UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

DEPLOYING TRANSITIONAL JUSTICE MECHANISMS AS ANTI-CORRUPTION TOOLS IN AFRICA

JORUM DURI
Student Number: 3691348

Thesis submitted in fulfilment of the requirements for the Doctor of Laws degree in the

Department of Criminal Justice and Procedure

Supervisor: Professor Raymond Koen

2020

Declaration

I, **Jorum Duri**, declare that **Deploying Transitional Justice Mechanisms as Anti-Corruption Tools in Africa** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: JORUM DURI

Signed: ..... Date: .....

Supervisor: PROFESSOR RAYMOND KOEN

Signed: ..... Date: .....

Dedication

I dedicate this thesis to my parents, Lydia Chinorira and Joseph Duri.

Acknowledgments

I give praise to the Lord for blessing me with the energy, enthusiasm and capacity to write this thesis.

I am very grateful to my supervisor, Professor Raymond Koen, for his dedicated supervision and support throughout my Doctor of Laws studies. His committed guidance and comments were useful in the completion of this thesis, and I will be grateful forever.

I extend my thanks to the *Deutscher Akademischer Austauschdienst* (DAAD) for the generous funding that made it possible to pursue this degree. I am also grateful to Professor Lovell Fernandez, Professor Ebenezer Durojaye and Doctor Windell Nortje for their critical comments during doctoral colloquia, which helped in shaping this paper.

And to my family, thank you for being my rock. Agnes, Jonathan, Joyline and Tinotenda, thank you for your continued support. To my parents, Joseph Duri and Lydia Chinorira, your everlasting love and endless support has made me the person that I am today. *Ndinotenda!*

TABLE OF CONTENTS

ABSTRACT

This thesis advocates the expansion of the field of transitional justice to address corruption in African states emerging from conflict or authoritarianism. There is a close connection between corruption and conflict or repressive regimes in Africa. A good example is the Arab Spring of 2011, where citizens of Tunisia, Egypt and Libya protested against endemic corruption, leading to removal of despotic leaders from power. Dictators or conflicts tend to leave African states in situations where their coffers have been emptied corruptly and their citizens subjected to serious physical violence. What is more, corrupt and oppressive leaders use their ill-gotten assets to escape liability for their crimes. The evident link between the two forms of abuse makes it desirable to address them simultaneously when the dictatorship or conflict ends. Many African countries have deployed transitional justice mechanisms, such as criminal prosecutions, truth commissions, institutional reforms and reparations to address violations of civil and political rights. However, they have neglected corruption and other violations of social and economic rights, notwithstanding their crucial role in the violent past. Many countries still are haunted by the unresolved legacies of corruption and other socio-economic injustices.

Recently, scholars and practitioners in the fields of transitional justice and anti-corruption have started to call for corruption and other socio-economic issues to be accommodated within transitional justice programmes. Problems encountered with the expansion of transitional justice mechanisms have not been worked out yet at the level of theory, policy and practice. This thesis subscribes to transformative justice theory as the most viable perspective from which to tackle corruption in transitional societies in Africa. Transformative justice theory is gaining increasing attention in the field of transitional justice, and it has been incorporated in the recent African Union Transitional Justice Policy. It champions locally driven mechanisms which reflect the needs of the victims and local communities, and which pursue socio-economic justice and transformation. The thesis argues that the current transitional justice mechanisms have the potential to become transformative and it will seek to answer how best each of these mechanisms may be implemented to address

corruption. It is hoped that this thesis will assist in answering critical questions regarding the proximate relationship between corruption and violence, and in offering guidelines towards the total integration of an anti-corruption agenda into the field of transitional justice in Africa.

KEY WORDS

Africa

Accountability

Anti-Corruption

Corruption

Institutional Reform

Kleptocrats

Prosecutions

Reparations

Transformative Justice

Transitional Justice

Truth Commissions

Victims of Corruption

LIST OF ABBREVIATIONS AND ACRONYMS

African Criminal Court	African Court of Justice and Human and Peoples' Rights
APDHE	*Asociación pro Derechos Humanos de España*
AU	African Union
AU Convention	African Union Convention on Preventing and Combating Corruption
AUTJP	African Union Transitional Justice Policy
DRC	Democratic Republic of Congo
ECOWAS Protocol	Economic Community of West African States Protocol on the Fight against Corruption
GOPAC	Global Organisation of Parliamentarians against Corruption
IACC	International Anti-Corruption Court
ICC	International Criminal Court
IMF	International Monetary Fund
Malabo Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
MENA	Middle East and North Africa
MLA	Mutual Legal Assistance
OHCHR	UN Office of the High Commissioner for Human Rights
SADC Protocol	Southern African Development Community Protocol against Corruption
SERAP	Socio-Economic Rights and Accountability Project
SDG	Sustainable Development Goal

SL TRC	Sierra Leone Truth and Reconciliation Commission
South African TRC	South African Truth and Reconciliation Commission
SSRs	Security Sector Reforms
TDC	Truth and Dignity Commission
TJRC	Kenyan Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNDP	United Nations Development Programme
UNSC	United Nations Security Council
UNCAC	United Nations Convention against Corruption
ZACC	Zimbabwe Anti-Corruption Commission

CHAPTER ONE

CORRUPTION AND TRANSITIONAL JUSTICE IN AFRICA

1.1 Introduction

African countries locked in or emerging from conflict and repressive regimes often are ranked amongst the most corrupt in the world. For example, Transparency International in 2018 ranked Libya 170st, Sudan 172th, South Sudan 178th and Somalia 180th on its Corruption Perceptions Index, with first place indicating the least corrupt and 180th place the most corrupt.[1] On a scale of 0 (highly corrupt) to 100 (least corrupt), these countries scored 17, 16, 13 and 10 respectively for public sector corruption.[2] Any score below 50 indicates very high levels of corruption and the scores listed above show how serious corruption is perceived to be in these countries. These same countries have experienced political violence and human rights violations in the past five years. For instance, since achieving nationhood in 2011, South Sudan has experienced widespread physical violence and endemic corruption fueled by political and military leaders.[3] Zimbabwe, which was under the autocratic leadership of the late former President Robert Mugabe from 1980 to November 2017, was ranked 160th and scored 22 for public sector corruption, indicating high levels of corruption in the country. The trend above demonstrates that when countries are experiencing or emerging from conflict or autocratic leadership, they are at their most corrupt.

Corruption often is used as a tool "to perpetuate authoritarian regimes, inter-group grievances, and recurrent conflict".[4] Perpetrators of and accomplices to physical violence in conflict-ridden or autocratic countries usually are powerful and corrupt figures. There is a close connection between corruption and political violence as these personages use stolen assets to fund political violence in furtherance of their political ambitions.[5] Also, conflict-torn countries offer a hospitable environment for endemic corruption because they have weak institutions

1 Transparency International (2018a).
2 Transparency International (2018a).
3 See Mores (2013) at 3-5; Frahm (2018) at 266-268.
4 Cohen (2017) at 1.
5 Human Rights Watch (2007) at 35.

which are incapable of enforcing anti-corruption measures.[6] Hence, corruption and conflict enjoy "a symbiotic relationship that threatens peace and stability in states already besieged by violence".[7] Their combination often is unbearable for victims who are being deprived of their rights politically, socially and economically. States are left in a situation where their coffers have been emptied corruptly and their citizens subjected to serious physical violence. What is more, corrupt and callous leaders use their ill-gotten assets to escape liability for their crimes. Hence, the undeniable link between the two forms of abuse makes it desirable to address them simultaneously.

In the last five decades, many African countries have experienced widespread physical and economic violence perpetrated by colonial and post-colonial governments. For instance, Zimbabwe experienced an armed liberation struggle before 1980 and the post-independence regime of Robert Mugabe from 1980 to 2017 was characterised by endemic corruption, brutality and massive human rights abuses.[8] In countries like Sierra Leone and Liberia, independence saw the emergence of power-hungry and corrupt governments and warlords interested in the extraction of natural resources to fund domestic and regional wars. Thus, for example, the control of minerals was key to the decade-long civil war in Sierra Leone in the 1990s.[9] Other countries, such as South Africa, experienced endemic human rights abuses by the apartheid government which ended in 1994,[10] the year in which Rwanda experienced genocide.[11] The Arab Spring of 2011 saw citizens take to the streets to protest against systemic corruption and repressive leadership in North African countries such as Tunisia, Libya and Egypt.[12] Many African states still are dealing with legacies of physical violence and plunder of resources perpetrated by political leaders.

States in transition routinely approach past violence in terms of the norms of

6 Cheng & Zaum (2012) at 1.

7 Pyman *et al* (2014) at 5.

8 See Compagnon (2011) at 48-56; Dombo (2018) at 182-185; Maguchu (2019) at 89.

9 Report of the Sierra Leone Truth and Reconciliation Commission, Volume 2 (2004) at 27.

10 See Report of the South African Truth and Reconciliation Commission, Volume 1 (1998) at 29-39.

11 See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (1999) at 3.

12 Whitaker (2010); Johnson & Martini (2012) at 2.

transitional justice. These encompass judicial and non-judicial measures such as criminal prosecutions, truth commissions, reparations programmes and institutional reforms meant to address legacies of abuses. Since the early 1990s, African countries have served as "testing grounds" for new strategies of accountability, truth, justice and reconciliation for large-scale violence.[13] Notable mechanisms included the International Criminal Tribunal for Rwanda,[14] the Special Court for Sierra Leone,[15] and the South African Truth and Reconciliation Commission.[16] Other African countries which have implemented transitional justice mechanisms in a bid to address past injustices include Burundi, Côte d'Ivoire, Ghana, Zimbabwe, Liberia, Sierra Leone, Chad, Sudan, Rwanda, Morocco, Egypt, Tunisia, the Democratic Republic of Congo and, recently, the Gambia.

The transitional period creates an opportunity to address physical violence and corruption perpetrated under the past regime. Many citizens in transitional states who were subjected to abject poverty and under-development due to corruption will be demanding justice for socio-economic wrongs. Andrieu correctly points out that:

> As an abuse of power, corruption is often associated with the violation of human rights norms in general. Indeed, widespread public sector corruption is often a symptom of deep governance failure, which should, as such, be addressed in a holistic manner. If corruption has acquired the status of a grievance, even leading to regime change and social conflicts, then it should certainly be dealt with in the transition period, as part of the postrevolution and peacebuilding reforms.[17]

However, many transitional states in Africa have not paid enough attention to anti-corruption as part of their transitional justice agenda. This is so despite the critical role which corruption would have played as an underlying cause or sustainer of past abuses. Also, corruption does not end suddenly when a dictator is removed from power or conflict ends. Indeed, corruption could be on the rise at this time. For example, the levels of corruption became worse in North Africa

13 See African Union Panel of the Wise (2013) at 27.
14 Established by UN Security Council resolution 955 of 8 November 1994.
15 It was a hybrid court set up by the Government of Sierra Leone and the United Nations pursuant to UN Security Council resolution 1315 of 14 August 2000.
16 Promotion of National Unity and Reconciliation Act 34 of 1995.
17 Andrieu (2012) at 538.

after the Arab Spring which itself, ironically, was sparked by endemic corruption.[18] Hence, unresolved legacies of corruption may emerge to haunt states during and after transition.

This thesis advocates confronting corruption as part of transitional justice agenda in Africa. It is critical to learn from the success and failures of past transitions so that corruption does not hinder the yearning of transitional states for democracy, transparency and accountability. If corruption is not addressed, there is a real risk of its recurrence in the new democratic state, together with its negative effects on social, civil, political and economic rights.

1.2 Background to the Study

It is uncommon for a despotic regime simultaneously to violate the civil and political rights of citizens and be clean economically.[19] African dictators are notorious as kleptocrats who regard state resources as their private assets that they can plunder without accountability. For instance, Sani Abacha, whose reign in Nigeria was characterised by extreme physical violence, amassed approximately US$5 billion from the public coffers and stashed them in Western countries.[20] In recent years, Yahya Jammeh, the former authoritarian ruler of the Gambia who was deposed in early 2017, allegedly stole millions of dollars, pillaged state coffers and, during his last days in power, shipped out luxury vehicles by cargo plane.[21] During his 22 years in power, he "stole a country" by looting state resources and building patronage networks which crippled the economy.[22] Both these political leaders had a bad human rights record, and they used their positions to expand their personal wealth and political power. Hence, an uncorrupt despotic regime is a fantasy, as despotic leaders almost always are kleptocrats who both bankrupt their countries and inflict physical violence on the citizenry.

The uncontrolled exploitation of natural resources has sustained authoritarian African regimes which readily commit human rights violations.[23] Looting of state resources serves as an

18 Pring (2016) at 5.
19 See Cockcroft (1998); Carranza (2008) at 311.
20 Jimu (2009) at 7.
21 Burke (2017).
22 See Sharife & Anderson (2019).
23 Harwell & Le Billon (2009) at 288.

incentive for dictators to remain in power forcibly and provides the means to reward the perpetrators of and accomplices to regime crimes.[24] For example, in Zaire (now the Democratic Republic of Congo), during Mobutu Sese Seko's despotic regime from 1965 to 1997, kleptocracy was the order of the day as Mobutu and his supporters plundered state resources. Mobutu even allowed army commanders to loot state resources in return for their ensuring his staying in power, declaring that: "You have the guns, you don't need a salary."[25] Transparency International, in its Global Corruption Report of 2004, estimated that Mobutu had embezzled at least US$5 billion at a time when the country was struggling to provide basic resources to its citizens.[26] In Zimbabwe, Robert Mugabe allowed corruption to flourish, including the looting of diamonds, land and state coffers by senior government officials and the security forces.[27] In exchange, the officials were loyal to him during his 37 years in power, particularly the security forces which usually were deployed to inflict physical violence on members of opposition parties.[28]

A common trait of previous and current African dictatorships is the unnecessary escalation of odious debts. There is complicity here by countries and international organisations which lend money to dictators and are aware that most of the money then is plundered and not expended for its intended use.[29] For example, during the Mobutu era, Zaire incurred a public external debt of approximately US$14 billion, while Mobutu was busy looting state resources.[30] The socio-economic conditions of the citizens deteriorated despite both the abundance of resources and the debts incurred supposedly to alleviate the harsh economic climate. The World Bank and the International Monetary Fund (IMF) continued to provide him with financial resources notwithstanding a secret report by the IMF's representative, Erwin Blumenthal, which revealed the embezzlement of previous loans.[31] New governments

24 Freedom House (2013).
25 Cited in Stearns (2012) at 116.
26 Transparency International Global Corruption Report (2004) at 13.
27 See Global Witness (2017) at 20-22; Bracking (2009) at 42.
28 Maringira (2017) at 99-105.
29 See Coyne & Ryan (2009) at 28-36.
30 Ndikumana & Boyce (1998) at 195.
31 Blumenthal (1982) at 19.

established after the transition from old corrupt regimes will be faced with obligations to pay back odious debts such as these. This poses problems for many African states which also have been plundered by leaders while incurring such debts.

Corruption may sustain violence within a state by providing financial resources to criminal networks and repressive regimes. For example, in 1963 the United Nations Security Council (UNSC) imposed sanctions against South Africa, prohibiting all member states from engaging in any arms deals with the country, as part of the international protest against apartheid.[32] Van Vuuren, in his book titled *Apartheid, Guns and Money: A Tale of Profit*, exposes how corruption and other economic crimes became state policy.[33] Corruption and money laundering by the apartheid regime, abetted by other countries, bankers and international corporations, helped it to survive.[34] Even UNSC member states secretively aided the apartheid regime.[35] This prolonged the systemic violence against the black majority as it enabled the apartheid regime to survive in the face of growing isolation abroad and protests at home. In this sense, corruption funded the continued cycles of violence.

Sometimes considered as necessary to secure peace in fragile states,[36] corruption is deeply rooted in many recent conflicts in Africa, as both driver and sustainer of these conflicts.[37] For instance, endemic corruption was cited as one of the key reasons for the decade-long civil war in Sierra Leone, which ended in 2002.[38] The control of natural resources in Liberia was an integral part of the conflict there, as it would allow looting and financing of armed efforts.[39] Corruption may increase grievances against the government, undermining its legitimacy and producing political instability as public demands change.[40] In 2010, a 26-year-old vendor named Mohamed Bouazizi immolated himself in protest against extortion by local

32 United Nations Security Council Resolution 181 of 7 August 1963.
33 Van Vuuren (2017) at 8.
34 Van Vuuren (2017) at 10, 158 & 160.
35 Van Vuuren (2017) at 11.
36 See Le Billon (2003) at 420.
37 See Sharp (2014) at 79.
38 Report of the Sierra Leone Truth & Reconciliation Commission, Volume 2 (2004) at 29.
39 Report of the Liberian TRC, Volume III (2009) at 1 & 21-23.
40 Le Billon (2003) at 418.

police in Tunisia.[41] Soon thereafter, several people in Tunisia, Algeria, Morocco, Yemen, Saudi Arabia and Egypt also set themselves on fire in protest. The demand for eradication of systemic corruption helped to trigger the 2011 Arab Spring in the Middle East and North Africa (MENA), which led to the overthrow of authoritarian regimes in Tunisia and Egypt, exposing shocking levels of assets theft.[42] In Libya, the protests escalated into a civil war, bringing to an end the long reign of Muammar Gaddafi.

The preceding discussion signals that corruption is intertwined with violence or conflicts in Africa. Indeed, grand corruption and plunder of natural resources have become a hallmark of authoritarian regimes and conflicts in Africa.

1.2.1 Corruption and Human Rights in Africa

Historically, corruption was not considered to be a serious issue, with bribery of foreign public officials being treated as a necessary business expense which was even tax deductible. However, economic globalisation in the 1980s resulted in the globalisation of corruption and, eventually, the globalisation of anti-corruption law.[43] This led to the enactment of various anti-corruption instruments such as the United Nations Convention against Corruption (UNCAC),[44] which is the only true global anti-corruption instrument. The applicable anti-corruption instruments created by African states are the African Union Convention on Preventing and Combating Corruption (AU Convention),[45] and the Southern African Development Community Protocol against Corruption (SADC Protocol).[46] The Economic Community of West African States enacted its Protocol on the Fight against Corruption (ECOWAS Protocol) in 2001, but it has not yet come into force due to lack of the required number of ratifications. This may indicate a lack of commitment by countries in West Africa to fighting corruption as a region. Likewise, the East African Community (EAC) may lack the commitment to deal with corruption, as it has a draft

41 Whitaker (2010).

42 Johnson & Martini (2012) at 2.

43 Glynn *et al* (1997) at 12.

44 UNCAC was adopted by the United Nations General Assembly resolution 58/4 on 31 October 2003. It came into force on 14 December 2005.

45 The AU Convention was adopted by the African Union on 1 July 2003. It entered into force on 5 August 2006.

46 The SADC Protocol was adopted on 14 August 2001. It entered into force on 6 August 2003.

anti-corruption protocol that has been under negotiation over the years.[47] Be that as it may, African states have shown a growing dedication to establishing anti-corruption measures at international, regional and national level.

Countries with high levels of corruption invariably have a poor record on human rights, and the two forms of abuse enjoy a complex relationship.[48] Surprisingly, a human rights perspective is missing in various anti-corruption instruments. For instance, UNCAC only refers to human rights in the foreword by former Secretary-General Kofi Annan, who stated that corruption "leads to violations of human rights".[49] Interestingly, it contains more provisions on the protection of the rights of the accused or defendants in corruption cases.[50] This suggests that anti-corruption instruments were drafted with little focus on the impact of corruption on human rights, and mainly were concerned with protecting human rights of persons accused of corruption. Such an approach resulted in corruption often being regarded as a victimless crime, with remote implications for human rights.[51] Hence, corruption is not recognised as a violation of human rights *per se* under international law. The non-recognition of corruption as a human rights violation is attributed to the fact that the anti-corruption agenda emerged from non-governmental organisations, such as the World Bank, which was advancing a good governance agenda rather than a human rights agenda.[52]

In recent years, there has been an increased focus on a human rights approach to corruption. This has been ascribed to the human rights perspectives on good governance and development, which are affected negatively by corruption, inevitably leading to human rights practitioners extending their focus to corruption.[53] For instance, Sustainable Development Goal (SDG) 16 of the United Nations 2030 Agenda on "Peace, Justice and Strong Institutions" includes targets to increase asset recovery and reduce corruption, bribery and illicit financial

47 Draft EAC Protocol on Preventing and Combating Corruption (last revised in 2012).
48 Peters (2018) at 1252. See also Cockroft (1998); Landman *et al* (2007) at 9-12 & 18.
49 Paragraph 1 of the Foreword to UNCAC (2003).
50 See Articles 30(4), 31(9), 32(2) & (5) and 44(14) of UNCAC.
51 Zimring & Johnson (2005) at 799; Peters (2018) at 1255.
52 Gathii (2009) at 127 & 143.
53 See Peters (2018) at 1254.

flows.[54] The Human Rights Treaty Bodies noted in their contribution to the 2030 Agenda that mismanagement of resources and corruption were "obstacles to the allocation of resources to promote equal rights".[55] Also, UN bodies have begun pointing out that corruption is "an obstacle to the effective promotion and protection of human rights",[56] that it has a "negative impact" on human rights,[57] and that it "undermines" human rights.[58] According to the United Nations Committee on Economic, Social and Cultural Rights, widespread corruption impedes the full exercise of economic, social and cultural rights.[59] The above examples indicate that there is a growing understanding of the complex and close relationship between corruption and human rights. However, a question remains as to whether corruption is a direct human rights violation.

A report by the International Council on Human Rights, with the aid of Transparency International, titled *Corruption and Human Rights: Making the Connection*, attempted to link specific acts of corruption to violations of specific human rights.[60] The conclusion reached was that anti-corruption measures may incorporate human rights but corruption is not an inherently human rights violation.[61] The UN Human Rights Council Advisory Committee contends that "corruption can lead to a human rights violation directly or indirectly".[62] Hence, it appears that there is some agreement that corruption may lead to human rights violation, but it is not considered a human rights violation *per se*. Other scholars have called for the recognition of the "right to a corruption-free society" as an individual and collective human

54 Target 16.4 & 16.5 of SDG 16.

55 Human Rights Treaty Bodies (2016) at 7.

56 Preamble to United Nations General Assembly Resolution 71/208 (2016).

57 Preamble to United Nations General Assembly Resolution 71/208 (2016); Paragraphs 4-9 of United Nations Human Rights Council Resolution 35/25 (2017).

58 Preamble to Resolution of 5 August 2005 of the Sub-Commission on the Promotion and Protection of Human Rights.

59 Paragraph 12 "Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldovia" (2003) E/C.12/1/Add.91.

60 International Council on Human Rights (2009) at 31-58.

61 International Council on Human Rights (2009) at 83.

62 Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights (2015).

right,[63] or for the acknowledgment of "freedom from corruption" as a human right.[64] However, such rights have not been recognised in various human rights instruments and, for now, corruption is regarded as a significant factor in the violation of human rights. The effects of corruption on socio-economic rights in Africa are especially concerning.

Article 21 of the African Charter on Human and Peoples' Rights (African Charter)[65] provides for the right to free disposal of wealth and natural resources. Citizens are deprived of such rights when the government and economic elites loot natural resources. In 2007, a Spanish organization, *Asociación pro Derechos Humanos de España* (APDHE), the Equatorial Guinea Justice organisation, and the Open Society Justice Initiative filed a petition with the African Commission on Human and Peoples' Rights complaining that endemic corruption in natural oil resources committed by the government of Equatorial Guinea violated the right of citizens to full and exclusive disposal of their wealth and natural resources. The petition argued that a group of the ruling family had diverted to itself huge profits from resource revenue, "leaving the great bulk of the population mired in absolute poverty".[66] Such resources would have been used and enjoyed in the "exclusive interest of the people", including provision of basic services, which many citizens were denied due to corruption.[67] The APDHE requested the Commission to find, *inter alia*, that the government of Equatorial Guinea had violated Article 21 of the African Charter by allowing looting of the country's natural resources.[68] Even though the Commission rejected the petition on grounds of inadmissibility, the complaint made clear the undeniable link between corruption and violation of the right freely to dispose of wealth and natural resources in Africa.

Corruption undermines the right to development enshrined in Article 22 of the African Charter.[69] It deprives developing countries of the resources required for the realisation of the

63 See Kofele-Kale (2000) at 163. See also Nilofer Nisha (2012) at 89; Harees (2012) at 491.

64 See Murray & Spalding (2015) at 4-5. See also Maguchu (2019) at 29.

65 Adopted on 27 June 1981 and entered into force on 21 October 1986.

66 Communication Submitted by the *Asociacion Pro Derechos Humanos De Espana* Regarding the Republic of Equatorial Guinea, under Article 55 of the African Charter on Human and Peoples' Rights (2007) at 4.

67 See *APDHE* Communication (2007) at 4.

68 See *APDHE* Communication (2007) at 9.

69 See Munyai & Agbor (2018) at 72-74. See also Moyo (2017) at 206-213.

right to development. For instance, it was alleged that Zimbabwe lost around US$15 billion in the diamond industry through corrupt means during Mugabe's era, with the security forces identified amongst the main criminal beneficiaries.[70] Around that time, the country had a national annual budget of US$4 billion, and many development projects would have been achieved had the looted money been injected into the economy. Corruption is cancerous to development and it deprives countries of the required resources for the full realisation of the right to development. Embezzlement of public funds meant for development obstructs the provision of services to the community, thereby violating the rights to an adequate standard of living, to health services and to education.[71] In some instances, government contracts are awarded corruptly to bidders who have neither the capacity nor the resources to fulfil the contract. As a result, development plans are not achieved, leading to the underdevelopment of the country and its people.

The case of *Socio-Economic Rights and Accountability Project* (*SERAP) v Nigeria* indicated that corruption has deleterious effects upon the right to education.[72] In this case, SERAP filed an application in the Court of Justice of the Economic Community of West African States (ECOWAS Court) alleging that the embezzlement of public funds meant for education purposes in Nigeria violated the right to education,[73] the right to development and the right to free disposal of wealth. SERAP sought an order declaring the embezzlement of the funds as illegal and unconstitutional for its violation of Articles 21 and 22 of the African Charter, and directing the arrest of the alleged perpetrators by Nigerian officials. It also sought a declaration of the right to free and compulsory education in Nigeria and an order directing the government to make provision for such education. The court did not grant the order, but it did note the negative impact of corruption upon the right to education, as "it reduces the amount of money made available to provide education to the people".[74] Even though the court went on to hold that the embezzlement did not amount to a denial of the right to education, the case was

70 See Global Witness (2017) at 36 & 46; Dzirutwe (2018).

71 Articles 11, 12 & 13 of the International Covenant on Economic, Social and Cultural Rights (1966).

72 *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, 30 November 2010).

73 Article 17 of the African Charter.

74 Paragraph 19 of *SERAP v Nigeria*.

instrumental in illustrating the impact of corruption on the right to education in Africa.

Civil and political rights are not spared by corruption. Corruption in the criminal justice system jeopardises the basic rights of suspects or criminal defendants, including the right to a fair trial before an impartial court without any reasonable delays.[75] For example, a judge may abuse his position to postpone unreasonably a case for personal or other unlawful gains. Corruption in an electoral authority, which leads to unfair or rigged elections undermines the right of every citizen to "participate freely in the government of his country, either directly or through freely chosen representatives".[76] Police corruption may lead to arbitrary arrest and detention of an innocent person who resists extortion, thereby violating the right to liberty and to the security of the person.[77] This is true particularly in countries experiencing conflict or autocratic leadership where security forces may abuse their office with little or no accountability.

There exists a close relationship between corruption and the violation of human rights in Africa. Indeed, a corrupt government which rejects both transparency and accountability is not likely to respect human rights.[78] Therefore, the campaign against corruption and human rights movements are interlinked and interdependent.[79] A human rights perspective moves away from the mere reporting of corruption figures to showing the actual impact of corruption upon people. It directly links corruption to mishaps around the world and "provides a moral impetus" for developed countries to return stolen assets transferred to their jurisdictions by corrupt politically exposed persons from developing countries.[80] Thus, it brings victims of corruption to the fore in the anti-corruption campaign.[81] Also, linking corruption and human rights may be essential in gaining access to human rights mechanisms, particularly for

75 Article 7(1)(d) of the African Charter.
76 Article 13(1) of the African Charter.
77 Article 6 of the African Charter.
78 Cockcroft (1998).
79 Cockcroft (1998).
80 Ngugi (2010) at 248.
81 Paragraph 25 of the Final Report of the Human Rights Council Advisory Committee (2015).

corruption as a violation of socio-economic rights.[82] This will help to shed light on the fact that the "international legal frameworks for protecting human rights and fighting corruption are complementary and mutually reinforcing".[83] Hence, the fight against corruption is indeed a fight for human rights.

1.2.2 Omission of Anti-Corruption from the Field of Transitional Justice

Despite the egregious effects of corruption upon states, the dominant assumption for a long time seemed to be that transitional justice mechanisms are meant to engage mainly with violations of civil and political rights and not with the economic violence inscribed in corruption and other violations of socio-economic rights.[84] This disregard of corruption may be attributed to transitional justice emerging in the 1980s and 1990s in Latin America and Eastern Europe, where a narrow approach to human rights was adopted, with an emphasis on civil and political rights.[85] International intervention in transitional justice was prominent during that time, as evidenced by the establishment of the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda and local courts seeking to allocate individual criminal responsibility for past abuses. Truth-finding mechanisms, such as the National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas*) in Argentina and the National Commission of Inquiry into Disappearances in Bolivia, were established in the early 1980s. These mechanisms adopted a narrow approach to justice by treating civil and political rights as a priority.

At that time the field of international anti-corruption law was in its infancy, without any international anti-corruption treaty in place. Hence, the early anti-corruption agenda could not find any place for transitional justice. This led, for example, to Augusto Pinochet of Chile being regarded as despotic but economically clean,[86] which was proved incorrect by the discovery of

82 Paragraph 27 of the Final Report of the Human Rights Council Advisory Committee (2015); Ngugi (2010) at 248.

83 Preamble to the United Nations Human Rights Council Resolution 35/25 (2017).

84 See Carranza (2008) at 310.

85 Sharp (2014) at 3 & 6.

86 See Carranza (2008) at 312.

his secret bank accounts in the USA.[87] This narrow approach to transitional justice was adopted by a number of transitional states in Africa, including South Africa after the end of apartheid.

Justice for economic crimes long has been relegated to the edges of transitional justice in favour of the dominant script which prioritises physical violence.[88] Where economic issues have been addressed, it was done in an effort to understand the full context in which physical violence occurred.[89] In other words, violations of social and economic rights have not been regarded as human rights violations *per se,* and have appeared in the transitional justice agenda only in relation to the core issue of physical violence. According to Carranza, violations of socio-economic rights are regarded as non-justiciable and not susceptible to redress through transitional justice but through a catch-all reference to development programmes.[90] This is so despite the fact that violations of socio-economic rights have "a devastating effect, often extending over several generations", with victims being denied access to basic services and opportunities for development.[91] The continued neglect of socio-economic rights also creates the impression that their violation is less gross than violations of civil and political rights.[92] As Arbour correctly points out, the failure to protect and promote economic, social and cultural rights "reflects the hidden assumption that these rights are not entitlements but aspirational expectations to be fulfilled by market-driven or political processes alone".[93] The sidelining of economic issues such as corruption has come at a cost, as the case of South Africa illustrates.

1.2.3 Costs of Ignoring Corruption: The Case of South Africa

South Africa's transition from apartheid to democracy was celebrated as one of the most peaceful and successful transitions ever. The new government deployed various transitional justice mechanisms, such as truth commissions and reparations, to address violations of civil and political rights, but paid scant attention to socio-economic issues, including corruption. For

87 United States Senate Permanent Sub Committee on Investigations' Supplement Staff Report on US Accounts Used by Augusto Pinochet (2005) at 2 & 5.
88 Arbour (2007) at 4. The term "dominant script" derives from Cavallaro & Albuja (2008) at 125.
89 Miller (2008) at 275-276.
90 Carranza (2008) at 315.
91 Roht-Arriaza (2019) at 106.
92 Andrieu (2012) at 543.
93 Arbour (2007) at 4.

example, the South African Truth and Reconciliation Commission (South African TRC) only addressed physical violence which occurred during the apartheid era,[94] and ignored corruption and other economic crimes committed by the apartheid government. South Africa's neglect of corruption in the field of transitional justice has not been without consequences.

One consequence was a wrong impression that the apartheid regime was free of corruption. A report compiled by the Institute for Security Studies revealed that apartheid in South Africa always was premised on corruption.[95] The report argues that in the last years of apartheid, the elite looted state resources, moved money abroad and engaged in economic adventures with devastating long-term effects for the economy.[96] What is more, the perpetrators became powerful after 1994 and still enjoy their ill-gotten resources under the new democratic government.[97] The South African TRC missed out on the opportunity to uncover grand corruption during the apartheid era since its mandate was to deal exclusively with gross violations of human rights.[98]

The new black majority government in South Africa usually is blamed for being the first government to embrace corruption. However, Van Vuuren refutes this myth:

> A powerful misconception … is that corruption in South Africa is a phenomenon that is intrinsic to majority rule. It is the subtext of some criticism of the post-apartheid state. It is made more obvious by the singular focus on contemporary corruption in government, with little reflection on the private sector where white South Africans are more prominent. As the book shows, the apartheid regime lied, bribed and broke every rule in the book to bust sanctions.[99]

This excerpt shows clearly that the disregard of corruption by the transitional government in South Africa misrepresented the truth about the apartheid government. The distortion of history has affected how post-apartheid generations understand the apartheid era and its unresolved legacies.

During political transitions to peace and democracy, criminal networks involved in

94 Section 4 of the Promotion of National Unity and Reconciliation Act 34 of 1995.
95 Van Vuuren (2006) at 21.
96 Van Vuuren (2006) at 85.
97 Van Vuuren (2006) at 85.
98 Section 4 of the Promotion of National Unity and Reconciliation Act 34 of 1995.
99 Van Vuuren (2006) at 12.

corruption and violence may progress with their operations, and unless disbanded, they may become a threat to peace efforts.[100] The end of apartheid did not signal the end of the corrupt networks in which the apartheid government was involved, as there were no investigations into their existence and activities. It has been revealed that these networks, which include private corporations and bankers, resurfaced in the new democratic South Africa and were involved in the corrupt arms deal during the Mbeki presidency.[101] The arms deal, officially known as the Strategic Defence Package, was a multi-billion rand weapons acquisition which allegedly involved grand bribery and corruption.[102] Van Vuuren argues that had apartheid corruption been addressed after 1994, the new government could have avoided conducting any business with such corrupt networks as have survived into the post-apartheid era.[103]

Truth commissions have become important mechanisms for revealing the past and furnishing recommendations which may be instrumental in setting important policies for the post-conflict government.[104] If a truth commission is not mandated to examine corruption as a crucial element of the conflict, its recommendations will not be aimed at addressing it and preventing its recurrence.[105] The South African TRC did not deal with corruption and thus did not recommend that the post-apartheid government address apartheid-era corruption. This neglect of corruption allowed corrupt criminal networks which operated during the apartheid regime to survive and regroup after 1994. Van Vuuren argues that the facts that not a single person stood trial for apartheid corruption and that there were no attempts to return looted assets to South Africa encouraged a culture of impunity.[106] As a result, the socio-economic rights in the South African Constitution of 1996 have little significance if billions of rands looted still have not been identified and returned to South Africa to help communities which suffered during apartheid.[107]

100 Boucher *et al* (2007) at 11.
101 Van Vuuren (2017) at 13.
102 Corruption Watch (2014).
103 Van Vuuren (2017) at 13.
104 Sharp (2014) at 88.
105 Sharp (2014) at 88.
106 Van Vuuren (2017) at 506.
107 Van Vuuren (2017) at 507.

This brief case study of South Africa illuminates how unresolved legacies of corruption may affect a state during or after transition. Therefore, African states emerging from conflict or autocratic regimes cannot afford to ignore corruption and other violations of socio-economic rights. The UN recommended in a Guidance Note that states should ensure that transitional justice processes take into account all root causes of conflicts or authoritarian regimes.[108] The Guidance Note further points out that peace can be attained only if, among other issues, endemic corruption is addressed in a legitimate and transparent manner by trusted public mechanisms.[109] Once the opportunity is lost, there is a real chance of previous acts of corruption haunting the new regime.

1.2.4 Changing the Dominant Script: Anti-Corruption and Transitional Justice

The fields of transitional justice and anti-corruption have been drifting towards each other. In 2013, transitional justice and anti-corruption experts interacted in a meeting organised by Freedom House, a leading international human rights organisation, and Transparency International, the global non-governmental organisation leading the fight against corruption. The meeting was held to consider the question:

> What transitional justice and anti-corruption tools can be used in pre- and post-transition settings to build and maintain legitimacy, fight impunity and corruption, provide redress for human rights violations and secure justice?.[110]

It was pointed out that there ought to be a "comprehensive and complimentary strategy" between the two fields in order "to improve a transitional country's chances to achieve accountability, truth, repair, reconciliation and non-repetition".[111] Developing such strategy simultaneously to address corruption and massive human rights violations was required "as a matter of urgency".[112] It should be noted that prior to the discussion, scholars such as Andrieu and Carranza already had started to advocate the inclusion of corruption within the transitional

108 Guiding Principle 9 of the United Nations Approach to Transitional Justice (2010).
109 Guiding Principle 9.
110 Pesek (2014) at 1-2.
111 Pesek (2014) at 1.
112 Pesek (2014) at 2.

justice context.[113] However, discussions by leading international human rights and anti-corruption organisations assisted in highlighting the importance of confronting both corruption and physical violence during transition.

Addressing corruption enhances accountability and allows for the satisfaction of a large pool of victims of economic violence compared to victims of physical violence. Many developing countries which have experienced transitional justice processes with a human rights focus, but which have neglected corruption, continue to be faced with the unresolved legacies of economic crimes.[114] Roht-Arriaza correctly points out that where transitional justice mechanisms have been applied following the dominant script, "the everyday lives of the majority in the countries involved had changed little or even worsened".[115] Human rights activists and anti-corruption campaigners increasingly are drawing closer to each other's domains, as the former realise the human rights impact of corruption, and the latter begin to employ a human rights approach to advance their case for reformation.[116] Because corruption and human rights violations are mutually reinforcing forms of abuse, the international practice of transitional justice is moving towards an approach that confronts abuses of economic and social rights, including corruption. Where corruption caused significant harm to citizens and played a crucial role in past abuses, then transitional states need to address it.[117] Many victims of corruption have been silenced since the inception of transitional justice, whereas they ought to be visible and given a voice during justice in transition.

The inclusion of corruption in the transitional justice agenda may promote the (re)building of civil trust in the government.[118] When past corrupt practices are exposed, the previous regime is delegitimised and a new relationship based on trust and democratic values may be established between citizens and the new government.[119] There may be financial benefits in confronting corruption, as recovered stolen assets may be used to alleviate some of

113 See Carranza (2008) at 310; Andrieu (2012) at 538.
114 Carranza (2008) at 311.
115 Roht-Arriaza (2019) at 105.
116 Albin-Lackey (2014) at 139.
117 See Andrieu (2012) at 538; Sriram (2014) at 35.
118 Robinson (2015) at 36.
119 Andrieu (2012) at 551.

the financial challenges which burden transitional justice processes. For example, in Peru assets recovered from former President Alberto Fujimori were placed in a fund and used for both anti-corruption and truth-seeking measures.[120] Thus, addressing corruption becomes important as it re-establishes civil trust and citizens may benefit from recovered stolen assets.

Anti-corruption ought to be part of state-building. As Boucher *et al* correctly point out:

> Deepening corruption [in post-conflict societies] can in principle lead to the resurgence or creation of grievances that can, in turn, lead back to violent conflict. Fighting corruption must therefore be a high priority for peacebuilders.[121]

Weak institutions and inflow of external funding create opportunities for corruption to thrive in post-conflict states, which may lead to the recurrence of violence.[122] Therefore, it is not sufficient for the new government merely to declare that corruption is not tolerated whilst turning a blind eye to previous acts of corruption. Rather, it should address the past conclusively and set a strong anti-corruption foundation for the future.

In early 2019, the African Union adopted its Transitional Justice Policy (AUTJP), which is regarded as the African "model" on transitional justice.[123] The AUTJP is the brainchild of a report by the African Union Panel of the Wise, which recommended a regional policy framework on transitional justice that is "based on Africa's rich and diverse experiences".[124] As a result, the policy is conceived as a guideline for AU member states to:

> develop their own context-specific comprehensive policies, strategies and programmes towards democratic and socio-economic transformation.[125]

Interesting to note is that the AUTJP aims at addressing "governance deficits and developmental challenges" which have been invisible in the dominant script on transitional justice.[126] This language by the AU shows the shift from an exclusive concern with liberal rights, to including socio-economic issues of governance and development in transitional justice. A

120 Navarro (2006) at 490.
121 Boucher *et al* (2007) at 21.
122 Rose-Ackerman (2008) at 405.
123 AUTJP (2019) at 1.
124 African Union Panel of the Wise (2013) at 5 & 65.
125 AUTJP (2019) at 1.
126 AUTJP (2019) at 1.

recent study by the African Commission on Human and Peoples' Rights on transitional justice echoes this shift:

> While the focus is often on violations of civil and political rights, from the perspective of the African Charter, violations of socioeconomic rights and peoples' rights are of significant interest in establishing a full account of the violations and the corrective measures to be adopted. Indeed, apart from violations to the rights to life, bodily integrity and personal liberty, most countries have had to grapple with the issues of destruction of sources of livelihood and socioeconomic infrastructure; exclusion and marginalisation of groups; uneven distribution of resources; ethnic and regional disparities; and systemic corruption.[127]

It goes on to discuss corruption and transitional justice in Africa in the following terms:

> Equally important is thus the consideration of acts such as embezzlement of public funds, corruption, nepotism in the provision of services and in recruitment to public services, the unfair concentration of economic opportunities and benefits in the hands of certain elites and their constituencies as forms of violations. These acts should also be characterised as violations requiring accountability and socioeconomic justice.[128]

This observation shows that African states are starting to realise that their previous expectations that transitional justice processes focused on violations of civil and political abuses "would usher in robust, inclusive democracies have, not suprisingly, proven overoptimistic".[129] The inadequacy of the current dominant script in transitional has begun to receive attention in Africa. Justice and reconciliation which do not address socio-economic issues are superficial and not in touch with the realities in many African states, where citizens have been exposed to both physical abuse and economic crimes. The AUTJP principles include national and local ownership of transitional justice processes; inclusiveness, equity and non-discrimination; African shared values on peace, security, reconciliation and rights; balance and compromises; gendered and generational dimensions of violations and transitional processes; co-operation and coherence; and capacity building for sustainability.[130] Hence, the African Union's vision is an expanded scope of transitional justice that departs from being regarded as a vehicle for addressing civil

127 Dersso (2019) at 15.

128 Dersso (2019) at 26. In this thesis, socio-economic justice refers to the redress for corruption and other violations of social, economic and cultural rights. See Arbour (2007).

129 Roht-Arriaza (2019) at 105.

130 AUTJP (2019) at 5-8.

and political rights, towards a project of sustainable peace, justice, democracy and development in Africa.

One weakness of the AUTJP is its failure explicitly to include corruption as a justice issue to be addressed by transitional states, notwithstanding cases such as the Arab Spring where corruption was a major grievance leading to the uprisings. The only reference to corruption is in the mentioning of the AU Advisory Board on Corruption as one of the key AU organs and institutions which should "provide leadership in the implementation" of the policy.[131] The AU Convention established the Board and its functions include promoting anti-corruption measures in Africa, advising governments on dealing with corruption, and building partnerships with key AU bodies, African civil society and organisations to co-operate in the fight against corruption.[132] Thus, the inclusion of the Board as a key organ for the implementation of the AUTJP gives a chance for the incorporation of anti-corruption agenda in transitional justice.

1.3 Statement of the Problem

Despite growing voices on the need to include an anti-corruption agenda in transitional justice, there is no established or agreed framework on the issue.[133] Bringing together the fields of transitional justice and anti-corruption in order to craft appropriate responses to past corruption raises complex issues. On the one hand, the field of transitional justice traditionally has addressed physical violence and usually thousands of people would have been murdered, tortured, displaced or suffered in some or other way. These issues cannot be ignored and indeed should be addressed by the various accountability mechanisms. On the other hand, socio-economic issues, such as corruption, are becoming indispensable and central justice issues to which transitional states cannot afford to turn a blind eye any longer. Questions have been raised about the dangers of overburdening transitional justice mechanisms, especially as regards resources and dilution of its goals.[134] There are concerns that dealing with corruption may divert attention away from gross violations of human rights. Accordingly, transitional

131 AUTJP (2019) at 26.

132 Article 22 of the AU Convention.

133 See Maguchu (2019) at 4.

134 Sandoval (2014) at 53; Robinson (2014) at 34.

states are likely to find themselves in a situation where there are opposing pressures for and against the inclusion of corruption in transitional justice.

Confronting corruption is essential for building a democratic society. Sharp correctly argues that what is "too much" or "too little" transitional justice should not be based on an arbitrary distinction between physical and economic violence.[135] In other words, transitional justice which deals with physical violence should not be considered sufficient for fear that dealing also with gross economic violence will become "too much" for mechanisms aimed at addressing the past. Rather, there is a need carefully to analyse all the causes of the conflict and the social, political and financial resources available for the deployment of a range of transitional justice mechanisms.[136]

Another issue relates to the adequacy of transitional justice to deal with corruption. Citizens of states in transition from conflict to peace or from authoritarianism to democracy are demanding that corruption be addressed. Yet, deploying transitional justice mechanisms to deal with corruption raises many thorny issues, starting with the theoretical framework. The field of transitional justice still is under-theorised as regards socio-economic justice and there still is work to be done on the level of theory, policy and practice. Haldemann & Kouassi point out that:

> It is one thing to explain why socio-economic rights should be integrated in the transitional justice framework; it is quite another to address the question of how this could be done. This is a crucial issue. If the ESC rights thesis is to be more than an empty abstraction, one should be able to describe the ways and means of putting it into practice.[137]

For instance, Sharp argues for an "economic violence—human rights nexus" where transitional justice will accommodate corruption and other economic violence that have the most direct and grievous effect on economic and social rights under international law.[138] Duthie argues for a "development-sensitive approach" in the designing and deployment of transitional justice mechanisms, as development and transitional justice enjoy a mutually beneficial relationship in

135 Sharp (2014) at 19.
136 Sharp (2014) at 19.
137 Haldemann & Kouassi (2014) at 503.
138 Sharp (2014) at 106.

more than one way.[139] Both approaches have challenges that make them difficult to implement. The exclusive human rights focus by Sharp complicates grand corruption cases, which are difficult to link to specific human rights violations but which played a role in perpetuating a despotic leadership or armed conflict. Duthie's approach may lead to the implementation of reparations as development projects, thereby losing their meaning as a transitional justice mechanism. Hence, this thesis will proceed in terms of a theoretical framework that will assist in formulating guidelines on how best these mechanisms may be implemented to address corruption.

Each transitional justice mechanism faces unique challenges that the transitional state must take into consideration in order to ensure that simultaneously justice is served and peace is secured. This thesis will examine the problems with which each transitional justice mechanism has to contend and pursue possible solutions. It is important to point out that the various transitional justice mechanisms complement one another and should not be seen as substitutes for one another. For example, truth commissions are not replacements for prosecutions: the two mechanisms may be deployed as complements to each other, with truth commissions recommending investigation and prosecution of certain suspects.

Criminal trials at national and international level are an important transitional justice mechanism. Questions arise about how best criminal trials may be deployed to address past corruption. If the same passion shown in prosecuting human rights violations is not deployed to deny kleptocrats and warlords access to ill-gotten assets, there is a real danger of the illicit gains being used to derail trials and asset recovery efforts.[140] During the transitional phase to peace or democracy, it is common for ex-leaders and their allies to use their tainted gains or political influence to shield themselves from prosecution and asset recovery, halt or interfere with meaningful reforms, and undermine the new regime.[141] Ineffective anti-corruption regimes in transitional states make it difficult to hold to account corrupt leaders. The political influence exerted by powerful corrupt persons makes it even more difficult for grand

139 Duthie (2008) at 292, 295-301.
140 Carranza (2008) at 314.
141 Freedom House (2013).

corruption to be investigated and prosecuted at national level. Witnesses are intimidated and there is minimal protection for whistleblowers. Investigations and prosecutions become even more complicated when assistance from other countries is needed. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (better known as the Malabo Protocol) gives hope for justice in that it provides for the prosecution of corruption at international level.[142] However, the Malabo Protocol provides also for immunity for the heads of states and other senior public officials who are usually the chief looters of state resources.[143]

As a transitional justice mechanism, amnesties may offer some benefits in understanding past corruption and in recovering stolen assets. Corruption is very secretive and difficult to detect, and there are seldom witnesses to testify. Parties to a corrupt relationship are guilty equally and usually are reluctant to come forward to incriminate themselves, unless some immunity can be provided. Therefore, amnesty in exchange for information may result in the exposure of corrupt relationships. However, the granting of amnesty may anger the general population who are usually the victims of corruption and may undermine the legitimacy of the transitional government. It may create the impression that corruption is tolerated by the new government and that it is not different from the old corrupt government. In this thesis, amnesties will be discussed in relation to other transitional justice mechanisms, for instance, amnesties as a barrier to criminal prosecutions, or as an incentive for truth and reconciliation. Unconditional or blanket amnesties are not an accountability measure, but a tool of impunity.

Truth commissions have become an important transitional justice process for discovering the facts regarding past violence. For example, in Sierra Leone the truth commission reported that corruption, poverty and structural violence were the causes of human rights violations.[144] A truth commission may be essential in bringing perpetrators of corruption to account through its investigations and report. However, it is problematic to expect a single truth commission to deal with violations of civil and political rights as well as

142 Article 28I of the Malabo Protocol.

143 Article 46A*bis* of the Malabo Protocol.

144 Report of the Sierra Leone Truth & Reconciliation Commission, Volume 2 (2004) at 29.

violations of social and economic rights. The mandate of the commission will be too wide, leading to some violations being disregarded. Not to be ignored here is the fact that truth commissions dealing with economic violence require persons skilled and experienced in auditing, accounting and forensics to identify and trace criminal proceeds.

Corruption as a justice issue raises the thorny question of reparations for victims of corruption. Many African states have been looted by previous leaders and have been left with huge debts, rendering them unable to offer reparations. Understandably, and given the need for development and reparations, such states attempt to recover the looted funds. However, they may face serious obstacles of limited legal, investigative and judicial capacity, inadequate financial resources, and a lack of political will. The difficulties faced in the recovery process diminish the state's ability to mobilise resources through asset recovery and offer reparations as a transitional justice mechanism. The thorny questions include: Who is a victim of corruption, particularly in countries where millions of people have experienced corruption? How best may transitional states remediate such victims for their previous harm? Should victims of corruption receive individual or collective reparations? And, is there a relationship between reparations and development?

Public officials who perpetrated, aided or abetted, or were complicit in corruption should not be left untouched. There is a need to purge or vet corrupt officials in order for the new government to separate itself from the previous corrupt government and to demonstrate its policy of zero tolerance towards corruption. Likewise, corrupt administrative structures should be reformed. The purging or vetting of corrupt officials and the reformation of corrupt government sectors likely will be met with strong resistance, particularly from the security sector. Another issue is how far up or down the ladder of authority vetting or purging ought to go. Gready & Robins argue that in fragile states there is a tension between a strong focus on human rights to reform the security and judicial sectors and the need to ensure service delivery.[145] There is a further tension between legitimacy and capacity. A question is whether it is better to have tainted institutions that work or untainted institutions that essentially do not.

145 Gready & Robins (2014) at 345.

Countries emerging from authoritarian regimes or violent conflicts are faced with the so-called "peace versus justice dilemma".[146] On the one side, transitional justice promises justice for victims who, together with their families and sympathisers, will be calling for perpetrators to be held accountable for their crimes. On the other side, perpetrators will pursue immunity and blanket amnesty for the sake of national peace and unity.[147] This dilemma is faced by every transitional state and should be addressed in a way which will ensure that the country is not plunged back into crisis. The ultimate goal of transitional justice is to achieve peace, accountability, truth, reconciliation and non-repetition of past events.

The issues identified above are faced by many transitional states in Africa and they need to be addressed in order to move anti-corruption to the centre of transitional justice. This thesis will investigate and analyse the critical issues in this regard, with a view to providing suggestions on how best transitional justice mechanisms may be implemented as anti-corruption tools in Africa.

1.4 Research Questions

The research has been undertaken with the objective of formulating answers to the following questions:

- What is the potential of transitional justice mechanisms being deployed to address corruption?
- How best may transitional justice mechanisms be implemented as anti-corruption tools in Africa?

1.5 Significance of the Study

The research aims to contribute to the development of transitional justice mechanisms as means of dealing with past corruption in Africa. The focus on corruption and other economic crimes in the field of transitional justice is a recent trend. Lots of literature is available on the topic as researchers grapple with the issues involved. However, the problems have not been

146 Sriram (2009) at 1.
147 Sooka (2009) at 21.

worked out as yet at the level of theory, policy and practice. This thesis is significant in that it seeks to identify the critical issues and to offer some answers to the questions which they entail.

1.6 Research Methodology

The thesis adopts a desk research methodology, taking a critical and analytical approach to the question of deploying transitional justice mechanisms as anti-corruption tools in Africa. It will use primary sources such as national and international laws, court cases, reports, as well as relevant secondary sources such as books, journal articles, internet sources and other materials relevant to the academic discussion on corruption and transitional justice in Africa. The chosen methodology is useful in distinguishing work by other authors and clearly explaining the contribution of this thesis. There is no need to obtain ethical clearance from the university, and all the sources used or quoted will be fully indicated and acknowledged.

1.7 Limitations of the Study

The study seeks to address whether corruption can be addressed under transitional justice in Africa. However, covering all African countries is too broad in scope. To make the study more feasible and manageable, the research is limited to African countries that have attempted to address corruption as part of their transitional justice agenda. This limits the scope of the study to Chad, Egypt, Tunisia, Sierra Leone, Liberia and Kenya. Most of these countries have deployed only one or two transitional justice processes to address corruption, hence there is an average of two case studies per chapter. In addition, the thesis provides important lessons from South Africa, which did not address corruption under its transitional justice processes, but its transition from apartheid to democracy is regarded as one of the most successful models in the field of transitional justice.[148] The case study of South Africa is important to balance the research and to draw important lessons on why African countries cannot afford to ignore corruption during periods of transition. Though the study is limited to these countries, the lessons learnt may be applicable to many contexts within Africa.

148 See Koss (2002) at 526; Garkawe (2003) at 378-380; Brahm (2009) at 9.

1.8 Literature Review

In 2006, the former UN High Commissioner for Human Rights stimulated discussion on accommodating socio-economic justice during political transitions:

> Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social, and cultural rights.[149]

Since then, the discussion has gathered momentum in transitional justice scholarship. The available literature agrees that corruption should be addressed within the transitional justice agenda. However, there are divergent approaches as to how best transitional justice mechanisms may be deployed to address corruption.

Carranza was one of the early scholars to advocate the strengthening of traditional transitional justice mechanisms to engage with corruption and economic criminality. He points out that there is no theoretical obstacle to the application of transitional justice mechanisms to address grand corruption and economic crimes.[150] This is supported by Andrieu, who argues that where corruption is a public grievance leading to conflicts, as in Egypt and Tunisia, it should be addressed during the post-revolutionary transition.[151] In practice, however, the transitional justice field has compartmentalised past violations into two, one for human rights violations and another for corruption and economic crimes. The narrow approach of human rights violations has dominated the field. This has led to corruption and economic crimes not being regarded as constituting human rights violations in themselves. Carranza considers that this compartmentalisation fails to reflect fully the realities of transition that should be addressed.[152] He also points out that transitional justice practitioners speak readily about fostering a sense of ownership for people in transitional states. However, there is no real sense of ownership in many transitional societies in Africa, where there are massive poverty and socio-economic

149 Arbour (2007) at 3.
150 Carranza (2008) at 314.
151 Andrieu (2012) at 538.
152 Carranza (2008) at 311.

concerns as transitional justice mechanisms have focused on violations of civil and political rights, and corruption and other economic crimes have been excluded from mainstream transitional justice work.[153]

Carranza argues further that the inclusion of corruption in mainstream transitional justice work provides a chance to shatter the myth of economically clean dictators, and reflects the relationship between economic crimes and human rights violations committed in the past.[154] He concludes that whether addressing corruption is based on the fact that corruption is a human rights violation, or that economic crimes are committed by the perpetrators of civil and political rights violations, transitional justice mechanisms can be deployed to address corruption.[155] This argument is valid, as the fact that corruption has been ignored before does not mean that transitional justice mechanisms cannot be harnessed to address it. It is submitted that transitional justice mechanisms in Africa cannot afford to ignore corruption and other socio-economic issues any longer.

Miller postulates that, historically, transitional justice has ignored the importance of economic issues, which include structural violence, inequality and economic (re)distribution, leading to conflicts and featuring in shaping the transition itself.[156] She argues that:

> [D]espite its claims to exposure, revelation and memorialisation, the project of transitional justice may simultaneously perpetuates invisibility and silence.[157]

It is arguable that overlooking corruption in transitional justice silences many victims of corruption and provides impunity for perpetrators. Silence is perpetuated not only through ignoring economic issues but also through mentioning these issues but then sidestepping them in favour of physical violence.[158] Miller correctly points out that the removal of economic questions from transitional justice makes invisible the economic factors leading to the conflict.[159] Even more, this invisibility affects post-transition economic situations which may

153 Carranza (2008) at 311.
154 Carranza (2008) at 320.
155 Carranza (2008) at 330.
156 Miller (2008) at 267.
157 Miller (2008) at 267.
158 Miller (2008) at 273.
159 Miller (2008) at 287.

lead to renewed violence related to the previous grievances. This thesis supports this view and contends that where corruption was a major concern leading to conflict, its neglect by transitional justice mechanisms may result in its recurrence.

Sharp examines the inclusion in the field of transitional justice of what he refers to as "economic violence", that is, violations of economic and social rights, corruption and plunder of national resources.[160] This thesis deals exclusively with corruption. The inclusion of all violations of social and economic rights will render the research ambit too broad. For example, the destruction and appropriation of property and looting of crops or livestock of civilians, which constitute violations of social and economic rights, may amount also to war crimes if committed during wartime.[161] Hence, the research will concentrate on corruption and its impact on citizens in transitional states.

Sharp notes that conflicts are not initiated in a vacuum, isolated from deeper socio-economic and historical influences, and their egregious effects are not terminated abruptly when conflicts end.[162] He argues that when economic violence is ignored, conflicts become one-dimensional, whereas in real experience there is an inseparable mixture of political, social, economic and cultural factors. This view is supported by Cavallaro & Albuja who argue that the disregard of economic crimes by truth commissions cannot be taken as an indication that corruption and other economic crimes are not problems in the states concerned.[163] This results in distortion of the truth about the past, and causes misunderstanding of the real causes of the conflict, thereby limiting the range of solutions.[164] There is also a real risk of the truth commission recommending policies which are not compatible with the crisis at hand and which do not provide the proper foundation for preventing repetition.[165]

This study adds to the literature by arguing that the avoidance of corruption creates the impression that looting of public resources is acceptable unlike, for example, torturing or killing

160 Sharp (2014) at 5.
161 Article 8(2)(a)(iv) & (b)(xvi) of the Rome Statute of the International Criminal Court (2002).
162 Sharp (2014) at 79.
163 Cavallaro & Albuja (2008) at 128.
164 Sharp (2014) at 3.
165 Sharp (2014) at 88.

citizens. In reality, corruption may have far-reaching consequences as it affects a larger pool of victims than torture does. Furthermore, this avoidance creates the impression that the transitional state tolerates corruption and is able to ensure that all citizens enjoy their rights fully, even without addressing corruption. Needless to say, this impression is entirely incorrect. Corruption is a threat to democracy and the rule of law and the transitional government must confront it.

