

Transitional Justice in the Aftermath of Transition to Democracy: The Experience of Ghana's National Reconciliation Commission¹

by
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Introduction

One of the key issues that emerged in the transitional justice debate in the early stages, particularly in the 1980s, was the question of either to 'prosecute and punish' or 'forgive and forget' during political transitions, what Samuel Huntington captured as the 'torturer problem'.³ Whereas the debate seems to have captured strongly views of those who supported some form of prosecution and punishment to account for gross human rights violations in times of political transition, there was equally a strong school of thought that cautioned against the emphasis on this approach because of its potential political cost towards a successful democratization.⁴ The literature on transitional justice has, since the 1980s, grown and expanded, yet the debate surrounding the 'torturer problem' lurks. Two fundamental problems engulf this debate.

First, the challenge of whether perpetrators of gross human rights violations be subjected to prosecution and punishment in all cases? The debate has more recently been best captured in a language of the clash between 'criminal justice versus restorative justice'. Further to this is the inquiry into what moment is criminal or restorative justice suitable or preferred? Must we choose either of them during a process of transitional justice? If so when and how? Do the two serve the same purpose? The second problem relates to the question of timing: when is transitional justice ripe? Should it occur during the particular moment of political transition or its institution be tied to the nature of political or democratic transition? Linked to this problem is a recent debate on whether transitional justice should focus on dealing with human rights abuses committed under previous authoritarian regimes and during violent conflicts or it has an equally important function in new democracies (that have experienced prolonged political violence), what Ni Aolain and Campbell calls 'conflicted democracies'.⁵

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³ See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Norman and London: University of Oklahoma, 1991), pp. 211-214.

⁴ The debate over the legal duty of states to prosecute and punish for gross human rights violations versus the political sense of not to prosecute and punish but find other ways to acknowledge the past wrongs during political transitions has been well documented in the Neil Kritz edited seminal work on transitional justice. Whereas some scholars (Diane F. Orientlicher, Ruti Teitel) quoted the demands of international law and the moral obligations for new emerging democratic states to uphold the tenets of accountability and rule of law to defend the need for criminal justice, others from the politics school, (including O'Donnell and Schmitter, Huntington) raised the potential danger in risking smooth transition to democracy when criminal justice approach is strongly endorsed without reference to the nature and complexities of the democratic transition. See Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1 (Washington DC: United States Institute of Peace Press,); and also Alice H. Henkin (ed), *The Legacy of Abuse: Confronting the Past, Facing the Future*, (Washington DC: The Aspen Institute, 2002)

⁵ Fionnuala Ni Aolain and Colm Campbell conceptualize 'conflicted democracy' from two perspectives. First, those democratic states that meet the minimum requirements of procedural form of democracy but fall short if measured against the test of substantive democracy. In this type the existence of prolonged

These problems that surround the ‘torturer problem’ are what this paper dilates on. In doing so the transitional justice process associated with Ghana’s democratic transition is used as a case study. The Ghanaian transitional justice exercise remains under-explored, perhaps because Ghana is not known to have experienced violent conflict. By analyzing the process leading to the establishment of a transitional justice mechanism in the form of a National Reconciliation Commission (NRC) against the background of the multifaceted nature of Ghana’s past political history and the subsequent democratic transition, the paper seeks to clarify these complexities in the transitional justice literature. The political legacies of Ghana required some form of remembrance, acknowledgment and justice if the country was to transcend the politics of vindictiveness to a more stable, unified and deepened democratic society. The NRC established in 2002 was, thus, a necessary transitional justice tool to facilitate the needed justice and reconciliation. Nonetheless, the transitional justice approach of restorative justice has not offered any meaningful justice to the victims of human rights violations.

Ghana’s case study fits into the two problems associated with the ‘torturer problem’ debate identified above. First, Ghana’s transitional justice avoided criminal or retributive justice and focused on restorative justice. In other words, the NRC was victim-centered, seeking to restore the dignity of the victims of past human rights abuse. Second, the transitional justice occurred almost ten (10) years after the political transition to a democracy, thus contradicting the conventional assumption that transitional justice process is instituted during the moment of the political transition. The timing of the NRC and its forward looking mandate connects to the notion of transitional justice in ‘conflicted democracy’ paradigm.⁶

Following this introduction, Part I of the paper briefly outlines the contestations within the two problems identified. In order to identify what is specific to Ghana’s transitional justice process, some discussion on the criminal justice versus restorative

unattended violence have manifested in the form of deep seated and sharp division (whether ethnic, racial or religious) in the body politic. Second and related to the first is the acuteness of this division that threatens significant political violence. In this situation of division and potential violent threat they argue that the international human rights law provides some useful markers in its provisions for derogation-when states are face with internal crisis of emergency. In these ‘conflicted democracies’ there are often legacies of the past that need to be addressed so as to create a more inclusive society and institutional reforms or even transformation for the prevention of the conflict in the future as well as to deepen the liberal democracy, hence the quest for transitional justice. See detailed discussion on this subject in “The Paradox of Transition in Conflicted Democracies”, *Human Rights Quarterly*, Vol. 27, (2005), pp. 172-213.

