Transitional Justice: The Evolution of an Essential Component of Post-Conflict Peace Building Processes

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Abstract

The term transitional justice has become synonymous with contemporary post-conflict peace building processes. The concept evolved from modest theoretical assumptions into distinctive models. The formal origins of the transitional justice concept can be traced to the 1990s, following the demise of the Eastern Communist bloc when nations experienced transition from autocratic to democratic rule. The roots of the concept can however be traced back to major peace settlements such as the Congress of Vienna (1815), the Paris Peace Settlement (1918) and the Nuremberg and Tokyo Trials after 1945. The major challenge it faced was acceptability and legitimacy; it was largely viewed as an instrument devised invariably to punish either the vanquished or the perceived perpetrators. This criticism may have informed the concept's evolution from being a vindictive 'victor's justice' seeker into defined frameworks such as criminal tribunals, commissions and courts. This paradigm shift was evidenced by the United Nations' recognition of the framework and its deployment in Yugoslavia (1993), Rwanda (1994) and Sierra Leone (2002). Arguably, success story of these case studies' motivated the formation of the International Criminal Court in 2003. The paper will underscore the importance of contexts in the choice of transitional options.

Key words: conflicted, post-conflict, transitional justice, victor's justice, tribunals, courts, International Criminal Court.

1.0 Introduction

This paper seeks to explore the origins, applicability and feasibility of the concept of transitional justice in conflicted or post-conflict societies. It is imperative to trace the evolution of the transitional justice concept in order to ascertain its emerging best practices. The analysis will be premised on the motives of transitional justice, forms of justice and whose justice is to be achieved. Key examples of transitional justice processes stretching from the 1814 - 15 Vienna Congress to the advent of the International Criminal Court in 2002 will be referenced. Due attention will be given to the concept's applicability and feasibility contestations vis-à-vis the context and the global trends.

1.1 The transitional justice concept

Transitional justice is a contested concept. The United States Institute of Peace (USIP) through its post-Cold War research project entitled, 'Transitional Justice' (Solomon, 1995, p. xxiii), first coined the term 'transitional justice.' Directed by USIP's Rule of Law Initiative, the

initiative had by 1995 produced a publication entitled, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Kritz 1995). The concept was viewed as 'the way in which emerging democracies or post- conflict societies deal with the legacy of past human rights abuses perpetrated or permitted by former authoritarian regimes' (Crocker, 2001, p.270). Non-violent democratisation processes in Eastern and Central Europe in the 1990s raised the optimism about the possibilities for conflict resolution mechanisms (McCandless, 2007, p.42). This paradigm shift in peacebuilding processes was affirmed by Boutros-Ghali (1992), the 6th United Nations Secretary-General in his *Agenda for Peace, which* advocates the engagement of a variety of activities that are associated with 'capacity building, reconciliation and societal transformation' (1992).

Kritz's *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995) has been received with mixed feelings. Several reviewers accepted both the utility and the contents of the term 'transitional justice.' For instance, Piccone (1996 cited in Arthur, 2009) appreciates how Kritz addresses 'how democracies have attempted to strike a balance between redressing the abuses of the former governments and integrating victims and perpetrators in a post-conflict society.' Siegel (1998 cited in Arthur, 2009) also hails the transitional justice options availed during the cross-over from an authoritarian regime to a democratic one. Ash (1998 cited in Arthur, 2009) has, however challenged the idea that the contents of what Kritz presented as 'transitional justice could capture real-world complexities.' Ash argues that 'instead of 'coming to terms' with the historical complexities, (as one might expect in an effort to deal with 'the past'), Kritz presented transitional justice as deeply enmeshed with political problems that were legal-institutional and relatively short-term in nature' (cited in Arthur, 2009, pp.331-332). Using the South African Truth and Reconciliation case study, Henkeman (2013) feels that the concept of 'transitional justice offers built-in denial and therefore should be discarded.'

Nevertheless, the transitional justice concept hailed as 'the emergence of a paradigm' (Fischer, 2011, p.407) and an 'invention' (Mouralis, 2014), has increasingly gained in importance and scope as a peace building framework. It is now a systematic study which 'has influenced the legal, social and political discourse of societies undergoing fundamental change and of the international community' (Villalba, 2011, p.2). Its growing significance is a reflection of the challenges faced by peacebuilders in dealing with post-conflict complexities.

(Zupan nate date, p.327) posits that a post-conflict society has to grapple with the following immediate challenges:

1. How can a post-conflict society deal with the legacy of a recent violent past?
2. How can a society deeply divided and traumatised, regain trust in itself and rebuild a moral system and a shared future?

These questions seek to find the methodologies to be used by conflicted societies in order to transform from cycles of violence to desired and more constructive future relationships (Lederach, 2005, p. 138). Transitional justice methodologies have to contend with the following complex questions (Solomon 1995, p. xxiii):

1. Can individuals, communities and societies make the choice to transform great suffering into great wisdom?

2. How best can a post-conflict society deal with the painful legacies of its gross human rights violations?

3. Should priority be given to punishing perpetrators in order to combat the culture of impunity?

4. Should a post-conflict society forgive and forget past human rights violations, in order to ensure peace and stability?

These questions are very difficult because no particular methodology can be prescribed to all post-conflict societies willy-nilly. Clark *et al.* (2009:381) concur that, 'transitional justice resembles the minefields it is meant to transcend.' Notwithstanding these seemingly insurmountable challenges, the concept of transitional justice has remained relevant in all post-conflict societies. The concept has grown from 'being a peripheral concern to a ubiquitous feature of societies recovering from mass conflicts or oppressive rule' (Clark 2012:1). In response to the question, *What is the idea behind transitional justice?* Herwitz (2005, pp.539-540) suggests a set of needs that a society in transition has to grapple with. These needs are:

1. to punish the human rights violators and strengthen the rule of law;
2. for restorative justice to ensure societal healing and reconciliation;
3. for transparency in order to build moral capital and support for the new regime;
4. to appease the old regime, so that transition will be smooth; and,
5. to strengthen the new regime and free it from the past.

Naturally, these needs form the most prevalent assumption in a transitional society but the dilemma is that the needs are not 'exactly consistent' (Herwitz, 2005). This assumption is motivated by the normative belief in the universal quest for justice and the causal belief which concerns the possible strategies to pursue justice and the rule of law (Mouralis, 2014, pp. 83-

84). The assumption, as noted by Lederach (2005, p.138), 'would require attention not just to proposed substantive solutions, but to the need for strategic design of change processes…'

This assumption underlines the United Nations' working definition of transitional justice as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation' (Annan, 2004).