Sharp notes also the difficult questions raised by the inclusion of economic violence in transitional justice work. Looking at economic violence involves engaging with deeper issues of distributive justice and structural violence before the conflict and which may have been the causes of the conflict.[166] This raises questions about whether it is the proper work of transitional justice or whether it is part of the work of "development" and longer-term political and social processes.[167] In other words, is it asking too much of transitional justice mechanisms to deal with the larger and deeper dimensions of economic violence? Sharp proposes that there is a need to reconceptualise and reorient transitional justice to include transition to positive peace, with both physical violence and economic violence receiving equal attention.[168] The risk of overburdening transitional justice mechanisms is real. Sharp argues that avoiding such overburdening should not be based on arbitrarily choosing physical violence over economic violence, but on carefully analysing the causes of the conflict and the social, political and financial capital available to ensure a peaceful transition through the various transitional justice mechanisms.[169]

As to truth commissions, Sharp posits that they should focus on an "economic violence—human rights nexus" by examining corruption and other aspects of economic violence with the most direct and grievous effect on economic and social rights under international law.[170] He argues that this approach is beneficial as it requires truth commissions

166 Sharp (2014) at 17.
167 Sharp (2014) at 19.
168 Sharp (2014) at 4.
169 Sharp (2014) at 19.
170 Sharp (2014) at 106.

to focus on victims who are the bearers of rights being violated.[171] A clear concern with economic violence and socio-economic rights empowers civil society and citizen groups with a potent mobilisation tool to ensure that the reports by the truth commissions, once published, are not ignored.[172] Sharp is supported by Albin-Lackey, who argues that linking corruption to human rights abuses assists in lending momentum to anti-corruption efforts.[173] Anti-corruption campaigners will be able to show the real effects of corruption on real human beings, and not merely as a drain on government resources.[174] However, Sharp warns that a focus by truth commissions on a rights nexus should avoid becoming overly lawyerly and atomistic, neglecting the wider historical context and leading to violations of rights.[175]

Likewise, Maguchu argues that transitional justice processes in Zimbabwe have exclusively focused on civil and political rights, regardless of rampant corruption over the years.[176] He proceeds to answer whether transitional justice processes in Zimbabwe should focus on corruption. He points out that the deterioration of socio-economic rights under the long reign of former President Robert Mugabe was massively linked to corruption.[177] An example is the 98 585 reported cases of cholera during the 2008 outbreak, which was exacerbated by endemic corruption in the health sector such as cronyism, prebendalism, rent-seeking and patrimonialism.[178] He concludes that since there is a close link between corruption and socio-economic rights violations in Zimbabwe, transitional justice processes ought to address it.[179] For that, Maguchu recommends the government to actively engage with citizens and civil society in designing transitional justice processes, ensure inclusion of socio-economic rights in dealing with past violence, adopt a holistic approach for transitional justice processes to complement each other, and strengthen other anti-corruption measures in Zimbabwe.[180]

171 Sharp (2014) at 107.
172 Sharp (2014) at 107.
173 Albin-Lackey (2014) at 152.
174 Albin-Lackey (2014) at 152.
175 Sharp (2014) at 107.
176 Maguchu (2019) at 53.
177 Maguchu (2019) at 4.
178 Maguchu (2019) at 71.
179 Maguchu (2019) at 145-147.
180 Maguchu (2019) at 152-153.

Robinson also advocates a human rights approach by truth commissions to address corruption. She argues that where there is a link between corruption and human rights and, in particular, where political corruption is an important social grievance, the mandate of truth commissions should include corruption.[181] Disclosure of the whole truth indeed should include exposing the truth about corruption and human rights violations.[182] Robinson argues for a complementary approach between truth commissions and anti-corruption efforts.[183] She warns that truth commissions should avoid duplicating the work of other anti-corruption agencies.[184]

In order to establish the foundations of the complementary approach, Robinson identifies a number of important matters which have to be taken into consideration. Firstly, truth commissions should consider the types of corruption to be targeted, whether endemic or sporadic corruption, and whether grand or petty corruption.[185] To avoid overburdening the truth commission financially and functionally, it would be best to concentrate on grand corruption and endemic corruption. This thesis agrees with a focus on grand corruption, but will argue that truth commissions should highlight endemic petty corruption also. Endemic corruption, whether grand or petty, is devastating to the well-being of the community. A typical example would be endemic police corruption involving extortion and kickbacks. It is also important to remember that endemic petty corruption was the match which ignited the Arab Spring.[186] Therefore, if it is ignored there is a real danger of recurrence of conflict.

Secondly, Robinson argues that truth commissions should examine the results of previous investigations of corruption and may investigate further where such previous investigations did not rely on the human rights approach.[187] This may save truth commissions time and avoid fruitless investigations. However, Robinson fails to point out that many anti-corruption agencies in authoritarian regimes or in conflict areas are compromised and their investigations are not independent. Kleptocrats ensure that anti-corruption agencies do not

181 Robinson (2015) at 48.
182 Robinson (2015) at 48.
183 Robinson (2015) at 48.
184 Robinson (2015) at 48.
185 Robinson (2015) at 49.
186 Pring (2016) at 5.
187 Robinson (2015) at 49.

investigate them and their allies for corrupt activities. What is more, the anti-corruption agencies themselves may have been involved in corruption. For example, the Zimbabwe Anti-Corruption Commission (ZACC) has been implicated in corruption, leading to the dismissal of its director and four other managers on allegations of corruption.[188] Where it has tried to investigate political corruption, politicians have threatened it.[189] If, in future, Zimbabwe establishes a truth commission to deal with corruption, it would not be sensible for the commission to rely on the investigations of the ZACC. Therefore, this thesis argues that truth commissions should not rely excessively or uncritically on previous investigations by anti-corruption agencies, as the information available may be biased and incomplete.

Thirdly, Robinson suggests that thematic hearings should be held on corruption to provide a public platform for its perpetrators and victims.[190] This thesis will examine the success of the public hearings on corruption that currently are taking place in Tunisia. Fourthly, Robinson argues that commissioners should undergo a vigorous screening process regarding any potential links to corruption and that at least one of the commissioners must be an anti-corruption expert.[191] This research will argue that there also should be commissioners with expertise in accounting and auditing in order to interrogate the financial status of corruption perpetrators and help trace the stolen money. Lastly, on the question of asset recovery, Robinson argues that since it is often a lengthy process and may require international legal assistance that falls beyond the mandate and duration of truth commissions, it is best left to specialised agencies.[192] Indeed, specialised asset recovery commissions are positioned better to deal with asset recovery. However, the importance of truth commissions in the asset recovery process should not be underestimated. This research considers that truth commissions may be useful for uncovering the whereabouts of hidden assets. The reports of truth commissions may point the specialised agencies to corrupt persons and the location of stolen assets. Apart from truth commissions, asset recovery agencies may obtain useful information from the media that,

188 Maodza (2016).
189 Mushava (2016).
190 Robinson (2015) at 49.
191 Robinson (2015) at 50.
192 Robinson (2015) at 50.

in recent years, have exposed the riches of corrupt politicians and the location of their ill-gotten assets.

Duthie argues for a "development-sensitive approach" in the design and deployment of transitional justice mechanisms.[193] He contends that there is a relationship between transitional justice and development as the two can complement each other in transforming society;[194] they can affect each other inadvertently;[195] they can be co-ordinated to generate positive synergies;[196] and they can address each other directly.[197] He posits that transitional justice mechanisms should be deployed to address certain economic crimes which are development-related and which constitute serious violations of human rights.[198] Since transitional justice mechanisms intend to address serious human rights violations, they inevitably will address economic crimes that constitute serious violations of human rights.

Duthie submits also that engaging development issues might important for the realisation of traditional transitional justice goals, such as prosecuting perpetrators of serious human rights violations, redressing victims and preventing recurrence of violations.[199] He further argues that transitional justice practitioners may assume erroneously that someone else or some other mechanisms will deal with development-related economic crimes such as corruption.[200] This mistake results in impunity for corruption, as no one will claim responsibility for tackling it. Therefore, if transitional justice mechanisms are development-sensitive, they could make a huge contribution to the fight against corruption that otherwise would not have been pursued at all.

However, the development-sensitive approach is not without its challenges. Transitional justice mechanisms such as truth commissions may have limited size, capacity, resources and

193 Duthie (2008) at 292.
194 Duthie (2008) at 295.
195 Duthie (2008) at 296.
196 Duthie (2008) at 299
197 Duthie (2008) at 301.
198 Duthie (2008) at 304.
199 Duthie (2008) at 305.
200 Duthie (2008) at 306.

appropriate methodologies to address or broadly investigate development issues.[201] Also, the inclusion of broad development issues may reduce the ability of transitional justice mechanisms to pursue justice in respect of serious human rights violations.[202] Lastly, other development tools may be suited better to dealing with development needs than transitional justice mechanisms.[203] Duthie refers to the prevention of corruption which, according to him, may be enhanced through stronger anti-corruption agencies, more administrative reform and the development of international law.[204] To some extent, the example is correct. Transitional justice mechanisms are accountability mechanisms aimed initially at addressing past violations and in the process ensuring that there is non-repetition of such violations. However, the fact that other anti-corruption tools are more appropriate to prevent corruption does not mean that transitional justice mechanisms should not confront corruption which occurred during a repressive regime or conflict. Transitional justice mechanisms may create the platform for effective measures to prevent corruption by ensuring that past corrupt networks are dissolved and by recommending the establishment or strengthening of certain anti-corruption measures.

The participation of victims and the public in the designation and implementation of transitional justice mechanisms is of great importance. Vinck & Pham, using empirical data from the Eastern DRC, examine the importance of the will of local actors and the victim population in the designation of transitional justice mechanisms with regard to peace, justice and social construction.[205] They argue that public consultation may influence the political agenda and enhance the impact of transitional justice mechanisms on sustainable human development.[206] The public consultations may produce knowledge of how to design important policies acceptable to the people, for example, whether the affected population is ready for reconciliation.[207] The authors present and analyse the outcome of their survey, which indicates respondents' views on various transitional justice mechanisms. It was found that the major

201 Duthie (2008) at 306.
202 Duthie (2008) at 307.
203 Duthie (2008) at 308.
204 Duthie (2008) at 308.
205 Vinck & Pham (2008) at 401.
206 Vinck & Pham (2008) at 399.
207 Vinck & Pham (2008) at 400.

concerns of victims and the general population in the worst affected areas of the Eastern DRC were the meeting of basic needs and issues of social justice and development.[208] Even though different results may be obtained in other regions, the Eastern DRC study suggests that it is important to promote participation and ownership by victims and the general public of transitional justice processes.

All in all, there is a general agreement that an anti-corruption agenda in transitional justice is overdue. However, there is still work to be done regarding the theoretical framework. This thesis argues that "transformative" transitional justice, which reflects the local needs of the affected population, should be able to address corruption. Where such mechanisms are based on extrinsic forces, there is a real risk of their lacking legitimacy in the eyes of the victims and the general population. This theory will be explained in detail in the next chapter.

1.9 Outline of Remaining Chapters

Chapter Two

This chapter provides the philosophical background of the study. It will discuss transformative justice theory and justifies its application to corruption during transition.

Chapter Three

This chapter will analyse the problems attached to investigating and prosecuting corruption cases involving prominent politicians and wealthy businessmen. It will look at cases that require assistance from foreign jurisdictions to investigate and prosecute. Besides prosecution at national level, the chapter will examine the extent to which corruption can be prosecuted at international level, for instance, at the International Criminal Court. It will discuss also the Malabo Protocol insofar as it provides for prosecution of grand corruption.

Chapter Four

In this chapter, the main discussion will concern the establishment of truth commissions to examine past cases of corruption. The chapter will analyse whether a single commission, as is

208 Vinck & Pham (2008) at 409.

usually the case, should consider all past injustices or whether there should be a special truth commission to deal with corruption, given the unique nature of the crime. It will discuss critically issues regarding truth commissions, such as their mandates and limitations, their membership and their duration.

Chapter Five

This is the victims' chapter. It will traverse the questions of asset recovery and reparations for victims of corruption.

Chapter Six

This chapter will consider the reformation of corrupt administrative structures and the vetting or purging of corrupt public officers. It will analyse the thorny issues likely to arise when endemic corruption in public institutions is addressed and when corrupt public officers are vetted or purged.

Chapter Seven

This is the concluding chapter and it will formulate recommendations on how transitional states in Africa could apply transitional justice mechanisms as anti-corruption tools in ways that will strengthen their anti-corruption regimes.

CHAPTER TWO

TRANSFORMATIVE TRANSITIONAL JUSTICE

2.1 Introduction

The field of transitional justice has evolved over the years. Teitel, in her article titled *Transitional Justice Genealogy*, outlines three phases or generations of transitional justice. She posits that phase one of transitional justice began with the Nuremberg Trials of 1945, which depicted the "triumph of transitional justice within the scheme of international law".[1] Phase two included post-Cold War transitional justice which was characterised by waves of domestic political transitions in Eastern Europe and South and Central America.[2] The third phase is steady-state transitional justice which began in the 1990s and was delineated by the expansion and normalisation of transitional justice, as in the establishment of the permanent International Criminal Court as a transitional justice mechanism expected to address ongoing violence.[3]

Common to all three generations of transitional justice is the almost exclusive focus on civil and political rights. Indeed, traditional transitional justice has been criticised for redressing violations of civil and political rights while violations of economic, social and cultural rights remain unaddressed;[4] and for focusing on the symptoms rather than the causes of conflict.[5] It has turned a blind eye to socio-economic causes and nature of past abuses, despite their significance in constructing a full and clear picture of the past. Transitional justice in the 1980s and 1990s was perceived as a vehicle for delivering "liberal goods" in transitional societies, which included "political/procedural democracy, constitutionalism, the rule of law and respect for human rights".[6] The liberal goods were promoted by international financial institutions, international organisations such as the UN, international non-governmental organisations and

1 Teitel (2003) at 60.
2 Teitel (2003) at 75.
3 Teitel (2003) at 89.
4 See Laplante (2008) at 333; Carranza (2008) at 310.
5 See Gready & Robins (2014) at 340.
6 Sharp (2015) at 150. See also Gready & Robins (2014) at 341.

international donors; and they were delivered to transitional states as necessary tools for stability, democratisation and development.[7] There was immense influence from external forces in imposing liberal approaches to transitional justice, and ensuring liberal peacebuilding that was concerned with promoting free markets and democracy.[8] Such liberal peacebuilding was expected to attract foreign investment, promote the rule of law and sponsor stability. It was based on the assumption that liberal states "behave better" and are less prone to violence or war which threatens international peace and security.[9] To achieve such liberal peace, there was enhanced emphasis on ending physical violence and ensuring that states respect and protect liberal rights. This narrative shaped the theory and practice of transitional justice.

Liberal democracy took a central stage during political transitions, thereby helping to legitimise claims to justice that prioritised physical violence over claims to justice for socio-economic issues.[10] Since the entrenchment of liberal democracy in transitional justice, it has become the norm that transitional states ought to, and should, focus on physical violence. A narrow approach to justice in transition was followed, which foregrounded civil and political rights, whilst social and economic rights were pushed to the peripheries.[11]

Liberal peacebuilding has received heavy criticism in recent years. It has been argued that the imposition of liberal democracy has presumed, wrongly, that free markets and democracy would secure liberal peace, which has failed in many transitional states.[12] As an externally imposed approach, it has been criticised as "top-bottom" peacebuilding which lacks legitimacy with the local communities and, hence, is insufficient to promote sustainable peace.[13] Also, it has been censured for favouring the creation of "empty" institutions over a contextualised engagement with the everyday needs of the citizens of transitional states, particularly in developing countries.[14] In other words, the dominant script in transitional justice

7 See Sriram (2014) at 30.
8 See Slaughter (1995) at 511-512; Sriram (2014) at 30.
9 See Slaughter (1995) at 508-512 & 514-517; Alvarez (2001) at 187-188 & 234-236; Waldorf (2012) at 173.
10 See Arthur (2009) at 334-348.
11 Sharp (2012) at 786-791; Robins (2017) at 56-57.
12 Sriram (2014) at 31.
13 Sriram (2014) at 31.
14 Gready & Robins (2014) at 341.

long has placed excessive emphasis on promoting free markets and international peace, whilst socio-economic grievances and needs of the citizens are overlooked. This has led to transitional justice mechanisms becoming unpopular with local communities, whose socio-economic grievances have remained invisible in the field. Opportunities to address the socio-economic realities of many citizens have been missed during all the three generations of transitional justice because of adherence to the dominant liberal script.

Neopatrimonialism and plunder of state resources have characterised recent conflicts and autocratic regimes in Africa, with corruption logically arising as one of the central justice issues during political transition.[15] The Arab Spring is a perfect example of uprisings in the 21st century as citizens took to the streets to demand the eradication of corruption. In the DRC, the main cause of the long-conflict is linked to the scramble to control and appropriate vast resources in the country for private gain.[16] A report by the UNSC outlines how army officials from Zimbabwe, Rwanda and Uganda, who had been sent to the DRC as military support either for the government or rebel groups, were involved in looting of diamonds from the country.[17] Political power has become an indispensable tool for abuse of state resources with impunity in many African states. Physical and socio-economic violence have become so intertwined that turning a blind eye to one is no longer justifiable. As explained above, all three generations of transitional justice identified by Teitel have missed opportunities to redress socio-economic injustices during periods of political transition. As a result, local political elites usually return to patronage-based and corruption-driven governance during and after transition. In this regard, the three phases of transitional justice have been associated too closely with mere change in political leadership, leaving the socio-economic needs of citizens unattended.

It has been suggested that there is a fourth phase or generation of transitional justice for the 21st century, which challenges the narrow approach of liberal democracy by demanding more focus upon the socio-economic dimensions of justice during transition.[18] Some scholars have championed a paradigm shift from "the crisis of the liberal peace" to approaches which

15 Arthur (2009) at 361. See also Robinson (2014) at 33; Pesek (2014) at 1.

16 See Turner (2007) at 24.

17 United National Security Council (2002).

18 See Sharp (2013) at 157.

are concerned more with local priorities and needs.[19] This fourth generation "interrogates the peripheries" of the transitional justice field and seeks to include the underlying politics of transitional justice, to balance local and international interests, and to pursue greater economic justice.[20] Sharp summarises it as follows:

> The goal of interrogating the lingering peripheries of transitional justice is not to reverse the tables, suddenly privileging background over foreground, but rather to call into question the reasons for the historic privileging of certain items over others, and to examine what this emphasis might say about transitional justice as a political project.[21]

Hence, the fourth generation of transitional justice is aimed at the inclusion of social and economic issues within the field of transitional justice, and not at doing away with civil and political rights issues. There is a need to find a balance between socio-economic issues and civil and political issues, in a bid to craft a comprehensive and holistic approach to justice in transition. Sharp argues that the traditional "emphasis and exclusion of economic violence" ought to be replaced with a more "nuanced, contextualised, and balanced approach" to reflect the full range of both physical and economic justice issues faced by societies in transition.[22] In other words, there is need to deviate from the liberal approach to transitional justice and devise new approaches which will accommodate socio-economic challenges faced by citizens in transitional states.

There have been recent calls for a more transformative kind of transitional justice.[23] Gready & Robins define transformative justice as:

> transformative change that emphasises local agency and resources, the prioritisation of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.[24]

Transformative justice is regarded as part of the fourth generation of transitional justice, aimed

19 See Cooper (2007) at 605-608 & 612-615; Shaw & Waldorf (2010) at 3-7; Rampton & Nadarajah (2017) at 442-443.

20 Sharp (2013) at 157.

21 Sharp (2013) at 157

22 Sharp (2014) at 38.

23 Gready & Robins (2014) at 340. See also; Evans (2019); Gready & Robins (2019); AUTJP (2019) at 3; McAuliffe (2017).

24 Gready & Robins (2014) at 340.

at reconceptualising the goals of transitional justice tools to account for long-term structural violence which persists during and after transition.[25] Structural violence is a term coined by Johan Galtung and refers to social structures which systematically harm or otherwise disadvantage individuals.[26] Daly, one of the first scholars to champion transformative justice theory, distinguishes between the terms "transition" and "transformation". For her, “transition happens at the top, it does not reach deep into the soil of the new society where the commitment to democratic values actually takes root”.[27] By contrast, transformation reaches community level by closely assessing the context of the problem and the needs of the community. In recent years, transformative justice theory has received attention in transitional justice scholarly work. McAuliffe, in *Transformative Transitional Justice and the Malleability of Post-Conflict States*, explores economic justice in transition and the application of the transformative justice approach as part of the fourth generation transitional justice.[28] *Transitional and Transformative Justice: Critical and International Perspectives* contains chapters by various scholars who argue for and against the possible application of the transformative justice approach.[29] *From Transitional to Transformative Justice* contains views and submissions by various scholars on transformative justice as a possible alternative to transitional justice.[30] Clearly, the enhanced focus on transformative justice as part of fourth generation transitional justice is worth exploring further.

The AU has embraced the transformative justice approach in the AUTJP by explicitly stating that the policy empowers transitional states “to take the lead in the process of providing restorative and transformative justice” in order to address a violent past as well as governance issues and developmental problems.[31] It appears that the transformative justice approach is taking a central stage to transitional justice in Africa, and many AU member states deploying transitional justice mechanisms likely will consider these transformative dimensions. The AUTJP

25 Balasco (2018) at 368.
26 Galtung (1969) at 167-191.
27 Daly (2001) at 74.
28 McAuliffe (2017).
29 Evans (2019).
30 Gready & Robins (2019).
31 AUTJP (2019) at 3.

further advises that:

> The overall objective of the AUTJP is to provide the policy parameters on holistic and transformational TJ in Africa … The policy establishes the principles and approaches that should guide such holistic and transformational TJ.[32]

Clearly, the AUTJP goes beyond mere political transition and promotion of liberal rights. Its specific objectives point towards "transformation" rather than mere "transition" at the top. These objectives include "laying the foundation for social justice and sustainable peace", addressing the root causes of conflicts, and establishing a "policy agenda for holistic and inclusive socio-economic transformation and development" of transitional states in order to address legacies of exclusion and historical injustices.[33] There is a shift towards real transformation where transitional justice mechanisms are deployed to unmask the underlying socio-economic causes of conflicts, ensure socio-economic justice and establish policies for socio-economic transformation and development. All these issues have been missing from the liberal peacebuilding discourse, which indicates a need for a shift towards the accommodation of socio-economic transformation in transitional justice.

This thesis subscribes to transformative justice theory as the most viable perspective from which to tackle corruption in transitional societies in Africa. It argues that the current transitional justice mechanisms have the potential to become transformative and it will seek to formulate guidelines on how best these mechanisms may be implemented in order to address corruption.

2.2 Transformative Transitional Justice and the Fight against Corruption

A central concern of transformative justice is to challenge and transform power structures which cause or facilitate structural violence or inequalities.[34] Thus, a question may be asked regarding the suitability of the theory to address corruption in transitional societies.

Corruption exacerbates marginalisation and structural inequalities. In many instances, victims of corruption are denied access to essential services, such as health and education, and

32 AUTJP (2019) at 2.

33 AUTJP (2019) at 2-3.

34 Gready & Robins (2014) at 340; Evan (2016) at 6.

they have lost property and land to economic and political elites. Institutionalised corruption sustains socio-economic structures of exclusion, which enriches the powerful and denies social and economic opportunities to the poor and underprivileged. Hence, confronting the rampant corruption which plays a huge role in the marginalisation, impoverishment and violation of socio-economic rights of citizens is essential as part of the effort to address structural violence. For example, transformative justice has been identified as a means of addressing gender issues and violations of women's rights during transition.[35] A growing area of concern pertaining to gender issues in African countries is land corruption, with women being more vulnerable than men to sexual extortion, poverty, social discrimination, and lack of access to education and information.[36] A report by Transparency International, titled *Women, Land and Corruption* and encompassing eight African countries, indicates how strong dependence by women on land as a resource means that land corruption disadvantages them more than men.[37] Hence, it makes sense to view corruption as a form and/or cause of structural violence and exclusion in Africa to be addressed as part of peacebuilding processes.

Failure to combat corruption will frustrate any meaningful efforts to challenge structural violence and to increase access to socio-economic opportunities for the poor and underprivileged. What is more, the transitional period may provide political and economic elites with the opportunity to regroup and further take advantage of structural inequalities to control economic resources denied to many citizens. Many states in transition will be working towards economic recovery and development, which comes with many opportunities for corruption. Financial resources will be provided by donors in order to alleviate poverty and other economic hardships. In many instances, donor funding never reaches the intended recipients because of corruption. Therefore, as long as corruption is not addressed, there is a real danger of further structural inequalities and unfair distribution of resources. Also, economic and social marginalisation in states drives recurrence of violence and corruption,

35 Reilly (2007) at 157-167; Boesten & Wilding (2015) at 75-80.

36 Transparency International (2018b) at 6.

37 Transparency International (2018b) at 8 & 16-47.

which threaten any hope for democratic reforms.[38]

Tackling corruption is a transformative factor for peacebuilding.[39] According to the Guidance Note of the Secretary-General on the United Nations approach to transitional justice:

> Peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted public institutions.[40]

Corruption has been regarded as a major obstacle to peacebuilding in post-conflict societies and its eradication is a priority.[41] It is a threat to peace as corrupt elites fight to maintain the *status quo* from which they benefit. In some cases, there have been peace agreements which implicitly allow corruption as a way of buying off potential peace spoilers.[42] However, history has shown that these political agreements are not sustainable as political parties become more power hungry once they are given access to economic resources and patronage links. For example, the Global and All-inclusive Agreement signed by armed groups in the DRC resulted in the key former rebel leaders being appointed as vice presidents, thereby giving them access to political and economic resources.[43] However, the peace agreement did not last long and fighting soon resumed between the rebels and the government. Le Billon points out that groups "sustaining dominant political and economic positions through corruption … may prevent the redistribution of power by stifling institutional checks and balances".[44] Patently, corruption cannot be treated as a long-term contributor towards peacebuilding.

An anti-corruption agenda in post-conflict or post-authoritarian regimes should comprise one of the major efforts of institutional and societal transformation towards preventing future abuse of power and encouraging sustainable peace. Lasslett has this to say about addressing corruption through transformative justice:

> [C]onstructively engaging in substantive ways the broader constituencies harmed by grand corruption is an essential inroad towards building the sort of mobilised, active

38 Roht-Arriaza (2019) at 105.
39 See Institute for Economics and Peace (2015).
40 United Nations (2010) at 7.
41 Philp (2008) at 310.
42 Cheng & Zaum (2008) at 303.
43 Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo (2002) at 7.
44 Le Billon (2008) at 353.

> and participatory citizenry, who can begin to claw back the inequalities of power, that allow elite actors to organise political regimes, which increase their share and control of the national wealth, through manipulation, theft and gouging. Anti-corruption practice, in this mould, becomes less about countering the immediate symptoms of the problem — abuse of process, manipulation of public institutions, etc. — and more about addressing the root cause.[45]

The point is that addressing the root causes of conflict and building sustainable peace through transformative justice requires addressing corruption as well.

A key aspect of transformative transitional justice relates to transforming the institutions and socio-economic conditions of citizens in the transitional state. It will be recalled that Gready & Robins define transformative justice as change aimed at "challenging unequal and intersecting power relationships".[46] Transitional justice processes which do not seek to transform political institutions and socio-economic distribution likely will not create the required transformation in relationships necessary to support sustainable peacebuilding.[47] Lambourne argues for a transformative justice approach which encompasses locally relevant mechanisms and processes that "provide accountability, acknowledgement, socio-economic justice and political justice" as the foundation of "an integrated and comprehensive peacebuilding process".[48] Applied to anti-corruption, transformative justice encourages victims of corruption and local communities to participate in transitional justice processes aimed at challenging corrupt structures and institutions, and to acquire a share in the redistribution of power previously abused by political elites to consolidate their positions and accumulate wealth.[49]

Transformative justice perceives an offence as an opportunity to build a more caring, more inclusive and more just community.[50] It demands the building of new or better relationships, not at a personal level, but at the level of social structures and institutional policies. With regard to corruption, transitional justice which is transformative provides an

45 Lasslett (2018) at 5.
46 Gready & Robins (2014) at 340.
47 Lambourne (2009) at 47.
48 Lambourne (2009) at 47.
49 Lasslett (2018) at 7.
50 Morris (2000) at 21.

opportunity for a new social contract to be negotiated between the community and its citizens, one which denounces any abuse of power for personal gain.

2.3 Balancing Local and International Agency

Transitional justice approaches have been criticised for failing to strike an appropriate balance between the "local" and the "international" as regards input, ownership and authority of justice and accountability measures during transition.[51] The mechanisms have been designed as part of the liberal peace "package" which emphasises a "top-down" state-building approach.[52] These mechanisms are externally-driven, planned and implemented by elites and imposed on the local or victim communities without any consultation or input from them.[53] External actors are oblivious to the socio-economic needs and demands of victims and local communities, showing the huge gap between the two. There is scant regard for the values and desires of the affected communities, which results in transitional justice lacking "local ownership".[54] The Chairperson of the AU Commission conceded that promotion of transitional justice processes by some international actors and "a selective disregard to local context", had "brought neither peace nor justice" to Africa.[55] According to Andrieu, the two main consequences of this liberal approach is that truth and justice are created by the political elites favouring their own interests, and there is limited understanding of human rights violations because of the preference given civil and political rights over social and economic rights.[56] This has led to truth and justice which are one-dimensional and unconcerned about the interests of ordinary citizens. Ensuring comprehensive and inclusive justice will require victims and local communities actively to participate and become involved in transitional justice processes. This is an essential element of transformative justice.

There appears to be an increasing willingness in academic work and practice to balance

51 Sharp (2013) at 160; Gready & Robins (2014) at 342-343.
52 Andrieu (2010) at 541; Sriram (2014) at 31; Roht-Arriaza (2019) at 105.
53 Robins (2013) at 76; Sharp (2013) at 161.
54 Lundy & McGovern (2008) at 278.
55 Foreword to the AUTJP (2019).
56 Andrieu (2013) at 541-543.

international agency and local agency.[57] Both the local and international approaches have their challenges and the one cannot be applied to the exclusion of the other. Scholars have cautioned about the dangers of "romanticising the local" and argue that, in the context of internationally financed intervention, a more realistic and desirable approach is a local-international balance.[58] Transformative justice theory seeks an equilibrium between local and international values in the approach to transitional justice. This thesis submits that corruption can be addressed best if the current transitional justice mechanisms reflect the demands of the local communities as prior to the concerns of external forces. There is no model justice approach which is universally applicable. Even though states in transition may take lessons from the experiences of other countries, there is a need to approach each situation differently, with local actors negotiating the parameters of transitional justice.[59]

2.3.1 Bottom-Up Approaches and Local Ownership

The current transitional justice discourse discourages engagement with affected populations, whose members are engaged only as witnesses and they are not afforded an opportunity to influence the goals or nature of transitional justice measures.[60] This is aggravated by political elites or organisations that purport to speak or act "on behalf" of victims and local communities, thereby silencing them.[61] Exclusion of victims and local communities as agents in transitional justice mechanisms has been criticised as a "primary flaw" affecting their legitimacy.[62] Carranza argues that the prevalence of the dominant script to transitional justice in many African states which are grappling with "mass poverty and socio-economic concerns" does not promote any true sense of ownership in transitional justice mechanisms by local people.[63] Departing from the traditional dominant approach to accommodate corruption and violations of socio-economic rights requires the active involvement of victims and local

57 See Shaw & Waldorf (2010) at 3; Hinton (2010) at 1-2, 17.
58 Richmond (2009) at 164-168. See also Gaventa (2004) at 151.
59 African Union Panel of the Wise (2013) at 15.
60 Gready & Robins (2014) at 343.
61 Cullinan (2001) at 19.
62 Lundy & McGovern (2008) at 266.
63 Carranza (2008) at 315.

communities at all times.

Transformative justice is not the outcome of a top-down imposition of extrinsic legal structures, but of a more bottom-up understanding and analysis of the everyday concerns of the population.[64] It "rejects the imposition of a global template" that has proved to be inapplicable in diverse societies.[65] Local populations possess the historical, cultural and linguistic resources that outsiders do not have, and they have a rich understanding of root causes and sustainable solutions.[66] This makes them key participants with first-hand experience of economic violence and what should be included in any transitional justice agenda. For example, after the 2008 post-election violence, many Kenyans had identified corruption as a major concern affecting their everyday life.[67] Accordingly, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) had an explicit mandate to address corruption.[68] Robinson argues that the inclusion of corruption within the mandate of the TJRC meant that a bottom-up approach to transitional justice was achieved, which was based on a local outlook on justice and experience of past violence.[69]

Transformative justice breaks with the "one-size-fits-all" approach which has dominated the field of transitional justice. It requires transitional justice processes to listen to and heed the "voices from below", that is, it demands bottom-up approaches to transitional justice. A report by the Secretary-General of the United Nations captures the issue well:

> We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations.[70]

He adds, correctly, that there can never be reformation of the rule of law, reconstruction of the justice system or transitional justice process that can be successful or sustainable when it is

64 Gready & Robins (2014) at 340.
65 Lasslett, Kanji & McGill (2017) at 84.
66 Donais (2005) at 13.
67 Report of the Truth, Justice and Reconciliation Commission, Volume IIB (2013) at 343.
68 Section 6(n) of the Truth, Justice and Reconciliation Act 6 of 2008.
69 Robinson (2015) at 40.
70 United Nations Secretary General (2004).

imposed by external forces.[71] Hence, the first task of the transitional authority is to embark upon national dialogues with victims and citizens on what their ideal of justice should encompass. A national consultation programme is an important aspect of transitional justice as it determines the best formal role for victims to play, identifies culturally appropriate truth-telling mechanisms, determines the role in proceedings of cultural practices, decides upon the time period of transitional justice mechanisms and settles upon how best to pursue recommendations on such matters as reparations.[72]

Failure to embrace the experiences and opinions of local populations results in poor understanding of peace transformation.[73] It has been argued that:

> [Local] ownership is important (a) because it raises the probability that reforms will be tailored to local circumstances, priorities and political realities, (b) because those who have to decide upon and implement the reforms are more likely to perceive the changes as being in their own, or their country's, interests, and (c) reforms are more likely to be perceived by the public as legitimate than when measures are viewed as having been forced on the government from outside through the exercise of financial leverage.[74]

Therefore, a transformative approach to transitional justice should include engaging the victims and survivor communities in identifying issues which should be addressed during and after transition. Tailor-made institutional mechanisms aimed at specific attributes of the local society are the best hope for dealing with problems of social dysfunction.[75] It has been contended that, in order to be effective, "transformative change should be locally driven … informed by the local and particular needs of people in communities".[76] Transitional governments should examine closely the nature of the problems from which they are emerging in order to craft responsive institutions.[77] In other words, the mandate of transitional justice mechanisms should reflect the needs of the community.

The notion behind local ownership is that imposed arrangements which reflect the

71 United Nations Secretary General (2004).
72 Office of the United Nations High Commissioner for Human Rights (2009) at 2.
73 Lundy & McGovern (2008) at 278.
74 Killick (2005) at 3.
75 Daly (2001) at 78.
76 Gready & Robins (2014) at 349.
77 Daly (2001) at 78.

interests of external actors are not sustainable once external influence and resources start to dwindle.[78] This is true for the fight against corruption. It will be difficult for transitional states to address corruption in response to external pressure without involving local populations. Bukovansky criticises the liberal anti-corruption discourse which has been imposed on the developing countries, and argues that it has created hollow anti-corruption measures which lack legitimacy because they are not embraced and internalised by the local population.[79] The argument accurately captures the danger of over-reliance upon external forces to fight corruption. For the sake of legitimacy and sustainability, the transformative justice approach supports a sense of ownership by local communities in transitional justice initiatives. Victims and local populations should be indispensable "owners" of and active participants in transitional justice processes aimed at addressing their demands. Active participation of citizens in the design, implementation and evaluation of transitional justice processes creates "opportunity to challenge a range of exclusions and power relations at both local and international level".[80] Furthermore, there is a need to engage victims and the community on how best to design appropriate accountability mechanisms to ensure transformation.

A critical question on local ownership concerns the desirable mode of participation. There are nominal, instrumental and transformative modes of participation. Significantly, nominal and instrumental modes of participation offer no transformative potential to victims and local populations.[81] Merely including victims and local communities formally when implementing transitional justice mechanisms is not sufficient and it should be avoided. For instance, victims may be visible only as witnesses in trials and truth commissions which are more events than processes. After the trial or truth hearing has been completed, many victims are forgotten and return to invisibility. This situation calls for thorough redefining of participation in transitional justice processes, so that participation "transforms victimhood".[82] In this regard, there is a need for an enhanced focus upon advocacy and mobilisation which

78 Donais (2012) at 12.
79 Bukovasky (2006) at 195-198.
80 Gready and Robins (2014) at 349.
81 Gready & Robins (2014) at 357.
82 Gready & Robins (2014) at 358.

permit participation of victims as an empowering rather than a technical exercise.[83] Transformative justice calls for active participation of victims in transitional justice processes aimed at transforming both the victims and their situations.[84] Transformative participation helps to bring a sense of ownership to victims and local populations, thereby legitimising transitional justice processes.

Another major challenge to active participation and local ownership is convincing citizens who have been subjected to repressive leadership to become more active participants in transitional justice processes. Transitional justice mechanisms may be seen as political projects driven by political elites, and citizens may become hesitant to lead or participate due to their previous experiences with political violence. For instance, the victims of the violent past committed by former warlord and dictator Hissèn Habrè in Chad viewed the truth commission as a possible trap to identify them and harm them later.[85] This may be aggravated where public engagements and consultations are being led by local political elites who may have played a role in past violence. In such cases, there is a need for such public engagements and consultations to be headed by politically neutral figures. Transitional justice processes must be carried out by independent persons in order to re-establish public trust.[86] Also, the government and civil society should educate citizens on transitional justice and its ultimate goals.

Victims and local communities should be empowered and transformed beyond transitional justice processes.[87] This calls for transitional justice to focus not only on the current act of corruption, but also to display a wider concern for transparency and accountability after transitional justice. For example, Laplante argues that the Peruvian Truth and Reconciliation Commission embarked on a human rights consciousness approach which broke down ingrained habits of fear, silence and distrust amongst citizens, and it empowered victims to participate in local movements for truth and justice.[88] Also, victims began rejecting versions of truth by third

83 Gready & Robins (2014) at 352-353.
84 Gready & Robins (2014) at 358.
85 See Kritz (1995) at 54.
86 African Union Panel of the Wise (2013) at 15.
87 Gready & Robins (2014) at 358.
88 Laplante (2007b) at 435.

parties, and instead found voice to speak about their own experiences and what needs to be done. Such conscientisation of victims and citizens situate them as watchdogs against any unlawful abuse of power for private gain in future.

2.3.2 Role of External Actors

A constant criticism of liberal peacebuilding is the imposition of transitional justice mechanisms upon post-conflict societies by the international community.[89] Most externally-driven transitional justice processes "follow a donor-driven, bureaucratic institutional logic" with policies which are imposed by "experts defined not by their local knowledge but by their grasp of institutional imperatives and pseudo-scientific models of society and social change".[90] Transitional justice has become dominated by elite international actors, rather than by local communities. This practice has led to "one-size-fits-all" approaches based on the tenets of Western liberalism. In such settings, local perspectives are regarded as hurdles or obstacles to be overcome, rather than as integral aspects of peacebuilding.[91]

There are few guarantees that locals, on their own, will have the capacity and will to pool their efforts and resources to achieve transformation.[92] This is true particularly when the call for local ownership is being led by local political elites who have tainted links with the previous regime. There is a huge risk of attempts to sabotage any meaningful transformation or reforms which may threaten their political powers, privileges and illicit gains. Also, lack of resources in transitional states may make it difficult for proper designation and implementation of transitional justice mechanisms. African countries themselves have requested the establishment and assistance of international or hybrid courts because they lack the resources or capacity to ensure fair justice and accountability. For example, Sierra Leone requested the United Nations to establish a special court to help after the civil war.[93] Other African countries such as the DRC and Cote d'Ivoire have referred situations to the International Criminal Court

89 Sriram (2007) at 588.

90 Krause & Jütersonke (2005) at 459. See also Gready & Robins (2014) at 342.

91 Donais (2012) at 7-8.

92 Donais (2012) at 10.

93 Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (2000).

for investigation and prosecution as crimes under international law. It is apparent that certain situations require external forces to ensure meaningful socio-economic justice and transformation. This may extend to diplomatic pressure by foreign governments to ensure that political elites do not abuse transitional justice processes as weapons against political enemies or to ensure effective implementation of transitional justice instruments.

The principle of local ownership does not mean rejecting international support to fund locally driven transitional justice programmes, keeping in mind that many transitional states will lack the required financial resources.[94] The AUTJP empowers the Chairperson of the AU Commission to establish an African Transitional Justice Fund in order "to ensure the availability of resources to enable prompt interventions".[95] African countries have relied regularly upon donor funding to implement transitional justice processes. For instance, the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda were funded by the international community. The idea of an African Transitional Justice Fund is a welcome development. If implemented, it will ensure that African states can address a violent past without reliance on international donors. However, many African countries struggle to fund the activities of the African Union, which itself is under-resourced. Where resources are not available at national or continental level, states should consider donor funding to ensure the smooth running of transitional justice mechanisms. However, such funding must not come with conditions on the scope of work to be covered by the mechanisms, leading to the imposition of agendas aligned to the needs and priorities of the foreign donors.

A transformative approach to transitional justice mechanisms involves ensuring that international support is regulated by a focus on and investment in justice for victims.[96] It is of paramount importance for other countries to assist in the investigation and prosecution of corruption. UNCAC endorses the importance of international co-operation by dedicating an entire chapter to the issue.[97] International co-operation becomes even more important for asset recovery purposes. Chapter V of UNCAC, regarded as a victims' chapter, requires states

94 Nathan (2008) at 21.
95 AUTJP (2019) at 27.
96 United Nations (2015) at 1.
97 Chapter IV of UNCAC.

parties to afford one another the widest measure of co-operation and assistance to facilitate the return of stolen assets.[98] A transformative approach to international asset recovery is important for remediating victims of corruption, engaging civil society, and preventing the recurrence of corruption. External actors do have an important role to play in assisting in asset recovery. However, any assistance in this regard which does not lead to recovery of stolen assets offers no transformative potentiality to victims of corruption.

2.4 Socio-Economic Justice and Transformation

Socio-economic justice and transformation should be key themes of transitional justice in Africa. This is acknowledged by the AUTJP which defines transitional justice as various measures deployed by societies to address the past and to "create conditions for both security and democratic and socio-economic transformation".[99] Such socio-economic justice is essential to correct structural inequalities and marginalisation perpetuated in the past.[100] The fact is that many African states still are struggling to address such socio-economic injustices. The AU Commissioner for Political Affairs acknowledges that the history of many African states has included struggles for socio-economic transformation as many countries experienced brutal colonial regimes and autocratic leaderships.[101] The fight for socio-economic justice and transformation has been at the centre of political transitions in Africa, and the removal of such issues from transitional justice for so many years cannot be justified. The AUTJP has showed that justice in Africa is empty and a charade if it neglects socio-economic justice and transformation.

The field of transitional justice is evolving from understanding socio-economic justice in terms of economic remedies for physical violence to justice for socio-economic violence and crimes.[102] Scholars have divergent views on what constitutes socio-economic violence and what is socio-economic justice. For instance, Lambourne defines socio-economic justice as

98 Article 51 of UNCAC.
99 AUTJP (2019) at 4.
100 AUTJP (2019) at 14.
101 Preface of the AUTJP.
102 Lai (2016) at 363.

incorporating various elements of justice related to:

> financial or other material compensation, restitution or reparation for past violations or crimes (historical justice) and distributive or socio-economic justice in the future (prospective justice).[103]

Arbour & Szoke-Burke argue that a focus on established and justiciable socio-economic rights is needed.[104] This means that past abuses that are linked remotely to socio-economic rights, presumably established under the international human rights framework, fall short of being addressed as part of socio-economic justice. In contrast, Sharp contends that socio-economic violence goes beyond violations of social and economic rights, and includes corruption and plunder of natural resources.[105] This thesis concurs with Sharp, and contends that a pure human rights approach to socio-economic justice may result in silencing ~~of~~ many victims of past abuses. There is a need to approach the issue of socio-economic justice with an open mind, led by victims, survivors and local communities who experienced the violent past.

Citizens in transitional states are demanding socio-economic justice to alleviate poverty and other harsh socio-economic conditions to which they are exposed. For instance, a qualitative study of the perception of the Truth and Reconciliation Commission of Sierra Leone, which was established after the decade-long civil war, revealed that victims and local citizens preferred the government to prioritise socio-economic issues such as education, healthcare, adequate shelter and other social services.[106] The consultative meetings in Tunisia after the Arab Spring indicated that Tunisians demanded strong socio-economic justice, including a determined fight against corruption.[107] The importance of socio-economic justice is that it establishes the foundation for accountability and fair distribution of state resources. By demanding socio-economic justice, citizens are sending a powerful message to the government that corruption and any abuse of power should not be tolerated, given that they are the ultimate victims of such injustices.

Justice which is more "transformative" than "transitional" is required to deal with socio-

103 Lambourne (2014) at 28-29.
104 Arbour (2007) at 14-40; Szoke-Burke (2015) at 473.
105 Sharp (2014) at 2.
106 Millar (2011) at 524-529.
107 Lamont & Boujneh (2012) at 44-45.

economic challenges, such as corruption, faced by citizens. This entails:

> transforming both institutions and relationships to eliminate corruption and promote a sense of fair representation and participation of the general population.[108]

Daly contends that simply changing the government without transforming society will not cure the culture which led to past injustices.[109] Key to socio-economic justice and transformation is combating corruption in both the private and public sectors. Socio-economic transformation requires resources which transitional states may lack due to rampant corruption by political and economic elites. Asset recovery then becomes important in advancing socio-economic transformation, with repatriated funds being deployed to remediate socio-economic hardships faced by the local population and to lay the foundation for an equal and democratic society.

There is an aspect of socio-economic justice aimed at establishing a feeling of justice for the past and minimising future structural violence in order to promote sustainable peace.[110] One of the major elements of the AUTJP is "redistributive (socio-economic) justice".[111] It aims at establishing socio-economic and development measures aimed at rectifying structural inequalities, marginalisation and exclusion. South Africa is an instructive point of reference as to the need for socio-economic transformation during transition. The democratic transition in South Africa focused on violations of civil and political rights, to the detriment of socio-economic justice. Victims of the apartheid regime wanted the government to address socio-economic issues such as housing, health care and education.[112] The apartheid era had created gross economic inequalities and exclusion which were meant to benefit the white minority whilst depriving the black majority access to basic needs and exposing them to cycles of poverty. Corruption was rife during the apartheid era and was an instrument used to further the discriminatory designs of the apartheid government.[113] The transitional government missed the opportunity to address apartheid corruption and to recover assets stolen during the apartheid regime in order to alleviate socio-economic hardships of citizens and to fund socio-

108 Lambourne (2009) at 45.
109 Daly (2001) at 74.
110 Lambourne (2009) at 41.
111 AUTJP (2019) at 14.
112 See Jaichand (2017) at 14-21.
113 Hyslop (2005) at 784; van Vuuren (2006) at 37-45.

economic transformation. What is more, government departments responsible for providing most essential public services, such as health, education and human settlements, after 1994 became breeding places of corruption, thereby slowing down any meaningful socio-economic transformation in South Africa.[114] Evidently, transitional justice which ignores socio-economic justice and transformation is bound to fail, with most citizens continuing to be exposed to poverty and inequality.

2.5 Indivisibility and Interdependence of Rights

The new democratic government should transform society from one that tolerated or encouraged oppression to one that embraces and defends human rights and democratic values.[115] This means that society at large should respect and promote not only civil and political rights but also social, economic and cultural rights. Fortification of the promotion and protection of economic and social rights and effective regulation of economic crimes by transitional governments are indispensable conditions for fulfilling the goals of transitional justice.[116] There are various reasons supporting such fortification. Firstly, victims and local communities require addressing of socio-economic problems and challenging of entrenched hierarchies which impoverished them.[117] Secondly, a focus on socio-economic rights is important for understanding and confronting the root causes of conflict.[118] Also, violations of civil and physical rights and socio-economic rights are mutually reinforcing.[119] Finally, highlighting economic and social rights could act as a "springboard" for the embedding of such rights, leading to a fuller conception of justice, in new democracies.[120] Hence, affirmation of the indivisibility and interdependence of rights is essential for the pursuit of holistic and transformative responses to past violations.[121] As such, transformative justice theory advocates that all rights be treated as indivisible and interdependent.

114 Jaichand (2017) at 17.
115 Daly (2001) at 74.
116 Karas & Vidlicka (2017) at 231.
117 Robins (2017) at 55-56.
118 Sharp (2014) at 3.
119 Carranza (2008) at 311.
120 Arbour (2007) at 26.
121 Gready & Robins (2014) at 355.

Indivisibility of rights means that a country cannot pick and choose amongst rights.[122] This means that all human rights should be regarded as having equal status and without being positioned in a hierarchical order. There are no supporting facts or evidence that certain rights can be realised fully when segregated from others.[123] If one right is denied, there will be an obstruction of other rights. The interdependence approach implies that the enjoyment of any right or groups of rights requires the enjoyment of other rights, irrespective of whether they belong to the same category or not.[124] In the context of corruption, embezzlement of public funds may violate the right to education or to health care (second generation rights), the right to life (first generation right), as well as the right to economic and social development (third generation right). The principle of indivisibility and interdependence of rights provides an opportunity for holistic approaches to transitional justice which link corruption and violation of all generations of human rights. Hence, whether corruption was a violation of civil or political rights or a violation of socio-economic rights will have little effect on the need to address it. This enhances understanding of the root causes of the conflict and helps to develop a full picture of past abuses.

2.6 Traditional and Local Informal Mechanisms?

Transformative justice provides a theoretical framework towards a paradigm shift from the current focus and practice of transitional justice. It has been argued by Gready & Robins that:

> For transitional justice to become more transformative will require a reframing of both the problem it seeks to address and related responses and interventions.[125]

Hence, there is a question whether the new theory, which reframes issues to be covered by including socio-economic issues, requires new approaches beyond the existing mechanisms. There have been discussions about whether localising transitional justice should include traditional or informal local mechanisms as new approaches to justice, peace, truth and

122 Nickel (2008) at 984.
123 Arbour (2007) at 9.
124 Whelan (2010) at 3.
125 Gready & Robins (2014) at 355.

reconciliation.[126] Such "culturally resonant mechanisms" are not based on global models and may create new opportunities to challenge exclusion and unequal power relations.[127] The AUTJP supports the incorporation of traditional justice mechanisms and provides that:

> Traditional and complementary justice mechanisms are the local processes, including rituals, which communities use for adjudicating disputes and for restoring the loss caused through violence in accordance with established community-based norms and practices. They include traditional adjudicative processes such as clan or customary courts and community-based dialogue. Such mechanisms form an important part of the AUTJP conception of TJ.[128]

The characteristics of these traditional mechanisms traverse acknowledgment of guilt, remorsefulness, asking for forgiveness, reparation and reconciliation.[129] Hence, they are more restorative than retributive as they are focused on healing the community rather than seeking individual accountability. The late UN Secretary-General, Kofi Annan, in the UN Note on Transitional Justice, encouraged the use of indigenous and informal practices to justice and dispute resolution.[130] He argued that "where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice".[131] This rings true, considering that poor and disadvantaged communities in African states rely on traditional justice systems, and they are not frequent users of the formal justice system.[132] These traditional systems are more attentive to local needs, and are capable of holding to account lower-level perpetrators, which takes off some pressure from the under-resourced formal justice mechanisms.[133] Customary laws and traditional courts usually survive the destruction of formal justice systems during conflict. Local communities relate well to these traditional mechanisms and could have relied on them during the conflict for dispute resolution.

There are a number of examples where traditional or local informal approaches have been pursued as part of transitional justice. For example, the *gacaca* courts in Rwanda played

126 See Shaw & Waldorf (2010) at 1-8; Gready & Robins (2014) at 355.
127 Gready & Robins (2014) at 349.
128 AUTJP (2019) at 4.
129 AUTJP (2019) at 4.
130 United Nations Secretary-General (2004) at 12.
131 United Nations Secretary-General (2004) at 12.
132 See Wojkowska (2006) at 11-12; Shaw & Waldorf (2010) at 15.
133 Shaw & Waldorf (2010) at 16.

an instrumental role after the 1994 genocide. These traditional courts were aimed at holding perpetrators of the genocide to account, finding the truth, encouraging talks between former enemies, repairing victims and facilitating reconciliation.[134] The courts were of a grassroots nature, they followed traditional practices to justice, and had flexible procedures presided over by lay judges chosen by the local communities. By their closure in 2012, they had tried an unprecedented number — over one million — cases associated with the Rwandan genocide.[135] Another example is that of the Truth and Reconciliation Commission of Sierra Leone which was empowered to "seek assistance from traditional and religious leaders" in the facilitation of public hearings to resolve local conflicts and to promote healing and reconciliation.[136] The Commission arranged reconciliation rituals presided over by chiefs and religious leaders.[137] There was incorporation of traditional norms and cultures to address a violent past. These two examples indicate that traditional processes are relevant to transitional justice in Africa as they may facilitate justice, truth and reconciliation.

In relation to anti-corruption, the critical question is what role African traditional or informal mechanisms can play in the fight against corruption? In other words, can traditional courts adjudicate criminal cases of corruption, in a manner that the *gacaca* courts in Rwanda prosecuted international crimes after the genocide? Can traditional leaders and other informal processes pursue and achieve truth, justice and reconciliation regarding corruption and other economic crimes?

It may prove a challenge for African traditional mechanisms to address grand corruption. Unlike genocide, for which there may be easily available evidence through eye witnesses and public records, corruption is secretive in nature and that makes it difficult to tackle. Successful prosecution of corruption needs expertise in financial crime, which lay investigators, prosecutors and traditional leaders do not possess. In a word, traditional courts lack the capacity and ability to prosecute corruption successfully. Also, some traditional customs or practices may be inconsistent with the minimum standards of human rights. For

134 See Sullo (2018) at 1.

135 See Chakravarty (2015) at 7.

136 Section 7(2) of the Truth and Reconciliation Commission Act 2000.

137 See Shaw & Waldorf (2010) at 16.

instance, the *gacaca* courts were criticised for lack of legal representation, inadequate protection of witnesses and allegations of corruption within the system.[138] Similar to the Commission in Sierra Leone, traditional processes may play a part in truth finding regarding corruption and land rights. In countries like Kenya, land was at the centre of historical injustices and a major cause of intra- and inter-ethnic conflicts in the country.[139] In such situations, traditional leaders and community should play a critical role in addressing the land issue. There may be collaboration with truth commissions on truth, justice and reconciliation around issues of land and corruption in their communities. However, some cultural practices historically have discriminated against and marginalised women, leaving their voices unheard in the public sphere.[140] As Gready & Robins warn, it is imperative "not to romanticise the local", as it faces challenges relating to victims' claims, prejudicial or biased practices against women and lack of capacity.[141]

It is submitted that the best approach is the combination of formal and traditional justice mechanisms to fight corruption.[142] This is supported by the AUTJP which provides that traditional or informal local processes should be integrated with formal transitional justice mechanisms to deal with justice, healing and reconciliation in affected communities.[143] The current transitional justice mechanisms have the potential to be transformative, with local approaches supporting such transformative effects. It has been argued that current mechanisms such as truth commissions, memorials and reforms are capable of taking a transformative agenda "through urgently needed reframings of socio-economic rights and continuities of conflict".[144] The current transitional justice mechanisms should be given a chance to address corruption, and thereby to pursue socio-economic transformation of victims and local communities.

138 See Wibarara (2014) at 205-210.

139 Report of the Truth, Justice and Reconciliation Commission (2013) at xiv.

140 See the Report of the Kenyan Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003) at 15.

141 Gready & Robins (2014) at 349.

142 See Maguchu (2019) at 153, who recommends the merging of official and non-official transitional justice processes to address corruption in Zimbabwe.

143 See AUTJP (2019) at 4.

144 Gready & Robins (2014) at 355.

Lasslett suggests that a transformative justice approach to corruption may require an increased active participation of citizens in challenging corrupt structures and abuses of power by political and economic elites.[145] In other words, transformative justice requires that citizens become involved more actively in holding corrupt persons and structures to account. African traditional or local mechanisms may play a critical role in creating an anti-corruption culture through mobilisation of local communities to participate actively in transitional justice mechanisms. Traditional or informal engagements with excluded or marginalised communities assist in encouraging and integrating them into transitional justice processes. Hence, the government in transition should ensure that there is incorporation of such engagements which conscientise and mobilise local communities to oppose corruption.

There is an increased recognition that corruption cannot be fought successfully without the active involvement and participation of citizens. Thus, the fourteenth International Anti-Corruption Conference concluded that "empowered people create change" and that the future of anti-corruption involves citizen mobilisation and empowerment.[146] This declaration in 2010 was made just before the Arab Spring, when citizens took to the streets to protest against corruption. Unsurprisingly, the theme of the fifteenth Conference was *Mobilising People: Connecting Agents of Change* and it was declared that:

> the most vulnerable people in our society, often severely affected by corruption, must be able to hold leaders to their word, and to expose those who go back on promises.[147]

Thus, traditional or grassroots mobilisation of victims and local communities to become active participants in transitional justice mechanisms with an anti-corruption agenda is vital.

Throughout this thesis, emphasis will be placed on ensuring that transitional justice mechanisms include victims and affected communities in the fight against corruption. It is only through active involvement and participation of citizens that transitional states can address past corruption successfully.

---

145 Lasslett (2018) at 9.

146 International Anti-Corruption Conference (2010) "The Bangkok Declaration: Restoring Trust", available at http://14iacc.org/ (visited 10 February 2018).

147 International Ant-Corruption Conference (2012) "The Brasilia Declaration", available at http://15iacc.org/ (visited 10 February 2018).

2.7 Limitations of the Transformative Justice Theory

Similar to other theories in the field of transitional justice, the transformative justice theory is subject to limitations. The theory is centred on challenging power relations, and ensuring socio-economic transformation. However, as Sharp points out, it is difficult to ascertain how even holistic and progressive approaches to the fourth generation of transitional justice will result in the required institutional reforms and redistribution of power and resources considering the deep-rooted nature of physical, structural, economic and cultural violence.[148] Similarly, the transformative justice theory is relatively recent and its effectiveness in reaching expectations on challenging corrupt and unequal power relations as well as ensuring socio-economic transformation still need to be assessed.

The wide gap between ambitious theoretical approaches and realities on the ground may potentially lead to unwarranted feeling of pessimism, delusion and failure on transitional justice projects.[149] Writing on the transformative justice theory, McAuliffe also criticises the literature of fourth generation transitional justice for mainly being concerned with criticising the norms, institutions and values of traditional transitional justice without focusing more on the actual context they apply.[150] This is particularly concerning where such theories are based on assumptions that states are malleable in post-conflict settings and that there are processes of change underway which present opportunities to capitalise upon. Hence, some recent theoretical approaches fail to capture the complexity of post-conflict environments and political economy dynamics that may hinder economic justice such as spoilers, elite retrenchment, neopatrimonialism and weak state capacities in developing countries.[151] This means that whilst the approaches are theoretically sound, they may lack practicability. As such, transformative change cannot be achieved by theoretical designs without practical considerations.

