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A Comparative Analysis of Transitional Justice Institutions in Africa

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Declaration

I Mary Mugure Mutugi declare that this dissertation is my original work and has not been submitted for the award of a degree in any other university.

Signed.....

Date 2011/11/09

Mary Mugure Mutugi

This Project has been submitted for examination with my approval as a university supervisor

Signed.....

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Dedication

This thesis is ultimately dedicated to my brother Bernard Macharia. His newly found motivation is the greatest encouragement even to me.

Acknowledgement

Many debts have been incurred during the writing of this thesis. To my supervisor Prof. Makumi Mwagiru, I would like to thank you for the guidance and the thought provoking discussions. It was indeed an honour to work with you.

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Eddie Kadebbe and Fredd Wakimani, their desire to offload my otherwise busy schedule to allow me time to write this will never be forgotten.

Abstract

Africa has been home to several protracted conflicts and still entertains the most bloodiest of them all. African states have also been very vibrant in seeking new and relevant ways of dealing with such conflicts to bring about reconciliation, healing and national unity. This study examines transitional justice institutions as applied in Africa.

The study investigates the choice of transitional justice institutions that African states prefer in achieving reconciliation, healing and national unity after a conflict and looks at the outcomes of these institutions. Of the intended outcomes, this study makes a comparative analysis of these outcomes and why some mechanisms as applied to African conflicts have achieved that particular outcome. The concept of transitional justice relies on the justice theory since it seeks to achieve fairness and accountability in post conflict states. The methodology applied in this study is inductive and relies on secondary data together with a thematic analysis of studies, commission reports and working papers of different transitional justice institutions in Africa.

The conclusion of this study is that the achieved outcomes of these institutions are that truth commissions and war crimes trials in Africa have been able to achieve reconciliation and healing by promoting truth telling and forgiveness. It is also the outcome of this study that the use of more than one institution to achieve reconciliation is more likely to produce the envisaged outcome than reliance on just one of the institution.

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List of Abbreviations

CAR	Central African Republic
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICJ	International Court of justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal For Former Yugoslavia
LRA	Lords Resistant Army
SCSL	Special Court of Sierra Leone
UNSC	United Nations Security Council

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

Whether caused by ethnicity, poverty, long and stretched legacies of colonialism, formalization of expansionism, resource control and competition, structural deficiencies, competition for power, political liberalization or any unforeseen reason, there is no denying the presence of conflicts in Africa. They are rooted from the above description in repression of basic needs, frustration generating from deprivation, challenging a dominant power status, difference in cultural norms and values and competition for dominance and power generally.

The conflicts in Africa have left behind a destructive path. They have increased the band of poverty that runs across Africa. Further, conflicts in Africa have had a negative impact on the individual and social units of society in terms of interference with the society's social and economic rights, there has been an increase in refugees, destruction of the social structure, political institutions and this has created the need to find ways of mending the cloth of society by ensuring that effective sanctions, dialogue and application of conflict prevention approaches are employed to prevent further escalation into conflicts and recurrence of the same. The priority of states after conflict is political transition by healing the wounds of society, ensuring accountability of the atrocities committed during the conflicts including human rights violations using judicial and non judicial approaches.

This study presents a background and genealogy of transitional justice including its role in post conflict peace building which is to transform society by mending social institutions like the justice system: rebuild social trust and establish democratic governance. Subsequently it will outline the institutions on which the duty to embark on political transition from violence to societal stability is vested. The study will examine how these institutions seek to acquire justice and it concludes with a comparative study of the transitional justice institutions in Africa and how these institutions have managed to make political transformations to create a peaceful democratic state in Africa. The study draws primarily from the experiences of Kenya, Ghana, Liberia, Rwanda, Sierra Leone, and South Africa

1.2 Background

Post colonial Africa has seen states engage in undemocratic, authoritarian and repressive means of governance. This together with globalization, development in knowledge, mutation of societal practices and exposure has seen difference of opinion giving rise to tensions which have sometimes escalated into conflicts. There have been serious human rights violations in this era. However during the last decade of the 20th C, many states have ousted authoritarian regimes and military dictatorships to instate new democratic orders and that desire to divorce from these dark eras have sparked the need to deal with human rights violations while healing the wound of the past and creating accountability. Reconciliation for state has been a primary goal of post conflict society that has been imposed and legislated using transitional justice mechanisms.

Today, many countries have implemented transitional justice mechanisms, enacted laws mandating the implementation of such mechanisms or included such mechanisms in peace agreements in African countries. Transitional justice has been implemented through either one of the following mechanisms: trials and prosecution of human rights violators either domestically or internationally using tribunals such as the International Criminal Tribunal for Rwanda, The Special Court for Sierra Leone and in recent years this has turned to the International Criminal Court (ICC) assuming universal jurisdiction. Secondly, transitional Justice has been implemented through national or international Truth Commissions. There have been eighteen countries in Africa that have implemented truth commission as a form of transitional justice. They are Algeria, Burundi, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Ethiopia, Ghana, Kenya, Liberia, Morocco, Nigeria, Rwanda, Sierra Leone, South Africa, Sudan, Uganda and Zimbabwe. Transitional Justice has also been implemented through lustration like in South Africa and finally through institutional reforms. These mechanisms have not existed in a vacuum and have been hosted by transitional justice institutions. The attempts to rebuild institutional infrastructure and restore order in divided societies have helped promote public confidence in the judicial system and encouraged the reestablishment of the rule of law as a necessary condition for prosecuting human rights abusers and war criminals simply because the imposed procedural standards ensure the credibility of the judicial process.[1]

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[1] Kritz, Neil J. (2001): "*The Rule of Law in the Post conflict Phase*" in Crocker, C.A. Hampson, F.O. and Aall, P. (eds): Turbulent Peace: The Challenges of managing International Conflict, Washington, United States Institute for Peace Press (USIP) , p. 804-805

Transitional justice institutions have been adopted by states of course with reference to their historical, social, geographical and economic positions. Countries in Africa have adopted the mechanisms well and are now consolidating their democracy by making constitutional changes. It goes without saying that political and institutional problems in the continent have been caused by the failure of state to deal with root causes of conflicts. States have invested in prosecuting and punishing as important components of justice even though they are post hoc intervention. They have been able to achieve truth and reform of institutions, reparation for victims and reconciliation but we dare not confine the struggle for human rights to one set of institutions or one approach to deal with the past. There is a need to employ new methods of mending the cloth of society and ensuring that for the benefit of Africa these methods are foolproof and that they are all encompassing.[2] Such a blunder will leave a gap that would otherwise be the trigger for more conflicts. This empirical knowledge can be formed by making an examination of transitional justice institutions in Africa whose mandate has been to met out transitional justice

1.3 Statement of the Research Problem

The study examines the concept of transitional justice as applied in Africa. It identifies states in Africa which are in transition having come from civil war where major human rights violations were committed. An examination through comparative means of the institutions that are created by these states to restore the community to peace and

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[2] Mani, Rama (2002): "*Beyond retribution: Seeking justice in the Shadows of War*", Cambridge, Polity Press, pp. 3-11

bring reconciliation will be the core of the study. It will also examine the characteristics of these institutions that help them achieve their goals.

1.4 Literature Review

Every political transition involves the removal of one political regime and the incoming of a new one. With this transition, come issues raised by the victims of the old regime who claim justice from the new regime of the alleged perpetrator This has been evidence lately in the trials of Saddam Hussein, General Augusto Pinochet, and Slobodan Milosevic, trials of top officials in Rwanda, Afghanistan, South Africa, Mexico and Israel.

Transitional justice is by no means a new phenomena. It is defined as the conception of justice in periods of political transition.[3] It can be seen as early 404 and 411 BC by Jon Elster in his cases.[4] Contemporary transitional justice emerged in the early 1990s as a discipline of study, as a reaction to the development of the brutal authoritarian regimes in the world together with the end of communism. This era also saw the development of democracy, individual and collective accountability and transparency. Scholars developed the policy debate surrounding transitional justice such as the prosecution of human rights violators during conflict, apologies, amnesties and

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[3] Tietel R (2003) '*Transitional Justice Genealogy*', Harvard Human Rights Journal 16 P. 69

[4] Elster J (2004) '*Closing the Books: Transitional Justice in Historical Perspectives*' Cambridge UK, Cambridge University Press, p.52

truth finding missions.[5] It was during this era that states started considering conflict resolution and further recourse to justice. Teitel notes that transitional justice moved from the exception to the norm and constituted a new paradigm of the rule of law.[6]

Transitional justice functions in institutions. Arthur notes that transitional justice institutions are meant to among other roles establish trust and reduce fear, reshape narratives and debunk myths, encourage political learning, neutralize the power of harmful elites, recognize victims and encourage less divisive ways of life.[7] The overall the mandate is to heal the society after such atrocities. Over the past decade, transitional justice institutions that have been established have included international tribunals for former Yugoslavia and Rwanda, a powerful international criminal court, dozens of truth commissions and dozens of hybrid national courts.

African states have had conflicts that have merited the use of transitional justice institutions. The countries under examination are notably still under transition having suffered the repercussion of inter and intrastate conflicts in Africa. These states share the same characteristics that cause conflict for instance a scramble for natural resources like in Sierra Leone, Democratic Republic of Rwanda, territorial conflicts like in the Somali and Eritrea over the Ottoman, ethnic conflicts like in Sudan, or political displeasures as

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[5] Arthur, P. (2009) '*How 'Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice*'. Human Rights Quarterly 31 (2): 321–367.; Bell, C. (2009) '*Transitional Justice, Interdisciplinary and the State of the 'Field' or 'Non-Field*' International Journal of Transitional Justice 3 (1): pp 5–27

[6] Teitel R '*Transitional Justice Genealogy*: op cit., p.85

[7] Arthur P ' *How 'Transitions' Reshaped Human Rights* : *A Conceptual History of Transitional Justice*: op cit p. 333

seen in the Kenyan post election violence,[8] poverty and or unequal distribution of income and resources such as the latest jasmine revolutions in North Africa.

In the development of transitional justice, it is clear that states have considered transition policy options to deal with the issue of transitional justice, rather than lean to other institutions. Minow[9] and Roht-Arriaza and Mariezcurrena break down transitional justice and appreciate that there are transition policy options available either nationally or internationally so that states consider if domestic trials as opposed to truth commissions will serve the purpose.[10] It therefore emerges that reconciliation and healing are politically inclined in most post conflict situations and that more often than not they conflict with politics. Political leaders, academics and members of the civil society agree that the biggest divide in the use of transitional justice institutions is how to achieve a balance between the demands of enforcement of human rights and political objectives.

The scholars who advocate for the enforcement of human rights by ensuring that justice is served on the victims of conflict advance these arguments under two arguments. First they appreciate the need to gratify the victim. The argument fronted is that prosecutions and punishment of the perpetrators would bring retribution to the victims.

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[8] Chabal P and Daloz J.P (1999) '*Africa Works: Disorder as Political Instrument*', Bloomington: Indiana University Press.

[9] Minow, M. (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press.

[10] Roht-Arriaza N '*The New Landscape of Transitional Justice*: in Roht-Arriaza, N and Merriezcurrena J (eds) (2006) *Transitional Justice in the twenty First Century*, New York Cambridge University Press pp. 1-16

This they argue is the justification for truth commissions because they encourage healing and restoration of self confidence of the victims.[11]

Their second argument is that there is a need to restore the peaceful status of the society. This they argue can be done through achieving political stability. They further argue that the repair in the social and political fabric will prevent further and future violations. Newly established regimes acquired through political change will depend so much for their survival on firm judicial and personal accountability of perpetrators will prevent future group blame eg the Kikuyu, the Kalenjin the Luo in Kenya are responsible for violence and atrocities which may in future cause conflict.

On the other hand, other scholars question whether being punitive is the way to go.[12] They argue that a state in transition has other priorities such as reconstruction of political social and economic institutions, guaranteeing security of the populace, disarming rebels, organizing elections and dealing with perpetrators is most likely going to be placed on the back banner. These states have to make choices in the fragile state of the newly reconstructed state. In the same breath, these prosecutions may be short of giving the victim all the attention to guarantee a full recovery from the pain of the atrocities. Desmond Tutu argued that western style justice does not fit with traditional

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[11] Verwoerd W. *'Towards an Answer to Criticism of The South African TRC'* in Govier Trudy (eds) 2003 Dilemmas of Reconciliation : Cases and Concepts, Waterloo Ontario, Wifrid laurier University Press pp. 245-278

[12] Neumann F (1986) *'The Rule of Law: Polotical Theory and the Legal System in Modern Society'*, Dover, Berg Publishers; Scheuerman W (ed) *The Rule of Law Under Siege: Selected Essays* of Franz L. Neumann and Otto Kirchheimer, Berkeley :University of California Press

African jurisprudence.[13] It is too impersonal since African justice is aimed at 'the healing of breaches, the redressing of imbalance, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence'.[14] These scholars give priority to prosecution. The institutions they advocate for are the tribunals. During these trials most of the attention goes to the perpetrator and not the victim.

While states in transition in Africa appreciate the fact that they have policy options, there has been a historical perception that transitional justice institutions are a threat to national reconciliation. This is because truth commissions and criminal tribunals investigate extremely divisive and violent histories. They are often viewed as obstacles to reconciliation and interfering with settled scores. This in the end generates political instability and interferes with the overall stability of a state. Because of its political influence, some scholars have perceived transitional justice institutions as questionable to the extent that they do not promote political change since they look into the past and uncover old scores. This is because they have a counter revolutionary agenda.[15]

In the same breath, there have been scholars that have perceived these institutions as contributing to the triumph of human rights and their growing influence such as

[13] Villa-Vicencio C, Tutu D (2009) '*Walk With Us and Listen*', Washington, Georgetown University Press, p. 54

[14] Daly E, Sarkin J and Tutu D (2006) '*Reconciliation in Divided Societies: Finding Common Ground*' Philladephia University of Pennsylvania Press

[15] Torpey J, (2003) '*Introduction. Politics and the Past in Politics and the Past: On Repairing Historical Injustices*' Lanham, MD: Rowman & Littlefeild Publishers p. 12

signaling a commitment to property rights, the market and democratic institutions.[16] Transitional justice also provides a method for the public to recapture lost traditions and institutions like the *Gacaca* courts in Rwanda, depriving former officials of political and economic influence that they could use to frustrate reform, and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime.

This study shall enter the first debate where it shall appreciate the role punishment plays in retribution for a society that is wounded by the wars in Africa. The study will also look at the positive impact transitional justice institutions have played in reaching this end. Clearly out of the work of the transitional justice institutions wounds have been healed in society and specifically as noted earlier restoration of self confidence for the victims since there is a public admission of who was right and who was wrong. These institutions have led to full recognition of the worth and dignity of those victimized by past abuses. The study shall also enter the debate to determine whether or not transitional justice institutions have worked in Africa in achieving their overall mandate which was to achieve peace and reconciliation in Africa. The study shall be guided by the criticisms for and against these institutions. By making a clear comparative study of the mechanisms to achieve justice we shall identify the ideal institution in dealing with the atrocities that are still evidence in states in transition.