The International Centre for Transitional Justice (2008) regards transitional Justice as a response to systematic or widespread violations of human rights by seeking to recognize victims and to promote opportunities for peace, reconciliation and democracy. It is imperative to note that 'transitional Justice is not a special kind of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse' (ICTJ, 2008). Suffice to say that these processes and mechanisms which include both judicial and non-judicial prosecutions, reparations, truth-seeking, institutional reforms, vetting and national consultations are critical in strengthening the rule of law (UN, 2014, p.5).

The processes and mechanisms, however, need a specific mandate (UN, 2014, pp.5-6) and to be tailor-made to suit the context rather than using the 'one-size-fits-all' approach (Rostow, 2013, pp.2-3). This means circumstances on the ground must determine the approach to adopt and implement. Rostow underlines that it is 'transitional' because it deals with past wrongs rather than ongoing issues. He therefore defines transitional justice as 'the provision of justice in the transition from one form of government, often perceived as illegitimate, unjust and tyrannical…to one that observes the rule of law and administers justice' He further advises that a firm foundation for the rule of law may be established if the processes are credible.

The normative framework for transitional justice is provided by the Charter of the UN, the Universal Declaration of Human Rights, international human rights law, international humanitarian law, international criminal law and international refugee law (UN 6.20: DDR and Transitional Justice, 2009, p.5). Hence, in recognition of these international instruments, transitional justice processes invariably comply with the right to justice, the right to truth, the right to reparations and the guarantees of non-repetition. This normative dimension is informed by the liberal thinking premised on concepts such as the rule of law, human rights and democracy (Hansen, 2010, p.58).

The UN (2014:5) has adopted four international human rights law tenets to inform transitional justice processes and the fight against impunity. These tenets listed below are linked to Herwitz's proposed needs:

1. The State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, and to punish those found guilty;
2. The right to know the truth about past abuses and the fate of disappeared persons;
3. The right to reparations for victims of gross violations of human rights and serious violations of international law; and
4. The State obligation to prevent, through different measures, the recurrence of such atrocities in the future.

Several definitions of transitional justice have also emerged. Herwitz (2005, p.539) refers to the concept as 'the kind of justice distinctive to nations on the rocky road from authoritarian regimes characterised by gross violations of human rights to those that are classified as liberal democracies.' This shows that the transitional justice field 'has a profound normative dimension in that it is pre-disposed to view the past as something 'bad' and the current as something 'good' (Hansen, 2010, p.58).

Roht-Arriaza (2006, p.2) also views it as a 'set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.'

The Zimbabwe Human Rights NGO Forum (2009) gives a more practical purpose of the transitional justice processes. It defines the frameworks as 'the pursuit of comprehensive justice during the time of political transition…the development, analysis and practical application of a wide variety of strategies for confronting the legacy of past human rights abuses in order to create a more just and democratic future' (2009:16). Transitional justice in a post-conflict State often claim as an objective, not just the alleviation of tension but the positive 'presence' of justice (Mani, 2009 cited in Rimmer, 2010, p.123).

It can be noted from these diverse definitions that the international human rights law has strongly influenced the development of transitional justice, but, ironically, the framework has invariably prioritised violations of civil and political rights (UN, 2014, p.6). This selective approach has prompted the Office of the UN High Commissioner for Human Rights (OHCHR) to lobby for the recognition of socio-economic and cultural rights in order to properly deal with the root causes of conflict. In 2006, the OHCHR hinted that, 'transitional justice must have the

ambition to assist the transformation of the oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.'

In his 2010 *Guidance Note on the UN Approach to Transitional Justice,* Ban Ki-Moon the former UN Secretary-General underscored the 'centrality of victims in the design and implementation of transitional justice mechanisms…and to… 'strive to ensure that transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights, including social and cultural rights.' The credibility of this blueprint has however been questioned for 'not accounting for indigenous and customary mechanisms of justice that do not espouse' legalistic lens (Vieille, 2011, p.58). Sending (2009) contends that the greatest resource for sustainable peace in the long-term is rooted in the local people and the context. Mateos (no date) also concurs that 'local ownership has become probably one of the most relevant mantras in post-conflict peace building interventions in sub-Saharan Africa.'

The drive to make transitional justice a global project and to judicialise international relations has led the global community to seek truth and accountability through legal frameworks. These include the post-World War II Tokyo and Nuremburg Tribunals, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special courts for Sierra Leone and the International Criminal Court which has assumed universal jurisdiction. From their world survey of 192 countries, between 1979 and 2004, Sikkink and Walling (2006) reveal a significant increase in the judicialisation of world politics. The judicialisation strategies provide a marked departure from what Cobban (2007) calls "self-consciously victim-centric." This new impetus has transformed the transitional justice concept from its narrow scope of jurisprudence to political considerations of developing stable democratic institutions (Hayner, 1995, p. 225).

It is noteworthy that there are other definitions of the transitional justice concept that focus on the set of actors in the processes rather than the substance (Villalba, 2011, p.3). For instance, Arthur (2009), Bratton (2011) and Vieille (2011) define the concept as a 'field' of study.

Arthur (2009, p.324) defines the concept as a field constituted by 'an international web of individuals and institutions whose internal coherence is held together by common concepts, practical aims and distinctive claims for legitimacy' most of which are an expression of dissatisfaction with gross human rights violations.

Bratton (2011) views transitional justice as a field of study which 'emerged as an attempt to systematise knowledge and practice about protecting human rights in the context of transition from authoritarian rule.'

Vieille (2011, p.58) who questions transitional justice's 'colonisation' sincerity embraces the concept as 'a field of study that explores attempts to secure peace and justice and that encompasses the legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict.'

However, Bell (2009, p.6) calls transitional justice a 'label or cloak that aims to rationalise a set of diverse bargains in relation to the past as an integrated endeavour, so as to obscure the quite different normative, moral and political implications of the bargains.' By considering the concept of transitional justice as a 'field,' Bell undermines its nature as a response to the international human rights law's call for the acknowledgement and accountability of past abuses.

In spite of the diversified definitions and controversies, the common denominator is that all transitional justice processes involve a particular set of strategies that seek to account for past human rights violations and international crimes. The concept may have assumed diverse definitions because of its evolution, growth in importance and the diverse contexts in which it is applied. Fischer (2011, p.407) describes the concept's advent as 'the emergence of a paradigm', possibly because of its influence in the processes of prosecution of human rights offenders, truth seeking/fact-finding and documentation, lustration of State officials, recognition and compensation of survivors, institutional reforms, memorialisation, healing and reconciliation.