Political will is a key factor for practical implementation of transitional justice processes. Without it, transitional states usually fail to achieve real socio-economic transformation regardless of promising theoretical perspectives. Such political will relates to the ability and

148 Sharp (2019) at 571.
149 See also Sharp (2019) at 571.
150 McAuliffe (2017) at 5.
151 McAuliffe (2017) at 10.

willingness by the state to fully support and implement transitional justice processes.[152] For instance, the state may allocate inadequate financial and human resources, or may be unwilling or uncommitted to fully implement socio-economic transformation by inactively participating in transitional justice processes.[153] In many situations, post-conflict leaders may be unwilling to accomplish transformation which threaten their political power, particularly when they were part of the pre-transitional elites. Thus, the transformative justice approach may pose a threat to political leaders who fear that bottom-up approaches and empowered citizens can challenge their abusive and unequal power relations. As argued by McAuliffe, there is need for serious consideration on malleability of post-conflict settings when devising transformative justice approaches, as real socio-economic transformation is hard to achieve without political will on the ground.[154]

Hence, there is need to keep in mind the realities on the ground when considering the transformative justice theory. In order to maintain balance between theoretical approaches and practical realities, there is need for transitional justice critique that pushes critical ideas but also keeping in mind questions of feasibility and implementation.[155] The thesis adopts a similar approach to mitigate the limitations of the transformative justice theory by keeping in mind the feasibility and practicability of the theory in addressing corruption.

2.8 Conclusion

The three generations of transitional justice have followed the dominant liberal script which has prioritised physical violence, despite the prevalence of economic violence and its critical role in the violent past. However, there is growing dissent over the dominant script which has been shown to be out of touch with the realities in many African countries. The field is moving towards accommodating socio-economic issues, but there is not yet an established or agreed approach on how transitional states can address such an expansion of the terrain. This chapter has argued for transformative transitional justice as part of the fourth generation of transitional

152 See Pham, Gibbons and Vinck (2019).
153 Pham, Gibbons and Vinck (2019) at 997.
154 McAuliffe (2017).
155 Sharp (2019) at 572.

justice in Africa, the elements of which feature prominently in the recent AUTJP framework.

This thesis submits that a transformative justice theory is the best approach to fight corruption in post-conflict or post-authoritarian communities. Such an approach carries the potential for transitional justice mechanisms to become locally driven, reflecting the needs of the local communities, including the demands for the eradication of corruption and the return of stolen assets. Also, it can empower victims and local communities to challenge corrupt and unequal economic, political and social power structures responsible for socio-economic injustices. This requires meaningful participation of victims of corruption and local populations in transitional justice mechanisms aimed at addressing corruption. Transitional governments should not underestimate the transformative effect of active participation of victims, survivors and local communities. Merging local demands and external contributions helps to maximise efforts and resources for socio-economic justice and transformation. In this way, citizens will be able to express their anti-corruption demands during the design of transitional justice mechanisms, as well as to be involved in the processes to expose corruption and challenge any power relations or socio-economic structures which perpetuated corruption.

The chapters to follow will examine different transitional justice mechanisms and attempt to identify ways which may increase active participation of citizens, facilitate socio-economic justice and transformation, and ensure non-repetition of abuse of power for private gains.

CHAPTER THREE

CORRUPTION, TRANSITIONAL JUSTICE AND CRIMINAL TRIALS

3.1 Introduction

Criminal trials, dating back to the Nuremberg Trials of 1945, have played an important role in addressing past violence.[1] Criminal prosecutions in transitional states are vital for ending impunity, restoring the rule of law and fostering a culture of respect for human rights.[2] Trials convey a political message that the new government dissents from the criminal activities of its predecessor and aims to establish a new legal order. They assist in demarcating the new regime from the old regime, and in preventing new cycles of violence whilst abiding by the rules and principles of a new democracy.[3]

Hitherto, criminal trials in the field of transitional justice have been limited to addressing serious physical violence, such as torture, enforced disappearances, crimes against humanity, genocide and war crimes. Thus, both the International Criminal Tribunal for Rwanda, established after the genocide, and the Special Court for Sierra Leone, established after the decade-long civil war, were aimed at addressing serious crimes of international concern. Therefore, a question arises as to whether previous acts of corruption qualify as an "extraordinary evil"[4] to be prosecuted as an aspect of the field of transitional justice.

Transformative transitional justice asserts that there is a need to devise transitional justice mechanisms which address both physical violence and economic violence committed by the previous regime.[5] Lutz & Reiger contend that the prosecution of corrupt leaders, which has not been accommodated in the international justice movement thus far, is worth exploring.[6] The close link between corruption and physical violence in many African states makes a compelling case for corruption being addressed within the transitional justice agenda. Starr has

1 Teitel (2003) at 70.
2 African Union Panel of the Wise (2013) at 16.
3 Mendez (1997) at 1 & 7.
4 Aukerman (2002) at 39.
5 Gready & Robins (2014) at 346-348; Lambourne (2009) at 47.
6 Lutz & Reiger (2009) at 10.

categorised grand corruption as an extraordinary crime which deserves international recognition as its "consequence is extreme poverty, and extreme poverty kills".[7] In other words, the consequences of corruption may be as deadly as the consequences of physical violence. The non-prosecution of corruption, on the basis that it does not fall within the existing crimes covered by the traditional scope of transitional justice, has contributed to the creation of new zones of impunity.[8] This traditional approach has been criticised for ignoring the experiences of many developing states where dictators or warlords are both brutal and corrupt.[9] The separation of corruption and physical violence is illogical and untenable since they are inextricably intertwined. The continuous evolution of the transitional justice movement to include socio-economic rights, in relation to which transformative justice theory was developed, justifies the prosecution of corruption and other economic crimes as part of the transitional justice process.

In recent years, transitional states in Africa have prioritised corruption charges against former heads of states and senior officials. In Sudan, the recently deposed Omar Al Bashir faced criminal charges of possessing illicit foreign currency and corruption, after leading a brutal and repressive regime for 30 years.[10] In Zimbabwe, several political leaders who were close associates of former President Mugabe faced charges of corruption shortly after the new government was established.[11] In the Gambia, the new government publicly expressed its intention to prosecute former President Yahya Jammeh on charges of corruption.[12] These examples indicate that criminal prosecution of deposed leaders are becoming a norm in Africa. Hence, there is an opportunity for the integration of corruption criminal trials into the transitional justice agenda as new governments attempt to address the past and shape the future of their countries.

7 Starr (2007) at 1284.
8 Andrieu (2012) at 543.
9 Carranza (2008) at 310. See also Sharp (2014) at 79.
10 Abdelaziz (2019).
11 Sithole-Matarise (2017); Munyoro & Chiyangwa (2018).
12 John (2019).

Criminal prosecutions raise many concerns for transitional societies, particularly in terms of the transformative justice approach. What is the role of victims and affected societies in these criminal trials? What is the role of outsiders, such as international courts and non-governmental organisations, in the prosecution of grand corruption? Do criminal trials have transformative effects as their primary function?

There have been calls for transitional justice processes to be victim-centred,[13] and this is an objective of transformative justice theory. Victim centredness implies that victims and affected communities are involved in the formulation and implementation of transitional justice mechanisms. Developments in transitional justice have indicated that justice should be concerned not only with punishment and perpetrators, but also — and centrally —with victims.[14] Without a focus on victims, any justification for deploying criminal prosecutions as a mechanism to secure justice, to restore the rule of law and to reveal the truth about past abuses will not be sensible.[15] A report of the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence states that:

> Prosecutions, for their part, can only serve as actual justice measures if the victims and their families are effectively involved in the processes and provided with the necessary information relevant to their participation in proceedings.[16]

The Rapporteur expressed the opinion that meaningful participation of victims was a *sine qua non* for the achievement of transitional justice goals.[17]

Regrettably, victims have been on the periphery of criminal trials in the transitional justice context. Many transitional societies in Africa have adopted the traditional approach to transitional justice, focused on the accused persons. The tendency to exclude victims and local communities as active participants in transitional justice mechanisms has been regarded as a primary concern affecting the legitimacy and local ownership of these mechanisms.[18] It results

13 Girelli (2017) at 9; Mendez (2016) at 1-5; Robins (2011a) at 77.

14 Garcia-Godos & Sriram (2013) at 4.

15 McEvoy & McConnachie (2013) at 490.

16 De Greiff (2012) at 17.

17 Report of the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (2012) at 19.

18 Lundy & McGovern (2008) at 266.

in the individual and collective impact of past violence on communities remaining unexamined.[19] In corruption cases, the role of victims is even more diminished, as there is more reliance on documentary evidence than on oral testimony. Corruption, more often than not, is regarded as a victimless crime and the state may decide to prosecute perpetrators without involving victims.[20] Prosecutions rely on an individualistic model of accountability which fails to give a "sense of the larger structure that made corruption possible, or to address its longer term structural effects".[21] In that sense, victims of corruption remain silenced and invisible.

Transformative participation in transitional justice processes ought to present a key opportunity for empowerment, allowing victims and affected communities to "challenge, access and shape institutions and structures from which they are previously excluded".[22] The AUTJP has called for criminal proceedings which facilitate full participation of victims and affected communities.[23] However, this possibility has been limited in criminal trials, where victims are afforded only nominal participation. It is an approach that does not grant victims the opportunity to show how corruption has affected their lives and to challenge the responsible systems. As a result, the causes, nature and effects of violence or conflict may not be understood, leading to recurrence of corruption and violence in future.

This exclusion of victims from criminal trials during transition raises questions about the suitability of the mechanism in relation to transformative justice. A bottom-up approach, which is an objective of transformative justice theory, enhances genuine participation of victims, places local communities at the centre of transitional justice mechanisms, and allows for a clear understanding of past abuses and their effects on the community.[24] Corruption affects the social, economic and political fabric of society. Without real involvement of victims and civil society, there is no real ownership of transitional justice mechanisms by local communities, which may affect the legitimacy of the trials. There is a need to make known the real impact of

19 Robins (2011a) at 77.
20 Zimring & Johnson (2005) at 799.
21 Andrieu (2012) at 545.
22 Gready & Robins (2014) at 358.
23 See AUTJP (2019) at 16.
24 Lundy & McGovern (2008) at 292.

corruption on citizens and to provide a clear picture of the relationship between corruption and human rights.

In this regard, it has been argued that prosecutions and amnesties may not achieve any of the transformative goals required by the transitional society.[25] It has been suggested that great caution should be exercised before deploying criminal prosecutions as the new government's primary response to past abuses.[26] This thesis dissents from the above view, as the significance of criminal prosecutions should not be underestimated and is worth exploring. Criminal trials are vital mechanisms to strengthen a culture and practice of accountability, which lays the foundation for challenging structural inequalities and abuses of power. Moreover, victims and affected communities demand justice and accountability for past crimes. Failure to prosecute corrupt leaders will ignore these demands and likely will result in citizens losing confidence in the new government. Impunity for corruption narrows the chances of realising any transformative effects for transitional societies, as corrupt leaders remain untouched and will use their influence to frustrate any meaningful challenge to their power. Therefore, prosecution of past corruption should be considered an integral part of any genuinely transformative transitional justice process.

This chapter will explore the potential of criminal trials as accountability mechanisms to address corruption. It will discuss the experiences in Tunisia and Egypt, where attempts were made to prosecute corrupt political leaders during the transition period, and the lessons learned. The prosecution of corruption faces many challenges which the new government must overcome. The chapter discusses these challenges and how they may be resolved. When the state undergoing political transition is unwilling or unable to prosecute perpetrators of past violence, the international community becomes involved. The chapter will discuss whether domestic courts of foreign states can exercise universal jurisdiction over grand corruption. Then it proceeds to consider the prosecution of corruption by international courts. It concludes by providing a critical overview of whether, in the light of transformative justice theory, criminal trials are an effective mechanism to address corruption in transitional states.

25 Daly (2001) at 78.

26 Daly (2001) at 103.

3.2 Domestic Trials

In the field of transitional justice, domestic trials are to be given preference over intervention by the international community.[27] Criminal trials are more effective when they are held in the state of commission. They attract significant attention from victims and local communities, which contributes to the rebuilding of the criminal justice system and establishment of courts as competent platforms for addressing grievances in a peaceful manner.[28] Domestic trials may be used to prosecute even lesser human rights violations, to provide remedies for socio-economic inequality and to interpret human rights laws enacted during transition.[29] Hence, the transformative effects of criminal trials are realised better during domestic criminal proceedings than international proceedings.

However, the criminal justice system of the transitional state may be ineffective after years of conflict or despotic leadership. For instance, the decade-long civil war in Sierra Leone destroyed the physical infrastructure of the criminal justice system, weakened the rule of law, and affected the credibility of all justice departments.[30] This circumstance led to the establishment of the Special Court for Sierra Leone by agreement between the government of Sierra Leone and the United Nations Security Council.[31] This example suggests that a serious concern is whether the state is capable of conducting trials for previous acts of grand corruption in an effective and transparent manner.

Justice in transition can be significant only if criminal trials and judgments are fair, transparent and based upon the rule of law. For legitimacy and credibility purposes, criminal investigations and prosecutions should be carried out in a non-discriminatory and objective manner.[32] Failure to ensure fair trials and respect for the rights of the accused may affect the public's confidence in the criminal justice system. Credible judgments will require due process and a legitimate judicial system. It is important to refrain from conducting "show trials" aimed

27 See AUTJP (2019) at 16.
28 Gahima (2013) at 15.
29 Gahima (2013) at 15.
30 Kane (2004) at 4.
31 Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone (2002).
32 United Nations Approach to Transitional Justice (2010) at 7.

at humiliating opponents and making a mockery of the rule of law. The trials should send a message that the justice system of the state is anchored in respect for human rights and the rule of law. Transformative justice in criminal law calls for a systematic approach to punishment which articulates with the wider social issues behind a specific crime.[33] According to Daly, the principal goals of transformative justice are reconciliation and deterrence.[34] Transformative justice has solid ties to restorative justice and conceives of "a reconciliatory approach to criminal justice involving the offender, the victim and the affected community".[35] Hence, criminal trials and punishment as just deserts offer no transformative effects to victims and the society.

Domestic criminal trials for corruption and other economic crimes have not received a lot of attention during political transitions in African countries. The exceptions are Tunisia and Egypt. Experiences in these two countries offer important lessons about the inclusion of anti-corruption in the transitional justice agenda. Corruption was one of the major grievances leading to the Arab uprisings, and unsurprisingly, corruption was addressed on the same footing as violations of civil and political rights. This is an aspect of the transformative justice approach, as the transitional governments heeded the demands of citizens to fight corruption by prosecuting corrupt political leaders. A precedent was set by moving from the narrow focus on civil and political rights to a focus on the legacies of socio-economic injustices, such as corruption. In fact, most complaints and criminal trials in the transitional states in the Middle East and North Africa (MENA) region have been related, more or less directly, to corruption and other economic crimes.[36]

3.2.1 Tunisia

A deep history of corruption and economic crimes prompted Tunisia to prioritise prosecutions of corrupt persons over violations of civil and political rights.[37] For instance, the former dictator,

33 Van De Merwe (2012) at 71.
34 See Daly (2001) at 84-95.
35 Van De Merwe (2012) at 71.
36 Aboueldahab (2017) at 4.
37 Aboueldahab (2017) at 58.

Ben Ali, together with his family and allies, was convicted of several acts of corruption immediately after his removal from power.[38] Ali exiled himself to Saudi Arabia and calls for his extradition were ignored, leading to trials *in absentia*. Prosecutions for physical violence in Tunisia were concerned mainly with killings during the Arab Spring protests, whereas prosecutions for corruption and economic crimes involved cases committed over the past three decades.[39] These prosecutions were driven entirely domestically, as a response to the demands of the public. They occurred in sharp contrast to the dominant and externally-driven approach to transitional justice informed by liberal peacebuilding which prioritises physical violence over economic violence.

In the result, a transformative approach to transitional justice was realised as the demands of many Tunisians for prosecution of corrupt leaders were met. Also, there was little interference by the international community in these prosecutions,[40] which is an important feature of the transformative justice approach. The criminal trials indicated that the bottom-up approach of transformative transitional justice, reflecting the demands of victims and citizens, is crucial to including economic violence in justice mechanisms during political transition.

However, prosecution of corruption declined significantly from 2014, as a result of reliance on international models of transitional justice which prioritised civil and political rights.[41] The new parliament of Tunisia, which was elected during the transition, enacted a Transitional Justice Law in 2013.[42] This statute identified transitional justice measures aimed at addressing violations from 1955 to 2013, including criminal prosecutions, truth-seeking and reparations for victims.[43] Specialised judicial chambers were established to pursue prosecutions for certain crimes, including cases of corruption referred by the Truth and Dignity Commission.[44] Notwithstanding the decline in the prosecution of corruption cases since its

38 International Centre for Transitional Justice (2017).
39 Aboueldahab (2018) at 187.
40 Aboueldahab (2017) at 74.
41 Lamont & Pannwitz (2016) at 280-281.
42 Organic Law on Establishing and Organising Transitional Justice (unofficially translated from Arabic into English by the International Centre for Transitional Justice).
43 Articles 1 & 16 of the Transitional Justice Law.
44 Article 8 of the Transitional Justice Law.

enactment, the statute expressed the evolution of transitional justice by establishing mechanisms to address corruption.

In 2017, Tunisia passed a law providing conditional amnesty to state officials who were involved in corruption during Ben Ali's time in office.[45] The conditions for being granted amnesty are that the person returns the illicit funds and pays a fine.[46] The law prevents any disclosure of corruption by people who have been granted amnesty and therefore undermines the mandate of the truth commission to investigate corruption with a view to possible prosecutions.[47] Since its draft stage, there were warnings that the new law threatened transitional justice in Tunisia and deflected the message at the heart of the Tunisian revolution.[48] The amnesty law sparked protests by citizens who rejected impunity for corrupt officials. Ironically, Tunisia granted amnesty to officials who had served under a dictator who was removed from power after protests against corruption, yet failed to offer transformative options for Tunisians to challenge past abuses of power. The law was condemned by Transparency International for hindering the investigation of the full extent of asset theft and allowing corrupt persons to conceal stolen assets and escape justice.[49] An activist interviewed by the International Crisis Group expressed the disappointment of citizens:

> If this law passes, corruption will increase. Everyone will say, "these people stole billions and nothing happened to them. Democracy does nothing but grant an amnesty to thieves".[50]

The drafters of the law advanced economic reasons in support of amnesty. They argued that it was more beneficial for Tunisia's cash inflow to negotiate with the looters to return stolen assets in exchange for immunity than for Tunisia to be trapped in asset recovery proceedings, which are difficult and time-consuming.[51] The economic arguments make sense as investigation and prosecution of corruption indeed usually are challenging, expensive and lengthy. Also, asset recovery is an exacting procedure which is even more time-consuming when the assets are

45 The Administrative Reconciliation Law.
46 Amara (2017).
47 Guellali (2017).
48 Guellali (2015).
49 Transparency International (2017a).
50 International Crisis Group (2016) at 20.
51 International Crisis Group (2016) at 22.

located outside the country. However, the amnesty law undermines transitional justice in Tunisia and the economic arguments are outweighed by calls for justice and accountability. The law is a result of a "top-down" approach to transitional justice processes and fails to heed the demands of citizens.

The Tunisian experience offers important lessons about the inclusion of corruption and economic crimes in the ambit of transitional justice mechanisms. The bottom-up approach of transformative transitional justice resulted in the successful prosecution of corruption in the early stages of the transition. The traditional top-down approach, based on extrinsic standards and practices, led to the government providing amnesty to corrupt persons. The traditional approach has been criticised for leaning towards privileging "the state, the international, and the purportedly universal over the local and the particular".[52] This criticism suggests that transitional justice responses should be contextual, locally driven and reflect the demands of victims for justice and accountability. It shows that the imposition of international standards, which fail to mirror the demands of the affected communities, is no longer acceptable in the field of transitional justice. The dominant transitional justice paradigm is being questioned as regards its suitability for "fourth generation" transitional justice, which demands economic justice[53] and from which transformative justice theory stems. The experience in Tunisia demonstrates the need to shift to a more transformative approach, in terms of which transitional justice mechanisms tackle socio-economic justice issues also, such as corruption.

3.2.2 Egypt

The former Egyptian dictator, Hosni Mubarak, was removed from power in 2011. After his ousting, Egypt went through a series of governmental changes, including a military government, a *coup d'état* and a reversion to authoritarianism.[54] As a result, transitional justice has not been smooth. The continued political instability and human rights violations after the fall of the Mubarak regime have been regarded as evidence of a "failed transition".[55] Nonetheless, there

52 Sharp (2012) at 150; Andrieu (2010) at 537 & 541.

53 Sharp (2012) at 149-150.

54 Potts (2016).

55 Brown (2013) at 55; Maghraqui (2014); Allison (2015) at 303; Potts (2016).

were cases of accountability which constitute important lessons for transitional justice and the fight against corruption.

There was a strong link between corruption and the violation of human rights, as corrupt funds were used to sponsor oppressive measures by the security forces.[56] The slogan of the Egyptian protests in 2011 was "Bread, Freedom, Social Justice", which indicated the importance of addressing both physical violence and economic violence.[57] Soon after he was toppled from power, Hosni Mubarak, his family and other high-level political leaders faced criminal trials on charges of corruption and human rights violations. Most convictions were related to corruption crimes, and were attributed to the political interests of the transitional state and to the army seeking to neutralise political opponents.[58] There were speedy corruption trials which raised questions about their procedural fairness.[59] Mubarak and his two sons were convicted of corruption and sentenced to three years in prison.[60] The former president was estimated to have assets worth around US$70 billion which he had acquired corruptly during his long stay in power.[61]

Transitional justice in Egypt was criticised for being "selectively developed by a state elite that is as yet untransformed", and for following an approach which distorted the objectives of the revolution and disregarded the demands of the citizens, including the eradication of corruption.[62] As stated earlier, criminal trials during transition should not be "show trials"; they ought to adhere to due process and the rule of law. Therefore, the criminal trials lost their credibility to some extent, as they were aimed at political opponents and not at the restoration of the rule of law, thereby failing to reflect the needs of citizens. They did not offer any transformative opportunities for Egyptians genuinely to challenge the unfair distribution of power leading to corruption and to address corruption as one of the issues

56 Mistry (2012) 10.
57 Aboueldahab (2017) at 13.
58 Hanna (2014) at 174.
59 Hanna (2014) at 175.
60 Malsin (2015).
61 Inman (2011).
62 Abou-El-Fadl (2012) at 329.

underlying conflict and unrest. As a result, the country has undergone repeated cycles of violence since the end of the Mubarak era.

Even though there was no smooth transition in Egypt, the focus on the prosecution of political leaders for corruption offences indicated a shift in transitional justice from a concentration on physical violence to a concern with economic injustices.

3.3 Challenges of Domestic Trials

As is evident from the discussion above, the prosecution of corruption during political transition is starting to receive attention. However, domestic trials for grand corruption as part of the transitional justice agenda are likely to face a series of legal and political challenges, which may make them undesirable as a primary transitional justice tool. Nonetheless, they are a popular accountability tool during political transition, with victims and communities calling for the punishment of wrongdoers.

A key question to answer when a transitional state chooses to prosecute corruption is: Who should be prosecuted? Usually, the most prominent demand by victims is that all offenders be prosecuted and punished.[63] However, many transitional states in Africa do not have sufficient political and financial resources to satisfy such a demand. It is impossible to prosecute all previous acts of corruption. Indeed, transitional states risk trivialising transitional justice mechanisms by prosecuting perpetrators of petty corruption. Also, there will be demands for justice and accountability for physical violence which the transitional authority should address. It is of paramount importance to note that the inclusion of corruption and other economic crimes in the transitional justice mandate should not result in overlooking crimes of physical violence. Both forms of violence should be addressed in order to end impunity and ensure non-recurrence of such violence. It is submitted, therefore, that selective prosecutions focusing on grand corruption committed by high-level leaders is the best approach.

63 Hayner (2011) at 8.

3.3.1 Lack of Resources

Transitional justice mechanisms require financial resources to function effectively. Many transitional states would have experienced serious violence leading to loss of life, destruction of property and extreme poverty. State resources would have been looted and natural resources fleeced. Such exploitation leaves little available for reconstruction, making domestic trials the least of the state's priorities.[64] Criminal trials are expensive and will strain the meagre financial resources of the state. For example, the former army chief and defence minister of the apartheid government in South Africa was prosecuted in connection with hit squads and assassinations before 1994. After approximately R12 million of taxpayers' money was spent on a long trial, the verdict was an acquittal.[65]

Financial resources in transitional societies always are scarce and they may be of more use in providing for the basic needs of the community than being expended in courts. The costs of prosecuting corruption cases are likely to be very high, as they require experts on financial crimes, and they are time-consuming. Prosecution is important in order to end impunity, but so is providing for the socio-economic needs of citizens, such as medical care, food, education, jobs and housing. Many people in transitional states will prefer available resources to be used to alleviate their poverty than to be "wasted" prosecuting individuals. Here, the "community over individual" aspect of transformative justice comes into effect. The priorities of the community should supersede the "individualistic" approach of transitional justice. However, criminal prosecutions are important for asset recovery. Conviction-based asset recovery may result in the return of stolen assets which could be used to remediate victims. Therefore, there is a need for a cost-benefit analysis of criminal trials, so that trials most likely to result in the return of significant stolen assets may be pursued.

3.3.2 Lack of Political Will

The lack of political will to prosecute corruption is a challenge facing transitional states. Policy makers in these states are hesitant to promote domestic trials for fear of jeopardising peace

64 Kerr & Mobekk (2007) at 114.

65 Kiss (2000) at 77.

and reconciliation. Lack of political will extends to reluctance to support transitional justice mechanisms and to ensure that they fulfil their mandates.[66] Without political will, transitional justice mechanisms are bound to fail. Therefore, political backing for criminal prosecutions of grand corruption is necessary.

Attempts to fight grand corruption usually lead to corruption fighting back. Anti-corruption campaigns threaten corrupt elites who will oppose them in order to ensure that they are not held to account for their corrupt activities. For instance, after the end of military rule in Nigeria in 1999, Nuhu Ribanda, who was the head of the Economic and Financial Crimes Commission from 2003 to 2007, embarked on an anti-corruption campaign in the country, exposing grand corruption, securing the conviction of over 250 people and achieving the return of US$5 billion.[67] His campaign threatened to take "food from the mouth of the ruling elite", resulting in a plot by senior government officials to remove him from power.[68] As this example makes apparent, the backlash by corrupt elites renders successful anti-corruption efforts near impossible without political support from the government. It is common for top politicians and businessmen to use their political networks and financial status to interfere in and delay investigations and prosecutions against them.[69] With vast corruptly-acquired funds at their disposal, these powerful figures will appoint elite legal counsel and will prolong trials almost indefinitely with technical requests and appeals.

Thus, transformative justice requires genuine political will for launching effective challenges to unequal power relations and holding corrupt leaders to account. *Bona fide* political will provides the necessary environment to fight corruption, enact effective laws and enable effective prosecutions and judgments.[70] Hence, transitional governments should ensure that criminal trials are funded adequately and proper political support is provided for the prosecution of powerful persons who may use their ill-gotten assets in an attempt to escape liability. Lack of political backing for investigations and prosecutions limits the transformative

66 Cohen & Lipscomb (2012) at 271-272.
67 Adebanwi & Obadare (2011) at 198-202.
68 Adebanwi & Obadare (2011) at 204.
69 ADB-OECD (2003) at 2.
70 Onsongo (2014) at 94.

effects of the mechanism as corrupt leaders remain untouched, frustrating attempts to recover the assets required to fund socio-economic transformation within victim communities.

3.3.3 Protection of Witnesses and Whistleblowers

A transformative approach to transitional justice is based upon extensive participation by citizens in the designation and implementation of transitional justice mechanisms. However, participation in criminal trials may come at a cost, which even may be life-threatening. Witnesses and whistleblowers may be targeted for vengeance by corrupt persons, who are usually powerful and influential. Thus, the protection of witnesses and whistleblowers is an indispensable tool for any effective investigation and prosecution of corruption. In most post-conflict societies, there is reluctance by witnesses to come forward and testify against powerful offenders because they fear for their lives or the lives of their family members. The lack of witness protection measures has been an obstacle in the implementation of transitional justice mechanisms. Inadequate witness protection threatens the integrity, privacy, dignity, reputation and lives of witnesses involved in various transitional justice processes.[71] Since transformative transitional justice calls for more victim participation, it promotes the proper protection of witnesses and whistleblowers as essential for the successful prosecution of corrupt persons. Transitional justice processes should reflect the centrality of victims and witnesses by designing and implementing comprehensive witness protection programmes.[72]

Protection of witnesses and whistleblowers in corruption cases usually is covered by national laws. However, there are massive deficiencies in witness and whistleblower protection programmes in many African states.[73] Even international anti-corruption conventions provide only hortatory obligations for states parties to protect witnesses and whistleblowers.[74] This is a major inadequacy since states parties are not compelled to implement protection mechanisms for them, regardless of their importance as anti-corruption agents. This makes it difficult for

71 OHCHR (2010) at 2.

72 Zimbabwe Human Rights NGO Forum (2015) at 3.

73 Njeri (2014). See also Mahony (2010) at 11.

74 Articles 32 and 33 of UNCAC. See also Article 5(5) of the AU Convention.

witnesses, whistleblowers and citizens at large to expose corruption, thereby facilitating impunity.

The insufficiency of witness and whistleblower protection undermines the transformative approach to transitional justice and its advocacy of centrality for victims and citizens in transitional justice processes. Therefore, it is proposed that before commencing with corruption criminal trials, the transitional state should establish mechanisms for the protection of witnesses and whistleblowers. Without such mechanisms in place, there is a real risk of intimidation of witnesses and potential whistleblowers, which weakens anti-corruption efforts by the transitional state.

3.3.4 Immunity

The concept of immunity dates back to the ancient doctrine of *Rex non potest peccare*, which means that "the king can commit no wrong".[75] The doctrine has developed over the years and protects certain officials from prosecution. There are two types of immunity enjoyed by state officials, namely, personal immunity (*ratione personae*) and functional immunity (*ratione materiae*). Personal immunity is granted to state officials for the office they hold, in order to protect them from being prosecuted for both their official and private acts while they are in office.[76] The holders of such immunity are usually heads of state, prime ministers, ambassadors and cabinet members. Functional immunity only covers official acts of state officials and holders of such immunity may be prosecuted for acts or omissions falling outside the scope of their work.[77] This immunity may be claimed even after the state functionary has left office.

It is a widely accepted practice in African states that sitting heads of state and other senior officials do not stand trial in their domestic courts. Immunity clauses in the laws of many African countries protecting high-ranking state officials from criminal prosecution while in office have been a major obstacle in the fight against corruption. Olaniyan argues that these immunity clauses are being utilised as "protection or assurance" by corrupt senior state

75 Stone (2005) at 381.
76 Foakes (2014) at 7.
77 Foakes (2014) at 7.

officials, that is, as shields against prosecution.[78] Whilst immunities are important to ensure that senior officials carry out their functions without any interference, they may result in looting of state resources by perpetrators who have become too powerful to prosecute once they leave office. In many transitional states, certain officials who served in the old regime will retain positions in the new government. For example, Frederick de Klerk, who was the leader of the apartheid regime in South Africa, was appointed vice-president of the first post-apartheid government.[79] This practice poses a problem for transitional justice initiatives, as the officials will claim immunity when being investigated for their past corrupt activities.

Some constitutions provide for immunity for senior government officials even after they have left office. For example, the Constitution of Angola protects the president from prosecution for crimes committed in the exercise of his or her functions.[80] And for crimes committed outside the exercise of his functions, the president may be prosecuted only after five years have elapsed from the time he vacates office.[81] This gives the former president ample time to move looted state resources out of the country and design a plan to escape liability.

In Zambia, a former president enjoys immunity for offences committed whilst in office, unless the National Assembly by resolution determines otherwise in the interests of the state.[82] This occurred in 2002, when the Zambian parliament voted unanimously to revoke former President Frederick Chiluba's immunity so as to allow the state to investigate and prosecute him for corruption he allegedly committed while he was in office.[83] The revocation of immunity led to him and his former top ministers and state officials being charged with 168 counts of corruption.[84] Again, in 2013, the Zambian parliament revoked former President Rupiah Banda's

78 Olaniyan (2014) at 142.
79 Lawson & Bertucci (1996) at 347.
80 Article 127(1) of the Constitution of the Republic of Angola (2010).
81 Article 127(3) of the Constitution of Angola.
82 Article 43(3) of the Constitution of Zambia.
83 National Assembly of Zambia (2002).
84 Puta-Chekwe (2011) at 65.

immunity against criminal prosecution to afford the state the opportunity to hold him to account for several allegations of corruption committed during his term as president.[85]

The Zambian cases indicate the importance of the political will of a government succeeding a kleptocrat in dealing with immunity against prosecution for corruption. If the law allows it, the immunity for former state officials can be revoked by parliament to allow for their investigation and prosecution. The fight for justice, accountability and transparency should ensure that no one is entitled to absolute immunity.

The international anti-corruption treaties support the view that public officials should not enjoy absolute immunity from investigation and prosecution. The AU Convention on Preventing and Combating Corruption (AU Convention) provides that any immunity enjoyed by public officials of member states should not be an obstacle to their investigation and prosecution, subject to their domestic laws.[86] The United Nations Convention against Corruption (UNCAC) provides that states parties should take necessary measures in relation to their national laws to ensure that there is an appropriate balance in immunities or jurisdictional privileges enjoyed by public officials for performing their duties, and the possibility of effectively investigating, prosecuting and adjudicating corruption offences.[87] However, the hortatory obligations created by these instruments are weak and contain loopholes which allow for immunity for corrupt public officials. There is a need for transitional states to take a strong stance against such immunities in their domestic laws so that state officials may be investigated and prosecuted for corruption. Transitional states should pay attention to the calls of citizens for the eradication of corruption, which requires revoking of immunity laws obstructing the investigation and prosecution of corrupt leaders. In terms of the transformative justice approach, this is necessary for the successful challenging of corrupt power relations and for the possible return of stolen assets.

85 National Assembly of Zambia (2013).

86 Article 7(5) of the AU Convention.

87 Article 30(2) of UNCAC.

At the same time, there is a need to strike a balance between the demand for retributive criminal justice and the need for peace and reconciliation.[88] The revoking of immunity for certain persons may pose a threat to peace and security in the state, particularly where the persons enjoy popular support with the security forces. Where revocation of immunity threatens political unrest or recurrence of conflict, it is submitted that states should adopt other options to hold the person accountable, such as conditional amnesties, which will be discussed below.

3.3.5 Amnesties

Amnesties are defined by the United Nations as:

> [L]egal measures that have the effect of:
> (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
> (b) Retroactively nullifying legal liability previously established.[89]

The three most common types of amnesties are self-amnesty, blanket amnesty and conditional amnesty. Self-amnesty is granted by perpetrators, who are usually political or military leaders, to protect themselves from prosecution. Self-amnesties are particularly popular at the eleventh hour of a political transition. These amnesties have been abused by governments to immunise military or state officials from criminal liability.[90] Blanket amnesty exempts offenders from criminal and civil liability without requiring the recipients to meet any preconditions, such as full disclosure of the crimes committed by them.[91] According to the Belfast Guidelines on Amnesty and Accountability, unconditional amnesties are illegitimate as they prevent investigations and provide immunity for responsible persons.[92] By contrast, a conditional amnesty is granted on the premise that the recipient meets specified requirements, and failure to do so will result in the amnesty being withdrawn.[93] Conditional amnesties are regarded as

88 See AUTJP (2019) at 7.
89 Office of the United Nations High Commissioner for Human Rights "Rule of Law Tools for Post-Conflict States: Amnesties" (2009) at 5.
90 Carter, Ellis & Jalloh (2016) at 151.
91 OHCHR (2009) at 8.
92 Belfast Guidelines on Amnesty and Accountability (2014) at 9.
93 Carter, Ellis & Jalloh (2016) at 153.

more legitimate where they require offenders to become involved in peace-building processes and to ensure truth, accountability and reparations.[94]

Due to the politically sensitive desire to end violence, amnesty may be granted by transitional states to ensure peace, nation-building and reconciliation.[95] A transitional state adopts an approach to past crimes according to the balance of power between the old and new regimes.[96] For instance, the post-apartheid government in South Africa granted conditional immunity to perpetrators of and accomplices to apartheid crimes in order to ensure reconciliation and reconstruction in the transitional stage.[97] The former apartheid regime and its security forces would not have accepted the transition to democracy if there were no amnesty.[98] Amnesty also has been used by politicians to promise dictators that they would not be prosecuted for their atrocities in order to persuade them to step down.[99]

A transformative approach to transitional justice should attempt to strike a balance between pursuing wrongdoers and institutionalising peace.[100] On the one hand, granting amnesty may be pivotal to ensuring peace. The new government will be interested in making a clean break with the past rather than compromising peace by prosecuting wrongdoers. The main perpetrators of previous heinous crimes are usually political and military leaders who remain key stakeholders in political transitions and would require some incentive such as amnesties to prevent them for derailing peace-building efforts.[101] For instance, the Lome Peace Agreement brought to an end the decade-long civil war in Sierra Leone with wrongdoers from both sides receiving amnesty.[102] On the other hand, amnesties perpetuate impunity as criminals escape liability. Mallinder argues that amnesties affect victims who are deprived of

94 Belfast Guidelines on Amnesty and Accountability (2014) at 9.
95 Young (2002) at 434.
96 Van Zyl (1999) at 648.
97 *Azanian People's Organisation and Others v President of the Republic of South Africa and Others* (1996) at para 19.
98 Van Zyl (1999) at 650.
99 Young (2002) at 434.
100 Gready & Robins (2014) at 345.
101 Belfast Guidelines on Amnesty and Accountability (2014) at 14.
102 Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (1999).

the truth, justice and reparations.[103] Amnesties lower the public's confidence in the anti-corruption efforts of the transitional state. In Tunisia, discussed in §2.2.1 above, amnesties may spark public outrage because some acts of corruption are so heinous that it is almost impossible for the public simply to forgive the perpetrators.[104] Blanket amnesties may result in denial of any wrongdoing by the responsible persons and institutions, depriving victims of the truth and possibly also of reparations.[105] It is submitted that blanket amnesties are unacceptable and should not be considered in any situation.

Carranza argues that amnesty-for-truth mechanisms are more suited to grand corruption and economic crimes than to human rights violations, in respect of which amnesties have been criticised as encouraging impunity.[106] UNCAC recognises the importance of amnesties by encouraging states parties to grant immunity from prosecution to any person who comes forward with vital information regarding the investigation and prosecution of corruption cases.[107] As in the case of Tunisia, amnesty for corruption during political transitions circumvents the demands of the citizens for the prosecution of corrupt leaders. It reflects the top-bottom approach to transitional justice by political elites, which is inconsistent with the transformative justice approach as an aspect of "fourth generation" transitional justice. However, amnesty laws should not be rejected out of hand as they have certain advantages.

It should be borne in mind that it generally is difficult to prosecute corruption cases. Hence, amnesties may be used to concentrate state resources on priority cases or to deliver on truth and accountability, particularly on cases not selected for prosecution.[108] Amnesties for corruption offenders may be defensible if the return of stolen assets is a condition of the amnesty. The ultimate aim of addressing past corruption is to recover stolen assets for the benefit of citizens. Considering that grand corruption trials are expensive and time-consuming with no guarantee of asset recovery, conditional amnesty may be an important tool of justice.

103 Mallinder (2008) at 10.
104 Adeh (2010) at 229.
105 Mallinder (2008) at 10.
106 Carranza (2008) at 325.
107 Article 37(3) of UNCAC.
108 Belfast Guidelines on Amnesty and Accountability (2014) at 10.

However, amnesties should not hinder efforts to establish the truth. According to UN policy and international law, an amnesty law is impermissible if, among others, it restricts the victims' and society's right to the truth regarding violations of human rights and humanitarian law.[109]

In addition, beneficiaries of amnesties should be required to fulfil conditions of future conduct to avoid revocation of the benefits.[110] In terms of anti-corruption, such condition of future conduct should include a commitment by the beneficiary to refrain from committing any economic crime for a specified long period. If the person breaches the condition, then the amnesty will be revoked and they will be prosecuted.

Hence, before granting amnesties to corrupt persons the following should be considered. Firstly, there is a need to determine the estimated value of the stolen assets. This is important in order to perform a cost-benefit analysis of prosecution as against amnesty. Secondly, the location of the stolen assets is very important. Stolen assets hidden in foreign jurisdictions with which a victim state does not have international co-operation treaties are difficult and expensive to recover, compared to those with which co-operation treaties have been concluded. Thirdly, the availability of evidence to prosecute successfully is critical. Where evidence is available readily to prove the case beyond a reasonable doubt, then criminal trials are more appropriate than amnesties. One of the non-negotiable conditions for prosecution or amnesty is the right to truth for victims and affected communities. The AUTJP provides that immunities should be formulated "with the participation and consent of affected communities, including victim groups" and with due regard to the right of victims to truth and reparations.[111] This means that if the state decides to prosecute, it should ensure that a full account of past corruption and connected human rights violations is recorded. Fourthly, there should be full recovery of all stolen assets. In summation, where a decision to grant amnesty is taken, the two indispensable conditions should be: return of all the stolen assets and provision of a full account of past corruption and accompanying human rights violations. This maximises the

109 OHCHR (2009) at 11.

110 Belfast Guidelines on Amnesty and Accountability (2014) at 18.

111 AUTJP (2019) at 18.

transformative effects of amnesties as there is closure on corrupt power relations and there is full recovery of stolen assets to remediate victims of corruption.

3.3.6 Lack of International Co-operation

An act of corruption can traverse more than one jurisdiction, with illicit funds hidden in bank accounts and shell companies around the world. Such transnational corruption becomes especially challenging to detect, investigate, prosecute and punish.[112] In such situations, international co-operation becomes an important tool in securing the assistance of the judicial and criminal justice authorities of other states to investigate and prosecute offenders, and to recover assets lost to corruption.

In terms of the transformative justice approach, the main role of international actors should be to support locally driven transitional justice processes. Such support should include mutual legal assistance (MLA). MLA in criminal cases refers to a formal process by which a state requests from or provides legal assistance to another state for the purposes of investigation, prosecution and execution of a matter. The legal basis for MLA includes domestic law, letters of request, multilateral treaties and bilateral treaties.[113] UNCAC makes it mandatory for states parties to co-operate in criminal matters.[114] It further provides that states parties should afford one another "the widest measure" of MLA in investigations, prosecutions and judicial proceedings concerning corruption.[115]

Despite its *prima facie* importance as an anti-corruption tool, requested states, particularly in the developed world, have not been averse to denying MLA. Some states continue to refuse MLA on grounds such as the absence of dual criminality, immunity or bank secrecy.[116]

112 ADB-OECD (2017) at 9.
113 See OECD (2008) at 75-77.
114 Article 43 of UNCAC.
115 Article 46(1) of UNCAC. See also Article 18(1) of the AU Convention.
116 Terracol (2014) at 4.

3.3.6.1 Dual Criminality

Dual criminality is a principle which stipulates that the conduct for which assistance is requested should be a crime in both the requesting and requested state.[117] UNCAC provides that MLA may be declined for lack of dual criminality.[118] A problem arises for controversial crimes such as illicit enrichment. The crime is not accepted universally because of human rights and constitutional arguments against it.[119] The AU Convention places a hortatory obligation on states parties to criminalise illicit enrichment in terms of their domestic law, and not to deny any legal assistance to requesting states parties with respect to the offence.[120] This creates a weak spot in MLA processes, as the requested state may refuse to co-operate on the basis that illicit enrichment is not a crime in its domestic law.

However, UNCAC remedies the *lacuna* by providing that the dual criminality requirement is met when the conduct in question is considered a criminal offence in both states, regardless of any difference in categorisation or wording.[121] For instance, illicit enrichment which is not recognised as such by the requested state may be regarded as bribery or theft of public funds. Thus, the transitional state, as the requesting state, needs to describe rather than merely list the offences committed in order for the requested state to assess whether the conduct constitutes a crime under its national law.[122] In the total absence of dual criminality, states parties are required to provide MLA through non-coercive measures, such as obtaining testimonies of voluntary witnesses.[123] The Convention goes on to impose a permissive obligation on states parties to consider adoption of measures to enable MLA in absence of dual criminality.[124] The possible refusal of MLA in this regard undermines the objectives of transformative justice as international actors should offer support to locally driven transitional justice processes. Such refusal denies victims of corruption an opportunity to bring

117 OECD (2012) at 20.
118 Article 46(9)(b) of UNCAC.
119 Muzila *et al* (2012) at 27.
120 Article 8 of the AU Convention. See also Article 20 of UNCAC.
121 Article 43(2) of UNCAC.
122 Brun *et al* (2011) at 143.
123 Article 46(9)(b) of UNCAC.
124 Article 46(9)(c) of UNCAC.

corrupt leaders to justice and removes the possibility of asset recovery to fund transitional justice processes such as reparations. In other words, failure or refusal by international actors to offer assistance lessens possibilities of socio-economic transformation in the transitional states.

3.3.6.2 Immunity

A state which has received a request for MLA may refuse to co-operate if the corruption suspect enjoys immunity from prosecution.[125] States tend to be reluctant to prosecute or provide MLA for offences committed by a foreign official. However, the protection afforded to public officials to carry out their duties should be balanced against the public interest in combating corruption.[126] As noted earlier in the discussion of immunity as a challenge to prosecution, the requesting state may waive the immunity of its suspect officials to allow them to be prosecuted.[127] Immunity threatens transformative justice as it protects perpetrators from accountability and sidelines victims of corruption, thereby denying them justice and the possible return of stolen assets. It is imperative, therefore, that protection be limited to functional immunity in order to minimise the denial of justice.

3.3.6.3 Bank Secrecy

Massive amounts of money stolen from Africa are hidden in Western countries with bank secrecy laws. These secrecy laws make difficult the successful investigation and prosecution of grand corruption. Corruption suspects continue to take advantage of such secrecy laws to escape liability as law enforcement agents are denied access to bank details which are primary sources of evidence of corruption. Banks and financial institutions in jurisdictions such as Switzerland are not compelled to reveal the existence of bank accounts or information on funds of African leaders. It is even an offence in some states for a bank to disclose information of a customer to domestic or foreign governments.[128]

125 Brun *et al* (2011) at 147.
126 Terracol (2014) at 4.
127 Brun *et al* (2011) at 147.
128 Nicholls (2011) at 682.

Bank secrecy laws cause difficulties at the start of investigations and may make foreign jurisdictions reluctant to provide assistance to requesting states.[129] With such vital information being concealed, evidence of corruption becomes difficult to obtain, resulting in impunity for corrupt officers and jeopardising the recovery of stolen assets. Article 46(8) of UNCAC takes a strong stand against bank secrecy by prohibiting states parties from denying MLA on this basis. The same position is contained in Article 17(1) of the AU Convention. The AU Convention goes on to prohibit the requesting state party from using the information obtained via MLA for any other purposes, unless such other usage is agreed to by the requested state party.[130]

The transitional state should ensure that it has a legal framework to request information from jurisdictions with bank secrecy laws. The most favourable framework is a system of bilateral agreements. Bilateral treaties are clear and detailed on the procedure to be followed, offer great certainty, and will obligate the requested state to co-operate.[131] This is in line with the transformative justice approach which requires that international actors provide necessary assistance in addressing past violence. Thus, signing of bilateral agreements is a feature which ought to be included in transformative transitional justice processes in order to enhance and expedite co-operation by international actors in bringing corrupt leaders to justice.

3.3.6.4 Lack of Expertise and Central Authorities

The transformative justice approach requires international actors to co-operate and assist locally driven transitional justice processes aimed at addressing corruption. The lack of expertise in MLA has been a major issue hindering requests for international co-operation. The G20 Group has identified the common challenges encountered by developing states when requesting MLA from the developed world. These include misunderstanding of the requested state's legal requirements, inadequate contact information, difficulties in obtaining informal consultations before official requests are made, and lack of knowledge regarding the correct MLA procedures.[132] Inexperienced persons requesting MLA will miss crucial details, which may

129 Nicholls (2011) at 682.
130 Article 17(2) of the AU Convention.
131 OECD (2008) at 76.
132 G20 Anti-Corruption Working Group (2012) at 1.

result in the requested state party declining to provide assistance because of irregularities in the request procedures.

International conventions require states parties to establish central authorities mandated to send, receive and manage all requests for MLA.[133] The establishment of such authorities offers many benefits for MLA purposes. It reduces delays in requests, it provides a clear point of contact in MLA procedures, and the MLA centre will be staffed by experts on international co-operation, thereby increasing compliance with prescribed MLA procedures.[134]

In relation to the transformative justice approach, transitional states should ensure smooth MLA during corruption criminal trials by establishing an effective and clear MLA framework. There should be a central authority with experts on MLA and a correspondent person or office. Without such a framework and expertise, requests for international co-operation in the investigation and prosecution of corruption will meet with little success which, in turn, will undermine the transformative justice approach.

3.3.7 Extradition and Trials *In Absentia*

It is a trend for deposed African dictators to exile themselves, most likely for fear of being held accountable for their previous crimes, and less likely to allow for a peaceful transition. Dictators such as Idi Amin of Uganda, Habre Hissene of Chad, Ben Ali of Tunisia and Yahya Jammeh of the Gambia went into exile after leaving power. Jammeh fled in January 2017, immediately after conceding power. In his last days in power, he looted state coffers and it is becoming less likely that he will return amid calls for his prosecution.[135]

Calls for extradition of exiled African leaders to stand trial for crimes they committed whilst in power have been ignored. Extradition serves to deny safe haven to corrupt persons and may serve as an important deterrent mechanism.[136] The refusal of calls for extradition results in national courts being forced to prosecute the exiled former leader *in absentia*. For example, the Tunisian government appealed for the extradition of former dictator Ben Ali from

133 Article 46(13) of UNCAC & Article 20(1) of the AU Convention.
134 OECD (2008) at 78.
135 Abdoulie (2017).
136 Snider & Kidane (2007) at 739.

Saudi Arabia.[137] An international arrest warrant was issued against him.[138] However, Saudi Arabia refused to extradite Ben Ali to stand trial for his crimes in Tunisia. A series of trials *in absentia* followed, which resulted in Tunisian courts convicting of corruption the former authoritarian leader, some of his family members and certain of allies. The former Tunisian dictator has been the subject of several convictions and sentences *in absentia* since 2011, with the latest conviction in 2017 being accompanied by a 10-year prison sentence.[139] The credibility of the trials may be questionable, considering that the accused was not present. However, his failure to appear after an international arrest warrant was issued may be interpreted as his waiving his right to be present when being tried.

Thus, international support for locally driven transitional justice should include heeding calls for extradition of persons to be tried for corruption offences, in accordance with transformative justice theory. Creating safe havens for corrupt leaders results in impunity and makes it difficult for stolen assets to be recovered and returned to the victim country. The transformative justice approach requires such assistance from international actors in order for offenders to stand trial in the transitional state and to offer a chance for the return of stolen assets to victims of corruption.

3.4 Foreign and International Courts

Transitional justice is not entirely a domestic process as international actors usually become involved. Their involvement may occur through the provision of funding, expertise or assistance with prosecutions. The AUTJP provides that where national courts are unable to prosecute persons, AU members states "should galvanise national and regional consensus for and co-operate with relevant regional and international judicial processes that have jurisdiction".[140] However, the role of international actors in criminal prosecutions during transition has come under scrutiny because they tend to take a liberal approach to transitional justice.[141] External

137 Jacob (2011).
138 INTERPOL (2011).
139 International Centre for Transitional Justice (2017).
140 See AUTJP (2019) at 16.
141 Sriram (2007) at 581, 588; Nagy (2008) at 275; Abou-El-Fadl (2012) at 320.

actors usually apply externally designed measures, with little consideration for the domestic causes and context of violence. By contrast, transformative justice involves a bottom-up approach which examines the underlying causes of violence, such as corruption. This begs the question of the role of foreign or international courts in the prosecution of corruption as part of the transitional justice agenda.

According to the report of the United Nations Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies:

> Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable. The role of the United Nations and the international community should be solidarity, not substitution … we must learn better how to respect and support local ownership, local leadership and a local constituency for reform.[142]

The absence of "local ownership" in international trials affects their legitimacy in the eyes of the local community, and therefore such trials hold little transformative promise for the community. It has been argued that the role of international actors mainly should be to strengthen local capacity and to provide support to national actors in locally driven transitional justice processes.[143] However, the challenges facing domestic prosecutions make it worthwhile analysing the potential of external courts. Foreign and international courts help to close impunity gaps where transitional states are unwilling or unable to prosecute corrupt leaders. Usually, these external courts have better funding than local courts, and may be better situated to gather evidence and trace stolen assets. There is also increased accountability, as amnesties that aggravate impunity at national level cannot prevent international, hybrid or foreign courts from prosecuting offenders.[144] The main transformative value of foreign or international trials is asset recovery and successful repatriation to the transitional states for remediation of victims of corruption. Recovered assets will assist in the alleviation of poverty and socio-economic transformation of victim communities. Any external trial of corrupt persons which does not involve the return of stolen assets to the victim country is more or less futile and offers no value to the transitional state.

142 Report of the United Nations Secretary-General (2004) at para 17.

143 Nassar (2014) at 72.

144 Belfast Guidelines on Amnesty and Accountability (2014) at 22.

The section below analyses the potential of such prosecutions by external courts, including foreign domestic courts, the African Court of Justice and Human and Peoples' Rights, and the International Criminal Court. It will consider the potential transformative effects of the courts and whether they are appropriate accountability mechanisms for addressing corruption during transition.

3.4.1 Foreign Domestic Courts

In the transitional justice field, domestic courts of foreign states have contributed to the fight against impunity for crimes under international law by prosecuting offenders on the basis of the principle of universal jurisdiction. The universality principle allows states to institute criminal proceedings in respect of certain crimes, irrespective of the absence of territoriality, nationality, passive nationality or protective interest jurisdiction.[145] The principle is based on the rationale that certain crimes are universally abhorred and affect international interests, and therefore should be prosecuted by any state. The crimes covered by the universality principle include genocide, crimes against humanity, war crimes, piracy and torture. Many states have established legal frameworks providing their domestic courts with the power to exercise universal jurisdiction over one or more of these crimes. A report by Amnesty International in 2012 indicated that 147 of 193 states have legal framework on universal jurisdiction.[146]

There are a number of cases where non-African states have exercised universal jurisdiction over crimes committed in Africa. The most popular case was Belgium's attempt to prosecute Abdulaye Ndombasi, who was the incumbent Minister of Foreign Affairs of the Democratic Republic of Congo. The matter went to the International Court of Justice as the *Case Concerning the Arrest Warrant of 11 April 2000*, in which it was held that incumbent foreign ministers enjoyed personal immunity from criminal trials in foreign jurisdictions.[147]

145 Randall (1988) at 788.

146 Amnesty International (2012) at 2.

147 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V. Belgium)* para 54.

Western states have prosecuted Rwandans involved in the Rwandan genocide, for example, Canada prosecuted Desire Munyaneza,[148] and Belgium prosecuted the *Butare Four* case.[149]

The exercise of universal jurisdiction by African states has been limited. In fact, African states have lamented the abuse of universal jurisdiction by European powers targeting African leaders.[150] However, some African states have prosecuted cases on the strength of universal jurisdiction. For instance, the South African Constitutional Court, in the case of torture in Zimbabwe, held that South Africa had a domestic obligation to exercise universal jurisdiction over crimes under international law.[151] The Extraordinary African Chambers in Senegal in 2016 convicted former Chadian dictator Hissene Habre for crimes against humanity, torture and war crimes committed in Chad. The appeal court upheld the verdict and ordered the payment of more than US$100 million to victims.[152] The case of Hissene indicates the potential of foreign domestic courts to recover and repatriate stolen assets for socio-economic transformation in the victim country.

It has been argued that the universality principle provides a suitable path for states to prosecute grand corruption committed in states with weakened anti-corruption mechanisms.[153] The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences, which were designed by African experts and enjoy international recognition,[154] called for grand corruption to be subject to universal jurisdiction.[155] However, universal jurisdiction applies to *jus cogens* crimes, and grand corruption is not regarded as one.[156] Over the years, there has been no legal framework or case law to support the argument that corruption is

148 *The Queen v. Munyaneza* (2009).

149 See Reydams (2003) at 433.

150 AU, Decision on Africa's Relationship with the International Criminal Court (2013) para 3.

151 *National Commissioner of South African Police Service v Southern African Human Litigation Centre* (2015) para 61.

152 Human Rights Watch (2017).

153 GOPAC (2013) at 4.

154 Cited in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V. Belgium* (Dissenting opinion of Judge Van Den Wynagaert paras 27, 46 & 57). See also Ankumah (2004) at 238.

155 Principle 4 of the Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective (2004).

156 Adeyeye (2012) at 136.

subject to universal jurisdiction. However, a recent corruption case in France showed some progress in the prosecution of corruption by foreign states.

On 27 October 2017, a French court convicted the Vice President of Equatorial Guinea, Teodorin Obiang, of embezzling public funds in his home country and laundering dirty money.[157] Obiang bought, among other things, a mansion, luxury cars, a yacht and a private jet in France using funds allegedly looted from Equatorial Guinea. He was sentenced to three years' imprisonment, which were suspended wholly.[158] The court further ordered that all assets in France belonging to Obiang be confiscated and returned to his victims in Equatorial Guinea.[159] The conviction presents a potentially landmark decision regarding the prosecution of corruption in foreign domestic courts. It is the first time that a senior public official has been prosecuted for and found guilty of corruption by a foreign court. The conviction is of great significance as it indicates an attempt to end impunity for corruption. As the global anti-corruption consensus continues to develop, there is a new movement against allowing safe haven for corrupt persons. What is more, the case indicates the potential transformative effects of external courts in ordering the return of all stolen assets to the victim country.

3.4.2 Regional and International Courts

International criminal tribunals are vital mechanisms in the fight against impunity when states are unwilling or unable to prosecute perpetrators of gross human rights violations.[160] These tribunals have succeeded in the prosecution and conviction of perpetrators of and accomplices to serious atrocities in Africa. For instance, the International Criminal Court (ICC) convicted Thomas Lubanga Dyilo, who was a warlord in the Democratic Republic of Congo, of war crimes for enlisting and conscripting child soldiers.[161] Also, the International Criminal Tribunal for

157 Chazan (2017).

158 Chazan (2017).

159 Transparency International (2017b).

160 African Union Panel of the Wise (2013) at 18.

161 *The Prosecutor v Thomas Lubanga Dyilo* Judgment pursuant to Article 74 of the Statute, Trial Chamber 1 (14 March 2012) para 1358.

Rwanda prosecuted and convicted perpetrators of and accomplices to the Rwandan genocide.[162]

Given the successes enjoyed by international tribunals as alternatives to domestic courts, it was inevitable that there would be calls from organisations and scholars for these tribunals to include corruption in their mandates. For example, in 2010 the Socio-Economic Rights and Accountability Project (SERAP) of Nigeria formally requested the Office of the Prosecutor of the ICC to examine and investigate whether endemic political corruption in Nigeria amounted to a crime against humanity.[163] However, hitherto the ICC Prosecutor has not responded to the request. There are two main reasons why the ICC prosecutor may have remained quiet on the request. First, the temporal jurisdiction of the ICC means that it can only investigate and prosecute international crimes committed after the Rome Statute came into force on 1 July 2002,[164] hence it cannot investigate corruption in Nigeria from 1985. Second, the subject matter jurisdiction of the ICC is currently limited to the four international crimes,[165] and corruption does not fit all the definitional elements of the crimes, as will be discussed in the section below.

SERAP also instituted a grand corruption case at the Economic Community of West African States (ECOWAS) Court of Justice. It argued that Nigerians' right to education had been violated by endemic corruption in the funding of public schools, and cited the African Charter on Human and Peoples' Rights as the applicable law.[166] One form of relief sought was that the Nigerian state be ordered to prosecute officials who embezzled education funds.[167] However, the court held that issues of grand corruption fell outside its scope and should be dealt with by the criminal courts of Nigeria.[168]

162 See for example *The Prosecutor v Jean-Paul Akayesu* Judgment, International Criminal Tribunal for Rwanda Chamber 1 (2 September 1998) para 744 verdict.

163 Available at http://serap-nigeria.org/who-we-are/ (visited 22 October 2017).

164 See article 11 of the Rome Statute.

165 See article 5 of the Rome Statute.

166 *SERAP v Nigeria* (2010) para 5.

