

African Union Transitional Justice Policy Framework in Practice

Implementing Accountability Measures

The African Union Transitional Justice Policy Framework is conceived as a practical and actionable tool to: a) consolidate peace, reconciliation and justice in Africa and prevent impunity; b) help end repressive rule and conflicts and nurture sustainable peace with development, social justice, human and peoples' rights, democratic rule and good governance; c) articulate a set of common concepts and principles to constitute a reference point for developing and strengthening peace agreements and transitional justice institutions and initiatives in Africa; and d) develop African Union benchmarks for assessing compliance with the need to combat impunity.

In line with these goals, this brief focuses on a central aspect of transitional justice: preventing impunity for past human rights abuses. Drawing on lessons from Latin America, the brief outlines several accountability processes available to African Union member states and African civil society organisations, the strengths and challenges of implementing these official processes at the national level and strategies for promoting accountability that have proven useful in diverse country contexts. It discusses regional litigation and domestic prosecutions, as well as reparations, truth telling and community-based justice mechanisms.

Enabling Factors

During their transitions from authoritarian rule to democracy in the 1980s and 1990s, Latin American states were faced with legacies of widespread forced disappearances, extrajudicial killings and torture, but concerns regarding the stability of fragile democracies led them to downplay calls for accountability. Until 1997, only a handful of prosecutions had occurred in the region as a result of amnesty laws passed by dictatorships upon relinquishing power.

Fifteen years later, most countries in the region have effected the repeal or reinterpretation of these amnesty laws, with prosecutions numbering in the hundreds, including of former heads of government and other senior officials. These trials complement other transitional justice measures in the region, particularly reparations for victims and truth commissions.

This groundbreaking shift towards accountability in Latin America was the result of a combination of external and internal factors for each country. External factors include the development of international criminal justice in the 1990s and 2000s, culminating in the establishment of the International Criminal Court, and the increasing regional and domestic legitimacy of the Inter-American system, particularly the rulings of the Inter-American Court of Human Rights.

Another important factor is precedent set through transnational cases, such as the warrant issued by a Spanish judge for the arrest of Chilean dictator Augusto Pinochet, with universal jurisdiction and the passive personality principle used to prosecute foreign nationals for crimes committed elsewhere, which has served as a catalyst for the development and political acceptance of criminal cases in the accused's country of origin.

Some internal factors include change of government, with gradual acceptance of the need for prosecutions; constitutional change, with the introduction of international law into constitutions and domestic law; judicial reform, particularly establishment of specialised penal chambers and training of judges and prosecutors on how to apply international law in the national context; and personnel shifts within the judici-

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ary, with dictatorship-era members enticed into retirement with generous packages.

Additional factors are the rise and continuing strength of vocal victims’ groups, aided by human rights lawyers and members of the media; the advocacy of victims’ children, a new generation of activists focused on legal and social sanction for past human rights violations; and the initiative of human rights lawyers in bringing meritorious test cases before the courts.

A major internal factor has been the careful and innovative development of region- and country-specific legal strategies for doing away with amnesty laws or using loopholes to bypass them in order to prevent continuing impunity.

Regional Human Rights Litigation

Regional human rights systems can be a powerful tool in seeking accountability for past human rights abuses. The key to this strategy is building a body of jurisprudence over time. The Inter-American Commission and Court of Human

Rights were in existence for a number of years before they gained the weight of precedent and legitimacy for regional states to be compelled to implement their recommendations and rulings. Even now the process is far from complete.

This process began with the Velásquez Rodríguez case in the late 1980s, in which the Inter-American Court ordered Honduras to pay reparations to the family of Manfredo Velásquez, a politically active graduate student disappeared in 1981. Honduras was responsible for hundreds of disappearances, but compared to other countries in the region it was a relatively minor offender. From 1993, the Inter-American Commission began to recommend that amnesty laws inconsistent with its jurisprudence were unlawful on the grounds that they violated a victim’s right to a remedy and a fair trial. By 2001, the Inter-American Court had intervened in the case of Peru’s former dictator, Alberto Fujimori, signalling that it would take a consistent stance on any amnesty case brought before it and further stipulating that damages would be awarded in similar cases.

