



Beyond Juba

Building Consensus on
Sustainable Peace in Uganda

The
Distinguished Lecture
Series

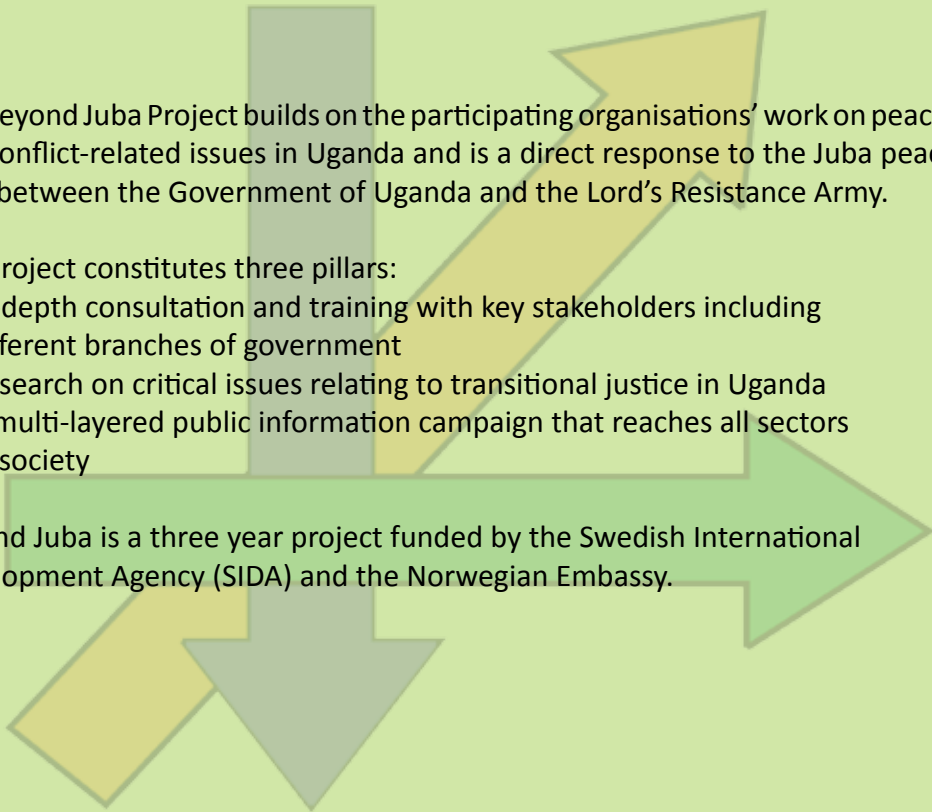


Traditional Justice as an Instrument in Peace Building

A Lecture by Yasmin Sooka formerly of the
Truth and Reconciliation Commission in South Africa
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Beyond Juba

A transitional justice project of
the Faculty of Law, Makerere University,
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the Human Rights & Peace Centre



The Beyond Juba Project builds on the participating organisations' work on peace- and conflict-related issues in Uganda and is a direct response to the Juba peace talks between the Government of Uganda and the Lord's Resistance Army.

The project constitutes three pillars:

- In-depth consultation and training with key stakeholders including different branches of government
- Research on critical issues relating to transitional justice in Uganda
- A multi-layered public information campaign that reaches all sectors of society

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On 28 January 2009 Yasmin Sooka spoke at the Faculty of Law, Makerere University on transitional justice as an instrument of peace building. She is the director of the Foundation for Human Rights in South Africa. She was a member of the Truth and Reconciliation Commission in South Africa and also appointed by the Office of the High Commissioner for Human Rights to be one of the three international commissioners on the Truth and Reconciliation Commission for Sierra Leone. Her lecture reads as follows:

I would like to thank the Refugee Law Project and the University of Makerere for inviting me to deliver this lecture on one of the most important issues of our time: Peace and Justice in transitional societies.

The topic which I have been asked to address is “Whether Truth and Reconciliation Bodies deliver?”

This is a profound question and one I would venture to say the field of transitional justice is grappling with. However, in order to respond in a meaningful way, it is necessary to explore the context in which this field has grown.

