

POLICY BRIEF

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TRANSITIONAL JUSTICE IN AFRICA

WHAT'S HUMAN RIGHTS
GOT TO DO WITH IT?

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Mainstreaming Considerations of Transitional Justice into the Work of the African Commission on Human and Peoples' Rights

Transitional justice in Africa requires (a) the confrontation of the violations of human and peoples' rights inflicted during conflict or authoritarian rule in order to address the wrongs of the past, (b) the creation of security and peace by ensuring the cessation of hostilities, and (c) the institutionalisation of mechanisms to build a just, democratic and inclusive political future for all.

However, transitional justice processes on the continent often do not conform to these conditions, resulting in partial implementation of reforms and reparations, and often a relapse into violent conflict.

The African Commission on Human and Peoples' Rights has the potential to play a significant role in the development of transitional justice approaches that meet the aims mentioned above, by providing a framework for States based on the African Charter on Human and Peoples' Rights and related regional human rights instruments.

The African Commission's 2019 *Study on Transitional Justice and Human and Peoples' Rights in Africa* develops a comprehensive human rights-based framework for transitional justice processes on the continent, as well as ways in which transitional justice can be mainstreamed in the African Commission's own work.

Link between Human Rights and Transitional Justice

Accountability for systemic and gross human rights violations committed during times of armed conflict or authoritarian rule is at the core of transitional justice. Human rights are thus a central part of transitional justice, as its processes deal with histories of human rights abuses and help societies move towards just and sustainable peace and dignity for all.

The issues addressed in the context of transitional justice are not limited to providing redress and establishing accountability for violations of civil and political rights; they also relate closely to group identities, gendered violence and structural socioeconomic disparities.

From an African human rights perspective, transitional justice is required to include processes that:

- End violence and/or authoritarian rule;
- Establish accountability and remedy for violations;
- Address the conditions that made systematic or gross human and peoples' rights violations and atrocities possible, including through legislative and institutional reforms to eradicate inequality and socioeconomic deprivations; and

What is Transitional Justice?

The African Union defines transitional justice as “the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.”

(AU TJ Policy, adopted February 2019)

For purposes of the work of the African Commission, transitional justice refers to the judicial and non-judicial measures that transitional societies adopt for advancing rehabilitation and reparations of victims, holding perpetrators of violence accountable, restoring social harmony and national cohesion, and transforming institutions, policies and processes aimed at achieving a just political and socioeconomic system, having particular regard to the gendered and generational burden of violence.

(ACHPR TJ Study, p. 56)

- Establish a rules-based political system able and willing to enforce these measures.

Based on these core tenets, the African Commission developed an African Charter-based approach to transitional justice in Africa to guide States and other actors in designing and implementing such processes in compliance with the Charter.

In relation to litigants bringing Communications before the Commission, the Study clarifies the ways in which

issues arising from transitional justice that affect rights guaranteed in the African Charter can be litigated through the Commission's Communications procedure, having regard to the specific context of transitions.

Civil society organisations can benefit from the Study as it provides a rich resource for advocacy to promote human rights in the design and implementation of transitional justice processes. The Study also sets standards for processes that can be used to monitor national transitional justice efforts.

African Charter-Based Approach to Transitional Justice in Africa

Procedural Components

1. Broad consultation with all affected individuals and groups, to reflect the will of all the people in transitional justice processes;
2. Active participation and role of victims and vulnerable groups to prevent marginalisation in transitional justice processes;
3. Use of local and indigenous justice mechanisms, with the necessary adjustments to comply with human rights considerations like gender equality and fair trial;
4. Freedom of speech, press and association so that all citizens can participate in transitional justice processes;
5. Protection from punishment for participating in transitional justice processes by military forces and political or other groups;
6. Democratic approval of the agreed on approach to transitional justice through an act of parliament or review by the highest court of the land;
7. Having transitional justice processes follow each other in a specific order based on the particular needs of the society and balancing of different transitional justice objectives; and
8. Integration of a gender perspective into transitional justice processes to promote equality between women and men.

Substantive Components

1. End any ongoing violence and remove threats of further violence that result in violations of human and peoples' rights and international humanitarian law;
2. Put in place legal measures to investigate and establish accountability and give remedy to victims, including by acknowledging their suffering, as well as community reconciliation and healing;
3. Establish the facts surrounding the violations perpetrated through independent investigative processes;
4. Take measures to heal the wounds and divisions of past conflict through compensation, reparation or restitution, as well as forward-looking measures to address structural socioeconomic exclusion;
5. Take measures to prevent a relapse to violence through wealth-sharing and power-sharing arrangements and inclusive development strategies;
6. Acknowledge the group dimension of violence where conflict was organised along ethnic, religious or regional lines, and address it by adopting policies and institutions that promote national cohesion, tolerance and inclusion;
7. Undertake constitutional, political and institutional reforms to ensure democratic and socioeconomic transformation and prevent the re-emergence of violence; and
8. Promote gender equality and address sexual and gender-based violence.

