

Protecting Minority and Indigenous Rights beyond Litigation horizon: The Challenge of Structural violence in Africa

KEMIGABO JOLLY*¹

Abstract

Although restorative justice in African states has gained a significant profile in responding to structural violence, Minorities and Indigenous Peoples (MIP) find themselves at the fringe of its practices. The mainstream practice in criminal justice systems represented here by ICC has also had its shortcomings in addressing issues of MIP. While proponents of MIP rights advocate for appropriate and restorative justice systems, it's important not to idealize them as they also come with a fair share of challenges. The main purpose of this article is to provide an insight into understanding the role Minority and indigenous peoples' rights play in articulating claims for transitional justice. The article also recognizes the fact that the use of both transitional non-judicial methods and criminal prosecutions can help to build peace based on the accommodation of diversity if appropriately employed.

The material in this paper is intended to be selective and suggestive, but does not pretend to be complete or authoritative.

Keywords: international criminal court, structural violence, ethnic minorities, Indigenous peoples, transitional justice, restorative justice, minority and indigenous peoples' rights

Introduction

In a continent marked by endless violence and political turmoil, at end of war or repressive regimes, International community always looks forward in supporting remedies to right the wrongs. There is always a consensus that people will inevitably be tried for their atrocious crimes and that the truth will need to be told. A broader agreement that impunity must end, and that truth should be considered an important objective in order to work towards reconciliation is now developing around the African continent. However, in supporting such judicial or non- judicial transition processes the African actors themselves especially at the grassroot level should be the centre focus of such initiatives as this makes them much more than victims of conflict and injustices but robust proponents and advocates for these provisional and vital strategies.

¹* *Jolly Kemigabo* is the Africa Regional Manager of Minority Rights Group International (MRG) – Africa Office. MRG works to secure rights for ethnic, religious and linguistic minorities and indigenous people around the world.

Transitional justice is the discipline² which, after the end of a violent conflict, seeks to build the societies in transition in order to prevent further conflict through the restoration of civic trust, reconciliation, and the establishment of the rule of law and democratic order.

In Africa Structural violence is one of the underlying causes of conflict. It brings about inequality, particularly in distribution of power in a social structure. Structural violence occurs when things that a society needs to survive such as access to healthcare and medicine; access to education, access to sufficient levels of food and water, are concentrated amongst just the upper classes or those in power³. Structural violence leads to economic under development and poverty amongst large sections of society. “These structures can then lead to conflict as certain sections of the societal structure feel that they are worse off or need more and so blame other groups within society” (Galtung, 1990 p292).

Africa and mainly Sub-Saharan Africa has been plagued by conflict for many decades now. It's believed that between 1946 and 2002 there were 47 civil wars in sub-Saharan Africa resulting in 1.37 million deaths on the battlefield and an even larger number of civilian deaths. In all these conflicts experience has shown that ethnic minorities and indigenous peoples who suffer systemic, widespread and institutional discrimination are the main victims of war crimes and crimes against humanity and suffer many atrocities including persecution, murder, forcible population transfer, torture, rape and extermination. Decades of marginalization, poverty and displacement all contribute to inequalities experienced by minorities and indigenous communities and an inability to realize meaningful peace. We have seen this happen to the Bambuti Pygmies in the eastern Democratic Republic of Congo (DRC), the Batwa in Rwanda (1994 genocide) among others.

Minority and Indigenous Peoples (MIP) Rights

The distinction between minority groups and indigenous peoples is not always clear-cut and this is equally the case in the African perspective. However, in the context of this paper I will use the terms ethnic minorities and indigenous peoples in an interchangeable manner and base their constitution on the international norms elements; any ethnic, linguistic or religious group within a state; in a non-dominant position in the state in which they live; consisting of individuals who possess a sense of belonging to that group; determined to preserve and develop their distinct ethnic identity; discriminated against or marginalized on the grounds of their ethnicity, language or religion⁴. In Africa MIP rights are based on the existing regional and international law and can be appreciated through the following pillars;

The right to exist: obliging states to protect the existence of minority communities as a whole, which means the prohibition of genocide, assimilation and population displacement.

The right to non-discrimination: protecting minorities from direct or indirect discrimination on the basis of ethnic, religious, linguistic or cultural identity.

The right to protection of identity: preserving the freedom of minorities to practice their culture, religion and language in the public and private spheres, and taking measures to enable minorities to develop these aspects of their identity.

