations that occurred in the past, and is further limited by exclusively using the human rights framework to determine what counts as a violation. Given that human rights advocates share the professional bias of lawyers, this conception of violence tends to be primarily physical and rooted in the right to life. The pursuit of justice through the criminal justice apparatus often produces adversarial social outcomes as a result of its punitive orientation.

Conceptions of violence have to expand beyond the bounds of physicality to include the socioeconomic violations, or “distributive injustices”, as Professor Tim Murithi terms them, which reproduce patterns of exclusion on the basis of gender, ethnicity and generation.¹¹ A multidimensional view will enable transitional justice efforts to transcend a fixation on the past to consider the present and future potentialities of violent conflict or repression. It behoves transitional justice practitioners to create inclusive and democratic societies as proactive strategies for preventing conflict and sustaining peace.

Another shortcoming of a legalistic method that Commissioner Dersso highlighted in his presentation is that it stems from its emphasis on perpetrators rather than on victims.

8 Presentation by Commissioner Solomon Dersso at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa. See also, Report of the African Union High-Level Panel on Darfur (2009).

9 Comment made at the Continental Forum on Transitional Justice on 19 October 2017

10 Brankovic and Van der Merwe, “Transitional Justice in Post-Conflict Societies”.

11 Y. Selim and T. Murithi, “Transitional Justice and Development: Partners for Sustainable Peace in Africa?” *Journal of Peacebuilding and Development* 6(2) (2011): 58–72.

For example, while sanctions on perpetrators are important, they are not victim-centric mechanisms. Processes that attain commendable outcomes such as affirming the rule of law often do not address the needs of victims. Relatedly, a transitional justice process approached merely as a technical exercise can ignore the tensions along social fault lines.¹² Guided by an assumed legal objectivity, such approaches to transitional justice are not only apolitical, but are politically imperceptive. This view characterizes extreme violence as mainly criminal and unethical aberrations, rather than as a deeply political contest of interests.¹³

In addition to these conceptual difficulties, practically applying transitional justice mechanisms can also be challenging. The “implementation gap” – the disjuncture between the rhetoric of support and the implementation of a policy – renders many transitional justice mechanisms poorly implemented, if at all, in various contexts. Therefore, participants highlighted the importance of obtaining the political support of Member States to adopt the AUTJP.

Participants posited that partial execution of transitional justice processes can lead to politically exclusive ends in cases in which, for example, legal trials are used to legitimize a new political order.¹⁴ This form of victor’s justice (seen in post-conflict Ethiopia, Liberia and Chad) does not necessarily guarantee a break from the past as transitional justice processes are used for political expediency rather than social transformation.¹⁵ Thus, it is important to note that some actors may use the language of transitional justice to compete for resources.

Key transitional justice mechanisms such as truth commissions have not always been satisfactory. Even in the highly regarded South African experience, the process has been criticized for failing to refer a large number of cases for prosecution, failing to offer reparations to the vast majority of victims and being unable to curb the wider structural legacies of apartheid that reproduce similar hierarchies of power. Despite the political transition from apartheid, South Africa remains in the grip of social crisis, xenophobia and political violence, while reconciliation tarries.

Despite its significant successes, the Truth and Reconciliation Commission was unable to produce a much-needed “emotional settlement” to address the psychological and structural violence that victims continue to carry in the new political dispensation.¹⁶ The search for social justice mechanisms to address socioeconomic deprivations continues. As Nomathamsanqa Masiko¹⁷ stated in a poignant paraphrase of Archbishop Desmond Tutu’s words, the greatest tragedy of apartheid, above and beyond its human rights violations as well as its structural and systemic violence, stems from its foundational premise that questioned the very humanity of black South Africans. The transitional justice processes in the country need to address this atomic (in both senses) denigration. Participants noted that this cannot happen in a setting of socioeconomic alienation and disempowerment, as deprivation entrenches these dehumanizing doubts. The two factors are profoundly interrelated.

Participants acknowledged the dearth of strategies and mechanisms of healing in transitional justice processes. Nomfundo Mogapi, Executive Director of the CSVSR, drew attention to

¹² See, L. Vinjamuri and J. Snyder, “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice”, *Annual Review of Political Science* 7(1) (2004): 345–362.

¹³ Presentation by Commissioner Dersso, 19 October.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Dr Mamphela Ramphele coined the phrase “emotional settlement” in her lecture at e’Bosch Heritage Project, Stellenbosch University, on 15 September 2016.

¹⁷ Comment made by Nomathamsanqa Masiko, Advocacy Officer, CSVSR at the Continental Forum on Transitional Justice on 19 October 2017

the psychological trauma and other implications of experiencing repression and violence. In agreement with this view, participants called for transitional justice mechanisms that address the whole person, in ways that facilitate healing among both victims and perpetrators. In particular, Mogapi called for the recognition of collective trauma, which can risk re-enactment of conflict-related violence when unresolved. For example, the wave of xenophobic violence in some South African townships in May 2008 can be seen as a re-enactment of the violent killings of *impimpis* (a colloquial term for sell-outs during apartheid) during 1980s apartheid South Africa. As Mogapi so aptly phrased it, “When a society does not deal with its woundedness, the past haunts the present and determines the future.”¹⁸ Unaddressed collective psychosocial wounds impede nation-building by distorting public discourse and producing contestation of every aspect of public life as a means of delineating between villains and victims. Societies experiencing such deep fragmentation typically lack a common vision. The participants at the Forum averred that this collective woundedness exists beyond individual human psyches, and often becomes ingrained in the cultures of institutions.

Highlighting the need for institutional reform, participants noted that despite power-sharing measures, Kenya is clenched in politics that led to the eruption of violence in 2007. The Kenyan 2010 constitution-making process championed reform along transitional justice lines and convened elections in 2013.¹⁹ Despite undertaking a laudable peace process, Kenya was yet to make a break with the past that affected the ways in which power was exercised, and the culture and conduct of politics. The structural conditions that created the outbreak of violence had not been resolved. Participants argued that political leaders and their constituencies need to engage in a meaningful process of inclusive political accommodation and to create a framework for distributive justice. Commissioner Dersso noted that in such instances power and politics tend to play themselves out as a zero-sum process whereby the “winner” takes all, and the “loser” is completely excluded from the political and socioeconomic processes. The pathologies of the authoritarian past have to be addressed.²⁰

Thus, there are significant challenges of implementation even when transitional justice is defined in narrow terms. In many cases, these challenges arise as a consequence of designing transitional justice mechanisms without regard for the messy contexts in which they will be implemented. These messy realities do not lend themselves to straightforward applications of transitional justice processes. The mechanisms are often established in contexts in which colonial and post-colonial repression serves as the backdrop. Commissioner Dersso, citing Mahmood Mamdani, argued that the design of the modern African state, drawn from the colonial template, often perpetuated aspects of its predecessor’s repressive culture of governance.²¹

The meeting maintained that transitional justice policies have the profound power to address the crisis of the modern African state. Participants acknowledged that colonial legacies continue to determine the shape of contestations of power in several countries across the continent. Dersso²² thus averred that the question of state architecture is crucial for post-conflict nation-building and state-building to reconstruct a truly reconciled country. In concurrence, Professor Murithi²³ noted that colonization’s brutal and racialized exploitation,

18 Presentation by Nomfundo Mogapi at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

19 See, K.R. Hope, “Bringing in the Future in Kenya: Beyond the 2010 Constitution”, *Insight on Africa* 7(2) (2015): 91–107.

20 Presentation by Commissioner Dersso, 19 October 2018.

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

22 Comment made at the Continental Forum on Transitional Justice on 19 October 2017

23 Comment made by Prof Tim Murithi, IJR, at the Continental Forum on Transitional Justice on 20 October 2017

combined with the limited recourse that the victims of its most vicious expressions (such as among the Nama and Herero in Namibia and the Mau-Mau in Kenya) had, may affect the pathologies of power that persist.

Adding to the cauldron of forces affecting the continent, aspects of the contemporary international system enable the conditions that create violence, such as the militarization of youth and gender discrimination. Commissioner Dersso posited that the unequal power relations in the world, particularly the structural economic subordination of Africa by the global North, perpetuates the pattern in which the latter continues to be the receiver of finished goods and the provider of raw materials. These power deficits impact domestic economic and political conditions in ways that trigger violence and repression.

Given this broad range of perspectives, participants agreed on the importance of an expanded view of transitional justice that enables healing, places victims at the centre, conceptualizes various forms of violations, emphasizes the root causes of violations and that can achieve conciliation.

The innovative AUTJP aims to address African concerns through a holistic process that accounts for ethnic, racial, religious, gender, generational and economic dimensions, as it seeks to facilitate both peace and justice. Rather than encouraging the application of models or scripts of criminal justice and peace processes, it pursues a holistic, integrated and multidisciplinary approach that aims to advance accountability, truth and social reconciliation through a framework of sustainable development. Rather than referring to a particular time period, the AUTJP views transitional justice as a journey that societies embark upon towards sustainable peace and democracy. It is premised on the belief that transitional justice should be approached as inherently political and not solely technical. The AUTJP seeks to help societies craft settlements that guarantee security and achieve a measure of accountability in the present, that redress the past, that identify root causes of violations, and that design an inclusive future through socioeconomic transformation.