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[16] Sikkink K and Walling B C (2007) '*The Impact of Human Rights Trials in Latin America*' 44 Journal of Peace Research , pp. 427-440

1.5 Objectives of the Research

The objectives of this study will be to:

1. Examine the role of transitional justice institutions in Africa
2. Analyze the mechanisms employed by transitional justice institutions in Africa
3. Identify the ideal transitional justice institutions for conflicts in Africa

1.6 Theoretical Framework

The theoretical underpinning of transitional justice contains elements from several disciplines including law, sociology, political science which renders it a contested status[17] or whether it achieves its main objective to reconcile communities. Being a new and developing discipline, transitional justice is relatively underdeveloped and therefore wanting in a comprehensive theoretical framework. However the framework for this study will be drawn from several scholarly works[18] which will benefit from a multifaceted discussion on transitional justice institutions

The theoretical discussions will be structured thematically and will begin with a presentation and discussion of transitional justice institutions including national, international and hybrid tribunals, followed by non criminal transitional justice

[17] See Bosire L. (2006) *'Overpromised, Under delivered: Transitional Justice in Sub-Saharan Africa'* Occasional Paper Series New York: International Center for Transitional Justice p 33, Teitel R. (1997) *'Transitional Jurisprudence'* New York: Oxford University Press, Kritz 1995 and Mc Adams, J ed (2001) *'Transitional Justice and the Rule of Law in New Democracies'*, Norte Dame: University of Norte Dame Press

[18] See Teitel R. (2000) *'Transitional Justice'*, New York: Oxford University Press; Hayner P. (2002) *'Unspeakable Truths Transitional Justice and the Challenge of Truth Commissions'* 2nd edn New York Routledge, Verdeja E. (2004) *'Institutional responses to genocide and Mass Atrocity'*, Kritz N (1997) *'Coming to terms with Atrocities'* and Sarkin D. (2008) *Reconciliation in Divided Societies*

institutions including truth and justice commissions. These institutions will be discussed with reference to the transitional justice theory.

The main theory will be the theory of justice. The main aim will be to present a concept of justice which generalizes and carries a higher level of abstraction the familiar theory of the social contract as found say in John Locke[19], Rousseau[20] and Kant.[21] This theory's basic structure is the primary subject which is the assignment of fundamental rights and duties and the regulation of social and economic inequalities and of the legitimate expectation founded on justice.

This theory also entertains two characteristic features: first there is an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed and two it is possible to devise a procedure that is sure to give a desired outcome. The theory in relation to transitional justice will be applied in three paradigms: retributive justice which is focused on establishing legal accountability and punishment of the victim[22]: restorative Justice which focuses on the victim and restoring the relationship between victim, perpetrator and the society[23] and reparative justice which empowers victims by providing them with redress in recognition of their suffering.[24] Transitional justice institutions can exist in one paradigm alone or incorporate a central tenet of multiple paradigms, in order to have the broadest impact on the

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[19] Locke J (1690), *'Second Treatise of Government'*; Amen Corner/Black Swan, Ave Mary Lane

Peter Gay (1987)*"The Basic Political Writings of Jean Jacques* Rousseau" Hackett Press p. 25;

Gough J.W. *'The Social Contract'* 2nd Edn Oxford, The Clarendon Press 1957

[22] Forsythe D (2006) *'Human Rights in International Relations'*, Cambridge: Cambridge University Press

[23] Minow M. (1998) *'Between Vengeance and Forgiveness'*, Boston: Beacon Press p 91-92

[24] Minow M. (1998) *'Between Vengeance and Forgiveness' op cit* p.93

transformation of society. This study will lean on all the justice theory to help in analyzing whether transitional justice institutions achieve retribution, restore peace in society and reparate the victims of atrocities in states in transition in Africa.

1.7 Hypotheses

This study has two hypothesis

That the choice of transitional justice institutions for African states is different in every state depending on the informing factors

That more than one transitional justice institution can be used by a state in transition

1.8 Methodology of the Research

When choosing material, one must be aware that it will always imply a limitation for the study and analysis.[25] This study will be entirely built upon material of a secondary nature, consisting of theoretic and empirical literature as well as a number of scientific articles and studies.

In order to avoid sources with extreme or especially angled views it has been imperative that in the use of these secondary documents, guidelines that will help filter unsuitable materials should be used. In practical terms it is important to eliminate rapport that come from authors with ethnically based interest.

The theoretical approaches of transitional justice institutions in Africa will be applied to all eighteen countries in Africa that have implemented truth commission as a form of transitional justice which are Algeria, Burundi, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Ethiopia, Ghana, Kenya, Liberia,

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[25] Lundquist (1993) '*Rationale for Meta-Analysis*'; London: Thames and Hudson p. 107

Morocco, Nigeria, Rwanda, Sierra Leone, South Africa, Sudan, Uganda and Zimbabwe. They will also be applied in Lustration in South Africa and special tribunals like in Sierra Leone and the International Tribunal for Rwanda. The study will explore all these cases and the transitional justice institutions that were used in order to find possible patterns in fulfilling the theoretical paradigms of retribution, reparation and restorative justice.

The study will compare African countries involved in transitional justice to establish if they have similar backgrounds and colonial history. The study will take the shape of a comparative study of the transitional justice institutions in these countries.

The relatively lack of country-specific data on the impact of transitional justice institutions means that the material for the study will come from academic publications and articles. The literature on transitional justice in general and political transition will be collected from books and academic articles. The majority of transitional justice scholars seem to agree on the general measures of the theory but some have slight diverging views on their application. Reflecting the different views they will be represented as objectively as possible during the research.

This study shall examine the existing assumptions about transitional justice and the role of transitional justice institutions in Africa. From an abundance of literature on transitional justice the study shall examine the main objectives of these institutions as a form of accountability through human rights trials in order to meet legal, moral and political obligations. This is meant to address past wrongs, lay a foundation for the rule of law, deter future human rights violations and strengthen democracy. In this examination, the study shall identify factors that influence the decision of states in transition to opt for transitional justice institutions as opposed to national legal mechanisms. The study shall

also examine the consequences of failing to try perpetrators and the possibility of retributive violence and vigilante justice.[26]

Secondly, the study will analyze the mechanisms employed by transitional justice institutions in Africa. To test the hypothesis in existing literature, the study shall examine the impact of all the transitional justice institutions alone and in combination that have been employed in Africa. This will be done by collecting all data on the transitional justice institutions and highlighting the mechanisms that these institutions employ. The study will guided by the theoretical underpinnings to determine whether or not all the mechanisms employed satisfy the justice theory generally and specifically restorative, retributive and reparative justice. It shall also be determined specifically if these institutions by achieving justice reduce human rights violations or improve democracy.

Finally, the study shall determine the ideal transitional justice institution suited for conflicts in Africa. It shall be guided by our analysis and identify if using one institution is sufficient. The study shall determine if using the holistic approach and using two combinations of institutions is the better option by using trials and amnesties and trials, amnesties and truth commissions. At this point, it shall be possible to determine the effectiveness of the combined institutions using literature and our own analysis of the institutions will offer an explanation to this puzzle. The transitional mechanisms allows for a combination of institutions to create a balance. Further, it shall be determinable if this is how states can achieve maximum output to acquire accountability necessary to

[26] The transitional justice bibliography finds over 2,000 scholarly works on transitional justice. See www.polisci.wisc.edu/tjdb

avert human rights violations. It shall be possible to determine if using two institutions will create a scenario where they undermine each other.

In conclusion the study shall refer to the literature examined to determine if transitional justice institutions miss the point to avert such atrocities, and be able to explicitly state the ideal institution that should be used by states while at the same time preserving their sovereignty, reconciling society and ensuring that justice is achieved.

1.9 Chapter Outline

Chapter One

Introduction to the Study

This chapter will give a general introduction to this study and outline. . The chapter also captures the contextual background to the research. It articulates the justifications, objectives, literature review, theoretical framework and methodology of the study.

Chapter Two

The Concept of Transitional Justice

This chapter introduces the historical development and theory of transitional justice. It also outlines the goals and principles of transitional justice.

Chapter Three

Transitional Justice Institutions in Africa

This chapter will identify the various transitional justice institutions that are used by African states. We shall determine if the states use one institution or if there are any states that use more than one.

Chapter Four

An analysis of Outcome of Transitional Justice Institutions in Africa

This Chapter will be a comparative analysis of the various transitional justice institutions employed by African states. In this chapter that we shall examine which of the institutions have been successful and the mechanisms they have adopted to reach that end.

Chapter Five

Conclusion

This chapter will give a conclusion of the study and discuss the emerging issues relating to the study.

CHAPTER TWO

THE CONCEPT OF TRANSITIONAL JUSTICE.

2.1 Introduction

The international community is evidently concerned about states in armed conflict all over the world. There have been very serious results towards the response of such protracted conflict in the world. The community has been concerned about the punishment of perpetrators and why the crimes happened. For historians it is very important to have facts about why crimes happen and how states deal with it. This is because there is a need to begin from a point of knowledge to acknowledgement to deal with these root causes to avoid a recurrence of the conflict.

When states are faced with the decisions of dealing with the past to inform the future and to come out of the atrocities that have resulted to massive violations of fundamental human rights, destruction of society and its institutions, they have to determine whether or not to deal with the past or not. Transitional justice is the study of how societies deal with past atrocities. Empirical evidence has shown that civil wars that have come to the end have a high chance or recurring. There are war induced grievances. People suffer from such atrocities and there is a need to deal with them at that point. A failure to deal with them is what leads to further and future conflict. This is because there are people who are angry and weak and there are politicians and entrepreneurs who are exploitative and dwell on such weaker points to allow a recurrence of violence. These issues are dealt with by transitional justice. A range of definitions of transitional justice exists today that have been coiled in history depending on the historical period of the practice of transitional justice.

Transitional justice can be defined as the conception of justice associated with periods of political change[1], characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.[2] A more broader definition would see transitional justice defined as anything that a society devises to deal with a legacy of conflict and or widespread human rights violations. from changes in criminal codes to those in creation of memorials. museums and days of mourning. to police and court reform. to tackling the distributional inequities that underlie conflict.'[3]

Others define transitional justice as an extension of regular criminal justice systems that rely exclusively on legal remedies to rectify grievances. However this definition fails to account for the limits of law, particularly in cases of mass crimes such as genocide, ethnic cleansing, and crimes against humanity. In trying to come to terms these types of crimes, not only does our moral discourse appear to reach its limit. but it also emphasizes the inadequacy of ordinary measures that usually apply in the field of criminal justice.

Some prominent scholars have rejected the term itself, preferring instead to speak of post-conflict justice. But "post-conflict justice" doesn't address the complexities and processes of political transitions, whether through conflict, negotiation, or state collapse.[4]

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[1] Teitel, R. (2000) '*Transitional Justice*', UK. Oxford University Press, p. 169

[2] Guillermo O'Donnell & Philippe C. Schmitter, (1998) '*Transitions From Authoritarian Rule: Tentative Conclusions about Uncertain Democracies . Defining transition as the interval between one political regime and another*' Baltimore, John Hopkins University Press P. 45

[3] Roht-Arriaza, N. (2005) '*Transitional Justice and Peace Agreements*' Paper given at the Review Meeting 'Role of Human Rights in Peace Agreements' at the International Council on Human Rights Policy. Belfast. March 7-8.

[4] Bassiouni C. M (ed) (2000) '*Post Conflict Justice*', Transnational Publishers. New York p. 34

It therefore leads us to conclude that transitional justice is the process employed by states to achieve justice for atrocities committed during conflicts and to rebuild society in the aftermath of such conflicts through reconciliation.

2.2 Historical Development of Transitional Justice

The development of transitional justice has been reactive to the conflicts that have erupted in history like the world wars and the cold war, fueled by the many root causes and catalysts that have seen the world result to war.

Tietel notes that the development of transitional justice is a systematic development in three phases; the post war phase, the democratization and political fragmentation phase or the post cold war phase and the steady state phase. The origins of modern transitional justice can be traced to World War I.[5] However, transitional justice becomes understood as both extraordinary and international in the postwar period after 1945. In this era which stretched up to the time of the second world war, the major concern of state was domination as realism was the *modus operandi* of the time and normal justice then was perceived to be of international interest because of the fact that the world was seeking to form alliances to dominate politically, economically and socially during this era. This meant that national justice was no longer a domestic concern of states because they were internationally inclined and they made decisions that would elevate them higher into the International arena. This period in the history of

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[5] Michael Walzer.(1992) '*Regicide and Revolution: Speeches on the Trial of Louis XVI*' Michael Walzer (ed).. Marion Rothstein trans.. Cambridge: Cambridge University Press. p.18

transitional justice saw the life of the attempted trails in Germany [6] resulting from the First World War which were meant to be punitive to the perpetrators to deter future carnage. This is where the beginning of failures of national prosecutions as opposed to international criminal accountability in this period in history.

In this era, the major concern of justice was to explain the unjust war and define the parameters of justifiable punishment arising from actions of persons involved in the war. There were concerns of whether to punish Germany for its aggression and what form of punishment should be meted. Important to note in this period is that sanctions had been levied against Germany by the Versailles Treaty of 1919[7] which alluded that all states allied to Germany in the war would be held responsible for acts of war undertaken by Germany which shifted the transitional justice focus from collective accountability at a time when alliances were the order of the day, to individual judgment and responsibility. This raised critical uses to the relationship between national and international justice due to the formation of alliances.

This form of justice was meant to be punitive especially to Germany and was not meant to deter future killings rather to prove a point to state that there would be consequences for their actions. However, this collective desire to bring Germany to account during the Second World War fueled the economic frustrations that saw the country rise in war in WWII. During this era, accountability was shifted from International to National and rolled down to the individual to allow the prosecution of

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[6] Battle G. (1921). '*The trials before the leipsic supreme court of Germany accused of war crimes*', 8 Virginia Law Review Pp 11-24, p.12

[7] See Article 231 Treaty of Versailles June 28, 1919

Reich as part of the trials of the major war criminals before the Nuremburg Military Tribunal for offenses of aggression and persecution. The Nuremburg trials were meant to justify and legitimize allied intervention in the war as a forward looking nature of deterrence.

After the second world war. there was a development of International justice became the rule of law inform of conventions and treaties such as the Genocide convention[8] and the Geneva Conventions which regulated the law of war and the principles of criminal responsibility also grew the international policy to guarantee the rule of law. However the rule of law was questionable by some because it was advocating for liberalism in an era where the dominating theory of interaction of states was realism. This meant that transitional justice was not achieved as it should have. The noted turn to international law meant that transitional justice was an international legal response to atrocities and the offenders of the law of war. Constitutionalism [9] and the development of law as a tool for modernization[10] was also an informing factor in the development of transitional justice at this stage. These events in history revealed a unique transitional justice dynamic that international justice recurs but is transformed by past precedents and new political context. The postwar turn to international law saw transitional justice gain international response and international accountability for war crimes.

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[8] Bassiouni C.(1991) '*The History of the Draft Code of Crimes Against the Peace and Security of Mankind*' in Nouvelles Etudies Penales. Commentaries on the International Law Commissions

[9] See Henkin L. (1990) '*The Age of Rights*' New York: Columbia University Press P. 46. See Franck T. M (1993) . '*The Emerging Rights to Democratic Governance*' 86 American. Journal of International Law p.53

[10] See Merryman H. (2000) '*Law and Development Memoirs II*': Slade 48 American Journal of Comparative Law. p 713

Post Cold War sees the development of democracy and the end of state supremacy as it were. The cold war also brought an end to the internationalism of this first, or postwar, development stage of transitional justice. Transitional justice in post cold war is associated with the wave of democratic transitions and modernization that began in 1989 and saw the emergence of political transition and the development of democracy. The collapse of the Soviet Union, the end of the bipolar balance of power, and the attendant increase of political democratization and modernization ushered in the new transitional justice.[1] During this time liberalism arose and regional developments were represented as independent of one another but there was evident political inclination with either the Soviet Union or the United States bipolarism. This did not necessarily see the end of violent conflict. It saw more recent, violent confrontations in history like the September 2001 attacks, the rise of the Jihad and the invasions of Iraq and Afghanistan. These liberal states did not really perceive the Nuremburg trials as having made a significant contribution to transitional justice and were therefore reluctant to conform to the World War II era mechanisms. The Falklands War posed a challenge and states sought to result to domestic trials to deal with the atrocities, since they felt that international rule of law would not necessarily adequately address domestic needs.