In our own continent Africa, over the last decade, we have witnessed an unprecedented rise in conflicts leading to millions of human casualties and atrocities that have been committed. At last count, more than 9.2 million people of which more than 70 percent have been civilians including women and children. In addition, millions more have been displaced and have become refugees. Citizens in Africa might be forgiven for wondering what they have done to deserve the savagery and violence, displacement, poverty and hunger which seem to be their daily lot. For us Africans, ending the violence and restoring lasting peace to our countries remains imperative.

In order to bring an end to the violent conflict and achieve peace, we are required to make choices which compel us to deal with the merchants of death, killers and war lords responsible for the violence. We are required to find solutions which bring peace but do not undermine the peace process and destabilize the country. At the same time we are morally and legally bound to preserve the potential for accountability in order to build a lasting democracy.

The harm that victims have suffered demand justice: Not to punish those who commit heinous crimes is morally repugnant and offends the standards of justice that we have tried to build since Nuremberg and Tokyo. The conflicts on our continent are a living testament to the fact that ignoring violations and letting leaders off the hook has led to growing impunity.

In recent times however there are many who argue that the imperatives of peace require that notions of justice and accountability should be set aside in favour of peace. Peace and justice are juxtaposed as if they are mutually exclusive options instead of being mutually reinforcing. Human rights activists argue that the experiences of the last twenty years have demonstrated that Justice must be pursued simultaneously even where the peace is fragile. Those who argue this view have often been called ‘spoilers’, responsible for prolonging the violence and standing accused of not accepting the reality of the political context and the constraints which exist at the time of the transition.

In reality, ignoring accountability and justice lead to a deepening of impunity given that where a perception exists that past injustices will not be dealt with the violence usually recurs again.

Transitional justice is usually defined as the political choices made by states in transition on how to deal with those who have been responsible for the commission of serious crimes during the years of the past regime. However, since the first Truth Commissions in Latin America, there is a growing acknowledgement that Transitional Justice has become a comprehensive tool for transitional and post-conflict societies to achieve not only lasting peace and justice but offers the opportunity for a return to the Rule of Law and Democracy.

Crucial questions which confront transitional states are:

The Balance of Power — How does the new state hold accountable those who are most responsible for the most egregious violations, particularly if they are part of the negotiations and the transitional structure and still hold power? How do you handle the fact that those responsible for the most egregious violations main remain outside of the peace process? How important is it for them to be there? For example, in recent times of leaving Hamas out of any peace discussions is a case in point. In the case of the LRA, the use of interlocutors raises the question of the issues are conveyed to a key stakeholder in the process.

Who exactly does the new state hold accountable? This question has vexed many, does one hold both sides accountable even where the one party the state ruling at the moment. In terms of international law, states have a greater obligation than non-state actors to abide the tenets of the international law. Even at Nuremberg, the Allies were criticized for exercising victor's justice. Many argue that the bombing of Dresden should have been considered a war crime.

What crimes should be punished? How deep does one drill down? How do you deal with the democratic deficit — in Sierra Leone, the Court only considered 'those who bore the greatest responsibility'? Who determines this — what checks and balances exist.

Are there a set of norms which can be applied in most circumstances? The debates between Carl Nino and Diane Orentlicher in the 1990's on whether a norm exists are really the beginning of the transitional justice debate.

Also 'transitional to what?' 'When does the transitional begin and when does it end?'

Is an end to the conflict enough? Transitional justice practitioners have borrowed from the field of conflict resolution: Conflict resolution practitioners point to the difference between 'negative' peace and 'positive' peace. 'Positive' peace points to lasting solutions which address the root causes of conflict and also seek to ensure that the conflict does not occur again with real democracy being the objective of positive peace. 'Negative' peace only secures an end to the immediate violence, does not address the root causes of the violence and does not provide lasting and endurable solutions to ensure that the conflict does not arise again. It only creates a democratic deficit which permits old divisions and tensions to flare up again.