⁶ The situation in Ghana exemplified the first type of Ni Aolain and Campbell’s ‘conflicted democracy’. First, until the establishment of the transitional justice process, Ghana had been a democracy for 10 years, largely satisfying the minimum requirements of procedural democracy. Second, a result of the history of convoluted governance regimes-series of military interruptions in its democratic regimes and attendant human rights violations- had resulted in the body politic factionalism, ethnic tensions, mistrust, suspicion, revengeful feelings, hatred, alienation, bitterness, and institutional failures. The society had been functioning along these lines, of course, by the inability of the citizens to come to terms with, or forgive and forget some of the heavy-handed human rights abuses inflicted on them by fellow countrymen. The net effect of such deep-seated social fractures are bound to have far-reaching but negative implications for the peace, stability and democracy of the country. A key objective of the NRC was its forward looking mandate. For more on the history of violent nature of Ghana’s political past and the rationale for setting up the NRC see Franklin Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative”, *The International Journal of Human Rights*, Vol.9, No.3 (2005), pp.327-347; and Kwame Boafo-Arthur, “The Quest for National Reconciliation in Ghana: Challenges and Prospects” in Kwame Boafo-Arthur (ed) *Voting for Democracy in Ghana: The 2004 Elections in Perspectives*, Thematic Studies, Vol.1 (Accra: Freedom Publications, 2006), pp. 127-155.

justice and implications of each choice on democratic transition are necessary. The nature and type of democratic transition provide useful guide to the timing and type of a transitional justice policy. Huntington's advice on this 'torturer problem' dilemma in times of democratic transition will be highlighted. An analysis of the explicit transitional justice issues in 'conflicted democracies' is examined in this section as well. The latter suggests that the goals inherent in transitional justice discourses that have been generally associated with a movement from violent conflict or authoritarian rule are the same as those in 'conflicted democracies'.

Part II follows with an examination of Ghana's transitional justice process. Particular attempt is focused on the background to the establishment of the NRC, represented as an attempt by Ghana to foster reconciliation, enhance political and legal inclusiveness as well as find answers to particular problems faced by the democratic state in coming to terms with the legacy of the past and with the challenge of institutional weakness. This section also discusses the paradox nature of Ghana's transitional justice exercise. For example, it addresses the questions: why the NRC in 2002 and not in 1993 when Ghana made the transition to democracy; and why restorative justice and not retributive, something which a sizeable number of Ghanaians preferred? Part III explores the issue of what kind of justice has been served to the victims and broadly to the nation following the work and outcomes of the NRC. The assessment of this question is based on empirical data on victims' perception of the NRC work⁷ and other evaluative research studies as well as anecdotal evidence on the Ghanaian NRC. Finally, some conclusions are presented about the extent to which Ghana's transitional justice experience contributes to the transitional justice debate and discourse.

Part I: Transitional Justice during Democratic Transitions

Huntington's 'Torturer Problem'

Huntington observes that one of the many issues that new democratic regimes had to decide on following the political transition was how to deal with former regimes with dubious human rights records. On the one hand, the new democratic regime may want to seek retrospective justice not only because the victims' closure demands it but also because the new regime's legitimacy rests upon a clear break from the past. But on the other hand, authoritarian holdovers may retain such considerable power and institutional safeguard that if the fragile new regime decides to take on them, it may risk its own demise and setback in the country's democratization. This he calls a 'dilemma'. And it becomes the 'torturer problem'; for he argues that each strategy has its pros and cons.⁸ His caution is that a reasonable strategy to advance justice during the political transition depends on the type of transition. His advice is that: "If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations. The political costs of such an effort will outweigh any moral gains; If

⁷ Two sets of survey research to test the perception of victims of human rights abuses who availed themselves to the NRC were conducted in April 2005 and March 2006 respectively. The first one was conducted in a joint collaboration between the International Center for Transitional Justice (ICTJ) based in the New York and the Ghana Center for Democratic Development (CDD-Ghana). The second survey was conducted by the CDD-Ghana. Among the issues that both research sought to find out was the victims' perception of the work of the NRC regarding truth, justice, reconciliation, and reparations (although by the time of the research, reparations had not been paid). Both research interviewed a total of 200 victims. The author of this paper, who was then the Programs Manager for CDD-Ghana, was a member of the research management team for the first survey and also assisted with the second. In this paper ICTJ-CDD survey is referred as Victims Survey 1 and CDD survey as Victims Survey 2

