

The Clash of Justice

A Study of Frictions and Global Mechanisms in the
Transitional Justice Process of Kenya

Abstract

Transitional justice is an essential part in any peacebuilding project. This study will aim to examine the relationship of the global and local spectrum in a transitional justice process and try to understand how the western adversarial systems erode and repress the local justice systems. The thesis will seek to study the empirical illustrations in a case study of the transitional justice process of Kenya. With the lens of friction and John P. Lederach's definition of retributive and restorative justice, I aim to come closer to the understanding of the intricate relationship between the prominence of retributive and restorative justice. I will be able to come to conclusion of the ways retributive justice works to undermine and erode the workings of local healing and justice, and how this ultimately can affect the result of a peace process.

Keywords: Transitional justice, Kenya, friction, armed conflict

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1 Introduction

The concept of justice remains as ancient as humanity itself. The people living in societies desire peace above all else, and when someone disrupts that peace, people hope for the deliverance of justice. The abstract definition of justice that is commonly used can be stated along the lines of: “Give to each person what he or she deserves”. Throughout the ages, war has been a common part of life, and even when peace is achieved, how do we recover from such atrocities? To come to terms with retribution, intense feelings of hatred and rage, the demands that the perpetrators receive prosecution and punishment, post-conflict societies seek the path of transitional justice.

The massive number of inter- and intrastate conflicts over the past decades, as well as the mass atrocities and human rights abuses that accompany them have led to extensive debates regarding the effectiveness of different types of transitional justice approaches. This study will dabble in the questions of the global influence on the justice process in situations of post-conflict and seek to understand how it affects the peace process in its entirety. (Kathryn, 2011, pp, 145)

1.1 Research problem, Aims and Purpose

This thesis will attempt at coming closer to the understanding of how the clash between the global mechanisms of justice and the local process in a post-conflict situation works. There are many activities in peacebuilding, in this thesis I will only focus on transitional justice. My aim is to take the transitional justice definition, developed by John P. Lederach (1997), and utilize the two aspects, namely retributive and restorative justice, and try to more narrowly see how they interact in the context of building sustainable peace. The problem that is to be further investigated is how retributive justice affects the workings of restorative justice. In doing this, I will apply the theory of friction to explain the dilemmas of

the global-local spectrum, which is also important in understanding the dynamics of the retributive and restorative justice. Recent studies show that retributive justice undermines the workings of restorative justice, and that this ultimately has a huge impact on the result of peace projects. The question regarding the purpose and effect of outside actors and helpers in post-conflict situations, and the dynamics between ideas, is an interesting topic altogether.

My aim is therefore to study one case of transitional justice efforts, namely Kenya, and research the clash of retributive and restorative justice. My strategy is to first look at the truth commission of my case and to get an overview of the details of the undertaken transitional justice process. The truth commission contains the concrete approaches and acts of transitional justice, with which I will more narrowly analyze. The real purpose of this study is to examine how approaches of retributive justice affect the workings of restorative justice, and how the friction of the global and local dynamics works in the context of this case. I wish to further develop and clarify the bridge between these two concepts. I believe that by studying the peace process of Kenya I can in an interesting way present in what ways the two concepts affected one another and how it may have ultimately decided the outcome of the peace project.

1.1.1 Research question

The question that this thesis will seek to answer will therefore be:

In what ways did western adversarial justice systems affect the local justice process within the context of the post-conflict peacebuilding process in Kenya?

1.2 Structure

In this brief chapter I will go over the structure of this study. The thesis begins with an overview of the theoretical framework, which explains the reasonings and lenses I will use throughout my study to reach an answer to my research question.

The empirical findings and background of my cases are then addressed, going into short detail of the contexts of the case and the strategy of their transitional justice approaches. In the analysis chapter I examine what specific mechanisms were employed in the TJRC final report of Kenya, analyzing the relationship of them and how they affect each other, going in specifically how global mechanisms affect the process of local healing and justice. I will then give my conclusion in the following chapter and give a conclusive answer to my research question.

1.3 Method

1.3.1 Case Study

This thesis will dedicate itself to be of a qualitative analysis type design, this to be able to better analyze the chosen material and execute the research process. In this single case study research approach, I have decided to take the interesting transitional justice process of Kenya. There exists a wide variety of compelling cases in Africa regarding transitional justice processes in the name of building sustainable peace. I have strategically chosen the specific case of Kenya because of the interesting parallels and dynamics drawn from its case and attempt to understand why certain things happened as they did. (Maxwell, 2012)

The case of Kenya in its peace efforts adopted a truth commission program that included a multitude of elements associated with both retributive and restorative justice. Indeed, the program to build peace had efforts put in place to help both with justice on a global and local level. However, Kenya is still to this day struggling with civil unrest and armed conflict (Ndungu, 2014, pp, 2). The aim of the study is to get an understanding of the reasons of why this happened, focusing specifically on how the elements of the retributive justice efforts affected the work of the restorative justice using the chosen definitions and theories regarding the concept of transitional justice. My task will therefore be to identify the elements undertaken to achieve retributive and restorative justice through analyzing the content of the peace accord and the truth commission strategy plan, and then see

how the mechanics of retributive justice affected the elements of restorative justice. This will then be used to give a conclusion to better understand and explain the process that unfolded.

By conducting this research, I will be able in the end to explain why elements undertaken to promote western judicial systems in the name of bringing about sustainable peace may have been negative to the peace process. The thesis will contribute to the understanding on the importance of utilizing the local level in peace processes and give an answer to why and how western judicial systems and ideas work to undermine it. By choosing to study Kenya, I can look at abstract mechanisms and see with the help of the theoretical framework on how they affect each other.