Since Nuremberg, the dominant discourse in the legal world has been that the only appropriate response to serious human rights violations is the criminal justice option. Most legal scholars would argue that a state is obliged to punish and to hold accountable those who committed human rights violations, irrespective of whether they have the political power or the legal ability to do so. This is based on the notion that a state has the power to do so and so must comply with its legal obligations. Of course the reality for most transitional societies is that the government may not be able to do so. Attempting to deal with perpetrators and the military may result in a destabilization of that society or the removal of the government from power. This

fragility has characterised most transitional governments. In the case of Argentina, the government of President Allende was compelled to halt the trials of the military in order to avoid the destabilization of the country. Chile too found once the work of the Truth Commission was over that it could not prosecute the military. The experiences of Latin America and Eastern Europe in the nineties confronted us with the question: whether prosecutions were always possible, given the role that the powerful continue to hold in the new society. Former President Mandela once stated that had he chosen to institute Nuremberg style trials that he would not have been surprised to find his residence surrounded by the former white military.

International law has evolved with the emerging norm being: that crime against humanity, war crimes and genocide cannot go unpunished. This principle has been ratified by human rights treaty bodies, international courts and many other authoritative organs. The establishment of the international criminal court codifies and strengthens this position. Blanket amnesties for crimes against humanity, war crimes and genocide are a thing of the past. There can no longer be amnesty for these crimes as Charles Taylor and Radovan Karadzic can attest to.

Given the challenges faced by transitional societies, what then should any transitional justice measure seek to achieve? Pepe Zalaquett the Chilean human rights lawyer has said that any policy to deal with past human rights abuses should have two overall objectives:

To prevent the recurrence of such abuses and to repair the damage caused to the extent possible. Pepe argues that whatever policy is put into practice to address human rights violations that have taken place in the past, a new government will need to keep in mind the larger objective which is aimed at achieving the following:

- *a measure of national unity and reconciliation particularly when the human rights violations of the past took place in a context of extreme political polarization and civil strife including forms of armed struggle; this goal he termed the ‘depolarization of society’*
- *the rebuilding or reconstruction of institutions that are conducive to a stable and fair political system.*
- *The procurement of the economic resources needed to achieve those ends, particularly when the transition period is marked by fragility and when a measure of economic stability is instrumental for political stability.*

Pepe at the time also outlined the conditions and principles that needed to exist for the legitimacy of the transitional policy. These included the following:

- *The truth must be known*
- *The truth must be officially proclaimed, acknowledged and publicly exposed*
- *The policy must represent the will of the people and*
- *The policy must not violate international law related to human rights*
- *The policy must include reparative measures such as compensation for victims and their families, symbolic reparations, a public acknowledgement by the perpetrators of the deeds committed*

- *The policy should ensure that a framework for 'preventive measures' is also put in place*

In responding to the challenges that transitional societies face, transitional justice practitioners argue for a holistic approach: a comprehensive transitional package will encompass an accountability mechanism in the form of a truth commission and/or a judicial mechanism for prosecutions, often both mechanism existing side by side, vetting, security sector reform, demobilization, disarmament and reintegration programmes, institutional reform programmes, reparations and a focus on memorialization.

It is important to note at the outset that a truth commission is not intended to be a substitute for a criminal justice option but rather one mechanism in panoply of measures which are appropriate to a particular context. In this regard, the local conditions and context are key factors that must be taken into account in deciding on what mechanism or mechanisms are appropriate. One should learn from other experiences but not replicate without taking onto account the local context.

Having set out the prevailing norms, it is important to highlight that post-conflict societies require imaginative strategies which taken into account the post-conflict reconstruction. The current High Commissioner for Human Rights Judge Navi Pillay argues that we should not become complacent about the strategies for post-conflict justice. Pillay argues that where societies are destroyed by cataclysmic war and mass crimes, while prosecutions are one mechanism to deal with the individual crimes, in the aftermath of war there is a great moral vacuum which the law alone cannot fill. The root causes of the conflict are not exposed, a historical record of the events is not made, the interests and concerns of the victims and indeed their active participation is not addressed; issues such as the effects of violence against women, reparations, rehabilitation, the use of alternate and local forms of justice and the influence of social-economic factors do not get sufficient attention.