⁸ Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, pp.211-231

replacement occurred and you feel it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within one year of your coming into power) while making clear that you will not prosecute middle- and lower-ranking officials; and Devise a means to achieve a full and dispassionate public accounting of how and why the crimes were committed”.⁹

Explicit from Huntington’s admonition is the importance of the nature of democratic transition in determining the type of transitional justice model to apply: either a criminal/retributive or restorative justice. Incidentally, his latter guideline, which is synonymous to the trend of truth and reconciliation commissions, has seen a lot more application in the context of transitional justice.¹⁰ Truth Commission¹¹ approach of a transitional justice policy has dominated the literature on transitional justice and democratization processes in recent years. And as De Brito and others note it has become the centerpiece of a transitional justice policy.¹² However, whether the increase in truth commissions as a way to promote transitional justice during political transitions is as a result of the nature of the transition (transformation or transplacement) is something for another research and beyond the scope of this paper. Suffice to say that Ghana’s experience with transitional justice could be likened to this context because its political transition to democracy in 1993 was of the nature of the transformation type¹³.

The issue here is not so much about the type of transition and the resulting transitional justice mechanism. It is more about the nature of justice that the type of transitional justice approach adopted is able to advance in support of accountability, respect for the rule of law, stability, reconciliation and an enhanced democracy. By its nature truth commissions are not usually designed for prosecution and punishment. Its inherent attribute is restorative justice because it is mainly set up to focus on the

⁹ Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 231

¹⁰ Between 1974 and 2003, more than twenty-five (25) truth commissions had been established throughout the world. See D.Bloomfield, T. Barnes, and L. Huyse, (eds), *Reconciliation after Violent: a handbook*, (Stockholm: International IDEA, 2003), pp. 125. Since 2003 up to the present new truth commissions have surfaced, including that of Morocco (2004) and Liberia (2006).

¹¹ In this paper truth commission is used interchangeably with truth and reconciliation commission. They come under various names and in Ghana it was called the National Reconciliation Commission (NRC). It is used to mean bodies set up to investigate a past history of violations of human rights, usually a pattern of abuse over a set period of time rather than a specific event, in a particular country in the hope of resolving a conflict left over from the past. They seek to find the truth, restore the dignity of victims of abuse (restorative justice) through reparations and memorial, promote criminal justice (where it can), and foster societal cohesion and national reconciliation.

¹² A.B. De Brito, C. Gonzalez-Enriquez, P. Aguilar, P. (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies*, (Oxford University Press, 2001), p. 5

¹³ According to Huntington, in the transformation type of democratic transition, those in power in the authoritarian regime take the lead and play a decisive role in ending that regime and changing it into a democratic system. In this model, it requires that the government is stronger than the opposition, where there is a well established military regime and government clearly controls the ultimate means and use of force against the opposition. The transition to democracy is usually the dictate of the leaders of this authoritarian regime. See Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, pp.124-142. In Ghana the military junta under Flt Lt. Jerry John Rawlings led the process to the transition to democracy. The leaders were in control at every stage of the transition to the extent that they granted themselves and past military rulers an entrenched indemnity from prosecution. See detailed discussion of Ghana’s 1992 democratic transition in Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative”, pp. 340-342; E. Gyimah-Boadi (ed), *Ghana Under PNDC Rule* (Great Britain: Codesria Book Series, Antony Rowe Ltd, 1993); Kevin Shillington, *Ghana and the Rawlings Factor*, (London: Macmillan Press, 1992); K.A. Ninsin, *Ghana’s Political Transition, 1990-1993*, (Accra: Freedom Publications, 1996); and K.A. Ninsin (ed), *Ghana: Transition to Democracy*, Codesria Book Book Series, (Dakar: Codesria, 1998).

victims of human rights abuses. Recent attraction to truth commissions as a transitional justice policy has rekindled the old contestation in the transitional justice literature: the debate over criminal/retributive justice versus restorative justice.