1.3.2 Choice of material

The material that I have chosen to utilize in my research range from both primary and secondary sources. My primary sources are comprised of the reports of each case and their respective conflicts, as well as the TJRC final report. My choice of material then consists of previous studies of the theoretical framework and empirical sources of Kenya regarding their peace processes. It is important that I make use of purely independent and that the material is consistent with the aim of the thesis. I have eliminated studies and reports that are written by authors with ethnically based interests or biases. The literature on the post-conflict situation of Kenya is abundant, and I will make use of the scientific and theoretical studies available to me regarding this case.

2 Theoretical framework

In this chapter I will provide an overview of the ideas, understandings, and theories that I will use to examine the interplay of transitional justice processes. In this thesis I will examine the workings of transitional justice through the lens of friction, and with the use of John P. Lederach's definition of retributive and restorative justice.

2.1 Previous Research

The theory of transitional justice has no main or dominating theory, I will therefore explain in this chapter the main common characteristics of transitional justice. Transitional justice is mostly known as a tool which is utilized to deal with pasts of injustices and atrocities. However, it does not constitute a single tool for peacebuilding, instead it consists of a series of processes and mechanisms. According to Lederach (1997), these can be both retributive or restorative, and be used in societies and countries to deal with and move on from previously experience violations by ensuring the punishment of those responsible and achieve reconciliation, but also to ensure that the violations never occur again. These mechanisms include prosecutions, amnesties, truth commissions, reparations for victims, memorial sites, and reforms of institutions (Lederach, 1997). Transitional justice revolves around situations in which a society is transitioning from a state of injustice to a state of justice, from an authoritarian state to democracy.

In defining the “global” and “local” in this case of the Kenyan transitional justice effort we are mostly looking at which groups, institutions and governments had a role to play in the transitional justice process. On the global side, I am mostly referring to the ICC (the International Criminal Court), but also liberal

internationalism and international human rights ideas that it represents. By looking at the local spectrum, I am referring to the values, institutions and practices of the indigenous communities of Kenya. The local sphere in a more general sense is quite vague and poorly understood, being more often associated by aspirational rhetoric's rather than a reality of policy. On the focus on the TJRC and the process of transitional justice, analyzing the mechanisms and focus of these two spectrums is of great importance. (Björkdahl et.al, 2017)

2.2 Justice, and the spirit of building peace

Justice is the antidote to impunity; justice goes hand in hand with peace and you cannot have both without the other. Transitional justice does not refer to any special kind of justice, instead it means to handle and deal with justice in extraordinary situations. The idea of justice in a certain situation are never solidified and revolve around normative interpretations, however, it is the rights of the people and the effect of the transitional justice that matters. With justice, you are also addressing the root causes of a problem. By not handling justice properly, the economic, cultural, and social rights and the violations of these rights, which usually plays a big part of the root causes of a conflict, are never addressed. The people are entitled to their rights of living according to their ideas, justice is what seeks to satisfy this. (N'getish, 2016, pp, 145)

2.3 Transitional Justice

Within the vast aspects of peacebuilding, transitional justice remains one of its most important endeavors. "Justice including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations" (UNGA, 2021). The term "transitional justice" is often understood as a measure undertaken by a major actor and is a framework for major political transformation. Transitional justice programs usually take the form of the popularized TRC (truth, and reconciliation commissions). Regime change from an

authoritarian or repressive rule to a democratic rule is the main aim of most peacebuilding operations. Transitional justice is the activity in which human rights abuses, and other forms of social trauma are addressed to build a just and peaceful future. (Lederach, 2005)

The chosen theoretical framework regarding the definition of transitional justice for this research is developed by John Paul Lederach (1997). By the term “transitional justice” he refers to the two concepts of retributive and restorative justice. For Lederach it is imperative that for a society to heal after an experience with mass violence and armed conflict to learn the truth of what occurred and put individuals and groups in a place of accountability for their crimes. Some of the main transitional justice programs confronting wrongdoings are trials, reparations, and truth telling. John P. Lederach argues that traditional forms of oral arts and symbols are the original sources of law within indigenous communities. These norms of law offer powerful mechanisms that undermine the efforts of the western world (Lederach, 1997).

2.3.1 Retributive and Restorative Theory

The term “retributive justice” adheres to the methods of the international community. According to Lederach (1997) retributive justice connects to the focus of the top-down approach to bringing justice to a healing society. The international idea of peacebuilding is its establishment of institutions, and the method to quickly implement democratic mechanisms into a broken and war ridden country (Lederach, 1997). Scholars argue that this is the main reason western adversarial justice systems take the center stage in truth commissions over the local community’s ideas, it involves a quick and easy “one size fits all” resolve to dealing with justice in a way that is promoting western ideas, by which ideas referring mostly to human rights and democratic ideas. (Llewellyn, 1999, pp, 360 - 365)

The bottom-up counterpart of transitional justice is restorative justice, which adheres to the effort of the indigenous people and communities in the justice process. Restorative justice lets the communities address the perpetrators using

their original ideas and ways of dealing with justice in their own cultural way. It involves promoting the indigenous people to establish meetings and tribunals to put the perpetrators in front of the victims, and for them to express their regrets and remorse. Restorative justice is also not only defined by punishing a perpetrator, but to also promote compassion and forgiveness, making it easier to transition to a peaceful mindset. Restorative justice also plays a big part in most truth commissions, where elements are implemented mainly to involve the indigenous people in the overarching peace process. (Lederach, 1997)

