

EFFECTIVE PARTICIPATION OF WOMEN IN THE TRANSITIONAL JUSTICE PROCESSES¹

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Introduction

Ladies; (if any Gentlemen)

I have the pleasure to speak to you in this great forum. I thank COVAW for extending this invitation.

This morning, I intend to discuss with you the contribution transitional justice mechanisms can contribute in enhancing gender justice particularly after legacy of large-scale, systematic violations of human rights. I take cognizance of the fact that the participants in this forum are drawn from a region whose track record in committing human rights atrocities is horrifying. From the tragic raping fields of DRC, through to Rwanda which has struggled to come to terms with 1994 genocide effect, to wobbling peace process in Burundi, to the Uganda terrifying horrors of Kony terrorism in Northern Uganda and in Kenya where justice for post-election violence crimes is still to be done. It is unthinkable that perpetrators of such atrocities should not be brought to justice.

Fighting Impunity

Fighting impunity is at the heart of transitional justice mechanisms. From a human rights perspective it is vital for crimes not to go unpunished. Fighting impunity is also key to achieving a just sustainable peace, from the point of view both of the individual victim and of the society at large. Ensuring that perpetrators do not get off free is therefore a major objective. This is why I am horrified by the assertion yesterday by the Kenyan Justice Minister Mutula Kilonzo that International Criminal Court intervention would undermine reconciliation. It is shocking revelation what finally the cabinet of July 30th, July 2009 decision meant.

I disagree with the Minister. How could we tell the women in the Eastern DRC or IDPs camps in Kenya who have been raped, who have given birth to their torturers' children- how could we tell these women: "Sorry, but in the interests of peace, we have given up on securing justice for you"? To me, this idea is unacceptable. It constitutes a denial of common sense of morality and constitutional obligation. Impunity cannot be an option, because impunity would mean trampling on these women's human rights.

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² Ndung'u Wainaina the Executive Director of the International Center for Policy and Conflict, ICPC. International Center for Policy and Conflict, ICPC, is registered in Kenya under the Trustee (Perpetual Succession) Act as non-government, non-profit organization fostering democratic, peaceful, secure and just societies in the Great Lakes and Horn of Africa by engendering the principles of justice, accountability, the rule of law and sustainable human security. These goals are accomplished through research, documentation, capacity building and technical assistance, networking, dialogue, information sharing and advocacy. The Center's core programmes are: Transitional Justice; Conflict Resolution and Peacebuilding; Gender Justice; Capacity building and Technical Assistance; and Human Security and Displacement.

Frankly, I suspect that the argument that peace should prevail over justice is all too often used as an excuse by individuals or parties that have no real interest in actually moving the peace process forward. I think this is just a convenient argument for those who seek to escape accountability. The end result would be neither justice nor peace. It is feeding into yet another cycle of violence and horrendous crimes. The ICC efforts to intervene in Kenya and push for the Special Tribunal for Kenya have to enter into concrete tangible actions. The international community has been issuing threats. We have to begin real actions against beneficiaries of impunity. We have joint responsibility to narrow their orbit.

Transitional justice mechanisms legitimacy

To my mind, by far the most important lesson is that transitional justice mechanisms must be embedded in local structures. Legitimacy is a key precondition for these mechanisms' success. Only mechanisms and processes with broad support from different sectors of the population can give people the sense that justice has really been done and can be truly effective. This does not mean that only transitional justice programmes at national level can be successful. On the contrary; there are countless examples of the use of transitional justice by grassroots organisations to achieve reconciliation. In this context, I think it is essential to reinforce and make more transparent national ownership of transitional justice processes.

In this regard, the Truth Justice and Reconciliation Commission(TJRC) currently underway in Kenya should urgently, exhaustively and satisfactorily addresses the serious questions raised against the current chair of the Commission. Specifically, all concerns that victims have raised relating to role of the Chair to some of the crimes subject to the work of the TJRC. The objectivity, impartiality, credibility and the legitimacy of the TJRC is on the trial.

It is essential to realize that legitimacy can never be taken for granted. It is a process. Open, transparent procedure, and preferably explained in language that large numbers of people can understand, constitute a crucial factor in legitimacy. Communicating the specific processes and their objectives is also vital in enhancing the legitimacy of transitional justice mechanisms. The international community can and must play a role here, either by initiating open and transparent processes or by financing them. For example, national and international NGOs can stress the importance of combating impunity and promoting reconciliation. I know that some people think that combating impunity and promoting reconciliation are mutually exclusive, but as I said before, I don't agree. I see combating impunity and promoting reconciliation as two complementary preconditions for achieving lasting peace.

Through bilateral or multilateral forums, donors can help reflect on and contribute to transitional justice. But I believe that donors' responsibility extends far beyond this. In helping to create more just societies, the international community cannot focus narrowly on the crimes that conflicts lead to. It needs to tackle the root causes of these conflicts. If the root causes are ignored, the country in question is likely to fall back into same situation. This is aimed at acknowledging the suffering of the people, ensuring credible and accountable institutions, seeking truth and documentation, promoting reconciliation and ending impunity.