Thus, transitional justice 'forms an absolutely essential component in every post-conflict peace building process' (Thallinger, 2007 cited in Vieille, 2011, p.59). However, the mechanism is not just a 'simple recipe for dealing with past human rights violations; rather, it is a range of options which require reflection, discussion and difficult choices' (The Zimbabwe Human Rights NGO Forum 2009:17). A post-conflict society's commitment to the principles of truth – seeking, accountability, reparations, institutional reforms and memorials will determine how that society can move from a past of human rights violations to a future of justice, democracy and peace. This scenario exposes the futility of Zimbabwe's blanket amnesty and amnesia approaches since independence; for, a society that chooses a blanket amnesty as its key

transitional justice model, risks negating the principles of institutional reforms and accountability (Villa-Vicencio, 2004, p.14).

Zimbabwe has since independence endured repeated cycles of violence, allegedly orchestrated by the State, but no deliberate efforts have been made to account and deal with this orgy of violence. Henkin (1995 cited in Hansen, 2010, p.55) also advises that, 'even in situations where pardon or clemency might be appropriate, there should be no compromising of the obligation to discover and acknowledge the truth.' Forcing survivors to live with 'silenced memories of horror and fear' make it hard for them 'to put the events behind them and move on' (Eppel, 2005, pp.46-47). Thus, by simply drawing a line between the bad past and the present, blanket amnesties invariably muzzle the truth of atrocities and nurtures impunity. The urgent challenge facing Zimbabwe is to come up with a transitional justice framework that enables victims, perpetrators and other stakeholders to deliberately engage each other to deal with the legacy of violence. To date, Zimbabwe's transitional justice frameworks such as the blanket national reconciliation policy imposed in 1980, the Organ on National Healing and Reconciliation crafted by the Government of National Unity in 2009 and the 2013 (new) constitution's National Peace and Reconciliation Commission sadly miss key words like truth and justice (Eppel, 2013, p.214). This, 'forgive and forget' or 'healing without revealing' approach can mitigate but cannot break the cycle of violence and impunity (Eppel, 2013).

This paper argues that the ouster of President Mugabe in November 2017 provides Zimbabwe an opportunity to seek alternative transitional justice options. The new political dispensation should now seek to engage all relevant stakeholders in dealing with the country's chequered electoral history. Inclusive stakeholder participation is essential in ensuring bottom-up transitional justice models. Bottom-up models have inherent merits such as mutual local ownership and are context-based. The Mnangagwa-led government must transform its appeal for peace, love, unity and forgiveness into action. Having popularised the mantra that, 'the voice of the people is the voice of God,' President Mnangagwa is expected to show political will in ensuring non-recurrence of the country's legacy of violence. His government must not prescribe or control the transitional justice models to be adopted and his call for 'fairness and credibility' in the impending harmonised elections should be matched with meaningful electoral reforms. Zimbabwe needs reforms such as diverse media and a clear electoral roadmap.

1.2 The evolution of the transitional justice concept: theory and practice

The concept of transitional justice is both a contested and evolving process. It is thus essential to explore the evolution of the term and concept of transitional justice because it has become an indispensable toolkit in governance and reform processes in most post-conflict societies (Kenya Human Rights Commission, 2010, p.9). This research embraces Roht-Arriaza's (2006, p.2) working definition of the transitional justice concept as a 'set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.' By holistically embracing issues of justice, truth, accountability, reform, compensation, memorialisation, mercy, forgiveness and reconciliation, 'transitional justice is preoccupied not only with individuals and communities, but also with structures' (Francis, 2006, p.30).

Since conflict has from time immemorial been a fact of life, efforts to deal with its atrocious effects are therefore equally 'very old' (Uprimny and Saffon, 2006, p.2). Bass (2000) traces the history of war crimes tribunals to more than two centuries ago, while Elster (2004) traces the trials and purges to ancient Greece. Even during the Nuremburg Trials, Justice Robert Jackson, the Chief Prosecutor made reference to the book of Genesis (Chapter 4:1-14) in the Old Testament: 'What we propose is to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code' (Linder 2000). What this means is that, since conflict is a fact of life, transitional justice processes have been salient throughout the history of humankind. The need to heal and reconcile wounded societies requires a holistic approach (Francis 2006, p.27). Thus, in dealing with this 'very old problem' of post-conflict transitional justice, some difficult questions have always emerged (Solomon, 1995, p. xxiii; Uprimny and Saffon, 2006, p.2; Helgesen, 2008, p. iii):

1. Can individuals, communities and societies make the choice to transform great suffering into great wisdom?
2. How best can a post-conflict society deal with the painful legacies of its gross human rights violations?
3. Should priority be given to punishing perpetrators in order to combat the culture of impunity?
4. Should a post-conflict society forgive and forget past human rights violations, in order to ensure peace and stability?

These questions are not easy to answer and no particular package can be prescribed to all post-conflict societies willy-nilly. Clark et al., (2009, p.381) concur that, 'transitional justice resembles the minefields it is meant to transcend.' In spite of these seemingly insurmountable challenges, the concept of transitional justice has remained relevant in all post-conflict societies. Clark (2012, p.1) acknowledges that the transitional justice concept has grown from 'being a peripheral concern to a ubiquitous feature of societies recovering from mass conflicts or oppressive rule.'

It is worth probing why the transitional justice concept has grown so rapidly in terms of 'both policy and scholarly realms, with ever increasing variety in terms of practical processes and analytical approaches' (Clark, 2012, p.1) It is debatable whether the term transitional justice 'is just a fashionable neologism that refers to an old phenomenon' or it has transformed over time (Uprimny and Saffon, 2006, p.2).

The popularity, it can be argued, has been a result of 'very important transformation of the framework within which mass atrocities are dealt with,' in terms of balancing peace and justice (Uprimny and Saffon, 2006, p.2). It is this demand of justice paradigm that has given the transitional justice framework the 'specific meaning it nowadays has' (Uprimny and Saffon, 2006, p.2). Clark *et al.,* (2009, p.381) contend that transitional justice is a nascent peace building 'toolkit' yet a 'dynamic field in which key concepts and their bearing upon concrete conflict and post-conflict situations are constantly defined and redefined.' In fact, transitional justice has become an essential component of any liberal peace building operation (Andrieu, 2010, p.3). This confirms Lederach's claims that efforts to confront the past are now 'a permanent feature in post-conflict transitions' (1997, p.27). There is need to deal with the legacy of past human rights violations in order 'to clear the ground in the present for the building of a shared future' (Lederach, 1997, p.27). This proves Lederach's contention that conflict is normal in human relationships**,** hence the need to harness conflict opportunities and use it as an impetus for positive and constructive change.

