

TJ PROCESSES AND THEIR CONTRIBUTION TO THE FIGHT AGAINST IMPUNITY & STRENGTHENING THE RULE OF LAW IN THE REGION

**HIGH LEVEL REGIONAL CONFERENCE ON JUSTICE AND GOOD GOVERNANCE
COMBATING IMPUNITY & UPHOLDING HUMAN RIGHTS AS CONTRIBUTIONS TO PEACE AND
SECURITY**

13-15 MAY 2019

**CHRIS GITARI,
ICTJ, HEAD OF OFFICE**

TRANSITIONAL JUSTICE IN AFRICA

- AFRICA Union Policy definition of transition and transitional justice
 - *Rather than referencing a particular time period, **transition** refers to the journey of societies with legacies of violent conflicts, systemic or gross violations of human and peoples' rights towards a state of sustainable peace, justice and democratic order.*
 - ***Transitional justice** refers to the various (formal and traditional Or non-formal) policy measures and institutional mechanisms that societies, through an Inclusive consultative process, adopt in order to overcome past violations, divisions and Inequalities and to create conditions for both security and democratic and socio-economic transformation.*

PRINCIPLES THAT UNDERPIN THE TJ POLICY

1. African Leadership through African Governments (Strategic Leadership And Guidance, Resource Mobilization, Solidarity etc)
2. National And Local Ownership
3. Inclusiveness, Equity And Non-discrimination
4. African Shared Values (Peace And Security, Non-impunity, Reconciliation, Human Rights, Peoples Rights)
5. Context Specificity – The Right To Choose The TJ Mechanism(s) Based On Context
6. Synergizing, Sequencing And Balancing TJ Elements- Balancing Peace/Reconciliation And Responsibility And Accountability...aiming To Achieve A Compromise Between Retributive Criminal Justice And Reconciliation
7. Due Regard To Gender Dimensions Of Violations And TJ Processes
8. Cooperation And Coherence- Between Processes And Between Actors
9. Capacity Building

TRANSITIONAL JUSTICE PROCESSES IN AFRICA

- The experiences of TJ on the continent show the wide Range of judicial and non-judicial options available to facilitate the transition from conflict and violence to peace and justice. Many of these approaches were new innovations in policies and practice, which have contributed to shaping the TJ field, and include reconciliation, reintegration of fighting forces, reconstruction programmes, accountability measures and investigation commissions. (ACPHR STUDY OF TJ IN AFRICA par 28)
- There are three concerns in transitional processes: 1) the cessation of ongoing violence and violations due to armed conflicts and the provision of remedial measures for victims; 2) the institutionalisation of legislative and institutional measures and reforms and 3) the establishment of A rules-based political system able and willing to enforce these legislative and institutional measures (ACPHR STUDY OF TJ IN AFRICA par 28)

TRANSITIONAL JUSTICE PROCESSES IN AFRICA

- Truth through commissions of inquiry or investigative truth Commissions; (Kenya)
- Accountability through, among others, prosecutions (DRC)
- Or other forms of accountability as well as attempts to undertake vetting And lustration; (Kenya)
- Provide redress for victims through reparations programmes (South Africa)
- Make use of and tap into local and community-based processes of justice, (Uganda)
- Initiate reconciliation programmes and national dialogue aimed at rebuilding social relationships and national consensus; (Rwanda) and
- Provide for and initiate institutional reforms for the democratic and transformative remaking of the political and socioeconomic systems of Governance (all)

KEY ACHIEVEMENTS FROM TRANSITIONAL JUSTICE PROCESSES IN THE REGION

BASED ON Five Regional Consultations BY The Special Rapporteur WITH Representatives Of Member States, United Nations Agencies, Regional Organizations And Civil Society Organizations. Cairo (7-9 November 2012); Buenos Aires (11-13 December 2012); Kampala (6-8 November 2013); Berlin (14-15 May 2014); And Colombo (9-10 November 2016).