167 *SERAP v Nigeria* (2010) para 9.

168 *SERAP v Nigeria* (2010) para 21.

In 2013, The Global Organisation of Parliamentarians against Corruption (GOPAC) pronounced that some acts of corruption have such grievous effects on human life, rights and welfare that they shock the international community and deserve international attention.[169] During its Fifth Conference, GOPAC unanimously resolved to pursue the international adoption of legal instruments and strategies aimed at the prosecution and the sentencing of perpetrators of grand corruption at international level.[170]

Several scholars have submitted arguments in support of the prosecution of grand corruption as an international crime. Kofele-Kale was one of the first to call for the recognition of grand corruption as an international economic crime. He refers to grand corruption as "indigenous spoliation" or "patrimonicide", which he defines as:

> [A]n act of depredation which is committed for private ends by constitutionally responsible rulers, public officials or private individuals.[171]

He argues that the words used to describe corruption, such as "embezzlement" or "misappropriation", do not indicate its destructive effects on the social, political, economic and moral fabric of the victim state.[172] Ochenje considers that the ICC Statute should be revisited in order endow it with a special jurisdiction over looted funds.[173] In agreement with international prosecution of corruption, Andrieu contends that the inclusion of corruption in the focus of international justice mechanisms would be a great leap forward to dealing with the "invisibility" of economic rights and responding to the "westernisation" of transitional justice.[174] This conforms to transformative justice theory, which questions the exclusion of socio-economic issues from transitional justice and seeks to break with the liberal approach to transitional justice. The sections below will examine the potential of regional and international criminal tribunals for exercising jurisdiction over grand corruption in Africa.

169 GOPAC (2013) at 1.
170 GOPAC (2013) at 1.
171 Kofele-Kale (2006) at 9.
172 Kofele-Kale (2006) at 12.
173 Ochenje (2002) at 779.
174 Andrieu (2012) at 543.

3.4.2.1 African Criminal Court

In 2014, the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). This is an amendment to the original Protocol of 2008 which merged the African Court of Human and Peoples' Rights and the African Court of Justice to form the African Court of Justice and Human and Peoples' Rights (African Criminal Court).[175] Annexed to the Malabo Protocol is the Statute of the African Court of Justice and Human and Peoples' Rights, which provides jurisdiction to the yet to be formed African Criminal Court. The Protocol requires 15 ratifications to come into force. Hitherto, there have been nine signatories but no ratifications.

The African Criminal Court will exercise jurisdiction over international and transnational crimes. These are genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.[176] The Court is subject to the complementarity principle, being empowered to exercise jurisdiction if the national courts and courts of regional economic communities are unable or unwilling to prosecute.[177] The adoption of the Malabo Protocol may be welcomed as a positive step in the fight for justice and human rights. It permits corruption and other heinous crimes committed in Africa to be prosecuted in the region, relatively close to the state of commission. Whereas transformative justice is anchored in local agency and local ownership of transitional justice mechanisms, the prosecution of corruption at regional level does provide a viable alternative for victims of corruption to seek justice and accountability at an African tribunal.

Corruption is criminalised by Article 28I of the Statute of the African Court of Justice and Human and Peoples' Rights. Article 28I encompasses acts of corruption which are "of a serious nature affecting the stability of a state, region or the [African] Union".[178] Questions have been asked about the (undefined) threshold for an act of corruption to be regarded as a threat to

175 Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights (2008).

176 Article 28A of the Statute of the African Court of Justice and Human and Peoples' Rights.

177 Article 46H of the Statute.

178 Article 28I(1) of the Statute.

national or international security as required by the Statute.[179] The Statute takes a purely criminal law approach which is not victim-centred, making it difficult to determine the impact of corruption on security and stability.[180] This approach removes victims as central elements of criminal trials and deprives them of the opportunity to show how corruption has violated their rights. It is an approach which contradicts the priority given by transformative justice theory to victims in transitional justice initiatives. It is submitted that there is a need for a more victim-centred approach during prosecutions and sentencing, to allow victims of corruption to testify in and contribute to corruption trials.

One of the acts of corruption criminalised by the Statute of the African Court of Justice and Human and Peoples' Rights is illicit enrichment, which is defined as a:

> significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.[181]

Illicit enrichment has not been criminalised by many African states because of the constitutional and human rights challenges implicit in the accused's need to identify the origins of his or her unexplained wealth.[182] Criminalisation may have been rejected by some states for violating their constitutional provisions on the presumption of innocence or the right to a fair trial. It may be argued also that criminalisation would be in contravention of the Malabo Protocol as regards the right of the accused to be presumed innocent until proved guilty.[183] However, the Protocol contains progressive measures for combating corruption, including the criminalisation of private sector corruption (private-to-private corruption).[184] It also criminalises money laundering and lists corruption as a predicate offence.[185] This means that if one loots state funds and hides the money in secret bank accounts, as is usually the case in African states, one is liable to be tried on charges of corruption and money laundering before the African

179 Fernandez (2017) at 105.
180 Fernandez (2017) at 94.
181 Article 28I(2) of the Statute.
182 See Muzila *et al* (2012) at 27.
183 Article 46A.
184 Article 28I(1)(e) of the Statute.
185 Article 28J of the Statute.

Criminal Court. Criminal liability is extended to legal persons involved in the commission of crimes within the jurisdiction of the court.[186]

The most retrogressive provision and a major challenge is the immunity clause. The Statute provides that:

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.[187]

This clause has received extensive attention and criticism.[188] Grand corruption is perpetrated by heads of states and governments, cabinet members and other senior government officials. These are the people whose acts of corruption have the capacity to affect the stability of a country or region.[189] In effect, the Protocol provides immunity for those who are capable of committing acts of corruption punishable by the African Criminal Court. The immunity clause renders it nearly impossible to understand how the proposed court will solve African problems, if the usual perpetrators of serious crimes cannot be investigated and prosecuted.[190] The inclusion of "other senior state officials" in the immunity clause has the effect of widening the pool of the officials who can claim immunity, thereby making it difficult for grand corruption to be investigated and prosecuted at all. What is more, many state officials will be motivated not to leave office in order to avoid facing trial for grand corruption before the Court.

The immunity provision has called into question the capacity of the Statute to end impunity for serious crimes in Africa. As a result, it has been labelled a protest treaty aimed at challenging the ICC's prosecution of African leaders.[191] It has been charged with having a negative impact on the promotion of human rights, peace and stability, and constituting a major setback to the advancement of democracy and the rule of law in Africa.[192] It has been blamed for undermining the potential of the African Criminal Court to become an important

186 Article 46C of the Statute.
187 Article 46A *bis* of the Statute.
188 Tladi (2017) at 204.
189 Fernandez (2017) at 92.
190 Gaeta & Labuda (2017) at 162.
191 Gaeta & Labuda (2017) at 162. See also Tladi (2017) at 204.
192 Njeri (2014a).

anti-corruption forum by deterring public officials from being corrupt and punishing those who loot state resources.[193] The immunity clause undermines transformative justice as it supresses the demands by many African citizens for prosecution of corrupt leaders who have drained vast resources from African countries. It may be seen as an elite agreement which aims to protect the politically powerful from being held to account and which fails to listen to the voices from below.

Notwithstanding the contentious immunity clause, the Statute provides a good opportunity for the prosecution of corruption by the African Criminal Court. The international criminalisation and prosecution of grand corruption in Africa was overdue and the Statute provides for such anti-corruption endeavours. However, it should be amended to allow for senior state officials to be prosecuted by the Court. As indicated earlier, there is a need for a victim-centred approach by the Court, in line with transformative justice theory. In that way, the voices of victims will be heard, including the call for reparations.

3.4.2.2 International Criminal Court

The International Criminal Court (ICC) offers a realistic opportunity for holding powerful perpetrators to account for grand corruption. The ICC is a permanent international court which has enjoyed commendable successes in ending impunity for heinous crimes since its establishment in 2002. In 2003, the ICC Prosecutor noted the importance of investigating the links between financial crimes in the extractive industry and international crimes in the Democratic Republic of Congo.[194] Anderson contends that the ICC is suited best to deal with corruption offences, particularly those involving money laundering, as it relies less on oral witnesses and focuses on documentary evidence.[195]

It has been argued that the ICC offers transformative justice opportunities to victims of international crimes through its reparations programme.[196] The ICC already has considerable authority to forfeit proceeds, property or assets which are linked directly or indirectly to the

193 Fernandez (2017) at 99.
194 ICC Prosecutor (2003).
195 Anderson (2013) at 779.
196 Hoyle & Ullrich (2014) 692-699.

international crime committed by a person convicted by the court.[197] Even though the Court has not exercised its authority in this regard yet, it may be argued that inclusion of corruption within its mandate will result in prompt asset forfeiture and recovery of stolen assets. The ICC does not recognise immunity under national or international laws as an obstacle to the prosecution of crimes under its jurisdiction.[198] This makes the ICC more attractive than domestic courts, which cannot prosecute persons enjoying immunity. Also, the complementarity principle[199] in terms of which the ICC operates provides sufficient opportunity to close the impunity gap in cases where states lack the political will to prosecute grand corruption.[200] The ICC has made progress in promoting victim-centred trials by allowing for victims to participate in proceedings when the court deems it necessary.[201]

Thorny questions concerning how grand corruption should be incorporated into the Rome Statute have provoked much debate. This matter will be discussed below.

3.4.2.2.1 Grand Corruption as a Crime against Humanity?

It has been argued that categorising grand corruption as a crime against humanity might possess some deterrent value in relation to kleptocrats or their financial collaborators, such as banks and companies.[202] If kleptocrats are indicted for corruption by the ICC, foreign banks will become reluctant to conceal assets stolen by the corrupt person.[203] Also, there is likely to be more international co-operation when an international tribunal is involved and this may result in the abolition of bank secrecy laws.

Several scholars have made arguments for the inclusion of corruption within the existing definition of crimes against humanity, in the categories of "extermination"[204] and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to

197 Article 77 of the Rome Statute.
198 Article 27 of the Rome Statute.
199 Article 1 of the Rome Statute.
200 Kling (2013) at 42.
201 Article 68 of the Rome Statute.
202 Starr (2007) at 1289.
203 Starr (2007) at 1288.
204 Article 7(1)(b) of the Rome Statute.

body or to mental or physical health".[205] For instance, Bantekas has argued that where a corrupt government forcibly displaces a civilian population in order to award mining rights to an investor and subjects the displaced citizens to harsh living conditions without relief, its actions may be regarded as "extermination" in relation to crimes against humanity.[206] However, the ICC always has dealt with the individual act, which in the above example would be the exposure of displaced citizens to harsh conditions of life aimed at bringing about their destruction. It is rare for ICC to look at the underlying factors such as bribery of state officials. Therefore, the categorisation of grand corruption as a form of "extermination" under the Rome Statute is not feasible.

Most scholars base their arguments on the catch-all reference to "other inhumane acts" in Article 7(1)(k) of the Rome Statute to include grand corruption in the definition of crimes against humanity. For instance, Bloom submits that grand corruption could be regarded as a crime against humanity because it meets the requirements of causing great harm and suffering.[207] It has been suggested that treating grand corruption as a seriously inhumane act would show its grave nature and the resulting mass violation of rights.[208] Theoretically, grand corruption may meet the definitional requirements of an inhumane act, as the plunder of state resources in developing countries leaves millions of people languishing in poverty and millions of children dying from treatable diseases.

It is debatable how an act of grand corruption can satisfy the contextual element of "widespread or systematic attack directed against a civilian population" which is needed for a crime against humanity.[209] Article 7(2) of the Rome Statute requires that the crime be committed "pursuant to or in furtherance of a State or organisational policy". In this regard, some scholars contend that in a kleptocracy, the systematic spoliation of state resources forms part of the system of government, and therefore constitutes a state policy.[210]

205 Article 7(1)(k) of the Rome Statute.
206 Bantekas (2006) at 474-475.
207 Bloom (2014) at 656.
208 Ramasastry (2015) at 714.
209 Article 7(1) of the Rome Statute.
210 Kofele-Kale (2000) at 173. See also Starr (2007) at 1304.

The mental element required for crimes against humanity is contained in Article 30 of the Rome Statute and has been an area of considerable debate. Article 30 provides that all crimes under the Statute must have been committed with intent and knowledge. The mental element of the offence is met if the perpetrator of the crime is aware that the consequence "will occur" in the ordinary course of events.[211] The ICC has ruled that the use of the words "will occur" (as opposed to "may occur") means that the mental element refers to *dolus directus* (direct intention) and *dolus indirectus* (indirect intention), but excludes *dolus eventualis* (legal intention).[212]

When perpetrators engage in grand corruption, they usually do not have the direct intention or knowledge to cause suffering to citizens. They want to line their own pockets. Hence, it is difficult for the perpetrator to be regarded as possessing direct intention or even indirect intention to inflict conditions of life calculated to bring about the destruction of a civilian population, or to cause severe suffering or serious bodily or mental or physical harm. The inclusion of corruption as a crime against humanity would provide a remedy for victims of corruption and place victims at the centre of the process, which is a fundamental principle of transformative justice theory. However, corruption does not fit all the definitional elements of a crime against humanity.

3.4.2.2.2 Grand Corruption as a War Crime?

Unlike the idea of corruption as a crime against humanity, the idea of corruption as a war crime has not received significant attention. For a crime to be regarded as a war crime, it must be committed within the context of an international or non-international armed conflict. Also, it must violate a rule of customary or treaty-based international humanitarian law, and must be criminalised as such.[213] Article 8 of the Rome Statute provides a long list of acts classified as war crimes. Some acts, such as pillaging[214] and destruction or seizure of property,[215] raise economic

211 Article 30(2)-(3) of the Rome Statute.
212 *The Prosecutor v Thomas Lubanga Dyilo* (2012) para 1011.
213 Schwarz (2017) at 1307.
214 Article 8(2)(e)(v) of the Rome Statute.
215 Article 8(2)(e)(xii) of the Rome Statute.

concerns. Clearly, these kinds of acts violate the economic and social rights of citizens, but cannot be regarded readily as grand corruption. In other words, grand corruption rarely would be a war crime, and most acts of grand corruption cannot be branded as such.[216]

From the above discussion, it may be concluded that corruption cannot be incorporated into the existing definitional elements of international crimes under the Rome Statute. It is unlikely that states parties would be willing to expand the jurisdiction of the ICC because of the financial implications and for fear of trivialising the Court. Also, the relationship between African states and the ICC is deteriorating, given the allegations by African states that the Court is being deployed as a political weapon to prosecute African leaders. Regrettably, African leaders are amongst the primary perpetrators of grand corruption, and it will not be in their best interests to empower the Court to prosecute grand corruption. Whilst the ICC has the potential to offer transformative reparations in terms of transformative justice theory, corruption does not meet the definitional requirements of a war crime.

3.4.2.3 An International Anti-Corruption Court?

Mark Wolf, a senior United States District judge, has been agitating for the creation of an International Anti-Corruption Court (IACC).[217] He argues that grand corruption is connected with serious violations of human rights, thereby threatening the stability of many states. What is more alarming is the level of impunity and the inadequacy and inefficiency of international efforts to combat grand corruption, a situation akin to that pertaining to crimes under international law before the creation of the ICC.[218]

Wolf proposes that the IACC should be similar to the ICC or should be part of it, with a mandate to enforce laws prohibiting grand corruption. The IACC would require the recruitment of skilled investigators with expertise in dealing with knotty financial transactions; prosecutors with expertise in dealing with complicated cases; and an experienced and impartial judiciary.[219] Like the ICC, the IACC is supposed to be subject to the principle of complementarity, exercising

216 Kling (2013) at 27.
217 Wolf (2014).
218 Wolf (2014) at 1.
219 Wolf (2014) at 10.

jurisdiction when states parties are unwilling or unable to prosecute grand corruption. It has been proposed that the IACC ought to have the competence to hear civil fraud and corruption matters brought by private persons.[220] Wolf argues that the US likely would support an IACC, giving it a major advantage over the ICC.[221] The US is not a state party to the ICC and has been involved in preventing the Court from investigating its citizens. However, the US well may support an IACC as it has adopted a strong anti-corruption stance and US companies will benefit from the international prohibition and prosecution of bribery.[222]

The idea of a specialised IACC is appealing as it adds muscle to the fight against corruption. Such a court may have the greatest transformative potential for recovery of stolen assets in most parts of the world. An international tribunal may enjoy more success in obtaining evidence and in pressuring countries into co-operating in the investigation and prosecution of corrupt leaders. It is submitted that any specialised IACC should include compensation measures aimed at remediation of victims of corruption. Any anti-corruption tribunal without effective measures for the repatriation of stolen assets to victim countries would be of little effect in the fight against corruption. With such measures in place, the IACC would offer transformative effects to victims of corruption, with recovered assets being used to alleviate poverty and improve socio-economic conditions for citizens.

The campaign for an IACC has been received with mixed results. While accepting the importance of such a court, Human Rights Watch has raised concerns about the political unwillingness of kleptocrats to support the establishment of an international court which would hold them to account for plundering state resources.[223] The current challenges faced by the ICC likely will be faced by the proposed IACC also. African countries have been lamenting the ICC's targeting of African leaders while turning a blind eye to other continents. Likewise, the IACC probably will focus more on Africa than other continents, because of the high levels of grand corruption in the region. And like the ICC, African support for the IACC may turn sour once African leaders are prosecuted. There also may be resistance from African leaders if the statute

220 Wolf (2014) at 10.
221 Wolf (2014) at 13.
222 Wolf (2014) at 13.
223 Ganesan (2014).

enacting the Court does not include immunity. African leaders already enjoy immunity under the Malabo Protocol and it is rather unlikely that they will support the establishment of a Court meant to hold them to account. Thus, notwithstanding the potential of the proposed international anti-corruption tribunal to offer transformative solutions to victims of corruption, it remains something of a pipe dream.

To sum up, international courts have the potential to prosecute corruption successfully. In terms of the transformative justice approach, international courts offer better chances than national courts of holding to account powerful corrupt leaders and returning stolen assets. Prosecutions at international level encounter minimum political interferences and immunities, making it easier to address acts of corruption by political elites. What is more, international courts command the international co-operation required for successful investigation and prosecution of corruption, and may play a fundamental role in the return of assets. Successful asset recovery provides resources to remediate victims of corruption, thereby showing the transformative potential of international courts.

However, transitional justice focus, stemming from the international human rights movement, has seen international attempts to do justice confined to cases of physical violence. Also, international courts lack "local ownership" as cases are not heard in the victim country and provide limited participation opportunities for victims. Victim-centredness forms the core of transformative justice theory, and international tribunals offer little in this regard. This affects the legitimacy of international tribunals and results in few transformative outcomes for victims and communities. However, the powerful potential of international tribunals to offer transformative reparations through asset recovery cannot be ignored. These considerations suggest that the preferred approach to the prosecution of corruption is a combination of international and national factors, with international actors supporting national efforts to pursue justice and accountability. Other countries play a significant role in international co-operation for the investigation and prosecution of corruption. Foreign and international courts may become involved if the transitional state is unwilling or unable to prosecute corruption. And these courts should have one main transformative aim, which is to facilitate recovery of stolen assets and their repatriation to the victim country.

3.5 Conclusion

Criminal trials in the field of transitional justice play a significant role in ending impunity and reinforcing the rule of law. Over the years, the accountability mechanism has been deployed exclusively to address physical violence in transitional states in Africa. However, experiences in Tunisia and Egypt have indicated a shift in transitional justice, to accommodate economic crimes such as corruption. The prosecution of corruption as part of the transitional justice agenda sends a strong anti-corruption signal by the transitional state. This chapter has argued that the anti-corruption agenda is attainable if transitional justice processes are not designed by external actors, or rely upon dominant approaches which prioritise physical and civil rights over socio-economic rights. Mechanisms should be designed locally and implemented in order to reflect the demands of citizens.

When a state decides to prosecute corrupt leaders during political transition, it faces many challenges. These challenges may make criminal prosecutions unfavourable as the primary response to a violent past. What is more, the role of victims in the designation and implementation of this transitional justice mechanism is minimal. The criminal law approach limits victims' participation and deprives the mechanism of the ability to transform the socio-economic structures which facilitated corrupt behaviours. International criminal prosecutions are more retributive than transformative and are based on extrinsic standards which invariably do not reflect the causes and nature of conflicts, thereby ignoring economic violence such as corruption. The main transformative value of foreign or international trials is the recovery and repatriation of assets to the transitional states for remediation of victims of corruption. Recovered assets will assist in the alleviation of poverty and in the socio-economic transformation of victim communities. Any external trial of corrupt persons which does not involve the return of stolen assets to the victim country offers no transformative value to the transitional state.

Since transitional justice mechanisms complement one another, the deficiencies of criminal prosecution in terms of the transformative justice approach may be remedied by other mechanisms. Truth commissions and reparations may present better chances to effect

transformative participation and remediation of victims, and greater inclusion of economic justice in the transitional justice field. These will be explored in the coming chapters.

CHAPTER FOUR

TRUTH COMMISSIONS AND ANTI-CORRUPTION

4.1 Introduction

A truth commission (TRC) is a fact-finding body which is established for the specific purpose of investigating past abuses over a period of time.[1] According to Sharp:

> [A] truth commission is an open-ended institution, combining some of the features of a court, an investigative legislative committee, and community therapy body, its ultimate form and power determined only by the institutional imagination of its creators, together with the political and financial realities they face.[2]

It is founded on public truth-telling regarding past abuses and it helps in establishing a public and accurate record of the past. A TRC creates a platform where victims can be acknowledged publicly and they are given an opportunity to narrate their experiences of abuse. Also, it helps against any future denial of wrongdoings, or any memory relapse. TRCs around the globe have varied greatly as regards, for example, their enacting authority, scope of work, duration, budget, powers in terms of amnesties-for-truth, contents of the final report, reparations for victims, and the binding force of their recommendations.[3] However, despite the different forms they take, their common ultimate objective is to reveal the truth about a violent past.

The history of TRCs can be traced back to the early 1980s during the political transitions in Latin America which swept away dictatorships and military regimes in countries such as Argentina and Chile.[4] The commissions were set up to address past periods of gross violations of human rights, including enforced disappearances, torture and mass murders.[5] Since then, TRCs have become an increasingly popular and dominant mechanism to confront legacies of past violence around the world. However, most commissions have followed a script adopted in Latin America in the 1980s by prioritising violations of civil and political rights while pushing

1 Buergenthal (2006) at 103.
2 Sharp (2014) at 85.
3 Sharp (2014) at 85.
4 See Hayner (1994) at 614-616, 621-623; Grandin (2005) at 47-50; May (2013) at 499-506.
5 For example, the *Comisión Nacional Sobre la Desaparición de Personas* (National Commission on the Disappeared) in Argentina. See Hayner (1994) at 614-617.

socio-economic issues, such as corruption, to the peripheries of transitional justice.[6] Cavallaro & Albuja attribute the narrow approach taken by TRCs to "acculturation", which means the continuous replication of the dominant script as a result of "repeated information exchange and consultations with prior commission members and a cadre of international scholars and practitioners" in the field of transitional justice.[7] For example, the vice chairperson of the South African Truth and Reconciliation Commission (SA TRC) revealed how its establishment and work were influenced substantially and assisted by previous TRCs, particularly those in Chile and Argentina.[8] Once the dominant script was applied in different parts of the world, it became difficult to modify the field to include socio-economic rights and economic crime.[9]

The narrow approach to transitional justice became the conventional model for TRCs universally. Even though TRCs over the years have shown great ability to evolve and adapt to issues, such as the scope of physical abuses and the use of amnesties and their duration, many have embraced unjustifiably the "conventional understanding of human rights law" by focusing on civil and political rights.[10] Cavallaro & Albuja argue that, apart from the dominant practice and belief that TRCs should focus on civil and political abuse, "there is no convincing *a priori* reason why economic crimes should be excluded from the ambit of transitional truth commissions".[11]

The unduly narrow focus by TRCs has negative consequences. TRCs risk distorting the history and understanding of the past regime and the underlying factors leading to conflict.[12] They encourage the telling of a "political rather than an economic story, limiting knowledge of the economic underpinnings of conflict", such as corruption and the plunder of natural resources.[13] TRCs have become important participants in setting up post-conflict agendas for transitional governments through their recommendations. Where economic issues are not

6 See Cavallaro & Albuja (2008) at 122; Miller (2008) at 275-276. Sharp (2013) at 169-170.
7 Cavallaro & Albuja (2008) at 123-125.
8 Boraine (2000) at 142-143.
9 Cavallaro & Albuja (2008) at 125.
10 Andrieu (2014) at 545-546.
11 Cavallaro & Albuja (2008) at 123.
12 Sharp (2014) at 88. See also Miller (2008) at 276.
13 Miller (2008) at 280.

included in the work of TRCs, there is a real danger of their making recommendations which are not tailored to the realities of past violence and which will not "lay the proper ground work to prevent recurrence of the dynamics that led to the conflict".[14]

The hollowness of transitional justice mechanisms which are blind to socio-economic injustices has become clear in recent years.[15] There are increasing calls for more "transformative" transitional justice which would expand the work of TRCs to investigate drivers and sustainers of economic violence, such as corruption and structural inequalities. TRCs may assist in shaping the public record on past abuses by drawing the links between corruption and human rights violations.[16] It is important to understand how corruption caused or sustained past abuses, or how it kept dictators in power. It has been argued that investigating and revealing the truth about corruption can assist to delegitimise the abusers, to strengthen democratic norms and values, and to enhance public trust in the new government.[17] Also, the recommendations of TRCs on addressing corruption may form the basis for a strong anti-corruption campaign by the transitional authorities.

Transitional justice scholars increasingly are advocating the inclusion of corruption and other economic crimes in the mandate of TRCs.[18] In 2006, the UN Office of the High Commissioner for Human Rights (OHCHR) conceded that in some transitional states economic crimes would have been as prominent and egregious as physical violence perpetrated by a prior regime, and therefore may warrant a TRC clearly to "recognise, inquire into and report on these matters".[19] Most people in transitional states would want redress for economic violence which would have left them poorer. Therefore, it is becoming less likely for TRCs to be credible and successful in Africa without confronting corruption and other economic crimes. Also, a TRC with an anti-corruption mandate could assist transitional states with early commitment to and

14 Sharp (2014) at 88.

15 See Arbour (2007) at 4-10; Lanegran (2015) at 63.

16 Robinson (2014) at 34.

17 Andrieu (2012) at 548.

18 See Arbour (2007) at 14-25; Carranza (2008) at 311-323; Waldorf (2012) at 174-179; Sharp (2014) at 89-107.

19 Office of the High Commissioner for Human Rights (2006) at 9.

experience in fighting corruption and setting a strong foundation for good governance, transparency and accountability in the future.

This chapter will explore the work of TRCs in South Africa, Tunisia, Chad, Liberia, Sierra Leone and Kenya, and will use these case studies to argue for the inclusion of anti-corruption in the mandate of TRCs in Africa. It will analyse the essentials of setting up a TRC with an extended mandate to address corruption.

4.2 Truth Commissions and Transformative Justice

As indicated earlier, TRCs have adopted the liberal approach to transitional justice as a result of their reliance on the mandates and work of earlier TRCs. There are concerns that most TRCs are "externally driven" by international scholars and practitioners who have limited knowledge of the real domestic conditions, and that there is little input from the locals.[20] According to the African Union Panel of the Wise, TRCs can contribute to stability and to a just state based on the rule of law if they are "conducted in consultation with local actors".[21] Whilst consultations with foreign experts and the experiences of other countries are important, transitional governments need to recognise and heed the voices of victims and local communities as to the way forward.

Transformative justice challenges this liberal approach to transitional justice by TRCs.[22] Transitional states confront a daunting diversity of compound and profound challenges, including economic instability, lack of basic needs by the majority of citizens, structural inequalities and endemic corruption.[23] TRCs which adopt the dominant script to address physical violence and leave economic violence unaddressed may risk their credibility in the campaign for justice and the non-recurrence of violence. Transformative justice advocates a holistic approach to transitional justice which rejects a simple focus on acts of political violence by TRCs.[24] In order to present a complete picture of the past, TRCs should expand their work to

20 See Sriram (2007) at 591; Andrieu (2010) at 539; Andrieu (2012) at 541; Sharp (2013) at 160-161.
21 African Union Panel of the Wise (2013) at 21.
22 Gready & Robins (2014) at 340.
23 See Daly (2002) at 79.
24 Gready & Robins (2014) at 344-345.

look into embezzlement, abuses of power and other corrupt practices which inflicted hardships on citizens. In other words, a transformative justice approach by TRCs could contribute to bringing to the fore the "silent, permanent injustices, discriminations, and exclusion which limit people's physical, social, and psychological well-being".[25] According to Gready & Robins:

> Demonstrating the indivisibility and interdependence of rights is a powerful and practical tool in the argument for holistic, transformative responses.[26]

TRCs need to demonstrate that all rights are indivisible and mutually dependent upon one other for full enjoyment and fulfilment. A transformative justice approach ensures that TRCs have an opportunity to acknowledge and respond to the full range of rights violations, including economic violence as part of their mandate.

Transformative justice requires local voices in the designation and implementation of transitional justice mechanisms.[27] It calls for a more victim-centred approach which requires transitional justice processes "that arise as a response to the explicit needs of victims, as defined by victims themselves".[28] It has been argued that the strongest TRCs are built:

> through a process of consultation and careful consideration of what kind of commission would be most appropriate for the context.[29]

TRCs become more effective when citizens exert local ownership by their active participation in their designation and implementation. A transformative approach to transitional justice will depend upon a proper understanding of the needs of the affected communities. Therefore, the first step is a bottom-up approach, which includes conducting public consultations on issues to be included in the mandate of TRCs. The crucial question is: what are the past injustices which citizens want investigated and addressed by the TRC? Affording citizens a chance to become involved definitely will result in corruption and other economic crimes being identified as a central concern of transitional justice. For example, Kenya embarked on a national dialogue

25 Andrieu (2012) at 545.
26 Gready & Robins (2014) at 355.
27 Gready & Robins (2014) at 357.
28 Robins (2011a) at 77.
29 Office of the High Commissioner for Human Rights (2006) at 7.

before the establishment of the Kenyan Truth, Justice and Reconciliation Commission which, in response to demands by citizens, was then mandated to confront economic violence.[30]

TRCs have combined functions of truth-seeking and truth-telling, thereby creating a public space for victims to air grievances.[31] Their accessibility to the public provides a ready platform for the inclusion of victims. TRCs have greater potential than criminal trials to confront corruption in accordance with transformative justice theory. They are less individualistic than criminal trials, as victims are given a chance to tell their stories without being constrained by the admissibility rules and high standard of proof applicable to criminal trials. Andrieu agrees with the potential transformative effects of TRCs, suggesting that an anti-corruption TRC should integrate a victim-centred approach which allows victims of corruption to narrate their experiences.[32] TRCs are able to investigate and give a sense of the structural drivers of corruption and to address its longer term socio-economic effects, which is a primary objective of transformative justice. By including corruption and other economic crimes in their mandates, TRCs can give voice to the silent victims of past economic abuses.[33]

TRCs constitute "a corps of temporary public servants" equipped with a legal and/or moral authority to call and interrogate powerful actors and "to appeal to public opinion from a unique position".[34] They have the potential to commence processes of public engagement and deliberation, and their force can be felt in a manner which is antipathetic to the established order.[35] It has been argued that:

> [A] truth commission constitutes ... an *ad hoc* actor that in its brief existence focuses a high degree of democratic energies. Such energies have great potential for calling attention to the systemic obstacles to justice and, ultimately, to show the need for systemic transformation.[36]

Thus, TRCs are in a good position to challenge social inequalities fuelled by corruption and to anticipate a new social contract based on good governance and respect for human rights.

30 Lanegran (2015) at 66-67.
31 Robinson (2015) at 39.
32 Andrieu (2012) at 549.
33 Andrieu (2012) at 545.
34 Cobián & Reátegui (2009) at 146.
35 Cobián & Reátegui (2009) at 146.
36 Cobián & Reátegui (2009) at 146.

A transformative approach by TRCs would enhance the potential of transitional justice to address the root causes of conflicts in Africa.[37] Truth-seeking about past corruption plays a role in ending impunity and assists in generating public discussion and building awareness, facilitating democratisation, and making a contribution to reconciliation.[38] TRCs may contribute to wide national discussions about anti-corruption, where endemic economic injustices and economic factors are at the centre of past conflicts and TRCs have been mandated to address such injustices. Many transitional states will be suffering from long institutionalised corruption and a TRC may act as a catalyst to "effect and help to build momentum at a grassroots level for longer-term anti-corruption reform".[39] Public platforms or national debates provided by TRCs to confront past corruption and its impact on human rights may arouse citizens to become more involved in the fight against corruption.

Nonetheless, the transformative approach by TRCs may fail to address corruption in the long term. The mandate of TRCs is typically for a specific period, which may affect the sustainability of their transformative effects. This is an issue in context where TRCs do not enjoy political backing, particularly if political leaders feel threatened or frustrated that addressing corruption could disturb their political power.[40] In such situations, corruption may even become worse during or after the mandate of the TRC, with political elites reverting to their corrupt behaviour. This problem is discussed in sections below where transformative justice approaches by TRCs in Chad, Liberia, Sierra Leone and Kenya did not lower corruption levels in the countries. Hence, the transformative justice approaches by TRCs need political support in the long term for sustainable anti-corruption and socio-economic transformation. Genuine political will closes the wide gap between ambitious theoretical approaches and realities on the ground.[41]

37 See Thoms & Ron (2007) at 686-692 on the role of socio-economic violence in causing conflicts.
38 Harwell & Le Billon (2009) at 287.
39 Robinson (2015) at 49.
40 See Pham, Gibbons and Vinck (2019).
41 See also Sharp (2019) at 571.

4.3 African Experiences

A number of TRCs in Africa have taken steps to depart from the dominant approach to transitional justice by including economic violence in their mandates. This chapter will discuss five such commissions, namely, those in Chad, Liberia, Sierra Leone, Tunisia and Kenya. It also will consider the missed opportunity by the South African TRC to address apartheid-era economic crimes, despite its reputation as one of the best models of a TRC in the world. The chapter will show that, notwithstanding the dominant script, TRCs in Africa cannot afford to place economic violence on the peripheries of transitional justice. It will show further that findings by the five designated TRCs established that corruption and other socio-economic concerns were amongst the main causes of violence and conflict. The close relationship between physical violence and economic violence in some countries has demonstrated that TRCs providing a "clear picture" of the past must include investigating economic crime and other violations of social, economic and cultural rights.

4.3.1 Chad: Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories (1990-1992)

Chad gained its independence in 1960 and, not long after, the country became the site of frequent internal conflicts and military *coups*.[42] Hissène Habré was the most notorious military leader to serve as president, from 1982 to 1990. His government continuously inflicted physical violence on citizens and simultaneously engaged in economic violence.[43] Habré was removed from power through a military *coup* orchestrated by his former lieutenant, Idriss Deby, who became the new president.

Immediately after usurping power, Deby sanctioned the creation of a Commission of Inquiry (the Commission) to investigate physical violence and economic crimes committed by the former President Habré, his accomplices and/or accessories.[44] Article 2 of the founding Decree mandated the Commission to "audit the financial operations and bank accounts" and to

42 Kritz (1995) at 52.

43 See Nolutshungu (1996) at 234-235.

44 Decree Creating the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories, Decree No 014/P.CE/CJ/90 of 1990.

"take inventory of all goods and property, in the country and abroad" belonging to the former president and his ilk. This approach by the Chad authorities deviated from the norms of liberalism dominant in transitional justice. The authorities involved in the transitional justice processes were not influenced heavily by international actors or the practices of previous TRCs in Uganda or Argentina. Instead, they chose a transformative justice approach by contextualising transitional justice mechanisms to the needs of the affected community. Chad was in the financial doldrums after the demise of Habré, and therefore it was desperate to confront past corruption and recover stolen assets to alleviate the socio-economic hardships of its citizens.[45]

The Report of the Commission was released in 1992 and it read very much like a political smear of the former president. For example, it referred to Habré as a "man without scruples", a Machiavellian, who "shamelessly and unabashedly usurped the attributes of God".[46] The Report was disappointing in its recording of corruption committed by Habré and it failed to crack the puzzles in the financial accounts of the former president, despite the dedication of an economic crimes section within the Commission to investigate corrupt activities by the former president. This failure was attributed to a lack of financial resources and auditing expertise.[47] However, the Report did document the arbitrary confiscation of property of arrested persons and political prisoners by the government, including bank accounts, houses and cars.[48] The targeting of political persons was extended to punishment of family members whose possessions were pillaged and some of whom were evicted from their homes.[49] The evicted homes would be occupied immediately by members of Habré's ethnic group. The Commission reported how dependants of those massacred by the Habré regime were deprived of moral and material support and many became homeless. It estimated that at least one billion francs in movable

45 Sharp (2014) at 105.

46 Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories (1995) at 58, 60 & 88.

47 Report of the Chad TRC (1995) at 54; Sharp (2014) at 93.

48 Report of the Chad TRC (1995) at 81-83.

49 Report of the Chad TRC (1995) at 82.

and immovable assets were plundered and confiscated from innocent citizens each year.[50] It recorded that:

> The reign of terror and despotism that came to an end on 1 December 1990 was knowingly maintained and encouraged by small, corrupt cliques that were more concerned about protecting their privileges than with the survival of the nation.[51]

This comment implied a palpable link between corruption and physical violence in Chad. However, no other connections were made between these two forms of violence. Missing from the Commission's Report were victims of corruption and other socio-economic violations. The Commission missed an opportunity to link corruption by the past regime directly to the socio-economic hardships faced by citizens.

Despite its shortcomings, the Commission introduced a transformative approach to transitional justice by attempting to address physical violence and economic violence simultaneously. The Commission was given a mandate to investigate crimes responsible for the poor state of the citizens, without prioritising civil and political rights over social, economic and cultural rights. Cavallaro & Albuja argue that the fact that the Commission preceded the spread of "acculturation" affirms that local TRCs may include corruption in their mandates if they are not influenced overly by the dominant liberal script.[52] Even though it failed to report on the financial crimes of Habré, it broke new ground to show the close link between political violence and economic violence, particularly with regard to arbitrary confiscation of property belonging to political prisoners. It showed that political violence during Habré's term of office aggravated economic violence, especially as regards confiscation of properties of political enemies and their families. It also reported how countries such as the USA, France, Egypt, Iraq and Zaire (now the Democratic Republic of Congo) provided financial, material and technical support to the Directorate of Documentation and Security, which was a political police agency responsible for gross violation of human rights.[53] To their credit, the transformative justice approach taken by the Chadian authorities in the establishment of the Commission inaugurated a

50 Report of the Chad TRC (1995) at 72.
51 Report of the Chad TRC (1995) at 92.
52 Cavallaro & Albuja (2008) at 138.
53 Report of the Chad TRC (1995) at 64.

contextualised transitional justice process which attempted to address the actual causes and drivers of the past abuses by including both physical violence and economic violence in its work.

However, the transformative approach by the Commission failed to reduce corruption in the long term. For instance, Chad's rankings in major governance indicators deteriorated between 2000 and 2007, with particular decline in the rule of law, control of corruption, and government effectiveness.[54] Corruption remains a major area of concern in the country and it manifests in different forms such as bribery, bureaucratic corruption, electoral corruption, nepotism and grand corruption.[55] Hence, transitional governments should offer substantive support to transformative approaches by TRCs beyond their timeline to ensure that corruption is addressed in the long term.

4.3.2 South Africa: Truth and Reconciliation Commission (1995-1998)

The South African Truth and Reconciliation Commission (SA TRC) was set up in 1995 by the new democratic government in response to the violence perpetrated during the apartheid era. The Commission was regarded as one of the most popular TRCs and a suitable model for future commissions.[56] It was given a mandate to:

> provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights

between 1 March 1960 and the end of apartheid.[57]

Instead of adopting a transformative justice approach to include economic violence, the SA TRC interpreted its mandate to be concerned solely with physical violence, despite its acknowledgment that apartheid affected socio-economic rights as well.[58] The Commission was criticised for failing to address structural inequalities perpetuated by the corrupt and abusive apartheid system.[59] It told a story of physical violence rather than of "long-term, systemic

54 World Bank (2009) at xv.
55 Transparency International 2018a; US Department of State (2019); Freedom House (2019).
56 See Koss (2002) at 526; Garkawe (2003) at 378-380; Brahm (2009) at 9.
57 Section 3(1)(a) of the Promotion of National Unity and Reconciliation Act 34 of 1995.
58 Report of the Truth and Reconciliation Commission of South Africa, Volume 5 (1998) at 125.
59 See Stanley (2001) at 539-541; Du Pisani & Kim (2004) at 88. Miller (2008) at 280-282.

abuses born of a colonial project with economic objectives".[60] Various civil society and non-governmental organisations in South Africa regretted the decision of the SA TRC to ignore the widespread socio-economic injustices of apartheid.[61]

A 2006 civil society report pointed out that "when the apartheid state was at its most repressive, it was also at its most corrupt".[62] The apartheid era in South Africa was characterised by endemic corruption, as the minority government deployed illicit means to sustain the system. Yet, South Africa followed the dominant international practice of TRCs, ignoring the chance of harnessing the resources of the transformative justice approach. The Deputy Chairperson of the Commission even conceded that the SA TRC was influenced by the dominant script established by earlier commissions in Latin America.[63] The concession highlights the problem with the liberal approach to transitional justice, as the work of the SA TRC was determined by conventional international practice and it was not contextualised to render visible the true nature and extent of violence during apartheid.

Van Vuuren has exposed how corruption and other economic crimes were used by politicians, banks and allies of the apartheid government to bust international arms sanctions and to sustain white supremacy.[64] The truth about corruption and other economic crimes committed by the apartheid government remains unknown and has not been investigated. In terms of the transformative justice approach, the SA TRC failed to challenge corrupt relations and structural inequalities common in the apartheid era. Corrupt networks which sustained the apartheid government were never interrogated and the transition in 1994 was actually "business as usual" for them, thereby facilitating impunity and permitting them to survive and draw in new politicians and businessmen.[65] These corrupt networks, such as that involving Armscor which supplied guns to the apartheid regime, continued after 1994 and played a part in the South African Arms Deal scandal which was pervaded by corruption and other forms of

60 Miller (2008) at 280.

61 Submission to the Truth and Reconciliation Commission concerning the relevance of economic, social and cultural rights (1997).

62 Van Vuuren (2006) at 85.

63 Boraine (2000) at 142-143.

64 Van Vuuren (2017) at 160-203.

65 Van Vuuren (2017) at 506-507.

economic criminality.[66] Part of the problem was the failure by the SA TRC and other transitional justice mechanisms to address past corruption. Van Vuuren criticises the approach by the SA TRC:

> South Africa's transition in fact brings these issues into sharp focus. The relative invisibility of economic crimes and violations that resulted from the South African Truth and Reconciliation Commission's (TRC) focus on torture and physical violence is something that continues to compromise those seeking economic and social justice in South Africa's ongoing transition. The narrative constructed by the TRC obscures this part of the country's history by presenting victims of apartheid as those who suffered physical violence. At a fundamental level, our memories are now filled with testimonies of the horrors of torture and detention ... However, we know comparatively little of the corruption and sanctions busting that funded apartheid's police state, and that facilitated the mass theft of money from the public purse.[67]

When it became clear that white minority rule was coming to an end, there was "a rush to grab as much in the way of spoils as possible before the curtain came down".[68] As a result, the first democratic government in South Africa inherited empty state coffers.

It has been argued that current corruption is a continuation of a deeply corrupt system predating post-apartheid South Africa.[69] The need for socio-economic transformation, as a component of transformative justice, has been discussed extensively in South Africa.[70] Van Vuuren argues that failure by the SA TRC to investigate and address past corruption undermined the creation of a more just society.[71] He further argues that the socio-economic rights enshrined in the South African Constitution mean less when no attempts have been to recover the billions of rands stolen during the apartheid era.[72] Indeed, addressing apartheid-era corruption and ensuring asset recovery would provide resources required for the government to implement fundamental socio-economic rights in South Africa. The SA TRC missed an opportunity to address apartheid-era corruption, thus depriving millions of South Africans of

66 See Van Vuuren (2017) at 173-174, 194-199.

67 Van Vuuren (2017) at 506.

68 Hyslop (2005) at 784.

69 Hyslop (2005) at 784; Van Vuuren (2017) at 507.

70 See Bond (2006) at 141-142; Gumede (2013) at 7-19; Jaichand (2017) at 12-25; Bhebe (2018) at 22-24, 60-62 & 72.

71 Van Vuuren (2017) at 507.

72 Van Vuuren (2017) at 507.

opportunities for socio-economic transformation and, at the same time, enriching the enforcers and supporters of the apartheid regime.

Interestingly, in its recommendations for future prevention of gross human rights violations, the SA TRC noted that endemic corruption in both the private and public sectors created a barrier to the establishment of a human rights culture in South Africa.[73] Considering that the Report was published within five years of the end of apartheid, the note is pregnant with assumptions that the SA TRC could have confronted the close link between past corruption and the apartheid regime. The amount of apartheid-era economic crime had compelled the SA TRC to state frankly that any war against poverty and crime in South Africa required:

> a corresponding ruthless stand against inefficiency, corruption and maladministration at every level of the public and private sectors.[74]

The fact that the SA TRC remarked upon the impact of corruption on the creation of a human rights culture in South Africa indicates that it was able, and should have been mandated thus, to address apartheid-era corruption and role in sustaining a repressive regime.

There has been an increased focus on apartheid-era corruption in recent years, particularly by non-governmental organisations. For example, the People's Tribunal on Economic Crime in South Africa was formed in 2018 by civil society to look into corruption and other economic crimes dating back to the apartheid days. The Tribunal heard and collected evidence related to corruption and state capture in South Africa, including evidence of how the apartheid regime created a corrupt and highly secretive system which helped politicians launder public and private funds and break international sanctions.[75] The preliminary findings of the Tribunal indicate that corruption in the Arms Deal of 1999 would have been reduced "had the apartheid sanctions-busting plot been fully investigated and those responsible been prosecuted and punished".[76] It remains to be seen whether the post-apartheid South African government will be willing to investigate apartheid-era corruption. It would desirable for civil society organisations in South Africa, particularly those which participated in the Tribunal's

73 Report of the Truth and Reconciliation Commission of South Africa, Volume 5 (1998) at 309.

74 Report of the Truth and Reconciliation Commission of South Africa, Volume 5 (1998) at 309.

75 Open Secrets (2018) at 6-57.

76 Interim Findings of the People's Tribunal on Economic Crime (2018) at 6.

work, to mobilise citizens to become involved actively in calling for accountability for apartheid-era corruption.

It is evident that an opportunity to apply a transformative justice approach to past abuses was missed and, as a result, South Africa still is experiencing high levels of corruption and structural inequalities which have their origins in the apartheid era. Bond argues that it was a "political transition based on elite, not popular reconciliation" which failed to offer any transformative value to most South African citizens.[77] A transformative justice approach by the SA TRC would have confronted economic violence during apartheid, such as corruption and structural inequalities, and offered tangible reparations to victims during the post-transition period. The narrow investigations of the SA TRC only produced "truth" of the experiences of a minority of South Africans, particularly state agents and political activists.[78] It has been argued that by ignoring victims of economic crime, the SA TRC "wrote the vast majority of apartheid's victims out of its version of history".[79] As summarised by Carranza, the omission by the SA TRC to address apartheid-era corruption and the consequences of such an unduly narrow approach taken by the SA TRC "should be a lesson for other countries, especially those seeking to emulate the TRC process".[80]

4.3.3 Sierra Leone: Truth and Reconciliation Commission (2002-2004)

Sierra Leone was involved in a civil war, from 1991 to 2002, between the government and the Revolutionary United Front (RUF), which was a rebel armed group. Initially, the RUF's main demand was the eradication of corruption and poor governance, but its fight quickly escalated to attacking, raping, pillaging and murdering civilians. More than 50 000 civilians were killed and more than a million citizens were displaced.[81] Before the civil war, corruption was the primary means of accumulation of wealth by the political elite, which aggravated the dire economic conditions of citizens and contributed to the fragility of the state.[82] The scramble for

77 Bond (2006) at 145.
78 See Lanegran (2015) at 64.
79 Mamdani (2000) at 183.
80 Carranza (2008) at 313.
81 Bellows & Edward (2006) at 394.
82 See Bah (2011) at 200, 205-207.

natural resources by warring groups, particularly for "black diamonds" which played a part in sustaining the armed conflict, made clear the link between natural resources and violent conflicts.[83] The decade-long civil war came to an end in 2002, after the intervention of the United Nations and the signing of a peace agreement.[84]

The Lome Peace Agreement established the Sierra Leone Truth and Reconciliation Commission (SL TRC) to "address impunity; break the cycle of violence" and to acquire "a clear picture of the past in order to facilitate genuine healing and reconciliation".[85] The peace agreement tacitly advanced a transformative justice approach by empowering the SL TRC to obtain a "clear picture of the past" without prioritising civil and political causes over social and economic causes of the conflict. In other words, the enabling provisions prevented the SL TRC from concentrating on one cause to the detriment of other drivers of the conflict. The SL TRC interpreted its mandated by adopting an expansive view on human rights violations to be addressed, noting that:

> Efforts to separate human rights into categories of "civil and political" as opposed to "economic and social", which have characterised human rights law in the past and which reflected geo-political conflicts, have been rejected in favour of a more holistic approach sometimes described as "indivisibility" of human rights. Thus, human rights are acknowledged as being universal, interrelated, indivisible and interdependent.[86]

This broad interpretation is supported by transformative justice theory, which considers affirmation of the indivisibility and interdependence of rights to be essential for pursuing holistic and transformative responses to past violations.[87]

Unlike the TRC in South Africa, the SL TRC carried out its mandate by examining the historical antecedents and root causes of the conflict, with a special focus on issues of governance.[88] On historical antecedents, the SL TRC noted that, under the leadership of the ruling All People's Congress from 1968 to 1991, there was rampant corruption, nepotism and

83 Sharp (2014) at 96.
84 Peace Agreement between the Government of Sierra Leone and the RUF (Lome Peace Agreement).
85 Article XXVL of the Lome Peace Agreement.
86 Report of the Sierra Leone Truth and Reconciliation Commission, Volume 1 (2004) at 52.
87 Gready & Robins (2014) at 355.
88 Report of the Sierra Leone TRC, Volume 2 (2004) at 4.

plunder of state resources at all levels of government.[89] One of the primary findings of the SL TRC was that:

> the central cause of the war was endemic greed, corruption and nepotism that deprived the nation of its dignity and reduced most people to a state of poverty.[90]

Corruption and other economic crimes "made armed rebellion an increasingly attractive option for many disaffected Sierra Leoneans."[91] This approach by the SL TRC is commendable as it did not limit itself to political causes of the conflict as dictated by liberal peacebuilding. Instead, it took a transformative justice approach to examine the socio-economic causes of the conflict as well.

On the nature and context of violence during the conflict, the SL TRC identified clearly the close link between economic violence, such as pillaging, looting and extortion, and physical violence, such as killing, torture and rape.[92] It did not attempt to separate or categorise the various violations as they were committed simultaneously and by the same perpetrators. The SL TRC reported that private and public assets were looted during the conflict, with combatants enriching themselves through tactics known as "pay yourself".[93] The Report has been applauded for being able to demonstrate the inseparable nature of economic violence and physical violence.[94] The SL TRC interrogated the socio-economic nature and context of violence which, till then, had occupied a back seat in transitional justice and raised the need to reconceptualise transitional justice from being a liberal peacebuilding project to becoming a transformative justice project.

The TRC's recommendations were divided into three categories:

- an "imperative" category of recommendations which implied a legal obligation to implement immediately;

89 Report of the SL TRC, Volume 2 (2004) at 6.
90 Report of the SL TRC, Volume 2 (2004) at 27.
91 Report of the SL TRC, Volume 2 (2004) at 30.
92 Report of the SL TRC, Volume 2 (2004) at 33.
93 Report of the SL TRC, Volume 2 (2004) at 36.
94 Sharp (2014) at 97.

- a “work towards” category of recommendations which implied a legal obligation to implement without any time frame; and
- a “seriously consider” category of recommendation which had no legal obligation to implement.[95]

In the imperative category, the SL TRC recommended that the government of Sierra Leone fight corruption by establishing a legal framework for the protection of whistleblowers and an assets disclosure regime.[96] In the second category, it recommended that the government work towards ensuring independent corruption prosecutions and ensuring public knowledge on the fight against corruption.[97] In the third category, it called upon the government, civil society, businesses and the donor community to form a united front to fight corruption.[98]

The approach adopted by the SL TRC to address past corruption is commendable and made a contribution to the development of transitional justice. It did not comply with the dominant practice of TRCs, and took a transformative justice stance by treating all rights as interrelated, indivisible and interdependent. It showed that corruption can be a major cause and sustainer of violence or conflict in Africa and, therefore, should be addressed as part of the transitional justice agenda.

However, Sierra Leone continued to experience major challenges of weak governance, widespread poverty and systemic corruption, which undermined sustainable development and long-term reconstruction efforts.[99] This indicates failure by the government to effect long-term anti-corruption agenda and transformation of socio-economic conditions in the country. Again, it brings out the importance of long-term political will to effect anti-corruption and socio-economic transformation after the mandate of the TRC has ended.

95 Report of the SL TRC, Volume 2 (2004) at 119-120.
96 Report of the SL TRC, Volume 2 (2004) at 160-161.
97 Report of the SL TRC, Volume 2 (2004) at 161-162.
98 Report of the SL TRC, Volume 2 (2004) at 163.
99 Ravichandran (2009); Chene (2010) at 1.

4.3.4 Liberia: Truth and Reconciliation Commission (2006-2009)

Liberia was involved in successive civil wars between rebel groups led by Charles Taylor and the government from 1989 to 2003. Between June 1990 and 1996, fourteen peace agreements were negotiated but the tensions remained high. Taylor was elected president in 1997, which office he occupied until his resignation in 2003. A peace agreement was reached in 2003, after the intervention of the international community, and the parties agreed to the establishment of a TRC.[100] In 2005, the National Transitional Legislative Assembly of Liberia enacted An Act to Establish the Truth and Reconciliation Commission for Liberia (Liberian TRC Act).

The Liberian TRC was given a mandate to promote national peace and reconciliation by investigating gross human rights violations and violations of humanitarian law, sexual violations, and economic crimes which occurred between 1979 and 2003.[101] In addition, the Commission was mandated to provide a forum to confront impunity and to provide a platform for victims to share their experiences in order to establish a clear picture of the past. It was authorised further to investigate the antecedents of the crises and to conduct a critical review of Liberia's history "in order to address falsehoods and misconceptions of the past relating to the nation's socio-economic and political development".[102] This holistic approach was an expression of transformative justice and declined the narrow liberal approach in seeking to establish "a clear picture" of the past which would include socio-economic issues.

The Report of the Liberian TRC established that the root causes of the conflict included "poverty, greed, corruption, limited access to education, economic, social, civil and political inequalities; identity conflict, land tenure and distribution".[103] It stipulated that:

> The perpetration of economic crimes in Liberia fuelled violent conflict both domestically and throughout the region. Warring factions used natural resources, such as timber, diamonds and other minerals, and rubber to finance war efforts. The illegal exploitation

100 Article XIII of the Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the political parties (2003).

101 Article IV of the Liberian TRC Act of 2005.

102 Article IV(c) & (d) of the Liberian TRC Act of 2005.

103 Report of the Liberian TRC, Volume I (2009) at 9.

> of natural resources by warring factions greatly contributed to the procurement and distribution of weapons throughout the sub-region.[104]

The TRC compiled a comprehensive volume detailing corruption and economic criminality between 1979 and 2003.[105] The volume contains details on economic crimes committed by individuals and corporations. Further, the TRC provided a list of individuals and corporations responsible for these crimes.[106] Also, it found that successive governments, and particularly the Taylor government, had established a massive patronage system and, as a result:

> economic crimes were committed by warring factions, government agencies, Liberian citizens and foreign individuals and corporate actors on a widespread and systematic level.[107]

It concluded its findings by noting that embedded and systematic economic crime in Liberia had deprived citizens of their economic rights and had undermined economic development and state policy.[108]

The first recommendation of the Liberian TRC on economic crime was to pursue civil and criminal actions against the alleged offenders and to reform laws to strengthen good governance and combat future economic crime.[109] The Liberian Solicitor General was advised strongly to investigate and prosecute economic crimes recorded in the Report and use criminal confiscation laws to recover stolen assets.[110] Further, the TRC recommended that the government establish a Reparations Trust Fund (RTF) to compensate victims of economic crime in Liberia.[111] Funding for the RTF would come from civil and criminal asset recovery schemes to repatriate stolen assets to Liberia. It also recommended that economic crimes should be included in the mandate of any tribunal set up by Liberia with jurisdiction to prosecute individuals for crimes under international criminal law.[112] Worthy of note is that the TRC also

104 Report of the Liberian TRC, Volume III (2009) at 39.
105 Report of the Liberian TRC, Volume III (2009) on "Economic Crimes and the Conflict, Exploitation and Abuse".
106 Report of the Liberian TRC, Volume III (2009) at 6-9.
107 Report of the Liberian TRC, Volume III (2009) at 39.
108 Report of the Liberian TRC Volume III (2009) at 39.
109 Report of the Liberian TRC, Volume III (2009) at 40-42.
110 Report of the Liberian TRC, Volume III (2009) at 45.
111 Report of the Liberian TRC, Volume III (2009) at 43.
112 Report of the Liberian TRC, Volume III (2009) at 44.

recommended that the international community prosecute economic crimes linked to Liberia and assist in the investigation and prosecution of economic crime in Africa.[113]

The Liberian TRC broke new ground in its extensive Report on the role of corruption and other economic crimes in violent conflict by providing a detailed narrative on economic violence. The holistic approach taken by the TRC made it clear that physical violence and economic violence were inseparable in constructing a full picture of the causes and nature of the civil war in Liberia.[114] Instead of the dominant script, Liberia contextualised the mandate of its TRC to respond to the actual causes and nature of violence in the country.

Successive governments since the end of the TRC's mandate have failed to address corruption or to effect socio-economic transformation in Liberia. For instance, during former President Johnson Sirleaf's first term in office, more than 20 government ministers were accused of corruption by the anti-corruption commission but no one was prosecuted, with the president alleging that the country had a weak judiciary.[115] It is reported that the current challenges of widespread corruption and economic crises are threatening to renew violence in the country.[116] This shows that failure to lower corruption and effect socio-economic transformation by transitional governments pose a threat to peace and development in the country.

4.3.5 Kenya: Truth, Justice, and Reconciliation Commission (2009-2013)

The post-election violence of 2007, which led to the death of more than a thousand citizens, forced Kenya to adopt a transformative justice approach to transitional justice by embarking on a national dialogue and reconciliation process through the mediation of former UN Secretary-General, Kofi Annan.[117] Many Kenyans were convinced that economic crimes were part of the root causes of Kenya's 2008 post-election violence, specifically the misappropriation of land.[118]

113 Report of the Liberian TRC, Volume III (2009) at 45-46.
114 Sharp (2014) at 100.
115 Lee-Jones (2019) at 1.
116 The Economist (2019).
117 Lindenmayer & Kaye (2009) at 1-26.
118 Lanegran (2015) at 63.

Contrary to international practice, earlier debates on a TRC in Kenya had included the need for truth and justice regarding corruption and other economic crimes.[119] Addressing economic violence long was seen as key to dealing with historical injustices in Kenya because of the proximate link between violence and economic crime.[120] In 2003, Kenya had created a Task Force on the Establishment of a Truth, Justice and Reconciliation Commission. Its main objective was to determine whether there was a necessity for a TRC and, if so, to recommend the type of commission to be established.[121] The Task Force considered the inclusion of economic crime within the mandate of the proposed Commission. It noted that a ravaged state like Kenya "cannot be recreated without an agenda for transitional justice to end public corruption and prevent human rights abuses".[122] It further noted that state despotism under the Moi government had inflicted both physical violence and economic violence upon citizens.[123] The Task Force recommended the inclusion of corruption and economic crime in the mandate of the proposed Commission.[124] Its Report reflected the demands of Kenyans who wanted the eradication of corruption as one of their priorities.