Integrating Transitional Justice into the African Commission's Work

In response to the gap that exists between current practices and human rights-compliant transitional justice processes, and in acknowledgement of the qualitative difference between implementation of human rights in transitional settings as opposed to normal circumstances, transitional justice should be integrated into the Commission's mechanisms and procedures in the following ways.

Communications Procedure

There are two ways in which the African Commission, through the Communications procedure, should engage in addressing and shaping transitional justice processes in Africa. The first is through consideration of Communications related to violence that was committed during conflicts, in which the Commission can make recommendations for appropriate transitional justice processes to address violations and ensure institutional and economic reform. The second is through considering Communications that relate to ongoing transitional justice processes in a State Party, where it is alleged that the processes do not conform to a Charter-based approach.

State Periodic Report Review Process

As part of the review of State Periodic Reports, the Commission should ask questions that relate to ongoing transitional justice processes, or, where the country is in conflict, seek information on efforts to end the conflict. In support of this process, civil society should provide shadow reports to the State Periodic Reports, highlighting challenges in transitional justice processes and thereby providing the Commission with a more holistic view and enabling it to ask probing and relevant questions.

In its concluding observations on Reports, the Commission should draw on the Charter-based approach to transitional justice, in order to highlight areas of concern in the processes and make recommendations for their improvement. In particular, the Commission should focus on those areas of transitional justice that are not considered

mainstream, such as the inclusion of customary justice processes and structural socioeconomic reform.

Promotion and Fact-Finding Missions

Promotion and fact-finding missions provide an opportunity for the African Commission to meet with various stakeholders in a particular country and from these interactions ascertain the state of ongoing transitional justice processes. Secondly, missions are relevant in the context of states emerging from conflict or repressive rule, in order to determine whether the different sectors of society are ready to initiate and participate in transitional justice processes, including taking the first step, which is peace-making.

This direct engagement with different sectors of society enables the Commission to make recommendations based on the specific circumstances, and to make recommendations to specific stakeholders such as relevant government departments, the national human rights institution, civil society, and business and international actors. While States are often reluctant, especially during sensitive periods like transitions, to grant authorisation for fact-finding missions, the Commission can use the opportunity provided by promotion missions to have similar discussions.

Statements and Resolutions

The Commission adopts resolutions during its Sessions, and can use this as a tool to address emerging issues in specific country situations as well as thematic trends that are observed in different States, where transitional justice processes do not fully conform to a Charter-based approach. The use of statements and resolutions is particularly pertinent at times when there are ongoing debates at the national level about which approaches to transitional justice to adopt. By providing information on approaches that fully respect human and peoples' rights, the Commission can contribute to shaping discussions in the relevant State.

Special Mechanisms

The Commission currently has 12 thematic special mechanisms, ranging from women's rights to migrants, torture and socioeconomic rights. The specific thematic

focus of each mechanism means that they would approach transitional justice from different perspectives. In order to ensure a systematic and comprehensive approach, the Commission should establish a special mechanism focused on transitional justice, which will be able to coordinate the various components in order to adopt a holistic view of transitional justice that takes into account all of the concerns arising in this context.

Recommendations

The Commission should:

- Establish a special mechanism dedicated to transitional justice and conflict, which, in collaboration with other special mechanisms with themes that have a bearing on transitions, would take the lead in streamlining transitional justice into the work of the Commission;
- Draft guidelines for State reporting on transitional justice;
- Develop internal guidelines on the procedural and substantive standards to be applied in Communications related to transitional justice;
- Streamline recommendations on transitional justice into its concluding observations on State Periodic Reports and Mission Reports and establish continuous follow-up on its recommendations;
- Adopt resolutions and prepare letters of appeal and press statements on following a human rights-

based approach to transitional justice; and

- Establish a continental repository or archive for transitional justice documentation and other materials that have major implications for transitional justice.

Civil society and litigants before the Commission should:

- Work with State Parties to the Charter to ensure that they adopt a Charter-based approach to transitional justice processes from inception to conclusion, in particular in ensuring that all affected people participate, that there is no marginalisation of vulnerable groups and that structural socioeconomic barriers are addressed;
- Bring Communications on challenges in transitional justice processes before the Commission;
- Submit shadow reports on State Periodic Reports in relation to transitional justice;
- Monitor and bring to the attention of the Commission instances on the ground where transitional justice processes are not fully compliant with a Charter-based approach, particularly in emerging or emergency situations; and
- During promotion or fact-finding missions, engage with the Commission to provide information in relation to the existence of transitional justice processes and the extent of their compliance with a human rights-based approach.

ABOUT THE CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION

The Centre for the Study of Violence and Reconciliation (CSVr) is a non-governmental organisation which envisions societies that are peaceful, equal and free from violence. CSVr aims to understand and prevent violence, heal its effects and build sustainable peace at the community, national and regional levels. We do this through collaboration with and learning from the lived and diverse experiences of communities affected by violence and conflict to inform innovative interventions, generate knowledge, shape public discourse, influence policy, hold states accountable and promote gender equality, social cohesion and active citizenship.

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