The literature on transitional justice is also evolving significantly. Andrieu (2010, p.3) notes that from a retributive-premised approach, the current literature has become more conciliatory and restorative. Emphasis is now more focused on healing the victims, better known as survivors, in order to repair relationships, rather than on naming and shaming offenders. The literature also centres on debates such as possible solutions to specific contexts, the need to address the root causes, the role of socio-economic justice, as well as the actors and scope of the framework (Zimbabwe Human Rights Forum, 2014). In fact, 'the rapid development of

transitional justice studies has reached the point at which it is impossible to devise simple characteristics without the risk of simplifying the complex phenomena and processes' (David, 2012, p.762).

Contemporary efforts to reconcile deeply divided and polarised post-conflict societies, transitional justice seem to emphasise both victors' and victims' justice. Francis (2006, p.30) notes that Truth and Reconciliation Commissions which have become the transitional justice processes' 'magic word' and War Crimes Tribunals/ Special Courts have become the preferred 'toolkits' in the search for certificatory justice, truth and reconciliation. It is imperative to trace and explain the origins and development of transitional justice processes and the preferred strategies.

1.2.1 The International Military Tribunal (also known as the Nuremburg Trials)

The precise starting point of the transitional justice phenomenon is contested. In her article, *Transitional Justice Genealogy* (2003), Teitel claims the credit for coining the term 'transitional justice' in 1991. She conveniently categorises the evolution of the transitional justice concept into three overlapping phases, namely: the post-World War II era, the post-Cold War era and the contemporary period. She organises the genealogy along a schematic structure of the development of ideas associated with the three phases. Orentlicher (1991 cited in Vinjamuri and Snyder, 2004) concurs that the Nuremburg Trials inspired the advocacy and scholarship in the study of international war crime tribunals and transitional justice.

Teitel (2003) traces the first phase of her transitional justice genealogy to post-World War I, but acknowledges that the phenomenon became clearer, 'as both extraordinary and international' thereafter. A review of how the victorious Allied powers dealt with the defeated Axis powers is hereby made, in order to assess the post-World War Two International Military Tribunal's influence in the evolution of transitional justice.

The International Military Tribunals are synonymous with the Nuremburg Trials of leading German and Japanese World War II perpetrators charged with violating the laws of war and of committing crimes against humanity (Littell, 1999, p.843; Linder, 2000). These trials have been hailed as the springboard for modern transitional justice processes and a watershed moment in international justice, because they initiated a 'model of accountability focusing on individual responsibility' (Andrieu, 2010, p.4). As acknowledged Tribunal's Chief Judge, Sir Godfrey Lawrence, the trials were 'unique in the annals of jurisprudence' (Linder 2000) because they were 'the first trial in history for crimes against the peace of the world' (Jackson, 1945).

After the six-year Holocaust, in which millions of lives were lost, the world was faced with the challenge of how to seek justice and make sure that such similar crimes were prevented in future (Littell, 1999, p.843*)*. The then USA President, F.D. Roosevelt was the architect of the Tribunals model (Linder, 2000). Roosevelt had to contend with some American hardliners who demanded outright retributive justice (Andrieu, 2010, p.5). Aimed at 'prevention not vengeance,' this legal route eventually earned the support of the USA War Department and Allied Powers (Robert H. Jackson Centre). In his opening statement for the Nuremburg Prosecutions on November 20, 1945, Justice Robert H. Jackson, the Chief Prosecutor underlined that the trials were a correctional and not a punitive measure. He assured:

> The wrongs which we seek to condemn and punish have been so malignant, and so devastating that civilizations cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason (Robert H. Jackson Centre).

The 10-months long Nuremburg Trials were befittingly held at the Palace of Justice in Nuremberg, Germany. Nuremburg was the venue for Hitler's most spectacular annual rallies and the infamous Nuremburg Race Laws of September 15, 1935, which deprived the German Jews of their rights of citizenship and property rights. Moreover, the massive destruction of the City of Nuremburg also bore testimony to the World War II horrors. The symbolic link was, therefore, not merely coincidental.

The initial 22 defendants were Nazi Party officials and high-ranking military personnel, lawyers, doctors and industrialists such as Marshall Hermann Goring, Deputy Fuhrer Rudolf Hess, Hans Frank the 'Slayer of Poles', Field Marshall Wilhelm Keittel, Albert Speer, the Minister of Armaments, the Nazi Party philosopher Alfred Rosenberg, and General Joachim von Ribbentrop (Linder, 2000). They were charged with perpetrating a war of aggression, violating the laws of war and of committing crimes against humanity (Littell, 1999, p.843). The adversarial system with the defence lawyers for the defendants was used. Fuhrer Adolf Hitler, the SS Chief Heinrich Himmler, and the Minister of Propaganda Joseph Goebbels evaded trial by committing suicide. The Nuremburg Trials introduced a cinema screen in the courtroom and enabled survivors to make open testimonies.

The Trials left an indelible mark on the evolution of the transitional justice processes. The model has been criticised as 'the victor's justice' or 'disguised revenge' (Minear 1971, p.19 cited in Andrieu 2010, p.4). The Tokyo Tribunal in particular, has been criticised as a gross 'miscarriage of justice' because the victors could not account for their own actions such as the

atomic bombing of Hiroshima and Nagasaki (Baussiouni 2004 cited in Hazan 2004, p.x). This criticism has been bolstered by the 'disappearance' of the Nuremburg Model during the Cold War era. With the advantage of hindsight, unlike the Vienna and the Versailles peace settlements of 1814-15 and 1919 respectively, the Nuremburg Trials were wary of restorative justice as well as non-recurrence of measures. Arguably, the Nuremburg Trials' quest for restorative justice motivated Willy Brandt, the Chancellor of the Federal Republic of Germany (1969-1974) and winner of the 1971 Nobel Peace Prize to pursue conciliatory policies, which included apologising for World War II atrocities.

1.2.1.1 The Legacy of the International Military Tribunal

The Nuremburg Tribunal, the first one of its kind, was a truly international trial. However, the legal justification for the trials and their innovations were inherently controversial. They were controversial even among those who advocated the trial of key offenders. Harlan Stone, the Chief Justice of the United States Supreme Court initially castigated the proceedings as a 'sanctimonious fraud' and a 'high-grade lynching party' (*Nuremburg Trials* - World War II - HISTORY.com). Even the then United States Supreme Court Justice William O. Douglas blamed the Allies for substituting 'power for principle' (*Nuremburg Trials* - World War II - HISTORY.com).