Governments born of liberalist movements and democratic revolutions had a desire to legitimize themselves and therefore the obvious shift to nation state mechanisms to achieve justice seemed to be the better alternatives. The democracy, Human Rights

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[1] Huntington S. P (1991) *'The Third Wave: Democratization in the Late Twentieth Century'*. Norman, University of Oklahoma Press. P 12.

conventions such as the Universal Declaration of Human Rights which provided for the preservation of fundamental rights such as the right to life and freedoms of speech, association, freedoms from torture at this time in history saw the debate as to whether states ought to prescribe to national or international mechanism rage on to no end. The rule of law as noted clearly evident in this era were equated with trials by the state to legitimize the successor regime and advance nation building with providing accountability and reconciliation. The main aim of transitional justice was misused. It diverted from acquiring justice and accountability to legitimizing succeeding governments in post conflict reconstruction of institutions including justice institutions and the rule of law. What was just and fair was determined by the political entity that was coming into power during the transition [12] which raised issues as to the criteria for selection of persons to be prosecuted, retroactivity of the law, conflict on existing laws, and the selection and independence of judicial personnel. This is what lead states like South Africa to forego prosecutions and opt for alternative means such as truth-seeking and accountability.[13] There was a clear shift from international transitional justice to alternative means.

On a more positive note, other factors arose on this time. States in transition also developed an interest in healing and reconciling the society. National values of peace and reconciliation became an immediate concern of states.

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[12] See Teitel R (2000) '*Transitional Justice*', New York: Oxford University Press, P. 231

[13] Zyl V. P (1999) '*Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*' 52 Journal of International Affairs. pp 647- 661, p 647

Further in this stage of development, transitional justice encompassed a new concept of restorative justice where healing of past abuses was a consideration. Institutions such as truth commissions were established to look into the past and create a historical record of events together with mechanisms such as institutional reforms which dominated the new *modus operandi* of the time. Transitional justice moved from the need to create or develop the rule of law to accountability and preserving the peace through reconciliation and forgiveness. All these concepts led us to conclude that a psychological angle of transitional justice was born. Issues of ethics attached to political inclination were a major concern of states, morals informed political choices and decisions that were informed by other non state actors such as NGOs and human rights groups.

This period in the development of transitional justice had to deal with how to resolve the issues when a whole society for instance was involved in the atrocities like in the Rwanda genocide and therefore the process became tainted with political influences and manipulations. Toward the end of the twentieth century, global politics were characterized by acceleration in conflict resolution and a persistent discourse of justice throughout law and society.

The final milestone in the development of transitional justice was associated with contemporary conditions of persistent conflict which lay the foundation for a normalized law of violence.[14] These contemporary political conditions include war in a time of

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[14] see Teitel Ruti G., (2000) '*Transitional Justice Geneology*' , Harvard Human Rights Journal: pp 69 94 p.78

peace[15], political disintegration, fragile states, diminutive wars, and fixed conflicts. Ruti opines that[16] contemporary political developments have spurred the normalization of the transitional rule of law, the integration and regularization of transitional institutions and processes. The present development of humanitarian regime, the old law of war which has merged with the law on human rights shows the evolution of a steady-state transitional justice. Teitel in her article identifies the contemporary trend of the normalization of transitional justice, seen in the modern increase of the humanitarian regime. What has been visualized as post-conflict rule of law has now become the standard, reflecting that the world is living in times of enduring divergence and sanctuary concerns, and that this broad exposition is apt to devise foreign policy making in the modern global dealings. During the development of transitional justice at this stage, states were seen to result to postwar mechanisms of courts o law applying the rule of law through institutions such as the International Criminal Court (ICC) established under the Rome statute as it were in the Nuremburg trials to prosecute war crimes, genocide and crimes against humanity.

During the 21st century, political instability and violence in Rwanda resulted in the creation of the ICTR.[17] It has been criticized that it does not operate on the sites where the crimes being investigated took place. This fact, so the criticism goes, creates a

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[15] Halberstam D (2001) '*War in a Time of Peace: Bush, Clinton and the Generals*', UK, Scribner, Simon & Schuster

[16] Teitel (2002) '*Transitional Justice in New Era*', Fordham International Law Journal, Vol.26:893, Issue. 4, Article 2 P.902.

[17] Karakezi, Urusaro Mshimiyimana "*Localising Justice: Gacaca in Post-Genocide Rwanda*" in My Neighbor My Enemy (eds) (2003) Eric Stover and Harvey M Weinstein Cambridge University Press p. 70

clear disconnect between the people who suffered throughout the war and the process in which their suffering is addressed. The attempt to address such criticisms has resulted in the creation of a rather innovative form of international justice the Internationalized or Hybrid Courts. These bodies, which have been operating in Bosnia Herzegovina since 2005, Kosovo since 2000, Cambodia since 2003, Sierra Leone since 2002, East Timor between 999-2005 and Lebanon since 2007, employ both international and local jurists and adjudicate on the basis of a mixture of national and international law

Perhaps the most significant development in international criminal justice since the Nuremberg trials has been the establishment as earlier noted by the Rome Treaty in 1998, of the permanent International Criminal Court (ICC) in The Hague. The court has jurisdiction over serious crimes genocide, crimes against humanity, aggression committed after July 1st 2002, by a national of one of the states that are party to the Rome Treaty. It also has jurisdiction over crimes committed on the territory of such state parties, or when the UN Security Council refers a specific case to it and most of the cases before the ICC involve ongoing conflicts. So far the ICC has taken up cases of war crimes committed in Uganda, the Congo and the Central African Republic. All three countries have referred these cases themselves. In addition, The United Nations Security Council has referred the case of Sudan, which is not a party to the Rome treaty. After conducting an investigation into the referral, the court's prosecutor has recently issued an indictment against Sudan's President, Omar al-Bashir [18].Recently six Kenyan citizens

[18] http://plato.stanford.edu/entries/justice-transitional/notes.html#9

were summoned by the Court to answer various charges including crimes against humanity.

One of the most innovative features of the ICC is the fact that it gives a significant role to victims in its proceedings. Victims can send information directly to the court's prosecutor, they can request the opening of a preliminary investigation, they can appear before the court's pre-trial chamber when it deliberates on whether to open a full blown investigation into a case, and, most significantly, they can ask to present their position during the trial itself. Today, the normalization of transitional justice is about expansion of the rule of law. The development of humanitarian law, human rights law and criminal law has constrained the conduct of states and individual in war. There is an appeal to universal morality through the respect of fundamental human rights which is the transitional justice trend as applied today.

Further, the reasons and justification for states to engage in transitional justice have also mutated. They have been influences as noted by political decisions and pressure from the developed to the developing states to find ways to reconcile societies. The underlying values of transitional justice have been to reconcile societies and to achieve justice. Although they appear to be at opposite ends of the spectrum, the goal in both cases is an end to the cycles that perpetuate war, violence and human rights abuses. It is worth to note that the historical pursuit of justice in period of political unrest, have resulted in the creation of truth and reconciliation commissions which fall under the third genealogical phase of transitional justice as proposed by Teitel.[19] She opine that under

[19] See Teilet R (2000) '*Transitional Justice*' ,UK, Oxford University Press, p.81

this face there is an acceleration of transitional justice phenomenon as is known today, associated with globalization and typified conditions of heightened political instability and violence.[20]

2.3 The Theory of Transitional Justice

This theory was advanced by John Rawls and he argues that it carries to a higher level of abstraction to the familiar theory of the social contract as found in the writings of John Locke, Rousseau and Kant.[21] Rawls continues to argue that justice as fairness corresponds to the state of nature and the traditional theory of the social contract. This concept is also termed as principles of political right. Every man must enter into a Social Contract with others. In this social contract, everyone will be free because all forfeit the same amount of freedom and impose the same duties on all. It therefore means that there is accountability in society; no man above all else or above the law and all actions must be accounted for in order for society to live peacefully.

Justice as a theory in the contemporary world rides on the rule of law. Many of the challenges that African states face today in establishing the rule of law is the historical lack of development of the rule of law, dating back to colonial times and continuing throughout the first three decades of independence. In the aftermath of conflict or authoritarian rule, people who have been victimized often demand justice. The notion that there cannot be peace without justice emerges forcefully in many

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[20] Teitel R., (2000) *'Transitional Justice Genealogy'*, Harvard Human Rights Journal, pp. 69-94, p 71

[21] Locke J (1690), *'Second Treatise of Government'*; Amen Corner/Black Swan, Ave Mary Lane Rousseau's (1762), 'The Social Contract' and Kants I.(1785) ' The Foundations of the Metaphysics of Morals' Broadview Press

communities. Justice can be based on punishment and corrective action for wrongdoings or on restoration or emphasizing the construction of relationships between the individuals and communities.

This theory emphasizes that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess and ask forgiveness. In any modern society, punishment is necessary to make perpetrators accountable for their past actions, deter future crime, counter a culture of impunity; and create an environment in which perpetrators and victims can realistically be expected to live next to one another.

During the development of transitional justice it became acceptable in the internationally that universal conceptions of 'justice' were the major platform on which transitional justice was premised.[22] The most contested issues relating to transitional justice are about legal issues and procedures that are invoked by international law and therefore the humble inclination that transitional justice cannot do without international law especially in matters relating to prosecution of perpetrators.

These are legal concepts that can only function within the ambit of the rule of law and justice. The applicability of this theory was further advanced by the fact that societies needed to attain lasting peace which seemed impossible without reference to justice or accountability. States are therefore using different approaches to justice to meet this end. Legal, distributive, rectification, reparative, restorative, distributive and transformative justice has been invoked to bring societies to reconciliation and facilitate accountability.

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[22] Mani, Rama (2005): '*Balancing Peace with Justice in the Aftermath of Violent Conflict*'. Journal of Development 48 (3): 25–34, p29

However it is paramount to note that even if all these forms of justice have been used in society there is a clear distinction between the modern western imposed form of justice and the local forms that have their own dynamics. These mechanisms have been employed by states to solve disputes between communities. It has emerged recently that most would prefer them because they belong to the society as opposed to being imposed upon them and they are widely acceptable. These traditional mechanisms are however not been free of western criticism because they are seen as though they don't in conformity with the theory of justice, go full cycle to end at accountability. Mani notes that peace builders often fail to integrate communities' values inherent in local culture in their quest for justice[23].It therefore follows that justice in transitional justice is achieved in collaboration with society and just peace to address atrocities in a sustainable manner.

2.4 Goals of Transitional Justice

There is a possibility and a justifiable one that as transitional justice has developed, its goals have mutated over time in the different eras that can be discussed the goals of transitional justice as they have developed and changed over time. However, this would be counterproductive for our research because the study would not be able to measure whether or not there have been positive or negative impacts on the mechanisms applied since it shall be limited to one single goal at any one time.

Different scholars have attempted to identify the goals of transitional justice. Elizabeth Evenson identifies four major goals of transitional justice as providing for

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[23] Mani R (2005) *'Beyond Retribution. Seeking Justice in the Shadows of War'*, Cambridge Polity Press, p 85-86

individual criminal accountability, deterrence and punishment and establishing a common truth about the past which can carry the society forward in a process of healing and reconciliation.[24] Miriam Aukeman identifies five separate goals for any justice process to include retribution, deterrence, rehabilitation, restoration and condemnation.[25] States in transition consider taking measures to bring accountability for the actions of perpetrators of human rights violations to provide public justice for the masses, reestablish the authority of the law and to adopt measures to ensure that there is no recurrence of such conflict in society.

Transitional Justice employs mechanisms that focus on addressing, and attempting to heal divisions in society that arise as a result of conflict, bringing closure and healing the wounds of individuals and society, particularly through truth telling; providing justice to victims and accountability for perpetrators; creating an accurate historical record for society; restoring the rule of law; reforming institutions to promote democratization and human rights; ensuring that human rights violations are not repeated; and promoting co-existence and sustainable peace.[26]

For purposes of this study, three goals of transitional justice shall be relevant because they will provide an opportunity to analyze the impact of the transitional justice

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[24] Evenson E. (2004) *'Truth and Justice in Sierra Leone: Coordination between Commission and the Court'*, Colombia Law Review 104, No 3 730-767

[25] Aukeman M (2002) *'Extraordinary Evil, Ordinary Crime: A framework for understanding Transitional Justice'*, Harvard Human Rights Journal 15 pp315-353

[26] Bickford L., (2004), *'Transitional Justice'*, in The Encyclopedia of Genocide and Crimes Against Humanity Vol. 3, pp 1045 1047

mechanisms on the same since they are more established and useful to the research. The first goal of transitional justice is the realization of criminal justice.

Criminal justice has been achieved in transitional justice through institutions that have invoked court proceedings to establish individual responsibility for perpetrators of war crimes to achieve justice and uphold the rule of law. The institutions used to meet these goals have been *Ad hoc* Tribunals of Former Yugoslavia and Rwanda, the International Criminal Court and respective national courts. Under criminal justice, there exists a second area of concern which is offender accountability.[27] In the traditional criminal justice system, offenders are discouraged from acknowledging their responsibility and are given little opportunity to act on their responsibility. Real accountability means encouraging offenders to understand the impact of their behavior and urging them to take steps to put things right.[28] Communities are impacted by crime and should be considered stakeholders as secondary victims. Communities need attention to their concerns as victims, opportunities to build a sense of community and mutual accountability, and encouragement to take on their obligations for the welfare of their members.

The second goal of transitional justice is truth seeking. It is commonly argued that truth-telling and peace go hand in hand. Bassiouni notes that without truth- telling, "the embers of yesterday's conflict can become the fire of tomorrow's renewed

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Robert Bates et al., (2007). '*Consolidating Peace and Mitigating Conflict in the Aftermath of Violence*' Washington, DC: American Political Science Association Task Force on Political Violence and Terrorism. p. 456

[28] Eric Brahm, (2007): '*Uncovering the Truth: Examining Truth Commission Success and Impact.*' International Studies Perspectives 8(1) p.16.

conflict".[29] Truth telling gives an opportunity for the perpetrator to expose and publicly account for wartime misdeeds. This process is aimed at promoting justice by promoting social healing and reconciliation, allowing an official record of the occurrences to be kept and deters future atrocities. By exposing the truth of past crimes, victims and survivors can begin to heal from the trauma of war and receive closure. They will them work towards reconciling with their former adversaries.

A further goal of truth telling is to determine the narrative truth about past events the exact numbers of victims and missing persons and to promote the personalization of victims, thereby preventing manipulation and creating a history of past events based on the truth. The third goal of transitional justice is to achieve institutional reforms. The goal of institutional reforms is to restore citizen confidence in state institutions. Reforms contribute to the prevention of further outbreaks of human rights violations civic jurisdiction over security services, reform of the justice system, and adoption of new legislation.[30] One of the first measures is the removal of violent and corrupted officials from the public sector through verification process that examines the responsibility of public officials for human rights violations and includes the processes of vetting and lustration or establishing responsibility.