Participants called for transitional justice mechanisms to adapt to the distinctive political context of each case, which partially depends on how authoritarian regimes or the conflicts came to an end. Processes designed for an end precipitated by popular revolution, a *coup d'état* or by negotiation talks have to be sensitive and responsive to the resultant balance of power. Contextual concerns tend to also encompass the question of timing. As Dr Hakeem Yusuf²⁴ noted, both are profoundly interlinked. Participants questioned whether or not there would ever be a right moment to pursue transitional justice. While the consensus is yet to be established, there are stakeholders on the continent pursuing it in different contexts, even when the conditions for its pursuit are suboptimal. Nevertheless, participants agreed that context-specificity is crucial to the design and implementation of transitional justice. Given the power dynamics in any given post-conflict, post-authoritarian context, Commissioner Dersso advised that there is a need to balance competing demands, to compromise and to encourage institutional innovation.

Agreeing with the significance placed on timing, the representative of Sudan, Tarig Mubarak Magzoub²⁵, noted that, for example, the Comprehensive Peace Agreement (CPA) signed by

²⁴ Comment made by Dr Hakeem Yusuf, at the Continental Forum on Transitional Justice on 19 October 2017

²⁵ Comment made by Mr Tarig Mubarak Magzoub, at the Continental Forum on Transitional Justice on 20 October 2017

the government of Sudan and the Sudan People's Liberation Movement and Army provided a six-year period before offering the people of southern Sudan a referendum vote on secession. In this period, among other activities, peace could have been institutionalized. This window of opportunity was missed, and the parties failed "to make unity attractive"²⁶ (in the words of the CPA) to southern constituencies. Consequently, secession ensued.

Participants also noted that the question of timing can impact the commitment needed to secure peace. In Sudan, Uganda and Burundi, peace-making efforts have been established only to collapse shortly afterwards, leading to the recurrence of violence. At times it stems from a lack of commitment to the processes among warring parties at the negotiation table. Thus, we need to recognize the various motivations that warring parties have to approach the negotiation table. Participants argued that these may be tactical for a weaker party seeking to "buy" time, or to attain recognition, or from an awareness that the only route to peace is through a negotiated settlement. In addition to these complex webs of reasoning, the peace that is agreed upon needs to reflect the legitimate consensus of all the stakeholders in the conflict.

In sum, the participants noted that transitional justice mechanisms ought to satisfy the justice needs of victims without triggering a return to violence. This delicate balance is crucial as the ultimate aim is to produce societies in which both former victims and perpetrators can live peacefully alongside each other. Thus, transitional justice mechanisms need to account for and manage the complex interplay of actors.

2. EVALUATING THE DISCOURSE OF TRANSITIONAL JUSTICE IN AFRICA

As a global phenomenon, transitional justice is commonly thought to have emerged in the aftermath of World War II with the establishment of the International Military Tribunal at Nuremberg.²⁷ The post-World War II imperatives of rebuilding a state and a shared nationhood in Germany came with new international obligations that made Nuremberg an important precedent. However, the mythology of Nuremberg elides the fast-tracking of the transitional justice process in Germany on account of the nascent Cold War's exigencies.²⁸ The proposed second international trial of major war criminals at Nuremberg was aborted, leading to the prosecution of only some of the major perpetrators.²⁹ Various communities experienced vengeance killings and other forms of vigilante violence as a means of achieving justice apart from the state.³⁰ By complicating the Nuremberg trial mythology, we can critically examine the compromises it required and its consequent shortcomings.

While Nuremberg has served as a template in transitional justice processes across the world, scholars have critiqued it, held up other transitional justice models (such as the negotiations that ended apartheid, the Convention for a Democratic South Africa) and called for a paradigm shift from Nuremberg.³¹ Dr Hugo van der Merwe³² asserted that it behoves practitioners

26 Ibid

27 However, the histories of international criminal law span centuries in differently configured international systems. See, Z. Bohrer, "International Criminal Law's Millennium of Forgotten History", *Law and History Review* 34(2) (2016): 393–485.

28 P. Maguire, "Nuremberg: A Cold War Conflict of Interest" (PhD Diss., Columbia University, 1995).

29 D. Bloxham, "'The Trial That Never Was': Why There Was No Second International Trial of Major War Criminals at Nuremberg", *History* 87(285) (2002): 41–60.

30 Presentation by Dr Hugo van der Merwe at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa.

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

32 Presentation by Dr Hugo van der Merwe at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

to acknowledge the differences between their specific post-conflict situations and post-Nazi Germany when extrapolating lessons from Nuremberg. He nevertheless affirmed that lessons can be gleaned from international transitional justice processes, within bounds. For example, the right to reparations and accountability for torture are ideas that have become well developed internationally in the aftermath of Nuremberg.

The discursive developments of transitional justice internationally have involved a move towards centring narrative-making and dialogue. It now seeks to privilege the voices of victims, and to engage ordinary people in the writing of their own histories of violence and repression. As such, there is a deviation from state-controlled, and often masculine, historical narratives. African approaches to transitional justice in the 1990s have, in particular, influenced international discourses by broadening the transitional justice agenda. Stakeholders on the continent have included socioeconomic concerns, gender norms, corruption, and expanded the exclusively historically time-bound framing of transitional justice processes.

Participants questioned whether or not the historical origination of transitional justice in post-war Germany necessarily suggests that transitional justice is foreign to Africa. The inquiry was rooted in a fear of framing transitional justice as an imposed agenda. Participants called for an acknowledgement of transitional justice's multiple histories across the world. They viewed the suggestion that it "began" in Europe and was merely "exported" to Africa as misguided. [In his presentation,] Professor Murithi³³ called for an excavation of historical accounts of African transitional justice mechanisms that preceded the colonial encounter. Such an excavation could form part of the canon from which transitional justice scholars and practitioners draw to design new mechanisms. This could have significant value given that across the continent grievances have been conceptualized in terms that exceed physical violence, and western juridical instruments have struggled to adequately address these complex dynamics.

The unstable definitions of transitional justice make a wide range of interpretations possible, thus lending transitional justice to localization in practice and opening it for discursive contestation. As such, participants noted that it is crucial to harness the collective power of AU Member States and to empower CSOs in order to build a consensus around the meanings, objectives and approaches to transitional justice in Africa.

Dr Franklin Oduro³⁴ argued that while an "African" transitional justice might not exist, there are approaches that more effectively reflect the realities of African societies. These African approaches – for example the unique mechanisms stemming from Rwanda and Uganda – need to be highlighted. Moreover, participants agreed that in light of the challenges of nation-building and state-building experienced on the continent, an African approach to transitional justice has to foreground the public. They recognized that potentially toxic and devastating implications may ensue if transitional justice processes are primarily state-centric and top-down, as such an approach may produce forms of exclusion that could inadvertently sow the seeds for future conflicts. As such, participants affirmed the need to continue to mobilize citizens and create forums for them to assert their rights, tell their stories and seek justice. Participants cautioned that the balance of political power is also an important consideration as transitional justice mechanisms and language can be captured and co-opted by repressive governments to further entrench injustice. The legitimacy of a state presiding over

33 Presentation by Prof. Tim Murithi at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa

34 Presentation by Dr Franklin Oduro at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

transitional justice processes may determine the degree of citizens' trust. Moreover, Dr Noha Aboueldahab³⁵ noted that some governments can put on facades of reform by sacrificing only a part in order to save the whole regime. This superficial adoption of transitional justice language inhibits the benefits of transitional justice mechanisms, and often leads to more civic rebellion and protest.

3. THE BALANCING ACT: NEGOTIATING TIMING, SEQUENCING AND CONTEXT

Realities in Formulating Transitional Justice in Africa

The goal of transitional justice remains an area of spirited debate among scholars and practitioners, who grapple with whether “the process should be based on ‘universalist’ or local values”.³⁶ In order to formulate an effective transitional justice process, it is imperative to take into account the contextual realities at hand, including local needs and interests. Commissioner Dersso highlighted that understanding the nature of the violation is crucial. He argued that *criminal* violence would require a *criminal* justice response, whereas *political* violence with criminal dimensions would require a *multidimensional* response. He, along with other participants, held that the broader political and socioeconomic conditions that made the violations of conflict or authoritarian rule possible also require analysis. While acknowledging that each context will differ and that no single transitional justice template will fit each scenario, participants noted that transitional justice models are required to help guide societies to break from conditions and patterns of violence and move towards peace. It was reiterated that an expanded scope of justice measures – policy, legal and socioeconomic – is required to address not only the initial violence but the legacies of violations as well.