In a bid to avoid the financial challenge of processing the Inter-American Court’s generous awards, Latin American governments increasingly resorted to pre-hearing settlements in the form of reparations from this point onwards. With time, rather than being placated by financial compensation, victims and human rights advocates began using the Court’s rulings to demand domestic investigations, prosecutions, further reparations and truth telling, returning to the Court when states failed to implement rulings, thereby building the norms of transitional justice in Latin America.

As noted, regional human rights litigation increases in effectiveness as precedent is set

through a number of cases that are comparatively politically uncontroversial, even if recommendations initially are not implemented. Over time, this litigation and resulting rulings can generate new accountability norms. Networks of advocates and civil society organisations play a role in encouraging member states to implement regional recommendations and rulings. Sub-regional entities, such as the African regional economic communities, could also play a more proactive role in ensuring accountability.

Domestic Prosecutions

If the country context allows, amnesty laws may be annulled, particularly where regional human rights litigation has set precedent. For example, Argentina's Supreme Court declared the country's amnesty laws unconstitutional. In other countries, amnesty laws remain on the books but have been interpreted to exclude systematic disappearances and other international crimes. These strategies require arguments based on a thorough understanding of the history and details of the law in question.

While a number of countries have not annulled or repealed their amnesty laws, the established majority norm has become that amnesty cannot be granted or maintained for international crimes, including crimes against humanity, genocide and war crimes. This has allowed a number of Latin American countries to pursue prosecutions using context-specific strategies, despite judicial and legislative challenges.

A significant obstacle to complementarity between international and domestic law exists in cases where countries had not signed onto relevant international human rights treaties at the time the crimes occurred. Chilean human rights lawyers, for example, addressed this challenge

by using the Geneva Conventions, the only treaty to which Chile was a party at the time of the violations, arguing that because the dictatorship claimed it was fighting a war against rebels, it should be held accountable for its war crimes.

Particular blocks to accountability are arguments that a statute of limitations prevents prosecutions for past human rights-related crimes and that retrospectivity—or rendering acts that were not specified in the domestic penal code at the time they were committed unlawful—is unjustified. Numerous legal strategies have been used to surmount these obstacles.

For example, focusing on dictatorships' widespread use of forced disappearances as a repressive tactic in Latin America, advocates have argued that given the absence of a body, cases of disappearance are ongoing and thus not subject

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either to amnesty laws or to the statute of limitations. It has also been argued that the statute of limitations only begins to run with the advent of democracy, when the right to a remedy can be guaranteed.

Other tactics have included prosecuting the accused for 'ordinary' murder but highlighting that their crimes at the same time have the characteristics of crimes against humanity, which renders them not subject to amnesty or a statute of limitations. In addition, prosecutors have argued that even if not typified in the penal code at the time as such, longstanding crimes under custom-

ary international law may be prosecuted without violating principles of legality or the prohibition on *ex post facto* law, citing Article 15 of the International Covenant on Civil and Political Rights. Extended theories of liability, especially indirect perpetration based on control of an organised structure, have also been used to tie former high-ranking political and military officials to crimes committed by subordinates.

Regarding responsibility, domestic courts in Latin America have avoided focusing on trying only those ‘most responsible’ for gross human rights violations. This broad approach to judicial accountability has resulted in a large number of pending and possible cases, which has required courts to innovate. Facing a case load that would require upwards of 300 years to process, Argentina, for example, adapted its Criminal Procedure Act to allow ‘mega trials’ with multiple defendants, cutting down on the number of trials and assisting witnesses who would otherwise have had to testify in multiple cases.

Courts in Latin America have also introduced flexibility in terms of sentencing by applying mitigating circumstances, with some sentences amounting to no more than three to five years of imprisonment with probation. This has allowed for differentiated sentencing, with masterminds and the worst offenders eligible for life sentences while foot soldiers receive reduced sentences. In a controversial move, Colombia opted for a plea bargaining system with its Justice and Peace Law. Perpetrators are required to make an official declaration regarding their crimes and the location of kidnapped individuals and stolen assets, after which they are subject to an alternative criminal justice process that allows for reduced sentences that deviate from the criminal code.