This is of course where Truth and Reconciliation Commissions can play an important role. Truth Commissions have been a successful model to investigate human rights violations that have taken place during the conflict, they have had the possibility of exploring the root causes and antecedents to the conflict, and they have taken statements and also offered victims and perpetrators the opportunity to unburden themselves. Truth Commissions in many countries have compiled databases on the basis of which they have compiled reports in which they have made findings of responsibility, have named perpetrators and have compiled the testimonies of victims and have also made recommendations in respect of institutional reform and reparations for victims. They have dealt with memorialisation and, disappearances. However, one of the most crucial roles is dealing with the mythology of lies. In both South Africa and Sierra Leone, the reports of the Truth Commission successively put to bed the myths that had been perpetuated by the former states. South Africa building on the experiences of Latin America chose to establish a truth commission to deal with past abuses and to enforce the conditional amnesty which involved a truth for amnesty exchange. The success of the South African model is the fact that it neutralized the rightwing and the military and gave South Africa the opportunity to move towards the restoration of democracy and the rule of law. This would not have been possible without the truth commission. The Commission also dealt a blow to the lies and mythology that the former government had propagated. In South Africa, the former state was declared a criminal state engaging in state sponsored terror against any person labelled an opponent of the state. At the same time it provided an opportunity for accountability. A major feature of the South African process was the openness and the commitment to transparency that the Commission adopted.

Sierra Leone following on the South African example also established a truth commission modelled on the South African Version. In the case of Sierra Leone, during the peace process, the UN had instructed their representative to enter a reservation on the Lome Peace Accord which prohibited amnesties for crimes against

humanity and genocide. Later when the peace agreement was violated, the government of President Kabbah was able to use this clause and request the Security Council to assist it with establishing a mechanism to prosecute those responsible for the violence in Sierra Leone. Sierra Leone had one of the most unique experiences of a post conflict country: a truth commission and a special court operating side by side. At the time when the Special Court issued the indictment for Charles Taylor many argued that this would destabilise both Sierra Leone and Liberia. There is no doubt that while many had doubts about the indictment, it had positive impact in creating pressure on African leadership to ensure that Charles Taylor was taken out of the political equation. His subsequent arrest and transfer to the Special Court while causing waves did not lead to any undue violence in the West African region. This was a test for accountability. Of course questions have been raised about the appropriateness of removing him to the Hague given that the vast majority of his victims are in the region. That however is another matter. In the case of Sierra Leone, the Commission found that a history of bad governance and successive corrupt governments had led to alienation and disillusionment by ordinary citizenship those who govern leading to many youth joining the RUF. It also dispelled the notion that the RUF was responsible for the 1999 invasion of Freetown but found that the AFRC had mainly been responsible. It also found that the silent crime of sexual violence against girls and women was the main violation rather than the amputations which had been so visible in most reports in the conflict.

In South Africa today, like Latin America, the fight against impunity and the quest for the truth continues. Demonstrating that peace building is a lifetime's work.

In determining the success of a truth seeking body, I argue that the process is as important as the final product. The link between truth as a product of a truth commission and truth seeking as a process that takes place through the dialogue on what is appropriate, statement taking, public hearings, investigations, report writing, findings and discussions on the recommendations. These tasks are not apolitical in function but contribute to the 'technology of truth' a process of active engagement which ultimately leads to what we call a filtered truth. Albie Sachs, the South Africa Constitutional Court judge in his writings has determined four different kinds of truths: juridical truth, social, diagnostic and forensic truth. If one was to dig deeper, we would probably define more categories of truth. Neither truth nor reconciliation is neat parcels which can be handed over to the nation. Rather they are profound experiences in which a nation is compelled to confront its painful history, compiling a shared narrative on which a new future can be built. In this regard, public participation in the process leading up to the draft law and the establishment of such a body is crucial. Ensuring that the rights of victims are preserved and that they receive reparations is one gauge of how effective a Truth Commission is. It is important to articulate from bitter experience that this is not a cozy or comfortable process. It is ugly and messy and is traumatic. Unlike the slogans that are created which speak to the 'truth setting one free' it is the beginning of a long journey which the individuals and nation walks.

This macro-level idea of "the greater good" is perhaps the fundamental notion underpinning the TRC process.