Understanding the specific context and conditions requires us to go beyond the normally accepted methods (typically the human rights approach) of addressing and remedying violations. An understanding of violence that is grounded in awareness of the political conditions, structures and power relations is thus crucial. Consequently, the meeting recommended that each society engage in the onerous task of designing the set of measures it needs, with an awareness of the resources required to implement the measures. By designing its own transitional justice package, each society can exercise its agency and demonstrate ownership over its transitional justice process.

The design needs to engage directly with victims in order to ascertain their needs. The assumption that victims simply seek the perpetrators' punishment can be erroneous. While transitional justice processes ought to concentrate on the needs of victims, these measures require a cognizance of the interplay of all social, economic and political actors party to the conflict or repression, the emerging balance of power, and the often competing sets of interests. Commissioner Dersso noted that while victims are most important, the conditions that created victimhood go beyond the victims themselves.

35 Comment by Dr Noha Aboueldahab at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

36 Brankovic and Van der Merwe, “Transitional Justice in Post-Conflict Societies”, 10.

A wider set of actors will need to be engaged in order to effectively dislodge the conditions that made violence and violations possible to begin with.

Two schools of thought emerged in the Forum. The first adopted the “peace first, justice next” approach. Participants holding this view approached peace and justice as potentially incompatible goals. Proponents of this perspective resolve the tension by sequencing peace as a necessary requirement for justice.³⁷ For example, Bonaventure Guedegbe argued³⁸ for the significance of even a fragile peace. The alternative perspective concedes to the importance of stability before embarking upon transitional justice. However, it contests the assumed linearity of transitional justice processes. Proponents of this view deem the equation that peace leads to justice, which will eventually produce reconciliation, as impractical.³⁹ In practice, it is often applied as a schema that starts with the cessation of violence in order to hold inclusive peace negotiations, which will lead to a power-sharing agreement that facilitates a peaceful transition. However, the complicated dynamics in each unique post-conflict, post-authoritarian rule context are often not optimal for the application of the linear sequence. For instance, Lury Nkouessom⁴⁰ noted that there is neither peace nor war in Mali, which presents significant challenges to transitional justice efforts. In light of the intricate connections between these three aspects of transitional justice, Dr Annie Chikwanha proffered that a simultaneous and multipronged approach⁴¹ that is customized to the specific conditions in each context would be most appropriate.

Despite the discrepancies, both views hold that even if tensions exist between peace, justice and reconciliation as aims, all three are interrelated, and the key stakeholders of each conflict context ought to determine the priorities and possibilities enabled by the conditions they face. Across the spectrum, there was consensus regarding the importance of political inclusivity. In addition to its significance as a democratic principle, participants noted that inclusivity can also function as a crucial strategy. To highlight this point, Edmund Yakani⁴² observed that those who are not in power today can jeopardize the peace processes tomorrow.

4. KEY ISSUES

4.1. Inclusivity

Victim Participation in Transitional Justice

Participants agreed that the involvement of victims is a crucial principle that ought to underpin transitional justice efforts. It is of both ethical and practical import. Achieng Akena⁴³ stated that,

Justice cannot be done without the people for whom it is intended. Inclusive participation and effective collaboration therefore become critical components of transitional justice processes, as does the recognition of and the value that must be accorded to all stakeholders.

37 See, N. Grono, “What Comes First, Peace or Justice?”, International Crisis Group, 27 October 2006, <https://www.crisisgroup.org/africa/horn-africa/uganda/what-comes-first-peace-or-justice> (accessed 30 October 2017).

38 Presentation by Bonaventure Guedegbe, PSD, at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa

39 Presentation by Dr Annie Chikwanha at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

40 Presentation by Lury Nkouessom at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

41 Presentation by Dr Annie Chikwanha at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa

42 Presentation by Edmund Yakani at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

43 Comment by Achieng Akena at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa

At present, the AUTJP already emphasizes victim-centricity, as do many CSOs on the continent that have a mandate to serve victims.

Transitional justice processes have to aim to, in part, facilitate the healing of victims, and to do so the needs of victims have to be highlighted. Granting victims platforms through which they can voice their experiences, needs and ideas can lead to insights needed for designing targeted and effective transitional justice programmes. Despite the challenges inherent in demarcating victimhood, inclusion of the perspectives of members of the occasionally ambiguous category of “victims” is essential. Their contributions help ground transitional justice processes in the lived experience of conflict or repression. Thus, their participation provides a means for overcoming the limitations of a perpetrator-centric vantage point.

Participants stated that in certain instances, the participation of victims may be more pronounced in the implementation phase of transitional justice processes rather than in the design and development phase, or vice versa. These entry points demonstrate the various possibilities available for victim involvement. The most common methods of participation include asking victims to serve as witnesses in prosecutions, to volunteer evidence and to provide commentary on court proceedings. Jackson Odong⁴⁴ drew attention to an International Criminal Court (ICC) trial, which can typically be thought to be perpetrator-centric but that has included opportunities for the involvement of victims. Over 200 victims have applied to participate in the ongoing trial of Dominic Ongwen, ex-commander in the Lord’s Resistance Army, in keeping with the provisions of the Rome Statute. Yet, the inclusion of victims’ voices was not without difficulty. Victims were represented by lawyers that the ICC appointed; as such, they have limited agency. In the local trials in the international crimes division of the High Court of Uganda, which has two lawyers for victims, victims have petitioned for representation by their preferred lawyers. Aside from the provision of opportunities to bear witness, live screenings of certain trials are created to encourage victims to follow the proceedings. Victim-led initiatives include lobbying parliament for a resolution concerning their needs and forming associations that advocate for reparations.

Participants discussed the impediments to victim participation in transitional justice processes. For instance, the lack of witness protection leaves victims at risk of revictimization and marginalization. Moreover, participants stated that legal and other official definitions of victimhood inadvertently rank and thereby cause contention among the recognized and unrecognized victims. Efforts to encourage victim participation ought to avert these dynamics and include a wide spectrum of victims.

Youth and Transitional Justice

In light of the AUC’s focus in 2017 on harnessing the demographic dividend through investments in youth, the participants highlighted the vital role of youth in transitional justice. Given that young people comprise the highest proportion of the continent’s population, they are severely affected by conflict, both as victims and as perpetrators. Scholars of childhood, including Virginie Ladisch, have argued for transitional justice mechanisms that protect traumatized youth.⁴⁵ High numbers of young people are involved in violent conflict across the continent, as child soldiers or unemployed and underemployed young adults with limited access to

44 Presentation by Jackson Odong at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa

45 V. Ladisch, “Children and Youth Participation in Transitional Justice Processes”, *Journal of the History of Childhood and Youth* 6(3) (2013): 503–513.

productive means of livelihood. They are, by virtue of this demographic preponderance, crucial stakeholders in transitional justice processes. Experiences such as the “fallist movements” on South African university campuses or Sierra Leone’s decade-long civil war, which was popularly referred to as the “revolt of youth”, show us the significant cost of generational exclusion.⁴⁶ Unaddressed generational tensions exacerbate social fissures.

Participants indicated that a generational gap persists in decision-making on transitional justice issues. African societies and polities are largely gerontocratic and patriarchal, excluding both youth and women, leaving young women to exist in double marginality. Thus, transitional justice processes need to deliberately include youth, especially young women. Additionally, young women’s experiences of conflict, violence or repression are often acutely different from those of young men. Thus, participants suggested that youth involvement ought to be disaggregated by gender, class and ethnicity.⁴⁷ Moreover, Brian Kagoro⁴⁸ cautioned against the superficial inclusion of youth representatives and the adoption of rhetoric about youth engagement, without actually prioritizing youth policy agendas and priorities. In agreement, participants proposed that intergenerational dialogues ought to take the contributions of young people seriously.

The participants suggested that more youth consultations like the Continental Youth Consultation on the AUTJP hosted in Nairobi, Kenya, on 14–15 November 2016 be held. Such gatherings are useful for ascertaining the agendas of young people, providing them with a platform and empowering youth leaders. Ludoh Nkabiti⁴⁹, Deputy Secretary General of the Botswana Movement for Democracy, recommended that youth from various backgrounds, including law and academia, be included.

Despite the large numbers of young people, the vast majority remain unaware of transitional justice processes and aims. Thus, Nkabiti noted that there is a great need for sensitization. Participants suggested that the Youth Division of the AU could take up the role of galvanizing youth around transitional justice issues, raising awareness and stimulating Pan-African solidarity for youth in conflict contexts.