² The International Journal of Transitional Justice, Vol.3, 2009, 5 – 27

³ Høivik, 1977, p60

⁴ Minority Rights Group International – briefing paper; Recognizing minorities in Africa – Samia Slimane, 2003

The right to participation in public affairs: ensuring that minorities can participate in decision-making processes at the local and national level, particularly in regard to how their communities are governed⁵.

Measures and affirmative action programs aimed at promoting reconciliation and reversing harm through transitional justice efforts need to draw links between causal factors of structural violence and the wider context of marginalization and lack of protection for minority groups in Africa, thus aiming at remedying past wrongs and creating long lasting peace.

International Criminal Court (ICC)

When the term International Justice is used in Africa, The International Criminal Court (ICC) comes in mind. Since the Rome statute came into force, 34 African countries have ratified the statute. The debate about the ICC's failures continues to pick momentum on the continent; the African Union has continued trenchant criticism of the ICC; threats from some African member states to withdraw from the Rome statute and the general debate around the court's selectivity and insistence on mainly indicting African leaders; being a manipulative instrument by western powers to impose versions of justice and peace that fit their own interests and ideas among others.

Weaknesses notwithstanding ICC has brought positives in Africa; the court's presence has given human rights violations a higher profile within the international community and have sent a clear message that the continent will no longer permit the continuation of impunity. The growing consensus that there are some crimes so atrocious that they simply cannot go unpunished or leaving them unpunished either through amnesty or incapacity to prosecute violates the principles of justice and impunity⁶, in itself validates the ICC existence and presence in Africa.

The prosecution of war lords such as Charles Taylor, Jean-Pierre Bemba, Thomas Lubanga among others has earned marks for the ICC but where has this left the victims and affected communities of these conflicts? For the ICC to gain relevancy in the continent it ought to listen to the concerns of African masses, victims or local communities or else it becomes a tool of injustice for the very national leaders with little interest in justice.

Issues pertaining International Justice, Peace and Reconciliations in Africa require a multi-pronged approach, firstly an initiative which seeks to guarantee and safeguard the rights and interest of the people, a system that empower and not disenfranchise or further victimizes the aggrieved party. Furthermore, a support system which provides victims with tangible remedies be it psycho-social support, community building and strategic restoration of relations and unity. It is also critical, before any engagement process takes effect, for Justice Practitioners to invest time and effort in understanding historical facts and structures behind any conflict or violation which threatens the existence of peace. Let's us not forget, to secure sustainable peace; issues must be dealt with from the roots and not peripherals.

⁵*Transitional Justice and the Rights of Minorities and Indigenous Peoples; Chris Chapman (2009)*

⁶ Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?," *Human Rights Quarterly* 31 (2009) 624-654

The question then, is whether or not the challenges and weaknesses of ICC make it dispensable in the African context. It would be naive and one dimensional to state that ICC adds no value; the alternative to ICC prosecution in the cases it has taken on would be no prosecution at all—no justice for the countless Africans, who have been murdered, tortured, raped, or forced to become child soldiers. For most Africans doing justice is identical with administering punishment. It may not be necessarily the Biblical edict of an eye for an eye but most would be in favour of a punishment that fits the crime. In such a mind-set, it would be difficult to even suggest an alternative justice system yet alternatives are plenty in form of restorative justice.

Restorative Justice & MIPs

Today in Africa both judicial and non-judicial restorative justice measures have been implemented by different countries in order to redress the legacies of massive human rights abuses. The diversity in restorative justice systems is reflective of the inherent variety of the African continent; each African country boasts of its own national goals, culture and political history though there might be shared values across the continent. Proponents of transitional justice should thoughtfully devise appropriate strategies that best serve existing needs and empower local communities.

Promoters of MIP rights in most cases hold a similar wide spread view to those who advocate for restorative non judicial systems, that the criminal justice system is not up to the task because it is too slow and too weak in addition to being too impersonal – “a guilty plea and imposition of a fine teaches nothing of the harm that’s been done”⁷. The nature of injustices suffered by MIPs in most cases is massive and systematic, that choosing a process of righting such wrongs would require one to look beyond mere punishment but address the breached relationships; support communities to re- tell their stories and in the long run help individuals transcend large and small wrongs. This can only be achieved by respecting MIP rights within the transitional justice process. However, in restorative processes involving the community in justice is not the same as bringing together those individuals most directly affected by the offence. We have seen restorative processes take place with less or no attention to minorities and indigenous peoples.