- Making Victims “Visible” And Acknowledging Their Voice (*Transitional Justice Helps Victims Occupy A Space In The Public Sphere That They Lacked Before*) (South Africa, Kenya)
- Gender Sensitivity And Inclusion (*Creation Of Specific Strategies To Address The Rights And Participation Of Women And To Integrate A Gender Perspective Into Transitional Justice Measures*) (Kenya TJRC)
- Fact-finding And Documentation (ICTR)
- Striking a balance between retributive justice and amnesties (Uganda)
- Prosecutorial Strategies (*Prioritization Strategies Are Now Available As Tools To Enhance The Effectiveness Of Transitional Justice Prosecutions*).
- Right To Truth (now considered as linked to a right to a remedy, right to information etc) as an autonomous right and achieved through various mechanisms such as truth commissions and commissions of Inquiry
- Guarantees of non-recurrence – preventative approaches

LESSONS LEARNT FROM TRANSITIONAL JUSTICE PROCESSES IN THE REGION

- The Transition Should Not Be Defined Only Per Peace Agreement Or Regime Change- Change Begins Way Before And Continues Way After. Limited Steps Can Be Taken Toward Justice in the face of conflict and repression (DRC/Ituri)
- Understanding the local socio political and economic context is critical in understanding the type of transitional justice measures to put in place and their own limitations based on context
- Focusing on direct objectives and processes over measures- scoping for opportunities that advance TJ objectives within that context more useful rather than supporting measures which are ineffective. (Ice Breaker Ship vs Ice Berg)
- When specific measures are available then sequencing rather than simultaneous implementation better. However the context will dictate.
- TJ measures should support the broader context objectives rather than undermine them
- Continuously supporting the local actors and not necessarily those directly involved in implementing the TJ measure

LESSONS LEARNT FROM TRANSITIONAL JUSTICE PROCESSES IN THE REGION

- Distinguishing Transitional Justice Approaches In Post-conflict Countries as compared to post-authoritarian countries. There has been 'mimicry' in the field with transplantation of TJ approaches from post-authoritarian countries (mostly Latin America and South Africa where the violator is usually the State) in post-conflict countries (where violators can be a multiplicity of actors and the state doesn't have control of the nation) where they were simply not applicable.
- Emerging thought on post-conflict context argue that the TJ mechanism will be dictated by a number of factors eg how to end the conflict, what was the conflict about (the meta conflict), who caused it, who needs to be accommodated, who suffered more, who committed more violations and who committed what violations (MaGray and O'Leary) (Christine Bell)
- Other similar arguments are to the effect the TJ mechanism will be dictated by the level of violence, the roles of the State, regional and international dynamics, characteristics of the protagonists, motivations of the protagonists, impact of the conflict on civilian population (DRC vs Rwanda vs Sudan) (Rachael Ker)
- In post-conflict: the role of the ICC as a catalyst or disrupter and the debate on amnesty both inconclusive - ongoing

TOWARDS MORE INCLUSIVE TJ MEASURES IN GENERAL

- Who should undertake the consultations and lead defining the TJ measure is critical
- Trust Building In Peace Processes (eg release of Nelson Mandela in South Africa and issuance of pardons or what violations will be of focus in the TJ agenda)
- Safety guarantees in TJ process – Police vetting in Kenya – victims we spoke to did not feel confident participating fearing reprisals- the Chair of NPSC – the police vetting body - was sent a human head- this matter was never investigated and those responsible held to account. South Sudan faces similar challenges
- Insufficient consultations can undermine the TJ measure and result in a chronic lack of trust in stakeholders – and when held their views should be incorporated
- Prioritizing women and youth when establishing TJ measures and over their life time for them to be more effective
- Consultations with vulnerable groups when defining or implementing TJ measures eg IDPs, refugees,
- Building knowledge and capacity of local actors to whom TJ is a foreign phenomenon