In the western world and among international actors, the tendency is that they look at justice in a retributive dimension, and that through the establishment of international criminal courts and tribunals they enforce this method of justice universally (Wenzel, et al, 2008, pp, 376 - 379). Nevertheless, indigenous societies turn their attention to restorative justice because they want to be in line with their own method of justice. However, a truth commission is a project that actors establish to promote transitional justice, which in most cases also contain strategies to promote transitional justice both on the bottom-up and top-down level. Scholars have for a long period disclosed that retributive and restorative justice are the alternatives of transitional justice, and that transitional justice projects adapt these two alternatives in their strategies according to appropriately fit the post-conflict situation (Wenzel, et al, 2008, pp, 380 - 384). However, with many post-conflict situations lately flaring up into armed conflicts again despite extensive efforts to bring forth transitional justice, the methods and strategies of transitional justice of truth commission must be re-evaluated, because there is much that is to be further understood about the interplay of retributive and restorative justice and how they affect each other, which this thesis seeks to better uncover.

It is usually the case that societies, in the aftermath of severe armed conflict and political violence, face difficult and deep distrust, fragmentation, and inescapable animosities (Omale, 2006, pp, 22 - 25). In such an environment, the main challenge of transitional justice may not be to capture and prosecute offenders, but to instead foster cooperation and political calm from the foundations of civic values (Omale, 2006, pp, 30). In today's era, scholars argue more and more that a

restorative approach offer the most promising method for healing and peacebuilding, due to its focus on re-establishing relationships between communities (Clear, 2001, pp, 128 - 130). Restorative justice is the alternative in transitional justice that truly stress the importance of healing the wounds of victims and perpetrators alike and seeks to lessen the emphasis on the division of societies into offenders and victims, and views it instead as a society of victims and survivors (Clear, 2001, pp, 136 - 137). However, restorative justice is regarded by many as something that only seeks to foster reconciliation, seeking to build new beginnings and ignore the past, which does not deal very well with transitional justice. With this said, restorative justice still does not try to avoid the rule of law or disregard the wrongdoings of offenders.

Like retributive justice, restorative justice also aims to restore the moral equality of the people. Restorative justice instead does not seek to primarily deliver justice through law and order, but rather seek that of truth-telling coupled with remorse and regret expressed by the perpetrators, to heal the injuries of the communities and reassure the morals of the collective people (Roht & Javier, 2006, pp, 78 - 80). Seeing as restorative justice seeks to fix broken relationships of both victims and offenders, it also focuses on the transformation of subjective factors that invokes the community, such as rage, hatred, and desire for vengeance. This is the main reason why restorative justice is such a demanding and difficult endeavor, which is also why retributive justice is regarded by scholars as an easier method of transitional justice (Roht & Javier, 2006, pp, 85).

2.4 The Global vs. the Local

The case regarding the global vs. the local is in its essence a clash of competing ideas. The international community have had a large hand in consolidating

peacebuilding processes in Africa during the latest three decades, and yet the number of armed conflicts continues to increase (Zistel, 2018, pp, 3 - 6).

Ambitious peacebuilding agendas have consistently fallen short of their expectations. Most societies have mechanisms that lets them deal with conflicts through their own peaceful ways, especially when it comes to the justice system, which is often rooted in traditions and culture. The institutions are consisted of people who make decisions based on their personal needs, interests, and values, but also the rights they perceive they are entitled to. When the people themselves takes the responsibility to bring about justice using their own methods and ways of thinking, the international community then acts to force their own values and interests in this process (Björkdahl et.al, 2017).

For example, the massive international institution of the ICC (the International Criminal Court) investigates cases whenever there is a crime so atrocious and severe that it classifies as a crime against the human race itself, therefore it becomes a “Crime against humanity”. Hence, the country and its institutions where the crime took place are not enough to alone bring justice, since a crime against humanity is technically the matter of everyone around the globe (The International Criminal Court, pp, 10 - 12).

Despite the many positive aspects that comes with the use of transitional justice in the work of peacebuilding, it has always been afflicted by a range of problems that all stem from their tendency of being influenced by western, “every size fits all” models. Lederach (1997) means to say that any approach not including the indigenous local level in a peace building model is a process that is doomed to fail. And the risk of managing a peace process can be to not put enough focus on the actual population that needs to transition to peace. Here it can be important to bring up the relevance of the colonial period and its lasting effects. During this period, African communities had their own set of laws and norms that governed their everyday lives (Mangena, 2015, pp, 4 - 7). This was mostly in oral form and stored in different types of media, such as stories and songs. These were observed by heart by the communities and were effectively communicated to the members of the community. (Mangena, 2015, pp, 10 - 12)

These traditions of justice mechanisms were destroyed by the colonial powers. Professor Dustin N. Sharp in “Addressing Dilemmas of the Global and the Local in Transitional Justice” argues that by trying to understand the dynamic between the global-local dilemma you must look at the international historical and ideological origins of transitional justice as the spring of the tensions between the global and the local.