Questions of peace and justice

It is argued that there are dilemmas around the question: what should be the priority: peace or justice? Personally, I find this question misleading. Peace and justice go hand in hand. Without justice, there simply, cannot be lasting peace. It is precisely as the United Nations High Commissioner for Human Rights, Ms. Pillay, statement of the 12th session of the human Rights Council: "it is only through the firm establishment of human rights and the rule of law that a solid foundation for sustainable peace, security and development can be built.

Accountability for violations that have been committed is critical to restoring public confidence and trust.”

What is transitional justice?

I have referred to transitional justice more often in my remarks so far. So what is it?

This is the process that most countries which have been through years of conflict have undergone. It is meant to assist the country address past injustices by holding accountable perpetrators of human rights violations and recognizing victims of past conflict.

The United Nations defines transitional justice (TJ) as the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These involve judicial and non-judicial mechanisms (with differing levels of international involvement, or none at all) that include individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. As Buckley-Zistel Stanley (2008) note, TJ is oriented to the past (in the sense that it addresses the wrongs that have been committed), to the present (in establishing a new ethical and institutional framework) and in the future (in trying to prevent future occurrences of similar injustices).

Transitional justice processes aim at: resolve the divisions in society caused by the human rights violations; to contribute to the healing process for victims and witnesses; to determine legal accountability; and/or to establish a historical record of the war and to educate. The broad objective, might be summarized as the restoration of the rule of law, and democratize public institutions by promoting human rights, and to promote a stable peace.

Ladies (and if any Gentlemen)

Let me now turn to Gender perspectives in transitional justice

The idea of gender in transitional justice has received very limited focus from both scholars and civil society. When addressed however, the women are given attention mostly as victims of sexual violations, causing stereotypes of women's experiences in times of conflict to prevail. It is therefore important to address the gender experience holistically to include women as victims of emotional trauma, economic violence, women as perpetrators, among other experiences. This should also include gender in relation to all the mechanisms of TJ such as truth telling, reparations, memorialization, prosecutorial mechanisms, and so on.

It is agreed that transitional justice mechanisms have valuable potential for transforming gender relations in post-conflict situation. For example, the 'A gender perspective in a truth commission's report can help bring about changes in existing laws and patterns of behaviour that have contributed to inequality and discrimination.'³ Incorporating a gender perspective also broadens the scope of crimes to be investigated, and widens the sources of information of the types of abuses experienced as well as their consequences.

However, while there have been some achievements in engendering transitional justice processes, the full potential has not been grasped due to the limited ways in which gender has thus far been understood. In particular, incorporating gender into TJ processes have largely focussed on two key issues: acknowledgement and redress for sexual violence experienced by women during conflict; and increased representation of women in decision-making

³ World Bank. (2006). Gender, Justice and Truth Commissions. Pg ix)

(including as members of Commissions).⁴ The Rome Statute establishing the International Criminal Court, and the recent case law of the International Criminal Tribunals of Yugoslavia and Rwanda have recognised patterns of gender specific violations as war crimes and crimes against humanity. The Liberian Truth and Reconciliation Commission Act also identified the need for special mechanisms for women. In addition, there have been efforts to increase the number of women involved in transitional justice mechanisms adopted at national level.

Limited scope; participation

While these are important achievements, there is still a need to anchor gender analysis which moves beyond a focus on sexual violence against women in conflict, and women's participation in TJ processes – to focus more holistically on gender justice. This mainstreaming will involve focusing on the ways in which gender identities and power relationships shape the nature and consequences of the conflict - including the development of militarized masculinities – as well as the continuities of gender based violence in peace time.

Peace negotiation and TJ processes tend not to sufficiently address the lasting impact of legacies of conflict which directly contribute to increased levels of violence against women during transition (e.g. incomplete and/or unevenly implemented demobilisation, disarmament and reintegration processes; gender-based violence trauma; economic marginalisation; normalisation of violence; disintegration of state institutions relied on by women in times of crisis). This directly impacts upon the ability of women to engage in the TJ development and implementation processes, and take advantage of the socio-economic development opportunities launched during the transition phase. Thus, a gender focus from the outset is required to ensure the equal and effective participation of women, as well as ensuring that gender justice is central in the work of TJ mechanisms. This will also ensure that recommendations which flow from the TJ process will insert a long-term agenda for furthering gender justice.

In African countries emerging from conflict and repression there are additional constraints that prevent TJ processes from fulfilling their potential to cultivate the foundations necessary for gender justice. One example includes the debates about TJ policy development in general, and its relationship to ensuring gender justice in particular, tends to be driven by international rather than local priorities. This occurs largely due to a lack of capacity within local civil society to impact upon these debates. Many local CSOs lack adequate content and process information at the time of transition to participate effectively in national debates, or to mobilize marginalized and vulnerable communities to ensure that their needs are included in policy-making and implementation processes. Without the active involvement of indigenous civil society stakeholders, particularly those voicing the interests of vulnerable and marginalized sections of a population, the roots of peace remain shallow and at risk.