TOWARDS MORE EFFECTIVE TJ MEASURES FOR THE REGIONS

AU TJ POLICY

- The policy document gives us language that we can adopt when operating in African context. For example, the definitions of TJ, or justice or traditional justice mechanisms. This enables some authoritativeness when referencing the AU document at domestic level
- **The African Union Transitional Justice Fund**
- The policy raises the question time and again about structural violations and wealth inequality as key questions the region must solve in fulfilling socio economic rights which we have long ignored.
- The document clarifies the enhancement of ownership by countries in the TJ context and specifically that they should out resources as a show of ownership. As such countries must now demonstrate ownership by putting money where their 'mouths are' and we have a policy statement to back this up.
- There is an interesting element of diaspora – a powerful group that is always left out and usually based in western capitals. This is an interesting group to engage with in TJ process which the policy document now identifies. For SS for example this is important
- There is cause to worry on the treatment of vulnerable groups when it comes to traditional justice mechanisms. The policy seems to give them strong backing without clear safeguards on their ability to deepen inequality and exclusion. For ICTJ our role is to audit these processes to ensure prevention while at the same time being careful not to disrupt them or make them ineffective.
- **The document opens the door for country programs to engage on TJ at two other levels i.e. Recs such as IGLR and ACPHR**

ICGLR

- THE International Conference On The Great Lakes Region (ICGLR) Is An Inter-governmental Organization Of The Countries In The African Great Lakes Region. Its Establishment Was Based On The Recognition That Political Instability And Conflicts In These Countries Have A Considerable Regional Dimension And Thus Require A Concerted Effort In Order To Promote Sustainable Peace And Development. Most Notable Among The Conflicts That Have Had Cross-border Impacts Or Origins Are The 1994 Rwandan Genocide That Led To The Loss Of More Than 800,000 Lives, And The Political Instability In DRC. These Conflicts Constituted A Major Threat To International Peace And Security.
- The Organization Is Composed Of Twelve Member States, Namely: Angola, Burundi, Central African Republic, Republic Of Congo, Democratic Republic Of Congo, Kenya, Uganda, Rwanda, Republic Of South Sudan, Sudan, Tanzania And Zambia.
- In November 2004, The Eleven Heads Of State And Government Of The Member Countries Unanimously Adopted The Declaration On Peace, Security And Development In The Great Lakes Region In Dar Es Salaam, Tanzania.
- This Dar-es-salaam Declaration presented a Political Statement With The Intention To Address The Root Causes Of Intractable Conflicts And Constraints To Development In A Regional And Innovative Approach.
- The Heads Of State And Government Convened Once Again In Nairobi In 2006 To Sign The Pact On Security, Stability And Development In The Great Lakes Region. The Pact Included The Dar Es Salaam Declaration, Programmes Of Action And Protocols. This Marked The End Of The Preparatory Phase And Ushered In The Implementation Period.

PREVENTION- Implementation Protocol For The Prevention And The Punishment Of The Crime Of Genocide, War Crimes And Crimes Against Humanity And All Forms Of Discrimination

- Criminal Accountability at domestic level A9- Member states undertake, according to their respective constitutions, to take the necessary measures to ensure that the provisions of this protocol **are domesticated** and enforced and in particular to provide for effective penalties for persons guilty of the crime of genocide, war crimes, and crimes against humanity. A9(2) Persons accused of genocide, war crimes or crimes against humanity shall be tried and punished
- Rome Statute domestication and operationalization - A21- The Member States Shall Endeavour To Ratify The Statute Of The International Criminal Court In Accordance With Their Constitutional Requirements.
- A committee for the prevention and the punishment of the crime of genocide, war crimes, and crimes against humanity and all form of discrimination shall be established. A26(2) member states shall provide the committee with sufficient resources to carry out its work effectively.

PREVENTION

- Invest heavily in projects that address the root cause of conflicts such as poverty eradication, human rights, gender empowerment, democracy and good governance, illicit trafficking of arms and light weapons,
- Support to DDR programmes
- broader security sector reform (SSR vs civilian oversight, SSR vs national policing and security policies, SSR vs inclusion discourse, SSR vs vetting/disciplinary programs)
- Constitutional and legal reform processes that promote the rule of law and diminish the centrality of the Executive and enable power sharing across ethnic, religious and other sectarian divides. Also making institutions more inclusive results in legitimacy. Enhanced protection of the Bill of Rights (Protocol On Good Governance A 2 On Observance Of Constitutional Principles), A23 on use of force against non-violent demonstrations – repeal of laws that reverse the right to demonstrate such as the public order management act and replace with public order management policy that support fulfilment of A23, A24 Prohibits On The Use Of Torture- Ratification Of The Convention Against Torture And Domestification, Establishment Of Necessary Legal Framework To Combat Torture Punishment Against Security Officers Who Arbitrarily Detain And Torture, Compensation Of Victims Of Torture, Monitoring By NHRIS And Shadow Reports To The Parliaments On State Of Detention Facilities And Instances Where Torture Is Experienced