These core objectives can only be achieved if the mechanisms employed by the society seeking to achieve justice are acceptable to that society. This means that these

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[29] Bassiouni M.C (1996) *'Searching for Peace and Achieving Justice: The Need for Accountability'*. Law and Contemporary Problems 59(4):pp9-28, p26

[30] Kritz(2001) *'The Rule of Law in the Post conflict Phase: Building a Stable Peace.'* in Turbulent Peace: The Challenges of Managing International Conflict, ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall . Washington, DC: US Institute of Peace Press

objectives need to be instigated in a society that has respect for the rule of law and upholds the concepts of justice. Only then can transitional justice be achieved. The roots of transitional justice impose obligations and rights upon individuals. The respect of human rights is the core duty and accountability is what must be achieved.

2.5 Principles of Transitional Justice.

The principles of transitional justice are informed by the values of transitional justice which are justice and reconciliation. The justice Principle requires holding individuals accountable for the worst transgressions of universal human rights, including genocide, war crimes and crimes against humanity. The argument is that trials in particular will deter future human rights violations and conflict.[31] Former ICTY prosecutor Richard Goldstone, for example argues that with trials, "countries emerging from periods of serious human rights violations can hope for an enduring peace. Without it, the terrible rate of war crimes will not abate.[32]

Countries in transition often face a legacy of large-scale human rights abuses that cannot be fully addressed by existing judicial and non-judicial structures. In such situations, instead of forgetting the past, many countries have used transitional justice mechanisms to seek the truth, pursue accountability, provide reparations to victims, serve justice, and take steps towards national reconciliation. The reconciliation principle offers other benefits, including promoting reconciliation and psychological healing, fostering

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[31] See, Malamud-Goti (1990), *'Transitional governments in the breach: Why punish state criminals'* Human Rights Quarterly 12 (1):Pp. 1-16.p.12

[32] Goldstone R. (1996): *'Peace Missions and* Transitional Justice *Part 2: UN Peace Missions Involvement in Transitional Justice'*: Journal of International Law and Politics ; Winston-Salem, North Carolina, USA pg.501.

respect for human rights and the rule of law: and helping establish conditions for a peaceful and democratically governed country. This is often presented as truth versus justice.[33]

The other principle of transitional justice is reconciliation. Reconciliation varies in meaning and significance. It can simply mean co-existence or it can mean dialogue. remorse. apology. forgiveness and healing. For each person. reconciliation can begin at a different point in the post conflict transition: at the negotiating table. during the prosecution of perpetrators or with the adoption of a new constitution. like in Kenya with the national cohesion program. Oduro gives a more concrete definition of reconciliation. He notes that reconciliation is healing the wounds of survivors. exacting some form of retributive and restorative justice, instituting truth seeking mechanisms to promote historical accounting: and the provision of reparations and other psychological support. In short. reconciliation ultimately connotes the practice of democracy.[34] An important point about reconciliation is that it is not an attempt to restore things to how they were *before* the conflict. but rather about constructing relationships in a way that allows everyone to move forward together. It is therefore not so much about an end result. such as punishment. but rather about a sequence of processes that build and improve relationships.

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[33] Most notably in Rotberg & Thompson (2000), *'Truth vs.* justice: *The Morality of Truth Commissions'* Princeton University Press p.134

[34] Oduro F (2007). *'What do we understand by Reconciliation? Emerging Definitions of Reconciliation in the Context of Transitional Justice Review of the Literature on Reconciliation'* . UK, Oxford University Journals. pp.335-405 p.380

Reconciliation emphasizes on reconstructing relationships more than punishment. Lederach[35] notes that it is difficult to find reconciliation with the at least four elements involved in reaching reconciliation. He further notes that striving to achieve truth which is acknowledgement, revelation of clarity, justice, centered on equality as noted in the social contract or making things right, peace which is reaching harmony or unity and mercy bordering on acceptance, forgiveness and compassion, the place where all these four elements. Lederech further notes that these different elements truth, justice, peace and mercy are foreground at different points in time. In Rwanda, the tribunal was set up to deal with the perpetrators and only later did an element of reconciliation discourse to appear through the Gacaca courts. Whatever the justification or stage in its process, reconciliation is a process and an outcome at the same time and in most cases it achieves reconciliation. It therefore follows as a value to transitional justice reconciliation cannot be overlooked in the overall objective of achieving justice.

Lederech P. (1997) 'Building *peace. Sustainable Reconciliation on Divided Societies'*. Washington DC Pg 145

CHAPTER THREE

3.1 Transitional Justice Institutions in Africa

Transitional justice implies the presence of both transition from authoritarian rule to democracy and the rendition of justice as a sign for renewed future. Thus, it presupposes both 'political change' and 'legal responses to confront the wrongdoings of repressive predecessor regimes.[1] Transitional justice institutions and mechanisms are the major policy innovation of the late twentieth century to reduce human rights violations and strengthen democracy. An in-depth examination of transitional justice has led to the conclusion that there exists in common practice a need for regimes in transition to attempt if only to prove their legitimacy to create an accountability mechanism for previous governments. This is totally a political exercise which seeks to conform to the existing or newly created rule of law in transition states because judicial institutions offer some form of acceptable legality at an attempt to create accountability in such states.

In history, there have been mutating reasons why states engage in transitional justice. Over the past decade, states have used different mechanisms and institutions in their opinion of transitional justice. In general, these mechanisms used have included prosecutions at domestic and international level, truth and reconciliation commissions; lustration the shaming and banning of perpetrators from public office; public access to police, military and other governmental records; public apology; public memorials; reburial of victims; compensation or reparation to victims and or their families in the

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[1] Tietel, R. G., (2003), *'Transitional Justice Genealogy,'* Harvard Human Rights Journal, Vol 16, No 1, pp 69-94

form of money, land, or other resources; literary and historical writing: and blanket or individualized amnesty.[2]

A more refined categorization of transitional justice institutions or mechanisms will be through: Truth seeking through Truth commissions, Prosecutions through War crimes Tribunals, Reparation, Memory through Memorials and Institutional Reforms. [3]The general principles of fundamental justice require holding individuals accountable for the worst transgressions of universal human rights, including genocide, war crimes and crimes against humanity which are evident in states in conflict. With the aforementioned mechanisms and institutions however, it has become clear that transitional justice seeks to achieve much more by making an attempt to reconstruct relationships, psychological healing, upholding the rule of law and reconciliation in society. There emerged debates as to the relationship between international and local politics and the impact of domestic politics on the choice and implementation of any particular transitional justice mechanisms. These debates have been influenced by the lack of clarity on the criteria used by states in the determination of which of the institution to use to achieve reconciliation and healing in a state in transition.

Africa is special. It is a continent endowed with both resources from human capital to natural resources and a large portion of conflict that surrounds these resources. It is the most controversial of the continents and has had its share of conflict fueled by the unequal distribution of national and natural resources, territories, political inequalities

[2] Frankie K. (2005) '*Gendered Subjects of Transitional Justice*', Columbia Journal of Gender and Law , p 153

[3] Audrey R. Chapman and Patrick Ball , (2001). '*The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*.' Human Rights Quarterly 23(1): pp.1-43. P. 23

which seem to stretch from independence. States in Africa have as a result been undemocratic, suppressive and dictatorial and as a result massive human rights violations have been reported. Africa has also seen the development of judicial and non-judicial mechanisms to deal with these violations and to create national cohesion and reconciliation. It has not been exempt from the development of transitional justice institutions to deal with these outbreaks. Of significance is the western influence and pressure for African states to deal with the atrocities by creating mechanisms that seek accountability and justice, methods coiled from experiences in Latin America and Europe As a result, Africa has used four transitional justice mechanisms to deal with these past experiences. These are Truth commissions, Lustration and Institutional reform and prosecutions

In a close examination of these institutions however, emphasis shall be put on only three of the institutions which are truth commissions, trials and institutional reforms. The study shall not discuss in much detail lustration and memorization since they do not produce sufficient experience in African for us to draw a conclusive evaluation of the same.

3.1.1 Truth Commissions

Truth commissions are defined as newly established temporary bodies officially sanctioned by the state or an international governmental organization to investigate a pattern of human rights abuses. This definition is shared among scholars [1] and most agree that it is not a judicial process. However, the practical tenets of truth commissions require

[1] Hayner P. B (2001). *'Unspeakable Truths: Facing the Challenge of Truth Commissions'* New York: Routledge

that they are defined in some parameters that include the requirement that they are set up for a specific period of time with a specific task that focuses on the past and has some authority that allows it greater access to information.

Countries such as Chile, Cambodia, and Uganda suffered terrifying incidents of terror and violence without the subsequent domestic political will or confidence to prosecute n human rights violators. Domestic barriers proved especially pronounced in nations where the violence was chronic and pervasive. Advocates seeking to articulate and to enforce human rights pursued reporting by nongovernmental organizations and journalists and also developed commissions of inquiry exposing and documenting torture, murders, and other human rights violations that would otherwise have been denied and covered up by repressive regimes.[5]

Truth Commissions developed in the contemporary world after the Balkans War of 1912 and 1913 when an inquiry into crimes against civilians were reported. While the first truth commission emerged in Uganda in 1974, the practice did not gain prominence until the mid-1980s in Latin America. The modern Commission was first seen in Latin America in 1982 which were formed to at national and international level administer justice by seeking the truth into the disappearance of people during the Dirty War[6]. However Since 1980 Truth Commissions have been created in Chad, Chile, East Timor, Ecuador, El Salvador, Ethiopia, Federal Republic of Yugoslavia, Ghana, Guatemala,

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[5] Freeman, Mark. (2006) *'Truth Commissions and Procedural Fairness'* , Cambridge: Cambridge University Press

[6] Cox David (2008). *'Dirty Secrets, Dirty War: The Exile of Editor Robert J Cox'*, Evening Post Publishing Company

Haiti, Honduras, Nepal, Nigeria, Panama, Peru, Philippines, Sierra Leone, South Africa, Sri Lanka, Uganda, Uruguay, Zambia and Zimbabwe. Moreover, other traditional justice mechanisms such as the Gacaca courts in Rwanda and the Ajaweed experts in Sudan are also facets of justice in states in transition. In the original setting, states saw no need of creating truth commissions.

The Realists perspectives governing power lines and alliances at this time in history was more concerned with more stringent and power displaying mechanisms such as the Nuremburg trials. The structure and form of truth commissions mutated more in the 1980s and 1990s to see some established by national legislation, some by the United Nations but the mandate mainly remained uniform to gather testimonials from victims of mass atrocities in states and fundamental breach of human rights violations. The findings of these commissions were not always well received. They invoked controversial reactions especially because they established individual criminal responsibility for state actions or actions sanctioned by the state in most cases. The commissions were rarely invested with the authority to prosecute, the commissions carried out their investigations within the resources availed by states and submitted reports to that effect.

While it is undisputed that truth commissions were mandated to and purported to find establish the truth, the 1990s saw a diversion to further include another goal which was to create future relations through reconciliation and forgiveness. These were social factors which were different from the initial position of finding fault. The Cold War brought in new dimensions in truth commissions which were a liberal order. The original setting of truth commissions relied on history and testimonies from witnesses and reconstructions of the violations that had taken place. Notable was the reliance on history

which in essence meant that the longer the period the more vague and unreliable the information became. E. H Carr noted that truth commissions due to their reliance on history, seemed to bring a country's past into the present and purport to make it relevant by using it to make a social moral reconstruction of society.[7]

However, post Cold War saw truth commissions acquire an ethical change by embracing history together with the proponents on the rule of law to achieve its end. On the same breath it remained to be seen that truth commissions in this era that holding individuals accountable for human rights violations at the expense of national reconciliation would in return compromise the process of reconciliation because of obvious concerns of the criteria used to determine those who would be held accountable and national reconciliation because of those who would lose family and friends as a result of the process. It is in this era that a clear divide as to the balance between reconciliation and prosecution became manifest. This was clearly seen in the South African Truth commission, Sierra Leone and Rwanda which pressured victims of apartheid, civil war and genocide to abandon vengeance and embrace forgiveness to achieve national reconciliation.

The original inventors of truth commissions saw the rule of law as a guide in the formalization of social solidarity.[8]Truth commissions therefore were to provide a platform for healing in society to encourage future relations and to deal with the original causes of such violence to avoid a recurrence. This is what justified the need to look into

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[7] Carr E. H (1961) '*What is History*', Random House, Ney York P. 45

[8] Margaret L. Popkin and Naomi Roht-Arriaza, (1995) '*Truth as Justice: Investigatory Commissions in Latin America*,' Law and Social Inquiry 20(1) pp. 56-98 p. 86

the past to help shape relations in the future. This view shared by Zalaquett meant that the understanding of the nature and role of truth commissions was to create a consensus concerning events about which the community is greatly divided.[9]

3.1.2 Characteristics of Truth Commissions

Truth commissions focus on past events to explain certain circumstances. They are about the establishment of historical occurrences that seem to cause discomfort in the present society. It is reactive rather than proactive in bringing accountability and reconciliation in society.

While establishing this historical record, their mandate and period of existence is not perpetual: rather it is limited to a specific period in history or a specific geographical scope or event in history. Secondly, truth commissions do not have judicial powers nor do they operate like judicial institutions. They do not apply judicial rules of evidence or any such procedures. Essentially they are social informal structures who have a clear mandate to establish truth through truth telling and confessions and are not in the business of establishing criminal liability and meting out punishment. Finally, truth commissions are bodies created by a specific authority and therefore they are officially sanctioned and given such authority by a superior body such as a state or the United Nations. Establishment under such authority as is state authority means that the state is more likely to implement the recommendations of the state.[10]

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[9] Zalaquett, J. (1999). "*Truth, Justice, and Reconciliation: Lessons for the International Community.*" in Comparative Peace Processes in Latin America. Arnson. Cynthia. Woodrow Wilson Center Press: Washington DC.

[10] Sarkin J (1999) '*Preconditions and processes for establishing a truth and reconciliation commission in Rwanda , the possible interim role of Gacaca Community Courts* 3 Law Democracy and Development

3.1.3 Truth Commissions in Africa

Africa has been the home of eighteen truth commissions since their development originally from Latin America. Even though some never really saw the light of day in the achievement of their goals. Truth Commissions have been established in Africa in Algeria, Chad, Burundi, Central African Republic, Ivory Coast, Democratic Republic of Congo, Morocco, Ethiopia, Kenya, Ghana, Liberia, Rwanda, Sierra Leone, Uganda, Sudan, Zimbabwe, Nigeria and South Africa. The most celebrated of the commissions is the South Africa Truth Commission while those of Sierra Leone, Rwanda, Ghana, Morocco Central African Republic and Nigeria have also embarked on truth telling processes that promote reconciliation. Moreover, the Kenyan government has taken up this initiative to created a truth commission to look at the atrocities leading to the Post election violence, while the peace agreements of the Democratic Republic of Congo and Liberia have provided for the formation of truth commissions.

Truth and reconciliation commission in Africa have been created to address different needs in the societies in transition. However the distinctions on the mandates, composition, goals, process and even the naming of the commissions have differed depending on the context of each of the African states.