The emotional magnitude of the Nuremburg Trials may have eclipsed the Tokyo Trials but both were labelled 'the victor's justice' or 'disguised revenge' (Minear, 1971, p.19 cited in Andrieu, 2010, p.4). Radhabinod Pal, an Indian Judge even described the Tokyo Trials as 'little more than a sword in a judge's wig' (Brook, 2001, p.38 cited in Andrieu, 2010, p.4), perhaps because the Americans, who were never made to account for their atomic bombing of Japan's two cities of Hiroshima and Nagasaki, ironically presided over the Tokyo transition. Thus, the 'victors' justice' phenomenon was derived from the fact that the victorious Allies were hard on the defeated Axis Powers and overlooked their own crimes. Given their vantage position, the victors could easily whitewash their misdemeanours. Teitel (2003, p.72) accuses the Allies grandstanding in order to justify their innocence and action against the aggressors. Baussiouni, 2004 cited in Hazan, 2004, x) also raps the Tokyo Tribunal, as a 'miscarriage of justice' for political expedience. Therefore, the Nuremburg Trial model could not be sustained. It 'disappeared from international practice during the Cold War' (Andrieu, 2010, p.4).

However, whatever flaws of the International Military Tribunal in general and the Nuremburg Trials in particular, the framework 'managed to produce something extraordinary' and second to none (Bass, 2000). Bass hails the Nuremburg Trials as 'legalism's greatest moment of glory.'

They had the potential to heal by establishing the truth, educating the public about the nature of the Holocaust and rebuild the future (Bass, 2000). In fact, the Nuremburg Trials have proved to be a milestone in the history of transitional justice (*Nuremburg Trials* - World War II - HISTORY.com). With the motion of 'crime against humanity,' the nullification of the 'I was following orders' defence and the criminal immunity of Heads of States, the Nuremburg Trials shaped the development of international law and justice (Earl, 2009 cited in Andrieu, 2010, p.5). Justice and peace are what Robert Jackson the Chief Prosecutor is credited for. He argued that, 'The world yields no respect for courts that are organized to convict. You don't put man on trial unless you are willing to set him free if he is not proven guilty beyond any reasonable doubt' (Ehrenfreund, 2005).

It is thus noteworthy that the Nuremburg Trials also informed the controversial issues in modern transitional justice such as truth recovery, retributive and restorative justice, apology, repentance, forgiveness, remorse, reconciliation and the need to prevent armed conflicts. This reflects the victory of transitional justice within the 'scheme of international law' (Teitel, 2003, p.70). This internationalisation of the transitional justice concept was therefore an invaluable achievement for humanity.

It can be argued that the Nuremburg Trials were a 'Damascus Experience' to the transitional justice processes in that their revelations directly motivated the newly formed United Nations Organisation (1945) to convene in quick succession, the Convention for the Prevention and Punishment of the Crime of Genocide (1948), the Geneva Convention on Laws and Customs of War (1949), and to adopt the Universal Declaration of Human Rights (1948). The Universal Declaration of Human Rights affirmed the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (preamble). Teitel (2003, p.76) hails the Nuremburg model for defining the rule of law in universal terms. She argues that, 'The profound and permanent significance of the Nuremburg model is that by defining the rule of law in universalizing terms, it has become the standard by which all subsequent transitional justice debates are framed.'

Arguably, the Nuremburg Trials inspired further developments in the modern international human rights law and institutions. Through the African Charter on Human and People's Rights (1981), the Constitutive Act (2000) (which mandates the African Union to intervene in member states to protect civilians from war crimes and gross human rights violations), and the recent African Court on People's Rights (2006), the African Union is trying to sensitize African States on the urgent need to uphold and respect human freedoms and dignity (Heyns and Killander, 2006). The African court of Justice and Human Rights is intended to replace the African Court

on Human and People's rights (AFCHPR). The court is to become the main judicial organ of the African Union and predominant human rights court for the African continent (*NewsDay Zimbabwe,* 2014).

1.2.3 The invention of the term 'transitional justice'

While there seems to be a general consensus that the concept of transitional justice emerged as a separate field of scholarly inquiry at an international level in the late 1980s and early 1990s (Kritz, 1995; Teitel, 2008; Arthur, 2009; Andrieu, 2010), the precise birthday of the term is controversial. Teitel (2008, p.1) who claims to have 'coined the term transitional justice to account for the self- conscious construction of a distinctive conception of justice…' in 1991, traces the first phase of the transitional genealogy to the Nuremberg Trials. Teitel seems to be getting the benefit of doubt, as the starting point lies between the Nuremberg Tribunals (1945) and the post-Cold War in the early 1990s. Arthur (2009, p.329) hints that Teitel may credit the Nuremburg Tribunals as an important moment in the initial growth of the concept of transitional justice, even though none of the actors may have ascribed the same meaning. However, Teitel was part of the 1992 Charter 77 Foundation Conference where the phrase transitional justice was used 'sporadically' (Arthur, 2009, p.324). The Charter 77 Foundation Conference described by its organiser, journalist Alice Henkin, as the 'intellectual framework' was also attended by N.J Kritz of the United States Institute for Peace, who later popularised the term 'transitional justice' in his book *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995). Reporting on the proceedings of this conference, held under the theme, 'Justice in Times of Transition,' Mary Jo Palumbo, the *Boston Herald* journalist used the term 'transitional justice' (Arthur, 2009, p.329).

Arthur (2009, pp.324-225) regards the transitional justice concept as a product of interactions among human rights activists, lawyers, philosophers, policymakers, journalists, donors and political scientists. She explores a series of conferences convened from the late 1980's to the 1990's. These conferences which include the Aspen Institute Conference in 1988, the Charter 77 Foundation Conference of 1992 and the Institute for Democracy Conference of 1994 became the 'founding moment of the field of transitional justice' because they focused on how to deal with an abusive past and justice in times of transition. Since the transitional justice concept is knowledge-based, the participants' diverse backgrounds afforded them the opportunity to compare their experiences, and debate possible options and challenges.

Faced with this 'origin complexity,' Arthur (2009, p.327) has argued that the starting point can be the 'transmission and acceptance of the term transitional justice.' Arthur singles out Kritz, another participant in the 1992 Charter 77 Foundation Conference for making a significant contribution in this regard, through his four-volume compendium entitled: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* in 1995. Thereafter, the use of the term transitional justice progressively grew. Arthur is one of the authors who hail Kritz's compendium as a 'canon on transitional justice literature (2009, p.331). The subtitle, '…. *How emerging democracies reckon with former regimes* has become an instant catch phrase which makes it easy to consider transitional processes, such as prosecution and the controversies abound. Kritz has however been accused of presenting transitional justice as deeply enmeshed with political problems that were legal-institutional and relatively short-term in nature, instead of coming to terms with historical complexities (Ash, 1998 cited in Arthur, 2009, pp.331-332).