The colonial government in Kenya as an example, enforced efforts to ban oral performances by communities because it posed a legitimate threat to the authority of the colonial rule. Ojendal (2017) stresses the idea that conflicts are inevitable in any community because people differ in their beliefs and understanding and have different needs and interests. What is important to African culture adheres to the resolution to conflict and that it remains unique because of the emphasis on the local ties and relations after conflict. Retributive justice has the problem of not including this vital part in the building of peace. Social harmony in communities is the most essential goal in African conflict resolution traditions and mechanisms (Hansen, et.al, 2015, pp, 407 - 410). The negative consequences of the general idea of retributive justice are that it does not care about how the African people deals with resolving conflicts. The western adversarial justice system, by contrast, places the entirety of the burden on the prosecution process and rely only on the evidence that both the defence and the persecution brought before them. (Oyeniya, 2017, pp, 60 - 62)

The western ideas of the judicial system have been eroding restorative justice all the way back since the colonial era and has therefore had a huge impact on the local community’s ways of settling conflicts using their own legal systems. This regards both Kenya and South-Africa since they were both ruled by colonial powers once. (Oyeniya, 2017, pp, 68)

The concept of a legitimate legal system in the government, which retributive justice seeks to uphold, already heavily relies on the idea of “a community governing itself under law”. The state is the vessel in which laws become legitimate, according to retributive justice. Countries that are undergoing major

political changes are however countries that does not yet have a fully developed rule of law that it can enforce on perpetrators in a way the population would deem legitimate (Björkdahl, et.al, 2017). In the context of transitional justice, western influences can potentially dampen the development of the government's rule of law, becoming more dependent on the international help, and potentially create a cause of further conflict (Oyeniya, 2017, pp, 70)

2.4.1 The Theory of Friction

In this thesis I will look through the workings and mechanisms of transitional justice through the lens of “friction”. The theory of friction engages in the interplay of international and local actors in an era of globalized transitional justice processes. Frictions, and in particular their dimension of causing distance and distrust between the transitional justice process and the people, have been one characteristic that always shape the development of transitional justice and the global-local tension (Björkdahl et.al, 2017).

The idea of friction has in recent years been witnessed more and more in the subject of transitional justice, which emphasizes the importance of the inclusion of the local level in transitional justice initiatives (Zistel, 2018, pp, 7). John P. Lederach argues that traditional forms of oral arts and symbols are the original sources of law within indigenous communities. These norms of law offer powerful mechanisms that undermine the efforts of the western world. In a truth commission, the methods of transitional justice are commonly designed to fit the paradigm of our democratic norms and ideas, such as human rights (Lederach, 2005). Restorative justice lets the communities address the perpetrators using their own ideas and ways of dealing with justice. Every post-conflict society must handle their legacies of abuses, war crimes, and large numbers of traumatized and displaced persons for the people to be reintegrated to society (Lederach, 2005). The work of the people in transitional justice involves unearthing exactly what happened, understanding the damages that was done and holding those

responsible for the crimes accountable while also addressing the victims and communities in need of healing and redress. This is what lays the foundation of reintegration so that the community can live normal lives again, and so that history does not repeat itself.

The concept of “friction” works to better analyze the interplay of the respective methods of the global and the local, it will be utilized to guide the study of the case of Kenya. Frictions in its essence refer to the effects of cultural differences on global interactions in peacebuilding processes and helps in understanding the importance of local contexts (Björkdahl, et.al, 2017). Frictions are to be analyzed between the global and the local and their practices, to explain the uneven encounters between the international community and local communities.

3 Background

3.1 The Emergence of Truth Commissions

Conflict-ridden societies are known to employ different transitional justice mechanisms depending on its context and needs, while attempting to respond to what perhaps is irreconcilable notions of political demands and justice. However, truth commissions have recently been employed despite differing contexts. Truth commissions are official nonjudicial bodies that lasts for a limited time frame to uncover the facts and causes of human rights abuses (OHCHR, 2006). They have become popular and gained an almost universal acceptance, especially in the recent three decades. Such commissions have been consistently shown to satisfy, atleast to a certain degree, the need for justice and the end of impunity while also nurturing societal healing and reconciliation among the people (Stanley, 2001, pp, 526 - 530). The first use of a truth commission was in Latin America in 1980 but is regarded to have been popularized by the South-African truth commission. (Stanley, 2001, pp, 531)

Most truth commissions, although their goal is officially to seek out the truth and facts of crimes, have explicit goals of fostering reconciliation and healing. The word “reconciliation” is often incorporated in its name and mandate. Truth commissions can create and foster better conditions for reconciliation by involving the affected communities of the conflict and its victims. The South-African truth commission for example, which is regarded as the staple of a successful truth commission, allowed victims to participate in amnesty processes where the convicted individuals confessed their crimes to them (South-Africa TRC, final report, 2011). Creating conditions of understanding and dialogue,

which is a direct measure of restorative justice, which was by scholars the main theme in the South-African truth commission (Lederach, 1997).

3.2 The Conflict in Kenya

The presidential election of 2007 was to a beginning heavily contested by both parties and their respective candidates. On one side there was Mwai Kibaki of “The Party of National Unity” (PNU), whom at the time was the most compelling president, and on the other side was Raila Odinga of “The Orange Democratic Party” (ODM) (Brown & Sriram, 2012, pp, 4). Tensions had been high for an extensive period between these two parties and was escalating fast due to the upcoming election. At a certain point, Kibaki grew impatient and declared victory for himself, and was sworn in as president quickly during a night ceremony. Supporters from the opposing party began their protests against this action, which became violent shortly thereafter (Brown & Siriam, 2012, pp, 5 - 7). Since Kenya is a highly divided country ethnicity wise, the violence took an ethnic turn. The armed conflict claimed the lives of 1.000 people and displaced over 600.000. In just a few weeks, the situation had gone from a heavily split presidential election to serious concerns of genocide. (Brown & Siriam, 2012, pp, 8 - 12)