3.1.4 Establishment of Truth Commissions

The formation of truth commissions in Africa has been by various processes. Truth commissions have been formed under the provisions of peace agreements, presidential decrees or national legislation. Peace agreements are part of the processes of ending wars or conflict and as a provision some have been seen to recommend reconciliation efforts to bring such states to peace. In Africa, The Accra Peace

Agreement[11] signed in Liberia between the government of Liberia, Rebels and political parties, The Lome Peace Accord[12] of Sierra Leone. The comprehensive peace agreement of the Democratic Republic of Congo[13] and The Arusha Agreement[14] of Rwanda recommended the establishment Truth commissions to deal with the atrocities committed in the respective countries. After a recommendation from peace agreements to create a truth commission, the implementation of the same has prompted states to create national legislation through Acts of Parliament that have given the truth commissions their legal force. Truth commissions in Africa have been governed by different Charters and Acts of new parliaments established after the conflict. The Liberian[15], South African[16], Sierra Leone[17], Rwanda[18], and Ghana[19] truth commissions operated under an Act of Parliament. There were also presidential decrees declared in Chad[20], Ethiopia[21], Algeria[22] and

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[11] The Accra Acceptance and Accession Agreement 1994

[12] The Peace Agreement between the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (Lome Agreement) 1999

[13] The Global and Inclusive Agreement on Transition in the Democratic Republic of Congo ("The Pretoria Agreement) 2002

[14] The Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front (Arusha Agreement) 1993

[15] An Act to Establish The Truth and Reconciliation Commission (TRC) of Liberia 2005

[16] Promotion of National Unity and Reconciliation Act No. 34 of 1995

[17] The Truth and Reconciliation Act 2000

[18] The Government of National Unity Law No. 3/99

[19] The National Reconciliation Act No. 611 of 2002

[20] Decree No. 014/PCE/CJ/90

[21] Proclamation to Provide for the Establishment of the Office of the Special Prosecutor 22/1992

[22] Presidential Decree No. 01-71

Morocco[23] to govern the truth commission while Burundi's commission was established by a resolution of the security council of the United Nations.[24]

Further, some truth commissions in Africa were established by the governments in transitions or by new presidents after they took power through a legal notice or presidential order. The truth commissions of Zimbabwe, Nigeria[25] and Ethiopia[26] were formed by such orders.

The choice of name of a truth commission is a consideration that needs to be made if only briefly. Usually, such a decision is influenced by their mandate, whether it is to establish the 'truth' or the fundamental reason of their creation for instance to 'investigate the disappearance' or a broader mandate such as 'inquiry into violations of human rights'. In Africa, reconciliation commissions are specific to the role and this can be derived from their names. The name Truth and Reconciliation Commission was given in countries like Liberia, South Africa, Sierra Leone, and The Democratic Republic of Congo while that of Kenya is called the Truth Justice and Reconciliation Commission. However a name depicting a broader mandate was given in Uganda,[27] Ghana,[28]Rwanda,[29] Nigeria,[30]

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[23] Dahir (Royal Decree) No. 1 04-42

[24] United Nations Security Council Resolution S/RES/1012 (1995)

[25] The Oputa Panel was officially inaugurated by President Obasanjo by statutory instrument No. 8 of 1999

[26] Proclamation to Provide for the Establishment of the Office of the Special Prosecutor 22/1992

[27] The Commission of Inquiry into Violation of Human Rights

[28] National Reconciliation Commission

[29] National Unity and Reconciliation Commission

[30] Human Rights Violations Investigation Commission later call The Judicial Commission for the Investigation of Human Rights Violations

Morocco[31] and Burundi.[32] Names arising from specific roles are seen in countries like Algeria.[33] Ethiopia,[34] Zimbabwe[35] and Chad.[36]

3.1.5 Mandates of Truth Commissions

The mandates of truth commissions are defined by the authority that creates them. Issues such as the length of operation, time limit and scope of investigations will form the mandate of the truth commission. Truth commissions in Africa have varied mandates in the enforcement of their duties. The mandate of truth commissions delineates the purpose of the truth commission the powers and the limitations set for it. The mandates set guidelines and boundaries within which the commissions must function. Since the mandates are not uniform, some are specific to an event as that of Zimbabwe which was mandated to investigate the killing of people in Matabeleland region, a specific regime like in Ethiopia as shall be discussed later, or broader mandates focusing on post independence periods like in Ghana and Kenya.

One of the major mandates of truth commissions is fact finding through investigations. These commissions can do an analysis of the causes of conflicts in any country and focus on major crimes such as human rights abuses, mass killings, forced

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[31] Equity and Reconciliation Commission

[32] International Commission of Inquiry for Burundi

[33] Ad Hoc inquiry commission in charge of the question of Disappearances

[34] The Special Prosecutorial Process in Ethiopia by the office of the special prosecutor

[35] Zimbabwe commission of inquiry into the Mateleland disturbances also known as Chihambakwe Commission of Inquiry

[36] The Commission of Inquiry into the Crimes and Misappropriations committed by Ex-President Habre, His Accomplices and/or Accessories.

disappearances and torture.[37] Lately truth commissions have also had the mandate to investigate economic crimes against individuals as in Ghana[38] or against an entire racial group as in South Africa[39]. Countries like Liberia, South Africa, Kenya, Uganda, Sierra Leone, Ghana, Nigeria, Morocco, Algeria and Chad sanctioned broad investigations on general gross human rights violations and violations of humanitarian law, disappearance, sexual violations and as noted economic crimes. There are additional specific mandates to investigate specific events such as the assassination of a former president in Burundi, organize public events to foster reconciliation and educate the public on their rights together with drafting laws to foster reconciliation in DRC and Rwanda. The Ethiopian commission was to investigate abuse of power by the previous government.

The duration of the mandate is also a consideration to make. Having a time limit of a truth commission is not an option. This is a political and social process and it should not drag on for too long. Democratic transitions are usually peaceful and it is important that states take advantage of this period to gain some millage on reconciliation. In Africa, the longest running truth commission is that of Ethiopia having ran for fourteen years, the Rwandan truth commission has been running for eleven years to date. The shortest running commission is that of Burundi which ran for ten months. There are two active truth commissions in Africa now. The Kenyan one created in 2008 and the Rwandan truth commission which became a permanent working body in 2002.

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[37] Truth and Reconciliation Commission of South Africa Report 1998 P. 29

[38] The National Reconciliation Commission (Ghana) Report P.51-155

[39] Roht-Arriza N. (2004) *'Reparations Decisions and Dilemmas'*, Hastings International and Comparative law Review 157.176

3.2 Prosecutions

The prosecution of perpetrators who have committed gross violations of human rights is a critically important component of any efforts to deal with a legacy of abuse. Prosecutions can serve to deter future crimes, reduce victims' sense of marginalization and grievance, re-establish trust between victims in the state, reflect a new set of social norms, and begin the process of reforming, building trust in government institutions, reaffirm the rule of law, and contribute toward reconciliation.[10]

In the post-Nuremberg era discussed in chapter two saw the first generation of transitional justice characterized by the widespread use of truth commission in Latin America. The second generation is primarily identified with the United Nations *Ad hoc* tribunals for Yugoslavia and Rwanda. Prosecutions have also been done by the International Criminal Court (ICC). Since the 1990s there has been an exponential growth in the establishment of new mechanisms for pursuing justice post conflict creating what is today a system of international justice. These mechanisms include individual international tribunals, the birth of the International Criminal Court in The Hague, Hybrid courts and the increased use of universal jurisdiction by individual countries prosecuting crimes under international law.

In Africa, of significance is the United Nations International Criminal Tribunal for Rwanda, The International Criminal Court and the Special Court for Sierra Leone. Due to the overwhelming difference in the mode of establishment, the mandate and the characteristics of these institutions shall be discussed separately and note the overlapping

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[10] Meernik, J. (2005) '*Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*,' Journal of Peace Research 42(3) Pp. 271–289. P. 288

issued so that justice is done to the peculiarities of the institutions. Between the purely domestic and the international lie hybrid tribunals and universal jurisdiction. This was a hybrid tribunal and defined by Sikkink and Walling as 'third generation criminal bodies defined by their mixed character of containing a combination of international and national features typically both in terms of staff as well as compounded international and national substantial procedural law'[41]

3.2.1 The International Criminal Court

This court is situated at The Hague in the Netherlands. It has eighteen judges, five of whom are from Africa. The court has three divisions: the appeal division, a trial division and a pre-trial division.[42] The International Criminal Court arose out of the gaps left by the Nuremburg and Tokyo trials and to respond to atrocities that were being committed in the former Yugoslavia that were being addressed by the International Tribunal for former Yugoslavia established by the United Nations Security Council and mandated to prosecute persons responsible for serious violations of International Humanitarian Law committed on the territory of former Yugoslavia since 1991. The same tribunal was created for Rwanda. In July 1998 states came together to campaign for a permanent international criminal tribunal which resulted in the Rome Statute that established the International Criminal Court.

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[41] Sikkin K and Walling B (2007) *'The Impact of Human Rights Trials in Latin America'* Journal of Peace Research 44(4) 427-445

[42] Article 34 and 39 of the Rome Statute of the International Court A/CONF.183/9 1998

3.2.2 The Mandate of The Court

The mandate of the court is vested in its Jurisdiction. The court has jurisdiction in respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[43] The statute goes further to define each of these crimes except for that of Aggression. Further the jurisdiction of the court is not retrospective and therefore the court can only prosecute crimes that were committed on or after July 2002 when the statute came into force. Lastly the jurisdiction of this court is complementary to national courts. The court can only hear matters as a court of last resort when national states have failed[44]. The court has power to investigate alleged atrocities and recommend trial of the perpetrators. So far, the court has received 139 complaints about alleged crimes and has opened investigation in 7 of these countries all of which are in Africa. The Democratic Republic of Congo, Uganda, The Central African Republic, were referred to the court by other states while Darfur in Sudan and Libya were referred by the United Nations Security Council. Kenya and Cote d'Ivore were begun by the prosecutor on his own motion[45] of the ICC. Of the seven states cases have begun at the ICC except for Cote d'Ivore because the investigations begun on 3rd October 2011.

Due to the political instability and the ongoing violence in the Great Lakes conflict, the legal systems of the Democratic Republic of Congo, the Sudan, Uganda and the Central African Republic have been enable or reluctant t prosecute the gravest crimes

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[43] Rome Statute op cit., Article 5

[44] Rome Statute op cit., Article 17

[45] Article 15 of the Statute grants the Prosecutor the mandate to commence investigations on his own

committed on their territories. The court has therefore on its own motion[46] proceeded with its own investigations.

So far the ICC has prosecuted rebel leaders from Uganda as a result of the atrocities committed by the Lords Resistant Army under the direction of Joseph Kony. A recommendation put to the court by the Ugandan president saw the issue of arrest warrants for the rebel leaders. Their trials proceed in absentia for war crimes and crimes against humanity against civilians n northern Ugandan and eastern DRC[47] and are yet to be determined by the court.

The court has also issued warrants of arrests against the Sudan President Omar al-Bashir who is still at large accused of war crimes and crimes against humanity together with genocide in Darfur and the western region which is home to the black Sudanese[48]. The former vice president of DRC Bemba is before the ICC on charges of war crimes and crimes against humanity in the Central African Republic and the trial is still on at the Hague. The latest matter to be heard at The Hague is that of six suspects who appeared before the court for confirmation of charges for offences against humanity.

3.2.3 The International Criminal Tribunal for Rwanda

In November 1994 Africa experienced the most horrific genocide in history. The Security Council again created a second Ad Hoc Tribunal on recommendation by the United Nations Secretary General's commission of experts[49] who investigated and

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[46] The court has complementary jurisdiction under Article 20 to proceed with the investigations

[47] Human Rights Watch,(2010) '*Trial of Death*'. New York

[48] Simons M. '*International Court Genocide to Charges Against Sudan Leader*'. New York Times 12th July 2010

[49] UN DOC S/RES/935(1994)

reported on the evidence of Hutu violations of international humanitarian law. The committee found overwhelming evidence that acts of genocide, within the meaning of Article II of the Genocide Convention, had been committed against the Tutsi ethnic group by Hutu elements in a concerted, planned, systematic and methodical way. it also concluded that although crimes against humanity and other serious violations of international humanitarian law had been committed by individuals on both sides of the conflict, there was no evidence to suggest that acts committed by Tutsi were perpetrated with an intention to destroy the Hutu ethnic group, as such, and therefore were not within the meaning of the Genocide Convention.[50]

Resolution No 955 authorized the creation of The United Nations International Criminal Tribunal for Rwanda (UN-ICTR) with the cooperation of the Rwanda government[51] under the authority of Chapter VII of the UN Charter which specifies that the Security Council has the right to take actions which maintain peace and security.

3.2.4 Mandate of the Tribunal

The tribunal's mandate is to investigate and prosecute persons responsible for genocide and other serious violations of international humanitarian law committed against Rwandan citizens and in one of the neighboring countries. Competencies of the tribunal extend to violations of International humanitarian law including genocide, crimes against humanity and violations of Article III to the Geneva Conventions and Additional

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[50] Final Report of the Commission of Experts established pursuant to Security Council resolution

[51] Shraga D, Zacklin R (1996) *'The International Criminal Tribunal for Rwanda'*, European Journal of International law Vol 7 P501-518

Protocol II.[52] This additional jurisdiction to hear matters under the Geneva Conventions was an unprecedented expansion of international law.[53] The mandate of this tribunal was originally limited to crimes committed during one year between 1 January and 31 December 1994 and the seat was not specified.

Despite its characterization as international justice, the International Criminal Tribunal for Rwanda has both the mandate and institutional components to foster local ownership of transitional justice within Rwanda. First, the ICTR witness assistance unit and information centre in Kigali represent an attempt to bring awareness and relevance to Rwandan communities and individual survivors. While the effectiveness of these components is questionable, the Tribunal's recognition of the need for local relevance and protection of survivors' needs and rights is an important lesson for a new generation of transitional justice strategies.

Second, the ICTR is the first international tribunal to articulate the goal of "national reconciliation" in its mandate, found in Security Council Resolution 955.[54] Peculiar to this Tribunal, The Statute of the Rwanda Tribunal does not limit the personal jurisdiction of the Tribunal to major criminals, as did the Nuremberg Charter, and thus, in principle allows the Prosecutor a larger discretionary power in the choice of the accused. But while the pursuit of political and military leaders is inherent to an international criminal jurisdiction, of the twenty-one accused so far indicted by the Rwanda Tribunal.

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[52] Article III of the Geneva conventions deals with armed conflict of an international character

[53] Rudolph (2001) *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals* . International Organization Vol 55 P. 655-93

[54] United Nations Security Council, "Resolution 955," (UN Doc., 1994), vol. S/RES/955.

only a handful were key members of the political and military leadership at the time of the events

3.2.5 The Special Court for Sierra Leone

In Sierra Leone, the post-war domestic judiciary was very weak and partisan. According to one report, following the civil war the judiciary had "collapsed and institutions for the administration of justice, both civil and criminal, were barely functional administration of justice outside Freetown was almost non-existent."[55]

3.2.6 Establishment of the Special Court

This court was established in 2000 by agreement between the Government of Sierra Leone and the United Nations establishing a Special Court for Sierra Leone. The Agreement includes as an integral part the Statute of the Special Court[56]. This special court differed distinctively with other tribunals. In its establishment, unlike the ICTY and ICTR, which were established by Resolutions of the Security Council and thus constitute subsidiary organs of the U.N., the Special Court is established by agreement between the U.N and the Government of Sierra Leone. It therefore is "a treaty-based *sui generis* court of mixed jurisdiction and composition"[57].