Steven Harageib⁵⁰ noted that in post-authoritarian settings like Namibia and South Africa, the vast majority of young people are experiencing the legacy of apartheid’s unaddressed structural inequalities. Compounding the generational dimension of socioeconomic inclusion, various ethnic and racial groups tend to have varying levels of access to education and employment. Tsholofelo Sesanga⁵¹ noted that if there is a single issue that affects Africa’s young people, it would be the quest for economic emancipation. Other participants noted that political disaffection has ensued among young people as a result of their economic marginality, and that these trends militate against nation-building as they could trigger preventable conflict. Participants also noted that an underexplored consequence of conflict is the question of statelessness among second-generation refugees, many of whom are young. They experience

46 Johanna Boersch-Supan, “The Generational Contract in Flux: Intergenerational Tensions in Post-Conflict Sierra Leone”, *Journal of Modern African Studies* 50(1) (2012): 25–51. The “fallist movements” refer to the #RhodesMustFall and #FeesMustFall student movements in South Africa that opposed financial and racial impediments to university access. See, Vuyisile Msila, “#FeesMustFall Is Just the Start of Change”, *Mail and Guardian*, 21 January 2016, <http://mg.co.za/article/2016-01-20-fees-are-just-the-start-of-change> (accessed 10 April 2016); Nicky Falkof, “South Africa’s Student Revolt”, *New York Times*, 25 October 2015, http://www.nytimes.com/2015/10/26/opinion/south-africas-student-revolt.html?_r=1 (accessed 10 April 2016).

47 M. Ensor, “Drinking the Bitter Roots: Gendered Youth, Transitional Justice, and Reconciliation across the South Sudan–Uganda Border”, *African Conflict and Peace Building Review* 3(2) (2013): 171–194.

48 Comment by Brian Kagoro at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

49 Presentation by Ludoh Nkabiti at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

50 Presentation by Ms Steven Harageib at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa.

51 Comment by Tsholofelo Sesanga at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

stigma at the hands of host communities as well as those of their communities of origin. Therefore, it was agreed that nation-building efforts need to make provisions for young people in this category, and transitional justice mechanisms ought to be designed to address their unique predicaments.

Gender and Transitional Justice

The participants highlighted the reality that transitional justice is neither gender-blind nor gender-neutral, thus it needs to be gender-responsive. The reasons put forward for this gendered approach to justice stem from an awareness of gendered violations such as, *inter alia*, rape as a weapon of war, other conflict-related sexual violations, and the plight of war wives. Consequently, questions of inclusion and gender sensitivity are crucial to designing and implementing effective mechanisms. Further, transitional justice programmes in AU Member States ought to align with the promotion of gender equality in public-sector governance as enshrined in Article 3(6) of the African Charter on Democracy, Elections and Governance.

Participants noted that “gender” tends to be used synonymously with women’s issues and called for an expanded definition and application. Moreover, participants added that there is a tendency to cordon women’s role in transitional justice to that of victimhood. Even though the overwhelming majority of victims of conflicts are women, there is a need to acknowledge that some women are perpetrators and others are actors in the provision of justice.

Prof. Tim Murithi raised crucial questions about the role of toxic masculinities that survive post-conflict contexts.⁵² Scholars have argued that this toxicity is not confined to violent outbursts and have disaggregated dominant and hegemonic masculinities.⁵³ To this end, Brandon Hamber has suggested that:

A power analysis, which is concerned with the invisible rather than visible manifestations of masculinity, moves us away from thinking about masculinity merely as a set of violent and visibly oppressive practices, but rather as an embedded social construct linked to intersectionalities of race, ethnicity and class that can adapt and change. ... This type of thinking is vital if we are to consider masculinity more seriously within societies in transition characterised by the ending of armed conflict and the emergence of new forms of power.⁵⁴

Similarly, participants noted that in the aftermath of disarmament, demobilization and reintegration processes, the men who have rooted their sense of power in fire weapons at times have a crisis of finding an alternative source of power and meaning.⁵⁵ Participants agreed that transitional justice mechanisms ought to address the impact of conflict on masculinities and femininities in ways that affect gender relations in the aftermath of conflict.

Participants recognized that sexual and gender-based violence (SGBV) occurs long before the context of conflict and continues into the post-conflict context. Transitional justice scholars Helen Scanlon and Kelli Muddell argue that, “Neglecting gendered patterns of

52 B. Hamber, “Masculinity and Transitional Justice: An Exploratory Essay”, *International Journal of Transitional Justice* 1(3) (2007): 375–390; J.N. Clark, “Masculinity and Male Survivors of Wartime Sexual Violence: A Bosnian Case Study”, *Conflict, Security and Development* 17(4) (2017): 287–311.

53 R. Connell and J. Messerschmidt, *Masculinities and Crime: Critique and Reconceptualization of Theory* (Lanham, MD: Rowman & Littlefield, 1993).

54 B. Hamber, “There Is a Crack in Everything: Problematising Masculinities, Peacebuilding and Transitional Justice”, *Human Rights Review* 17(1) (2016): 27.

55 For an overview of the scholarship on these dynamics, see, W. Hauge, “Gender Dimensions of Disarmament, Demobilization and Reintegration (DDR)”, Policy File (Oslo: Peace Research Institute, 2016). See also, K.S. Theidon, “Reconstructing Masculinities: The Disarmament, Demobilization, and Reintegration of Former Combatants in Colombia”, *Human Rights Quarterly* 31(1) (2009): 1–34.

abuse entrenches impunity, distorts the historical record, and undermines the legitimacy of transitional justice initiatives, and thus ultimately affects both women's and men's access to justice."⁵⁶ As such, SGBV ought not to be compartmentalized and explored only through the narrow timeframe of the conflict.

Dr Annie Chikwanha opined that transitional justice processes often do not pay attention to the socioeconomic exclusion of women, nor is it seen as an essential step towards attaining justice or healing.⁵⁷ This constricted view inadvertently leads to a gendered hierarchy of violations, with the experiences of men serving as the normative foundation upon which all violations are benchmarked within a society, while those experienced by women are either ignored or provincialized. This elision of the female experience often stems from state-centric or top-down processes. Participants stated that it is thus necessary to integrate women's points of view into the normative frameworks on transitional justice.

Chikwanha noted that at times, traditional and community-based justice mechanisms can also entrench patriarchal norms by excluding women. For example, the Rwandan *Gacaca* process barred Hutu women from receiving compensation because they belonged to the perpetrator community, even in instances in which a Hutu woman was raped during the genocide because she was married to a Tutsi man.⁵⁸ This relegation suggests that such instances of SGBV were not adequately addressed by transitional justice mechanisms that ensued after conflict. While it is crucial to be sensitive to, and respectful and even encouraging of the diverse range of local traditional justice mechanisms, there are complicated and problematic cases. For example, some traditional processes of reconciliation hurt women, such as the payment of daughters as compensation for harm incurred during conflict.

Participants indicated that women tend to access justice with the assistance of non-governmental organizations (NGOs) and through alternative dispute resolution mechanisms. In contrast, the existing structures generally do not protect women's rights. Moreover, some of the institutions responding to gendered aspects of transitional justice lack capacity to provide support as needed, including psychosocial support. Women in rural areas are often embedded in patriarchal social contexts that limit or preclude their participation. Sufiya Bray⁵⁹ thus urged that effective transitional justice interventions in such settings tackle the marginalization of women.⁶⁰

Participants held that the formulation of transitional justice processes needs to take into account the implications of the reintegration of sexual violence perpetrators into the communities in which their victims live. This is not only traumatizing to the victims; it also inhibits them from seeking recourse. Ultimately, this stifles the effective proliferation of justice.

Institutions that are not directly germane to transitional justice processes but that impact victims in visceral ways include healthcare institutions. Participants noted that many of these institutions remain rigid in the face of changing societies and contexts. For example, in some countries women are still required to identify the fathers of children in order to access post-natal care.

56 H. Scanlon and K. Muddell, "Gender and Transitional Justice in Africa: Progress and Prospects", *African Journal on Conflict Resolution* 9(2) (2009): 10.

57 Presentation by Dr Annie Chikwana, 20 October.

58 Ibid.

59 Presentation by Sufiya Bray at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa

60 Presentation by Ms Sufiya Bray at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

This practice is especially retraumatizing in a post-conflict context in which large numbers of women were violated.

Participants also acknowledged the limited inclusion of women in both formal and informal transitional justice processes.⁶¹ For example, one meeting with a women's group is often thought to suffice as an act of including women's perspectives. However, women need to be involved at every level of designing and implementing transitional justice processes. Moreover, there ought to be a diverse array of women's voices so as to be as inclusive as possible.

Irene Kwaga spoke primarily to the Ugandan transitional justice experience and to the recurring issues in that context. In particular, she mentioned the gaps in the law in addressing gender issues, especially around redress for SGBV; the status of and issues related to children born in war; medical interventions, such as for fistula; psychological support; and the legal requirement for evidence of rape.⁶² Transitional justice inventions for women are sporadic and gender concerns are not holistically, consistently or effectively addressed.

Traditional Justice Mechanisms and Transitional Justice

Traditional justice mechanisms (TJMs) tend to be state-centred and not sufficiently reflective of community-based justice innovations. Local rituals and symbols of traditional justice can imbue transitional justice efforts with meaning and legitimacy. Nicole Beardsworth⁶³ noted that, "There is immense wisdom and value in these culturally rooted rituals and ... transitional justice must be conducted in ways that are locally meaningful and culturally-specific." Other participants agreed that transitional justice must be conducted in ways that take on localized forms. Yet, the participants reflected on the meaning of "traditional" justice in the context of universalized notions of justice. Brian Kagoro⁶⁴ argued that all forms of justice are "traditional" to their communities of origin. Thus, internationalized legal systems ought not to enjoy a greater legitimacy in African contexts than autochthonous legal approaches.