When the African Union later succeeded in creating a peace agreement between the two warring parties, the political parties agreed to participate in a power-sharing coalition. Both parties also agreed on undertaking reforms and commissions, including the TJRC (Gibson & Long, 2009, p, 7). The creation of the TJRC in Kenya was to have a serious focus on justice. The TJRC was fully established in 2008 and worked to uncover and document gross violations of human rights and other injustices committed during the British colonial period and across the first three presidential administrations up until the 2007-2008 conflict. (Kenya TJRC final report, 2013, pp, 4)

3.3 The Truth, Justice and Reconciliation Commission of Kenya

The Kenyan TJRC was originally inspired by the South-African truth commission. In the development of the TJRC, Kenyan legislators clearly had in mind to bring about transitional justice in a similar way to South-Africa. The commission sought to investigate a record of crimes of gross human rights violations, explaining the causes of the crimes and recommending reparations for victims, since Kenya's independence from colonial rule in 1963 to 2007 (Kenya TJRC final report, 2013). The commission conducted public hearings across the country, letting victims and townsfolk share their stories, which was then used for the process of prosecution in courts constructed by international law. (Kenya human rights commission, 2010)

The TJRC formally began its hearings in early 2010 but was heavily delayed due to the controversy surrounding the members of the commission, especially regarding its chairman, ambassador Kiplagat. His opponents deemed him an insider and an accomplice in the regime that committed heinous crimes against the Kenyan people. He still declined to step aside despite the people demanding him to resign from the commission, causing further outrage from the public. (TJRC summary, 2013, pp, 4 - 8)

The ICC began its investigations in 2010 and sought to prosecute six of Kenya's political leaders for human rights violations during the armed conflict. The two presidential candidates, deputy prime minister Uhuru Kenyatta and MP William Ruto were among these six individuals charged with crimes against humanity. Along with the rest of the political leaders, Ruto and Kenyatta actively resisted the ICCs involvement, and did not co-operate with the process whatsoever. They framed the ICC as a neo-colonial tool and was later discovered to weaken the cases against them by bribing witnesses testifying against them (ICC progress report, 2013, pp, 2 - 5).

4 Analysis

4.1 The Final Report of the Kenyan TJRC

This chapter will analyze the contents of the final reports of the Kenyan TJRC as it undertook its work over the span of 4 years in what can only be described as a highly controversial and tumultuous experience. Finally, it submitted its findings to President Uhuru Kenyatta in May or 2013. The report, which contained 2210 pages in four volumes, was the product of local hearings across the country, as well as 42665 statements and 1865 directives from the indigenous people of Kenya (TJRC summary, 2013, pp, 2 - 6). Volume 1 outlines the decree of the TJRC, the methods undertaken and the challenges it met. Volume 2 contains the information on abuses of bodily harm, such as killings, torture and sexual violence. It also contains violations of economic and social rights, which also covers the violations of the rights of special groups of society, such as children, women and minority groups. Volume 3 covers the ethnic tensions and the reconciliation strategy, Volume 4 is dedicated to the general findings and recommendations. (TJRC Final report, 2013)

As stated earlier, the core of the controversy lay with the appointment of Bethuel Kiplagat as chairman. Despite the process going through its standard cycle, the appointment was heavily rejected by civil society and victim groups. Their opposition was based on that Kiplagat himself had been a major part in severe rights abuses, which were abuses that the TJRC would be looking into. The TJRC act contained plans of amnesty to further the objectives of the truth-seeking process (Kenya, Amnesty International report, 2010, pp, 5 - 8). However, the TJRC faced huge setbacks in utilizing this mandate. The amnesty was plagued by contradictory drafting that restricted the very ability of granting amnesty by; locking the role of the TJRC to only recommend amnesty, and not being able to

grant amnesty by itself. This broadened the exclusion range to a point where no crimes would qualify for amnesty. The potential for acknowledgement by perpetrators in the case of restorative purposes was never realized through this method. (TJRC final report, 2013, pp, 38 – 43)

4.1.1 The Mechanisms of the International Criminal Court (ICC)

In this chapter I will analyze the role that the ICC had in the Kenyan TJRC as the epiphany of a retributive mechanism.

The International criminal court has several indirect and direct elements that is utilized when it intervenes in a country. The direct mechanisms that the Court executes are in most cases contained in the cases themselves, as well as its outreach programs. Aside from providing justice, the ICC has the mandate to directly influence legal situations of domestic character and increase education regarding the ICC and international law. The indirect mechanisms of the Court are the massive shadow that it casts over the involvement of violence and human rights, which aided their aims of stability, unification and judicial change in Kenya. (ICC progress report, 2013, pp, 6 - 7)

The effects of the ICC in the Kenyan post-conflict situation have had a significant impact on the political figures of the Kenyan government, specifically individuals who have been accused of a severe crime or have been closely aligned with such individuals. Witnesses, and the increase in risk, has therefore had a direct impact of the ICCs efforts to provide justice. The Court also has the mandate to directly impact Kenyan individuals through reparations, but the failure to do so also affects those persons. The efforts of the Court and its method of providing justice was also the main reason the country saw a Kenyatta/ Ruto alliance. (ICC progress report, 2013, pp, 10 - 12)

The indirect impacts of the ICC originate from the legal threat that radiate from the presence of the Court. The looming omnipresence of the ICC influenced the writing of the 2010 Constitution of Kenya, and the judiciary which are almost solely based on international norms and ideas. The legal threat of the Court indirectly caused the 2013 election to be a peaceful one. However ironically, the Court succeeded in creating a unity in Kenya – a unity in opposition to the ICC. (Shulz-Herzenberg, et.al, 2015, pp, 4 - 8)