The Truth, Justice and Reconciliation Commission (TJRC) was founded after the post-election violence by the Truth, Justice and Reconciliation Act 6 of 2008 (TJR Act). It was given a mandate to establish, for the period 1963 to 2008:

> an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office.[125]

Further, it was mandated to provide a complete a picture of the "causes, nature and extent of the gross violations of human rights and economic rights" committed during the same period.[126] In carrying out its mandate, the TJRC was required to obtain the perspectives of both

119 Syle (2018) at 73.
120 Musila (2009) at 447-448, 450.
121 Mutua (2004) at 15.
122 Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003) at 11. See also Mutua (2004) at 15-16.
123 Report of the Task Force at 22.
124 Recommendation 24 of the Task Force Report.
125 Section 5(a) of the TJR Act.
126 Section 5(b) of the TJR Act.

the victims and perpetrators of the violations. It had to provide "victims of human rights abuses and corruption with a forum to be heard and restore their dignity".[127] Kenyans showed significant appetite for economic justice by testifying and making submissions on economic violence.[128] The TJRC had authority to grant conditional amnesty to persons who made full disclosure of all the relevant facts related to economic crime.[129]

The Report of the TJRC was released in 2013. Its primary findings showed that successive governments between 1978 and 2008 were responsible for numerous violations of human rights, which included grand corruption and economic crime.[130] The Report noted that there was "a direct link between corruption and gross violation of human rights".[131] It noted further that:

> Poor people are affected by corruption because it diverts resources from investment in infrastructure that is crucial to lift them out of poverty. Corruption undermines the quality of public services on which the poor depend particularly to meet their basic needs. Minority and indigenous people suffer effects of corruption when they are displaced by, for example, corruptly approved infrastructure developments.[132]

There were reports of political interference from the president's office regarding the findings of the TJRC on economic violence, particularly on unlawful acquisition of land.[133] Slye contends that such political interference underscored how economic power and interests lay "at the heart of injustices" in Kenya and, therefore, warranted investigations of economic crime by the TJRC, in order fully to understand the social and economic causes of violence in Kenya.[134]

The TJRC recommended a series of anti-corruption measures, including harmonisation of various anti-corruption laws, domestic criminalisation of certain offences contained in UNCAC, expansion of the Ethics and Anti-Corruption Commission from three to nine commissioners, and expedition of investigations of corruption cases which had been idle for

127 Section 5(h) of the TJR Act.
128 Lanegran (2015) at 63.
129 Section 5(f) of the TJR Act
130 Report of the TJRC, Volume IV (2013) at 6-7.
131 Report of the TJRC, Volume IV (2013) at 56.
132 Report of the TJRC, Volume IV (2013) at 56.
133 Lanegran (2015) at 63; Slye (2018) at 73.
134 Slye (2018) at 73-74.

years.[135] It furnished names of alleged perpetrators of human rights violations, including those involved in illegal acquisition of land, and it referred the cases to the National Land Commission for further investigation.[136] In terms of section 50(2) of the TJR Act, the recommendations of the TJRC are binding legally, and the relevant Ministry would have to furnish reasons for non-implementation to the National Assembly.

The Kenyan TJRC made a significant contribution to the development of transitional justice by the inclusion of economic violence, which long had been seen by most Kenyans as a major cause of historical injustice. The TJRC has been criticised for having too broad a mandate and for overburdening itself by investigating both economic and physical violence.[137] The critics fail to understand that the history of Kenya clearly showed economic violence at the centre of violence and historical injustices in the country. Robinson argues that by investigating corruption, the TJRC "incorporated a bottom-up approach to transitional justice, based on local understandings of justice and experiences of past abuse".[138] Kenya chose to depart from the conventional practice of TRCs in order to address the real issues at hand. The TJRC provided a comprehensive official record of past abuses and cemented the platform for the prevention of recurrence of violence.

Despite the broad mandate of the TJRC which included investigation of corruption, Kenya still faced corruption challenges soon after the transitional justice processes. According to the 2015 Global Corruption Barometer that was published the same year as the TJRC report, about 70% of respondents in Kenya perceived that the government was doing badly in fighting corruption.[139] In addition, at least 37% reported that they had paid bribes to access public services in the previous twelve months.[140] This showed lack of political will to address corruption in the country, regardless of the opportunity by the TJRC to ensure a clean break from the past and embed an anti-corruption culture going forward.

135 Report of the TJRC, Volume IV (2013) at 56-57.
136 Report of the TJRC, Volume IV (2013) at 146-156.
137 See Musila (2009) at 453; Slye (2018) at 62.
138 Robinson (2015) at 40.
139 Transparency International (2015) at 11.
140 Transparency International (2015) at 12.

4.3.6 Tunisia: Truth and Dignity Commission (2014-2018)

The demand for justice in the aftermath of the Arab Spring brought economic violence issues to the centre of transitional justice. Soon after the demise of the Ben Ali regime in 2011, the transitional government in Tunisia prioritised anti-corruption measures to deal with the past. Two commissions were established for this purpose. The first was the *ad hoc* National Commission of Inquiry into Misappropriation and Corruption, established only a day after the departure of the former president.[141] The general committee of this Commission was in charge of monitoring fundamental orientations linked to the Commission's activities and identifying future strategies to fight corruption and embezzlement.[142] The technical committee of the Commission was mandated to investigate public and private corruption committed by any natural or legal person from 7 November 1987 to 14 January 2011.[143]

The Commission received more than 10 000 complaints. It managed to investigate more than half of the submissions it received and transferred about 400 cases to the permanent anti-corruption body established in October 2011.[144] It is important to note that it published a report which confirmed the deep-rooted and systematic problem of corruption in Tunisia. However, the *ad hoc* Commission did not respond fully to the demands of the citizens and, in 2013, the Tunisian parliament passed a comprehensive Transitional Justice Law which established the Truth and Dignity Commission (TDC), the second commission with a mandate to investigate corruption.[145]

Several local and international organisations were involved in the elaboration of a Tunisian model of transitional justice.[146] There was a national dialogue on transitional justice led by representatives from five networks of civil society organisations whose members

141 Yerkes & Muasher (2017) at 3.
142 Article 2 of the Decree-Law n° 2011-7 of 2011.
143 Article 3 of Decree-Law n° 2011-7 of 2011.
144 Ghali (2015) at 2; International Crisis Group (2016) at 2.
145 Organic Law n° 2013-53 of 2013 (hereinafter referred to as the Transitional Justice Law).
146 International Crisis Group (2016) at 5.

belonged mostly either to the far left or the Islamist movement.[147] The national dialogue and public engagements conveyed a transformative justice approach by the new government, as it sought to include large numbers of Tunisians in the elaboration of the transitional justice mechanisms. It presented a chance for many interested parties to participate in broad discussions on fundamental transitional justice matters.[148]

The TDC's work covered human rights violations from 1 July 1955 to the date of its establishment,[149] and its duration was fixed at four years from the date of the appointment of its members, renewable once for one year, subject to approval by the legislative authority.[150] Its mandate included financial corruption and the misappropriation of public funds for the same period. The Commission was given authority to refer cases of election fraud, financial corruption and misuse of public funds to the specialised judicial chambers created by the Transitional Justice Law.[151]

The TDC was required to establish a "commission of public officials' examination reform" to make proposals for the reformation of corrupt institutions and the vetting of administrative sectors.[152] Also, "commission of arbitration and reconciliation" was established to "examine the settlement requests dealing with the cases of financial corruption".[153] The arbitration approach to corruption included an "amnesty for truth" arrangement, in terms of which a person who submits a request for reconciliation and arbitration was required to confess his guilt in writing and offer a clear apology as a condition for the Commission to accept the request. Where the request was related to financial corruption, it had to be accompanied by a description of the events that led to the unlawful benefits.[154] In that way, the right to truth would be upheld as enshrined in Article 2 of the Transitional Justice Law. Where the perpetrator intentionally hid the truth or made false declarations to the Commission, any

147 International Crisis Group (2016) at 6.
148 Ghali (2015) at 3.
149 Article 17 of the Transitional Justice Law.
150 Article 18 of the Transitional Justice Law.
151 Article 8 of the Transitional Justice Law.
152 Article 43 of the Transitional Justice Law.
153 Article 45 of the Transitional Justice Law.
154 Article 45 of the Transitional Justice Law.

prosecution, judgment or sentence would be resumed.[155] By 2017, the Commission had received 2 700 requests for arbitration, including 685 from the government, 16 from those responsible for financial violations, and the rest from individual victims.[156]

The arbitration approach to past corruption as part of transitional justice is quite innovative. For the first time in Africa, a TRC was given powers to grant amnesty to corruption offenders in exchange for the truth. Instead of taking the traditional approach to transitional justice, the TDC investigated and arbitrated corruption cases as a fundamental element in recording the truth about past abuses and addressing past corruption.

4.4 Setting up an Anti-Corruption TRC

From the above discussion, it is apparent that TRCs in Africa slowly are departing from the dominant script to a more transformative and holistic approach which situates corruption and other economic crimes within their mandates. It is apparent, too, that South Africa still is being haunted by its unresolved legacy of apartheid-era corruption which was not investigated and recorded by the SA TRC. Clearly, African TRCs in the 21st century cannot turn a blind eye to the economic violence which has contributed to conflicts and sustained repressive regimes.

However, the above section noted that most African TRCs that adopted a transformative justice approach did not successfully eradicate corruption. As pointed out by Sharp, the wide gap between ambitious approaches and realities on the ground may potentially lead to failure of transitional justice projects.[157] This is a huge concern where there is no political will to support TRCs in achieving their transformative justice goals. Hence, there is need to be careful in designing TRCs, particularly by avoiding assumptions that states are malleable in post-conflict settings,[158] and that corruption can be successfully addressed by TRCs without backing from political elites. It is argued that political will is an indispensable element for setting up successful anti-corruption TRCs.

155 Article 45 of the Transitional Justice Law.
156 Guellali (2017).
157 Sharp (2019) at 571.
158 McAuliffe (2017) at 5.

4.4.1 Mandate

Needless to say, it is important for a TRC to have a clear and practicable mandate. According to a practical guideline issued by the International Centre for Transitional Justice:

> Well-crafted mandates enable a commission to undertake its task with effectiveness: they set the stage for productive co-operation among institutions and allow civil society to fully understand the nature and potential of the truth-seeking exercise. A mandate that is incomplete, obscure, or contradictory to fundamental human rights standards can cripple a truth commission in many ways, forcing it to waste valuable time and resources in defining the parameters of its task, causing critical contradictions within the commission, and diminishing the capacity of key stakeholders to co-operate effectively with the commission.[159]

A significant challenge is how corruption may be included in the mandate of TRCs without affecting their credibility and effectiveness. In other words, how can TRCs effectively investigate corruption and other economic crimes alongside physical violence such as torture, mass murder and rape? There are concerns that the inclusion of economic violence may overburden TRCs and eclipse gross human rights violations.[160] An overwhelming workload combined with absence of political will to provide adequate resources make it especially difficult to address both economic violence and physical violence. For example, the Commission of Inquiry in Chad was required to submit its findings on physical violence and economic crime within six months (with the possibility of an extension at the request of the head of the commission).[161] As a result, the Report of the Commission failed to give a comprehensive picture of economic crime and to show any close relationship between economic violence and physical violence committed by Habré and his accomplices.

Hayner & Bosire question the logic of the Kenyan TJRC to investigate economic crimes along with human rights crimes. They conclude that there was a need to set up a separate commission to investigate corruption and economic crimes independently from a broad inquiry into human rights violations.[162] This separation is problematic in two ways. Firstly, it is based on

159 González (2013) at 1.

160 Robinson (2015) at 38.

161 Article 7 of the Decree Creating the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, Decree No. 014/P.CE/CJ/90 of 1990.

162 Hayner & Bosire (2003).

the traditional approach to transitional justice, which considers addressing physical violence as more important than addressing economic violence, and which holds that the two cannot be addressed simultaneously. What is more, separate commissions exclude the opportunity of linking economic violence and physical violence which usually are committed simultaneously and by the same perpetrators and accomplices. Secondly, many transitional states in Africa simply do not have the financial resources to set up more than one TRC. Following the submission of Hayner & Bosire may have resulted in economic violence remaining on the peripheries of transitional justice in Kenya.

The idea of separating economic violence and physical violates emanates from the liberal approach to transitional justice, which is being questioned by fourth-generation transitional justice. Corruption and other economic crimes lead to violations of human rights, particularly socio-economic rights. TRCs should not be restricted to physical violence merely because "conventional" transitional justice practice so requires. Failure to investigate and address corruption and other economic crimes results in TRCs providing an incomplete picture of the causes and nature of past abuses. TRCs should take a holistic approach to human rights and demonstrate their indivisibility and interdependence, as advocated by transformative justice theory.

Many of the TRCs discussed above had a mandate to produce "a complete picture" of past abuses. This cannot be achieved if TRCs concentrate on physical violence and do not include the socio-economic causes and drivers of such physical violence.[163] A transformative approach to transitional justice looks at all causes, drivers and sustainers of past abuses in order to obtain a full understanding of the past and to formulate post-conflict policies which confront the past and ensure non-repetition of violence in future. As the Office of the High Commissioner for Human Rights (OHCHR) conceded:

> if there is a clear link between economic issues and violence … then a truth commission should clearly recognise, inquire and report on these matters.[164]

163 See Andrieu (2012) at 545.

164 OHCHR (2006a) at 6.

No doubt, corruption and other economic crimes ought to be included in the mandates of TRCs. The question to be answered is how best TRCs can do so?

In this regard, it is submitted that the best approach is to establish a TRC with a sub-committee which has the sole mandate of confronting past corruption and other economic crimes.[165] In this way, there will be fewer concerns about overshadowing gross human rights violations, as other sub-committees of the TRC will concentrate on investigations of physical violence. All sub-committees will be working towards the same overall mandate, which is to provide a "clear picture" of the past and to ensure non-recurrence of violence. This helps to locate economic crime at the core of transitional justice without diluting investigations of crimes such as torture, mass murder and enforced disappearances. Such a holistic approach to transitional justice will ensure that TRCs investigate and give a complete picture of past abuses, and will assist the new government to formulate its peacebuilding and reconciliation policies accurately.

4.4.2 Nexus between Corruption and Human Rights

A thorny question for TRCs with an anti-corruption mandate is what acts of corruption should be investigated and recorded? Clarifying the investigative boundaries of a TRC is important, as corruption occurs in various contexts and multiple dimensions.[166] In many transitional states, both petty and grand corruption are widespread and endemic. It would take years to record every act of corruption and it would overburden the TRCs, rendering them trivial and ineffective. TRCs usually are designed to address serious violations of human rights and, therefore, there is a need to devise an approach which effectively confronts corruption and simultaneously avoids overburdening TRCs.

Sharp proposes an "economic violence—human rights nexus" which entails a primary focus on economic violence which has had direct and egregious effects on socio-economic

165 The South African TRC had three sub-committees: the Human Rights Violations Committee, the Reparation and Rehabilitation Committee, and the Amnesty Committee. See sections 12-27 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

166 Robinson (2015) at 49.

rights recognised under international law.[167] He argues that even though this will result in some acts of corruption remaining unexamined, it will require TRCs to focus on victims of economic violence "without getting lost in numbers and open-ended historical analysis".[168] Sharp is supported by Duthie, who advocates addressing the most serious and widespread economic crimes which are likely to have "the greatest negative impact on economic and social rights".[169] Robinson contends that:

> In contexts where corruption is linked to human rights violations, and particularly where high-level corruption is identified as an important social grievance, truth commissions should be mandated to address corruption … [E]xposing the impact of corruption on human rights can help shape the public narrative in a way that also recognises economic violence.[170]

It is submitted that a holistic and transformative response will require TRCs to demonstrate the indivisibility and interdependence of rights by investigating economic violence which had a direct impact on civil, political, social and economic rights. A corruption—human rights nexus would provide a powerful mobilisation tool for civil society and citizen groups to pursue the protection and realisation of internationally recognised rights which would have been violated by corruption and other economic crimes. The recommendations of the TRC on corruption and economic crime will carry more weight and it will be difficult for the government to ignore solutions to human rights violations and remediation of victims of economic violence.[171]

A human rights approach is essential as it encourages victims to come forward and reveal how corruption has affected their lives. Also, in many of the countries discussed above, corruption was committed as part and parcel of human rights violations. Such a human rights approach will make anti-corruption TRCs more acceptable to human rights campaigners who are usually the driving force behind the establishment of commissions. According to Albin-Lackey, "a corruption—human rights nexus offers an easy point of entry for mainstream human rights groups" to agitate for addressing corruption as a proper concern of actual people.[172]

---

167 Sharp (2014) at 106.
168 Sharp (2014) at 106-107.
169 Duthie (2014) at 189.
170 Robinson (2015) at 48.
171 Sharp (2014) at 107.
172 Albin-Lackey (2014) at 148.

However, the link between corruption and human rights violations has not been documented sufficiently by most TRCs in Africa. For example, the Chad Commission of Inquiry was criticised for failing to link any grand corruption to the socio-economic hardships and poverty which tormented many Chadians during Habré's term of office.[173] This affected the credibility of its Report since it failed to show the impact of corruption upon real human beings.

TRCs in Africa should investigate and record selected acts of corruption that have a direct bearing on the enjoyment of rights. A point of departure will be to address grand corruption. However, endemic petty corruption may be crucial and these should be addressed in relation to the history of the country. For example, in a country where there is a long history of endemic extortion by the police, it will be essential for a TRC to address such extortion, considering that many people would have been deprived arbitrarily of their civil and political rights. Most importantly, a holistic and transformative approach will require TRCs to demonstrate the indivisibility and interdependence of rights by investigating and recording acts of corruption which have a direct impact on civil, political, social and economic rights.

4.4.3 Appointment of Commissioners

Given the importance of TRCs in transitional countries, their members ought to be of credible character and possess the requisite expertise to perform their jobs effectively. The commissioners play a critical role in truth-finding and it is important for transitional states not to underestimate the selection and appointments process. Currently, there is no universal standard for the selection and appointment of commissioners. Appointing authorities of TRCs around the world have appointed commissioners based on the mandate of the commission and the nature of the transition. Other factors taken into account include gender, age, political affiliations, nationality, level of education and religious background. This range of factors illustrates how problematic the selection and appointment of commissioners can be. The problem is aggravated when the TRC has an additional mandate to investigate and record corruption.

173 Sharp (2014) at 93.

This chapter has suggested a TRC sub-committee which ought to address corruption and other economic crimes in terms of the transformative justice approach. Such an exercise will require financial experts, particularly if the corruption being investigated and analysed involves the use of multiple layers of corporate vehicles and offshore accounts to hide criminal proceeds. In Chad, the Commission of Inquiry lacked the expertise in finance and forensic accounting required to uncover corruption and other economic crimes committed by the previous regime.[174] The point is that the investigation of corruption by a TRC requires entirely different commissioners from the conventional appointments. A TRC with an anti-corruption mandate would require skills and experience to investigate economic crime and the resources to identify and trace persons, companies and properties. For example, there is a need for accounting and auditing expertise to unravel irregularities in financial records of persons under investigation. In Tunisia, the head of the TDC's Arbitration and Reconciliation Committee, which dealt with past corruption, was a financial specialist.[175] There should be a commissioner with anti-corruption experience to give input regarding acts of corruption and related issues. Where the TRC has powers to investigate proceeds of corruption moved outside the country, there is a need for a person with professional experience in mutual legal assistance and who is familiar with procedures to request assistance from other countries in the investigation and recording of economic crime.

There should be a vigorous selection process which involves thorough screening of candidates and their possible links to or involvement in corruption.[176] Commissioners should not have any criminal conviction or be subject to investigations which may affect their credibility or impartiality. In Kenya, there were intense conflicts between the TJRC and the government and within the Commission itself regarding economic crimes. Some commissioners declined to sign the report which covered economic crimes, accused the president's office of altering their report, and publicly issued a dissent.[177] Such conduct by commissioners affects

174 Sharp (2014) at 106.
175 Robinson (2015) at 45.
176 Robinson (2015) at 50.
177 Lanegran (2015) at 63.

their work and may lead to more questions than answers regarding their credibility to uncover past corruption and record it accurately.

4.4.4 Allocation of Time and Resources

An enormous challenge faced by anti-corruption TRCs is the allocation of adequate time and funding for effective investigation of corruption. By nature, TRCs are costly as they are set up from scratch. TRCs usually face tight deadlines and are saddled with paltry budgets and limited institutional capacity.[178] Despite the expansion of the mandate of TRCs in Africa to address corruption and other economic crimes, it is unclear whether there has been a proportionate increase in the allocation of time and resources to these TRCs.[179] For instance, the Commission in Chad faced challenges, including lack of financial and human resources and office space, and these affected its operations, given its wide mandate.[180] There is a need for an increase in staff size and budget of the TRCs to allow them to deal with the significant increase in their scope and focus. Investigating corruption and other economic crimes usually is expensive and will require vast resources. The allocation of meagre resources may derail work of the TRC before it gets off the ground.

Ideally, the transitional government should show its active political support for TRC processes by providing sufficient funding and giving clear direction to civil servants to cooperate with the TRC.[181] However, commissions addressing corruption are likely to face resistance from powerful political and economic elites who are usually the beneficiaries of grand corruption.[182] The allocation of finances should facilitate their independence from such elites who might feel threatened by the uncovering of acts of corruption. The Kenyan TJRC wrote an official letter complaining that it did not enjoy control over finances allocated to it, which posed a threat to its independence.[183] Such control or interference with the running of a

178 Duthie (2014) at 189.
179 Sharp (2014) at 106.
180 See Kritz (1995) at 54.
181 Office of the High Commissioner for Human Rights (2006) at 2.
182 Duthie (2014) at 189.
183 Truth, Justice and Reconciliation Commission (2010).

TRC undermines its independence, and may result in recording of facts which suit the narrative of the political and economic elites, thereby silencing the voices of victims.

The increased resources required to investigate corruption may dissuade transitional states from setting up a TRC with an anti-corruption mandate. Most transitional states face socio-economic hardships and citizens may be more interested in using available resources for food, health facilities and shelter. For example, research in Sierra Leone showed that citizens:

> felt that the work of a transitional justice project aimed at bringing peace to the country must include the construction of schools, medical facilities, roads, etc., not trials, nor truth telling.[184]

In Kenya, citizens interviewed by the Task Force were of the view that government commissions before the TJRC have been a charade and a waste of public resources.[185]

The OHCHR has recommended that countries should reach out to donor countries even before appointment of a TRC, so that it is supported very early.[186] However, funding from the international community should be accepted only if it is not accompanied by unreasonable or questionable demands. For example, the international donors should not dictate the mandate or scope of the TRC as a condition of funding. Such demands likely will result in the TRC following the dominant script which has been accepted by the international community. As transformative justice dictates, the scope and mandate of the TRC should be contextualised to meet the needs and demands of the locals, rather than following the international practice which prioritises civil and political rights over social and economic rights.

4.4.5 Methodologies of Investigation

As appears from its name, a TRC indicates the possibility of finding out the truth about past events.[187] TRCs around the world have chosen a variety of methods to expose such truths. For example, the South African TRC recorded oral statements given by the public, victims and

184 Millar (2011) at 525.

185 Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003) at 34.

186 OHCHR (2006a) at 25.

187 Roosa (2008) at 569.

perpetrators through public gatherings.[188] It had powers to conduct inspections *in loco*, to summon any person with custody of or control over any article or thing relevant to its investigations, and to require any person to adduce evidence or to answer questions relevant to its investigations.[189] The methodologies received criticism for failing to check some allegations recorded and for establishing key findings on untested and poorly corroborated statements, including hearsay.[190]

Such methodologies cannot be used to investigate corruption because of the clandestine nature of the crime. Corruption is difficult to investigate and usually there is "no scene of the crime" to inspect or no eye-witnesses to adduce evidence. Most of the time, corruption involves satisfied parties with no incentive to disclose the truth. Where witnesses are available, usually they will have benefited from illegal dealings and will fear incriminating themselves. Even when information is intercepted by an innocent third party, offenders may be very powerful and ruthless in enforcing a code of silence through intimidation and violence. This makes it difficult for people to come forward with information of corruption in public gatherings, negating them as a methodology for a TRC with an anti-corruption agenda. Also, there is a real danger of uncorroborated information which will affect the credibility of the TRC's report.

The methodologies required to investigate corruption and economic crimes are quite different from those required to investigate individual or systematic practices of physical violence, such as torture or killings.[191] Transformative justice advocates challenging unequal power relations and TRCs provide such a platform through public hearings. TRCs may give a chance to victims of corruption to come forward and adduce evidence of how specific acts of corruption affected their rights. However, this should be followed by further investigations to obtain direct and corroborative evidence of such corruption. It is at this stage that experts in

188 Section 28 of the Promotion of National Unity and Reconciliation Act 34 of 1995. See also Report of the Truth and Reconciliation Commission of South Africa, Volume 1 (1998) at 150.

189 Section 39 of the Promotion of National Unity and Reconciliation Act.

190 Jeffery (2000) at 19-22.

191 OHCHR (2006a) at 9; Sharp (2014) at 106.

finance and crime are required. The success of such investigations relies on the diligence of the investigators to confirm the alleged corrupt acts.

The TRC should be given powers to issue subpoenas for the delivery of documents and to inspect the financial accounts of allegedly corrupt persons or entities. Certain government offices or functionaries may attempt to hinder investigations by blocking access to information relevant to the work of the TRC. For example, some government departments in Kenya were reluctant to provide and share information required by the TJRC and, in some instances, the commissioners were informed that the information was unavailable.[192] Hence, it is imperative that the TRC has power to obtain access to any information without unreasonable delay. Investigations by the TRC should include thorough inspections of the relevant bank accounts and company books, and gathering of information from various witnesses and sources to corroborate any corrupt transactions.

Less reliance ought to be placed by TRCs on secondary evidence from anti-corruption commissions or other commissions of inquiry. The Liberian TRC was criticised for relying on secondary evidence in documenting economic violence, which was weaker compared to evidence on physical violence based on primary fact-finding and first-hand testimony.[193] Similar criticism has been directed against the Kenyan TJRC final report for its dependence upon secondary sources such as published scholarship and reports of other Kenyan commissions.[194] Even though the TJRC had a mandate to "consider the reports of the relevant commissions of inquiry", it failed to assess critically such previous reports, thereby reducing the credibility of its final report.[195]

Despite its shortcomings, the South African TRC introduced an innovative approach to truth-seeking, that is, amnesty-for-truth. Whilst public hearings usually attract victims, perpetrators may be incentivised to come forward and tell their stories in exchange for legal protection against civil or criminal liability. The TRC had authority to grant amnesty to persons

192 Slye (2018) at 75.
193 Sharp (2014) at 106.
194 Lanegran (2015) at 71.
195 Lanegran (2015) at 71.

who make full disclosure of past atrocities committed by them.[196] In that way, many victims and survivors of the apartheid regime in South Africa were able to learn the truth about the past from offenders seeking amnesty for their crimes.[197] The same approach can be used when addressing corruption. It is submitted that TRCs should be given powers to negotiate with perpetrators of corruption and other economic crimes for the return of stolen assets in exchange for immunity against civil or criminal liability. Such amnesty can facilitate the collection of the truth about past corruption and can assist in lessening the amount of time and resources spent on investigations. The Tunisian case is of great relevance as amnesty was granted to corruption perpetrators through an arbitration process. It set an important precedent on how transitional states may empower TRCs to offer amnesty in exchange for the truth and the return of stolen assets.

Amnesties should be subject to the following conditions: public consultations, admission of guilt, public truth-telling about acts of corruption, unconditional return of stolen assets, and material or symbolical contributions to reparations.[198] According to the Belfast Guidelines, public consultations during the design of an amnesty mechanism may enhance its legitimacy.[199] The consultation should involve potentially marginalised groups such as victims, women, children, displaced persons and other minority groups. Such public consultations are in line with the transformative justice approach which aims to enhance inclusion of victims and affected communities in transitional justice processes, and to increase local ownership. In addition, the TRCs should be mandated to allow affected victims and community members to participate in hearings and have a voice on approvals of individual cases of amnesty.[200]

4.4.6 Recommendations

TRCs make recommendations in their final report, aimed at addressing the past and avoiding recurrence of past violence. This means that TRCs with an anti-corruption mandate should recommend anti-corruption measures to ensure accountability and prevent recurrence. For

196 Section 3(1)(b) of the Promotion of National Unity and Reconciliation Act.
197 Hayner (2001) at 2.
198 See Belfast Guidelines on Amnesty and Accountability (2014) at 17.
199 Belfast Guidelines on Amnesty and Accountability (2014) at 20.
200 Belfast Guidelines on Amnesty and Accountability (2014) at 22.

example, the TJRC in Kenya recommended the harmonisation of various anti-corruption laws, expansion of the Ethics and Anti-Corruption Commission, prosecution of corrupt persons, and the expedition of current corruption cases.[201] The Liberian TRC recommended court actions against corrupt persons, payment of reparations to victims of corruption, and certain anti-corruption reforms.[202] These recommendations were critical as they showed the importance of TRCs in setting anti-corruption policies for transitional governments. Disappointing to note, however, was the silence by the above TRCs on the importance of citizens' participation in anti-corruption movements. The neglect of citizens as key stakeholders in the recommendations disempowers them. It gives an impression that corruption can be fought without citizen engagement. Hence, there is a need for TRCs to examine and recommend ways in which citizens can play an active role in the fight against corruption.

Anti-corruption TRCs may contribute to the development of anti-corruption regimes in transitional states by identifying and recommending reform priorities. For example, they may recommend the adoption of a human rights approach to corruption by anti-corruption bodies.[203] Also, they may recommend the establishment of an anti-corruption body if one does not exist. The TRC of Sierra Leone recommended important anti-corruption steps, including the protection of whistleblowers, the establishment of an assets declaration regime, and the encouragement of independent prosecution of corruption cases.[204] Acts of corruption are usually criminal offences and this makes it relatively simple to identify the perpetrators for possible prosecution. Hence, the findings of a TRC should include a list of corrupt persons for possible prosecution.

A major challenge to recommendations ~~is~~ sometimes is their non-binding nature. For instance, the Sierra Leone TRC included anti-corruption measures in the second category of recommendations, which the government was to "work towards", which implied a legal obligation to implement without any time frame[205], and in the "seriously consider" category of

201 Report of the TJRC, Volume IV (2013) at 56-57.
202 Report of the Liberian TRC, Volume III (2009) at 40-45.
203 Robinson (2015) at 49.
204 Report of the Sierra Leone Truth and Reconciliation Commission, Volume 2 (2004) at 160-162.
205 Report of the Sierra Leone TRC, Volume 2 (2004) at 161-162.

recommendations which it had no legal obligation to implement.[206] Such categories result in recommendations on physical violence being prioritised and those on economic violence seen as an "after-thought", the implementation of which depends on the benevolence of the state. Hence, it is imperative for recommendations on anti-corruption to be binding upon states, and not seen as aspirations which the government may choose to ignore. According to the AUTJP, the legislation establishing a TRC should ensure that its recommendations are binding and that the state should address the recommendations through written responses, parliamentary debates, and with victims, affected communities and civil society.[207] Legally binding recommendations ensure that the government and political elites do not enjoy discretion about whether to implement the recommendations.

Political will by the transitional government is very important for the sustainability of the transformative justice approaches by TRCs, including on recommendations. For instance, governments may be tempted to ignore TRC recommendations which are unfavourable to the political elites regardless of their importance to anti-corruption and socio-economic transformation in the country. Recommendations around issues of anti-corruption reforms may threaten corrupt structures from which they are beneficiaries. In such situations, there is likely to be delayed reforms or no reforms at all. In countries like Sierra Leone, politicians picked and chose which reforms to adopt from the TRC's recommendations, regardless of their binding force.[208]

4.4.7 Relationship with Other Anti-Corruption Bodies

A TRC with an extended mandate to address corruption usually will be established in a country where there are other anti-corruption mechanisms, such as an anti-corruption commission. There is, in such cases, a real possibility of tension or conflict between the TRC and other anti-corruption bodies. The main challenge is whether the TRC should investigate acts of corruption already investigated or under investigation by the anti-corruption commission. Robinson argues that the TRC should avoid duplicating the work of other anti-corruption bodies, "particularly

206 Report of the Sierra Leone TRC, Volume 2 (2004) at 163.
207 AUTJP (2019) at 11.
208 Bakiner (2014) at 20.

given that the anti-corruption 'industry' is steadily growing".[209] She contends that TRCs with an extended mandate should take into consideration previous investigations by anti-corruption bodies so as to avoid overburdening themselves.[210] Anti-corruption commissions have been criticised for failing to examine the human rights impact of corruption,[211] and hence some have argued that TRCs should add or emphasise the human rights impact of corruption already investigated by other commissions.[212] However, this approach fails to consider the credibility issues faced by many anti-corruption commissions in Africa. These commissions have been used as weapons against political opponents and have experienced significant political interference. As a result, they have carried out half-baked investigations and even may have doctored some findings as part of political gamesmanship. Thus, TRCs should assess the work of other anti-corruption bodies thoroughly in order to construct a comprehensive and accurate picture of past acts of corruption.

Granting of amnesty by TRCs to corrupt persons for truth-telling may result in the recovery of stolen assets. For such purposes, the TRCs may be required to work closely with assets forfeiture departments to preserve and recover those assets. If the stolen assets are hidden abroad, mutual legal assistance may become relevant. In this regard, the TRC may play a significant role in referring cases of stolen assets to the relevant department for recovery. Considering that a TRC is a temporary body with a limited life and that asset recovery is a long process, it is unrealistic to expect the TRC to be the main point of reference for asset recovery. Its primary function ought to be to provide the relevant authorities with information on stolen assets and their location, and to recommend recovery of the assets.

4.5 Conclusion

This chapter has shown that TRCs in Africa have started to depart from the dominant approach to transitional justice by including economic violence in their mandates. In Tunisia, Sierra Leone, Kenya, Chad and Liberia, economic violence and physical violence were so intertwined

209 Robinson (2015) at 48.
210 Robinson (2015) at 48.
211 Boersma (2012) at 202.
212 Robinson (2015) at 48.

that it was simply impossible for the TRCs to investigate and understand the drivers and causes of conflict without investigating economic violence. It would have been difficult for the TRCs to give a "complete picture" of the violent past without reference to the role of corruption and other economic crimes in human rights violations. The cost of undue narrowness by the South African TRC is self-evident, as corrupt networks from the apartheid era remained untouched and carried their corrupt conduct into the new democratic South Africa.

A transformative justice approach by TRCs to address corruption offers a number of benefits to transitional states. TRCs are able to investigate and make sense of the larger structure which facilitated corruption and to confront its longer term structural effects, which is a primary objective of transformative justice. Such an approach helps to give voice to the victims of corruption, reveal structural violence and expose mismanagement of natural resources. The accessibility of TRCs to the public provides a better platform for active participation of victims and local communities than do criminal trials. Truth-seeking about past corruption may reduce impunity and create an avenue for the public to challenge corrupt power relations. Many transitional states will be suffering from institutionalised corruption and a TRC may act as a catalyst to "effect and help to build momentum at a grassroots level for longer-term anti-corruption reform".[213] In short, a TRC with an anti-corruption mandate offers transformative effects to transitional states by encouraging citizens to become more involved in the fight against corruption.

Setting up a TRC to address corruption comes with many challenges, which include the risk of overburdening the TRC, a lack of political will, devising viable methods of investigation and balancing the relationship between the TRC and other anti-corruption bodies. In terms of the transformative justice approach, each TRC mandate has to be context-appropriate and tailored to confront the actual demands for truth and justice by the affected communities. The close relationship between corruption and physical violence warrants investigation and reporting by TRCs. This chapter has argued that, in order to avoid overburdening TRCs, there should be a sub-committee which has the sole mandate of investigating and recording past acts

213 Robinson (2015) at 49.

of corruption and economic violence. So as not to trivialise transitional justice processes, the TRC should investigate and record selected acts of corruption that have a direct bearing on the enjoyment of rights. The sub-committee should include experts on finance and economic crime who can track complex financial records and trace dirty money. There is a need for the transitional state to seek funds before the commencement of the work of the TRC in order to minimise financial problems once the process has begun. However, funding from third parties should not come with unreasonable demands, such as the prioritisation of physical violence over economic violence. Lastly, the TRC should enjoy a close relationship with other anti-corruption bodies to enhance the fight against corruption and establish a solid foundation for transparency and accountability in the transitional state.

CHAPTER FIVE

REPARATIONS FOR VICTIMS OF CORRUPTION

5.1 Introduction

Reparations are a variety of measures aimed at redressing various types of harms suffered by victims of past abuses. They are regarded as the transitional justice mechanism which is more victim-centred than any of the others.[1] They are less focused on perpetrators and, in the context of this chapter, they are victim-centred measures tailored to redress harm suffered by victims of corruption. Reparations offer the most tangible demonstration by transitional states that victims are remediated for past abuses.

Like other transitional justice mechanisms, reparations have been limited largely to compensation for physical violence, such as enforced disappearances, torture, arbitrary imprisonment and wrongful killings.[2] For example, the South African reparations programme concentrated on victims of politically motivated physical violence during the apartheid era.[3] According to the United Nations, reparations for gross violations of human rights or for serious violations of international humanitarian law may be arranged into five categories:[4]

- *Restitution*, which involves restoration of the victim to the situation before the violations in question occurred. These measures may include restoration of human rights and liberty, reunion with family, returning from exile, regaining citizenship, restoration of employment and return of property.
- *Compensation*, which entails provision of appropriate and proportionate payment for any economically assessable damages suffered as a result of the violations. This includes compensation for physical or mental harm, lost opportunities, material

1 Moffett (2017) at 377.

2 Roht-Arriaza (2014) at 109; Robins (2017) at 55.

3 See Chapter 5 of the Promotion of Unity and Reconciliation 34 of 1995; Colvin (2006) at 184-199.

4 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) paras 19-23.

damage and loss of earnings, moral damage, legal or expert costs, medicine and medical services, and psychological and social services.

- *Rehabilitation*, which includes provision of medical care, psychological care, and legal and social services to victims.
- *Satisfaction*, which provides a variety of measures, such as cessation of violations, truth-seeking, searching for the disappeared, recovery and reburial of victims, restoration of the dignity of victims, official acknowledgment of guilt and public apologies by liable persons, judicial and administrative sanctions, commemoration and tributes to victims, and human rights training.
- *Guarantees of non-repetition*, aimed at preventing any future abuses or violence. These include reforms in the military and security forces to ensure civilian control, strengthening the independence of the judiciary, protection of legal, medical, media and human rights professionals, human rights training, promotion of codes of conduct and ethical norms, promotion of mechanisms to prevent and monitor social conflicts and their resolution, and reviewing and reforming of repressive laws.

It is important to note that these UN Principles and Guidelines regarding reparations were established in terms of a limited focus on violations arising from a liberal approach to transitional justice, making it difficult to include cases of corruption.

The legal right to remedies and reparations for physical violence has been enshrined long in various international human rights instruments.[5] By contrast, compensation for victims of corruption still is not developed fully nor is it enshrined completely in various anti-corruption instruments. For instance, Article 35 of UNCAC provides a soft obligation for states parties to establish measures to ensure the right of victims of corruption to initiate legal proceedings for compensation against responsible persons. The ECOWAS Protocol is the only anti-corruption instrument applicable to African states that provides for compensation and restitution to

5 See Article 8 of the Universal Declaration of Human Rights; Article 2 of the International Covenant on Civil and Political Rights; Article 6 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Article 91 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts; Articles 68 & 75 of the Rome Statute.

victims of corruption.[6] The AU Convention does not mention victims of corruption and hence does not provide for reparations, despite its preamble raising concerns about the deleterious effects of corruption upon socio-economic development and "the political, economic, social and cultural stability" of African states.[7] Likewise, the SADC Protocol is silent on victims of corruption. Evidently, the various anti-corruption instruments were composed with little focus on victims of corruption and their right to claim reparations. As a result, reparations have been granted mostly for egregious violations of physical integrity, such as killings, torture and enforced disappearances.

A less rigid classification of reparations is to divide them into material reparations and non-material or symbolic reparations.[8] Such reparations may be either individual or collective. This thesis adopts this simple categorisation in the discussion of reparations for victims of corruption. With more calls for transitional justice to accommodate socio-economic questions, it is inevitable that there is an increased interest in reparations for economic violence.[9] Citizens in transitional states experience economic hardships as a result of corruption and other violations of social and economic rights. Concentrating on physical violence changes little in the everyday lives of such citizens and, in some instances, it may worsen their situations even. The inclusion of socio-economic issues in the field of transitional justice means that reparations programmes should not be limited to victims of physical violence, but extended to victims of economic violence, such as corruption.[10]

Employing reparations as an anti-corruption tool involves offering reparative programmes aimed at undoing the consequences of past corruption. This raises critical questions regarding such reparations. Who is a victim of corruption? How best may transitional states remediate such victims for their previous harm? Should victims of corruption receive individual or collective reparations? And, is there a relationship between reparations and

6 See Article 9(2) of the ECOWAS Protocol.

7 Paragraph 6 of the Preamble to the AU Convention.

8 de Dreiff (2006) at 453.

9 See Laplante (2007a) at 171-173; Roht-Arriaza (2014) at 121-122; Haldemman & Kouassi (2014) at 505-506; Szoke-Burke (2015) at 484-486.

10 Robins (2017) at 55-56.

development? The chapter will explore these issues in a bid to offer guidelines on remediating victims of corruption as part of justice in transition.

5.2 Identifying Victims of Corruption

In a reparations programme, it is important to identify the victims since it is they "who will be entitled to whatever form of remedy or benefit is to be provided".[11] The inclusion of anti-corruption in the transitional justice field inevitably engenders the need to identify victims of corruption for reparations purposes. The work of criminal trials and TRCs with a transformative justice agenda would have exposed the corrupt nature of the past regime. As such, it may have raised questions about remediating victims of corruption. An example is the recommendation by the Liberian TRC that victims of economic violence receive compensation.[12] However, the consideration of victims of corruption raises serious theoretical and practical questions. Who can claim reparations? In other words, who qualifies as a victim of corruption for reparations purposes? How best can transitional states define and identify victims of corruption?

Identifying victims of corruption is the thorniest issue relating to reparations as an anti-corruption tool. UNCAC provides a hortatory obligation for states parties to establish legal measures for victims of corruption, both natural and legal persons, to pursue legal actions for compensatory damages against wrongdoers.[13] However, it does not provide a definition of a victim of corruption, leaving the issue open-ended. Nearly all citizens in transitional states may have encountered corruption in its different forms and magnitude, which means that the majority of citizens potentially may be defined and identified as victims of corruption. Andrieu summarises the problem by arguing that, since corruption will be rampant in transitional states:

> virtually all the citizens could complain about bribes being part of their daily life and therefore could consider themselves legally entitled to reparations. That would raise enormous technical and conceptual difficulties, given the complex levels of causality and responsibility in cases of corruption. Violations created by corrupt practices form a continuous process, whose effects are not immediately obvious. The proof of harm would be very difficult to establish for each and every victim — even more so than in cases of criminal reparations. Moreover, reparations for economic crimes could

11 Garcia-Godos (2008) at 122.

12 Volume III of the Report of the Liberian TRC (2009) at 43.

13 Article 35 of UNCAC.

overshadow the demands for reparations for gross rights violations.[14]

It is difficult to gainsay this argument. Indeed, it is more difficult to establish an individual as a direct victim of corruption than to ascertain harm arising from the negative externalities of corruption on the general population or specific communities.[15] Also, to identify any individual who has experienced corruption as a victim for reparations purposes would open the floodgates for claims.

A possible solution is to go beyond the individual harm of corruption. Corruption is a serious obstacle to economic development and a leading cause of social and economic marginalisation of certain communities. It creates barriers for certain groups and communities to essential public services and resources, such as health, education, water and sanitation.[16] The injurious effects of corruption are felt heavily by the poor and marginalised, as it undermines the government's ability to promote the social, economic, cultural, civil and political rights of citizens. Remoteness of certain communities or regions from political patronage or corrupt networks reinforces their marginalisation, as they are denied employment opportunities and resources required for development. They have few opportunities to participate actively in economic and political life, which silences their claims to rights and entitlements and makes them easy targets for corruption.[17]

A victim study conducted in Tunisia identified corruption as a key cause of the marginalisation of certain regions.[18] The study reported that:

> The marginalisation of regions also appears linked to the corruption of the two pre-revolutionary regimes, and whose ramifications survive today. This fact is viewed by locals as the primary cause of public money lost. "We receive aid during the winter to help people in need, but in reality it ends up in the bellies of officials and wealthier people" denounced two students from Ain Draham (ZV28). "The marginalisation of the region began with Bourguiba and continued with Ben Ali, but to different degrees. With Ben Ali there was an improvement but corruption continued to exist and the trafficking network around public works persisted," says a historian from Ain Draham (ZV11). He continued, "this is a regime and a network that should be punished, officials who have

14 Andrieu (2012) at 549.

15 See Boehm & Sierra (2015).

16 Hossain & Musembi (2010) at 10.

17 See Chene (2010) at 3 on the impact of corruption on disadvantaged groups.

18 Andrieu *et al* (2016) at 9, 11, 31, 34 & 36.

> contributed to corruption, be it at local or national level."
>
> It would be above all public works, including infrastructure, which would have been the object of greed of some leaders, and which explains the poor state of the roads today. "Corruption has affected especially public works concerning the roads, each time we pay money for it, but the roads are still the same," says a high school student from Ain Draham (VZ13). The money for these regions too often seems to disappear, even if it has been allocated, making proof of the exclusion or intention even more difficult.[19]

Corruption was a major cause of marginalisation and structural inequalities in Tunisia as it denied many citizens access to education, employment, adequate housing and infrastructure development.[20] It ensured the degeneration of public administration down to the local level, hindered any productive initiative, and even affected cultural initiatives of marginalised regions.[21] Victims from communities in southern Tunisia, who had suffered years of targeted repression and marginalisation, identified the access to basic health services and infrastructural development as priorities in reparations programmes.[22]

The Transitional Justice Law in Tunisia provides for reparations to victims of past abuses. It defines a victim as "any individual, group or legal entity having suffered harm as a result of a violation", including "every region which was marginalised or which suffered systematic exclusion".[23] The law takes a transformative justice approach to victimhood, which goes beyond the conventional transitional justice definition, by including victims of marginalisation and structural injustices. Such a broad definition presents an opportunity for undoing marginalisation stemming from corruption in Tunisia.

A study on reparative demands in Kenya showed that victims prioritised access to the livelihood and sustenance provided by land as a critical factor.[24] The historical injustices in Kenya have evolved around land and marginalisation, among other issues.[25] Unjust patterns of access to land was regarded as a cause and consequence of widespread and systematic human

19 Andrieu *et al* (2016) at 31.
20 See Carranza (2015).
21 Andrieu *et al* (2016) at 9 & 32.
22 International Centre for Transitional Justice (2013).
23 Article 10 of the Transitional Justice Law.
24 Robins (2011b) at 33.
25 See Hornsby (2012) at 787; Report of the Kenyan TJRC, Volume IIB (2013) at 18 & 22-23.

rights violations suffered by citizens.[26] According to the study:

> In other cases, access to land is taken away through corruption or "legalised" land grabbing that disregards the customary and possessory rights of the victims' communities.[27]

Crucially, corruption was seen as an integral part of the land-grabbing process at all levels.

> We felt that as Taitas born and bred here our rights were being violated. The owner of the sisal plantation was keenly using his financial muscle to frustrate us. When we went to the members of parliament we would always find he had been there before us. He would even taunt us that should we dare go to the president, he would have been there before us. Even the representatives we elected — especially councillors — had been pocketed. (Taita community member, Mwatete, Coast).[28]

The TJRC reported that bad governance and endemic corruption were factors which led to the economic marginalisation experienced by various regions, groups and communities in Kenya.[29] It noted that there was a direct link between corruption and human rights violations, and that this link had a negative and destructive impact on the vulnerable groups, on the economy and on development.[30] In other words, corruption was seen as a major factor leading to marginalisation and violations of socio-economic rights in Kenya.

However, the TJRC did not recommend any direct reparations for victims of corruption.[31] Instead, it recommended that the government "formulate, adopt and implement" a policy which consciously earmarks socio-economic development in historically marginalised regions.[32] The reparative programmes would include building of efficient road networks for easy accessibility of marginalised areas, access to clean water, building of hospitals and ensuring their adequate stocking and staffing, quality education, courts of law, and ensuring availability of government services and public facilities to all.[33] Since these marginalised areas had been ravaged by corruption, reparations for affected communities would play a role in undoing the consequences of corruption in such areas.

---

26 Robins (2011b) at 33.
27 Robins (2011b) at 33.
28 Robins (2011b) at 35.
29 Volume IV of the Report of the Kenyan TJRC (2013) at 49.
30 Volume IV of the Report of the Kenyan TJRC (2013) at 56.
31 See Volume IV of the Report of the Kenyan TJRC (2013) at 56-57.
32 Volume IV of the Report of the Kenyan TJRC (2013) at 53.
33 Volume IV of the Report of the Kenyan TJRC (2013) at 53.

The cases of Tunisia and Kenya show that corruption is a major factor in the marginalisation of certain communities in Africa.[34] Hence, reparations should target communities which were deprived of economic resources as a result of corruption. Such marginalised areas could have been identified by TRCs in their work. For example, the TJRC in Kenya identified and reported on areas which were marginalised economically, such as Nyanza and the Coast, North Eastern, Western and North Rift regions.[35] Civil society may become involved also by conducting research on corruption and marginalisation in transitional states. For example, civil society organisations were instrumental in conducting field research and interviewing citizens in Kenya and Tunisia on a range of matters, including issues of marginalisation.[36] This will avoid reparations being made for sporadic acts of corruption, which will overburden transitional justice mechanisms and render reparations programmes ineffective.

In addition, there is a concept of "social damage" that has gained attention in recent years.[37] The concept entails pursuing civil actions for collective damages suffered by communities as a result of corruption. According to the UNODC:

> Corruption may victimise people directly, but also indirectly and it may also negatively affect the society as a whole. Consequently, some groups of persons may not be readily considered victims and their legal standing may be denied when they do not have a direct and specific interest. In this context, the concept of social damage should be mentioned, which exists in some jurisdictions and allows compensation for damages to the public interest. It could include damage to the environment, to the credibility of institutions, or to collective rights such as health, security, peace, education or good governance.[38]

Hence, the concept constitutes an avenue for remediating a victim of corruption in the form of "society as a whole".[39] Where a community has been denied access to basic living conditions by corruption, the community as a victim is entitled to compensation. In 2010, a French company in Costa Rica agreed to a US$10 million settlement after it was sued for "social damages"

34 Robins (2011b) at 33; Andrieu *et al* (2016) at 9, 11, 31, 34 & 36.

35 See Volume IV of the Report of the Kenyan TJRC (2013) at 51-53.

36 See, for example, Robins (2011b) and Andrieu *et al* (2016) for Kenya and Tunisia respectively.

37 See Olaya, Attisso & Roth (2010) at 20-22; Marette (2014) at 1-2; UNODC (2016) at 5-7.

38 UNODC (2016) at 5-6.

39 Marette (2014) at 1.

caused by its corrupt activities.[40] However, the concept is still in its infancy and depends on appropriate legal measures for "social damage" being enacted by countries. For instance, the Costa Rican case was possible because Article 38 of the Costa Rican Criminal Procedural Code allowed the Attorney-General to institute a social harm civil action "in the case of offences involving collective or diffuse interests".[41] In any case, the idea of "social damage" highlights the valid point that communities can be victims of corruption and that there is a possibility for their inclusion in reparations measures.

There is a fear that reparations for victims of corruption will overshadow concern for victims of physical violence.[42] This argument emanates from the dominant script which has reinforced "economic invisibility" in transitional justice to limit knowledge, understanding and acknowledgment of the economic nature of past abuses.[43] As pointed out earlier, victims of violations of physical integrity enjoy ample recognition through entrenched legal measures in international law. But the inclusion of economic violence in the transitional justice field entails that victims of economic violence are entitled to reparations as well.[44] Hence, a transformative approach to transitional justice recognises victims of physical violence and of economic violence.[45]

Many victims would have been denied the necessities of a decent life — such as access to education, medical services, work opportunities, decent housing, clean water and food security — as a result of corruption, leading to their marginalisation. Excluding such victims from reparations programmes would deprive transitional states of the opportunity to tackle the socio-economic structures underpinning previous abuses and to offer socio-economic transformation. This path requires departing from the liberal approach to victimhood, which is "top-down" and "elite-driven", and fails to reflect the real situation on the ground.[46] Such a

40 See Olaya, Attisso & Roth (2010) at 8-18 for details of the case.
41 See Olaya, Attisso & Roth (2010) at 15.
42 See Andrieu (2012) at 549.
43 See Miller (2008) at 280.
44 Laplante (2007a) at 171-173; Roht-Arriaza (2014) at 110; Haldemman & Kouassi (2014) at 505-506; Szoke-Burke (2015) at 484-486.
45 Gready & Robins (2014) at 345-348.
46 Roht-Arriaza (2014) at 110.

departure implies that both material and non-material reparations ought to be offered to victims of corruption.

5.3 Financing Reparations

One of the first issues that draws attention in reparations programmes is the availability of financial resources. Hitherto, transitional justice mechanisms in Africa have struggled to reach their potential because of limited funding. For example, South Africa could not pay reparations to victims of apartheid crimes on time and, when it did, their adequacy was questioned.[47] The main problem is that the political transitions have occurred in "societies with so few resources that justice efforts depend almost entirely on external funding".[48] Many reparations programmes in transitional states have failed for lack of funding.[49] Victims are entitled to receive full and effective reparations "as appropriate and proportional to the gravity of the violation and the circumstances of each case".[50] This is not possible in many transitional states, where public coffers have dried up and where widespread poverty, underdevelopment and low standards of living are "normal". As a result, most victims are left frustrated by underfunded reparations programmes which offer little transformative effects, particularly for their socio-economic situation. This raises concerns about whether transitional states are able to source funds to remediate victims of corruption.

The new government has a responsibility to source funds in order to provide stable and adequate financial resources for reparations. It has an onus to devise creative means of funding reparations. Such means include the creation of a special trust fund, finance from the national budget, the introduction of special taxes, debt swaps and international donor funding.[51] Usually, foreign actors refrain from financing reparations too early, as there is an assumption

47 Colvin (2006) at 188-190.

48 Call (2004) at 109.

49 McCarthy (2012) at 234; OHCHR (2008) at 21; de Greiff (2006) at 456-457; Bosire (2006) at 81.

50 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) para 18.

51 OHCHR (2008) at 32-33. See also Magarrell (2007) at 14; Segovia (2006) at 670.

that financing is in itself "an act of reparation" by the transitional state.[52] Hence, transitional states are compelled to devise other means before seeking assistance from external actors. Special trust funds which rely on donations and which are not backed by financial support nor guaranteed their functionality usually end up with paltry funds.[53] This will result in reparations programmes becoming "empty promises" characterised by unplanned financial practices and unguaranteed financial backing. Instead, states are encouraged to provide for government financing through the national budget, backed by advanced planning.[54] To be sure, the national budget may be constrained already, which makes it difficult for the transitional state to allocate funds for reparations. However, as Magarrell observes:

> Reparations in the present can avoid greater social harms — and their resulting costs — in the future.[55]

Failure to offer reparations may result in recurrence of violence as underlying causes of past abuses would remain unaddressed. Also, payment of reparations is a responsibility of the state, particularly where government officials perpetrated acts of corruption to be remedied. The importance of political will needs to be emphasised in order for the financing of reparations through the national budget to materialise. National budgets are subject to rigorous political backing, and the existence of political forces supporting reparations makes a difference in the effective financing of the reparations programmes.[56]

5.3.1 Asset Recovery

Asset recovery, as an anti-corruption tool, may become another important source for funding reparations. Considering that vast resources in transitional states would have been looted by the previous governments, it makes sense for recovered proceeds of corruption to be used to repair harms suffered by their citizen victims. Carranza argues that it is "both just and practical" for recovered assets to be used to fund transitional justice processes in part, particularly

52 Segovia (2006) at 660.
53 Magarrell (2007) at 14.
54 Magarrell (2007) at 14.
55 Magarrell (2007) at 14.
56 Segovia (2006) at 670.

reparations programmes.[57] This is echoed by Yakinthou *et al* who observe, in relation to transitional justice in Libya, that:

> First, money stolen from the public, goes back to directly serve those harmed by the conflict by contributing to fund transitional justice work. And second, the process of tracing, recovering, and returning stolen assets supports truthseeking efforts to help victims and society understand crimes of the past.[58]

In Kenya, the TJRC specifically recommended that stolen assets recovered by the Ethics and Anti-Corruption Commission and the Kenyan courts be used to finance reparations for victims of past abuses.[59] Also, the Liberian TRC recommended that the government establish a Reparations Trust Fund to compensate victims of economic crimes with funding derived from asset recovery schemes.[60] In 2018, Nigeria signed a Memorandum of Understanding with Switzerland and the International Development Association for the return of around US$321 million of former dictator Sani Abacha's loot, subject to "confirmation that the World Bank shall monitor the use of the Funds".[61] Some 300 000 poor families from 36 states in Nigeria are entitled to receive approximately US$14 per month through the Nigeria National Social Safety Net Programme paid from the recovered assets.[62] Thus, transitional states should consider pursuing asset recovery as a possible source to finance reparations.

Recovery of stolen assets for reparations purposes during political transitions may offer transformative effects to transitional states. A transformative approach ensures that citizens are empowered and involved actively in the asset recovery process. According to Lasslett, Kanji & McGill, a transformative justice approach to asset recovery "could usefully inform how stolen assets are returned to victim populations".[63] They argue that:

> a transformative approach encourages the engagement of victim groups in the design of

57 Carranza (2008) at 324-325.

58 Yakinthou *et al* (2014) at 12.

59 Volume IV of the Report of the Kenyan TJRC (2013) at 122.

60 Volume III of the Report of the Liberian TRC (2009) at 43.

61 Article 1(2) of the Memorandum of Understanding among the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association on the Return, Monitoring and Management of Illegally-Acquired Assets Confiscated by Switzerland to be Restituted to the Federal Republic of Nigeria (2018).

62 Transparency International (2018c).

63 Lasslett, Kanji & McGill (2017) at 92.

> enacting mechanisms for asset return, and defining desirable outcomes. This promotes a return process that is bottom-up, victim oriented, context driven and calibrated to important systemic changes.[64]

Such an approach will thwart criticism of transitional justice as being too "elite-driven" and more responsive to demands from donors than from the local population.[65] Hence, it may invoke a "bottom-top" approach, where citizens are regarded not as spectators in transitional justice processes, but as active participants who can contribute to asset recovery processes and the distribution of returned assets. Civil society may play an important role in mobilising and empowering citizens to participate in the process. In Tunisia, after the 2011 revolution, transitional authorities pursued assets stolen during Ben Ali's time in office.[66] Moreover, civil society organisations engaged citizens and agitated for "transparency", "good governance", "citizen engagement" and "inclusion" in a bid to fight corruption, including the return of stolen assets.[67] This active involvement of citizens ought to continue at least until the stolen assets are repatriated to the country of origin and used for the benefit of citizens, including payment of reparations. External actors may support the asset recovery process by providing fast and effective responses to requests by transitional states for the return of stolen assets which have been moved to their jurisdiction.