In addition to the differences between international and domestic approaches of justice, justice mechanisms differ on the local level between rural and urban communities. The latter are associated with a formal legal system while the former tend to be connected to informal, long-standing traditional practices. The conceptions of justice in rural contexts at times do not lend themselves to the legal frameworks recognized and accommodated by the court system. Rather, the local justice mechanisms are often rooted in home-grown customs and cosmologies. Participants noted that not only are these traditional mechanisms appropriate, but they are also efficient as they cost less and can process a high number of cases swiftly. Thus, the evidence of the efficiency of traditional justice mechanisms prompted questions about the possibility of scaling them up and about the conditions that are conducive to their success.

61 Ibid.

62 Presentation by Ms Irene Kwaga at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

63 Presentation by Nicole Beardsworth at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

64 Presentation by Brian Kagoro at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

Across the continent, in countries as diverse as Malawi, Nigeria, Uganda, Zambia, Mozambique, Niger, South Africa, Rwanda and Namibia, TJMs have long histories predating colonialism, some practices remain in use in the contemporary context and a few countries have incorporated TJMs into hybrid mechanisms. Jackson Odong drew attention to Uganda's time-honoured TJMs, including *Mato Oput* in Acholi, *Ailuc* in Teso, and *Kayicuk* in Lango.⁶⁵ Many of these practices persist despite the introduction of foreign justice systems during colonialism, partially due to the perception among locals that the trial and conviction of the perpetrator does not sufficiently deal with the victim's loss, unlike the restorative justice that traditional mechanisms provide.

To this end, Odong explicated the Acholi TJMs that gained international attention in the 2006 Juba peace talks to serve as examples of the inclusion of a TJM in transitional justice processes.⁶⁶ The TJMs, namely *Culo Kwor*, *Gomo Tong* and *Mato Oput*, were recognized as complementary to the formal legal transitional justice processes. *Culo Kwor*, meaning compensation for the bones and blood for the deceased, is a practice that deals with murder.⁶⁷ The Acholi consider murder a matter of clan significance, elevating it from an individual issue. Administered by the Mediation and Reconciliation Committee of the Acholi Chiefdom comprised of women and men, all parties in a conflict are invited to testify. It aims to elicit admission of guilt, facilitate forgiveness, create a setting through which symbolic compensation can be delivered, and ultimately restore peace in the community. *Gomo Tong*, meaning the bending of the spear, is similar to *Culo Kwor*, but includes a third party from a neutral clan. *Mato Oput*, meaning blood compensation, is an elaborate ceremony that "addresses relationships between the perpetrator and the victim through mediation, leading to reconciliation based on truth-telling, admitting the wrong done, accepting responsibility for the offence, and accepting to compensate the victim".⁶⁸

In sum, TJM shares transitional justice principles including truth-telling, punishment, reparations and reconciliation. However, despite TJMs' rich cultural heritage, they have limitations. Traditionally designed to settle crimes that take place on a community level, the TJMs' ability to address mass atrocities has been questioned. The role of traditional leaders who administer these local forms of justice has come under scrutiny as they are not immune to politicization, which can erode their authority. TJMs' treatment of women and children can at times be at odds with democratic principles. Further, on occasion, religious institutions obstruct TJMs due to their opposing cosmological foundations and divergent rituals. Finally, the relationship between formal and informal justice processes is occasionally strained. Notwithstanding these shortcomings, Africa's heterogeneity requires multiple transitional justice mechanisms, and some settings would benefit from TJMs. Their efficacious myth-making power remains unparalleled as an instrument of social cohesion.

4.2. The Practicalities of Transitional Justice

In addition to the challenges of inclusivity, post-conflict reconstruction is an expensive undertaking. As Bonaventure Guedegbe noted, the work of transitional justice requires ascertaining the depths of the violations committed, and therefore adequate technical resources

⁶⁵ Presentation by Mr Jackson Odong at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

⁶⁶ The Acholi TJM was addressed under Agenda No. 3 on Accountability and Reconciliation.

⁶⁷ Presentation by Mr Jackson Odong, 20 October 2018.

⁶⁸ Ibid.

must be made available. However, in the rubble of violent conflict and authoritarianism there are limited monetary and logistical resources for the arduous task of transitional justice. Thus, financial and technical support tends to come from external sources. Ismael Muvingi has interrogated the ethical dilemmas inherent in the competing priorities of donors and civil society actors in donor-driven transitional justice programmes.⁶⁹ In particular, he has highlighted the disjunctures between the “retributive international norms and standards preferred by donors” and local practices based on conciliatory aims and the different conceptions of justice on the ground.⁷⁰

In concurrence, Ambassador Osman Keh Kamara⁷¹, representative of Sierra Leone, stated that funding limitations can impact the extent of the justice that can be achieved. In this regard, Sierra Leone served as an apt example. After a civil war that led to an estimated 70,000 casualties, the warring parties signed the 1999 Lomé Peace Agreement.⁷² Established by the Sierra Leonean government and the United Nations, the Special Court of Sierra Leone (SCSL) prosecuted perpetrators of the most egregious human rights violations during the civil war. Amnesty was granted for crimes committed between 1991 and 1996, and some of the rebel combatants were allowed to take up government posts. The transitional justice programme was funded by the international community on a voluntary basis and partly by the Sierra Leonean government.⁷³

Despite the significant strides Sierra Leone made with the SCSL and the Truth and Reconciliation Commission (TRC), funding shortages ultimately shaped and limited the country’s transitional justice processes. Few perpetrators were brought to justice due to these funding restrictions. The funding determined the timeframe of the country’s transitional justice programme, the number of perpetrators tried, the kind of crimes that could be tried and also restricted the number of victims who participated. Participants at the Forum noted that, for example, perpetrators of gendered crimes that took place during the civil war were not tried. They pointed out that the Management Committee of the SCSL was based in New York City, USA, and thus removed from the practical challenges of implementing the kind of justice it envisioned. Moreover, the shortages in funding impeded the functioning of the TRC and special courts, which need predictable funding in order to operate effectively. International donors thus played a major role in setting the priorities of the programmes. Further, participants noted that the financial cost of certain transitional mechanisms can be exorbitant, without significant local impact. The processes employed in Sierra Leone, for example, where only thirteen people were indicted, seem very expensive and stand in contrast to the very limited reparations provided to victims.

In cases in which countries have been able to finance their own transitional justice programmes, challenges have limited the design of transitional justice processes. For example, Egypt’s post-Arab Spring transitional justice mechanisms focused narrowly on violations that took place during the revolution, a period that lasted for two weeks and three days. Representative of Egypt, Ambassador Wael M. Attiya⁷⁴, noted that the process included a six-month fact-

69 I. Muvingi, “Donor-Driven Transitional Justice and Peacebuilding”, *Journal of Peacebuilding and Development* 11(1) (2016): 10–25.

70 Ibid., 21.

71 Presentation by Amb. Osman Keh Kamara at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

72 M. Kaldor with James Vincent, *Case Study: Sierra Leone: Evaluation of UNDP Assistance to Conflict-Affected Countries* (New York: United Nations Development Programme, 2006), 4.

73 Centre for the Study of Violence and Reconciliation, *Justice in Perspective – Truth and Justice Commission, Africa – Sierra Leone* (Cape Town: CSVSR, 2008).

74 Presentation by Amb. Wael M. Attiya at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

finding commission that was financed exclusively by the Egyptian state budget. The Egyptian government did not accept funding from abroad for its transitional justice processes in order to avoid “strings attached”, such as privileging donor priorities, thus enabling the Egyptian process to diminish external influence.

It is important to note that the scope of the transitional justice agenda is not simply determined by the size of the budget. South Africa provides a different case of non-donor related constraints to the effectiveness of transitional justice. Various aspects of South Africa’s transitional justice process have proved exemplary and prevented violence, including its relatively wide timeframe of 1963 to 1990. However, the South African government’s approach to reparations and its related identification of victims, in light of its significant TRC budget that was mostly funded by the national government, remain areas of controversy.⁷⁵

Even though the examples above demonstrate that domestically sourced funding is not necessarily a panacea, participants noted that controlling the purse strings does bring significant benefits, such as the agency to set the agenda and priorities of a transitional justice programme. Participants thus encouraged external funders of transitional justice programmes to embrace a funding framework that enables local actors to define their own transitional justice agendas.