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[55] Amnesty International, (2000)' *Sierra Leone: Ending Impunity an Opportunity not to be Missed.*'

[56] The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone UN Doc S/2000/915

[57] Report of the Secretary-General on '*The Establishment of a Special Court for Sierra Leone. The Special Court for Sierra Leone: A New Type of Regional Criminal Court for the International Community?*', International Enforcement Law Representative Vol. 17

3.2.7 Mandate of the Court

This court has mixed jurisdiction because it may act as a domestic court of Sierra Leone when it applies Sierra Leonean criminal law to offences under that law and as an international criminal tribunal when it applies international law to offences enumerated as punishable in the court's statute. This was peculiar because the personnel or judges are appointed partly by the government of Sierra Leone and the United Nations after mutual consultation. The establishment of the Special Court for Sierra Leone was partly a response to this disintegration of the domestic judicial system. Its mandate includes embracing both international and national crimes, to deal with crimes against humanity, violations of Article 3 of the Geneva Convention and of Additional Protocol II and other violations of international law.

Further and perhaps the most controversial aspect of the statute is the court's jurisdiction over children aged between fifteen and eighteen at the time of the commission of the crime. Children had certainly committed horrible crimes: the RUF's 'Small Boy Units' rapidly gained a reputation for being among the most vicious and impetuous killers, and the younger the child, the more merciless they seemed to be. One of the most passionately advanced objections was that for children caught up in Sierra Leone's war, the line between victim and perpetrator was distressingly blurred. It is estimated that perhaps half of the RUF combatants were between 8 and 14 years old[58]. The Special Court for Sierra Leone accurately reflects the international community's

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[58] Krijn Peters and Paul Richards, (1998) *'"Why we fight": voices of youth combatants in Sierra Leone'*. Africa 68: 2, p. 187.

commitment to international criminal justice. The court began trials on 3 June 2004. It was supposed to end by 2006 and completed its mandate by December 2009. Thirteen people have been indicted, with nine of them in custody.

The jurisdiction of this court to determine matters under the Geneva Conventions and its additional Protocols distinguishes the court and develops a special jurisprudence in international humanitarian law. It provides an avenue to explore prosecution of serious human rights including torture as provided for under the Geneva Conventions. This is an otherwise absent avenue to bring such accountability even with such provisions being made available under the African Charter.

3.3 Institutional Reforms

Institutional reform is the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents. By incorporating a transitional justice element, reform efforts can both provide accountability for individual perpetrators and disable the structures that allowed abuses to occur. Institutional reform can include many justice-related measures, such as vetting which is examining personnel backgrounds during restructuring or recruitment to eliminate from public service or otherwise sanction abusive and corrupt officials.

Structural reforms that involve restructuring institutions to promote integrity and legitimacy, by providing accountability, building independence, ensuring representation, and increasing responsiveness.[59] Oversights involving creating publicly visible oversight bodies within state institutions to ensure accountability to civilian governance. Legal

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[59] Gibson. J. L (2004), '*Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa.*' Law and Society Review 38(1) Pp. 5–40. P. 38

frameworks can also be structured by reforming or creating new legal frameworks, such as adopting constitutional amendments or international human rights treaties to ensure protection and promotion of human rights. Disarmament, demobilization and reintegration which involves disbanding armed actors such as paramilitary groups and providing justice-sensitive processes and means by which ex-combatants can rejoin civil society.

Finally, training initiatives for public officials and employees on applicable human rights and international humanitarian law standards. Institutional reform as a transitional justice measure aims to acknowledge victims as citizens and rights holders and to build trust between all citizens and their public institutions. Measures to assist this include promoting freedom of information, public information campaigns on citizen's rights, and verbal or symbolic reform measures such as memorials or public apologies.

Successful institutional reform and a sustained process of democratization vindicate the value of their convictions and rebuild the part of the self that the repressive regime destroyed.[60]

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[60] Becker, David, Elizabeth Lira, Maria Isabel Castillo, Elena Gomez, and J. Kovalskys. (1990). *Therapy with victims of political repression in Chile: The challenge of social reparation*. Journal of Social Issues 46 (3): 133-50.

CHAPTER FOUR

4.1 Outcomes of Transitional Justice Institutions in Africa

Having identified the various transitional mechanisms employed in Africa over history, it is prudent to examine the effects of the outcomes of transitional justice institutions. Emphasis is laid on three major forms of transitional justice mechanisms: truth commissions, war crime trials and institutional reform or change, the other two, reparations and lustration mechanisms have not been used widely in Africa and have too few observations to generate meaningful conclusions regarding their outcomes in Africa.

All transitional justice mechanisms including trials, truth commissions, vetting, reparations, memorialization, and institutional change as well as other alternative interventions raise questions about truth, national identity, history, human rights, cultural practices, and good governance. It is the norm in the analysis of the outcomes of transitional justice institutions that scholars choose to focus on single case analysis rather than the outcomes of transitional justice mechanisms in totality.[1]

However to perceive a more holistic analysis of the outcomes of transitional justice mechanisms in Africa, it is important for us to be guided by the goals that transitional justice mechanisms seeks to achieve as a yardstick towards their success or otherwise.

Earlier, the major goals aligned with transitional justice mechanisms in Africa were established. The goals attempt to heal divisions in society that arise as a result of conflict.

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[1] Wiebelhaus-Brahm E. (2009) *'Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy'*; London; New York: Routledge; Brahm E.W, Dancy G and Hunjoon K (2010) *'The Turn to Truth: Trend in Truth Commission Experimentation'*, 9 Journal of Human Rights, 15; Mallinder L. (2008) *'Amnesty, Human Rights and Political Transition: Bridging the Peace and Justice Divide'* U K, Hart Publishing, Oxford

bringing closure and healing the wounds of individuals and society particularly through truth telling: providing justice to victims and accountability for perpetrators: creating an accurate historical record for society; restoring the rule of law: reforming institutions to promote democratization and human rights; ensuring that human rights violations are not repeated: and promoting co-existence and sustainable peace.

For us to make a conclusive analysis, the study shall focus on the outcomes of the transitional justice mechanisms that have been employed in Africa in the face of the intended goals.

4.1.1 Justice to victims and accountability for perpetrators

The field of transitional justice in Africa has not been any different from the rest of the world. It draws on the decade's long development of international humanitarian law and prior efforts to prosecute war criminals and bring a sense of accountability for the perpetrators in the conflicts. However as earlier noted, the modern transitional justice mechanisms had a shift from the traditional setting of court prosecutions to a more democratic mode of operations that saw the birth of other institutions especially post cold war that traditionally would not have been used to met out justice. These institutions have employed a different philosophy and political justifications to apply justice.

Ideally, every transition creates a divide between the old regime and the new regime. Victims of the old regime frequently demand justice against those whom they regard as perpetrators. The perpetrators include officials of the old regime such as dictators, party leaders, judges, bureaucrats, and soldiers and collaborators among the civilian population including business and religious leaders, union officials, and ordinary citizens who betray their friends and neighbors. The victims argue that they were unjustly

deprived of jobs, educational opportunities, and property. Officials of the new regime themselves often victims of the old regime must decide how to answer these calls for justice. It has therefore emerged that in Africa such justice has been obtained from the outcomes of trials and Truth Commissions.

With reference to the mandate of truth commissions as earlier identified, the highlight the outcomes of such commissions are important here. While it is true that all of the mandates of truth commissions are linked to national unity and reconciliation, it is also important to appreciate that most of the reports from the proceedings of these commissions in Africa have been made public. Liberia, Chad, South Africa, Uganda, Sierra Leone, Ghana, Ethiopia, The Democratic Republic of Congo, Nigeria, Morocco, Burundi and Algeria released their reports on the findings of the truth commissions. However Zimbabwe has never released the report while the Kenyan and Rwanda truth commissions are still sitting.

Truth commissions in Africa have been dedicated to establishing a historical record of conflict including human rights abuses over a defined time period, these bodies have contributed to creating shared accounts of disputed and hidden events, clarifying who committed abuses and how, eliciting acknowledgement of state misconduct, and restoring some degree of social reconciliation and moral order.[2] Commissions in Africa have entertained disputes relating to the disappearance or abduction of persons like in Algeria and South Africa, mass killings in Rwanda, Zimbabwe and Sierra Leone or to

[2] Kiss E. (2000) '*Moral Ambition Within and Beyond Political Constraints*'; in Rothberg R and Thompson D Truth Vs Justice: Princeton University Press p.68

otherwise promote peace, forgiveness and reconciliation by establishing the truth in countries like The Democratic Republic of Congo, Kenya and Zimbabwe.

Truth commission's major goals is to foster reconciliation between conflicting armies, ethnic groups as in Rwanda or economic groups in conflicts centered on resource distribution. It however does not happen as easily as it may be perceived. Angola for instance may have reached the Bicesse Accord in 1991, but peace was not realized until 2002. The process of reconciliation involving erasing traumatic memories and involving truth commissions may not be an easy one.

However it is important to note that outcomes of truth commissions that they differ widely depending on the nature of the conflict and the political will to address past abuses in a specific context. For example, the truth commissions in South Africa had access to files, but faced non-cooperation from the police and military or found that relevant documentation had been destroyed, thus compromising their investigation.[3] Outcomes of Truth Commissions are published in the commission's final report. This report is a summary of the key findings. Patterns of abuse are outlined. Several findings have been determined by the eighteen Truth Commissions in Africa. Their reports lead to the first official acknowledgement of past crimes and suffering endured by victims after years of denial and silence. Most importantly, the commission's report provides

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[3] James L. Gibson, (2006) '*The Contribution of Truth to Reconciliation: Lessons from South Africa.*' Journal of Conflict Resolution 50(3), Pp. 409-432.

recommendations for rebuilding society because they pave the way for future criminal prosecutions, institutional reforms and reparation programmes for victims.[1]

However, in all the truth commissions in Africa, the sole purpose of the written report is precisely to provide an account of what happened, thus becoming the definitive analysis of the conflict. This then as an outcome fulfils one of its major goals which are to document the events leading to the violations and atrocities and with this create a reference point for states. One of the key aspects of the report is the highlighting of the structural factors that facilitated the abuse of human rights. Recommendations often center on judicial, military, and police reform. Some observers argue the implementation record of reform recommendations is often poor. Reforms are often debated for years, may require legislation or a constitutional amendment, and may become overshadowed by other issues as political changes as time goes on.

It is public knowledge that most of the findings of the reports have been kept away from the public. However of the known findings, responsibility for the massive violation of human rights has been condemned. In order to have maximum impact on society, the reports should be widely disseminated. It seems unlikely a truth commission can be considered a success if its findings are not made public. It is important that the entire population has access to the findings to better understand the trauma they have experienced. If a report is kept out of public view, it will raise suspicions about the government's role in the violence.

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[1] William J. (2003) Long and Peter Brecke. '*War and Reconciliation: Reason and Emotion in Conflict Resolution*', Cambridge, MA: MIT Press, P, 65.

The Truth commissions of Algeria, Chad Sierra Leone have in their findings found that the government in power at the period for which the mandate of the truth commission is limited to had violated fundamental human rights and were responsible in one way or another for the deaths and disappearances including abductions of several people. The Sierra Leone and South African Truth Commissions went ahead to hold individuals responsible for the atrocities being investigated.

Truth commissions in Africa have been able to achieve these outcomes because of a few elements. Truth commissions by their composition make themselves autonomous and independent from any government interference and confidence from the people. The South Africa truth commission's independence was evidence because the ruling party did not necessarily agree with the findings of the commission.[5] The Liberian Truth Commission quashed the idea of pro-government bias when it recommended that president Sirleaf be banned from holding office as earlier noted[6] which may be counterproductive because the commission may not get its recommendations implemented.

Another ingredient for success of truth commissions in Africa is public involvement. The involvement of civil society is important. Ghana's civil society was the key to successful and extended to the drafting of the Truth and Reconciliation Act. Without the support of non state actors the process is questioned and its credibility

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[5] Gibson J. L. (2009) *'On legitimacy Theory and the Effectiveness of Truth Commission'* Law and Contemporary problems, p. 123

[6] Death Threats Sent to Liberia TRC , BBC News July 10 2009

flawed.[7] The South African truth commission the NGOs were not involved as much although that did not really stop the process from gaining mileage on achievements. This commission however gained more from the fact that it held public hearings, special hearings which focused on key constituencies such as youth and women or institutional hearings which created more confidence in the process. The largest challenge for non achieving Truth commissions is the lack of funds to make reparation payments.[8] This was a critical mandate of truth commissions in Africa if only to pave way for reconciliation in societies. The truth commissions of South Africa, Sierra Leone and Ghana had monetary problems and therefore did not properly execute the issue of reparations.

Another limiting factor is the adversarial nature of these processes which makes it difficult to get the truth because there are incentives to limit the truth. However, truth commissions found a way around it by granting amnesties to perpetrators. These cases were seen in Sierra Leone, Ghana, Algeria and Zimbabwe. Amnesty was originally meant to be and incentive for perpetrators to speak out and tell the truth. It means that despite the findings of the truth commissions, states take no action to bring to accountability the respective perpetrators. This has been a contentious issue in Africa considering the gravity of the violations that invoke the formation of truth commissions. However, it also led to another outcome that was compromising the overall desire to achieve accountability and justice. In South Africa, perpetrators received amnesty only in return for truthful testimony; ex-combatants in Sierra Leone already had amnesty before the

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[7] The International Court of Justice, (2004) *Truth Commissions and NGO's: The Essential Relationship* IV ICTR Occasional Paper Series

[8] Alexandra Barahona de Brito, Carmen Gonz´alez-Enr´ıquez and Paloma Aguilar, eds., (2001) *The Politics of Memory: Transitional Justice in Democratizing Societies* , Oxford: Oxford University Press p. 59

Truth Commission started the work, and therefore lacked an incentive to testify. Many ex-combatants wanted to return to their communities but were afraid of their reception: participating in the truth commission was seen as a means of easing the path of reintegration but not healing the public. It therefore follows that the outcome of the Sierra Leone Commission was an undesirable one because it seemed to favour the perpetrator and providing an easier way out rather than achieving justice for the victim. Compared with the South African and Ghanaian cases, the issue of amnesty was very controversial in Sierra Leone, being probably the most internationally scrutinized process.

The Lome Accord extended a blanket amnesty, included at the insistence of one of the parties and with little discussion of the issue.[9] The mandate of the Sierra Leone Commission was seen as very limiting and therefore did not achieve the objective of bring to account Foday Sankoh. This would have been the desired outcome considering the need for justice to bring therapeutic healing for the people abducted, detained and for those displaced in the conflict. Further, Algeria by peace Accord granted amnesty for both security forces and armed Islamists groups. This would have in the end compromised the findings of the commission had it completed its work and published its findings. Before drawing a conclusion on the issue of *Ad hoc* tribunals in Africa, it is paramount to note that there are instances where states have utilized the tribunals and national courts together to achieve the possible perceived outcome of achieving justice for the victims. Rwanda began its own genocide trials in the national courts in December 1996: many analysts predicted, however, that the sheer magnitude of the genocide and

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[9] Hirsch, John. (2001) *'Sierra Leone: Diamonds and the Struggle for Democracy'*. London: International Peace Academy Occasional Paper Series and Boulder, CO: Lynne Rienner Publishers, Pp. 175

violence of 1994 would overwhelm the system.[10] The position taken by Rwanda has been challenged heavily on how national courts can share the playing field in the international arena to bring justice to crimes of an international nature. The protracted conflict in Rwanda became internationalized and attracted great international attention and due to the magnitude of the atrocities, demanded international mechanisms granted that the national courts could not handle matters extending to such gravity.