Nonetheless, it is important for transitional states not to rely upon returned assets as the main source of funding for reparations. The success of the cumbersome and lengthy asset recovery processes is not guaranteed, which may result in victims remaining unremediated. As noted above, the Liberian TRC recommended setting up a Reparations Trust Fund to compensate victims of economic crimes in Liberia.[68] The Fund would rely on assets recovered from tax arrears, from conviction of economic criminals in Liberia, and from international asset recovery.[69] It is not surprising that victims of economic crimes received no compensation, as the reparations programme relied heavily on asset recovery as its main source of funds. It has

64 Lasslett, Kanji & McGill (2017) at 92.
65 See Roht-Arriaza (2014) at 110 on reparations for social, economic and cultural rights.
66 Ball & Bryan-Low (2011).
67 World Bank (2015).
68 Report of the Liberian TRC, Volume III (2009) at 43.
69 Report of the Liberian TRC, Volume III (2009) at 43-44.

been argued that:

> stolen assets should not be written in the line of reparations, but should rather be noted separately. The TJ mechanism of reparations aims to induce government-administered reparations where the state acknowledges its failure to protect its citizens, which should not be contingent upon court decisions, recovery of assets, etc. This duty of the state to protect and redress when it fails to do so is a legal obligation and using stolen assets to fund these reparations can be used as additional (but not primary or in any way conditional) funds to provide individual/group compensation, build monuments, cover healthcare costs, etc.[70]

Indeed, recovered assets should not be the primary source of reparations, but should be supplementary. For example, the TRC in Sierra Leone, in considering different sources to finance the Special Fund for War Victims, distinguished between funds collected from the government (such as revenue generated from mining) and assets seized from convicted persons.[71] The clear distinction between funding from government and funding from recovered stolen assets is important as it ensures that the government fulfils its legal obligations to source funds and pay reparations, rather than relying solely on recovered assets, which likely are insufficient to cover all reparation programmes. Still, recovered stolen assets do present an opportunity for the intersection of anti-corruption initiatives and transitional justice, through the provision of funds from recovered assets to remediate victims of past abuses.

5.3.2 Doctrine of Odious Debt

Corrupt and despotic leaders usually incur sovereign debts for their private gain or to fund repressive forces. Usually, the ordinary citizens enjoy little or no benefit from the odious debts, and may even become victims of repressive forces funded by these debts. When the regime loses power, the transitional government is required to repay debts incurred by its predecessor, regardless of the funds having been used to perpetuate violence or to enrich political elites.[72] This presents a thorny situation for the new government which finds itself saddled with a sovereign debt due for payment and at the same time financially struggling to fund reparation programmes and to improve the socio-economic conditions of citizens.

70 Pesek (2014) at 5.

71 Report of the Sierra Leone TRC, Volume 2 (2004) at 269.

72 Gray (2007) at 138.

The doctrine of odious debt seeks to provide a moral and legal basis for writing off, in whole or in part, the legal obligations by a successive government where the debt in question was contracted by a prior "odious" regime and was not used to benefit the citizens or to advance interests of the public.[73] The argument is that sovereign debts that are incurred without public consent or benefit are objectionable and should not be transferable to the new government, especially where lending institutions or countries had knowledge of these facts in advance.[74] According to Udombana, it would be unfair for the lenders to burden ordinary taxpayers in countries ruled by corrupt governments "to repay loans made to leaders who did not represent these payers".[75] In such cases, the previous corrupt and abusive regime is regarded as "illegitimate", with no legal and moral authority to incur loans on behalf of the country. Since there are international obligations to repay debts, the claim may be invoked by the debtor country in state-to-state arbitration or court proceedings, but in practice, it is more likely voiced in political or diplomatic discussions and negotiations during political transitions.[76]

With transitional states failing to raise enough resources to pay reparations and ensure socio-economic transformation, it would seem desirable for the transitional government to appeal for forgiveness of odious debts. According to Gray,

> If forgiving the debts of odious regimes can free more resources needed for justice, and if paying those debts compromises justice, then there is good reason to void those debts.[77]

Thus, revocation of odious debts may free up resources to fund transitional justice processes such as reparations. In addition, it will send a message to international lenders that corrupt and despotic leaders should not be awarded financial packages where the lenders had reason to believe that corrupt elites would abuse the funds for their own benefit or to facilitate its human rights violations.

However, debt agreements with international lenders are very sensitive and may affect the reputation of the transitional state, making it difficult to borrow again or to attract foreign

73 Howse (2007) at 2.
74 Kremer and Jayachandran (2002).
75 Udombana
76 Howse (2007) at 7.
77 Gray (2007) at 143.

investments.[78] The revocation of debt agreements might cause loss of credibility and relationship with lenders, particularly where the transitional government is advocating for total repudiation of the debt. Hence, states may be hesitant to invoke the doctrine of odious debt regardless of the clear relationship between the debt and human rights violations. An example is South Africa, where various leaders including Desmond Tutu, called for the revocation of the apartheid debts incurred in the 1980s as the apartheid regime borrowed funds, devoting a large percentage of its budget to finance repressive mechanisms against the African majority.[79] The transitional government in South Africa distanced itself from calls to nullify its apartheid-era debt and insisted on repaying the debts in order to maintain international relations and attract foreign investments.[80]

In terms of the transformative justice theory, it is imperative for the transitional government to take approaches that best institutionalises peace and stability, which includes financial stability. In this case, it will not be desirable for the transitional government to abandon its international obligations to repay debts as a way to finance reparations, and in the process suffer loss of financial reputation and relationship with the international community. It is important to balance between financing reparations and maintaining international relationships with international lenders. Hence, rather than repudiating debts, the transitional government may raise concerns on the odious nature of the debt when negotiating with its creditors in order to reach a compromise that promotes financial stability and future access to credit.[81] The government may negotiate favourable debt settlement agreements, highlighting the impact of odious debts on socio-economic conditions of citizens and the obligations of the transitional state to pay reparations to victims of corruption, who are usually victims of such odious debts as well. At the same time, the government may institute investigations or truth telling processes regarding the odious debts to ensure truth, justice and accountability. The state may then fund reparations using the recovered proceeds of odious debts.

78 Kremer and Jayachandran (2002).
79 Kremer and Jayachandran (2002).
80 Howse (2007) at 13; Kremer and Jayachandran (2002).
81 Howse (2007) at 8.

All in all, the concept of odious debt will unlikely free up resources for reparations. However, negotiations by lenders for amendment of odious debt agreements may buy time for transitional states to finance reparation programmes. Where proceeds of odious debts are located, then asset recovery should take place and the recovered funds used to fund reparation programmes.

5.4 Material Reparations

Material reparations include the provision of tangible assets to repair harm done by past abuses, and may come in form of money, goods or services.[82] For example, the South African government, on the recommendation of the TRC's Committee on Reparations and Rehabilitation, paid monetary reparations to victims of human rights violations committed during the apartheid era.[83] Apart from financial compensation, material reparations may come in form of restoration of civil and political rights, such as releasing political prisoners, erasing politically motivated convictions, and returning of exiled citizens. However, these latter forms of material reparations find little application to victims of corruption. Corruption mostly hurts the fiscal integrity of the state, resulting in deprivation of victims' rights to socio-economic development. Hence, the focus of material reparations for victims of corruption involves offering financial resources, goods or services to alleviate the deteriorating socio-economic situation. A critical issue pertaining to material reparations is whether they should be granted individually or collectively.

5.4.1 Individual Material Reparations

Individual material reparations are received by specific persons to repair harm suffered by them. Victims may receive the reparations as a once-off payment or in instalments, depending on the availability of resources. Individual monetary reparations give victims authority to use the funds to satisfy their needs and preferences, may improve their standard of living, and are

82 Garcia-Godos (2008) at 124.

83 Report of the Truth and Reconciliation Commission of South Africa, Volume 6 (1998) at 94; Colvin (2006) at 184-199.

simpler to administer than other distribution methods.[84] There are also disadvantages attached to individual grants, including that they are costly for developing countries, that they may be unsatisfactory and inadequate in proportion to the harm suffered, and that they may not improve the standard of living of the victims markedly.[85] Without a comprehensive reparations framework, individual grants may be perceived as buying "the silence and acquiescence of the victims".[86]

The high number of victims of corruption, which may be in the millions, makes it difficult to mobilise enough resources to provide individual reparations. According to Muvingi, individual reparations are inadequate where there has been systemic and institutionalised economic exploitation and, in fact, they "may impede systemic change by surrogating redistribution".[87] In other words, they temporarily soothe the pain for a few recipients without transforming the socio-economic structures which led to the violations. In Kenya, submissions to the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission included the observation that:

> a poor country with huge developmental needs like Kenya cannot afford to compensate all people for their loss. It might be possible to make token compensation to the countless victims if the colossal sums of money looted by perpetrators of economic crimes are recovered, but it might be infinitely better to make compensation in other forms, such as enhancing access to basic services in the form of access to education, health, clean water, user-friendly roads, restoration of respect and humanity to the provincial administration, an end to all forms of discrimination, among many other humane deeds for the benefit of the residents of the province.[88]

All in all, it really is not feasible to offer individual reparations to victims of corruption. Also, individual reparations may create new tensions between recipients and overlooked citizens in marginalised areas. Exceptional cases for individual reparations for economic violence may take the form of restitution, particularly of individual land and property lost to corruption and other economic crimes. For instance, the Commission in Chad recommended return of illegally

84 de Greiff (2006) at 469.
85 de Greiff (2006) at 469.
86 de Greiff (2006) at 469.
87 Muvingi (2009) at 180.
88 Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003).

confiscated or plundered properties by security forces to their rightful owners.[89] However, this would require a clear legal framework to protect property rights, including protection of the rights of innocent third parties.[90]

Individual reparations may suit victims of physical violence who are usually fewer in number and easily identifiable. In some cases, recovered proceeds of corruption have been used to compensate victims of physical violence. This was implemented successfully in the Philippines, after the demise of Ferdinand Emmanuel Marcos, whose ruthless leadership was characterised by gross violations of human rights and grand corruption. The new government recovered at least US$680 million from his bank accounts in Switzerland, the United States and other countries.[91] About US$200 million of the recovered assets were used to pay reparations to victims of physical violence. Victims received individual grants which were significantly low and came with a letter of apology from the Marcos family.[92] In Peru, a special fund, called the *El Fondo Especial de Administracion del Dinero Obtenido´ Ilicitamente en Perjuicio del Estado*, was established to administer recovered assets looted by former President Alberto Fujimori.[93] Some of the assets were used to fund transitional justice measures, such as truth-finding and reparations.[94] The examples of the Philippines and Peru show that "paths that were closed to transitional justice can be opened when reparations and asset recovery intersect".[95] However, such individual reparations are difficult to implement for the large numbers of victims of corruption, whose individual harm is not ascertainable easily.

5.4.2 Collective Material Reparations

Collective reparations are "benefits conferred on collectives in order to undo the collective harm" suffered by their members.[96] These reparations may come in form of service packages or

89 See Kritz (1995) at 93.
90 See Atuahene (2010) at 90-92; Perez (2013) at 138-140 & 145.
91 Carranza (2008) at 324; Andrieu (2012) at 550.
92 Andrieu (2012) at 550.
93 Navarro (2006) at 507-508.
94 Carranza (2008) at 324; Andrieu (2012) at 550.
95 Carranza (2008) at 324.
96 Rosenfeld (2010) at 732.

development and social investments.[97] They transcend individual payments and may play a fundamental role in the transformation of the socio-economic aspects of past violence, so often neglected in the field of transitional justice. Many citizens would have experienced deep socio-economic inequalities and extreme poverty before and during the armed conflict or autocratic rule.[98] Whilst victims are entitled to full and effective reparations as individuals, this seems impossible in unequal and marginalised societies where there are common economic and institutional constraints. Given the large number of victims of corruption in marginalised communities, it would make sense for the government to offer collective reparations. For example, the Transitional Justice Law in Tunisia offered collective reparations to regions that were marginalised systematically because of large-scale corruption and state economic policies.[99] Such collective reparations are transformative in nature, since they are aimed at transforming the social and economic fabric of the transitional state, and at addressing structural inequalities and marginalisation.[100]

A key feature of the transformative approach to transitional justice is the provision of transformative reparations. Reparations are seen increasingly as the mechanism with the greatest potential for socio-economic impact,[101] and which can transform structural injustices in post-conflict or post-authoritarian countries.[102] According to Arbour:

> Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.[103]

Transformative reparations depart from the dominant and individualistic stance common to transitional justice mechanisms by bringing victims of socio-economic injustices to the core of transitional justice.[104] Instead of prioritising individual victims of physical violence, transformative reparations offer an opportunity to address the socio-economic features of

97 de Greiff (2006) at 468-469.
98 Yepes (2009) at 631.
99 See Carranza (2015).
100 See Evans & Wilkins (2019) at 138-140.
101 Yepes (2009) at 637.
102 Balasco (2017) at 1; Gready & Robins (2014) at 347.
103 Arbour (2007) at 3.
104 Evans & Wilkins (2019) at 138-140; See also Yepes (2009) at 637-639.

human rights abuses and to provide collective reparations aimed at transforming unequal societies. Robins & Gready argue that reparations in unequal societies should not return "poor victims to poverty and discrimination" but should "transform their circumstances and in so doing address the injustice that drives conflict".[105] This corresponds to the argument by Yepes that:

> the purpose of reparations of massive human rights violations in unequal societies should not be to restore poor victims to their previous situation of poverty and discrimination, but to change or "transform" these circumstances in which they lived, and that could have been one of the roots of conflict and that anyway are in themselves unjust. In that sense, reparations in a transitional context could be used as an instrument to come to terms with an injustice that took place in the past, but are also a means for a better future; we should see them as a modest but non-negligible opportunity to move towards a more just society. That is why we speak about transformative reparations.[106]

Thus, reparations for victims of corruption should go beyond returning them to their position before the abuses. Transformative reparations should not be seen merely as a means of restoring the *status quo ante* for victims, but as a justice tool which corrects the past and prepares the platform for a better future and a more just society.[107]

Many transitional states in Africa will be experiencing deteriorating socio-economic conditions, structural inequalities and marginalisation as a result of corruption. In such an environment, restitution likely will maintain the conditions of economic deprivation, thereby leaving the underlying structural inequalities and marginalisation unchallenged. The notion of transformative justice insists that reparations "must aim at the reconstruction of economic, social and political relations" responsible for causing or sustaining past abuses.[108] This includes transforming the socio-economic conditions of victims and affected communities. Yepes further argues that reparations in transitional justice should not be perceived as fixing past problems only, but should be regarded also as a means "to promote a democratic transformation and to attain better conditions of distributive justice for all".[109] This implies that transitional states

105 Gready & Robins (2014) at 347. See also Duthie (2008) at 295-296.
106 Yepes (2009) at 637-638.
107 Yepes (2009) at 637-638.
108 See Walker (2016) at 109.
109 Yepes (2016) at 639.

pursuing a transformative approach to transitional justice have legal and ethical duties which are weaker on the provision of integral reparations and stronger on distributive, transformative reparations for the affected community.[110] Hence, the best way to undo the consequences of corruption in transitional states is to go beyond individual reparations and restitution to improving the socio-economic conditions of victims and affected communities.

The concept of transformative reparations is not new. In 2007 already, advocates and activists for women's rights around the globe declared that reparations must go above and beyond specific wrongdoings and consequences to "address the political and structural inequalities that negatively shape women's and girls' lives".[111] Such an approach not only looks backward to the particular incidents resulting in the violence, but also looks forward to eliminating the underlying factors leading to or sustaining the violence. This means that transformative reparations are aimed at addressing economic violence as an underlying cause and sustainer of a violent past.[112] Hence, transformative reparations are forward-looking, seeking to transform the socio-economic conditions of citizens in a bid to create a more equal and just society. They are regarded as indivisible since all victims can share in them.[113] Similarly, all victims of corruption in marginalised communities share comparable socio-economic problems, and transformative reparations may be shared amongst all victims in the community.

It is the responsibility of the new government to dismantle systemic socio-economic injustices and inequalities.[114] Gready & Robins correctly point out that in order to maximise the socio-economic impact of reparations, there is a need to "look at harms done and the structures underpinning such harms, rather than at decontextualised acts of violence".[115] The structural effects of corruption on human rights, such as aggravation of social inequalities and marginalisation, cannot be "repaired" generally through individual grants.[116] It has been argued

110 Yepes (2009) at 641-642.

111 Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007). See also Rubio-Marin & de Greiff (2007) at 325; Walker (2016) at 111-115.

112 de Greiff (2006) at 469.

113 Rosenfeld (2010) at 733.

114 Muvingi (2009) at 178.

115 Gready & Robins (2014) at 347.

116 Andrieu (2012) at 550.

that transformative reparations should be devised as an inclusive political project (without favouring a political side), specifically aimed at including victims in the new social order "by recognising alleviating their past suffering and by offering them possibilities of a decent life".[117] Hence, transformative reparations offer victims of corruption an opportunity to escape their current state of inequality and marginalisation, and a possibility of a better life. They represent an attempt to undo the detrimental effects of corruption on socio-economic development in marginalised communities.

However, there are several challenges facing transformative reparations. These include defining the target group, avoiding "discriminatory and exclusionary development that could fuel future conflict", clarifying the role of external actors, and differentiating between reparations and development.[118] On defining the target group, a transformative approach to reparations should take into consideration both the past suffering and the present needs of potential beneficiaries.[119] Such criteria will justify prioritising the allocation of significant material reparations to persons in most vulnerable conditions and minimising material reparations for advantaged victims and communities.[120] Advantaged victims and communities should be recognised through symbolic reparations. In that way, the creation or furtherance of unjust social relations is kept to a minimum, as poor and marginalised communities are prioritised for material reparations in order to address structural inequalities and improve their lives. It is imperative to circumvent reparations programmes which aggravate inequalities or affirm discriminatory practices.[121]

Transformative justice includes transformative participation that engages and reconstructs victimhood.[122] As the most victim-centred mechanism, transformative reparations for victims of corruption should ensure their active participation in the design, implementation and monitoring of reparations programmes. In Kenya, the active participation of victims in all

117 Yepes (2009) at 639. See also Rubio-Marin & de Greiff (2007) at 325.
118 Gready & Robins (2014) at 347.
119 Yepes (2009) at 644.
120 Yepes (2009) at 644.
121 Yepes (2009) at 644.
122 Gready & Robins (2014) at 358.

aspects of reparations programmes was emphasised by the TJRC.[123] It recommended the development of policies that engage with victims and their representatives throughout the reparations process.[124] It has been argued that "reparations programmes need to consider what the intended recipients want and need".[125] There is a clear need for local ownership of collective reparations, with the beneficiary community actively involved in the design and implementation of the reparations programmes.[126] In other words, the victims of corruption "should support, shape or contest" any reparations programmes.[127] Reparations should be subject to locally driven processes and active participation of victims, which ensure support for them as a transitional justice measure. Such an approach underlines the worth of citizens and the marginalised in challenging unequal power relations and promoting a just society.[128]

A good way of including affected communities is decentralisation of reparations programmes. This entails "giving increased control and authority to local government or community structures — for socioeconomic projects and policies" instead of a centralised bureaucracy at national level.[129] For example, Morocco decentralised its collective reparations programme by distributing funds to eleven regions which previously were marginalised and excluded from development.[130] Local councils were responsible for the administration and distribution of the funds, based on the priorities of their constituents.[131]

Victim participation may be improved also through participatory budgeting and oversight.[132] This involves the creation of a community mechanism, through a representative and deliberative process, which decides on the spending of funds allocated to the community.[133] The mechanism is most effective if it is subject to oversight or monitoring by

123 Report of the Kenyan TJRC, Volume IV (2013) at 121.
124 Report of the Kenyan TJRC, Volume IV (2013) at 121.
125 Evans & Wilkins (2019) at 139.
126 Roht-Arriaza (2014) at 120.
127 Gready & Robins (2014) at 358.
128 Gready & Robins (2014) at 358.
129 See Szoke-Burke (2015) at 487.
130 International Centre for Transitional Justice (2009) at 24-28 & 42.
131 International Coalition of Sites of Conscience (2013) at 9-11.
132 Szoke-Burke (2015) at 488.
133 See Hordijk (2009) at 43.

community members on the implementation of agreed projects.[134] Such transformative participation by victims is an effective anti-corruption tool that ensures transparency and accountability in reparations programmes. Also, it provides an opportunity for victims to challenge corrupt and unequal power relations responsible for their destitution and marginalisation.

The notion of transformative reparations goes to the heart of the debate on transitional justice and development. Practically, it may be difficult to differentiate between transformative reparations and development. There are different schools of thought on the relationship between the two. One school of thought is cautious about extending reparations beyond restitution and warns that they should not become a substitute for development.[135] This is true, considering that reparations are a form of acknowledgment of guilt, which is quite different from development. The provision of development projects instead of reparations allows governments and other responsible institutions or persons to absolve themselves from officially acknowledging their wrongdoing.[136] Transitional governments tend to offer collective reparations, as they are less expensive than individual reparations and beneficiaries are likely to understand them as a form of government benevolence.[137] This undermines justice for specific victims and any prospect of ensuring non-repetition of abuse in future. The latter point has raised objections from human rights activists on the ground that there should not be attempts to substitute reparations with infrastructural projects, which are part of government's responsibility to develop communities.[138] Development projects, regardless of their reparative effects, and even though they occasionally may be used for this purpose, are not reparations programmes as they are not aimed at redressing victims of abuses.[139]

The other school of thought contends that there is a need for a close relationship

134 Hordijk (2009) at 53.

135 See Roht-Arriaza & Orlovsky (2009) at 3; UN Women & UNDP (2010) at 23; Gready & Robins (2014) at 347.

136 Laplante (2007a) at 145; Roht-Arriaza (2014) at 119.

137 Roht-Arriaza (2014) at 119. See also Laplante (2007a) at 164.

138 Roht-Arriaza (2014) at 119.

139 Robinson (2008) at 299.

between transitional justice and development, particularly in developing countries.[140] Robinson argues for development sensitive transitional justice as the two relate to each other in more than one way: they complement each other, advertently affect each other, can be co-ordinated intentionally, and may address each other directly.[141] Waldorf makes an important distinction between reparations and development assistance by arguing that the former "redress harms" whilst the latter "addresses needs".[142] However, he goes on to stress that this distinction is applicable more in theory than in practice, as victims' harms and needs usually originate from the same wrongful conduct.[143] This is similar to an argument by Duthie, that even though reparations and development are conceptually distinct, they "may be co-ordinated intentionally with an eye to how they might affect each other, thereby minimising tensions and possibly creating synergies".[144] Development sensitive reparations can reduce marginalisation, exclusion and vulnerability "by bringing people and groups into the economy, recognising and empowering them as citizens and perhaps generating economic activity".[145] As such, reparations programmes cannot have any transformative effects if they are contrary to the development strategies of the transitional state.[146]

Roht-Arriaza & Orlovsky stress the complementary relationship between reparations and development as follows:

> Development efforts affect reparations outcomes. The more development focuses on strengthening the services that will most likely be used by reparations beneficiaries, the more effective the reparations program or project is likely to be. This is in part because post-conflict and post-dictatorship states are generally weak or have state institutions and functions that have been skewed towards internal security and the benefit of those in power, to the exclusion of the majority. A development focus on service delivery to the poor, or on the anti-corruption efforts needed to make sure those services actually arrive, can have important positive repercussions on the eventual delivery of reparations, and will expand the range of benefits that reparations programs could

140 See Mani (2008) at 253; Duthie (2008) at 292.
141 Robinson (2008) at 295-303.
142 Waldorf (2019) at 134.
143 Waldorf (2019) at 134. See also Dixon (2016) at 97.
144 Duthie (2008) at 299.
145 Robinson (2008) at 298.
146 Yepes (2009) at 642.

provide.[147]

When one looks at transitional justice through the lens of the transformative approach, development becomes an important part of transitional justice. Past corruption would have stifled economic growth and undermined socio-economic development in transitional states by diverting resources required for essential services, such as health, housing, education, clean water and sanitation. In a way, the government would have failed fully to realise the socio-economic rights of citizens. Hence, a transformative perspective on transitional justice inevitably should consider transformative reparations to victims of corruption which are development-oriented.

It has been suggested that "one's understanding of transitional justice affects the way one sees its relationship to development".[148] The traditional approach, with its narrow ambit, makes it difficult to link transitional justice and development because emphasis is placed on remediating victims of physical violence, without considering the socio-economic causes and consequences of past abuses. By contrast, a transformative approach to transitional justice examines the socio economic causes, nature and effects of past abuses. Victim-survivors may understand poverty and exclusion as preventing them from improving their well-being and meeting their needs, and expect that these wrongs be made right.[149] As a result, many victims of corruption may ask for better access to health, education, food security, adequate housing and general improvement of living standards. This makes it difficult for transitional states to avoid offering collective reparations which are development-oriented and aimed at transforming the socio-economic conditions of victims in response to their needs. The South African TRC highlighted the importance of development sensitive reparations, centred around participatory implementation which "strengthens collective community development and local reconstruction and development initiatives".[150] This understanding saw it recommending collective reparations such as skills training, support of black education and housing projects to

147 Roht-Arriaza & Orlovsky (2009) at 3.

148 Duthie (2008) at 294.

149 Laplante (2007a) at 166.

150 See Report of the South African TRC, Volume 5 (1998) at 180.

undo the collective harm suffered by black communities during the apartheid era.[151]

The above arguments show that there can be a close relationship between transformative reparations and development. However, transitional states need to make a clear distinction when remediating victims of corruption. Unlike the obligation of the transitional state to develop communities and provide basic services to all its citizens, reparations programmes need to be linked to the state's previous neglect and/or oppression of marginalised areas or groups and its attempt to correct this injustice. The building of hospitals or schools for victims of corruption is beneficial, but it may lose its reparative character and become more humanitarian or developmental if it is not attached to recognition of a past wrong.[152] In Kenya, the TJRC recommended that the government acknowledge that it is prioritising development of marginalised areas as a response to their previous neglect.[153] Thus, collective reparations should be presented with acknowledgment of past abuses and should not be passed off as development projects. In particular, the government should make it clear that the development projects are a response to the previous marginalisation faced by the communities because of corruption and any other factors. Even though reparations cannot, and should not, replace long-term development goals, they can establish an initial "victim-friendly" face of the state, and generate an excellent platform for a more positive, long-term interaction between the state and its citizens.[154] They have the potential to change citizens' relationship to the state, to strengthen civic trust, and to create minimum conditions "for victims to contribute to building a new society".[155]

To sum up, transitional states should target marginalised communities as collective victims of corruption eligible for material reparations. Individual reparations are not ideal for undoing the consequences of corruption as they alleviate the pain for a while but with little prospect of socio-economic transformation. Collective reparations include the provision of, and access to, public services and development projects from which the communities previously

151 Report of the South African TRC, Volume 5 (1998) at 192-193.

152 Andrieu (2012) at 550.

153 Report of the Kenyan TJRC, Volume IV (2013) at 113.

154 Roht-Arriaza & Orlovsky (2009) at 4. See also Yepes (2009) at 642.

155 Roht-Arriaza & Orlovsky (2009) at 4.

were excluded because of corruption. These transformative reparations should not be passed off as part of the transitional state's obligation to develop communities, but should be accompanied by a clear official acknowledgment that the programmes are remedies for past wrongdoings.

5.5 Non-Material or Symbolic Reparations

There is non-material damage caused by corruption, such as loss of public trust and of credibility of public institutions.[156] In Tunisia, the Arab Spring was ignited by a vendor, Mohammed Bouazizi, who immolated himself in protest against endemic corruption, which act led to widespread protests by Tunisians who had lost trust in the corrupt government.[157] Such condemnation of government corruption demonstrated the immaterial damage it caused citizens. Transitional states should address this aspect of corruption through non-material or symbolic reparations, which ensure "satisfaction" for victims and carry "guarantees of non-repetition". However, bringing socio-economic issues to the fore of transitional justice requires the widening of what "satisfaction" and "guarantees of non-repetition" mean as components of reparations.[158] What measures will ensure satisfaction for victims of corruption? How will the transitional state guarantee non-repetition of acts of corruption which fuelled or sustained past violations of human rights?

Satisfaction as a form of reparations entails measures which bring emotional repair to victims of past abuses. Satisfaction measures, such as truth-seeking and searching for the disappeared, usually are carried out by TRCs. As explained in Chapter Four above, TRCs in Liberia, Sierra Leone, Kenya and Tunisia have examined and reported on past corruption as part of their truth-seeking mandate. It is important to conduct thorough investigations in order to understand the causes and nature of previous abuses, including the link between corruption, structural inequalities and marginalisation. The findings by the commissions on corruption and other economic crimes may prove useful in constructing a complete picture of past violence.

156 Meng & Friday (2014) at 359.
157 Whitaker (2010).
158 See Roht-Arriaza (2014) at 138.

This may be followed by an official acknowledgment by the government of the impact of corruption on the victims, particularly on economic development and violations of human rights. The official acknowledgment will help to restore public trust and to establish a new social contract between the new government and its citizens that corruption is not to be tolerated. Another symbolic reparation is the expedition of corruption cases involving political leaders in which citizens have an interest.[159] Unnecessary delays in the arrest, arraignment and trial of corrupt leaders tells victims of corruption that the new government is committed to bringing a new culture which does not condone or tolerate corruption.

Material reparations for victims of corruption should be accompanied by non-material measures aimed at preventing recurrence of corruption. This reassures victims that reparations are not merely temporary relief efforts by the new government, whilst corruption remains unbridled. The transitional phase provides an opportunity to (re-) establish and instil good governance in transitional states, with a view to ensuring non-recurrence of corruption as a cause or sustainer of violence. This includes instituting effective anti-corruption measures which will prevent and hold to account any abuse of power for personal, political or any unlawful gains. The reparative demands of victims usually include a change in state behaviour.[160] This may include reformation in the security sector, judiciary and any administrative body which perpetuated corruption and human rights violations. Transitional states may enact laws which require public officials to declare their assets publicly so as to prevent corruption and detect unexplained wealth and conflicts of interests.[161] A code of conduct for public officials may be introduced to promote respect for human rights, the rule of law, accountability, transparency in government, and prevention of conflicts of interests.[162] Laws regulating the funding of political parties may be introduced to prevent use of public funds by ruling parties to advance their political agendas, and to bring transparency to the

159 See Report of the South African TRC, Volume 5 (1998) at 189 on "symbolic reparation of expediting outstanding legal matters related to the violations".

160 Robins (2017) at 49.

161 Article 8(5) of UNCAC; Article 7(1) of the AU Convention.

162 Article 8(1)-(3) of UNCAC; Article 7(2) of the AU Convention.

funding of political parties.[163]

Most importantly, there is a need for active participation of victims of corruption and the general public in the design, implementation and monitoring of anti-corruption initiatives. Transitional states should put in place measures which promote the active participation of individuals, civil society, non-governmental organisations and community-based organisations in preventing and combating corruption. This includes improving public access to information, undertaking public information activities against corruption, and promoting public contributions to the government decision-making process.[164] Public participation may be promoted also by the introduction of comprehensive laws which protect whistleblowers, witnesses and victims of corruption.[165]

Transformative justice cannot be implemented successfully without an empowered civil society. Civil society plays a fundamental role in initiating, advocating and shaping the transitional justice agenda.[166] For example, civil society in Tunisia was instrumental in forcing the Tunisian government into accepting socio-economic issues, such as corruption, as transitional justice issues.[167] Public mobilisation by civil society boosts transformative participation in the planning, designing and implementation of transitional justice mechanisms.[168] Civil society may play a supporting role in marginalised and disadvantaged communities or groups where victims of corruption feel powerless and uninformed regarding their role in the fight against corruption. Hence, transitional states should ensure that civil society, non-governmental and community-based organisations are protected against political interference by powerful persons who may try to maintain corrupt and unequal power relations. An empowered civil society and transformative participation of victims of corruption and citizens at large in anti-corruption initiatives are important for preventing recurrence of corruption as a factor leading to violence.

163 Article 7(3) of UNCAC; Article 10 of the AU Convention.
164 Article 13 of UNCAC; Article 12 of the AU Convention.
165 Articles 32 & 33 of UNCAC; Article 5(5) of the AU Convention.
166 Hayner (2005) as cited in Gready & Robins (2017) at 961. See also Gready & Robins (2014) at 358.
167 World Bank (2015).
168 Gready & Robins (2017) at 960.

5.6 Conclusion

This chapter has shown that reparations are an important tool for justice in transition. They are the ultimate transitional justice mechanism which is less focused on perpetrators and more centred on redressing harm suffered by victims. The inclusion of an anti-corruption agenda within the field of transitional justice inevitably raises the issue of reparations for victims of corruption. Transitional states in Africa cannot afford to turn a blind eye to the destructive effects of past corruption on socio-economic development and marginalisation of communities. Due to practical difficulties of repairing individual harm caused by corruption, it was submitted that there is a need to identify marginalised communities as collective victims of corruption. The examples of Tunisia and Kenya showed that corruption was a major cause of marginalisation, and hence identifying such communities for reparations purposes will help to undo the consequences of corruption. Individual reparations for victims of corruption mitigate the pain in the short term, but fail to address the socio-economic structures which perpetuated their victimisation. Hence, such reparations are most suitable for victims of physical violence, whose numbers are relatively manageable compared to victims of economic violence.

On collective material reparations, it was argued that reparations should be more "transformative" than corrective or restorative. Reparations for victims of corruption should involve transforming society rather than merely restoring the *status quo ante* for victims. This calls for reparations which are aimed at transforming the social and economic fabric of the transitional state by tackling structural inequalities and marginalisation. Transformative reparations for victims of corruption invariably will collide with development or be construed as development projects. However, they should be accompanied by an official acknowledgment of wrongdoing and should not be written off as the transitional state's responsibility to develop communities. Importantly, there is a need for local ownership of reparations programmes, with beneficiaries actively involved in the design, implementation and evaluation of the programmes. As to non-material or symbolic reparations, there is a need to change the state's corrupt behaviour by the introduction of comprehensive anti-corruption tools which prevent the recurrence of corruption as an underlying cause and sustainer of past violence.

All in all, reparations have the most potential to offer transformative effects to victims

of corruption. They have the potential to dismantle systemic socio-economic injustices and inequalities caused by corruption in the transitional state. Transformative reparations assist in the reconstruction of the social, economic and political fabric of the country, where citizens are empowered to challenge corrupt and unequal power relations which threaten their rights and which may lead to recurrence of violence. Most importantly, reparations offer actual resources to victims for the betterment of their socio-economic conditions.

CHAPTER SIX

INSTITUTIONAL REFORMS

6.1 Introduction

Institutional reforms entail various initiatives aimed at the (re)formation of institutional arrangements "necessary for democratic and socio-economic renewal and transformation".[1] Reformation of institutions is a measure towards the guarantee of non-recurrence of violence.[2] Whilst other transitional justice measures are aimed at redressing past abuses, institutional reforms are forward-looking, in that their primary aim is ensure a change of norms and behaviour in the new government. From an anti-corruption perspective, institutional reforms are a possible means of disassembling corrupt networks and reducing the recurrence of corruption as a cause and sustainer of abuses, thereby reinforcing the pursuit of peace and the fight against corruption.[3] Unless disbanded, corrupt networks and structures will continue to operate and will undermine any efforts towards peace and justice.[4] Hence, transitional justice presents an opportunity to eliminate the conditions and dismantle the structures which bred corruption, and to create new conditions and structures to advance socio-economic transformation in transitional states.

Public institutions in transitional states may be perceived as symbols of corruption and abuse of power because of their history of association with the plundering of state resources and the commission of human rights violations. They would have endured many years of undue interference from and abuse by political and economic elites deploying them as instruments of both physical and economic violence. In Sierra Leone, the TRC found that, by the beginning of the civil war, "greed, corruption and bad governance had led to institutional collapse" which

1 Dersson (2019) at 17.

2 United Nations Secretary-General (2010) at 9; Andrieu (2012) at 550; OHCHR (2014) at 44; Roht-Arriaza (2019) at 108. See also Principle 23 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

3 Andrieu (2014) at 551.

4 See Boucher *et al* (2007) at 11.

encompassed the judiciary, the security forces and the civil service.[5] Successive governments before the conflict abandoned any notion of accountability, with public institutions such as the judiciary and the civil service being used as pawns by the executive.[6] The TRC made the important finding that:

> Institutional collapse reduced the vast majority of people to a state of deprivation. Government accountability was non-existent. Political expression and dissent had been crushed. Democracy and the rule of law were dead.[7]

In Zimbabwe, the ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF), under the leadership of the late Robert Mugabe, captured all key public institutions in order to further the its interests, resorting readily to sponsoring violence,[8] rigging elections[9] and exploiting resources.[10] Endemic corruption became the order of the day as ZANU-PF elites looted captured public institutions with impunity, leading to their collapse and inability to offer basic services to citizens.[11] Hence, transitional states have a huge task to transform such vehicles of corruption and physical abuse into new symbols of democracy, transparency and accountability.

Weak institutions and the inflow of external funding create opportunities for corruption to thrive in transitional states.[12] The transition to peace or democracy usually results in increased foreign direct investment and donor funding to alleviate the socio-economic hardships faced by citizens. In these circumstances, there is a real risk of increased levels of corruption if public institutions remain weak and unaccountable. Also, transitional governments are susceptible to the influence of illicit political finance which incapacitates democratic features of society and captures key state institutions, including *de facto* takeover of public institutions by private interests.[13] If corruption is not addressed, it threatens the "legitimacy of

5 Report of the SL TRC, Volume 2 (2004) at 30.
6 Report of the SL TRC, Volume 2 (2004) at 31.
7 Report of the SL TRC, Volume 2 (2004) at 30.
8 Muvingi (2008) at 87-88, Mapuva (2010) at 467.
9 See Matyszak (2017) at 91-92; Kriger (2012) at 17-19.
10 Kriger (2012) at 21-23; Saunders (2014) at 381-384 & 386-389.
11 See Bracking (2007) at 43-46.
12 Rose-Ackerman (2008) at 405.
13 Kupferschmidt (2009) at 5-8 & 32.

government institutions trying to re-establish themselves" during or after a political transition.[14] This may derail any meaningful peacebuilding efforts as citizens become frustrated by the inability of the new government to tackle corruption.

A survey by Afrobarometer in 2018 showed that the majority of Tunisians perceived corruption in public institutions to be on the increase, and ranked it third of the most important things which ought to be addressed by the government.[15] This perception is a challenge to the government which emanated from the Arab Spring in Tunisia, as citizens would have expected a decrease in the public-sector corruption which had led to the revolution in 2011. Persistent unbridled levels of corruption may "justify those who threaten renewed fighting" and who are able to count on support from citizens frustrated by an unchanged culture of corruption.[16] As Boucher *et al* correctly point out, a comprehensive anti-corruption strategy can function as a complete peacebuilding or statebuilding strategy.[17] For instance, anti-corruption measures that enhance the management of natural resources in transitional states prevent abuse of such resources to fuel violence.[18] State institutions which fail to combat corruption and to protect citizens against human rights abuses make the state susceptible to instability.

Corruption undermines public trust in the government and its institutions.[19] Victims and affected communities perceive public institutions as undependable and as vehicles with excessive powers to inflict pain upon them and to plunder state resources. Such lack of trust undermines efforts by the government to mobilise citizens to join in the fight against corruption, and it results in the public generally dismissing any anti-corruption pledge by government.[20] Thus, institutional reforms targeted at tackling corruption may contribute to the development of trust between citizens and the government.[21] Transitional states need to re-(establish) civic confidence in state agencies by implementing institutional reforms demanded

14 Boucher *et al* (2007) at 1.
15 Afrobarometer (2018).
16 Rose-Ackerman (2008) at 407.
17 Boucher *et al* (2007) at 57.
18 Peterson (2014) at 17.
19 See Blind (2006) at 11-14; Andrieu (2012) at 551.
20 See Offe (1990) at 70.
21 Andrieu (2012) at 552.

by years of corruption and human rights violations. It will send a clear message that corruption or any abuse of office is no longer a way of doing business in state institutions.

Institutional reform is important for successful implementation of other transitional justice mechanisms. For instance, institutional reforms facilitate the pursuit of criminal accountability for past wrongdoings.[22] Reformed anti-corruption bodies can receive complaints of corruption, investigate without undue influence and lodge formal complaints or initiate criminal proceedings. Reformed police departments will not hesitate to arrest and take suspects into custody. A reformed prosecutorial authority will prosecute effectively, and a reformed judiciary can adjudicate high-level corruption cases impartially and pass sound judgements.

Simultaneously, institutional reforms benefit from strong and effective transitional justice mechanisms. For example, TRCs which have investigated economic violence effectively and extensively may make important recommendations on institutional reforms required to deal with corruption.[23] Some TRCs have recommended reformation of anti-corruption institutions,[24] reformation of anti-corruption laws in relation to matters such as protection of whistleblowers and assets disclosure,[25] and general strengthening of laws to advance good governance and combat future economic crime.[26]

Hence, transitional justice presents an opportunity for the transformation of state institutions to secure desired levels of transparency, accountability and respect for human rights. African countries are starting to appreciate the need for an anti-corruption agenda in institutional reforms as part of transitional justice. For instance, the Transitional Jusice Law in Tunisia provides for institutional reforms aimed at "dismantling and rectifying the system of corruption, oppression and tyranny so as to guarantee the non-repetition of the violations", and to ensure respect for human rights and warrantee the rule of law.[27] The remainder of the

22 OHCHR (2006b) at 3.
23 Gready & Robins (2014) at 345.
24 See Report of the TJRC, Volume IV (2013) at 56-57.
25 See Report of the SL TRC, Volume 2 (2004) at 160-161.
26 See Report of the Liberian TRC, Volume III (2009) at 40-42.
27 Article 14 of Transitional Justice Law.

chapter will examine how best institutional reforms may be implemented to address corruption in transitional states.

6.2 Institutional Reforms and Transformative Justice

Institutional reforms are the brainchild of liberal peacebuilding, which places much emphasis on the need to build free markets and democratic institutions.[28] The theoretical premise of liberal peacebuilding is liberal peace, which views peace as a product of established institutions needed for "the liberal governance of society, the economy and politics".[29] State institutions are required to adhere to key principles of liberal peace, such as democracy, the rule of law and human rights, which provide the necessary conditions for capitalism and free markets to flourish.[30] In other words, building democratic state institutions is regarded as a *sine qua non* of achieving liberal peace in states emerging from armed conflict or autocratic rule.

Concerns have been raised about the sustainability of liberal peacebuilding projects which are driven by "top-down mediation amongst power brokers", as opposed to bottom-up peacebuilding approaches.[31] Such peacebuilding exercises usually are imposed on transitional states by external actors, including international organisations, non-governmental organisations and donors.[32] Liberal peacebuilding has been criticised as a "hegemonic project whose ideological purpose is to spread the values and norms of dominant power brokers".[33] In this regard, Chandler argues that state-building efforts which lack local approval indicate a Western "empire in denial" seeking nevertheless to "colonise non-Western state institutions".[34] Where transitional justice initiatives are externally driven and lack local participation and ownership, the peace programme "reflects Western/Northern concerns and priorities" at the

28 See Sriram (2007) at 579-581; Paris (2010) at 342; Talentino (2012) at 47; Sriram (2014) at 35.
29 Newman, Paris & Richmond (2009) at 15. See also Wallis (2018) at 83.
30 See Wallis (2018) at 83.
31 Newman, Paris & Richmond (2009) at 4. See also Cavalcante (2014) at 146.
32 See Sriram (2007) at 590.
33 See Paris (2010) at 344. See also Richmond & MacGinty (2015) at 178; Sriram (2007) at 588-589.
34 Chandler (2006).

expense of local issues and context.[35] Such initiatives lack adequate consultations with victims and affected communities. As a result:

> liberal peacebuilding has created very weak states and institutions that are dependent upon foreign support and subject to contests over both power-sharing and corruption.[36]

The preferences of external actors usually are centred around international peace and security, which pay more attention to institutional reforms to prevent recurrence of physical violence and less to economic violence.

Transformative justice denounces such elitist approaches to institutional reform, which are aligned with external security rather than with local needs and priorities.[37] Such approaches adhere to international understandings of stability without addressing the underlying causes of conflict, which suggests that the peace and stability being sought are "not entirely inclusive or context sensitive".[38] Lambourne argues that institutional reform for transformative justice means that:

> Political structures and accountability processes need to be designed for local conditions and with local ownership, as well as to incorporate culturally relevant symbolism and rituals, in order to support capacity building and meaningful personal and societal transformation. This applies to both structural or institutional transformation and relationship transformation, which creates the framework and conditions conducive to reconciliation and peacebuilding.[39]

Thus, a transformative approach to institutional reforms considers local needs before accommodating external forces structured by liberal approaches to peacebuilding and statebuilding.[40]

However, the criticism of liberalism in transitional justice should not discard the importance of strong institutions as part of transformative transitional justice. The AUTJP argues for institutional reforms in Africa which ensure "democratic and socio-economic

35 Richmond & MacGinty (2015) at 178. See also Sriram (2007) at 590.
36 Richmond & Franks (2007) at 30.
37 Gready & Robins (2014) at 345.
38 Newman, Paris & Richmond (2009) at 4.
39 Lambourne (2009) at 46.
40 Gready & Robins (2014) at 345.

transformation".[41] Functioning public institutions play a key role in post-conflict settings, as they manage power relations and deliver security and justice to citizens. Lambourne identifies "political justice" as a core element of a transformative justice model.[42] Such political justice involves the transformation of:

> both institutions and relationships to eliminate corruption and promote a sense of fair representation and participation of the general population.[43]

In other words, the objective of political justice is the reformation of political and institutional structures, without which incomplete transformative justice and unsustainable peacebuilding will result.[44] Also, international funding support is required for establishing strong institutions. Hence, a transformative approach to transitional justice includes measures on institutional reforms which enable democratic structures to reinforce the rule of law and protect human rights. What is questionable is the creation or reformation of empty institutions in terms of the liberal peacebuilding approach which sidelines victims and local constituencies.

A transformative approach to institutional reform raises the possibility of changes "tailored to local circumstances, priorities and political realities".[45] According to Roht-Arriaza, a transformative approach means "getting at root causes, especially economic and social rights violations, and requires a bottom-up analysis of what those root causes are".[46] There is a need for effective consultation with local communities whose everyday life is affected by the conduct of these state institutions.[47] It is important for local communities to participate actively in structuring institutional reforms as measures towards guaranteeing non-repetition of past abuses. Such participation helps to legitimise reforms, since victims and local populations will embrace them as being in their best interests. Local ownership and participation promote effectiveness of reforms, facilitate the demotion of external actors to supporting roles, and

41 See AUTJP (2019) at 18.
42 Lambourne (2009) at 45-47.
43 Lambourne (2009) at 45.
44 Lambourne (2009) at 45.
45 Killick (2005) at 3.
46 Roht-Arriaza (2019) at 125.
47 See AUTJP (2019) at 19.

provide "the foundation for sustainability".[48] They are essential for disrupting patterns of corruption and abuses responsible for the exclusion and marginalisation of communities in transitional states. Hence, local conditions need to be prioritised in order to formulate ł reforms which comprehend the role played by institutions in previous abuses and how recurrence may be prevented. Only in that way can institutional reforms in transitional states include an anti-corruption agenda as part of their peacebuilding efforts and encourage participation of victims and local communities.

In terms of the transformative justice approach, local participation can take the form of public discussions and engagements. For example, a TRC may be given a mandate to collect information on the views of victims and affected populations with regard to institutional reforms and to consider their input in its recommendations. The TRC may summon representatives of key institutions implicated in past corruption and human rights violations to ascertain their views on their expected roles and responsibilities in the future. Such open discussions encourage locally driven reforms, reflecting the needs and priorities of the local population. Also, they prevent local elites from dictating institutional reforms aimed at the retention of corrupt power structures which entrench socio-economic inequality and marginalisation.

There is an "anti-corruption consensus" which comprehends corruption as a symptom of governance failure and which holds that it can be reduced or eliminated through effective reformation of institutions.[49] For instance, the managing director of Transparency International recently stated that:

> Corruption chips away at democracy to produce a vicious cycle, where corruption undermines democratic institutions and, in turn, weak institutions are less able to control corruption.[50]

The World Bank views corruption "as a symptom of underlying institutional dysfunction" which requires a solution that can assist countries to fortify governance and management of public

48 See Ismail (2008) at 129.

49 Uberti (2015) at 318. See also Bukovansky (2006) at 185.

50 Transparency International (2018d) at 185.

institutions, so as "to improve economic policies and legal/judicial systems, and to develop and implement specific anticorruption measures".[51]

Corruption is regarded as an obstacle to liberal peacebuilding because it supposedly weakens public institutions and increases the risk of recurrence of violence.[52] Uncontrolled levels of corruption thus will undermine state effectiveness and state legitimacy, which increases the fragility of the state.[53] Hence, the imposition of anti-corruption measures on public institutions is regarded as an important tool to promote capitalism and free markets. Bukovansky exposes the hollowness of current liberal discourse on anti-corruption, in which it has become "a technical matter of effectively manipulating incentive structures".[54] She summarises the issue as follows:

> The ethical problem in the liberal-rationalist approach to corruption has to do with the external imposition of contingent standards on societies that are not fully participating in defining those standards … Externally imposed standards will lack legitimacy unless they are embraced and internalised by the culture on which they are imposed.[55]

This comment helps to explain why corruption thrives in many African states despite the adoption of various anti-corruption measures recommended by international institutions.

The creation of empty institutions or measures which lack local validity may worsen corruption. For instance, countries may be tempted to create anti-corruption institutions, regardless of their ineffectiveness, in a bid to attract foreign aid and investment rather than to fight corruption. As pointed out earlier, the availability of donor funding and foreign investment in weak institutions likely will result in more opportunities for corruption. In order to avoid vacuous anti-corruption institutional reforms, there is a need for engagement with local communities about how to establish strong anti-corruption reforms which reflect local understanding of and enthusiasm to fight corruption. This is particularly important in relation to local institutions which are responsible for the delivery of everyday services to the local population. Inclusion of local populations in the drafting and implementation of reforms will

51 World Bank (2000) at 4.

52 Le Billon (2008) at 344. See also Boucher *et al* (2007) at 21; Cheng & Zaum (2012) at 1.

53 O'Donnell (2014) at 226-227.

54 Bukovansky (2006) at 183.

55 Bukovansky (2006) at 184.

encourage them to fight corruption and to challenge any corrupt power structure which threatens their demands for socio-economic transformation.

A transformative justice approach to institutional reforms should transform old institutions, which played a part in past violence and corruption, into vehicles of good governance and fair distribution of state resources.[56] According to Boraine, "institutional reform should be at the heart of a transformation".[57] Like transformative reparations, institutional reforms should not be aimed at restoring victims to their former positions, but at transforming the situation of victims through transparent and honest institutions which offer better service delivery. Such institutional reforms, as part of guarantees of non-repetition, will not be directed only at a specific individual, but broadly at collectives of victims or the community at large.[58] They have the potential to fuel structural changes,[59] including the dismantling of the environment which bred corruption at the institutional and local levels.[60]

Institutional reforms in fragile states may rekindle violence and conflict as warring factions will be keen to keep control over strategic posts and structures in the government. Reforms may result in the dismissal of key officials in the security sector or may lead to loss of power by key political figures, which may provoke retaliation. Those recruited to replace key persons or to staff restructured offices may lack the experience needed to maintain or improve service delivery. A combination of disgruntled political leaders and ineffective service delivery provides a platform for renewal of corruption and conflict. Hence, reforms may "easily become a source of conflict" in fragile states.[61] According to Gready & Robins:

> A transformative approach will need to balance pursuing wrongdoers with whatever best institutionalises peace and effective service delivery, and as such it is likely that principle and pragmatism will cohabit in approaches to institutions.[62]

56 Simpson (2017) at 392; Lambourne (2009) at 36.
57 Boraine (2006) at 23.
58 Roht-Arriaza (2019) at 114.
59 OHCHR (2014) at 44.
60 Andrieu (2012) at 551.
61 Bächler (2004) at 274.
62 Gready & Robins (2014) at 345.

This means that institutional reforms need to be managed well to prevent recurrence of violence.[63] Transitional states need to be cautious and avoid overambitious reforms. In some countries, reforms have seen warring parties being given positions of power with access to state resources as a compromise for peace. For example, a peace agreement in the DRC resulted in leaders of former rebel groups initially being appointed as vice presidents.[64] Even though such arrangements are necessary to maintain peace, they may pose a risk to peacebuilding and reconciliation because of "'capture' of the state by particular private interests".[65] Hence, their long-term sustainability is questionable. Transitional states should consider their political context to determine how, when and to what extent institutional reforms are to be implemented in a manner which maintains peace and service delivery. Political compromises may be inevitable, but there is a need consider the long-term sustainability of compromises which may nurture corruption and, hence, undermine peace efforts.

All in all, a transformative justice approach to institutional reforms prioritises local needs before liberal agendas or the desires of external actors.[66] There is a need to depart from liberal peacebuilding in terms of which designs for institutional reforms are imposed by the international community,[67] rather than being shaped by local demands. Reliance on external actors will result, more often than not, in prioritisation of international peace, in form of political reforms, whilst leaving corrupt government institutions untransformed. Transitional states must be pragmatic in reforming corrupt institutions to ensure that they can deliver services to citizens and minimise the risk of recurrence of violence.

6.3 (Re)formation of Anti-Corruption Institutions

The establishment of anti-corruption agencies (ACAs) has become a primary response to endemic corruption around the world, following the successful models of Hong Kong and

63 See Boraine (2006) at 23.
64 See International Crisis Group (2005).
65 See Boucher *et al* (2007) at 12.
66 Gready & Robins (2014) at 345.
67 Sriram (2007) at 588.

Singapore.[68] ACAs have a specific mandate to fight corruption and reduce "the opportunity structures propitious for its occurrence in society through preventive and/or repressive measures".[69] They are regarded as the "ultimate institutional response to corruption", following the ineffectiveness of traditional law enforcement bodies, such as the police, in combating corruption.[70] Various anti-corruption instruments provide for the creation of ACAs as preventive and/or accountability mechanisms.[71] The difference between the two functions is that the former is concerned to deter corruption, whereas the latter addresses corruption *ex post facto*. However, many countries have opted for ACAs with a combined mandate to prevent corruption and to receive and investigate corruption complaints. Transitional states should consider the establishment of ACAs where none exists, as part of their institutional reforms.

After the removal of Yahya Jammeh as president of the Gambia in 2017, the new government undertook to establish an ACA as part of its institutional reforms.[72] However, no ACA has been established yet, and this may undermine the confidence of citizens in the new government's commitment and ability to combat corruption. The establishment of ACAs offers several advantages to transitional states. The institutions will become primary bodies to prevent and combat corruption. They boost public confidence and trust in the new government because they are an indication of the transitional state's commitment to anti-corruption institutional reform. The ACAs may collaborate with TRCs to reveal the truth about past abuses, and to initiate criminal prosecutions against corrupt persons, bringing to the fore the close link between corruption and the violation of human rights.

However, these institutions require sufficient resources and independence from political influence.[73] An independent ACA should not initiate or cancel an investigation to accommodate the political interests of certain individuals. Staff members who are drivers of the ACA should be vetted for integrity and a strong ethic of professionalism, in order to avoid appointment of

68 See Johnston (1999) at 220-221; Heilbrunn (2004) a 3-7; Meagher (2005) at 69-70.

69 de Sousa (2010) at 5.

70 de Sousa (2010) at 6.

71 See Articles 6(1) & 36 of UNCAC; Article 5(3) of AU Convention; Article 4(1)(g) of the SADC Protocol; Article 5(h) of ECOWAS Protocol.

72 International Centre for Transitional Justice (2018).

73 See Articles 6(2) & 36 of UNCAC; Meagher (2005) at 79; de Sousa (2010) at 13.

persons who are not fit or proper to lead the fight against corruption. For instance, an ACA which was established in the DRC to monitor border trade was dissolved in 2006, after its chairperson was implicated in the illegal charging of fees for each shipment of goods to cross the border.[74]

In Kenya, the TJRC recommended the expansion of the Ethics and Anti-Corruption Commission from three to nine commissioners, as part of institutional reform.[75] This recommendation alludes to the fact that weak or understaffed ACAs cannot fight corruption. ACAs already existing in transitional states may remain weak and ineffective without reformation.[76] This is true mainly where previous commissions had been infiltrated by political elites for political objectives or where their commissioners have been implicated in corrupt dealings. For instance, during the Mugabe era the Zimbabwe Anti-Corruption Commission (ZACC) lacked the probity required to fight corruption and was subject to political interference from the ruling ZANU-PF party.[77] Ironically, its former director was convicted for embezzling public funds.[78] In post-Mugabe Zimbabwe, the ZACC remained ineffective and eventually the commissioners were forced to resign by the new President Mnangagwa on grounds of their impotence to fight corruption.[79] The examples of Kenya and Zimbabwe show that existing ACAs need to undergo reform in order to increase their effectiveness in fighting corruption.

Anti-corruption institutional reforms should include forming or strengthening asset recovery mechanisms. Effective asset recovery institutions play a critical role in depriving previous leaders of their criminal proceeds, which otherwise may be used to derail transitional justice efforts. As part of its transitional justice goals, Tunisia established a Confiscation Commission to recover stolen movable and immovable assets belonging to the former president Ben Ali, his wife and any other persons linked to him.[80] It covered the period from 7

74 See Boucher *et al* (2007) at 19.
75 Report of the TJRC, Volume IV (2013) at 56-57.
76 Le Billon (2008) at 346.
77 See Maguchu (2019) at 61-62.
78 Nemukuyu (2015).
79 Mashaya (2019).
80 Article 3 of Decree 13 of 2011.

November 1987 to 2011.[81] It was set up within the Ministry of State Property and Land Affairs, and was required to transfer the recovered assets for the benefit of the state. Two weeks later, a "National Committee of Recovery of the Wrongly Acquired Properties Existing Abroad" (Recovery Committee) was established.[82] The difference between the Confiscation Commission and the Recovery Committee was that the former was concerned mainly with intra-state asset recovery, whereas the latter was concerned with inter-state asset recovery. The Recovery Committee was set up within the Central Bank of Tunisia and it had a mandate to take all steps necessary to identify and return stolen assets deposited or invested abroad by Ben Ali, his family or accomplices. In July 2011, a "National Commission of Management of Assets and Funds Subjects of Confiscation or Recovery in Favour of the State" (Management Commission) was established.[83] Article 8 of the establishment decree required the Confiscation Commission and the Recovery Committee to submit a statement of the assets and properties subject to confiscation or recovery to the Management Commission. The Tunisian asset recovery institutions handled many cases of stolen assets between 2011 and 2014, and they complemented one another in doing so. For example, the Confiscation Committee made 828 confiscations during that period, and it transferred 527 corporations to the Management Commission.[84] The total value of assets confiscated by 2014 was estimated at US$13 billion, which amount was more than a quarter of the GDP of Tunisia in 2011.[85]

In terms of transformative justice theory, reformation of anti-corruption institutions may fail if they are not locally driven. ACAs which do not secure "sufficient local consultation and buy-in, risk simply satisfying the international community", at the expense of domestic endorsement and support.[86] Hence, it is imperative for transitional states to involve local communities in the reformation of ACAs and their objectives and powers. Locally driven ACAs

81 Article 1 of Decree 13 of 2011.

82 Decree 15 of 2011.

83 Decree 68 of 2011.

84 National Commission for the Disposal of Property and Funds for Confiscation (2014).

85 Rijkers (2017) at 43.

86 See Course Note titled "Management and Leadership: Organising Anti-Corruption Efforts" by U4 Anti-Corruption Resource Centre, available at https://www.u4.no/management-and-leadership-organising-anti-corruption-efforts (visited 20 July 2019).

will enjoy public support and citizens likely will collaborate with such institutions in fighting corruption.

6.4 Judicial Reforms

An independent, impartial and effective judiciary adds muscle to the fight against corruption in transitional states. Judicial corruption corrodes the rule of law and undermines the ability of the government to protect, guarantee and uphold human rights. What is more, it decreases public trust in justice, as court documents go "missing" or cases are delayed unjustifiably. Judicial corruption is not limited to bribery, but extends to "all forms of inappropriate influence" which damage the impartiality of justice.[87] Thus, judicial reforms should be aimed at limiting any opportunities for abuse of power by the judiciary and protecting the judiciary against any undue influence. Effective judicial reforms contribute to socio-economic transformation and development by way of affirmation of the rule of law, improved governance and social capital.[88] Investors become more confident that their investments are protected where laws are respected and anchored in an independent judiciary able to enforce their rights.