It is therefore my view that proper evaluation of the efficacy of various transitional justice mechanisms in South Africa (and perhaps elsewhere in the world), must be situated within the specific context of the questions raised by Pepe Zalaquett:

To prevent the recurrence of such abuses

To repair the damage caused to the extent possible. The larger objective which is aimed at achieving the following:

- *A measure of national unity and reconciliation particularly when the human rights violations of the past took place in a context of extreme political polarization and civil strife including forms of armed struggle; this goal he termed the 'depolarization of society'*
- *The rebuilding or reconstruction of institutions that are conducive to a stable and fair political system*
- *The procurement of the economic resources needed to achieve those ends, particularly when the transition period is marked by fragility and when a measure of economic stability is instrumental for political stability.*

This of course presents a key challenge for the agenda of transformation, particularly of inherited criminal justice institutions operating under such circumstances in a new democracy. Indeed, this perspective demands that we genuinely shift the debates on transitional justice from an exclusively retrospective scrutiny of past injustices (important as this is), to a strategic and proactive engagement with the challenges that face justice institutions in newly emerging democracies- where patterns of violence and social conflict change rather than simply ending through political settlements and where the lines of social cleavage that lie at the heart of such historical violence are redefined rather than simply staying the same.

Such an approach demands an engagement both with the past and with the future and it insists not only on a scrutiny of justice in transition, but of violence in transition as well.

*The growing global enthusiasm for truth commissions represents a reassertion of not merely the possibility, but also the profound political importance, of the idea of objective historical truth as a route to conflict resolution or restorative justice in societies emerging from authoritarian and violent pasts. This is placed in context by Felipe Fernandez-Armesto in his book *Truth: A History and a Guide for the Perplexed* (London, 1998) when he laments that "trapped between fundamentalists who believe they have found truth, and relativists who refuse to pin it down, the bewildered majority in between continues to hope there is a truth worth looking for, without knowing how to go about it or how to answer the voices from either extreme."*

The weakness of Truth Seeking bodies has been in the implementation of the recommendations and the dissemination of the final report. Indeed Uganda is no stranger to this issue having had two commissions where the access to the reports was fairly restricted. Government itself played a role in endeavouring to ensure that the reports did not see the light of the day.

There have been truth commissions in Nigeria, Ghana and now in Liberia. The Liberian Commission has been fraught with internal schisms which have threatened to destabilize its work completely. It has also indicated that it intends to recommend the establishment of war crimes tribunal or chamber. The flurry of emails on this point is interesting as it underscores the complexity of the issues in a fragile post-conflict situation.

It is however the situation in Uganda which has really brought to the fore the debate around which comes first peace or justice and whether there should be sequencing if we desire accountability. The referral by the Ugandan government of the LRA to the ICC and the subsequent indictments of the LRA leadership has raised the question of whether the indictments are likely to be helpful to the peace process. The establishment of a War Crimes Chamber by the Judiciary and the need to establish a Truth Commission raise complex issues which must be explored thoroughly. For instance what happens to those granted amnesty, which will come first the truth commission or the war crimes chamber. Issues of precedence, collaboration, the right to non-incrimina-

tion and the political realities of the country. Many also clamour for traditional mechanisms of justice. We have learnt from the experiences of Sierra Leone that traditional mechanisms are particularly important when dealing with reintegration issues and stigma. However, its appropriateness for mass crimes remains a challenge. Uganda however provides an opportunity to explore fully how this mechanism can be integrated into a holistic programme on transitional justice. Ultimately the key questions must be how to achieve justice for victims and how to ensure never never again.

However, while amnesties are no longer considered acceptable, the reality of the last decade has demonstrated that amnesties continue to abound. Between 2002 and 2006, more than 66 amnesties have been enacted. In Chile and Argentina we saw amnesties being set aside by courts and those who were given it being held accountable. It does not raise the question of how we deal with dictators to get them out of power.

Juan Mendez argues that the way to avoid a "Peace vs. Justice" conundrum is to try and see both peace and justice in a continuum of actions, measures, policy steps and achievements over which a nation overcomes conflict and confrontation and builds a future of understanding and democracy.



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