5. KEY STAKEHOLDERS: TOWARDS A CONTINENTAL TRANSITIONAL JUSTICE COMMUNITY OF PRACTICE

5.1. AU Member States, AU Organs and RECs

A high degree of cooperation has been required between a remarkable array of international and local organizations in post-conflict contexts and peacebuilding efforts. AU Member States are critical actors in the provision of transitional justice to post-conflict societies. Thapelo Mokushane⁷⁶ of the TRC Unit in the South African Department of Justice enumerated the ways the South African government is responding to the challenges of helping a divided country move forward after apartheid. Noting that the TRC Unit is not an extension of the TRC, Mokushane stated that the Unit was designed to monitor and report to parliament on an ongoing basis the progress on TRC processes. In addition to administering financial reparations to victims, the Unit has collaborated with the Ministry of Arts and Culture to erect monuments and symbols to honour national heroes who contributed to the liberation struggle. It administers TRC bursaries to a thousand citizens, extends medical and counselling measures to victims, has exhumed and facilitated the burial of 500 people who went missing during apartheid, has completed the exhumation of 43 executed political prisoners, and implements community rehabilitation efforts to repair property that incurred apartheid-related damage between 1960 and 1994.

⁷⁵ It identified roughly 22,000 victims who each received just over R30,000 when the TRC recommended a larger sum. The TRC itself had problematically framed victim violation based on a “narrow definition of human rights violation” as well as on those who testified. W. Buford and H. van der Merwe, “Reparations in Southern Africa”, *Cahiers d’études africaines* 44(1–2) (2004): 269.

⁷⁶ Presentation by Thapelo Mokushane at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

Tarig Mubarak Magzoub⁷⁷ of Sudan noted that while Sudan does not have a similar TRC Unit, the Advisory Council on Human Rights in Sudan might be the most appropriate body to handle the country's transitional justice matters. He averred that the Comprehensive Peace Agreement that ended the war between the South of pre-session Sudan and the national government has informed the constitution-making processes in the country.

Meseret Asrat⁷⁸ of Ethiopia reflected on the transitional justice efforts in his country that were designed to remedy the human rights abuses, summary executions and forced disappearances that took place during the Derg regime. The government established in the aftermath of the 1991 revolution adopted a new constitution in 1995 that enshrined human rights as a preventative measure against future atrocities, and established a special office to prosecute the crimes committed during the period of authoritarian rule. It took retributive action against perpetrators and offered amnesty to some with the aim of attaining sustainable peace. However, the process had shortcomings. Problems with funding meant that there were insufficient resources to help victims. Investigations into violations as well as institution-building took longer than expected to adequately address the abuses suffered.

In light of the varied experiences of Member States, participants agreed that effective transitional justice requires collaboration between Member States and various stakeholders. Thompson Ogunlowo⁷⁹ of Nigeria aptly commented that in addition to governments, citizens are important stakeholders who are also responsible for the implementation of transitional justice processes. Moreover, participants agreed that Member States have the ability to ensure that processes are not externally-driven but represent local priorities and realities.

On a continental level, an African transitional justice framework will most likely rely on the principle of subsidiarity, akin to the precedent of the African Peace and Security Architecture (APSA). The principle “means that a central authority should play a secondary role, performing only those functions that cannot be performed at a more local level”.⁸⁰ Through the APSA, the AU and the RECs are guided by the same principle in sharing the responsibilities of meeting the peace and security needs of the continent.⁸¹ Ideally, subsidiarity allows for a division of responsibilities on the basis of the comparative advantages of the stakeholders, but in practice it has been incoherently applied and national sovereignty can serve as trump card for collective efforts. Notwithstanding its shortcomings, APSA is the most appropriate body to reflect upon and learn from its experiences with collaborations as it currently covers aspects of transitional justice processes on the continent.

However, participants noted the confusion, discord and competition that exists between international institutions and other stakeholders in the peacebuilding and transitional justice field. In particular, Achieng Akena⁸² highlighted the need to interrogate and clarify the terms upon which the framework will hinge, including “collaboration” and “subsidiarity”. Based on a shared understanding of these key concepts, Boniface Okere⁸³ advised that a finely

77 Presentation by Mr Tarig Mubarak Magzoub at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

78 Presentation by Mr Meseret Asrat at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

79 Presentation by Thompson Ogunlowo at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

80 L. Nathan, “Will the Lowest be First? Subsidiarity in Peacemaking in Africa”, presented at the International Studies Association 2016 Annual Convention, Atlanta, USA, 16–19 March 2016, 1.

81 The recognized RECs include the Intergovernmental Authority on Development (IGAD), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of Central African States (ECCAS) and the Southern African Development Community (SADC).

82 Presentation by Ms Achieng Akena at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

83 Presentation by Mr Boniface Okere at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

attuned strategy of partnership can encourage synergy in the AU organs and promote cross-fertilization in a network of transitional justice actors.

The participants noted that the development of the transitional justice policy by the AU is a laudable step that can provide guidance to the RECs. The AUTJP's potential to facilitate synergistic collaboration was highlighted. Some RECs have begun to see the Policy, still only in draft form, in this light. For example, ECOWAS, comprising 15 mainly West African states, has expressed its aim to build its regional transitional justice programme on the basis of the AUTJP's template, while contextualizing it to the various needs of the region. The representative of ECOWAS at the Forum, Dr Eyesan Okorodudu⁸⁴ noted that the REC has been involved in several peace agreements in the region through which it has developed systems to address post-conflict contexts. It has also aimed to adopt aspects of the APSA's strategies, including a restorative justice approach and employing preventive diplomacy. He stated that ECOWAS recognizes the need for a holistic approach to transitional justice, including judicial processes.

Another important AU organ in the continental transitional justice network is the African Court on Human and Peoples' Rights (AfCHPR). Established by the protocol to the African Charter on Human and Peoples' Rights, the AfCHPR's mandate is to complement the African Commission on Human and Peoples' Rights (ACHPR) in protecting the rights enshrined in the African Charter. As of 2017, 30 states had ratified the Court protocol, while only eight had submitted documents allowing the Court to be accessed by individuals and NGOs within the states' jurisdiction. The functions of the Court are to interpret contentious issues, provide advice and settle matters amicably. It is accessible to the ACHPR, state parties, intergovernmental bodies, NGOs and individuals. General remedies offered by the Court include compensation and a declaration of release of people held unlawfully.

The specific roles of the Court in implementing transitional justice are to support ongoing processes for the implementation of transitional justice processes. For example, as Meredith Lwanga⁸⁵ highlighted, the Court participated in the establishment of the Special Court in South Sudan.⁸⁶ Other functions relevant to transitional justice include contributing to the expedited adoption of the AUTJP; handling relevant cases and issuing advisory opinions; following up with the Executive Council of the AU to ensure the implementation of judgments; and ensuring that Member States ratify the Court protocol to enable public access to the Court. Given the centrality of providing victims with access to justice, it is important to allow the Court to provide legal support for individuals and CSO applicants.

5.2. National Human Rights Institutions

Charged with the responsibility to promote and protect human rights at state level, NHRIs are official independent entities and receive sponsorship and funding from national governments. Africa has 47 NHRIs, 21 of which are fully compliant with the United Nations Human Rights Commission's Paris Principles relating to the status of National Institutions for the Promotion and Protection of Human Rights and nine are partially compliant.⁸⁷ The remaining 14 NHRIs

84 Presentation by Mr Eyesan Okorodudu, ECOWAS, at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

85 Presentation by Ms Meredith Lwanga at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

86 Presentation by Ms Meredith Lwanga at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

87 Presentation by Mr Gilford Kimathi Kithure at the Continental Forum of Transitional Justice on 19 October 2017 in Johannesburg, South Africa.

have not complied.⁸⁸ Gilford Kimathi Kithure⁸⁹ noted that NHRIs abet the state to implement and monitor its human rights duties. They also make remedies available when human rights violations occur.

Nicole Beardsworth noted that transitional justice processes can often be thought off as an event instead of a process; for example, we speak of the South African process “ending” in 1998 with the submission of the TRC Report. However, she noted that transitional justice ought to be seen as an open, ongoing process between the state and citizens. In light of the independence of NHRIs, they have the potential to play a crucial role in serving as a conduit between the two. By speaking truth to power, NHRIs can serve civic interests on a national level. Nevertheless, the participants acknowledged the limitations of NHRIs, including their lack of power to implement their findings and recommendations. They thus succeed at producing vital knowledge rather than policy. Moreover, they are sensitive to funding constraints and other forms of obstruction threatened by governments.

Regardless, NHRIs play a crucial role in transitional justice. In his presentation, Kithure noted that they are well-suited to design and implement reparations mechanisms, facilitate prosecutions, champion the participation of victims, carry out nationwide consultations on transitional justice, document and archive human rights violations, work alongside civil society actors to shape the transitional justice discourse and assist victims legally.