A case in point is the Gacaca process in Rwanda as a means to address the 1994 genocide - which itself is often rendered as an exclusively Hutu-Tutsi affair without due consideration to the significant impact it caused on the Batwa (approximately 0.4 percent of Rwanda’s population of 8 million then)⁸. As studies indicate as much as one third, or 10,000 people from the small Batwa population were also wiped out during the 1994 Rwanda genocide, possibly because they were associated with Tutsi hegemony. Batwa, like many marginalized groups during conflicts, were stuck between factions. They were killed by both sides—and co-opted by both sides to participate. Some studies have noted that Batwa were used as “human shields”—forced to act as a barrier between the warring Hutu and Tutsi⁹. The Batwa were both perpetrators and victims of violence, and their individual experiences and roles must be recognized. Prior to the genocide, the Batwa population experienced high levels of social discrimination and were perceived, by Hutu and Tutsi

⁷ Prison Fellowship International – Centre for Justice and Reconciliation

⁸ Twa Pygmies; Rwanda’s ignored people – *Jerome Lewi, 2006*

⁹ <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/rwanda/people-who-dont-exist#sthash.DC52tkF6.dpuf>

alike, as dirty, immoral and even sub-human. They primarily relied on the forested areas to pursue a hunter-gatherer existence and on marshland swamps to provide clay for the production of pottery. However, they were disposed of their ancestral lands often with little or no consultation or adequate compensation, causing internal displacement and further hardship¹⁰.

Gacaca cannot be considered a successful model of restorative justice as it delivered a one sided justice but it positively drew a route for understanding and improving restorative justice practices. For any restorative practice to succeed recognition and understanding of the context¹¹ and its underlying factors is significant. To critique Gacaca process from the Batwa's perspective; it failed to recognize the historical, political and social economic realities of this group and no wonder 20 years down the line the Batwa can be considered the forgotten victims of the Rwandan war and genocide; their suffering has gone largely unrecognized pre and after genocide.

Studies have shown that where minority and indigenous peoples' rights go consistently ignored, a descent into conflict is always a risk. Minority Rights Group's assessment of 45 ongoing conflicts between 2007 and 2009 found that 78 per cent of the world's conflicts have an ethnic dimension¹². Despite this, the factors that create conflict, such as historical marginalization of one group by another, denial of a group's identity and land rights, increasing poverty, discrimination and hate speech go un-addressed in the post conflict processes. Post-conflict situations provide a unique opportunity to implement new and better practices. But when MIP rights are ignored or misapplied at the expense of some communities, the creation of lasting peace is forfeit and the seeds for future violence are sown. In Africa to date, governments and international bodies such as the UN have been extremely slow to address violations of minority or indigenous people's rights in a systematic way. In most case the fear is based on the belief that if they make concessions, communities will only make more demands that will lead to the ultimate: the demand for a separate state. However, experience on ground shows otherwise; MIP rights are about creating stable, integrated, equal societies where everyone can choose their identity and practice it¹³. If minorities and indigenous people are able to live without fear of persecution, practice their traditional culture and participate in governing, they will feel a sense of belonging and entitlement, just as majority communities do.

Conclusion

In Transitional justice non-judicial methods are as important as the promotion of minority rights and actually they are even part of the strategy to implement the latest. While, at the same time, the existence of a minority rights framework is a necessary existing condition for transitional methods to effectively work. Therefore, in the African context minority and indigenous rights and

¹⁰ Forest Peoples Programme, Submission, 10.

¹¹ <http://atlismta.org/online-journals/human-security/african-transitional-justice/>

¹² https://www.google.co.ug/?gws_rd=ssl#q=Minority+Rights:+The+Key+to+Conflict+Prevention+By+Clive+Baldwin%2C+Chris+Chapman+and+Zo%C3%AB+

¹³ <http://www.minorityrights.org/6857/thematic-focus/conflict.html#sthash.8PL8pXOH.dpuf>

judicial transition justice such as ICC complement each other and one cannot be successful without the other. On the other side, while African states should strengthen transitional non-judicial methods, these are not meant to be seen as a substitute for criminal prosecutions of war crimes. The latest is also necessary to ensure a long stable peaceful state. Justice should not be sacrificed in the name of stability.

When ethnic groups have suffered massive and systematic abuses, respecting MIP rights within the transitional justice process is an important symbolic gesture, demonstrating that a break has been made with the past. MIP rights have been a tool in some cases for highlighting MIPs' justice claims, both with respect to acts of atrocity and the discriminatory contexts that enabled them. Other transitional justice efforts may draw similar links between abusive acts and the broader context of marginalization and lack of protections for minority groups—thus enabling mechanisms for remedy to these conditions.