The Kenyan Perspective

As a country, it is important to note that Kenya has undergone a unique kind of past injustices that need to be addressed. The Kenyan experience is thus unique since it comprises of different a multifaceted kind of human rights violations at different times in its history.

⁴ See Valji, N. (2007). Gender Justice and Reconciliation. Dialogue on Globalization, Occasional Paper No. 35, Friedrich-Ebert-Stiftung, November 2007

The Transitional Justice processes are crucial ingredients that Kenya has been thirsting for over the years dating to struggle for return to multiparty; and has been and remain integral component of the democratization project. While new democratic constitutional order provides the normative framework of delineating citizens-state relations; transitional justice mechanisms give the implementation parameters. The Task Force on the Establishment of a Truth Justice and Reconciliation Commission headed by Prof. Makau Mutua in 2003 recommended the formation of a TJRC so as to address past human rights violations. Among these violations include political killings and assassinations, banditry and military action, torture, detention, exile, disappearances, persecution, arrest, detention and torture of wives of political opponents and crime suspects, among other kinds of atrocities. Like many other Commissions and task forces reports, the Task Force was never executed and consequences were devastating in 2007/08.

The appointment of the Truth, Justice and Reconciliation Commissioners by the President on 23rd July, 2009 gave way to the addressing of these historical injustices. Coupled with this the debate on the establishment of a Special Tribunal for Kenya that will give way to the trial of post election violence perpetrators, these two processes are the Transitional Mechanisms in which women should actively participate so that their voices are recorded and appropriately justice brought to bear.

Woman role in transitional justice mechanisms

Women have been involved in all kinds of conflicts as indicated above. However, the plight of women should not be reduced to being described as victims of sexual violence, but the scope should be widened to include other forms of violations suffered by women. According to Ross (2003)⁵, the definition of violations suffered by women can be addressed in the following ways,

- The definition of violation should be widened to include structural violations, discriminations/marginalization, among other institutional forms of violence against women.
- The definition should not only be body bound (referring to atrocities inflicted on the human body) but should also include other various forms of violation such as economic crimes.
- On top of this, according to Hamber et al (1998)⁶, the definition should not discriminate in terms of high profile victims (those who suffered most) versus low profile victims. It should therefore include ordinary victims.
- It should also be encompassing covering various unique experiences so that a victim does not feel left out.
- There are also the female and male activists, who suffered atrocities and could therefore fall under the category of victims. According to the South African experience however, these category had reservations with the TRC since they wanted their experiences to be documented as martyrs/heroes of the struggle. This would therefore give another angle in the definition of victim hood.

Women should therefore participate in the process in the following ways:

Gender as a cross cutting theme will affect the TJ Process in different ways, such as appointments, mandate, conduct of hearings and training procedures.

1. appointment and recruitment

⁵ Ross, F. (2003) Bearing Witness: Women and the Truth Commission in South Africa. London: Pluto Press.

⁶ Hamber et al (1998) Survivor's Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report. Johannesburg: Centre for the Study of Violence and Reconciliation.

Appointment of persons to work with the commission should be gender sensitive. On top of this, recruiters should not only look at the number of women, but also the applicant's attitude towards gender before appointment.

2. Mandate

In mandate definition, commissions should be aware of the need to explore institutional aspects of gender based violations, for example internal displacements, losing breadwinners etc. Also, the commission should not only look at the act alone, but aspects of social attitudes and policy frameworks within which the act is embedded.

3. Hearings

Gender violations should not only be looked at from a thematic point of view that only focuses on sexual violations, and having the commission's work being done in camera. Through victim friendly public hearings, women can be given a chance to talk about their experiences and the consequences.

4. capacity building

Training of commissioners and staff should be comprehensive and on-going. Should be done regularly to ensure that staffs working in any transitional justice mechanism keep the gender perspective moving and old ones are updated on upcoming issues.

Conclusion

In the light of the above experiences in past TRC from other countries, to engender Kenyan TJRC, women should participate in the following ways:

- ◆ Women should participate in this process, not only as victims, but also as part and parcel of the transitional justice process in terms of jobs as statement takers, etc.
- ◆ They should sensitize other women especially at the grassroots level by encouraging them to participate in the truth telling process.
- ◆ They could aid in boosting awareness on salient issues that may not be apparent at the moment, such as the repetitive nature of sexual violence at the slightest eruption of conflict, and also the continuous domestic and sexual violence experienced by women and girls even at peace time.
- ◆ In relation to this, women could aid in profiling the gender violations of the past that will inform investigators on what to investigate, and will be used as guidelines for interviewers. The final report will then be used to make a final report on conflict patterns and experiences.
- ◆ In working together with CSOs, women can also do workshops to sensitize the public on the truth commission and how it can engage with it. It could also produce educational documents for them and encourage policies that include women.
- ◆ A communication strategy is also important since it will encourage direct engagement with the commission and the public.

Thank you.