Morocco’s was offered as an example of an effective NHRI fulfilling an important role in the country’s transitional justice process. In the aftermath of the 16-year war (1975–1991) between the Kingdom of Morocco and the Polisario Front, a series of peace initiatives were established, including a truth commission designed to investigate human rights violations that occurred during that period.⁹⁰ Although the Western Sahara Peace Process has failed to attain sustainable peace, the Moroccan NHRI, *Conseil National des Droits de l’Homme* (CNDH), provided valuable assistance for victims. In 1999, the CNDH issued a report on 112 missing persons, recommended that the victims receive reparations and conducted research on the forced disappearances.⁹¹ It also petitioned parliament to establish a commission of inquiry to examine the suspects responsible for the forced disappearances and the instances of torture. Furthermore, it advised the national government regarding the investigation of its officials who were complicit in gross violations of human rights, and implemented the collective reparations for communities that suffered from systemic abuses.⁹²

Other cases were examined. For instance, despite the significant resource constraints on the Sierra Leonean transitional justice processes, its NHRI has been charged with continuing the TRC’s mandate by following up on its recommendations. As such, the NHRI represents an opportunity for increased local ownership over Sierra Leone’s transitional justice processes. Chair of the Burundian NHRI, Jean-Baptiste Baribonekeza⁹³, noted that the NHRI he leads contributed to drafting the law that created the TRC in Burundi, examined the commissioners, helped process cases and organized tools for transitional justice. As TRCs are temporary, it was noted that NHRIs are best placed to carry the institutional legacy of commissions.

88 United Nations Development Programme, “Study on the State of National Human Rights Institutions (NHRIs) in Africa”, 2016, <http://www.nanhri.org/2016/11/01/study-on-the-state-of-national-human-rights-institutions-nhris-in-africa/> (accessed 10 March 2018).

89 Presentation by Gilford Kimathi Kithure at the Continental Forum on Transitional Justice on 20 October 2017 in Johannesburg, South Africa.

90 Presentation by Mr Gilford Kimathi Kithure, 19 October.

91 Ibid.

92 Ibid.

93 Presentation by Jean-Baptiste Baribonekeza at the Continental Forum on Transitional Justice on 19 October 2017 in Johannesburg, South Africa.

Finally, the participants cautioned that NHRIs are most effective when political will exists in the government, and in a setting in which there are strong public institutions.

5.3 Civil Society Organizations

According to the Economic, Social and Cultural Council, the advisory organ to the AU comprised of African CSOs, the latter include social groups representing special interest groups (for example, women, children, persons with disabilities or the elderly), professional groups, NGOs and cultural organizations on the continent or in the African Diaspora. They are a crucial resource of knowledge, and they play an important role in the delivery of transitional justice programmes at national and local levels. As Annah Moyo-Kupeta⁹⁴ expounded, CSOs provide independent services in transitional justice processes and receive information that TRC commissioners, for example, may not receive from victims due to lack of trust of the process and mechanism that may be established. Citing CSVR's role in transitional justice processes, Moyo highlighted CSOs' advocacy and research work that leads to policy recommendations that help craft policy that resonates with the realities of affected communities on the ground. Given the competing priorities of donors, states and local communities, it is increasingly difficult yet imperative for CSOs to be imbedded in the experiences and needs of the communities they purport to serve. Sufiya Bray⁹⁵ highlighted the need for more CSO collaboration and to strengthen their networks in order to avoid the duplication of efforts. As the participants exchanged best practices and strategic errors made, they emphasized the importance of investing in relationships with donors, governments and the relevant bodies within the AUC. By adopting non-confrontational methods, CSOs have been able to form strategic partnerships that have yielded fruit for victims.

A case in point was presented by Roselyn Hanzi⁹⁶. She stated that in Zimbabwe, lawyers are playing a crucial role as civil society actors in the transitional justice processes, despite the suboptimal conditions in which the needs of victims are often marginalized. In this context, a broad coalition of 48 CSOs formed a transitional justice working group in 2003.⁹⁷ The CSOs adopted a division of labour strategy that relied on the strengths of each organization. Accordingly, the lawyers in Zimbabwe worked with victims of violence, litigating on their behalf to demand damages for police brutality and other abuses of power. They also empowered communities with knowledge by creating awareness of the rights enshrined in the 2013 constitution, and helped them seek remedy and reparations.

They have also engaged directly with state institutions involved in transitional justice processes to advocate for reforms. Other strategies this coalition of CSOs embarked upon included drafting parallel legislation and working with the Human Rights Commission to lessen the load of the government where it lacked capacity. Moreover, they engaged with the legislature to ensure that its laws conform with the constitution, and with any government agency willing to work with CSOs. The aim of the working group has been to reorient the national institutions to adopt a human rights approach. The Zimbabwean case reveal that CSOs can mobilize and formulate a transitional justice roadmap in the midst of a challenging political environment. In Uganda, lawyers are also using strategic litigation, writing policy briefs around transitional

⁹⁴ Presentation by Ms Annah Moyo-Kupeta at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

⁹⁵ Comment by Sufiya Bray at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

⁹⁶ Presentation by Roselyn Hanzi at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

⁹⁷ Presentation by Ms Roselyn Hanzi at the Continental Forum on Transitional Justice on 21 October 2017 in Johannesburg, South Africa.

justice, collaborating with academics to push a human rights agenda, and initiating private meetings with government officials where CSOs meet to talk outside the purview of the press. CSOs collaborate by deferring to the government to lead, while they provide knowledge and advice in the background. Notwithstanding these significant strides, CSOs in Uganda still face significant setbacks, from donors freezing funds to theft of computers and external hard drives from their offices.

Dr Noha Aboueldahab noted that although it is not an African setting, the transitional justice attempts in the Syrian crisis may offer insights into CSOs operating in a hostile environment. CSOs in Syria were recognized as exemplary in their tireless efforts at documenting violations that occur on a daily basis in the midst of conflict. This documentation process was identified as a mechanism of transitional justice, as some of the documentation has supported universal prosecutorial processes. The Syrian case highlights the key role that activist lawyers and civil society more broadly can play in addressing justice deficits, even in a climate of ongoing conflict. Given that documentation processes are accessible and affordable, they are an appropriate mechanism to use while conditions are defective. Participants acknowledged that documentation concentrated on the experiences of the victims, thus reflecting a core tenet of an expansive approach to transitional justice.

6. RECOMMENDATIONS

The Forum recommends that the AU Member States:

1. Ensure that transitional justice processes are inclusive in a way that does not politicize or permanently encode the identities of victims and perpetrators. Instead, transitional justice mechanisms must transform both categories into citizens.
2. Implement socioeconomic transitional justice measures to curb deprivations along the lines of group identities such as race, religion, ethnicity or generation. In particular, it is recommended that eliminating youth unemployment forms part of the state's transitional justice conflict prevention measures.
3. Ensure that transitional justice processes are informed primarily by the lived realities of victims and affected communities, and that their formulation is locally driven and not driven mostly by external experts.
4. Ensure that transitional justice mechanisms are not mainly state-centric through encouraging citizenship-building and participation.
5. Ensure that the transitional justice agenda is gender sensitive and that the inclusion of women is substantive and not merely procedural.
6. Recognize community-level transitional justice and healing processes and encourage local ownership. Where these processes discriminate against women, actively address the patriarchal tendencies.
7. Engage leaders in a process of unlearning patriarchy and violent masculinities, especially if leaders were involved in the preceding conflict.
8. Recognize and address the collective trauma experienced during conflict or during the period of authoritarian rule. Acknowledge the long-term effects of exposure to violence.
9. Make use of education systems in peacebuilding efforts.
10. Establish a Standing Committee in parliament to assist the implementation of transitional justice processes.
11. Provide legal assistance to victims through the Ministry of Justice.

12. Strengthen judicial systems as part of the infrastructure for transitional justice, so they can effectively undertake their responsibilities.
13. Address colonial legacies of continuing patterns of domination and repression.

The Forum recommends that the AU and its Organs:

1. Adopt and popularize the AUTJP and disseminate it across the continent to all the stakeholders of transitional justice processes.
2. Map out the key stakeholders in continental transitional justice processes in order to encourage coherence in the network of actors in Africa's transitional justice efforts. Ensure that the AUTJP promotes cooperation.
3. Ensure that the AUTJP is implemented as a guiding tool for states embarking on transitional justice.
4. After the adoption of the AUTJP, it is recommended that the AU provide technical and other appropriate forms of support to states developing their transitional justice programmes.
5. Ensure that the AUTJP endorses tailored transitional justice mechanisms.
6. Establish a Continental Fund for Transitional Justice, to help finance the transitional justice processes of Member States and thereby ensure that they are enabled to set their own agendas and priorities, by:
 - a. Finding local funders and supporters.
 - b. Diminishing reliance on external funders.
7. Nurture and develop an African community of experts and community of practice regarding transitional justice.
8. Explore the potential of redressing the historical injustices perpetrated by the colonial governments on African peoples.
9. Collaborate and partner with the RECs and other national institutions in transitional justice implementation in AU Member States.
10. Craft frameworks for effective collaboration with other bodies working towards transitional justice in Africa, and clarify the roles to avoid confusion, redundancy and to observe the principle of subsidiarity.
11. Acknowledge that the African Court of Justice and Human Rights should have the primary responsibility of addressing international crimes on the continent, and only refer cases to the ICC that it is unable to handle.
12. That the African Union Commission on International Law (AUCIL) should formulate legal solutions to address the root causes of conflict and assist Member States dealing with transitional justice issues.