Trials are also used by African states to achieve justice. In the aftermath of violence, the people want justice for blood shed. One author noted that 'just as victims of crimes in a domestic settling expect to see the due process of law take its place with a criminal investigation, prosecutions and possible convictions and sanction, most victims of brutality in armed conflicts have a similar hope.[11] Trials have multiple goals, including revealing the truth, deterrence, punishment, removing criminal element from positions of public office, reconciliation and promotion of the rule of law.[12] Trial advocates believe criminal punishment serves the needs of victims, reinforces social norms, removes political threats to the new regime and deters future abusers.[13] Special deterrence is

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[10] Lawyer Committee for Human Rights (LCHR) (1997), '*Rwanda, the Justice System and Violations of Human Rights*' New York, p. 6.

[11] Varney H (2007) '*Retribution and Reconciliation: War Crimes Tribunals and Truth Commissions. Can they work together in our freedoms: A decade's Reflection on the Advancement of Human Rights*. Human Rights Institute of the International Bar Association. Pp. 208-230

[12] Jane E. Stromseth, (2003).' *Introduction: Goals and Challenges in the Pursuit of Accountability*.' in Accountability for Atrocities: National and International Responses', (ed). Jane E. Stromseth ,Ardsley, NY: Transnational Publishers.

[13] Kritz, Neil. (2001).'*The Rule of Law in the Post conflict Phase: Building a Stable Peace*.' in Turbulent Peace: The Challenges of Managing International Conflict', ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall Washington, DC: US Institute of Peace Press,

achieved through the outright removal of perpetrators and implicated leaders. while generalized deterrence is effected by spurring changes in potential perpetrators and by tacitly instilling inhibitions against abuse. Advocates also believe that credible threats of punishment boost political stability and encourage constructive political behavior. Trials respond to victims' needs and provide psychologically therapeutic effects. offering victims a sense of justice and catharsis, as well as a sense that their grievances have been addressed and can hopefully be put to rest, rather than smouldering in anticipation of the next round of conflict.[14]

Before turning into the international law to achieve this kind of justice. states purport to achieve the same in-house. Domestic trials therefore are the first initiative to achieve this kind of justice. Their close proximity to the local population guarantees that justice will be done. Domestic efforts to try war crimes, as in Ethiopia where Mengistu was found guilty of acts of genocide and given a life sentence. have helped strengthen a new and fragile government's credibility. These trials have been highly visible and act as a showcase and foundation for a new domestic criminal and judicial system. Other countries have explored prosecution of the perpetrators of the conflicts. Chad has been able to have Habre prosecuted for violations of international criminal law by a Senegalese court has was convicted in absentia. Though not as prominent as it would otherwise be, South Africa by the recommendation of the truth commission prosecuted very few people especially those responsible for aiding and abetting apartheid. These

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[14] Kritz, Neil J. 1996. '*Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*'. Law and Contemporary Problems 59 pp.127-152. P. 129

trials were compromised by the amnesties that were granted by President Mbeki and therefore the expected outcome was not achieved.

The creation of the Ad hoc International Criminal Tribunal for Rwanda and the reference of some matters to the International Criminal Court ushered in a new era in international law as well as international relations. Justice for mass violence in the form of criminal accountability has long been an elusive demand of many victims. This court had a special mandate to investigate high ranking officials involved in the genocide. The tribunal though with power to investigate these individuals faced a huddle at the onset when states could not cooperate with the tribunal. Article 28 of the 955 Resolution of the United Nations Security Council for member states to repatriate individuals to the ICTR. This did not happen with Kenya and the Democratic Republic of Congo who took in most of the refugees including key planners[15] during the genocide. This was an initial huddle on the tribunal although that changed. DRC extradited defendants and approximately 75 % of those indicted by the tribunal have been arrested and approximately half of those arrested have either been tried or are on trial.[16] This tribunal has six kinds of defenders; the political leaders including eleven ministers, thirteen military leaders, three media leaders, fourteen senior government administrators and three religious leaders.[17] Significant the former Prime Minister Jean Kambanda has been

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[15] Morris Madeline. H. (1997) '*The trials of Concurrent Jurisdiction: The case of Rwanda*', Duke Journal of Comparative and International Law Vol 7 p 349-374

[16] Erin Daly, (2002) '*Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*', 34 New. York University Journal of International Law and Politics, p 355

[17] United Nations International Tribunal for Rwanda Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of

convicted of genocide. This verdict for crimes against humanity is the most important conviction of humanitarian law.

However it is worth noting that even if the tribunal has managed to get convictions on key perpetrators, none of those convicted are serving their sentence in Rwanda. At this point, 75% of those convicted are serving sentences in Mali. Three other countries including Benin, Swaziland and France have also agreed to accept ICTR convicts. Justice for victims is skewed not towards them but towards the perpetrators. If leaders are away receiving international justice which is perceived as lenient, their followers plea bargaining at home, then no one is severely punished for the atrocities.

Sierra Leone had a unique way of achieving justice for the victims of the conflict. The country established The Sierra Leone Special Court. The philosophy was that the court would prosecute only individuals in top leadership positions responsible for the commission of the crimes not mid-level people who might have been responsible for the deaths of hundreds or thousands, but the individuals responsible for the deaths of tens of thousands of people. It prosecuted only those people who bore the greatest responsibility for crimes committed during the civil war.[18] It begun hearings in 2002 and indicted thirteen individuals including Charles Taylor who claimed to have immunity from prosecution by the court. The Taylor trial is still being conducted in The Hague in the shadow of the trial of Yugoslavian President Slobodan Milosevic. Fortunately, with the Taylor trial occurring in The Hague and this case being viewed as a test of international

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International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such violations Committed in the Neighboring states between 1 January and 31 December 1994 A/57/163-2/2002/733

[18] U.N. Sierra Leone Agreement, Art 1(1)

justice. there has been support from some countries at greater levels than would have been offered for proceedings in Freetown. As the Taylor trial began in earnest in The Hague. important work was also being concluded in Freetown in the other cases. In June 2007. Trial Chamber II delivered its judgment convicting the three defendants in the AFRC case on eleven counts of crimes against humanity and war crimes.[19] The judgment included the first convictions in history for the crimes of conscription or use of child soldiers. sexual slavery as the war crime of outrage against personal dignity. and acts of terror in a civil war.[20] In July 2007, the trial chamber sentenced two of the defendants to fifty years and the third defendant to forty five years.[21] The establishment of international tribunals may not. at the beginning, have been expected to accomplish a great deal. But what has happened in the Taylor case; his arrest and transfer. despite having been allowed to go into a comfortable exile indicates that international justice has gained great momentum. Further another achievement of this court is that it built local justice by localizing the judicial process so that it is closer to its intended beneficiaries and reduced on costs.

In the same breath, Rwanda in 1992 passed a law establishing the Gacaca system of a hierarchically organized network of community courts that would try lower level crimes. The outcome of this transitional justice mechanism here was that since the ICTR was trying high level government officials, the low level perpetrators would also be entitled to their justice. The courts prosecuted cases ranging from property crimes that

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[19] Prosecutor v. Brima. Case No. SCSL-2004-16-T. Judgement. Disposition, 660 759 (June 20. 2007).

[20] Prosecutor v. Brima. Case No. SCSL-2004-16-T. Judgement, Disposition., op. Cit. P.10

[21] Prosecutor v. Brima. Case No. SCSL-2004-16-T. Judgement, Disposition,, op. Cit. P.. 36

were heard at the smallest level to assaults that were heard at the next higher level through to intentional and unintentional homicides at the top level. Those accused of sexual crimes or organizing or inciting genocide were tried in the formal courts if they did not go before the ICTR.

On another platform, The International Criminal Court (ICC) has, to date, opened cases exclusively in Africa. Cases concerning 25 individuals are open before the Court, pertaining to crimes allegedly committed in six African states: Libya, Kenya, Sudan in the Darfur, Uganda by the The Lord's Resistance Army, LRA, the Democratic Republic of Congo, and the Central African Republic. A 26th case, against a Darfur rebel commander, was dismissed. The trials of former Congolese vice president Jean-Pierre Bemba who was charged with war crimes and crimes against humanity and Thomas Lubanga the rebel leader are currently before the ICC, with the latter being accused of recruiting child soldiers.

To date, matters before the ICC have not been settled. Arrest warrants for the Libyan leader Muammar Al Qadhafi and his son Sayf Al Qadhafi and the Libyan Intelligence Chief have been issued. The trial of Congolese militia leader Thomas Lubanga Dyilo is set to be completed soon. The six Kenyan suspects before the court are yet to have their charges confirmed by the court. In addition, the Prosecutor has initiated preliminary examinations, a potential precursor to a full investigation in Côte d'Ivoire, Guinea, and Nigeria. The achievements of trials for conflict related violations and in particular international trials done by the ICC and the ICTR have been curtailed by a few aspects. The low number of convictions or the conviction of the big fish leaving out the real perpetrators of such conflicts has been marred by issues relating to distance from the

victims of the violence. This distance has been criticized specifically for the ICTR and the ICC so that the victims do not feel as if their plight is being addressed well because they do not even have the opportunity to attend the hearings.[22] This has made the process lose the people's confidence all together.

Having borrowed a lot from the Nuremburg trials, the ICC and ICTR are not victim friendly. The focus in this court is more towards the perpetrator than it is the victim. This means that the victim's needs are not being addressed by the hearings. The Hague confirmation hearings of the Kenyan six, Charles Taylor put all the perpetrators and not on the victims. Trials in International courts are political processes. They are about who comes out of it unscarred. The plight of the dead and internally displaced is not a consideration of the court and therefore it does not really get resolved at the expense of the victim.[23]

Further, another negative outcome of trials is that since they cannot really deal with whoever is not judicially accountable such as child soldiers, collaborators and beneficiaries, they never really bring everyone responsible to book. There is however an exception in Africa in the functioning of the Sierra Leone special court. The court had jurisdiction to deal specifically with child soldiers. This is probably one of its biggest achievements since the gap as it were in international law is misused by parties committing atrocities to avoid liability.

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[22] David Backer, (2006) '*Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa*,' International Journal of Transitional Justice, 4(3):P. 345

[23] Gunnar Theissen, (2009) '*Public Opinion Research on Transitional Justice Mechanisms: Issues and Challenges*,' in Assessing the Impact of Transitional Justice: Challenges for Empirical Research, ed. Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman , Washington, DC: US Institute of Peace Press.

4.1.2 Fact Finding

All the truth commissions invariably struggle to fulfil the enormous objectives laid out in their individual statutes. The truth commission process including statement gathering and public hearings always generated widespread interest and participation, thereby largely fulfilling the mandated task of providing a public forum for victims and perpetrators to tell their stories. The commissions also instigated a formal, public process of reconciliation and providing models for how such activities could be organized so that they can attain their objectives. Although both truth commissions and trials seek to establish truth, commissions supply narrative, rather than forensic, accounts of the past. [24]Commissions can investigate broader contexts of abuses, including the institutional and structural factors and therefore make it difficult to deny gross violations of human rights and signal official determination to avoid the recurrence of violations.[25]

Truth commissions in Africa have the mandate to ensure reconciliation in society. Specific to South Africa, Sierra Leone and Kenya, they had the duty to ensure that victims and perpetrators of gross human rights violations have their relationships restored with the victims being healed. They were also to hasten national unity and reconciliation in order to create a nation democratically at peace with itself. The commissions sought to pursue historical truth not for its own sake, but in the service of reconciliation and nation

[24] International Center for Transitional Justice (ICTJ) and Human Rights Center,(2005) '*Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*'

[25] Goldstone Richard J., (1996), '*Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals*', New York University Journal of International Law and Politics, p. 28

building and that is why they publish a report that explores the historical underpinnings of a nation to determine the source of the conflict.

To determine whether truth commissions have achieved the ultimate goal, the commission's final written product should be evaluated according to the extent of truth that is revealed, as well as its proposals for reparations and reform.[26] and the degree to which the commission's work contributes to long-term reconciliation, healing, which will be determined in large part by whether perpetrators or state officials acknowledge and apologize for wrongs. The major outcome here that is long lasting and sustainable is that the healing and reconciliation opens the possibility that there can be national healing and reconciliation, which in turns provides bedrock for democracy.

The transitional justice mechanisms employed in Africa emphasize reconciliation between perpetrators and victims built ideally on a perpetrator's repentance and a victim's forgiveness. Ultimately, it is hoped, that all states that have truth commissions would become reconciled. The most successful of the truth commissions in establishing this is the South African truth commission. This commission had a Christianity connotation to it. It has been argued that two features of South Africa's religious culture supported the TRC's emphasis on forgiveness, rather than punishment: Christian theology and the traditional concept of ubuntu[27] which was also used to legitimize the TRC's call for reconciliation. It can therefore be seen that the South African Truth and Reconciliation

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[26] Hayner, Priscilla. (1994). '*Fifteen Truth Commissions 1974-1994: A Comparative Study*'. Human Rights Quarterly 16. p.32.

[27] Graybill, Lyn. (2004) '*Pardon, Punishment, and Amnesia: Three African Post Conflict Methods*'. Third World Quarterly 25. p. 1117

Commission did indeed succeed in convincing a majority of South Africans across the political spectrum that all sides were guilty of human rights violations and in turn suffered from violations. This provided them with a common interpretation of the apartheid era, which is serving as a basis for reconciliation. The reason this commission succeeded was because the proceedings were held in public. This process was hoped to lead to forgiveness and finally reconciliation because the truth would be in the public domain. Also to note is that the fact that amnesty was in the equation as a condition for full disclosure helped the process.

Another component arises out of the South African commission. The public did not necessarily see the nexus between truth and reconciliation. Some did not believe that knowing the truth would eventually lead to any form of reconciliation. The attitude of the public therefore needs to be worked on before the mechanism to be employed is actually said to have achieved its perceived goal.[28] As earlier noted in this chapter, Rwanda looked within to achieve justice for the victims through its Gacaca courts. It was also an unprecedented outcome that these courts were used to achieve high levels of reconciliation and healing. They achieved this through truth telling. The courts were used alongside the formal judicial system at the local level, especially in settling family disputes and minor offenses between neighbors. Intended primarily to restore social order, traditional Gacaca meted out punishments with the intention of restoring harmony between the community and those responsible for discord. Gacaca encompasses important features of relevance to broader truth telling, confessions and reconciliation.

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[28] Roland Paris and Timothy D. Sisk, eds., (2009) '*The Dilemmas of State building: Confronting the Contradictions of Postwar Peace Operations*', London: Routledge

The systems in these courts rewards those who confess their crimes with the halving of prison sentences. As a result, 60,238 prisoners have confessed to participating in the genocide[39]. Gacaca law highlights apologies. Part of the procedure of the traditional Gacaca system, apology has been maintained in the new variant as an important ingredient to promote truth telling for reconciliation.

The goal of national reconciliation which is specifically mentioned in Resolution 955 of the formation of the ICTR is unique to this tribunal. It is a broad goal which can be linked to international peace and national reconciliation through fact finding and truth telling. Fundamentally, national reconciliation is an internal domestic process that can be achieved through reconciling past differences. The ICTR represented an international attempt at national reconciliation because national structures like are too weak to forge such reconciliation. However because of the proximity of the tribunal, it is perceived that it is literally trying to kill a snake with a long stick. It is too far to have a personal effect on reconciliation.

4.1.3 Reforming institutions to promote democracy

In conflict affected and fragile states, institutions may suffer from discriminatory practices, corruption or abuse of power by officials and failure to protect human rights, thereby aggravating or even triggering violence and instability. Since conflict destroys social cohesion, restoring or building effective and reliable institutions should be an expected outcome in post-conflict and fragile states is essential in preventing the renewal of violence and in state building.

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[39] Stockman, Farah. (2000) '*The People's Court: Crime and Punishment in Rwanda*'. Transition 9, no. 4 37.