Many Scholars, who are optimistic about the ICC and its mission, such as Kathryn Sikkink (2011), believe that the goals of the ICC should be to deter future acts of violence and to bring peace to war-torn communities. According to her theory, when top leaders of countries, who sits on established and important roles of the government, are tried for violations of human rights and crimes against humanity, only occurs during periods of peaceful transitions. In other words, the peace-process needs time to bake before these trials can take place. Kenya follows a different pattern however, in that with the involvement of the ICC, the power of these top individuals increased after they were charged with the crimes. (Sikkink, 2011, pp, 145 - 155)

The political parties of the Kenyan government have always been in constant change. New alliances and coalitions emerge at every election of a new president, however the election of 2013 was directly impacted by the ICCs trials of Kenyatta and Ruto. Due to the Kenyatta/ Ruto alliance, they were a stronger force in the elections and could more easily win it, which they did. Thus, a trial could not take place with the argument that the country still was unstable and needed the charged individuals to lead. (Shulz-Herzenberg, et.al, 2015, pp, 9 - 12)

4.1.2 The Local Mechanisms of the Kenyan TJRC

The Kenyan TJRC sought to conduct public hearings around the country throughout its mandate. More specifically it conducted individual hearings which included recording session in 8 different provinces in Kenya. Women and children's hearings, thematic and institutional hearings were also organized.

The Kenyan TJRC does demonstrate a respect for the rights of the affected as Kenyan citizens. A majority of the refugees had a positive outlook on the TJRC and were excited to meet their fellow countrymen involved in the discussions of reconciliation. The TJRC promised to make a wide range of recommendations focused on accountability and reconciliation regarding the injustices of the Kenyan conflict. It proposed a variety of reparation forms as well as a reparations policy framework for the victims and sought to make the National Assembly develop guidelines to carry them out (TJRC summary, 2013, pp, 36 - 38).

The TJRC had no intentions of forgetting the rights and needs of the people, however, there has been no commitment by the Kenyan government or the political elite to promote justice and healing at the local level. It was up to NGO:s and other local initiatives to foster the plan of reconciliation that the TJRC gave. In the case of South-Africa, there was an incredibly strong will from the people to promote reconciliation, especially with a figure such as Nelson Mandela, who preached forgiveness and reconciliation. The question of political and moral leadership in Kenya was severely lacking, and with a suffering integrity, it makes it even more difficult to convince the people to address the legacy of past human violations on their own terms (TJRC summary, 2013, pp, 23 - 27). Civil society should strive to be proactive in the reconciliation process, and not reactive. This is important to ensure that only individuals with exquisite character, integrity and reputation are appointed to helm the truth commission. Still, the TJRC also recognized the need for reparations policy to redress the injustices committed in the past. Reparations validate and acknowledge these events, it provides victims with the capacity to cope with the suffering and contributes with deterring future crimes.

The restorative work of the Kenyan TJRC was from the beginning multifaceted, the scope and mandate of the mission was quite huge for only having a timeframe of 4 years. There were countless weaknesses, challenges, and flaws, however, the findings of the commission should not be discredited or written off. Their findings did form an integral part and basis to the reconciliation, with the fact that the TJRC mandate was deeply moral. The truth commission lay the foundation for a

more humane and just social order, passing the moral judgement on past events but in ways that would reconcile a divided community (African Union, TJRC Public hearings, 2011). Discovering the truth itself would initiate the processes of collective healing at the local level, creating catharsis for the people. Reconciliation through this method was the affirmation of “Ubuntu”, “recognition of the humanity of the other”. Ultimately, an effective process of restorative justice through truth seeking will take more than one generation and must include most of the people. The TJRC was overburdened in its work on the local level, and it was well illustrated by a testimony of one witness, speaking of only a single event, The “Wagalla massacre” stated that:

“If all the water is turned into ink with which to write, all the trees are turned into pens with which to write, and all the land is turned into paper on which to write, the history of Wagalla cannot be covered” (Public hearing Wajir, 2011, pp. 20)

4.2 The Friction

In this chapter I will discuss the frictions between the retributive and the restorative mechanisms.

The adversarial justice system of the ICC might succeed in bringing closure and legal satisfaction for those living in the West, but for the communities living in Kenya, it is difficult for healing to be found solely in courts of law. The role of victims is reduced to that of mere spectators, and although the State is there to represent the population, the communities and parties involved in the conflict are absent in this process. As an example, in the South-African transitional justice system, it is clear to see that entire communities were involved in the justice process and that the international community had no part in rebuilding the government and its legal system (Allais, 2011, pp, 332 - 336). The Kenyan TJRC evidently ignored or failed to realize the local context in which the conflict arose. Social relations do not appear from nowhere, especially not considering Kenya’s

history of ethnic divisions and tensions (Muigai, 1995, pp, 11 - 14). The ICC directly undermines the African culture and traditions by denigrating them on a level where Africans are constantly educated and socialized in western belief systems. This is evident looking at the government and political elites of Kenya, who fails to grasp the needs of the war-torn communities.

To declare a party guilty or innocent is clearly not enough for reconciliation, but that is what the ICC inadvertently is teaching African governments through their broader peacebuilding efforts, nonetheless. Once the truth is told, the process of healing can begin, and the matter can be resolved (Mangena, 2011, pp, 18 - 20). However, reconciliatory activities can only be performed on the local level because the people are not able to express their dissatisfaction after the court has delivered its verdict or judgement. The people will instead continue talking about their dissatisfaction outside of the court. Laws that the people do not agree with can never be true laws and imposing them on the perpetrators would cause further distrust in the government (Lederach, 1997).