The Forum recommends that RECs:

1. Consider, in interconnected, cross-border conflicts, designing a secondary regional approach to transitional justice to supplement the state's mechanisms, in order to address the transnational dimensions of conflict and authoritarian repression. For example, address the needs of refugees and stateless second-generation youth.
2. Be sensitive to geopolitical and geostrategic causes and triggers of instability.

The Forum recommends that NHRIs:

1. Provide for victims not defined as such by truth commissions and other transitional justice mechanisms, noting that often truth commissions face practical funding challenges that affect how victims are defined.
2. Report on transitional justice processes coherently.

The Forum recommends that CSOs:

1. Ensure that transitional justice processes are substantial and not merely superficial.
2. Design holistic, victim-centred initiatives.
3. Encourage the emergence of citizen-led initiatives.
4. Consider the psychological architecture of each society, and:
 - a. Design transitional justice mechanisms that address the post-conflict trauma and the psychosocial root causes of the violence or repression.
 - b. Provide psychosocial support for both victims and perpetrators as part of transitional justice processes.
 - c. Create sensitization programmes that destigmatize mental illness, especially the kind stemming from war. Create programmes that help victims and others heal.
5. Ensure that the CSOs' conceptions of justice and accountability are aligned with the understandings of justice among victims and survivors.
6. Understand the local context and the mechanisms that are already available.
7. Manage the expectation of the communities in which CSOs operate. By overpromising, CSOs risk retraumatizing conflict-affected communities. For example, promising reparations without the financial capacity to deliver creates unmet expectations that compound the initial trauma.
8. Create gender-inclusive transitional justice interventions and prioritize the inclusion of women from different ethnic, class, racial, religious, generational and geographic backgrounds.
9. Include youth from various sectors, including the faith sector, to:
 - a. Participate in setting the youth agenda for transitional justice.
 - b. Encourage youth to spearhead sensitization campaigns about transitional justice on social media.
10. Actively shape the mainstream transitional justice discourse to promote African empirical realities and theorization by:
 - a. Documenting experiences with transitional justice processes in order to create a repository from which stakeholders in other communities and countries can consult and learn.
 - b. Reflect on the initiatives that have worked and repeat them where appropriate.
 - c. Design an agenda of producing knowledge based on the CSOs' access.
 - d. Identify concrete advocacy targets.
11. Build bridges to address the disconnect between policy-level organizations and community-based ones.

The Forum recommends that academics:

1. Conduct research on successful local, community-led processes that are not donor-funded or -led, and strategize methods of replicating these processes.
2. Working together with CSOs, investigate and document the wide range of transitional justice processes taking place across the continent in order to create a repository that stakeholders in new post-conflict and post-authoritarian settings can consult.
3. Conduct research that foregrounds gender by:
 - a. Determining how gender-responsive transitional justice mechanisms in Africa are.
 - b. Incorporating masculinity discourses in transitional justice research.
 - c. Devising transitional justice theories that situate women's experiences in their socioeconomic and politico-legal contexts.
 - d. Developing an intersectional approach that accounts for gender, ethnicity, race, class and generation in the conceptualization of transitional justice mechanisms.

The Forum recommends that donors:

1. Be more attentive to the context of the transitional justice processes that they fund.
2. Develop a partnership model with other funders and national transitional justice actors.
3. See themselves as equal partners and be more open to voices of other partners such as government, civil society and citizens.
4. Fund transitional justice processes as a whole rather than earmarking funding for only specific projects.

7. BIBLIOGRAPHY

Articles and Books

Bloxham, D. 2002. "'The Trial That Never Was': Why There Was No Second International Trial of Major War Criminals at Nuremberg", *History* 87(285): 41–60.

Boersch-Supan, J. 2012. "The Generational Contract in Flux: Intergenerational Tensions in Post-Conflict Sierra Leone", *Journal of Modern African Studies* 50(1): 25–51.

Bohrer, Z. 2016. "International Criminal Law's Millennium of Forgotten History", *Law and History Review* 34(2): 393–485.

Brankovic, J. and H. van der Merwe. 2014. "Transitional Justice in Post-Conflict Societies: Conceptual Foundations and Debates", in *Moving Beyond: Towards Transitional Justice in the Bangsamoro Peace Process* (Davao City: forumZFD Philippines), 10–15.

Buford, W. and H. van der Merwe. 2004. "Reparations in Southern Africa", *Cahiers d'études africaines* 44(1–2): 263–322.

Clark, J.N. 2017. "Masculinity and Male Survivors of Wartime Sexual Violence: A Bosnian Case Study", *Conflict, Security and Development* 17(4): 287–311.

- Connell, R. and J. Messerschmidt. 1993. *Masculinities and Crime: Critique and Reconceptualization of Theory* (Lanham, MD: Rowman & Littlefield).
- Ensor, M. 2013. "Drinking the Bitter Roots: Gendered Youth, Transitional Justice, and Reconciliation across the South Sudan-Uganda Border", *African Conflict and Peacebuilding Review* 3(2): 171–194.
- Grono, N. 2006. "What Comes First, Peace or Justice?" International Crisis Group, 27 October, <https://www.crisisgroup.org/africa/horn-africa/uganda/what-comes-first-peace-or-justice> (accessed 30 October 2017).
- Hamber, B. 2007. "Masculinity and Transitional Justice: An Exploratory Essay", *International Journal of Transitional Justice* 1(3): 375–390.
- _____. 2016. "There Is a Crack in Everything: Problematizing Masculinities, Peacebuilding and Transitional Justice", *Human Rights Review* 17(1): 9–34.
- Hauge, W. 2016. "Gender Dimensions of Disarmament, Demobilization and Reintegration (DDR)", Policy File (Oslo: Peace Research Institute).
- Hope, K.R. 2015. "Bringing in the Future in Kenya: Beyond the 2010 Constitution", *Insight on Africa* 7(2): 91–107.
- Kaldor, M. with James Vincent. 2006. *Case Study: Sierra Leone: Evaluation of UNDP Assistance to Conflict-Affected Countries* (New York: United Nations Development Programme).
- Kelsall, T. 2008. "An Introduction to Some Issues in Transitional Justice", Nordiska Afrikainstitutet Lecture Series on African Security, <http://www.diva-portal.org/smash/get/diva2:610681/FULLTEXT01.pdf> (accessed 13 March 2018).
- Ladisch, V. 2013. "Children and Youth Participation in Transitional Justice Processes", *Journal of the History of Childhood and Youth* 6(3): 503–513.
- Mamdani, M. 2015. "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa", *Politics and Society* 43(1): 61–88.
- _____. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press).
- Muvingi, I. 2016. "Donor-Driven Transitional Justice and Peacebuilding", *Journal of Peacebuilding and Development* 11(1): 10–25.
- Scanlon, H. and K. Muddell. 2009. "Gender and Transitional Justice in Africa: Progress and Prospects", *African Journal on Conflict Resolution* 9(2): 9–28.
- Selim, Y. and T. Murithi. 2011. "Transitional Justice and Development: Partners for Sustainable Peace in Africa?" *Journal of Peacebuilding and Development* 6(2): 58–72.

Theidon, K.S. 2009. “Reconstructing Masculinities: The Disarmament, Demobilization, and Reintegration of Former Combatants in Colombia”, *Human Rights Quarterly* 31(1): 1–34.

Vinjamuri, L. and J. Snyder. 2004. “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice”, *Annual Review of Political Science* 7(1): 345–362.

African Union Resolutions, Policies and Documents

African Charter on Democracy, Elections and Governance

African Charter on Human and Peoples’ Rights

Report on the African Union Commission Consultation with African Union Member States on Transitional Justice in Africa, 12–13 September 2011, Cape Town, South Africa

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

United Nations Documents

Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (3 August 2004).

United Nations Development Programme, “Study on the State of National Human Rights Institutions (NHRIs) in Africa”, 2016, <http://www.nanhri.org/2016/11/01/study-on-the-state-of-national-human-rights-institutions-nhris-in-africa/> (accessed 10 March 2018).

Other Documents

Centre for the Study of Violence and Reconciliation. 2008. *Justice in Perspective: Truth and Justice Commission, Africa – Sierra Leone* (Cape Town: CSVVR).

Falkof, N. 2015. “South Africa’s Student Revolt”, *New York Times*, 25 October, http://www.nytimes.com/2015/10/26/opinion/south-africas-student-revolt.html?_r=1 (accessed 10 April 2016).

Maguire, P. 1995. “Nuremberg: A Cold War Conflict of Interest’ (PhD Diss., Columbia University).

Msila, V. 2016. “#FeesMustFall Is Just the Start of Change”, *Mail and Guardian*, 21 January, <http://mg.co.za/article/2016-01-20-fees-are-just-the-start-of-change> (accessed 10 April 2016).

Nathan, L. 2016. “Will the Lowest be First? Subsidiarity in Peacemaking in Africa”, presented at the International Studies Association 2016 Annual Convention, Atlanta, USA, 16–19 March.

Sharife, K. 2009. “Landmark Ruling Allows Apartheid Victims to Sue Multinationals”, *African Business* 354: 34–36, 38.