Traditional or other non-state justice and security systems usually persist through conflict. They are gaining increasing attention as a way of delivering justice immediately in the aftermath of conflict and in fragile states at the community level. This is why it has been an ultimate goal of transitional justice mechanisms to embark on institutional reforms for the sole purpose of ensuring that the public institutions are transformed during the transition period and that there is more transparency to promote democracy.

In addition to criminal justice, these reforms aid in prosecuting perpetrators of the conflict, transitional justice mechanisms are meant to address civil law protection, in particular property law, public administration law and family law, including child protection.[30] For example, land and property disputes might have been a part of the conflict and often plague post conflict states as displacement forces people to flee their homes that are later occupied by others.

The laws in many fragile and conflict affected states are often discriminatory against the poor and marginalized and violate international human rights standards. They may also be outdated and therefore lack certain provisions that are key to protecting the safety and security of the population. Inevitably, the laws in fragile and conflict-affected states need to be reformed, especially where a new constitution has introduced provisions on human rights and the re-organization of the justice system. In many instances, small-scale reforms recommended by the transitional justice mechanisms employed have been done in the interim period after conflict pending more broad scale reforms that

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[30] KieranMcEvoy, (2007)*'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice.'* Journal of Law and Society 34(4) p. 412.

significantly amend and ameliorate the entire legal framework from criminal law to civil law to public administration law.

There are countries in Africa that have using their transitional justice mechanisms enacted or amended laws following the recommendations of the truth commissions. Uganda amended its laws to outlaw detention of persons without trial. Ghana has taken measures to reform its judiciary. The commission's report stated that the law enforcement institutions and the armed forces were responsible for the highest percentage of abuse in the country. This ignited Ghana's quest to develop the relevant institutions to tackle corruption in the public sector and curtail police brutality. In Rwanda, on recommendation commission that revealed that the political and socio-economic issues were responsible for the divisions that were manifest between the Hutus and Tutsis giving rise to the genocide. The transitional national assembly passed an anti discrimination law imposing a jail sentence for any person practicing discrimination or segregation. On the other hand, Morocco saw the incorporation of the Independent Council on Human Rights into its constitution to safeguard constitutional rights after the commission established that the state was responsible for the political violence and the subsequent abuses.

To attain institutional reforms, states have in reaction to the fact that most previous governments have been held responsible for the atrocities leaned towards removing categories of people responsible for abuses especially the police, persons in prisons service, the army and the judiciary from public office or benefits. The reasons that invoke the need for institutional reform in the form of vetting is that the institutions to be vetted were either responsible for having committed human rights violations or for

allowing them to occur under the previous regime or during the conflict. The deeper relationship is that vetting has an institutional impact and is therefore a form of institutional reform.[31]

The process of vetting has also been seen as a way to punish perpetrators of the conflict because they are not allowed to hold office and to transform the existing institutions with an overall objective of safeguarding democratic transition and to prevent a recurrence of human rights abuses. This is achieved by creating accountability, independence, representation and responsiveness.[32]

The most prominent of countries in Africa to benefit from this outcome are South Africa and Liberia. However, in view of the fact that this was an expected outcome in the process of ensuring that the conflict does not recur, the Liberian Supreme court in the determination of whether individuals that had been indicted for the trials by the court could hold office, the court held that it would otherwise be unconstitutional to ban such individuals from holding office. This compromised the desire to have institutional reforms as an outcome of the recommendation of the truth commission to bar certain individuals from holding office including President Sirleaf. In South Africa, this process was held in view of the fact that institutional reforms would have made a contribution though not substantial to human rights violations and cleansing the public sector of

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[31] Eric Brahm, (2007) *'Uncovering the Truth: Examining Truth Commission Success and Impact.'* International Studies Perspectives 8(1) p. 16.
[32] Mallinder L. (2007), *'Can Amnesties and International Justice Be Reconciled?'* International Journal of Transitional Justice 1(2) p. 25

persons with certain backgrounds.[33] The Judicial Service Commission was for instance established to look into the membership of the courts in post apartheid South Africa. This was an important consideration because for South Africa it gave or created room for the developments concerning legal guarantees of indemnity for the perpetrators upon full disclosure of their human rights violations and if those violations were proportional to the achievement political objectives. This exercise of barring certain persons from public office was not a direct recommendation of the South Africa Truth commission. However, on another platform of institutional reform, South Africa while enacting its new constitution established the public service commission and so with the nine provinces that oversaw the vetting process in the end.[34]

As an outcome institutional reforms have been able to build confidence, integrity and legitimacy of institutions generally and law enforcement specifically in post conflict states. It is also important to note that some of the conflicts may have been caused by institutional collapse or conflicts. The wave of new constitutions in Africa have gone ahead to influence independent structures of governance in some fragile states. Issues such as lack of effective separation of government power or political interference of organs of government have been the cause of conflict.

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[33] Klareen, J (2007) '*Institutional Transformation and the choice Against vetting*'in Mayer-Rieckh and Greiff P. (eds) South Africa's Transition in Justice as Prevention; Vetting Public Employees in Transitional Societies. Social Science Research Council USA p.31

[34] Naomi Roht-Arriaza.(2006) '*The New Landscape of Transitional Justice.*' in Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice, ed. Naomi Roht-Arriaza and Javier Mariezcurrena Cambridge: Cambridge University Press,

4.1.4 Conclusion

This chapter analyzed the outcomes of transitional justice mechanisms and how effective they have been measured against their goals noting the reasons why they succeeded and why they failed. Given the nature of the crimes and the varied mandates. it is not surprising that these mechanisms have not been able to entirely and effectively provide peace. justice to victims and accountability to perpetrators as well as fostering national reconciliation.

The major objectives of this research were to determine the role of transitional justice institutions in Africa. This has been determined and appreciated the overlapping roles and goals of these institutions. In our research it has emerged that transitional justice is still evolving and changing and so have the institutions that deal with it. Our analysis of the outcomes of transitional justice institutions has led us to appreciated that there is no single mechanism that is sufficient to address the needs of the victims and perpetrators at the same time and foster national reconciliation. It has remained unclear in our discussion if indeed peace means reconciliation. Most of the mechanisms that the study has researched on definitely achieve peace. The issue of reconciliation is a psychological one and poses difficulties even in measuring.

It has emerged that it is more feasible to achieve the objectives of transitional justice when states engage in more than one mode of achieving transitional justice. It is true that the determination of which method to apply is a political one and therefore the interference from the political scene compromises the possible outcome of such initiative. Further. it has been noted that independence of these institutions is what contributes to their success. This proves our hypothesis that the choice of transitional justice institution

to use is influenced by political inclination because despite the need for transitional justice socially, it is also a political process that creates legitimacy for a government coming into power and reconciliation to help in the transition. The advanced theory of justice is what qualifies the effectiveness or otherwise of transitional justice. Further it is noted in the study that this is the key and fundamental objective. To reach reconciliation when justice has been served. This theory cannot be divorced from such efforts because it is what informs whether or not a state and its people will heal.

In conclusion, it is noted that states must come from a point of knowledge to acknowledgement. Realize their root causes and deal with them to avoid a recurrence of such conflicts and develop a responsible society which ideally takes responsibility for its actions and the burden of healing and reconciliation with as much attention.

CHAPTER FIVE

5.0 CONCLUSION

Transitional justice refers to a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights. In making such a transition, societies must confront the painful past in order to achieve a holistic sense of justice for all citizens, to establish or renew civic trust, to reconcile people and communities, and to prevent future abuses. A variety of institutions can help wounded societies start anew, including: prosecuting perpetrators: establishing truth commission and other forms of investigation about the past: forging efforts toward reconciliation in fractured societies: developing reparations packages for those most affected by the violence or abuse: memorializing and remembering victims: and reforming a wide spectrum of abusive state institutions such as constitutional provisions, security services, police, or military in an attempt to prevent future violations.

5.1 Emerging issues

An overview of the African conflicts as presented in the second chapter of this thesis should inform our understanding of the legacy of human costs and the transitional justice efforts that are currently undertaken in the region. As demonstrated, past and current governments, still dominated by nationalist parties, have been unwilling to put its establishment on their political agendas and to support regional initiatives that strive to create peace. A lack of political will, local capacity, and social trust, combined with the absence of a comprehensive and effective approach to transitional justice issues, have

hindered progress in addressing the past and laying the foundations for a future based on justice and the rule of law. As a result, transitional justice efforts have been ad hoc and in most African states incomplete.

Further, retributive rather than reparative justice has been emphasized: the efforts and financial resources that have been spent on legal prosecutions, mostly by the Sierra Leone Court and the ICTR, are disproportionately high when compared to the modest restorative efforts made for the victims of conflict. Retributive justice can, instead of contributing to reconciliation, also emphasize the differences within society and thereby create new divides which are undeniably the trigger of most conflicts in Africa.

National and regional long term stability remains under threat unless significant advances are made, especially in the areas of truth-seeking and reconciliation. In the case of South Africa, reconciliation equaled "moving forward", rebuilding the "new South Africa", a multicultural and unified state. The main parties of the conflict favored a restorative approach with truth-seeking elements as a means of acknowledging the past while focusing on the future. Initially, in Rwanda, reconciliation meant justice and punishment. Retributive justice was the corollary of this approach to answer the demand of punishment wanted by the Tutsi and the government. However as time went by, due to many material and social factors, a broader notion of reconciliation that included new relationship-building and forgiveness is evidently adopted by African states giving rise to hybrid mechanisms of transitional justice.

In this research, the hypothesis that the choice of the reconciliation and transitional justice strategy is conditioned by domestic and international factors which, in the short-term, limit the options and mechanisms liable to be used in dealing with the past

was demonstrated. There is no universal recipe to attain reconciliation because many factors incline the election of the strategy towards a certain approach.

No size fits all and all reconciliation and transitional justice processes must take into account the characteristics of the conflict, the actors involved, the context, the international influencers and the type of transition. It is impossible to design a successful reconciliation strategy if it is not deducted from the reality in which it is taking place. Therefore, the imposition of foreign models or paradigms could risk, as seen in the case of the South Africa, Jasmine revolutions evidenced in North Africa, Liberia, DRC, Kenya and Rwanda, a relapse into conflict or the collapse of the transition.

As for the domestic factors that condition the transition, the cases of South Africa and Rwanda have shown that, if the conflict is rooted in a society's history and the causes go beyond a simple political juncture, restorative and truth-seeking approaches are great tools to deal with the past. Moreover, if there are social inequalities and lack of access to essential resources, reconciliation would be impossible without addressing social injustices. In the case of Rwanda although with some limitations and where it was possible to identify the masterminds behind the conflict, the mobilization of such individuals as well as identifying the triggers, all of which were determined by the various transitional justice mechanisms employed, a retributive approach was more appropriate to create a notion that collusion to commit such crimes as seen in the genocide would not be tolerated

The employment of combined approaches in achieving justice in Africa is the more effective one. Single line mechanisms do not achieve a wholesome result which is what is needed to achieve both reconciliation and healing and avert a relapse of the

conflict in future. This is because they seek to achieve only too well a single objective which is in the long run not sustainable.

5.1.2 Accountability for War crimes and Hybrid Tribunals

The courts established in Africa to bring accountability for war crimes have proved to be costly. Despite the formidable achievement of war crimes jurisprudence, they have been slow. As seen in Chapter four, Rwanda's courts have suffered corruption in its administration. The ICC and ICTR has not made real contact with the populaces affected by their proceedings. They are perceived as distant and unconcerned with the effect of their activities upon the victims. However, there it little evidence that the courts have diffused tension in the region. Judges have little power to do so and the prosecution has selected the 'big fish' for prosecution. The process of selection of whom to prosecute is important because it will contribute to reducing tension. This is a political matter and completely strategic in that prosecutions are not seen to be done for the sake of justice but rather that justice is indeed achieved.

This process of trials has also in our research raised an issue of where the seat of the court should be. Its political inclination provides some security concerns for the officers of the court. While it is indeed true that the public will reach an appreciation of the process being undertaken in the country where the atrocities took place, it remains to be seen whether such level of security can be achieved to make the process transparent and fair without intimidation of the officers of such institutions. Such intimidation can be from specific individuals or from the government of the day. However in most trials, prosecutors have displayed docility, witnesses have not been protected from intimidation, and courtrooms have been filled with noisy and uncontrollable demonstrators. The

special court of Sierra Leone made an effort to have such autonomy by bringing in international judges for its proceedings. This however did not achieve much and the internal capacity of Sierra Leone to deal with these issues in future was not developed. Further, it is highly unlikely that justice was achieved due to the intimidation of the people and the process.

5.1.3 Reconciliation

Reconciliation is, of course, a prerequisite for achieving a sustainable peace. But reconciliation is a difficult concept to measure. How can the success in healing psychological wounds be evaluated. The role of truth commission in all this is very well a work in progress. The South African truth commission has been helpful in eliciting admissions of responsibility from perpetrators of war crimes. The Sierra Leone special court and the truth commission worked simultaneously did not reach the expected outcome because it suffered from lack of resources while the truth commission in other countries has had feeble and futile due to distrust.

It therefore leads us to conclude that even though the intention for truth commissions is a noble one, they would not ideally be able to work and reach the envisaged results on their own. There is a need to get an institution or a combination of institutions that cater for both middle level and lower level offenders and bring them to trial. In essence, the conclusion is that it may be over ambitious on our part to expect these mechanisms as employed in Africa to reconcile as well as punish offenders. It is in this spirit that it is noted that tribunals cannot give back land, homes, jobs or lost relatives; and the corruption in courts, inefficiency and frustrations may not deliver what the continent is looking for in terms of healing and reconciliation.

However, there is a light at the end of the tunnel. Out of the study of all the institutions in Africa, it can be concluded that institutional reforms may be the most achievable of all the desired results together with truth seeking. These are the most sustainable of the expected results.

5.1.4 Structural Changes

As earlier noted that during a period of transition to peace and democracy, it is particularly important that States should undertake legislative, administrative and constitutional reforms to restore respect for the rule of law, a culture of respect for human rights and trust in government institutions. It is also essential that States undertake institutional, administrative and constitutional reforms that can restore the public trust in State institutions. These institutional reforms can contribute to redressing harm to victims and preventing the reoccurrence of violations by addressing the wrongs of perpetrators, including groups that have been traditionally excluded or persecuted and creating a basis for peace and democracy through the reintegration of combatants. Dealing with perpetrators of violence especially in ensuring that they do not take up public offices has been neglected if not ignored by most African states. The report of the Liberia truth commission that held the current president Sirleaf Johnson incapable of holding office has been ignored as she continues to hold public office. This process of vetting however was effectively employed in South Africa. As a recommendation of truth commissions, it is important that states realize that structural reforms can also include vetting of personnel to hold government offices to prevent a recurrence of such conflict.

Structural changes have been a result of transitional justice mechanisms as in South Africa, Kenya, Morocco, Uganda, Sierra Leone and Morocco. There have been economic reforms because peace promotes a positive social environment. More investments have been made in the repairing and reconstructing of the country's infrastructure, and thereby in creating employment opportunities.

Police and judicial reform have been evident in some countries in Africa. The contribution of the police force in a post-conflict setting is generally presumed to be its role in fostering stability. Further, the credibility of the police force would be restored, especially because this has been damaged during the years of war and genocide. When the police and justice system is well developed it could also control the population and promote stability and order within a state.

Finally, a major failure of governments engaging transitional justice institutions is their failure or omission to release the reports of such institutions. This omission on their part has if not delayed, curtailed the achievement of anticipated justice and accountability. It therefore follows that there is no public record of such a process even for the purpose of developing jurisprudence.

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