Arthur contends that the term 'transitional justice' was 'invented as a device to signal a new sort of human rights activity and as a response to concrete political dilemmas human rights activists faced in what they understood to be 'transitional' contexts' (2009, p.326). She hails this as a turning point in the shift from 'naming and shaming' to accountability for past human rights abuses at international level (2009, p.321). The notion of transitional justice crystallised due to debates on how to deal with human rights violators Teitel, 2010, p.1). In the current global phase of transitional justice, the increasing involvement of non-state actors and the turn to law to regulate violence has intensified debates regarding issues of accountability and impunity (Teitel, 2010, p.1). Even the purpose of transitional justice now goes beyond state building, to include issues of 'human peace and human security' (Teitel, 2010, p.2). The debates also tend to concur that restorative justice is more enduring than retributive justice.

1.2.4 Globalised tribunals: International Criminal Tribunals for former Yugoslavia, International Criminal Tribunals for Rwanda and the International Criminal Court

Notwithstanding the alleged merits, the Nuremburg Model was subdued by the Cold War and the bipolar balance of power politics which ended with the demise of Soviet Union in 1990 (Andrieu, 2010, p.5). This post-Cold War era, described by Roht-Arriaza as the 'age of human rights' (Burt, foreword in Teitel, 2010) has been hailed as the defining moment of the evolution of the transitional justice phenomenon (Kritz, 1995; Arthur, 2009; Hansen, 2010; Teitel, 2010; Hinton, 2013). The democratic transitions of most Latin American, East and Central European

nations grappling with traumatic legacies of autocratic regimes in the late 1980s can be hailed as a springboard in the development of transitional justice processes. The post-Cold War 'new world order,' witnessed the proliferation of criminal tribunals, commissions of inquiry, reparations and memorialisation efforts, and institutional reforms as fashionable practices in dealing with past human rights abuses (Arthur, 2009, p.328; Hinton, 2013, pp.87-88).

The post-Cold War era has been hailed as a milestone in the development of the transitional justice phenomenon. Teitel (2010) categorises this era as her 'phase two' of the transitional justice genealogy. With more actors, mainly from the civil society, now involved, the new transitional justice frameworks moved beyond trials and retributive justice, in favour of more comprehensive frameworks, such as truth commissions, which considered how to heal and reconcile a post-conflict society (Teitel, 2003, pp.75-77). The truth commission mechanism which was first used in Argentina in 1983, was characterised by the adoption of a broader amnesty policy and forgiveness (Teitel, 2003, pp.77-82).

The post-Cold War era also described as the 'third wave of transition' (Huntington cited in Teitel, 2003, p.75), was associated with political democratisation. The 'what is to be done?' challenge in the post-Cold War era shows a significant paradigm shift from the Nuremberg Trials' value in punishment of perpetrators, to tension between the legal demands of justice and the political need for peace (Uprimny and Saffon, 2006, pp.14-15). Uprimny and Saffon prefer to describe the post-Cold War transitions as a 'transitional justice paradigm' because the need to achieve peace and justice became evident. Thus, the demand for peace and justice is the 'need which gives specificity to the phenomenon of transitional justice' (Uprimny and Saffon, 2006, p.15).

Teitel (2003) has defined her 'phase three' of the transitional justice genealogy as the contemporary processes. This 'steady-state transitional justice,' as Teitel refers to it, is epitomised by the International Criminal Court (ICC). The ICC symbolises the entrenchment of the Nuremburg Trials model, in that it is an international tribunal mandated to prosecute war crimes, genocide and crimes against humanity (Teitel, 2003, p.90).

1.2.4.1 International Criminal Tribunals for Former Yugoslavia and for Rwanda

The UN created International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1995 respectively, using the Nuremburg Model. These *ad hoc* tribunals also aimed to end impunity, moralise international affairs and create a link between peace and justice (Andrieu 2010, p.6). This new form of 'international judicial intervention' has been hailed as

the birth of 'a shiny new hammer in the civilised world's box of foreign policy tools' (Scheffer, 1996 cited in Andrieu 2010, p.6).

Both *ad hoc* tribunals have contributed to the advancement of international law, with regard to the definitions of rape as a crime of war, genocide and crimes against humanity (Journal of International Criminal Justice 2004 cited in Andrieu, 2010, p.5). The prosecution of Milosevic and fellow perpetrators in former Yugoslavia and Jean Kambanda, the former Rwandan Prime Minister, bear testimony to the fact that there should be no sacred cows in international law.

1.2.4.2 The International Criminal Court

The creation of the ICC in July 2002 can be hailed as a milestone achievement in the evolution of transitional justice processes. Bassiouni (1998 cited in *The Associated Press,* 2016), called it 'a triumph for all peoples of the world.' Human rights' groups celebrate the ICC 'as the best means of pursuing perpetrators of the world's worst atrocities' (Torchia, 2016). As noted in chapter 7, the creation of a regime of reparations to victims in Article 75 of the Rome Statute of the ICC has been hailed as a milestone development in transitional justice (McCarthy, 2009). It is plausible to note that, 'today more than ever, there is a huge need for universal justice' (Kaba, 2016 cited in *News24,* 2016).

The roots of the ICC can be traced directly back to the Nuremburg Tribunal. The ICC is, however, unique in that it is the first 'international judicial tribunal tasked with a global jurisdiction to investigate and prosecute war crimes, crimes against humanity, and acts of genocide committed on the territories of its member states or by individuals, or whenever asked by the UN Security Council' (Kaye, 2011, p. 121). In sum, this 124-member 'court of last resort' is entrusted with prosecuting the world's worst atrocities categorised as: 'genocide, crimes against humanity, crimes of aggression and war crimes' (Vaselinovic and Park, 2016, p.1). Africa has the largest membership of 34.

By and large, the ICC's potential to deter atrocious crimes committed by 'anyone anywhere in the world' against humanity and its possible role in securing global peace and justice are commendable (Kastner, 2010, p.131). The ICC's instant impact made it an 'indispensable international player' in peacebuilding (Kaye, 2011, p.118). Issuing warrants of arrest to five leaders of the Lord's Resistance Army rebels on allegations of crimes against humanity and war crimes committed in Northern Uganda on October 13, 2005 was commendable, partly because the conflict was one of Africa's longest and most brutal armed civil conflicts (Ssenyonjo, 2007). The initiative boosted the ICC human rights protection image.