PREVENTION

- Accountability for violations particularly torture: (Protocol On Good Governance) prohibits on the use of torture, false arrest, ill treatment- ratification of the convention against torture and domestication, establishment of necessary legal framework to combat torture punishment against security officers who arbitrarily detain and torture, compensation of victims of torture, monitoring by NHRIS and shadow reports to the parliaments on state of detention facilities and instances where torture is experienced
- Fight organised crime and corruption as well as illegal exploitation of natural resources. (Protocol On Good Governance Article 43 On Corruption- Member States Undertake To Fight Corruption And Ensure Transparency In The Management And Equitable Distribution Of Resources)
- Enhance access to justice institutions to enable avenues to reduce grievances (Protocol on Good Governance Article 37 urges state parties to enhance access to justice and establishment and protection on independent judiciaries)
- Deal with inequality and marginalization (Protocol on Good Governance A47 on promotion and protection of vulnerable groups and in particular urges States to put in place policies and programmes aimed at addressing these inequalities and take affirmative action to ensure that vulnerable members of society participate in the governance and development process)
- Gender equality through constitutional and legislative reform.

PREVENTION THROUGH REPARATIONS

- Reparations vs fulfilment of immediate socio economic rights for victims
- Reparations vs transformation
- Collective reparations vs building trust
- Trauma counselling
- Relief as conversations on reparation programs go on
- Emphasis to attend to gender-related violations both through relief and reparation measures
- Protocol On The Prevention And Suppression Of Sexual Violence Against Women And Children: A2(4) establishment of a regional mechanism for providing legal, medical, material and social assistance, including counselling and compensation, to women and children who are victims and survivors of sexual violence in the great lakes region; prosecution of sexual violence as an international crime – crime against humanity and war crime – particularly against commanders

OTHER TJ SUPPORT MECHANISMS FOR THE REGION

AFRICAN COMMISSION ON PEOPLE AND HUMAN RIGHTS (ACPHR)

- ACPHR should be utilized much more fact finding missions and should remain seized of the country situation beyond cessation of the conflict
- ACPHR has a more flexible avenue for responding and engaging in TJ processes through adoption of statements and resolutions
- ACPHR can undertake promotion missions
- ACPHR can undertake State Party review process- A 62 African Charter
- Establishment of a special mechanism with ACPHR on TJ
- Integrating TJ into the work of various other special mechanisms eg Working Group on Death Penalty, EJKs,

REFERENCES

- AFRICAN UNION TRANSITIONAL JUSTICE POLICY
- ICGLR PROTOCOL ON GOOD GOVERNANCE
- ICGLR PROTOCOL ON THE PREVENTION AND SUPPRESSION OF SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN
- PROTOCOL FOR THE PREVENTION AND THE PUNISHMENT OF THE CRIME OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY AND ALL FORMS OF DISCRIMINATION
- PROMOTION AND PROTECTION OF HUMAN RIGHTS: HUMAN RIGHTS QUESTIONS, INCLUDING ALTERNATIVE APPROACHES FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION OF TRUTH, JUSTICE, REPARATION AND GUARANTEES OF NON-RECURRENCE – 24TH OCT 2016 A/71/40827
- JUSTICE MOSAICS; HOW CONTEXTS SHAPE TRANSITIONAL JUSTICE MECHANISMS IN FRACTURED SOCIETIES (ICTJ)
- ACPHR: THE STUDY ON TRANSITIONAL JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN AFRICA (2019)
- RULE OF LAW TOOLS FOR POST CONFLICT STATES: NATIONAL CONSULTATIONS ON TRANSITIONAL JUSTICE, (OHCHR).
- REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION OF TRUTH, JUSTICE, REPARATION AND GUARANTEES OF NON-RECURRENCE ON HIS GLOBAL STUDY ON TRANSITIONAL JUSTICE (A/HRC/36/50/ADD.1)

THANK YOU