> According to Ndulo & Duthie:
>
> The relationship between transitional justice and judicial reform exists at three levels. First, judicial reform can constitute an element of transitional justice. Second, judicial reform may facilitate transitional justice, and in some instances may be a precondition of certain justice measures, particularly criminal prosecution for human rights violations. Third, transitional justice may contribute to judicial reform efforts.[89]

Clearly, judicial reforms are an integral part of re-establishing the rule of law, transparency and accountabilty in transitional states. Reforms involve key elements such as independence, accountability, representativeness, oversight and access to justice.[90] Judicial independence entails a complete autonomy of judicial power from any outside influence, and requires that

87 Gloppen (2014) at 69.
88 Ndulo & Duthie (2009) at 2.
89 Ndulo & Duthie (2009) at 2-3.
90 Ndulo & Duthie (2009) at 1.

the judiciary operate as a separate organ of government, free of meddling from the executive, the legislature or political parties.[91]

Judicial independence is a standard which long has been enshrined in various international legal instruments.[92] Article 11 of UNCAC provides that:

> Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

The United Nations recommends that states guarantee judicial independence in their laws and that judges adjudicate matters "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[93] The UN Special Rapporteur on the independence of judges and lawyers noted the thorny issues for justice in transition where judges may find it difficult to try criminals who appointed them during their time in office.[94] For instance, a judge may be hesitant to convict a former president standing trial for corruption on the grounds that the latter appointed him to the bench. This is prevalent where judicial appointments by the former president were political or for the furtherance of personal interests. Thus, transitional states, as a matter of priority, may need to:

> clean up the judiciary in order to restore its legitimacy, independence and impartiality, and hence its public credibility.[95]

Such a clean-up may involve vetting judges to determine their suitability to continue holding office based on their record on human rights abuses and corruption.

Ensuring non-repetiton of judicial corruption arising from political influence requires reforming laws or regulations to minimise political dominance over the judicial system.[96] For

91 Ndulo & Duthie (2009) at 1.

92 See Article 10 of the Universal Declaration of Human Rights; Article 26 of the African Charter on Human and Peoples' Rights; Article 24 of the International Covenant on Civil and Political Rights.

93 Principles 1 & 2 of the United Nations Basic Principles on the Independence of the Judiciary (1985).

94 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers (2005) para 44.

95 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers (2005) para 44.

example, the selection and appointment of judges should have a minimal political dimension. This is possible through the appointment of a selection committee (rather than presidential appointments) which follows clear criteria and a transparent process.[97] Also, judges should be awarded permanent and non-renewable contracts in order to minimise any abuse of executive privilege when they negotiate extension of their contracts.

Judicial reforms in transitional states ought to make courts more accessible to civil and criminal proceedings involving corruption. For instance, they may include the creation of specialised anti-corruption courts. Judicial specialisation in anti-corruption increases efficiency of the courts to try corruption cases by presiding officers with the requisite expertise.[98] Such specialised courts are willing to try and capable of trying high-level cases compared to traditional formal courts which may be compromised and lacking in expertise. However, appointed judicial officers should be trained to understand complex financial structures, accounting principles and how to follow proceeds of crime. In line with transformative justice goals, victims of corruption and complainants in corruption matters should be empowered legally to institute civil cases challenging corrupt power relations responsible for their marginalisation. For instance, courts ought to be given jurisdiction to receive civil cases from members of the public on exploitative and corrupt mining contracts which offer no benefits to the local community. In terms of the transformative justice approach, judicial reforms which extend the civil and criminal jurisdiction of courts over corruption cases likely will receive endorsement from the local population and create a platform for confronting the structural drivers of corruption.

6.5 Security Sector Reforms

The security sector in countries experiencing conflict or dictatorship is prone to abuse as instruments of economic violence and physical violence.[99] The COI in Chad reported on security sector abuses during Hissène Habré's time in office, including the unlawful seizure of property

96 Gloppen (2014) at 74.
97 Gloppen (2014) at 75-76.
98 Stephenson & Schütte (2016) at 10 & 14.
99 See Cohen (2017) at 2; Wulf (2004) at 12.

belonging to political prisoners, which was used for personal enrichment or added to the security sector's coffers.[100] Also, security officials may abuse their powers and privileges to intimidate and extort citizens. In many African states, the police, which forms part of the security sector, is perceived to be one of the most corrupt institutions.[101] Hence, security sector reforms (SSRs) are necessary as part of peacebuilding activities to ensure an effective and responsible security sector which protects civilians and, in return, enjoys civilian support. The security sector transformation in South Africa after end of apartheid is such an example. The transitional government successfully transformed security forces that were used as instruments of violence during apartheid into institutions that respect and protect citizens under civilian control.[102]

A transformative approach to transitional justice should ensure that victims of past abuses and local communities are consulted regarding their grievances or concerns against security forces before and during the reforms.[103] Local ownership of SSRs is important as "local people routinely influence the day-to-day behaviour of the security sector".[104] This may include providing a participatory forum where a common vision of the desired security sector is shared. In particular, there is a need for a shared view on the involvement of security forces in the political and economic spheres, which opens up opportunities for corruption. This ensures that SSRs are tailored to reflect the realities faced by local communities, rather than embracing external standards. Also, it helps in the legitimisation of reform efforts by citizens, especially where the security sector had a negative history of physical and economic violence.

SSRs in transitional justice entail reformation of abusive security structures and building of new structures that are anchored in respect for human rights.[105] SSRs must ensure that new security structures are free of corruption. Cohen argues that justice-sensitive approaches to SSRs may play a vital role in addressing corruption as part of transitional justice, aimed at four

100 See Kritz (1995) at 81-83.
101 Transparency International Global Corruption Barometer (2013) at 13-17; Wambua (2015) at 1-3.
102 See Wulf (2004) at 14; Africa (2008) at 183-186.
103 Davis (2009) at 15.
104 See Martin & Wilson (2008) at 83.
105 Patel (2010) at 3.

areas of reform: building integrity, establishing effective accountability, strengthening legitimacy, and empowering citizens.[106] Building integrity may be achieved through the establishment of a code of conduct and internal rules to be followed by security forces. A code of conduct which follows transitional justice processes, such as truth commissions, may include prohibited conduct for the security forces based on the accounts of victims of past abuses.[107] For instance, if victims testify that they were compelled by military personnel to give up their possessions, the new code of conduct ought to prohibit soldiers from accepting any material donations or gifts from citizens. Codes of conduct or internal rules work effectively with external civilian oversight of the security sector.[108] This may include executive oversight to ensure proper civilian management of security policy, budget and expenditure. There is a need for competent national human rights bodies to monitor the behaviour of security personnel and institute complaints against any abuse of power which threatens human rights. Only when there is civilian control of security forces can they respond positively to transitional justice processes.[109]

The presence of a sizable number of former and current security personnel in the government and oversight bodies endangers their effectiveness, as these persons may feel obligated to protect "their own". Also, reforms may become cumbersome in instances where security forces have become *de facto* key political and economic actors during political transitions, especially when the transition was made possible through a military action. After the overthrow of former President Mubarak in 2011, the Egyptian army became more involved in politics and public administration, as evidenced by subsequent *coups*. The military control over economic activities in the country extends to the oil, telecoms, infrastructure and housing sectors.[110] This creates opportunities for the security sector to become more corrupt and power

106 Davis (2009) at 12.
107 Cohen (2017) at 14.
108 Cohen (2017) at 14.
109 Cohen (2017) at 14.
110 See Marshall (2015) at 14-18.

hungry, and to threaten any meaningful reforms. SSRs which threaten loss of privileges by security elites will result in resistance and possible recurrence of violence.[111]

The transformative justice approach requires pragmatism in negotiating and implementing reforms in the security sector in order to maintain peace and security.[112] According to de Greiff, reforms in the security sector need to be understood primarily as dealing with security threats and as preventive measures, instead of being seen as retributive.[113] There is a need to create an impression that SSRs are good for everyone and will leave all interested parties better off than they are in the current situation.[114] This may require compromises from all parties to ensure that the sector becomes more transparent and accountable and is subject to civilian control, while keeping some of its privileges. For such negotiations to occur, the importance of political reforms should be emphasised. Boucher *et al* stress that political will at the highest level "is thus a necessary step toward creating a culture of professionalism and integrity" in order to combat corruption in post-conflict settings.[115] This political will may come from within the security sector itself, as well as from external forces such as international organisations. The principle of local ownership does not mean rejecting international support to fund locally driven SSRs or international pressure on the government to implement SSRs.[116] Without genuine political will to effect reforms in the security sector, there is a real risk of the sector remaining unreconstructed, and hence that its corrupt configurations will persist.

6.6 Personnel Reforms

Public institutions are administered by its employees who act on its behalf and represent it. Past abuses perpetrated by institutions would have been carried out by natural persons staffing the institution.[117] Hence, personnel reforms constitute a key component of any effective and

111 See Wulf (2004) at 7.
112 Gready & Robins (2014) at 345.
113 de Greiff (2011) at 18.
114 Mobekk (2006) at 4.
115 Boucher *et al* (2007) at 23.
116 Nathan (2008) at 21.
117 OHCHR (2006b) at 4.

tenable institutional reform mechanism.[118] Basically, personnel reforms entail measures which screen employees in public institutions for their integrity and capacity to carry out their duties and responsibilities in terms of new values set by the new government. The reforms have the potential to deny, dismiss or demote from government positions persons who are found to lack the required levels of integrity and capacity. In relation to anti-corruption, persons whose past record includes patterns of corrupt behaviour may be denied the opportunity to work or continue to work in their positions.

The two most common forms of personnel reform are vetting and lustration. The terms have been used interchangeably in the past.[119] However, lustration goes beyond conventional vetting, as will be discussed later. The two mechanisms are discussed separately below.

6.6.1 Vetting

Vetting involves reformation of an institution's personnel by relieving or excluding from duty persons who lack the integrity required to hold public office. Duthie defines integrity as "a person's adherence to relevant standards of human rights and professional conduct, including her or his financial propriety".[120] Hence, vetting screens the suitability of public officials to hold office in relation to their record on human rights and corruption. The notion behind vetting is that corrupt persons will continue old patterns of corrupt behaviour even in new institutions created by the new government, and hence they will disrupt processes of change.[121] Keeping corrupt officials in important public positions undermines anti-corruption efforts as it sends wrong signals that there is no accountability for corrupt practices.

A transformative justice approach should abandon a "one-size-fits-all" response to vetting as part of transitional justice. There is a need for a context-specific approach which encompasses public consultation and an honest assessment of needs and available resources.[122] Public consultations on vetting assist in the re-establishment of public trust and

118 OHCHR (2006b) at 4.
119 See Los (1995) at 121; Horne (2017a) at 432; Horne (2017b) at 33.
120 Duthie (2007) at 17.
121 See Roht-Arriaza (2019) at 108.
122 OHCHR (2006b) at 1.

re-legitimisation of public institutions, as the public becomes acquainted with the reform process.[123] Also, there ought to be transparency during the consultations and vetting processes, to ensure that the mechanism responds to the actual needs and demands of victims and affected communities.[124] There are key issues which must be attended to in order for vetting to be effective. At what misconduct is the screening aimed? What are the institutions and positions to be vetted? What is the scope of vetting, or how many people will be vetted? What are the sanctions for positively vetted individuals? What is the timing and duration of vetting?

The criteria for vetting in transitional justice generally have been limited to a person's record on or respect for human rights standards.[125] For instance, the United Nations Development Programme (UNDP) vetting guidelines expressly state that:

> as a general rule, involvement in gross violations of human rights or serious crimes under international law should always disqualify a person from public employment.[126]

Such criteria have been influenced by international standards on human rights which have concentrated on civil and political rights. Vetting programmes seem to concentrate on physical violence and, once again, socio-economic issues are pushed to the peripheries of transitional justice.[127] A transformative justice approach departs from such a narrow focus upon past abuses, and enjoins transitional states to address the socio-economic demands of victims and citizens. It is submitted that the vetting criteria should be determined by the transitional state in order to reflect the demands of victims and citizens. Corruption in most transitional states is regarded as unacceptable behaviour and suspect persons should be vetted for their suitability to hold public office. Hence, the use of vetting as an anti-corruption tool means that the misconduct to be screened for in public officials is corruption.

It is impossible for vetting programmes to target the entire public sector even though it is desirable to determine whether all officials meet minimum standards of integrity.[128] The financial costs and political instability associated with such large-scale vetting may cripple the

123 UNDP (2006) at 19.
124 UNDP (2006) at 19.
125 Duthie (2007) at 17.
126 UNDP (2006) at 20. See also Duthie (2007) at 22.
127 Andrieu (2012) at 552.
128 Duthie (2007) at 20-21; World Bank (2011) at 151.

public service in transitional states. It may interrupt delivery of services and generate a governance gap in the public sector.[129] According to vetting guidelines produced by the UNDP, vetting can target a certain institution as a whole, or it can focus on certain positions within an institution, or concentrate on certain categories across institutions.[130] It can be applied also to employees being transferred or promoted, and to external candidates being offered a position at the institution. However, the latter type of vetting is weak as it does not purge public officials with serious integrity issues who still are employed. It is submitted that the type of vetting should be determined on an institution-by-institution basis, taking into consideration the perceived levels of corruption in the institution, the level of management implicated in corruption, and the form of corruption. For instance, vetting can be applied to the police as an institution, particularly in traffic departments which often are perceived to be sites of endemic corruption. Security and judicial reforms are usually priorities for vetting, given their importance in peacebuilding and the re-establishment of the rule of law in transitional states.[131]

Vetting processes should be based on assessment of individual corrupt behaviour, and not on membership of a group or institution. Any large-scale purging based on group affiliation will cast the net of liability too wide and may lead to exclusion of persons of integrity who were not involved in or responsible individually for past abuses.[132] Also, it is unlikely to reach the reform goals as it leaves incompetent persons outside the group untouched and excludes employees whose critical skills and expertise are needed in the post-conflict period.[133] Furthermore, "unjustly scapegoating middle-level actors at the expense of big fishes" must be avoided.[134] It is important to vet persons in top management who sanctioned corrupt deals, without becoming too involved themselves. Information used or relied upon should not be

129 UNDP (2006) at 14.
130 UNDP (2006) at 15.
131 UNDP (2006) at 19; Horne (2017a) at 429.
132 UNDP (2006) at 22.
133 UNDP (2006) at 22.
134 Andrieu (2012) at 552.

incomplete or flawed, as it may result in a biased transitional justice process and destroy any trust-building goals.[135]

Sanctions following the vetting process may vary from dismissal, suspension, early retirement, transfer, demotion or public exposure of past abuses.[136] Vetting programmes differ on the kind of sanctions they impose, and "even firings can take place in different forms".[137] For instance, a person may be placed on indefinite unpaid leave or may be given an opportunity to retire voluntarily. However, the imposed sanctions must send a message that corruption is not tolerated by the new government and that it will not hesitate to remove corrupt public officials from office. Duthie correctly points out that if "vetting is aimed at transforming institutions in order to prevent the recurrence of abuses", then it is important for positive vetting results to be followed by dismissal of the persons from the institution.[138]

The timing and duration of vetting programmes are important. In this connection, "timing refers to when, during a transition, vetting begins; duration refers to how long the process lasts".[139] The duration of the vetting programmes is affected by different factors, such as the number of institutions targeted, the positions chosen for vetting, and number of people to be vetted.[140] Also, consideration should be given to whether the government has enough time and resources to fill vacant posts after the vetting process. The duration affects the general perception and understanding of the aims and purpose of the process.[141] Transitional states should avoid abrupt and fast vetting processes which do not follow due process and the rule of law, and which may be regarded as "victor's justice" aimed at the new government's opponents in public office. By contrast, prolonged vetting processes could result in citizens losing confidence in the new government's ability to deal with corrupt persons. Vetting may lead to weakening of institutions as key persons may be replaced by inexperienced personnel. Dismissing highly-experienced persons may result in capacity deficits and institutional problems

135 Horne (2017a) at 429.
136 Duthie (2007) at 24.
137 World Bank (2011) at 151.
138 Duthie (2007) at 24.
139 Duthie (2007) at 28-29.
140 Duthie (2007) at 29.
141 Duthie (2007) at 29.

accompanying the appointment of qualified but inexperienced replacements.[142] Inexperienced personnel and excessive bureaucracy, which are common in many public institutions, will slow down service delivery.

The timing of vetting programmes usually is determined by the political situation in the transitional state.[143] For example, it will be difficult to start vetting programmes in the security sector where the army holds political power and strategic positions in the government. The dismissal of a large number of security personnel can result in increased criminality, as unemployed military, security service and police officials may use their old connections to engage in corruption and other forms of organised crime.[144] Hence, vetting may lead to renewed corruption, instead of combating it. Also, the dismissed officials may retaliate to their dismissal or obstruct vetting processes by resorting to armed conflict, leading to recurrence of violence.

In order to counter these challenges, transformative justice advocates principle and pragmatism, and the pursuit of actions which "best institutionalises peace".[145] This means that the vetting process should be balanced with effective service delivery so as to avoid the recurrence of violence. In other words, vetting should ensure that persons who retain or obtain positions in government after the personnel reforms, are competent and qualified to carry out the tasks at hand. Unqualified and incompetent persons will slow down service delivery, which breeds new grounds for corruption even in reformed public institutions. In an effort to mitigate the challenge of inexperience, transitional states ought to embark on training programmes and capacity-building workshops to enhance the skills and experience of the new employees. It is clear, though, that vetting cannot be applied to all public officials and it is not advisable for transitional states to dismiss the majority of their employees.

6.6.2 Lustration

Lustration is defined as legal measures which:

142 Horne (2017a) at 429.
143 UNDP (2006) at 14.
144 Horne (2017a) at 429.
145 Gready & Robins (2014) at 345.

> restrict members and collaborators of former repressive regimes from holding a range of public offices, state management positions, or other jobs with strong public influence.[146]

Lustration became a popular mechanism in post-communist states in Eastern and Central Europe where it was deployed to remove communist members and collaborators from powerful positions.[147] A person would be barred from holding public office based on his or her complicity or association with the former communist regimes. Lustration goes beyond personnel reforms by vetting, as it includes elements of symbolic and retributive measures, such as access to secret security files, compulsory public disclosures and self-confessions.[148]

Lustration has a clear moral cleansing connotation that is extended to semi-public institutions such as banks and universities, and to social institutions such as churches and unions.[149] Also, it has a longer duration than vetting. For example, in the Czech Republic it lasted from 1991 to 2016, in Poland from 1997 to 2007 and in Hungary from 1994 to 2005.[150] Lustration processes were carried out in Tunisia after the Arab Spring, particularly as regards running for public office. The electoral law banned from contesting in the National Constituent Assembly any person who was part of the Ben Ali government (except for those who were not members of his party), any person who assumed responsibilities within the structures of the Constitutional Democratic Rally during Ben Ali's time in office, and any person who was on a list compiled by a commission who had called Ben Ali to renew his mandate as president after 2014.[151] The measures received criticism for their violations of civil and political rights of persons who would be banned by association, without proof of any individual responsibility for past abuses.[152]

The application of lustration to corrupt persons is not likely. Personnel reforms should be centred on individual conduct as vetting prescribes, rather than on the affiliation of

146 Nalepa (2013) at 46.
147 Nalepa (2013) at 46.
148 Horne (2017a) at 432. See also Nalepa (2013) at 46; Killingsworth (2010) at 278.
149 Horne (2017a) at 433.
150 Horne (2017a) at 433.
151 Article 15 of Decree 35 of 2011.
152 See Human Rights Watch (2013).

individuals to a certain group. Personnel reforms based on group affiliation open up the net of liability too wide and may lead to exclusion of persons of integrity who were not involved individually in or responsible for past abuses.[153] However, there are elements of lustration, such as disclosure of secret security files, which may assist in dismantling networks of corruption in the security sector. The main issue with such activities is their potential to compromise security and peace in transitional states.

6.7 Anti-Corruption Legal Reforms

Legal reforms, which include adopting, reviewing and strengthening legislation, are an imperative aspect of institutional reforms.[154] Habits of corruption are very difficult to break even after vetting and weeding out of corrupt officials in public institutions.[155] New employees and structures quickly may become infested with corruption where there are weak anti-corruption measures to implement transparency and accountability in public institutions. Hence, strong institutions require effective anti-corruption legal measures. In Sierra Leone, the TRC recommended that the government fight corruption by establishing a legal framework for the protection of whistleblowers and an assets disclosure regime.[156] In Liberia, the TRC recommended the reformation of laws to strengthen good governance and combat future economic crime.[157] Thus, transitional states should institute legal reforms aimed at preventing and holding to account any abuse of power for personal, political or any unlawful gains.

6.7.1 Protection of Whistleblowers and Witnesses

A comprehensive legal framework which protects whistleblowers and witnesses is an important anti-corruption tool.[158] Usually, grand corruption is perpetrated by powerful persons who have the financial, political or managerial influence to threaten or harm any person who reports their corrupt activity to the relevant authorities. Without any legal protection, many persons will be

153 UNDP (2006) at 22.
154 See Arbour (2007) at 25.
155 Boucher *et al* (2007) at 18.
156 Report of the Sierra Leone TRC, Volume 2 (2004) at 160-161.
157 Report of the Liberian TRC, Volume III (2009) at 40-42.
158 Articles 32 & 33 of UNCAC; Article 5(5) of the AU Convention.

hesitant to report corruption for fear of hostility, retaliation and, in the worst-case scenario, their own lives or the lives of their families. Employees in public institutions usually have knowledge or evidence of corruption. But those who blow the whistle or testify in corruption trials may become targets of denunciation and labelled as "sell outs". This creates a hostile work environment and threatens job security for the whistleblower or witness. Hence, transitional states risk losing the fight against corruption where whistleblowers and witnesses who expose corruption in public institutions are not protected legally.

A transformative justice approach advocates public participation, which is enhanced when whistleblowers and witnesses are protected by comprehensive anti-corruption laws. Whistleblowers and witnesses in public institutions are encouraged to come forward and testify in criminal cases or TRCs as part of the transitional justice processes. Thus, a culture of accountability and integrity is instilled in citizens, and the public becomes active participants in exposing corruption in institutions, thereby strengthening them.

6.7.2 Assets Declarations by Public Officials

Reformed institutions require personnel who are transparent, accountable and free from conflicts of interests. One way to ensure this is to require public officials to declare their assets at the time they are employed, and during and after the termination of their contract.[159] Declaration of assets serves two main purposes: to detect unexplained wealth; and to reveal and detect any conflicts of interests.[160] This reduces corruption by public officials who will become hesitant about engaging in corrupt deals knowing that their wealth and lifestyles are being watched closely. In order to re-build public trust in terms of the transformative justice approach, assets declarations should be made public so as to enhance the involvement of the media, civil society and the general public in monitoring increases in assets of public officials, from the national level down to the local level.[161] Also, assets declarations should be verifiable to ensure their accuracy. There ought to be sanctions for public officials who fail to declare their assets or knowingly make false declarations.

159 Article 8(5) of UNCAC; Article 7(1) of the AU Convention.

160 See Hoppe (2014) at 1; Messick (2006) at 6.

161 Messick (2006) at 9.

6.7.3 Transparency in Public Procurement

Public officials involved in procurement processes are susceptible to corrupt relationships with bidding parties where there are no transparency measures. This entails the awarding of contracts to the most corrupt persons, who also lack the capacity or resources to deliver in terms of the contract. As a result, citizens will be provided with low quality goods and services. In other circumstances, corruption may result in non-delivery of goods, thereby aggravating the socio-economic conditions of citizens. For example, if a contract is awarded corruptly to a company to build a school in a marginalised area but it fails to deliver, this affects the right to education and undermines development in the area. In order to reduce risks of corruption, the entire public procurement process should be anchored in "integrity, transparency, accountability, fairness, efficiency and professionalism".[162] Article 9 of UNCAC requires states parties to:

> take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption.[163]

These measures include timeous and public calls for tenders; clear conditions for participation, selection criteria and procurement rules; objective and established criteria for public procurement decisions; effective domestic review and appeal processes; and measures to regulate the conduct of responsible personnel, such as declarations of personal interests, screening procedures and training requirements.[164] Such transparency and accountability reduce corruption by public officials, and result in the mobilisation of resources for socio-economic transformation for the benefit of citizens.

6.8 Conclusion

This chapter has argued that institutional reforms are important to guarantee non-recurrence of past abuses. As an anti-corruption tool, reforms are aimed at reducing corruption as a cause and sustainer of violence or authoritarianism. Reforms indicate a change of behaviour on the

162 Kuhn & Sherman (2014) at 12.

163 See also Article 5(4) of the AU Convention; Article 4(1)(b) of the SADC Protocol; Article 5(b) of the ECOWAS Protocol; Article 6(2)(b) of the EAC Protocol.

164 Article 8(1)(a)-(e) of UNCAC.

part of the new government, with corrupt or abusive institutions being transformed to nurture a new culture of transparency, accountability and respect for human rights. Transitional states with weak institutions are breeding sites for corruption, together with its deleterious effects on human rights. Corruption reduces public trust in public institutions, threatens the legitimacy of the new government and makes possible a reversion to conflict or violence.

A transformative approach to institutional reforms requires public participation and local ownership. Transitional states should refrain from implementing externally driven reforms which prioritise free markets and political stability, whilst ignoring the everyday concerns of citizens. The local population interacts with public institutions every day, and their input is important to legitimise reforms and ensure sustainable peacebuilding. In that way, acts of corruption and marginalisation perpetrated by public institutions will be brought to the fore of institutional reforms. Reforms with an anti-corruption agenda should target key institutions, such as anti-corruption agencies, the judiciary and the security sector. Persons who ran institutions and were responsible for corruption and human rights abuses should be subject to vetting. Also, key anti-corruption measures, such as protection of whistleblowers and witnesses, assets declarations and transparency in public procurement, should be introduced to enhance the fight against corruption in public institutions.

In terms of transformative justice theory, transitional states must be pragmatic about institutional reforms in order to balance reformation with the need for peace and effective service delivery. States ought not to be overambitious with institutional reforms that may result in ineffective service delivery or threats of retaliation or resistance, particularly from the security sector. Compromises and political will are important in reforms, particularly where such reforms threaten privileges of key political and military elites during transition. Hence, reforms need to be presented as beneficial to all parties and, above all, they should be aimed at transforming the lives of citizens in transitional states.

CHAPTER SEVEN

RECOMMENDATIONS AND CONCLUSION

7.1 Introduction

This thesis has explored how transitional justice mechanisms may be deployed to address corruption in Africa. Regrettably, African states experiencing or emerging from endemic violence or autocratic leadership are usually at their most corrupt. What is more, corruption is both an underlying cause and/or sustainer of such violence, and it perpetuates dictatorship. Endemic corruption is a genuine grievance at the heart of conflicts or violent uprisings, with two classic examples being the civil war in Sierra Leone and the Arab Spring uprisings. Corruption logically emerges as one of the key injustices during political transition which needs to be resolved.

The field of transitional justice was developed to address past abuses in countries emerging from conflict or autocratic leadership. It rose to prominence in the 1980s and 1990s in Latin America and Eastern Europe, where liberal democracy took centre stage. The approach to transitional justice emphasised the need to prioritise truth and justice in relation to civil and political rights. This meant that socio-economic issues, such as corruption, were pushed to the fringes of transitional justice. This narrow approach became the dominant script adopted by transitional states around the globe, despite a clear relationship between physical and economic violence experienced in different contexts. Many citizens in transitional states would have been exposed to both physical and economic violence, making their lives unbearable politically, socially and economically. However, corruption and other socio-economic concerns of citizens became "invisible" in transitional justice, regardless of their roles as underlying causes and sustainers of the violence. The narrow focus of transitional justice on physical violence has failed to meet the increasing demands and expectations of victims and many citizens for transitional governments to address corruption.

The thesis has argued that the undue narrowness of the dominant script has had negative effects upon transitional states in Africa. One effect was to reinforce impunity for past

corruption, resulting in transitional societies missing the opportunity to hold corrupt leaders accountable, to recover stolen assets and to use them to remediate victims of corruption. It also entailed the danger of creating a wrong impression that the past regime was free of corruption. Chapter One presented a case study of South Africa, where the TRC did not address corruption despite endemic economic crime having been committed by the apartheid government in its efforts to bust sanctions. As a result, the apartheid government was viewed as economically clean, and it appeared that corruption became a problem after the establishment of the black majority government. What is more, corrupt networks were not dismantled and their corrupt practices continued into the new democratic South Africa.

The narrow approach to transitional justice fails to give a full and complete picture of the causes and nature of past abuses. This means that the recommendations of TRCs or national policies arising from transitional justice work will be incompatible with local realities faced by victims and local communities, including the demand to eradicate corruption. It was argued that transitional states without an anti-corruption agenda likely will continue to be haunted by the unresolved legacies of past corruption. There is a real risk of recurrence of corruption, and thus an enhanced possibility of renewed violence. Hence, tackling corruption is a key step towards confronting the blind spots of transitional justice.

It was submitted that the dominant script in transitional justice is inadequate, particularly in African states where state coffers have been looted and millions of citizens left marginalised and languishing in poverty. The traditional approach has faced heavy criticism in recent years, and there is a new generation of transitional justice scholars and practitioners who are challenging this narrow approach and demanding that more attention be given to the socio-economic dimensions of transitional justice. Transformative justice theory is one of the theories emanating from the so-called “fourth generation of transitional justice” and is compatible with transitional justice in the 21st century. The African Union has embraced the transformative justice approach, which features frequently in the AUTJP. The approach rejects the dominant script and emphasises bottom-up approaches which enjoy local ownership and

which challenge "unequal and intersecting power relationships and structures of exclusion".[1] A key feature of transformative justice is challenging and transforming socio-economic structures in transitional states which cause or facilitate structural violence or inequalities. Such socio-economic abuses often are manifestations of corruption. In many instances, victims of corruption are denied access to essential services, such as health and education, and they have lost property and land to economic and political elites. It was argued that it is futile to address structural violence without confronting the rampant corruption which played a huge role in the marginalisation, impoverishment and violation of socio-economic rights of citizens.

The thesis applied transformative justice theory as the most viable perspective from which to tackle corruption in transitional societies in Africa. It argued that the current transitional justice mechanisms have the potential to become transformative. However, they need to be modified to include features that make them more "transformative" than "transitional". Thus, there ought to be transformative participation of victims and local communities in the planning, implementation and review of the transitional justice mechanisms to ensure local relevance and ownership. Victims and local communities must be given a platform to challenge the corrupt power relations which had allowed the violation of their rights and interests in the past. Socio-economic transformation should become a prominent theme in transitional justice in order to address the socio-economic conditions of victims who were affected by corruption. Lastly, the interdependence and indivisibility of rights have to be emphasised so as to assist in providing the full picture of abuses and to ensure the construction of a new social and legal order that treats all rights equally. Hence, whether corruption meant a violation of first, second or third generation rights will not be a decisive factor as regards the need to address it as part of the transitional justice agenda.

Chapter Three discussed criminal prosecutions, which play a significant role in ending impunity and reinforcing the rule of law. Recently, deposed African leaders and senior public officials in Sudan, Zimbabwe, Tunisia and Egypt have faced more criminal charges relating to corruption and fewer relating to physical violence, indicating a change in priorities for justice in

1 Gready & Robins (2014) at 340.

transition as corruption slowly is becoming a central issue. Experiences in Tunisia after the Arab Spring showed that criminal prosecution can address corruption as part of transitional justice, as stipulated in the transitional justice law. This is possible where prosecutions are designed and implemented locally, reflecting the demands of citizens, thereby allowing a bottom-up approach in terms of the transformative justice approach. However, the demands of citizens were ignored later when Tunisia passed a law providing immunity for corrupt officials. Unconditional amnesties were identified as one of the barriers to successful prosecution of corrupt leaders. It was argued that conditional amnesties were preferable and should be considered when they offer more benefits, such as recovery of stolen assets and truth-finding purposes. It was observed also that the current trials at national and international level limit the role of victims in the designation and implementation of the justice mechanism. There is limited participation of victims in the trials and this deprives them of the chance to challenge corrupt structures and put on record their experiences of past corruption. It was argued that international criminal prosecutions are more retributive than transformative and are based on extrinsic standards which do not reflect the causes and nature of conflicts, thereby ignoring corruption and other forms of economic violence. Hence, the mechanism offers little transformative effects to victims and local communities.

Chapter Four showed that TRCs in Africa are departing from the dominant script by the inclusion of economic violence in their mandates. The examples of Tunisia, Sierra Leone, Kenya, Chad and Liberia, where TRCs addressed economic violence in varying degrees, were discussed. It was argued that a transformative justice approach by TRCs could address corruption in many ways. TRCs are able to investigate and make sense of the larger structure which facilitated corruption and to confront its longer term structural effects, which is a primary objective of transformative justice. This will provide a platform to give voice to the victims of corruption, particularly as regards corrupt structures responsible for their exploitation and marginalisation. A TRC may act as a catalyst to enhance grassroots anti-corruption reforms and empower citizens to become more involved in challenging corrupt power structures. In other words, a TRC with an anti-corruption mandate will encourage citizens to become more involved in the fight against corruption. The chapter argued for a single TRC that addresses both physical and

economic violence, in order to provide a full picture of the past. A sub-committee on economic crime ought to be established and it should include experts on economic crime who can investigate and analyse complex cases and transactions. Also, it should be given power to subpoena documents and persons, and to offer amnesty in exchange for admissions of guilt, public truth-telling about acts of corruption, and unconditional return of stolen assets. Such a TRC should enjoy a close relationship with other anti-corruption bodies so as to maximise co-ordination in the fight against corruption. The discussion showed that, compared to criminal trials, TRCs offer more transformative effects to victims and local communities.

Chapter Five argued for reparations for victims of corruption. Reparations have the most potential to address corruption in terms of the transformative justice approach because of its central concern with redressing harm suffered by victims. There is potential for including victims of corruption in the designation, implementation and evaluation of these reparations. It was submitted that transitional states ought to offer collective reparations to marginalised communities as collective victims of corruption given the practical difficulties of offering individual reparations to large numbers of potential victims. The reparations should be "transformative", that is, they should be aimed at transforming the social and economic fabric of the transitional society by tackling structural inequalities and marginalisation. Reparations offer transformative effects to victims of corruption and could help to dismantle systemic socio-economic injustices and inequalities caused by corruption. However, it is imperative for transitional states not to pass off these transformative reparations as development projects, and they should be accompanied by acknowledgment of past wrongdoings that led to marginalisation of victims.

Chapter Six analysed the potential of institutional reforms to contribute to the fight against corruption. Since corruption undermines public trust in the government and its institutions, tackling corruption may contribute to the re-establishment of trust between citizens and the government. From an anti-corruption perspective, institutional reforms are a possible means of dismantling corrupt networks and reducing the recurrence of corruption as a cause and underwriter of violence. The chapter underlined that institutional reforms were initially the brainchild of liberal peacebuilding which emphasised free markets and democratic

institutions. Notwithstanding their provenance, the transformative justice approach embraces institutional reforms since functioning public institutions play a key role in post-conflict settings to manage power relations and deliver security and justice to citizens. It rejects externally driven reforms which are concerned with liberal peace and disregard local participation and ownership. It was argued that a transformative justice approach by transitional states should highlight local needs and demands in order to tailor institutional reforms to local circumstances, priorities and political realities. In that way, corruption in key institutions, such as anti-corruption bodies, the judiciary and the security sector, will be addressed. Reforms should transform old institutions, which played a part in past violence and corruption, into vehicles of good governance and fair distribution of state resources.[2] However, such reforms may rekindle violence and conflict, particularly in fragile states, by interests bidding for control over strategic posts and structures in the government, particularly in the security sector. A combination of disgruntled political leaders and ineffective service delivery provides a platform for the renewal of corruption and conflict. Hence, the chapter argued that transitional states need to be cautious and avoid overambitious reforms which may result in the recurrence of violence.

All in all, the thesis has sought to demonstrate that fighting corruption in transitional societies ought not to be an elite activity. It requires empowerment of and active participation by victims and the local population in criminal trials, TRCs, reparations programmes and institutional reforms. An active citizenry and victim-centered approaches are capable of challenging corrupt power structures which perpetrated or contributed to past abuses. In addition, the fight against corruption in transitional societies is futile if it does not lead to socio-economic transformation of victims and local communities in order to undo its negative consequences.

7.2 Recommendations

In order to maximise the potential of transitional justice to address corruption in transitional states, the following recommendations are offered.

2 See Simpson (2017) at 392; Lambourne (2009) at 36.

7.2.1 Reject the Dominant Script

The narrow approach incorporated into the transitional justice framework in the 1980s and 1990s has become the dominant script in transitional justice. Its incompatibility with current problems or challenges is evident, given that it has made it impossible theoretically and practically for transitional states to address socio-economic injustices, despite their key roles as underlying causes and sustainers of past abuses. As a result, transitional justice has failed to achieve its goals. It is certain that the continued adherence to the dominant script in Africa is doomed to fail in the quest for truth, justice and accountability in transitional states. Transformative justice theory rejects this "one-size-fits-all" approach, and interrogates the exclusion of socio-economic issues from transitional justice processes. The AUTJP is conceived as a continental guideline for African states "to develop their own context-specific comprehensive policies, strategies and programmes towards democratic and socio-economic transformation".[3] The rejection of the narrow approach by the AUTJP sends a strong signal regarding the insufficiency and inapplicability of the traditional dominant script to 21st century transitional justice in Africa. Clearly, the AUTJP has adopted a more "transformative" transitional justice approach aimed at achieving socio-economic transformation in Africa.

In accordance with the transformative justice approach, it is recommended that transitional states reject the liberal notion of transitional justice and that local actors be empowered to define the parameters of transitional justice contextually. Transitional justice should not be seen as a vehicle to deliver liberal goods from top-bottom. Instead, transitional states should devise and implement transitional justice programmes which are specific to their needs and priorities. By opposing the conventional transitional justice policies and their unjustifiable limitations, transitional states will be able to examine and address the root causes of past abuses, without turning a blind eye to socio-economic issues. Solutions to past abuses ought to remain context-specific and driven by local communities.[4] In order to achieve that, transitional states need to embark upon national consultations prior to designing transitional justice processes, rather than accepting the proposals of external actors who are divorced from

3 See AUTJP (2019) at 1.

4 Sharp (2014) at 292.

the realities on the ground. There is an imperative to consult local people in affected communities about their main grievances and priorities in transitional justice.

With a view to avoiding the dominant script, it is recommended that the role of external actors be limited to that of supporting local approaches. The dominant script was adopted as a result of reliance upon Western organisations and foreign experts to advise and shape local transitional justice processes. Transitional states were offered justice mechanisms that were tailored to the expectations and standards of the Western powers. These externally driven approaches lack local ownership and context. As to expert opinion and advice, it is submitted that states should consult mainly with local experts who and organisations which are familiar with the history of the country pre-transition and who will help formulate a context-specific transitional justice strategy.

7.2.2 Make Anti-Corruption a Key Aspect of Transitional Justice

Addressing past corruption should not be an after-thought in transitional states. Corruption threatens peace and democracy. Hence, anti-corruption should become a priority for peacebuilders.[5] It is beneficial to address corruption immediately after political transition. When a new government is in place, there are high levels of "civil consciousness" and the will to reform is strong amongst all major parties.[6] Addressing past corruption outside transitional justice creates the impression that corruption is not part of the injustices faced by citizens and, hence, that it is not necessary for peacebuilding purposes. Where anti-corruption movements are divorced from transitional justice work, they are likely to be labelled as "less important" issues which may be addressed "at a later stage". As submitted in this thesis, treating anti-corruption as an after-thought has undesirable effects on transitional states, and may lead to the recurrence of violence.

It is suggested, thus, that transitional states in Africa make anti-corruption a key goal of transitional justice. Every day, citizens in African states are demanding an end to corruption, particularly in states emerging from or experiencing conflict where there are high levels of

5 Boucher *et al* (2007) at 21.

6 Pesek (2014) at 5.

corruption. The transitional period presents an opportunity for a new government to demonstrate its commitment to fighting corruption. Missing such a golden opportunity likely will result in failure of the efforts to create a strong anti-corruption movement in future. However, embracing an anti-corruption agenda should not distract transitional states from addressing other injustices. The anti-corruption agenda should be aimed at uncovering and linking corruption and past violence. This will limit the scope of the anti-corruption agenda, and ensure that it conforms to the transitional justice aims of peace, truth, justice and accountability for past abuses.

It is recommended that the AUTJP accept and reflect upon this anti-corruption agenda. The AUTJP fails to include explicitly the importance of fighting corruption in Africa during political transitions, particularly after the Arab Spring of 2011 which lay bare corruption as a major grievance. The AU Advisory Board on Corruption is mentioned as one of the key AU organs to "provide leadership in the implementation" of the policy.[7] In carrying out its mandate to promote anti-corruption measures,[8] it ought to advocate the inclusion of anti-corruption as an essential element of transitional justice in Africa. The identification of the Advisory Board as a key institution in the implementation of transitional justice policy was not incidental, and shows that there is potential for inserting an anti-corruption strategy at the centre of the transitional justice agenda.

7.2.3 Define and Identify Victims of Corruption

Corruption is not a victimless crime. The victims of corruption range from individuals whose socio-economic rights remain unfulfilled or whose civil and political rights are violated as a result of abuse of power, to marginalised communities whose collective rights to socio-development are stifled. Victims are the main subjects of transitional justice, hence the identification of victims of corruption is of paramount importance to addressing it successfully as a justice issue in transition. In terms of transformative justice theory, Identification of victims will enhance their visibility and active participation in transitional justice mechanisms Without

7 AUTJP (2019) at 26.

8 Article 22 of the AU Convention.

clear definition of victims and the inclusion of victim-oriented provisions in transitional justice laws and practices, there is a risk that the anti-corruption drive by transitional states will become tokenistic and, at worst, a charade.

Identifying and defining victims of corruption determine who can speak and who will be silenced in transitional justice and the fight against corruption. Hence, transitional states must consider the issue carefully to avoid turning a blind eye to many victims of corruption. The main challenge here is the absence of international guidelines or principles for identifying or defining corruption-based victimhood. Many states have not defined victims of corruption in their anti-corruption legislation, and they may want to rely upon basic provisions relating to victims of crime.[9] However, such an approach is not desirable as there is a risk of collective victims of corruption remaining unidentified and silenced. There is a need to identify collective victims, particularly marginalised communities. Hence, it is submitted that transitional states must formulate a definition of victims that encompasses efforts to address structural inequalities and marginalisation. This will enable transitional justice mechanisms to include communities as collective victims of corruption and to offer avenues for their socio-economic transformation.

7.2.4 Enhance Victim-Centredness of Transitional Justice Mechanisms

Since its inception, transitional justice has represented itself as a discipline and practice that is victim-centred, with the main aims of bringing justice for previous victim abuses, providing a platform for victims to narrate their experiences, and offering them reparations. However, these aims have not been reached, as victims are usually on the outskirts of major decisions or processes regarding transitional justice. In addition to clear identification and definition of victims of corruption, transitional states must enhance their participation in the formulation, implementation and evaluation of various transitional justice mechanisms. Victims must be seen as subjects and not as objects of transitional justice processes. As Fonseka & Naples-Mitchell correctly posit, a "truly victim-centered process will recognise and engage victims as

9 UNODC (2016) at 5.

active participants".[10] Increased participation of victims will enhance the legitimacy of transitional justice mechanisms as locally driven and relevant.

An anti-corruption agenda requires victims to be at the heart of any transitional justice process. Augmented participation empowers and transforms victims to become ambassadors of the anti-corruption agenda. This means that victims should be consulted in the negotiation or planning of transitional justice processes, with anti-corruption being placed at the core of transitional justice. There ought to be increased participation of victims in criminal trials, where they are given an opportunity to share how the corrupt conduct being prosecuted affected them, subject to the rights of the accused not being prejudiced.[11] In order to avoid presentation of inadmissible or prejudicial information, victims may be given their opportunity to speak following a conviction. In TRCs, there is a need to afford individual and collective victims of corruption a platform to give their account of past corruption and its effects on their rights. Reparations should be victim-centred, particularly as regards the forms and types of reparations to be received so that they may be tailored to the needs of the victims. Reforms require victims to share their experiences of abuse of power in public institutions and make input on what needs to be done. All in all, transitional states must ensure that victims are the main subjects of transitional justice mechanisms, and they should have a seat at the table during the planning and implementation of the mechanisms.

7.2.5 Increase the Role of Civil Society in Transitional Justice

The fight against corruption in transitional societies requires an active civil society. Increasing the role of civil society is important for ensuring more diverse, accessible and locally appropriate justice. Transformative justice concerns itself with transformative participation of victims and local communities in transitional justice. Civil society organisations educate and empower citizens to participate actively in transitional justice mechanisms. Also, they may assist in linking past corruption and human rights violations, identifying the location of stolen assets and monitoring the use of returned assets for reparations purposes. They may play a

10 Fonseka & Naples-Mitchell (2017) at 4.

11 See Article 32(5) of UNCAC.

significant role also in identifying victims of corruption and advocating reparations. Such organisations help to exert pressure on the government to contextualise transitional justice and to include anti-corruption as an important pillar of the process.

The AUTJP recognises the need to increase the role of civil society by encouraging member states to enable non-state actors to "play their role in creating forums for and documenting and reporting on TJ processes".[12] Hence, transitional states should provide legal and political support for civil society to participate in transitional justice. This may include constitutional or legislative recognition of civil society organisations as crucial for the successful implementation of transitional justice mechanisms. A question may be asked as to whether international civil society organisations ought to feature more prominently, considering that they are likely to support externally driven approaches to transitional justice that are divorced from local realities? To answer such a question, civil society must be limited to those organisations which have worked with the affected communities for a number of years and which have empowered them to address their challenges. In that way, only civil society organisations which have a long-standing and active relationship with local communities will enjoy an enhanced role facilitated by the transitional state.

7.2.6 A Holistic Approach to Transitional Justice

No transitional justice mechanism can address corruption singlehandedly and sufficiently. The African Union Panel of the Wise has observed that "transitional justice mechanisms are most effective when implemented as part of a holistic strategy".[13] This means that an anti-corruption agenda should not be implemented by way of only one TJ mechanism. Collaboration between various mechanisms to address corruption imperative and must be enhanced. For example, transitional governments should be compelled to implement recommendations of TRCs on criminal prosecutions of corrupt persons, reformation of corrupt institutions and reparations for victims of corruption. Criminal prosecutions should be pursued as a means to recover stolen assets to fund reparation programmes.

12 AUTJP (2019) at 26.

13 African Union Panel of the Wise (2013) at 14.

However, there is a need to ensure that these mechanisms are planned, sequenced and timed carefully to heighten their collaborative effects. For instance, TRCs should be implemented before reparations programmes, as the former can unveil the truth about past abuses, expose the effects of corruption on marginalization, and may recommend appropriate reparations from the victims' perspective.

7.2.7 Co-ordinate Transitional Justice Mechanisms and other Anti-Corruption Measures

Transitional justice is not the ultimate answer to all injustices in transitional states. Certainly, it cannot address all forms of corruption. Transitional justice mechanisms will need to address physical violence as well as socio-economic issues. As a result, it is likely that the mechanisms deployed will address corruption linked to past violence. This means that other forms or patterns of corruption not linked directly to past abuses will fall outside the scope of transitional justice. Hence, it is suggested that transitional states implement other anti-corruption measures which will complement transitional justice mechanisms. For instance, recommendations by TRCs on corruption and other economic crimes must be compulsory and integrated into the national anti-corruption policy. Also, transitional states must ratify and implement fully the various anti-corruption instruments applicable in Africa.[14] Corruption is a multi-faceted problem which requires a multi-faceted approach to combat it. The co-ordination between the two fields will advance justice, accountability and peace building activities in transitional states.

7.3 Conclusion

Questions about addressing corruption during political transitions are receiving increasing attention and are making their way slowly to the centre of transitional justice. The undesirable and unresolved legacies of past corruption must be challenged head-on to prevent its recurrence during or after transition, which may pose a threat to peace and security in the transitional state. The fact that corruption has been neglected because of the dominance of civil and political rights does not mean that it should remain on the peripheries forever,

14 These are UNCAC, the AU Convention, the SADC Protocol, the ECOWAS Protocol and the draft EAC Protocol.

particularly when increasingly it is becoming a priority justice issue demanded by citizens. It is submitted that transitional justice mechanisms can be expanded to address corruption. Moving anti-corruption to the fore of transitional justice is not an easy task, and it likely will encounter many challenges. However, the existence of challenges does not mean that corruption and other economic crimes should be ignored during political transitions.[15] Transitional societies in Africa cannot afford to miss the golden chance of addressing past corruption and laying a solid foundation for a strong anti-corruption campaign during and post-transition.

The field of transitional justice is young and remains under-theorised. There is space to devise various means of including an anti-corruption agenda in the field. This thesis has applied transformative justice theory. Transitional states should consider its potential benefits, particularly with regard to increased public participation and socio-economic transformation. The transformative justice approach was adopted in the AUTJP, endorsing its importance for current transitional justice movements and approaches in Africa. Addressing corruption requires transformation of the relationship between citizens and government, and that transformation should be indicated in the transitional justice tools. A weak citizenry provides the best platform for corruption to breed, hence there is a need to transform victims and local communities into champions in the fight against any abuse of power. Equally important, socio-economic transformation is vital for undoing the consequences of corruption.

It is hoped that this thesis will assist in answering critical questions on the proximate relationship between corruption and violence, and in offering guidelines towards the total integration of an anti-corruption agenda into the field of transitional justice in Africa.

15 See Duthie (2014) at 191.

REFERENCES

PRIMARY SOURCES

International Instruments

African Charter on Human and Peoples' Rights, adopted on 27 June 1981, entered into force on 21 October 1986.

African Union Convention on Preventing and Combating Corruption, adopted on 11 July 2003, entered into force on 5 August 2006.

Draft East African Community Protocol on Preventing and Combating Corruption (last revised in 2012).

Economic Community of West African States Protocol on the Fight against Corruption, adopted on 21 December 2001, (not yet in force).

International Covenant for Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976.

Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008 (not yet in force).

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 27 June 2014, (not yet in force).

Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002.

Southern African Development Community Protocol against Corruption, adopted on 14 August 2001, entered into force on 6 August 2003.

Universal Declaration of Human Rights, adopted on 10 December 1948.

United Nations Convention against Corruption, adopted on 31 October 2003, entered into force on 14 December 2005.

United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment

or Punishment, adopted on 10 December 1984, entered into force on 26 June 1987.

Domestic Legislation

An Act to Establish the Truth and Reconciliation Commission for Liberia of 2005.

Constitution of the Republic of Angola (2010).

Constitution of Zambia Act (1991).

Decree-law n° 2011-7 of 2011.

Decree Creating the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-president Habre, His Accomplices and/or Accessories, Decree No. 014/P.CE/CJ/90 of 1990.

Organic law n° 2013-53 of 2013 (Transitional Justice Law).

Promotion of National Unity and Reconciliation Act 34 of 1995.

Truth, Justice and Reconciliation Act 6 of 2008.

Truth and Reconciliation Commission Act 2000.

Cases

Azanian People's Organisation and Others v President of the Republic of South Africa and Others 1996 (4) SALR 671 (CC).

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of The Congo v Belgium) Judgment, ICJ Reports 2002.

National Commissioner of South African Police Service v Southern African Human Litigation Centre 2015 (1) SA 315 (CC).

SERAP v Nigeria, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, 30 November 2010).

The Prosecutor v Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Rome Statute, Trial Chamber 1 (14 March 2012).

SECONDARY SOURCES

Books and Chapters in Books

Aboueldahab N (2018) "Navigating the Storm: Civil Society and Ambiguous Transitions in Egypt, Libya and Tunisia" in Brankovic J & van de Merwe H (eds) *Advocating Transitional Justice in Africa: The Role of Civil Society* New York: Springer.

Aboueldahab N (2017) *Transitional Justice and the Prosecution of Political Leaders in the Arab Region: A Comparative Study of Egypt, Libya, Tunisia and Yemen* Portland: Hart Publishing.

Adeh I (2010) *Corruption and Environmental Law: The Case of the Niger Delta* Berlin: LIT Verlag Munster.

Adeyeye AO (2012) *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* Cambridge: Cambridge University Press.

Africa S (2008) "South Africa: SSR After Aparthied" in Donais T (ed) *Local Ownership and Security Sector Reform* London: Transaction Publishers.

African Union Panel of the Wise (2013) *Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity* New York: International Peace Institute.

Albin-Lackey C (2014) "Corruption, Human Rights, and Activism: Useful Connections and Their Limits" in Sharp DN (ed) *Justice and Economic Violence in Transition* New York: Springer.

Bächler G (2004) "Conflict Transformation through State Reform" in Austin A, Fischer M & Ropers N (eds) *Transforming Ethnopolitical Conflict: The Berghof Handbook* Weisbaden: Springer Fachmedien Weisbaden.

Bhebe A (2018) *Understanding Socioeconomic Transformation in South Africa — What has not Changed Two Decades into Democracy* Cape Town: Alef Innovations.

Boersma M (2012) *Corruption: A Violation of Human Rights and a Crime under International Law?* Antwerp: Intersentia.

Boraine A (2000) *A Country Unmasked: Inside South Africa's Truth and Reconciliation*

Commission Oxford: Oxford University Press.

Brun JP, Gray L, Scott C & Stephenson KM (2011) *Asset Recovery Handbook: A Guide for Practitioners* Washington DC: The International Bank for Reconstruction and Development/The World Bank.

Carter LE, Ellis MS & Jalloh CC (2016) *The International Criminal Court in an Effective Global Justice System* Cheltenham: Edward Elgar Publishing Limited.

Cavallaro J & Albuja S (2008) "The Lost Agenda: Economic Crisis and Truth Commissions in Latin America and Beyond" in McEvoy K & McGregor L (eds) *Transitional Justice from Below: Grassroots Activism and Struggle for Change* Oxford: Hart Publishing.

Chakravarty A (2015) *Investing in Authoritarian Rule: Punishment and Patronage in Rwanda's Gacaca Courts for Genocide* Cambridge: Cambridge University Press.

Chandler D (2006) *Empire in Denial: The Politics of State-Building* London: Pluto Press.

Cheng CS & Zaum D (2012) *Corruption and Post-Conflict Peacebuilding: Selling the Peace?* London: Routledge.

Cobián RA & Reátegui F (2009) "Toward Systemic Social Transformation: Truth Commissions and Development" in De Greiff P & Duthie R (eds) *Transitional Justice and Development: Making Connections* New York: Social Science Research Council.

Cohen D & Lipscomb LA (2012) "When More May Be Less: Transitional Justice in East Timor" in Williams MS, Nagy R & Elster J (eds) *Transitional Justice* New York: New York University Press.

Colvin CJ (2006) "Reparations Program in South Africa" in de Greiff P (ed) *The Handbook of Reparations* Oxford: Oxford University Press.

Compagnon D (2011) *A Predictable Tragedy: Robert Mugabe and the Collapse of Zimbabwe* Philadelphia: University of Pennsylvania Press.

Cullinan S (2001) *Torture Survivors' Perceptions of Reparation* London: Redress.

de Greiff P (ed) (2006) *The Handbook of Reparations* Oxford: Oxford University Press.

Dombo S (2018) *Private Print Media, the State and Politics in Colonial and Post-Colonial*

Zimbabwe Cham: Palgrave Macmillan.

Donais T (2012) *Peacebuilding and Local Ownership: Post-Conflict Consensus-Building* Abingdon: Routledge.

Duthie R (2007) "Introduction" in Mayer-Rieckh A & de Greiff P (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* New York: Social Science Research Council.

Evans M (2019) *Transitional and Transformative Justice: Critical and International Perspectives* Abingdon: Routledge.

Fernandez LD (2017) "Corruption (Article 28l) and Money Laundering (Article 28l *bis*)" in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* The Hague: T.M.C Asser Press.

Foakes J (2014) *The Position of Heads of State and Senior Officials in International Law* Oxford: Oxford University Press.

Gaeta P & Labuda PI (2017) "Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases" in Jalloh CC & Bantekas I (eds) *The International Criminal Court and Africa* Oxford: Oxford University Press.

Gahima G (2013) *Transitional Justice in Rwanda: Accountability for Atrocity* New York: Routledge.

Garcia-Godos J & Sriram CL (2013) "Introduction" in Sriram CL, Garcia-Godos J, Herman J & Martin-Ortega O (eds) *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* Oxfordshire: Routledge.

Girelli G (2017) *Understanding Transitional Justice: A Struggle for Peace, Reconciliation, and Rebuilding* Cham: Palgrave Macmillan.

Gloppen S (2014) "Courts, Corruption and Judicial Independence" in Søreide T & Williams DA *Corruption, Grabbing and Development: Real World Challenges* Cheltenham and Northampton (MA): Edward Elgar Publishing.

Glynn P, Kobrin SJ & Naim M (1997) "The Globalisation of Corruption" in Elliot KA (ed)

Corruption and the Global Economy Washington: Institute for International Economics.

González E (2013) *Drafting a Truth Commission Mandate A Practical Tool* New York: International Centre for Transitional Justice.

Haldemann F & Kouassi R (2014) "Transitional Justice without Economic, Social, and Cultural Rights?" in Riedel E, Giacca G & Golay C (eds) *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* Oxford: Oxford University Press.

Hanna MW (2014) "Egypt and the Struggle for Accountability and Justice" in Fisher KJ & Stewart R (eds) *Transitional Justice and the Arab Spring* Oxford: Routledge.

Harees L (2012) *The Mirage of Dignity on the Highways of Human 'Progress' —The Bystander's Perspective"* Bloomington: AuthorHouse.

Harwell EE & Le Billon P (2009) "Natural Connections: Linking Transitional Justice and Development through a Focus on Natural Resources" in de Dreiff P & Duthie R *Transitional Justice and Development: Making Connections* New York: Social Science Research Council.

Hayner PB (2ed) (2011) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* New York: Routledge.

Hinton LA (ed) (2010) *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* New Jersey: Rutgers University Press.

Horne CM (2017a) *Building Trust and Democracy: Transitional Justice in Post-Communist Countries* Oxford: Oxford University Press.

Horne CM (2017b) "Transitional Justice: Vetting and Lustration" in Lawther C, Moffett L & Jacobs D *Research Handbook on Transitional Justice* Cheltenham: Edward Elgar Publishing.

Hornsby C (2012) *Kenya: A History Since Independence* London: IB Tauris.

Ismail O (2008) "Enabling Local Ownership: Participation and Capacity-Building in SSR" in Donais T (ed) *Local Ownership and Security Sector Reform* London: Transaction Publishers.

Johnston M (1999) "A Brief History of Anticorruption Agencies" in Schedler A, Diamond L & Plattner MF (eds) *The Self-Restraining State: Power and Accountability in New Democracies*

Boulder: Lynne Rienner.

Karas EI & Vidlicka SR "Asset Recovery Policies in Transitional Societies: Croatia" in Ligeti K & Simonato M (2017) *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in EU* Portland: Hart Publishing.

Kerr R & Mobekk E (2007) *Peace and Justice: Seeking Accountability after War* Cambridge: Polity Press.

Kiss E (2000) "Moral Ambition within and beyond Political Constraints: Reflections on Restorative Justice" in Rotberg RI & Thompson D (eds) *Truth v Justice: The Morality of Truth Commissions* Princeton: Princeton University Press.

Kofele-Kale N (2006) *The International Law of Responsibility for Economic Crimes: Holding State Officials Individually Liable for Acts of Fraudulent Enrichment* Aldershot: Ashgate Publishing Limited.

Kritz NJ (3ed) (1995) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* Washington DC: United States Institute of Peace Studies.

Lambourne W (2009) "Transformative Justice, Reconciliation and Peacebuilding" in Buckley-Zistel S, Beck TK, Braun C & Mieth F (eds) *Transitional Justice Theories* London: Routledge.