Many suggest that the major issue with the transitional justice program in Kenya was that the TJRC placed too much emphasis into initiatives that would “treat the symptoms of violence” (Arbour, 2006, pp, 22), rather than addressing its roots and causes, which is regarded to have been socio-political factors. Therefore, only a broken peace was achieved, and with the presence of the ICC, the narratives and ideas felt by the civil society could never be addressed. Instead, anger still surged through the public, knowing that the TJRC, that was supposed to put the country back on track, effectively was used as an escape tool by the highest-level of war criminals and orchestrators of violence to evade justice (TJRC Final report, 2013, pp, 28 - 32). Thus, what developed is a lack of trust among the people, especially in institutions and the legal system, due simply to the past failures, false promises, biases, and ethnic oppression.

4.2.1 The Absence of Local Participation

The public perception of the TJRC and the transitional justice process in Kenya were constantly viewed as negative. The local sphere, if it can be involved in the decision-making process from the start, would gain the opportunity to influence the law-making process and the government, including the formulation of the transitional justice process and the selection of its commissioners (Leebaw, 2003, pp, 39). This also positions the commissioners and the process accountable in the face of the civil society.

The South-African transitional justice process, although its TRC were initiated solely by the government, these local initiatives were meant to be provided by community-based organizations and NGOs, local community healing and reconciliation, ex-combatant reintegration programs and projects of memorialization (Lambourne, 2004, p, 17 - 20). But most important of all to the process of restorative justice was the *lekgotla* courts, and the enabling of perpetrators and ex-combatants of the conflict to engage directly with the victims and the civil society (Lambourne, 2004, p, 22). Most of the local justice operations were initiated with the mandate of the TRC, while others throughout the country tried to pick up on the progress of the TRC to deepen its impact on those areas or extend its work to other communities. In other words, these types of self-erected local courts took the charge of the transitional justice process on the local level (Rautenbach, 2015, pp, 275 - 276).

A key variable in the future path of peacebuilding is whether the public maintain trust and loyalty to the political and legal system. This is a major factor where South-Africa were successful, all the while Kenya failed in this regard. The restorative justice mechanisms employed in South-Africa made use of available institutional channels to deal with the grievances of the people, granting the newly formed government the approval and legitimacy of the public and thus ensuring sustainable peace and development (Sing'Oei, 2014, pp, 90 - 95).

In the case of Kenya, widespread use of amnesties that were granted to high-ranking government officials and commissioners denies the victims a chance to

redress (Ndungu, 2014, pp, 10). This would have a severe effect on civil contempt, increasing the urgency and sequence of other measures of transitional justice efforts, potentially even rendering it obsolete. Indeed, even though the Kenyan TRC took measures to instate the ICC and proceed using criminal courts, there was also a great deal of non-prosecution, even without formal promises of amnesty. There is a growing trend when it comes to international norms and law of excluding war crimes, genocide, and crimes against humanity from amnesties (Merry, 2006, pp, 15 - 20). These exact exceptions were seen in Kenya, and when the public eventually lost interest in the commission's findings, the victims were left with no political representation (Ndungu, 2014, pp, 24 - 25). By not consulting victims and encouraging participation prior to the transitional justice effort, the quality and quantity of information circulating the population regarding the commission would decrease. In the case of Kenya, not only was there a deep distrust in the TRC, but the knowledge regarding it was lacking as well (Thomson & Kihika, 2017, pp, 24 - 26).

Extensive participation is important to the restorative effort because it helps to ensure that every victim is heard and reflected in a commission's recommendations. The outreach of participation in South-Africa facilitated the victim's engagement with the subsequent restorative initiatives by encouraging NGOs and victim's groups to effectively organize (N'getich, 2016, pp, 160 - 161). This also helped with building trust and communication channels, not only regarding the TRC but also among the people. A truth and reconciliation commission's outreach and consultation strategy educates the public of the TRC, this in turn would explain the lack of commitment of the Kenyan people to enhance the restorative efforts. Without the input of the public, the peacebuilding effort may find difficulties narrowing down and addressing the root causes of the conflict. Scholars argue that Kenya's transitional justice effort failed to address the socio-political factors that was regarded to be one of the major reasons for the outbursts of the violence (Hansen et.al, 2015, p, 425 - 426).

Without the TJRC appropriately dealing with this issue, the ethnically based structural violence that was permeating societies in Kenya continued. To understand structural violence in a country requires the truth seeking to target all

areas of society and include as many people as possible. In Kenya, it is vital to understand how and where structural ethnic violence has affected and presently continues to affect societies and communities. By extensively involving the people in the truth commission and letting the concerns and opinions of the people flow up to the surface, it would be possible to better understand where the issue lies and where to begin solving it (Brown & Siriam, 2012, pp, 9 - 13). With the ICC granting protection and indirect power to actors representing the deeply ingrained structural violence in Kenya, there was nothing advocating for change and the potential for violence in Kenya remain high, while the potential for peace will remain minimal.