Therefore, the advent of the ICC as the universal 'supreme court,' has allegedly added new impetus to global peace building endeavours (Ero and Khadiagla, 2013). Equally assuring are the three ways in which cases would be brought to it:

- referral by a member state, of any crime within its jurisdiction;
- referral by the United Nations' Security Council via the ICC's office of the Prosecutor; or,
- at the initiation of the latter, after some meticulous homework.

The ICC has however, been hamstrung by inherent structural and legal defects such as lack of the UN Security Council's unequivocal backing and the absence of subpoena powers in respect of signatories. As a result, fourteen years later, the ICC 'is still struggling to find its footing' (Kaye, 2011, p.118).

The UN Security Council's lukewarm backing of the ICC is a big setback to the Court's jurisdiction. The non-membership of USA, China and Russia, the three of the five UN Security Council permanent members, for whatever reasons, is conspicuous, especially at a time when Africa's call for the reform of the UN gains momentum. Arguably, USA, China, Russia and other countries have not ratified the ICC Statute for fear that they could be prosecuted for their past, present or future transgressions. China and Russia even vetoed a UN resolution to refer the brutal Syrian civil war to the ICC in May 2014. Other notable absentees are Israel and India. This lack of total and 'unequivocal backing' makes the ICC authority look inherently fragile. This is a big drawback to peacebuilding given that the effectiveness of the ICC depends on the funding and judicial cooperation of member states. This is equally important given that the ICC can only act when national courts are either 'unable' or 'unwilling' to preside over the cases (Kaye, 2011:122). Burundi, the first country to announce its intention to pull out of the ICC is a case in point. Yet, in Burundi, local democratic spaces have been closed. The embattled President Nkurunziza has since April 2015, killed at least a thousand people and displaced 300,000 who opposed his unlawful third term bid (McCann, 2016).

The continued absence of the USA, in particular has been described by Qualman (1999, p.16) as 'a very troubling fly in the ointment.' Ironically, the US signed the Rome Statute but never ratified it. America's 'cast-in-iron' demands that her service members and agents should 'never be hauled before the Court for crimes committed on official duty' exposes the ICC. Lip service support to the ICC is not an adequate resource in moulding it into a powerful 'vehicle for justice and deterrence' (Qualman, 1999, p.17).

In sum, the ICC has been accused of allowing 'non-member states to dictate and interfere with its work to suit their own imperialist agendas' (Trochia, 2016). Unity of purpose is, therefore, necessary in making the ICC permanent and capable of trying perpetrators where national courts are either unable or unwilling to deliver justice. According to Boven (2016 cited in *The Associated Press,* 2016), 'It would be helpful indeed if major powers…would join and contribute to the representative character of a judicial institution that is standing for universal values of an imperative nature.'

This structural defect frustrates the victims and 'feeds into African discontent' (*The Associated Press,* 2016). Peace and justice remain elusive, as perpetrators capitalise on these sustained structural defects. The ICC should learn from such mistakes and move on.

The permanent structural absence of subpoena powers in the ICC legal framework is another great threat to its effective functioning. Subpoena powers are imperative in fact-finding and rapport with witnesses. Lack of such an instrument implies that appearance is voluntary. This is problematic because the ICC has to literally beg witnesses to testify before it. Sluiter (2009:590) contends that since 'the absence of subpoena powers even entails under the Statute, a non-derogable right for witnesses not to appear at the Court,' both the quality of the administration of justice and the accused's right to a fair trial are seriously jeopardised. The concern here is that when the 'decision-maker is not directly confronted with a witness or when testimony becomes too much, the subject of negotiations,' the quality of fact-finding gets seriously compromised (Sluiter, 2009, p. 607).

Allegations of threats to witnesses, bribery and non-state co-operation forced the ICC to drop investigations in Kenya where the President and his deputy were indicted on charges of crimes against humanity in the post-2007 election. This example reveals how inadequate the ICC may be in actually prosecuting human rights' abuses according to its mandate. The allegations that the ICC has tended to focus on African human rights' abuses and ignored other countries' histories of abuse, whether America or Israel as examples, has implied that it is perceived as being biased in favour of condemning only African human rights' abuses. This is a huge weakness in the ICC which should have a global reach.

Global cooperation is a top priority in promoting world peace and security. The international community must support the ICC's enforcement of the international criminal law since it depends on State authorities for arresting and transferring suspects, witnesses, evidence and intelligence. As witnessed in the Omar al-Bashir case, relying on member states to arrest

fugitives is problematic because there is no enforcement mechanism (Safodien, 2016). This is a serious defect in the ability of the ICC to operate successfully.

Kaye (2011, p.122) bemoans a situation where the ICC has to prosecute 'international crimes in countries where conflict is ongoing or against sitting heads of state…' The task becomes difficult because it involves violation of the principle of non-interference in sovereign states. As mentioned previously, the Ugandan case study deserves mention. Upon President Museveni's request, the ICC issued warrants of arrest to the LRA rebel leadership on October 13, 2005. Although this was ostensibly a sign of the ICC's ability to succeed, regrettably, before the warrants were executed, Museveni withdrew the request and granted the rebels a 'total amnesty' in July 2006 (Ssenyonjo, 2007, p.686). The outcome did not only damage the image of the ICC, but also failed to abate the Ugandan hostilities. Interestingly, Museveni has since dismissed the ICC as 'useless' and is agitating for mass African exodus from the court (Safodien, 2016, p.2).

1.2.4.3 ICC-African Relations: Is Africa unfairly targeted?

As mentioned previously, the ICC has been criticised, mainly by African States, as 'a Western institution that can only offer one type of selective and retributive justice' (Kastner, 2010, pp.131-132). African leaders complain that at least 30 Western countries have committed crimes that warrant ICC prosecution, including crimes committed against African refugees and immigrants (Bojang, 2016 cited in *Reuters,* 2016). The former British Prime Minister, Blair, has been singled out as an ICC candidate due to his direct involvement in the Iraq atrocities. It seems obvious that a certain level of hypocrisy abounds if, of the 10 full-scale human rights violations investigations underway, 9 have been in Africa and only one in the former Soviet Republic of Georgia. The Court has indicted 39 Africans since 2005. The ICC has so far convicted only four perpetrators of war crimes and crimes against humanity. One is from Mali and three from Congo (*The Associated Press,* 2016). This alleged bias has seriously compromised the ICC's legitimacy. Kastner (2010, p.132) recalls that, '…since the issuance of an arrest warrant against Sudanese President, Omar Al-Bashir, in March 2009, the ICC has increasingly been perceived as a court for Africa.' The African Union has embraced this perception as evidenced by its Commissioner Jean Peang's remark that, '…there is a problem with the ICC targeting only Africans…' (Kastner, 2010, p.132). The victimhood card has regrettably become the African leadership's anti-ICC compliance trump card, yet most human rights violations in Africa have been referred to the ICC by Africans (Kaba, 2016 cited in

News24, 2016). In fact, Africa and the UNSC have referred six and two cases respectively to the ICC.