While efforts to ensure judicial accountability have met with significant success across Latin America, they are marked by inherent challenges. Legal processes are drawn-out and expensive and often difficult to understand and engage with for the wider public. Despite the increasing legitimacy of such processes, prosecutors may choose not to take cases forward, often for political reasons. Such processes may also become tangled up in power politics disguised as procedural manoeuvres, as the recent trial of former Guatemalan dictator Efraín Ríos Montt demonstrates.

The security of victims and witnesses, as well as judges and lawyers, is tenuous. Physical and other evidence is frequently missing or difficult to access. As a result of the stigma of sexual violence, comparatively few cases have been brought before the courts and the true scope of the sexual violence perpetrated by the dictatorships is still emerging. Because decades have passed since the crimes were committed, the public and legal professionals have reservations about sentencing aging defendants, often placing them under house arrest, which brings into question the degree of justice served. Finally, in some cases, defendants win, which can be devastating for victims.

For these reasons, prosecutions should be only one of several mechanisms implemented in seeking accountability.

National Reparations

Reparations are the only transitional justice mechanism explicitly aimed at benefiting victims of gross human rights violations. In pursuing accountability to victims, Latin American states have established reparations programmes of varying types, ranging from generous benefits for

a few thousand victims, as in Brazil, to modest benefits for tens of thousands of victims, as in Peru and Guatemala.

Victims may receive individual reparations, which usually take the form of once-off monetary payments, or collective reparations, which may include scholarships, the construction of schools, economic and development projects and state-run searches for the physical remains of victims. Reparations may be material as well as symbolic, taking the form of, for example, memorials or apologies.

Both individual and collective reparations measures have strengths and weaknesses. Individual reparations are often not substantial enough to

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make a meaningful change in victims’ circumstances. In addition, they may exacerbate existing divisions and gender inequality within communities and families, for example in cases where victims receive differing amounts according to a state-determined hierarchy of victimhood or where compensation is paid to the ‘head of household.’

Latin American states have inclined towards collective reparations, especially where they are liable for a massive number of individual reparations claims. One danger is that collective reparations programmes, which benefit an entire community, may be seen as a way for governments to carry out their existing development responsibilities—to build schools and medical clinics, for

example—and call this sufficient reparations. On the other hand, such development-oriented projects are often what people demand most when asked about reparations.

The Inter-American Commission and Court have been key in providing reparations for individuals and communities. As the number of cases has increased, some states have found it advantageous to negotiate settlements with victims rather than take the cases to the Court, where they could be liable for much higher damage awards. The prospect of years of litigation at the Commission and Court has also provided a spur for governments to create less costly administrative reparations processes. Victims entitled to administrative reparations are not prohibited from approaching the Inter-American Commission for court-ordered reparations. Where a claim is successful, however, the amount of the administrative reparations is deducted from the final award.

In Latin America, administrative reparations initiated by the state have faced greater challenges than the few cases of court-ordered reparations, with governments citing lack of resources and difficulties with registering victims, particularly those residing in isolated areas or lacking official documentation. In Guatemala, individual monetary awards quickly became a patronage system exploited by the government and nongovernmental groups to buy support. A parallel process aimed at compensating paramilitaries for forced service resulted in confusion that allowed individuals to claim multiple and at times contradictory benefits.

Reparations may take the form of grants for the spouses and children of victims, access to health-care and education bursaries for dependents up to a certain age, as in Chile. Countries with a

large number of victims entitled to reparations may consider adopting the approach of Peru, which transferred relatively modest funds to municipalities, where victims voted on the projects they thought deserved funding. This approach has been for the most part successful, although the priorities identified by victims are diverse, with some proposing the construction of community meeting places, others electrification and still others memorials.

Recent research on the Peruvian experience has found that women were underrepresented in such municipal voting. When they did vote, they tended to motivate for projects that are beneficial to children, such as more schools, bursary awards or electrification projects to improve study conditions. Men, meanwhile, tended to vote for income-generating initiatives, such as irrigation to improve crop cultivation (ICTJ/APRODEH 2011). This points to the utility of convening consultations with the target community before implementing a reparations programme.