4.2.2 Distrust Among the People

In Kenya, most respondents saw in the TJRC an opportunity to come to terms and deal with the past and the alienation of their ancestral land. While many others had the sceptic notion that it would be used by the government to create a witch-hunt of members of their communities or to alienate them further. For the TJRC to fulfill its purpose, the respondents felt that it should have been composed of people who had significance to the community, rather than the bureaucrats who were removed from the reality of the location where the violence took place. Even despite the efforts of the TJRC to recruit survivors and victims as “statement takers”. (Brown & Siriam, 2012, pp, 14 - 16)

Among the respondents of the TJRC, there was almost a universal lack of trust in the commission, and what it could achieve for the Kenyan people. There was simply no faith from the people that the government could protect them, especially how it was currently constituted (Hansen & Siriam, 2015, pp, 17). The greatest challenge of the Kenyan TJRC was the loss of legitimacy elicited by the public loss of trust in its commissioners, particularly was the case of its Chair, ambassador Kiplagat. It is made clear that the appointment of commissioners was extremely rushed in relation to when the peace accord was signed, this ultimately had a negative impact on the process of transitional justice. Consequently, it is

argued that there simply was not enough time for the commissioners to be appropriately appointed for the public to be comfortable with the picks. (Ndungu, 2014, pp, 12)

The question of criminal trials based on international law, and how it can have a deterring effect on the truth commission, depends solely on the practical ability to prosecute perpetrators and bring them to justice and convict them based on the credible testimony. In the case of Kenya however, this was an incredibly difficult task because of the large number of people who were likely supportive or responsible of past crimes and injustices. Moreover, the uncertainties and divisions that come with the enforcement of the ICC, as well as the tensions of the transitional context, the effort becomes unreasonable. (N'getich, 2016, p, 145 - 150)

It would be easy to say that some of the criticism of the ICC could be covered as a rearguard by the autocratic leaders to keep some of the privileges associated with power. As clearly demonstrated in Kenya, going against supporting the work of the ICC might be more popular among the local level than self-interested political bodies. However, the emphasis should be put on the possibility of having a former president or political officer tried for human rights abuses, or before an international court, has more than often generated tensions and feelings of distrust, from Laurent Ghagbo, Charles Taylor and Augusto Pinochet today (Human rights watch, 2002). Therefore, it should be expected that these types of prosecutions carried out by the ICC will generate significant controversy no matter the circumstances.

In the Rome Statute, the matter hinges on a compromise between local and global sovereignty regarding justice. Under the “principles of complementarity”, member states exercise the sovereignty in matters of justice where a member is unable to carry out justice (Rome Statute, art 17, 2012). The standard of “unwilling and unable” being clear echoes of international norms of “responsibility to protect” or the “War on terror” serving the reconfigurations of the global-local friction by replacing traditional ideas of sovereignty with simple conventionality.

The ICC is the ultimate arbitrator, it can never serve to complement the restorative justice effort of the local as it stands as the primary jurisdiction exercised by the tribunals. However, consider the possible idea of the ICC not only as a grant of pardon or amnesty, but an effort to address offenses using restorative methods. In instances without circumstantial prosecutions, would such an alternative of justice be “unwilling and unable” under the jurisdiction of the Rome Statute? Former Chief Prosecutor Luis Moreno-Ocampo suggests the problem lies in the enabling of the local flexibility, the way to deviate from retributive justice relies on the cases regarding prosecutions of high-level political officers. (Greenawalt, 2009, pp, 44)

5 Conclusion

This paper set out to examine and explain how the adversarial retributive systems from the west affected the workings of restorative justice and its mechanisms in Kenya. To answer this question, I drew upon the theory of friction as well as John P. Lederach's (1997) definition of retributive and restorative justice. With the implementation of the ICC in Kenya, it left the root causes of the conflict unaddressed, making the process of transitional justice obsolete.

The ICC removed the perpetrators from society, instead protecting them from justice, and making it impossible for the people to come to terms with a government operated by what was ultimately the high-level perpetrators of the conflict. When it comes to healing the wounds caused by the criminal's act, the ICC not only alienates local communities and removes their participation in the transitional justice process, but it also diminishes the integrity of the people, and excludes the community from whence the offender and victim came from, hence creating distrust. Forcing an idea on a people will ultimately erode and repress the original ideas of that people, as seen on the western influence on the structure of newly formed governments and democratization in Africa.

It is evidently clear that dilemmas of global and the local are firmly entwined in the process of transitional justice in Kenya, however these dilemmas are strands which is difficult to let go of or remove. The friction demands us to examine both the historical and ideological origins of the circumstances at hand. However, the international methods of the ICC represent the path dependency that western ideas of transitional justice are glued to. The generator of the global-local frictions comes from the lingering suspicions and blind spots often associated with transitional justice processes. On one hand, attempts to resolve these dilemmas through retributive justice are heavily unlikely to contribute to post-conflict peacebuilding if it is not accepted by the people who must live with it, creating difficult questions of legitimacy and sustainability. Beyond the western arrogance

lies the increasing attention to local communities, the inhabitants of the land, which reflect a deeper uncertainty of retributive justice in that they also inspire a moral justice of their own. To best describe the Kenyan TJRC, you could say that it gave the local side its due regard, but global institutions squeeze their hands where due regard must give to make place for international standards and practices. In the end, frictions of the global and the local express the strain between two different normative engagements, between international human rights and liberal internationalism on one side, and on the other: deep principles of local sovereignty and autonomy.

And yet, instead of repeating that addressing the issues of global and local is both wholly important and difficult, the peacebuilders of our age must begin by questioning simple narratives of local-global and understand the transitional justice process instead as part of a more complicated indigenous process that maneuvers through multiple levels. We must also further develop our understanding of the local, and what exactly we mean by the term, this is one way of crafting future processes of transitional justice that will build on a more equitable global-local collaborations that take us beyond the parameters of the transitional justice toolbox.

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