Rwanda's liberator-turned-dictator, President Kagame's denigration of the ICC as part of neo-colonialism, seems to be an argument that is gaining credibility amongst the African leaders (*Diplomat News Network,* 2015). The AU's official position on the ICC has been confirmed by its former Chairperson, President Mugabe's remarks that Africans are '… duly concerned about the activities of the International Court which seems to exist only for alleged offenders…the majority of them Africans…. (Eppel, 2013, p.216).

The possible mass exodus by the 34 African member-states to the ICC can be explained partly in terms of the ICC's perceived bias against Africans and partly as Africans' effort to cover up their 'lamentable human rights record' (Ofeibea, 2016 cited in Hersher, 2016). African states have, both as individuals and as the AU raised the 'undue victimisation' concerns by the ICC which they have labelled 'an International Caucasian Court for the persecution of people of colour, especially Africans' (Hersher, 2016).

The AU's unspecified strategy to collectively withdraw from the ICC in the wake of Burundi, South Africa, Kenya, Namibia and Gambia's threats to leave the ICC in 2016 is regrettable (*Reuters,* 2017). The threats can trigger far-reaching effects on the ICC and global security. Fatou Bensouda the reigning ICC Chief Prosecutor and former Gambian justice minister, has, however, dismissed the withdrawal threats as mere gunboat diplomacy (*Reuters,* 2017). The new political dispensation in Gambia has reversed the threats while the ANC's notice of South Africa's intention has been nullified by the South African High Court.

It is easy to blame the withdrawal motives as part of the 'big brother syndrome,' which sees no evil, hears no evil and speaks no evil against a fellow African leader. The embattled Sudanese President Al-Bashir's controversial attendance and unceremonious exit from the 25th AU Ordinary Summit in Pretoria in 2015 is a case in point. The governing ANC's noncompliance on the basis of safeguarding its Diplomatic Immunities and Privileges Act demonstrates the claim that African leaders and the civil society organisations may agree on the need for accountability, but differ significantly on methodologies to achieve it (Wielenga, 2015).

The AU's solidarity with Al-Bashir indicted for war crimes, crimes against humanity and genocide in Darfur is indeed a big drawback in the pursuit of peace and justice (Masombuka and Savides, 2015, p.1-2). The AU position that Al-Bashir, the first person to be charged for genocide by the ICC, is 'innocent' after allegedly killing 300 000 and displacing 2, 5 million

in Sudan since 2003 is disturbing (UN). Justice should be sought regardless of the fact that many nations are guilty of human rights' abuses elsewhere.

The AU-ICC row has ostensibly dampened the prospects of constitutionalism and the rule of law in Africa. President Zuma's double standards of unilaterally guaranteeing immunity to Al-Bashir coupled with Mugabe's (then AU Chair) indefensible claim that, '… we don't subject ourselves to justice outside our borders' has been condemned by Amnesty International as a shocking failure to abide by our own courts' order and 'a betrayal of the victims of the Darfur conflict' (Evans and du Plessis, 2015).

The call for the formation of Africa's 'own ICC' (Share, 2015), mandated to prosecute global human rights' violation cases backdating to the colonial era can be viewed as an alibi to embolden the AU's threats to pull out of the ICC and the UN. He has his own fears; his long reign has allegedly been tainted with gross human rights abuses ranging from the *Gukurahundi* Massacres to systematic political violence (Tshuma, 2015). These gross human rights violations warrant ICC indictment. In fact, the same African leaders calling for a wholesale ICC and UN pull out in favour of an African Court are also non-members of the SADC tribunal established in Burkina Faso in 1998. To date, 40 out of 54 AU member states including Zimbabwe are yet to ratify this hyped tribunal.

1.2.4.4 The ICC and the way forward

The relevance of the ICC is unquestionable, for 'Today more than ever, there is a huge need for universal justice' (Kaba, 2016 cited *News24,* 2016). In fact, 'If the world is to become a fairer, more compassionate, tolerant and peaceful place, it needs institutions such as the International Criminal Court to hold those who abuse power to account' (Desmond and Leah Tutu Legacy Foundation, 2015). Powerful nations may have erred by creating precedence that contempt of the ICC is an option, but this cannot license human rights' violations and impunity. An equitable and functioning ICC can never be achieved by joining or emulating its prime violators, but by abiding by its cause and objectives. Withdrawing from 'the court of last resort' is a big drawback. Without credible domestic structures to safeguard constitutionalism and the rule of law, the ICC remains the last line of defence. Dialogue must therefore, be given a chance; the UN must engage all ICC stakeholders and work on its inherent defects. I contend that since withdrawal would put premium on impunity, the AU must push for the ICC reform.

An examination of the ICC-African relations can necessitate reforms for the common good (Sharf, 2016 cited in *The Associated Press,* 2016). Africa's wholesale ICC withdrawal will

certainly threaten global peace. Withdrawal poses a threat to one of the greatest achievements in pursuit of justice and peace, at a time when genocide, crimes against humanity, war crimes and impunity have become so highly probable (*The Associated Press, 2016*). Despite its defects, the ICC is currently the better alternative. Appendix 3 shows the ICC inductees since 2005.

1.3 Conclusion

Transitional justice has become the all-encompassing processes that seek to deal with the wrongs of any post-conflict community. The main objective of transitional justice processes is to face legacies of abuse in a broad and holistic manner. These encompass retributive, restorative, social, and economic justice. Tracing the origins of the concept of transitional justice from the Vienna Settlement of 1814-15 to date shows that the concept has been refined over the years, but no single tool can assume the master status. It is the local context that must determine which tool, when and how to apply it. Even the post-World War II Nuremburg Trials which crystallised the term have been criticised as the 'Victor's justice.' Therefore, the issue of local context and local ownership of peace building process is a strong factor in transitional justice processes. While the UN has been conscious about the local inputs, the ICC has faced stiff resistance mainly from African leaders who feel targeted and victimised; the concept of transitional justice can no longer be re-invented but needs modifications, as determined by the context. The emergence of diverse transitional justice methodologies such as judicial and non-judicial trials bears testimony that the evolution of this contested concept is ongoing.

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