Lawson EH & Bertucci ML (2ed) (1996) *Encyclopedia of Human Rights* Washington DC: Taylor & Francis.

Lindenmayer E & Kaye JL (2009) *A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya* New York: International Peace Institute.

Lutz EL & Reiger C (2009) *Prosecuting Heads of State* Cambridge: Cambridge University Press.

Maguchu L (2019) *Transitional Justice and Socio-Economic Rights in Zimbabwe* The Hague: TMC Asser Press.

Mahony C (2010) *The Justice Sector Afterthought: Witness Protection in Africa* Pretoria: Institute for Security Studies.

Mamdani M (2000) "The Truth According to the TRC" in Amadiume I & An-Na'im A (eds) *The*

Politics of Memory: Truth, Healing and Social Justice London: Zed Books.

Martin A & Wilson P (2008) "Security Sector Evolution: Which Locals? Ownership of What?" in Donais T (ed) *Local Ownership and Security Sector Reform* London: Transaction Publishers.

McAuliffe P (2017) *Transformative Transitional Justice and the Malleability of Post-Conflict States* Cheltenham: Edward Elgar.

McCarthy C (2012) *Reparations and Victim Support in the International Criminal Court* Cambridge: Cambridge University Press.

Mendez JE (1997) "In Defence of Transitional Justice" in McAdams AJ (ed) *Transitional Justice and the Rule of Law in New Democracies* Notre Dame: University of Notre Dame Press.

Matyszak D (2017) "State Capture and Elections in Zimbabwe" in Meirotti M & Masterson G (eds) *State Capture in Africa: Old Threats, New Packaging* Johannesburg: EISA.

Meng Q & Friday PC (2014) "Victims of Corruption: A Conceptual Framework" in Vanfraechem I, Pemberton A & Ndahinda FM (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* Oxford: Routledge.

Moffet L (2017) "Transitional Justice and Reparations: Remedying the Past?" in Lawther C, Jacobs D & Moffett L (eds) *Research Handbook on Transitional Justice* Cheltenham: Edward Elgar Publishing.

Morris R (2000) *Stories of Transformative Justice* Toronto: Canadian Scholars' Press Inc.

Munyai A & Agbor AA (2018) "The Impact of Corruption on the Right to Development in Africa" in ~~CC~~ Ngang CC, Kamga SD & Gumede V (eds) *Perspectives on the Right to Development* Pretoria: Pretoria University Law Press.

Muzila L, Morales M, Mathias M & Berger T (2012) *On the Take: Criminalising Illicit Enrichment to Fight Corruption* Washington: World Bank.

Nalepa M (2013) "Lustration" in Stan L & Nedelsky N (eds) *Encyclopedia of Transitional Justice* Cambridge: Cambridge University Press.

Nassar H (2014) "Transitional Justice in the Wake of the Arab Uprisings: Between Complexity

and Standardisation" in Fisher KJ & Stewart R (eds) *Transitional Justice and the Arab Spring* Oxford: Routledge.

Nathan L (2008) "The Challenge of Local Ownership of SSR: From Donor Rhetoric to Practice" in Donais T (ed) *Local Ownership and Security Sector Reform* London: Transaction Publishers.

Newman E, Paris R & Richmond OP (eds) *New Perspectives on Liberal Peacebuilding* Tokyo: United Nations University Press.

Nicholls C, Daniel T, Bacarese A & Hatchard J (2011) *Corruption and Misuse of Public Office* Oxford: Oxford University Press.

Nilofer Nisha NM (2012) "Corruption Free Service as a Fundamental Right" in Viswanathan VN (ed) *Corruption and Human Rights* New Delhi: Allied Publishers Pvt. Ltd.

Nolutshungu SC (1996) *Limits of Anarchy: Intervention and State Formation in Chad* Charlottesville: University Press of Virginia.

O'Donnell M (2014) "Corruption: A Rule of Law Agenda?" in Hurwitz A & Huang R (eds) *Civil War and the Rule of Law: Security, Development, Human Rights* Boulder: Lynne Rienner Publishers.

OECD (2008) *Corruption: A Glossary of International Standards in Criminal Law* Paris: OECD Publishing.

OHCHR (2014) *Transitional Justice and Economic, Social and Cultural Rights* New York: United Nations Publications.

Olaniyan K (2014) *Corruption and Human Rights Law in Africa* Oxford: Hart Publishing Ltd.

Peterson JH (2014) *Building a Peace Economy? Liberal Peacebuilding and the Development-Security Industry* Manchester: Manchester University Press.

Robinson M (ed) (1996) *Corruption and Development* London: Frank Cass.

Roht-Arriaza N (2014) "Reparations and Economic, Social, and Cultural Rights" in Sharp DN (ed) *Justice and Economic Violence in Transition* New York: Springer.

Roht-Arriaza N (2019) "Measures of Non-Repetition in Transitional Justice: The Missing Link?" in

Gready P & Robins S *From Transitional to Transformative Justice* Cambridge: Cambridge University Press.

Segovia A (2006) "Financing Reparations Programs" in de Greiff P (ed) *The Handbook of Reparations* Oxford: Oxford University Press

Schatzberg MG (1988) *The Dialects of Oppression in Zaire* Bloomington: Indiana University Press.

Schwarz A (2017) "War Crimes" in Lachenmann F & Wolfrum R (eds) *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* Oxford: Oxford University Press.

Sharp DN (ed) (2014) *Justice and Economic Violence in Transition* New York: Springer.

Sharp DN (2018) *Re-Thinking Transitional Justice for the 21st Century: Beyond the End of History* Cambridge: Cambridge University Press.

Shaw R & Waldorf L (2010) "Introduction: Localising Transitional Justice" in Shaw R, Waldorf L & Hazan P *Localising Transitional Justice: Interventions and Priorities after Mass Violence* Stanford: Stanford University Press.

Slye RC (2018) *The Kenyan TJRC: An Outsider's View from the Inside* Cambridge: Cambridge University Press.

Sooka YL (2009) "The Politics of Transitional Justice" in Sriram CL & Pillay S *Peace versus Justice*: *The Dilemma of Transitional Justice in Africa* Durban: UKZN Press.

Sriram CL (2009) "Transitional Justice and Peacebuilding" in Sriram CL & Pillay S *Peace versus Justice: The Dilemma of Transitional Justice in Africa* Durban: UKZN Press.

Sriram CL (2014) "Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?" in Sharp DN (ed) *Justice and Economic Violence in Transition* New York: Springer.

Stearns JK (2012) *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* New York: Public Affairs.

Stone JR (2005) *The Routledge Dictionary of Latin Quotations: The Illiterati's Guide to Latin*

Maxims. Mottoes, Proverbs, and Sayings New York: Routledge.

Sullo P (2018) *Beyond Genocide: Transitional Justice and Gacaca Courts in Rwanda* The Hague: TMC Asser Press.

Tladi D (2017) "The Presence of the Accused: Right or Duty? The Art of Interpretation in a Tense Political Climate" in Jalloh CC & Bentakas I (eds) *The International Criminal Court and Africa* Oxford: Oxford University Press.

Turner T (2007) *The Congo Wars: Conflict, Myth and Reality* London: Zed Books.

Van Vuuren H (2006) *Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit from 1976 to 1997* Cape Town: Institute for Security Studies.

Van Vuuren H (2017) *Apartheid Guns and Money: A Tale of Profit* London: Hurst & Company.

Viswanathan VN (ed) (2012) *Corruption and Human Rights* New Delhi: Allied Publishers Pvt Ltd.

Waldorf L (2019) "Between Transition and Transformation: Legal Empowerment as Collective Reparations" in Gready P & Robins S *From Transitional to Transformative Justice* Cambridge: Cambridge University Press.

Wallis J (2018) "Is There Still a Place for Liberal Peacebuilding?" in Wallis J, Kent L, Forsyth M, Dinnen S & Bose S (eds) *Hybridity on the Ground in Peacebuilding and Development: Critical Conversations* Canberra: Australian National University Press.

Whelan DJ (2010) *Indivisible Human Rights: A History* Philadelphia: University of Pennsylvania Press.

World Bank (2000) *Helping Countries Combat Corruption: Progress at the World Bank since 1997* Washington DC: The World Bank.

World Bank (2011) *World Development Report 2011: Conflict, Security, and Development* Washington DC: The World Bank.

Young C & Turner T (1985) *The Rise and Decline of the Zairian State* Madison: University of Wisconsin Press.

Journal Articles

Abou-El-Fadl R (2012) "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will" 6(2) *International Journal of Transitional Justice* 318-330.

Anderson M (2007) "International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction" 53 *Virginia Journal of International Law* 763-788.

Arthur P (2009) "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" 31(2) *Human Rights Quarterly* 321–367.

Allison J (2015) "Class Forces, Transition and the Arab Uprisings: A Comparison of Tunisia, Egypt and Syria" 22(2) *Democratisation* 294-314.

Alvarez JE (2001) "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory" 12(2) *European Journal of International Law* 183–246.

Arbour L (2007) "Economic and Social Justice for Societies in Transition" 40(1) *International Law and Politics* 1-27.

Andrieu K (2010) "Civilising Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm" 41(5) *Security Dialogue* 537-558.

Andrieu K (2012) "Dealing With a 'New' Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?" 11(4) *Journal of Human Rights* 537-557.

Atuahene B (2010) "Property and Transitional Justice" 58 *UCLA Law Review Discourse* 65-93.

Aukerman MJ (2002) "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice" 15 *Harvard Human Rights Law* 39-97.

Bah AB (2011) "State Decay and Civil War: A Discourse on Power in Sierra Leone" 37(2) *Critical Sociology* 199–216.

Bakiner O (2014) "Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society" 8(1) *International Journal of Transitional Justice* 6–30.

Balasco LM (2017) "Reparative Development: Re-Conceptualising Reparations in Transitional Justice Processes" 17(1) *Conflict, Security and Development* 1-20.

Balasco LM (2018) “Locating Transformative Justice: Prism or Schism in Transitional Justice” 12(2) *International Journal of Transitional Justice* 1-11.

Bamidele O (2013) “Corruption, Conflict and Sustainable Development in African States” 13(1) *The African Symposium* 42-52.

Bantekas I (2006) “Corruption as an International Crime and Crimes against Humanity” 4(3) *Journal of International Criminal Justice* 466-484.

Baumgartner E, Hamber B, Jones B, Kelly G & Oliveira I (2016) “Documentation, Human Rights and Transitional Justice” 8(1) *Journal of Human Rights Practice* 1-5.

Bellows J & Edward M “War and Institutions: New Evidence from Sierra Leone” 96(2) *American Economic Review* 394-399.

Bond P (2006) “Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition” 60(1) *Journal of International Affairs* 141-156.

Boraine A (2006) “Transitional Justice: A Holistic Interpretation” 60(1) *Journal of International Affairs* 17-27.

Bosire LK (2006) “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa” 3(5) *Sur International Journal on Human Rights* 70-107.

Bracking SL (2009) “Political Economies of Corruption beyond Liberalism: An Interpretative View of Zimbabwe” 30(1) *Singapore Journal of Tropical Geography* 35-51.

Bukovansky M (2006) “The Hollowness of Anti-Corruption Discourse” 13(2) *Review of International Political Economy* 181-209.

Bloom B (2014) “Criminalising Kleptocracy? The ICC as a Viable Tool in the Fight against Grand Corruption” 29(3) *American University International Law Review* 627-671.

Boesten J & Wilding P (2015) “Transformative Gender Justice: Setting an Agenda” 51 *Women's Studies International Forum* 75-80.

Brahm E (2009) “What is a Truth Commission and Why Does it Matter?” 3(2) *Peace and Conflict Review* 1-14.

Brown NJ (2013) “Tracking the ‘Arab Spring’: Egypt’s Failed Transition” 24(4) *Journal of Democracy* 45-58.

Call CT (2004) “Is Transitional Justice Really Just” 11(1) *Brown Journal of World Affairs* 101-113.

Carranza R (2008) “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes” 2(3) *International Journal of Transitional Justice* 310-330.

Cavalcante F (2014) “The Influence of the Liberal Peace Framework on the United Nations Approach to Peacebuilding in Guinea-Bissau” 6(6) *Revista Crítica de Ciências Sociais Annual Review* 141-161.

Cheng CS & Zaum D (2008) “Introduction – Key Themes in Peacebuilding and Corruption” 15(3) *International Peacekeeping* 301-309.

Cooper N (2007) “Review Article: On the Crisis of the Liberal Peace” 7(4) *Conflict, Security & Development* 605-616.

Coyne CJ & Ryan ME (2009) “With Friends Like These, Who Needs Enemies? Aiding the World's Worst Dictators” 14(1) *Independent Review* 26-44.

D’Alessandra F (2017) “The Accountability Turn in Third Wave Human Rights Fact-Finding” 33(84) *Utrecht Journal of International and European Law* 59-76.

Daly E (2001) “Transformative Justice: Charting a Path to Reconciliation” 12 *International Legal Perspectives* 73-185.

de Sousa L (2010) “Anti-Corruption Agencies: Between Empowerment and Irrelevance” 53(1) *Crime, Law and Social Change* 5-22.

Dixon PJ (2016) “Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo” 10(1) *International Journal of Transitional Justice* 88–107.

Du Pisani JA & Kim K (2004) “Establishing the Truth about the Apartheid Past: Historians and the South African Truth and Reconciliation Commission” 8(1) *African Studies Quarterly* 77-95.

Duthie R (2008) “Towards a Development-sensitive Approach to Transitional Justice” 2(3)

International Journal of Transitional Justice 292-309.

Enweremadu DU (2013) "Nigeria's Quest to Recover Looted Assets: The Abacha Affair" 48(2) *Africa Spectrum* 51-70.

Evans M (2016) "Structural Violence, Socioeconomic Rights, and Transformative Justice"15(1) *Journal of Human Rights* 1-20.

Evans M & Wilkins D (2019) "Transformative Justice, Reparations and Transatlantic Slavery" 28(2) *Social and Legal Justice* 137-157.

Firchow P (2013) "Must Our Communities Bleed to Receive Social Services? Development Projects and Collective Reparations Schemes in Colombia" 8(3) *Journal of Peacebuilding and Development* 50–63.

Frahm O (2018) "Corruption in Sub-Saharan Africa's Established and Simulated Democracies: The Cases of Ghana, Nigeria and South Sudan" 70(2) *Crime, Law and Social Change* 257-274.

Galtung J (1969) "Violence, Peace, and Peace Research" 6(3) *Journal of Peace Research* 167-191.

Garcia-Godos J (2008) "Victim Reparations in Transitional Justice — What Is at Stake and Why" 26(2) *Nordisk Tidsskrift for Menneskerettigheter* 111-130.

Garkawe S (2003) "The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights" 27(2) *Melbourne University Law Review* 334-380.

Gathii JT (2009) "Defining the Relationship between Human Rights and Corruption" 31(1) *University of Pennsylvania Journal of International Law* 125-202.

Gaventa J (2004) "Participatory Development or Participatory Democracy? Linking Participatory Approaches to Policy and Governance" 50 *Participatory Learning and Action* 150-159.

Grandin G (2005) "The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala" 110(1) *American Historical Review* 46-67.

Gray CD (2007) “Devilry, Complicity, and Greed: Transitional Justice and Odious Debt” 70 *Law and Contemporary Problems* 137-164.

Gready P & Robins S (2014) “From Transitional to Transformative Justice: A New Agenda for Practice” 8(3) *International Journal of Transitional Justice* 339-361.

Gready & Robins (2017) “Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and ‘New’ Civil Society” 21(7) The *International Journal of Human Rights* 956-975.

Hayner PB “Fifteen Truth Commissions — 1974 to 1994: A Comparative Study” 16(4) *Human Rights Quarterly* 597-655.

Hartman JM (1997) “Government by Thieves: Revealing the Monsters behind the Kleptocratic Masks” 24 *Syracuse Journal of International Law and Commerce* 157-175.

Hope KR (2014) “Kenya's Corruption Problem: Causes and Consequences” 52(4) *Commonwealth & Comparative Politics* 493-512.

Hordijk MA (2009) “Peru’s Participatory Budgeting: Configurations of Power, Opportunities for Change” 2 *Open Urban Studies Journal* 43-55.

Hyslop J (2005) “Fragile Stability: State and Society in Democratic South Africa” 31(4) *Journal of Southern African Studies* 773-789.

Jaichand V (2017) "In Transition? The Struggle for Socio-Economic Justice in South Africa" 7(1) *Notre Dame Journal of International & Comparative Law* 12-26.

Jeffery A (2000) “The Truth about The Truth Commission” 27(2) *Human Rights* 19-22.

Katiyana E (2017) “Transitional Justice: Reconciling Domestic Amnesty with the Universal Jurisdiction of Foreign Courts” 8(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 1-11.

Killingsworth M (2010) “Lustration after Totalitarianism: Poland’s Attempt to Reconcile with its Communist Past” 43(3) *Communist and Post-Communist Studies* 275–84.

Kofele-Kale N (2000) “The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law” 34(1) *The*

International Lawyer 149-178.

Koss T (2002) “South Africa's Truth and Reconciliation Commission: A Model for the Future” 14 *Florida Journal of International Law* 517-526.

Krause K & Jütersonke O (2005) “Peace, Security and Development in Post-Conflict Environments” 36(4) *Security Dialogue* 447-462.

Kriger N (2012) “ZANU PF Politics under Zimbabwe's ‘PowerSharing’ Government” 30(1) *Journal of Contemporary African Studies* 11-26.

Kumar CR (2005) “Corruption, Human Rights, and Development: Sovereignty and State Capacity to Promote Good Governance” 99 *Proceedings of the Annual Meeting (American Society of International Law)* 416-419.

Lai D (2016) “Transitional Justice and Its Discontents: Socioeconomic Justice in Bosnia and Herzegovina and the Limits of International Intervention” 10(3) *Journal of Intervention and Statebuilding* 361-381.

Lambourne W (2009) “Transitional Justice and Peacebuilding after Mass Violence” 3(1) *International Journal of Transitional Justice* 29-48.

Lanegran K (2015) “Justice for Economic Crimes? Kenya’s Truth Commission” 6(2) *Air and Space Power Journal* 63-76.

Laplante LJ (2007a) “On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development” 10(1) *Yale Human Rights & Development Law* 141-177.

Laplante LJ (2007b) “The Peruvian Truth Commission’s Historical Memory Project: Empowering Truth-Tellers to Confront Truth Deniers” 6(4) *Journal of Human Rights* 433-452.

Laplante LJ (2008) “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework” 2(3) *International Journal of Transitional Justice* 331-355.

Lamont CK & Boujneh H (2012) “Transitional Justice in Tunisia: Negotiating Justice during Transition” 49(5) *Politička Misao* 32-49.

Lamont CK & Pannwitz H (2016) “Transitional justice as Elite Justice: Compromise Justice and Transition in Tunisia” 7(2) *Global Policy* 278-281.

Le Billon P (2003) “Buying Peace or Fueling War: The Role of Corruption in Armed Conflicts” 15 *Journal of International Development* 413-426.

Le Billion P (2008) “Corrupting Peace? Peacebuilding and Post-Conflict Corruption” 15(3) *International Peacekeeping* 344-361.

Lemkin R (1947) “Genocide as a Crime under International Law” 41(1) *American Journal of International Law* 145-151.

Los M (1995) “Lustration and Truth Claims: Unfinished Revolutions in Central Europe” 20(1) *Law & Social Inquiry* 117-161.

Lundy P & McGovern M (2008) “Whose Justice? Rethinking Transitional Justice from the Bottom Up” 35(2) *Journal of Law and Society* 265-292.

Mani R (2008) “Editorial: Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development” 2(3) *International Journal of Transitional Justice* 253–265.

Mapuva J (2010) “Militarisation of Public Institutions, Flawed Electoral Processes and Curtailed Citizen Participation: The Case of Zimbabwe” 14(4) *Journal of Legislative Studies* 460-475.

Maringira G (2017) “Politics, Privileges, and Loyalty in the Zimbabwe National Army” 60(2) *African Studies Review* 93–113.

May RA (2013) "‘Truth’ and Truth Commissions in Latin America" 21(2) *Ciencias Sociales Investigación y Desaroll* 494-512.

McEvoy K & McConnachie K (2013) “Victims and Transitional Justice: Voice, Agency and Blame” 22(4) *Social and Legal Studies* 489-513.

Meagher P (2005) “Anti-Corruption Agencies: Rhetoric versus Reality” 8(1) *The Journal of Policy Reform* 69-103.

Mendez JE (2016) “Victims as Protagonists in Transitional Justice” 10(1) *International Journal of*

Transitional Justice 1-5.

Millar G (2011) "Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice" 12(4) *Human Rights Review* 515-535.

Miller Z (2008) "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" 2(3) *International Journal of Transitional Justice* 266-291.

Moyo K (2017) "An Analysis of the Impact of Corruption on the Realisation of the Right to Development" 33(2) *South African Journal on Human Rights* 193-213.

Musila GM (2009) "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions" 3(3) *International Journal of Transitional Justice* 445–464.

Mutua M (2004) "Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission" 10 *Buffalo Human Rights Law Review* 15-214.

Muvingi I (2008) "The Politics of Entitlement and State Failure in Zimbabwe" 40(1) *Peace Research* 77-101.

Muvingi I (2009) "Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies" 3(2) *International Journal of Transitional Justice* 163-182.

Navarro NC (2006) "Fighting Corruption: The Peruvian Experience" 4(3) *Journal of International Criminal Justice* 488–509.

Nagy R (2008) "Transitional Justice as Global Project: Critical Reflections" 29(2) *Third World Quarterly* 275-289.

Ndikumana L & Boyce J (1998) "Congo's Odious Debt: External Borrowing and Capital Flight in Zaire" 29(2) *Development and Change* 195-217.

Ngugi JM (2010) "Making the Link between Corruption and Human Rights: Promises and Perils" 104 *International Law in a Time of Change* 246-250.

Nickel JW (2008) "Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights" 30(4) *Human Rights Quarterly* 984-1001.

Ochenje PD (2002) "Refocusing International Law on the Quest for Accountability in Africa: The

Case against the "Other" Impunity" 15(4) *Leiden Journal of International Law* 749-779.

Olaniyan K (2004) "The African Union Convention on Preventing and Combating Corruption" 4 *African Human Rights Law Journal* 74-92.

Paris R (2010) "Saving Liberal Peacebuilding" 36(2) *Review of International Studies* 337-365.

Perez N (2013) "Property Rights and Transitional Justice: A Forward-Looking Argument" 46(1) *Canadian Journal of Political Science* 135–155.

Peters A (2018) "Corruption as a Violation of International Human Rights" 29(4) *European Journal of International Law* 1251-1287.

Pham PN, Gibbons N & Vinck P (2019) "A framework for assessing political will in transitional justice contexts" 23(6) *International Journal of Human Rights* 993-1009.

Philp M (2008) "Peacebuilding and Corruption" 15(3) *International Peacekeeping* 310-327.

Ramasastry A (2015) "Is There a Right to Be Free from Corruption?" 49 *University of California, Davis* 703-739.

Randall KC (1988) "Universal Jurisdiction under International Law" 66 *Texas Law Review* 785-841.

Rampton D & Nadarajah S (2017) "A Long View of Liberal Peace and its Crisis" 23(2) *European Journal of International Relations* 441–465.

Reilly N (2007) "Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach" 3(2) *International Journal of Law in Context* 155-172.

Richmond OP & Franks J (2007) "Liberal Hubris? Virtual Peace in Cambodia" 38(1) *Security Dialogue* 27-48.

Richmond OP (2009) "The Romanticisation of the Local: Welfare, Culture and Peacebuilding" 44(1) *International Spectator* 149-169.

Richmond OP & Mac Ginty (2015) "Where Now for the Critique of the Liberal Peace?" 50(2) *Cooperation and Conflict* 171–189.

Rijkers B, Freund C & Nucifora A (2017) "All in the Family: State Capture in Tunisia" 124 *Journal*

of Development Economics 41-59.

Robins S (2011a) "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in PostConflict Nepal" 5(1) *International Journal of Transitional Justice* 75-98.

Robins S (2017) "Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations" 11(1) *Human Rights and International Legal Discourse* 41-58.

Robinson I (2015) "Truth Commissions and Anti-Corruption: Towards a Complementary Framework?" 9(1) *International Journal of Transitional Justice* 33-50.

Rose-Ackerman S (2008) "Corruption and Post-Conflict Peace-Building" 34 *Ohio Northern University Law Review* 405-443.

Rosenfeld F (2010) "Collective Reparation for Victims of Armed Conflict" 92(879) *International Review of the Red Cross* 731-746.

Roosa J (2008) "How Does a Truth Commission Find out What the Truth Is? The Case of East Timor's CAVR" 80(4) *Pacific Affairs* 569-580.

Rubio-Marin R & de Greiff P (2007) "Women and Reparations" 1(3) *International Journal of Transitional Justice* 318–337.

Saunders R (2014) "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" 32(3) *Journal of Contemporary African Studies* 378-394.

Sharp DN (2012) "Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice" 35(3) *Fordham International Law Journal* 780-814.

Sharp DN (2013) "Interrogating the Peripheries: The Preoccupation of Fourth Generation Transitional Justice" 26(1) *Harvard Human Rights Journal* 149-178.

Sharp DN (2015) "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition" 9(1) *International Journal of Transitional Justice* 150–169.

Sharp DN (2019) "What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice" 13(3) *International Journal of Transitional Justice* 570–589.

Simpson G (2017) “From the Normative to the Transformative: Defining and Promoting Justice and Human Rights as Part of Violent Conflict Prevention and Peacebuilding” 9(3) *Journal of Human Rights Practice* 379–400.

Slaughter AM (1995) “International Law in a World of Liberal States” 6(3) *European Journal of International Law* 53–81.

Sriram CL (2007) “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice” 21(4) *Global Society* 579-591.

Snider TR & Kidane W (2007) “Combating Corruption through International Law in Africa: A Comparative Analysis” 40(691) *Cornell International Law Journal* 691-748.

Stanley E (2001) “Evaluating the Truth and Reconciliation Commission” 39(3) *Journal of Modern African Studies* 525-546.

Starr S (2007) “Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations” 101 *Northwestern University Law Review* 1257-1314.

Szoke-Burke S (2015) “Not Only ‘Context’: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights” 50(3) *Texas International Law Journal* 465-494.

Talentino A (2012) “Transgressive Norms and the Labels of Liberal Peacebuilding” 17(1) *International Journal of Peace Studies* 47-72.

Teitel RG (2003) “Transitional Justice Genealogy” 16 *Harvard Human Rights Journal* 69-94.

Thoms ONT & Ron J (2007) “Do Human Rights Violations Cause Internal Conflict?” 29(3) *Human Rights Quarterly* 674–705.

Uberti LJ (2015) “Can Institutional Reforms Reduce Corruption? Economic Theory and Patron–Client Politics in Developing Countries” 47(2) *Development and Change* 317–345.

Udombana NJ (2005) “The Summer Has Ended and We are Not Saved! Towards a Transformative Agenda for Africa's Development” 7(1) *San Diego International Law Journal* 5-60.

Van Zyl P (1999) “Dilemmas of Transitional Justice: The Case of South Africa’s Truth and

Reconciliation Commission" 52(2) *Journal of International Affairs* 647-667.

Vinck P & Pham P (2008) "Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC" 2(3) *International Journal of Transitional Justice* 398-411.

Waldorf L (2012) "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs" 21(2) *Social & Legal Studies* 171-186.

Walker MU (2016) "Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations" 10(1) *International Journal of Transitional Justice* 108–125.

Yepes R (2009) "Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice" 27(4) *Netherlands Quarterly of Human Rights* 625–647.

Young GK (2002) "Amnesty and Accountability" 35(2) *University of California Davis Law Review* 427-482.

Zimring FE & Johnson DT (2005) "On the Comparative Study of Corruption" 45(6) *British Journal of Criminology* 793–809.

Internet Sources

Afrobarometer (2018) "Perceptions of Corruption in Tunisia", available at https://afrobarometer.org/media-briefings/perceptions-corruption-tunisia-0 (visited 26 July 2019).

Adrieu K, Ferchichi W, Robins S, Aloui A & Hamza HB (2016) "The 'Victim Zone' and Collective Reparations in Tunisia", available at https://www.impunitywatch.org/publications/the-victim-zone-and-collective-reparation-in-tunisia-1 (visited 30 November 2018).

African Union Transitional Justice Policy (2019), available at https://au.int/en/documents/20190425/transitional-justice-policy (visited 28 April 2019).

Amnesty International (2012) "Universal Jurisdiction: A Preliminary Survey of Legislation around the World-2012 Update", available at

https://www.amnesty.org/en/documents/IOR53/019/2012/en/ (visited 29 November 2017).

APDHE (2007) "Communication Submitted by the *Asociacion Pro Derechos Humanos De Espana* Regarding the Republic of Equatorial Guinea, under Article 55 of the African Charter on Human and Peoples' Rights", available at https://www.justiceinitiative.org/uploads/e16c541f-40b3-4cca-aaa8-17125338c44e/a_communication_20071012.pdf (visited 20 June 2018).

Arab Forum on Asset Recovery (2012) "Report of the First Meeting of the Arab Forum on Asset Recovery", available at https://star.worldbank.org/document/report-first-meeting-arab-forum-asset-recovery (visited 19 May 2019).

Belfast Guidelines on Amnesty and Accountability (2014), available at https://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf (accessed 30 December 2019).

Blind PK (2006) "Building Trust in Government in the Twenty-First Century: Review of Literature and Emerging Issues", available at http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN025062.pdf (visited 20 February 2019).

Boehm F & Sierra E (2015) "The Gendered Impact of Corruption: Who Suffers More – Men or Women?", available at https://www.u4.no/publications/the-gendered-impact-of-corruption-who-suffers-more-men-or-women (visited 25 November 2017).

Carranza R (2015) "A Measure of Dignity: The Beginning of Reparations in Post-Revolution Tunisia", available at https://www.ictj.org/news/measure-dignity-reparations-tunisia (visited 30 May 2019).

Chene M (2008) "Mutual Legal Assistance Treaties and Money Laundering", available at https://www.u4.no/publications/mutual-legal-assistance-treaties-and-money-laundering (visited 19 May 2019).

Chene M (2010) "Impact of Corruption on Indigenous People", available at https://www.u4.no/publications/impact-of-corruption-on-indigenous-people (visited 30 May 2019).

Chene M (2014) "Overview of Corruption and Anti-Corruption in Chad", available at https://knowledgehub.transparency.org/assets/uploads/helpdesk/Country_profile_Chad_2014.pdf (accessed 15 December 2019).

Cohen DS (2011) "US Freezes At Least $30 Billion in Libyan Assets" *US Department of the Treasury*, available at https://www.treasury.gov/connect/blog/Pages/US-Freezes-At-Least-$30-Billion-in-Libyan-Assets.aspx (visited 13 January 2019).

Corruption Watch (2014) "The Arms Deal: What You Need to Know", available at http://www.corruptionwatch.org.za/the-arms-deal-what-you-need-to-know-2/ (visited 3 August 2017).

Davis L (2009) "Transitional Justice and Security System Reform", available at https://www.ictj.org/publication/transitional-justice-and-security-system-reform (visited 15 June 2019).

Dersso SA (2019) "Study on Transitional Justice and Human and Peoples' Rights in Africa", available at http://www.achpr.org/news/2019/04/d373/ (visited 17 June 2019).

Federal Department of Foreign Affairs, Switzerland (2017) "Switzerland Returns EUR 3.5 Million to Tunisia in Stolen Assets Recovery Process", available at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-66859.html (visited 5 July 2019).

Fonseka B & Naples-Mitchell J (2017) "Victim-Centred Transitional Justice in Sri Lanka: What Does It Really Mean?", available at https://www.cpalanka.org/victim-centred-transitional-justice-in-sri-lanka-what-does-it-really-mean/ (visited 14 April 2019).

Freedom House (2013) "Transitional Justice Should Take on Corruption", available at https://freedomhouse.org/blog/transitional-justice-should-take-corruption (visited 8 May 2017).

Freedom House (2019) "Freedom in the World 2019: Chad", available at https://freedomhouse.org/country/chad/freedom-world/2019 (visited 10 January 2020).

G20 Anti-Corruption Working Group (2012) "Requesting Mutual Legal Assistance in Criminal

Matters from G20 Countries: A Step-by-step Guide 2012", available at https://star.worldbank.org/resource/step-step-guide-requesting-mutual-legal-assistance-criminal-matters-g20-countries-mexico (visited 19 November 2017).

Ganesan A (2014) "Tom Lantos Human Rights Commission Briefing: An International Anti-Corruption Court (IACC) to Mitigate Grand Corruption and Abuses", available at https://www.hrw.org/news/2014/11/13/tom-lantos-human-rights-commission-briefing-international-anti-corruption-court-iacc (visited 18 October 2017).

Ghali A (2015) "Practitioner Perspective on Transitional Justice", available at https://www.csvr.org.za/publications/latest-publications/2614-practitioner-perspectives-on-transitional-justice-tunisia (visited 20 August 2018).

Global Witness (2017) "Zimbabwe: The State, the Security Forces, and a Decade of Disappearing Diamonds", available at https://www.globalwitness.org/en/campaigns/conflict-diamonds/inside-job/ (visited 11 March 2019).

GOPAC (2013) "Prosecuting Grand Corruption as an International Crime", available at http://gopacnetwork.org/Docs/DiscussionPaper_ProsecutingGrandCorruption_EN.pdf (visited 14 April 2018).

Guellali A (2015) "Tunisia: Transitional Justice in the Crosshairs", available at https://www.hrw.org/news/2015/09/08/tunisia-transitional-justice-crosshairs (visited 20 September 2017).

Guellali A (2017) "New Reconciliation Law Threatens Tunisia's Democracy", available at https://www.hrw.org/news/2017/10/02/new-reconciliation-law-threatens-tunisias-democracy (visited 23 November 2017).

Gumede V (2018) "Social and Economic Transformation in Post-Apartheid South Africa – Policies, Progress and Proposals", available at https://pdfs.semanticscholar.org/a099/816137bfe55645627accfa42677a29683e9b.pdf (visited 25 April 2019).

Hayner P & Bosire L (2003) "Should Truth Commissions Address Economic Crimes? Considering

the Case of Kenya", available at http://www.tikenya.org (visited 11 December 2018).

Heilbrunn JR (2004) "Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption?", available at http://web.worldbank.org/archive/website01006/WEB/IMAGES/WBI37234.PDF (visited 15 July 2019).

Hoppe T (2014) "The Case for Asset Declarations in the Judiciary: Identifying Illicit Enrichment and Conflicts of Interests", available at https://www.u4.no/publications/the-case-for-asset-declarations-in-the-judiciary-identifying-illicit-enrichment-and-conflicts-of-interests (visited 27 July 2019).

Hossain N & Musembi CN (2010) "Corruption, Accountability and Gender: Understanding the Connections", available https://www.undp.org/content/dam/aplaws/publication/en/publications/womens-empowerment/corruption-accountability-and-gender-understanding-the-connection/Corruption-accountability-and-gender.pdf (visited 30 May 2019).

Howse, R. 2007. "The Concept of Odious Debt in Public International Law", available at https://unctad.org/en/docs/osgdp20074_en.pdf (visited 20 December 2019).

Human Rights Treaty Bodies (2016) "Contributions to the 2030 Agenda for Sustainable Development", available at https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=201&menu=3170 (visited 2 August 2019).

Human Rights Watch (2007) "Criminal Politics: Violence, 'Godfathers' and Corruption in Nigeria", available at https://www.hrw.org/reports/2007/nigeria1007/ (visited 6 June 2017).

Human Rights Watch (2017) "Senegal/ Chad: Court Upholds Habre Conviction", available at https://www.hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction (visited 27 October 2017).

ICC Prosecutor (2003) "Communications Received by the Office of the Prosecutor of the ICC", available at https://www.icc-cpi.int/NR/rdonlyres/B080A3DD-7C69-4BC9-AE25-

0D2C271A9A63/277502/16_july__english.pdf (visited 20 October 2017).

Institute for Economics and Peace (2015) "Peace and Corruption 2015: Lowering Corruption — A Transformative Factor for Peace", available at http://visionofhumanity.org/app/uploads/2017/04/Peace-and-Corruption.pdf (visited 10 November 2017).

International Anti-Corruption Conference (2010) "The Bangkok Declaration: Restoring Trust", available at http://14iacc.org/ (visited 10 February 2018).

International Anti-Corruption Conference (2012) "The Brasilia Declaration", available at http://15iacc.org/ (visited 10 February 2018).

International Centre for Transitional Justice (2009) "The Rabat Report: The Concept and Challenges of Collective Reparations", available at https://www.ictj.org/publication/rabat-report-concept-and-challenges-collective-reparations (visited 20 May 2019).

International Centre for Transitional Justice (2013) "Three Years after Revolution, Tunisians Seek Justice through Collective Reparation and Development", available at https://www.ictj.org/news/tunisia-collective-reparation-and-development (visited 14 September 2019).

International Centre for Transitional Justice (2017) "Tunisia: Ex-President Ben Ali and wife handed fresh sentences", available at https://www.ictj.org/news/tunisia-ex-president-ben-ali-and-wife-handed-fresh-sentences (visited 10 October 2017).

International Centre for Transitional Justice (2018) "Gambia to Get Human Rights, Anti-Corruption Outfits Soon — President", available at https://www.ictj.org/news/gambia-get-human-rights-anti-corruption-outfits-soon-%E2%80%94-president (visted 26 June 2019).

International Coalition of Sites of Conscience (2013) "Transforming Sites of Detention: A Review of and Roadmap for Reparations and Memorialisation in Morocco", available at http://www.sitesofconscience.org/wp-content/uploads/2013/01/FINAL-MOROCCO-REPORT1.pdf (visited 20 May 2019).

International Council on Human Rights (2009) "Corruption and Human Rights: Making the

Connection", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222 (accessed 23 June 2017).

Integrated Regional Information Network (2005) "Donors Pledge Less than Half Funds Needed for War Crimes Court", https://reliefweb.int/report/sierra-leone/sierra-leone-donors-pledge-less-half-funds-needed-war-crimes-court (visited 8 August 2017).

INTERPOL (2011) "Tunisia Seeks Ousted President and Family via INTERPOL", available at https://www.interpol.int/News-and-media/News/2011/PR007 (visited 11 October 2017).

Johnson E & Martini M (2012) "Corruption Trends in the Middle East and North Africa Region (2007-2011)", available at http://www.u4.no/publications/corruption-trends-in-the-middle-east-and-north-africa-region-2007-2011/ (visited 20 February 2017).

Killick T (2005) "Conditionality is Dethroned but When Will Ownership be Crowned?", available at www.christophesolioz.ch/bos2005/conference/doc/ownershippanel.pdf (visited 3 June 2018).

Kremer M & Jayachandran S (2002) "Odious Debt", available at https://www.imf.org/external/pubs/ft/fandd/2002/06/kremer.htm (visited 30 December 2019).

Kuhn S & Sherman LB (2014) "Curbing Corruption in Public Procurement: A Practical Guide", https://www.transparency.org/whatwedo/publication/curbing_corruption_in_public_procurement_a_practical_guide (visited 10 July 2018).

Kupferschmidt D (2009) "Illicit Political Finance and State Capture" *International Institute for Democracy and Electoral Assistance*, available at https://www.idea.int/publications/catalogue/illicit-political-finance-and-state-capture visited 19 June 2019).

Lasslett K (2018) "Countering Grand Corruption and Kleptocracy through Transformative Justice: A Victims of Corruption Approach", available at http://ccprcentre.org/files/media/Asset_Recovery_and_Victims_FINAL.pdf (visited 5 January 2019).

Lee-Jones K (2019) “Liberia: Overview of Corruption and Anti-Corruption”, available at https://www.u4.no/publications/liberia-overview-of-corruption-and-anti-corruption (visited 18 December 2019).

Magarrell L (2007) “Reparations in Theory and Practice”, available at https://www.ictj.org/publication/reparations-theory-and-practice (visited 6 July 2019).

Maghraqui A (2014) “Egypt’s Failed Transition to Democracy: Was Political Culture a Major Factor”, available at https://www.e-ir.info/2014/04/29/egypts-failed-transition-to-democracy-was-political-culture-a-major-factor/ (visited 20 December 2017).

Marshall S (2015) “The Egyptian Armed Forces and the Remaking of an Economic Empire”, available at https://carnegieendowment.org/2015/04/15/egyptian-armed-forces-and-remaking-of-economic-empire-pub-59732 (visited 15 July 2019).

Messick R (2006) “Income and Assets Declarations: Issues to Consider in Developing a Disclosure Regime”, available at https://www.u4.no/publications/income-and-assets-declarations-issues-to-consider-in-developing-a-disclosure-regime (visited 26 July 2019).

Mistry H (2012) “Transitional Justice and the Arab Spring”, available at https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/010212summary.pdf (visited 30 November 2017).

Mores M (2013) “Overview of Corruption and Anti-Corruption in South Sudan”, available at https://www.u4.no/publications/south-sudan-overview-of-corruption-and-anti-corruption/ (visited 14 December 2019).

Murray M & Spalding A (2015) “Freedom from Official Corruption as a Human Right”, available at https://www.brookings.edu/wp-content/uploads/2016/06/Murray-and-Spalding_v06.pdf (visited 2 July 2017).

National Assembly of Zambia (2002) “Debates-Tuesday 16th July, 2002”, available at http://www.parliament.gov.zm/node/2068 (visited 15 October 2017).

National Assembly of Zambia (2013) “Debates-Friday 15th March, 2013”, available at http://www.parliament.gov.zm/node/711 (visited 15 October 2017).

National Commission for the Disposal of Property and Funds for Confiscation (2014) "Confiscated Companies", available at http://www.confiscation.tn/?p=27 (visited 25 February 2019).

Ndulo MB & Duthie R (2009) "The Role of Judicial Reform in Development and Transitional Justice", available at https://www.ictj.org/publication/role-judicial-reform-development-and-transitional-justice (visited 15 July 2019).

Njeri JK (2014a) "Witness Protection: The Missing Cornerstone in Africa's Criminal Justice Systems", available at https://issafrica.org/iss-today/witness-protection-the-missing-cornerstone-in-africas-criminal-justice-systems (visited 28 October 2017).

Njeri JK (2014b) "The African Union's Decision to Support a Court that Provides Immunity to Heads of State Undermines Human Rights", available at https://issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes (visited 17 October 2017).

OECD (2012) "Typology on Mutual Legal Assistance in Foreign Bribery Cases", available at https://www.oecd.org/corruption/typologyonmutuallegalassistanceinforeignbriberycases.htm (visited 22 November 2017).

OHCHR (2006a) "Rule of Law Tools for Post-Conflict States: Truth Commissions", available at https://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf (visited 3 December 2017).

OHCHR (2006b) "Rule of Law Tools for Post-Conflict States: Vetting, an Operational Framework", available at https://www.un.org/ruleoflaw/blog/document/rule-of-law-tools-for-post-conflict-states-vetting-an-operational-framework/ (visited 18 June 2019).

OHCHR (2008) "Rule of Law Tools for Post-Conflict States: Reparations Programmes", available at https://www.un.org/ruleoflaw/blog/document/rule-of-law-tools-for-post-conflict-states-reparations-programmes/ (visited 23 June 2018).

OHCHR (2009) "Rule of Law Tools for Post-Conflict States: National Consultations on Transitional Justice", available at https://www.un.org/ruleoflaw/blog/document/rule-of-law-tools-for-post-conflict-states-national-consultations-on-transitional-justice/ (visited 4

September 2017).

OHCHR (2010) “The Protection of Victims and Witnesses: A Compilation of Reports and Consultations in Uganda”, available at https://uganda.ohchr.org/Content/publications/WitnessAndVictimProtectionInUganda.pdf (visited 13 June 2019).

Olaya J, Attisso K & Roth A (2010) “Repairing Social Damage out of Corruption Cases: Opportunities and Challenges as Illustrated in the Alcatel Case in Costa Rica”, available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1779834 (visited 5 July 2019).

Open Secrets (2018) “Evidence for the People’s Tribunal on Economic Crime (03-07 February 2018)”, available at https://corruptiontribunal.org.za/site/wp-content/uploads/2018/02/Apartheid-Corruption_OS-Submission-to-Peoples-Tribunal_11.01.18.pdf (visited 30 November 2018).

Patel AC (2010) “Transitional Justice, DDR, and Security Sector Reform”, available at https://www.ictj.org/publication/transitional-justice-ddr-and-security-sector-reform (visited 15 July 2019).

Pesek S (2014) “Combating Impunity: Transitional justice and Anti-Corruption”, available at https://freedomhouse.org/report/special-reports/combating-impunity-transitional-justice-and-anti-corruption (visited 10 January 2019).

Potts JC (2016). "The Muslim Brotherhood and Egypt's Failed Democratic Transition" 8(10) *Inquiries Journal*, available at http://www.inquiriesjournal.com/a?id=1480 (visited 20 December 2017).

Public Protector (2016) “State of Capture: A Report of the Public Protector”, available at http://saflii.org/images/329756472-State-of-Capture.pdf (visited 20 May 2019).

Pyman D, Bock T, de la Blache EV & Zaum D (2014) “Corruption as a Threat to Stability and Peace”, available at http://ti-defence.org/publications/corruption-as-a-threat-to-stability-and-peace/ (visited 17 November 2018).

Ravichandran S (2009) “Factors of Persistent Poverty in Sierra Leone”, available at

https://www.e-ir.info/2011/07/28/factors-of-persistent-poverty-in-sierra-leone/.

Robins S (2011b) "To Live as Other Kenyans Do: A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations" *International Centre for Transitional Justice*, available at https://www.ictj.org/publication/live-other-kenyans-do-study-reparative-demands-kenyan-victims-human-rights-violations visited 30 May 2019).

Roht-Arriaza N & Orlovsky K (2009) "A Complementary Relationship: Reparations and Development", available at https://www.ictj.org/publication/complementary-relationship-reparations-and-development (visited 10 January 2019).

Sabharwal G (2017) "How Can Dialogue Support Reconciliation and Transitional Justice in Post-Conflict Contexts?", available at https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/oslo_governance_centre/how-can-dialogue-support-reconciliation-and-transitional-justice.html (visited 1 August 2019).

Sandoval C (2014) "Transitional Justice and Economic, Social and Cultural Rights", available at https://www.oecd-ilibrary.org/content/publication/2eabb087-en (visited 13 November 2017).

Sharife K & Anderson M (2019) "How Yahya Jammeh Stole a Nation", available at https://www.occrp.org/en/greatgambiaheist/how-yahya-jammeh-stole-a-country (visited 10 October 2019).

StAR Initiative (2007) "Challenges, Opportunities, and Action Plan", available at http://documents.worldbank.org/curated/en/846731468338347772/Stolen-asset-recovery-STAR-initiative-challenges-opportunities-and-action-plan (visited 23 January 2019).

StAR Initiative (2018) "Restitution of USD 321 Million by Switzerland to Nigeria under World Bank Oversight: Signing of a Tripartite Agreement", available at https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Swiss%20Federal%20Council%20press%20release%20-%20Restitution%20of%20USD%20321%20million%20by%20Switzerland%20to%20Nigeria%20under%20World%20Bank%20oversight.pdf (visited 15 March 2019).

Stephenson MC & Schütte SA (2016) "Specialised Anti-Corruption Courts: A Comparative Mapping", available at https://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping (visited 13 June 2019).

Suarez-Martinez A (2013) "Closing Down the Safe Havens: Ending Impunity for Corrupt Individuals by Seizing and Recovering their Assets in the UK" *Transparency International UK*, available at http://www.stakeholderdemocracy.org/stockholm/wp-content/uploads/2015/04/Closing-Down-the-Safe-Havens-TI-UK-2013.pdf (visited 15 June 2018).

The Economist (2019) "Liberia's Economic Crisis and Corruption Could Lead to Violence", available at https://www.economist.com/middle-east-and-africa/2019/08/10/liberias-economic-crisis-and-corruption-could-lead-to-violence (visited 10 December 2019).

Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social and Cultural Rights (1997), available at https://www.justice.gov.za/trc/hrvtrans/submit/esc6.htm (visited 20 June 2018).

Terracol M (2015) "Mutual Legal Assistance and Corruption" *Transparency International*, available at https://www.transparency.org/files/content/corruptionqas/Mutual_legal_assitance_and_corruption_2015.pdf (visited 9 October 2017).

Transparency International (2013) "Global Corruption Barometer", available at https://www.transparency.org/gcb2013/report (visited 25 July 2019).

Transparency International (2015) "People and Corruption: Africa Survey 2015", available at https://images.transparencycdn.org/images/2015_GCB_SubSaharanAfrica_EN.pdf (visited 15 December 2015).

Transparency International (2016) "Lost Billion: Recovering Public Money in Egypt, Libya, Tunisia and Yemen", available at https://www.transparency.org/whatwedo/publication/lost_billions_recovering_public_money_in_egypt_libya_tunisia_and_yemen (visited 20 April 2019).

Transparency International (2017a) “Tunisia: New Law Granting the Corrupt Amnesty Must be Rescinded”, available at https://www.transparency.org/news/pressrelease/tunisia_new_law_granting_the_corrupt_amnesty_must_be_rescinded (visited 23 October 2018).

Transparency International (2017b) “Obiang Verdict: Transparency International Welcomes the Corruption Conviction and Seizure of Assets”, available at https://www.transparency.org/news/pressrelease/obiang_verdict_transparency_international_welcomes_the_corruption_convictio (visited 27 October 2017).

Transparency International (2018a)”Corruption Perceptions Index”, available at https://www.transparency.org/cpi2018 (visited 17 July 2019).

Transparency International (2018b) “Women, Land and Corruption: Resources for Practitioners and Policy Makers”, available at https://www.transparency.org/whatwedo/publication/women_land_and_corruption_resources_for_practitioners_and_policy_makers (visited 17 September 2018).

Transparency International (2018c) “Returning Nigerians’ Stolen Millions”, available at https://www.transparency.org/news/feature/returning_nigerians_stolen_millions (visited 13 August 2019).

Transparency International (2018d) “Corruption Perceptions Index 2018: Executive Summary”, available at https://www.transparency.org/files/content/pages/CPI_2018_Executive_Summary_EN.pdf (visited 19 June 2019).

United Nations (2005) “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx (visited 29 November 2018).

United Nations (2015) “A Transformative Approach to Transitional Justice: Building a

Sustainable Peace for All", available at http://www.un.org/webcast/pdfs/150224pm-concept-uae.pdf (visited 10 April 2017).

UNDP (2006) "Vetting Public Employees in Post-conflict Settings: Operational Guidelines", available at https://www.ictj.org/publication/vetting-public-employees-post-conflict-settings-operational-guidelines (visited 29 May 2019).

United Nations Secretary-General (2004) "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", http://www.unhcr.org/protection/ruleoflaw/4506bc494/rule-law-transitional-justice-conflict-post-conflict-societies-report-secretary.html (visited 19 September 2018).

United Nations Secretary-General (2005) "In Larger Freedom: Towards Development, Security and Human Rights for All", available at https://www.un.org/ruleoflaw/blog/document/in-larger-freedom-towards-development-security-and-human-rights-for-all-report-of-the-secretary-general/ (visited 28 June 2018).

United Nations Secretary-General (2010) "Guidance Note: United Nations Approach to Transitional Justice", available at https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-united-nations-approach-to-transitional-justice/ (visited 14 September 2018).

UNODC (2016) "Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation" CAC/COSP/2017/11, available at https://www.unodc.org/unodc/en/corruption/COSP/session7-documents.html (visited 13 February 2019).

UNODC (2017) "International Expert Meeting on the Management and Disposal of Recovered and Returned Stolen Assets, Including in Support of Sustainable Development", available at https://www.unodc.org/documents/corruption/AddisEGM2017/Concept_Note_Beyond_Addis.pdf (visited 19 May 2019).

UN Women & UNDP (2010) "Reparations, Development and Gender", available at https://www.un.org/ruleoflaw/files/Kampala%20workshop%202011-

%20Reparations,%20Development%20and%20Gender.pdf (visited 28 June 2019).

United States Department of Justice (2014) "U.S. Forfeits Over $480 Million Stolen by Former Nigerian Dictator in Largest Forfeiture Ever Obtained Through a Kleptocracy Action", available at https://www.justice.gov/opa/pr/us-forfeits-over-480-million-stolen-former-nigerian-dictator-largest-forfeiture-ever-obtained (visited 16 September 2018).

United States Department of State (2019) "Country Reports on Human Rights Practices: Chad", available at https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/chad/ (visited 10 January 2020).

Wambua PM (2015) "AD56: Police Corruption in Africa Undermines Trust, but Support for Law Enforcement Remains Strong", available at https://afrobarometer.org/publications/ad56-police-corruption-africa-undermines-trust-support-law-enforcement-remains-strong (visited 24 March 2019).

Wojkowska E (2006) "Doing Justice: How Informal Justice Systems Can Contribute", available at https://www.un.org/ruleoflaw/blog/document/doing-justice-how-informal-justice-systems-can-contribute/ (visited 23 September 2019).

Wolf ML (2014) "The Case for an International Anti-Corruption Court", available at https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf (visited 17 October 2017).

World Bank (2009) "The World Bank Group Program of Support for the Chad-Cameroon Petroleum Development and Pipeline Construction", available at http://documents1.worldbank.org/curated/en/565481468224677215/pdf/503150PPAR0P05101Official0use0only1.pdf (visited 15 December 2019).

World Bank (2015) "Tunisia's Fiscal Transparency Revolution: from Secrecy to Full Openness", available at http://www.worldbank.org/en/news/feature/2015/12/23/tunisia-fiscal-transparency-revolution-from-secrecy-to-full-openness (visited 22 April 2019).

World Bank/UNODC (2019) "International Partnerships on Asset Recovery: Overview and Global Directory of Networks", available at https://star.worldbank.org/publication/international-

partnerships-asset-recovery (visited 6 May 2019).

Wulf H (2004) "Security Sector Reform in Developing and Transitional Countries", available at http://www.wulf-herbert.de/Berghofdialogue2.pdf (visited 14 April 2019).

Yerkes S & Muasher M (2017) "Tunisia's Corruption Contagion: A Transition at Risk", available at https://carnegieendowment.org/2017/10/25/tunisia-s-corruption-contagion-transition-at-risk-pub-73522 (visited 14 September 2018).

Media Sources

Abdelaziz K (31 August 2019) "Sudan's Ex-President Bashir Charged with Corruption, Holding Illicit Foreign Currency" *Reuters.*

Abdoulie J (30 April 2017) "Gambia: Calls Intensify for Yahya Jammeh to Stand Trial as Hissene Habre's Sentence Upheld" *Freedom Newspaper.*

Amara T (13 September 2017) "Tunisia Parliament Approves Controversial Amnesty for Ben Ali-Era Corruption" *Reuters.*

Ball D & Bryan-Low C (24 October 2011) "Nation Seeks Ben Ali's Assets" *The Wall Street Journal.*

Burke J (23 January 2017) "Exiled Former President Yahya Jammeh 'Stole $11.4 m' from the Gambia" *The Guardian.*

Chazan D (27 October 2017) "France convicts Equatorial Guinea's vice President of Corruption in Landmark Trial" *The Telegraph.*

Dzirutwe M (20 April 2018) "Zimbabwe's Parliament Orders Mugabe to Answer Questions over Diamonds" *Reuters.*

Inman P (4 February 2011) "Mubarak Family Fortune Could Reach $70bn, Says Expert" *The Guardian.*

Jacob J (21 February 2011) "Tunisia Wants to try Ben Ali; Seeks Extradition" *International Business Times.*

John A (13 September 2019) "Gambia Minister to Recommend Charges Filed against Ex-leader" *AP News.*

Letzing J (17 March 2015) “Switzerland Confiscates Funds Linked to Former Nigerian Dictator” *The Wall Street Journal.*

Malsin J (9 May 2015) “Egypt: Hosni Mubarak Sentenced to Three Years in Prison” *The Guardian.*

Maodza T (26 April 2016) “4 Anti-corruption Bosses Suspended” *The Herald*.

Mashaya B (1 February 2019) “Zacc Chair, Commissioners Resign” *Daily News*.

Munyoro F & Chiyangwa N (14 September 2018) “Ex-Minister Parirenyatwa Arrested” *The Herald.*

Nemukuyu D (3 March 2015) “Anti-Corruption Commission Boss Jailed” *The Herald.*

Sithole-Matarise E (25 November 2017) “Ousted Zimbabwe Finance Minister Chombo Faces Corruption Charges” *Reuters.*

Whitaker B (28 December 2010) “How a Man Setting Fire to Himself Sparked an Uprising in Tunisia” *The Guardian.*

Reports

ADB-OECD (2003) “Effective Prosecution of Corruption: Report on the Master Training Seminar”, available at https://think-asia.org/handle/11540/4779 (visited 10 January 2018).

ADB-OECD (2017) “Mutual Legal Assistance in Asia and the Pacific: Experiences in 31 Jurisdictions”, available at https://www.oecd.org/corruption/ADB-OECD-Mutual-Legal-Assistance-Corruption-2017.pdf (visited 30 November 2018).

African Union Panel of the Wise (2013) “Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity” *The African Union Series.*

Blumenthal E (1982) “Zaire — Report on Her International Financial Credibility” *Africa Economic Digest*.

Boucher AJ, Durch WJ, Midyette M, Rose S & Terry J (2007) “Mapping and Fighting Corruption

in War-Torn States" *Simon Centre Report 61.*

International Crisis Group (2005) "The Congo's Transition is Failing: Crisis in the Kivus" *Africa Report 91*.

International Crisis Group (2016) "Tunisia: Transitional Justice and the Fight against Corruption" *Middle East and North Africa Report 168.*

Kane M, Mackiggan K, Mburu C, Gassama I, Morley E & Eldon C (2004) "Sierra Leone: Legal and Judicial Sector Assessment", available at http://documents.worldbank.org/curated/en/269701468304851925/Sierra-Leone-legal-and-judicial-sector-assessment (visited 25 January 2019).

Pring C (2016) "Peace and Corruption: Middle East & North Africa Survey 2016" *Transparency International Global Corruption Barometer*.

Report of the Commissison of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre, His Accomplices and/or Accessories (1992) in Kritz NJ (3ed) (1995) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* Washington DC: US Institute of Peace Press.

Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (1999).

Report of the Liberian Truth and Reconciliation Commission, Volume I (2009).

Report of the Liberian Truth and Reconciliation Commission, Volume III (2009).

Report of the Sierra Leone Truth and Reconciliation Commission, Volume 1 (2004).

Report of the Sierra Leone Truth and Reconciliation Commission, Volume 2 (2004).

Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, Kenya (2003).

Report of the Truth, Justice and Reconciliation Commission of Kenya, Volume II B (2013).

Report of the Truth, Justice and Reconciliation Commission of Kenya, Volume IV (2013).

Report of the Truth and Reconciliation Commission of South Africa, Volume 5 (1998).

Transparency International (2004) “Global Corruption Report”, available at https://www.transparency.org/whatwedo/publication/global_corruption_report_2004_political_corruption (visited 8 May 2017).

United Nations Human Rights Council (2012) “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff”, A/HRC/21/46.

United Nations Human Rights Council (2015) “Final report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights”, A/HRC/28/73.

United Nations Security Council (2002) “Plundering of DR Congo Natural Resources: Final Report of the Panel of Experts”, S/2002/1146.

United States Senate Permanent Sub Committee on Investigations (2005) “Supplement Staff Report on US Accounts Used by Augusto Pinochet”, available at https://www.hsgac.senate.gov/subcommittees/investigations/reports (visited 23 June 2018).

Working Papers

Cockcroft L (1998) “Corruption and Human Rights: A Crucial Link” Working Paper, Transparency International.

Jimu IM (2009) “Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Phillipines and Kazakhstan” Working Paper Series 6, Basel Institute of Governance.

Landman T, Jan C & Schudel W (2007) “Corruption and Human Rights: Empirical Relationships and Policy Advice” Working Paper, International Council on Human Rights Policy.