As far as possible, states should seek to provide both individual and collective reparations, the former to address victims' immediate needs and the latter in service of longer-term, structural reforms. Finally, while reparations are at times seen as restoring victims to their pre-violation state, the emphasis should be placed on the restoration of dignity and active citizenship rather than on the quantum for compensation.

Truth Telling

Truth seeking and truth telling have been a central aspect of transitional justice in Africa, in part through the influence of the South African Truth and Reconciliation Commission. The example of African truth commissions has contributed to growing state and public acceptance of truth tell-

ing as a complement to prosecutions and other mechanisms in Latin America.

Latin American countries have developed several innovative approaches to state-sanctioned truth telling to add to the accepted form of the truth commission. For example, Argentinian judges initiated 'truth trials,' ordering investigations and holding hearings on past violations. These judicial processes were conducted without defendants at a time when amnesty laws made prosecutions impossible and were aimed at establishing truth as opposed to identifying and sanctioning those responsible. In El Salvador, bypassing the judicial system, municipal government offices have held hearings to determine what occurred in a community during the armed conflict and to identify the individuals responsible for gross human rights violations. Nonstate mock trials, for example on sexual violence during the internal armed conflict in Guatemala, may be an effective way of raising formerly taboo topics.

The comparative success of Latin American processes demonstrates that truth commissions and other official truth-telling mechanisms should be viewed as a complement rather than a substitute for accountability measures such as trials.

Community-Based Mechanisms

While informal or community-based justice processes have rarely been incorporated into legal systems in Latin America, the need to develop some relationship between traditional and conventional justice approaches has been acknowledged, at least in countries with large indigenous populations. For the most part, traditional community dispute resolution processes have not dealt with the past, although there is some experience of traditional authorities using such processes to clarify events and allow people who

left during an armed conflict to reintegrate into their communities.

The Latin American experience suggests that community-based justice processes cannot be broken down into neat categories, as they combine conflict mapping and truth telling, incorporate a punitive element, draw strongly on culture, religion or spirituality and weave in restoration and reparation. Efforts to formalise such practices as part of transitional justice processes must be pursued carefully and be appropriate to the conflict and postconflict context in each transitional country, as well as complement other accountability measures.

Conclusion

As reflected in the Transitional Justice Policy Framework, transitional justice processes aim to end and prevent repressive rule and conflicts; to consolidate peace, reconciliation and justice; and to prevent impunity. This brief has outlined some of the strategies available to African Union member states, African civil society and other actors in pursuing the long-term goals of transitional justice, particularly accountability through regional litigation, domestic prosecutions, reparations for victims and truth-telling and community-based justice mechanisms.

Lessons from Latin America’s long-standing engagement with transitional justice suggest that the full range of formal processes must be viewed as complementary and mutually dependent, as well as that external and internal enabling factors must be developed in an innovative and responsive manner over time to ensure state and public support for these processes.

Transitional justice is a long-term undertaking that requires ongoing engagement and monitor-

ing. The rise of international criminal justice norms has ensured that international law is increasingly reflected in regional and domestic law. Regional litigation becomes more effective as precedent is set with a growing number of cases. Amnesty laws can be repealed or bypassed years after the moment of political transition, with context-specific legal strategies resulting in domestic prosecutions as well as the development of increasingly victim-oriented reparations programmes.

Innovations in truth-telling processes and inclusion of traditional, informal or community-based justice practices contribute to greater accountability and the establishment of a historical record, opening the door to guarantees of not only civil and political rights but also economic, social and cultural rights.

Africa and Latin America, at the regional and domestic levels, have provided models of transitional justice to other areas of the world and continue to develop their transitional approaches, with states and civil society in both regions offering experiences and lessons to the other in this continually developing field.

This is a digest of two talks delivered at the Centre for the Study of Violence and Reconciliation in 2012 by Prof. Naomi Roht-Arriaza, who has extensive experience working on issues of accountability and international criminal law, particularly in Latin America. It was compiled by CSVR researcher Jasmina Brankovic.



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