Criminal Justice versus Restorative Justice

The important role of justice has been acknowledged in the literature on transitional justice.¹⁴ Yet its role is also seen to be problematic in the search for durable peace and stability in times of political transition, especially those emerging from violent conflict. As Chinapen and Vernon note, “its pursuit may prevent other important aims from being realized”.¹⁵ Indeed, the aspect of justice (both retributive and restorative) has also featured considerably in the literature as a contributive source of achieving reconciliation.¹⁶ For human rights activists, the contributions of criminal or retributive justice through judicial processes towards accountability, reconciliation, and the respect for the rule of law are enormous. The establishments of ad hoc international criminal tribunals for former Yugoslavia and Rwanda and in recent years a more permanent court as well as the pursuit of national courts (for example the Special Court in Sierra Leone) to bring to justice perpetrators of human rights violations are considered to be in the right direction in addressing injustices, check the culture of impunity and promote accountability.¹⁷

For those in support of the criminal justice, failure to prosecute and punish offenders of human rights abuse in times of transition is detrimental to the rule of law and reconciliation at the interpersonal level and to the society as a whole in its quest for future accountable democratic society.¹⁸ Restorative justice, they argue, is unable

¹⁴ See works of Rhiana Chinapen and Richard Vernon, “Justice in Transition”, *Canadian Journal of Political Science*, Vol. 39, No.1 (2006), pp.117-134; Siri Gloppen, *Reconciliation and Democratization: Outlining the Research Field*, CMI Report: 5(Bergen: Chr. Michelsen Institute, 2002), Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; Ruti G. Teitel, *Transitional Justice*, (Oxford University Press, 2001); and Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York & London, Routledge, 2001)

¹⁵ Chinapen and Vernon, “Justice in Transition”, p. 117

¹⁶ See works by Abdullahi Ahmed An-na'im, “September 11 and the Search for Justice and Accountability” in Amy Benson Brown and Karen M. Poremski (eds.), *Roads to Reconciliation: Conflict and Dialogue in the Twenty-First Century*, (New York: M.E. Sharpe, 2005); Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies*, (Notre Dame & London, University of Notre Dame Press, 1997); John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, (Washington D.C: United States Institute of Peace Press, 1997); Louis Kriesberg, ‘Comparing Reconciliation Actions within and between Countries’, in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation*, (Oxford University Press, 2004)

¹⁷ Aleksandar Fatic, for example, has observed with the International Criminal Tribunal for the former Yugoslavia (ICTY) that one of the goals in applying international judicial measures as a form of intervention is to help “effect a reconciliation between the nations torn apart by war”. He notes that a process of criminal justice through these judicial processes, however difficult and, sometimes associated with political cost, would have to be pursued in order for peace to take hold and for reconciliation and forgiveness to start taking place. See his *Reconciliation via the War Crimes Tribunal?* (Aldershot: Ashgate, 2000). Also Timothy Longman notes that the UN Security Council Resolution adopted in 1994 created the International Criminal Tribunal for Rwanda (ICTR) and charged with, among others, to bring to justice those responsible for genocide and with contributing to the process of national reconciliation and to the restoration and maintenance of peace. See his study on ‘Justice at the grass roots? Gacaca trials in Rwanda’ in Roht-Arriaza and Mariezcurrena (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006)

¹⁸ Gloppen, *Reconciliation and Democratization: Outlining the Research Field*, p.10; Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; and Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*.

to advance these aims of accountability and institute a culture of rule of law effectively. Similarly, international human rights organizations, such as Amnesty International and Human Rights Watch, frown on transitional justice processes that lack criminal justice attributes and sometimes its endorsement of amnesties. The two organizations argue that such processes undermine international legal regime on the protection and promotion of human rights, the rule of law and also tend to send the wrong signal that impunity is an accepted culture, thereby setting the stage for future abuses by political leaders.¹⁹

On the other side of the debate, however, are others who view restorative justice as more in line with reconciliation processes than retributive justice. It facilitates reconciliation by way of restoring relationships through acknowledgement of the offences and compensation to victims for the harm done.²⁰ In other words, reconciliation is not so much of punishing perpetrators for wrongs in the past or knowing the truth, but taking steps to address the victims' situation through the restoration of the physical, psychological, social and economic well-being of the individual damaged by past wrongs. Due to its focus on restoration, rehabilitation, restitution, reparation and compensation, it is argued that this form of justice is helpful to the advancement of peace, stability and reconciliation needed for the transition to take-off. The cases in Argentina in early 1983 and Chile in 1990 provide lessons in the literature.²¹

Restorative justice has, in recent years, attained fashionable status as the type of justice that represents an approach to promote and achieve reconciliation in transitional societies in Africa. This has been captured in reference to an increasing interest and attraction to cultural and traditional approaches to achieving reconciliation, conceptualized in restorative terms. These cultural and traditional approaches present alternative judicial responses to promoting transitional justice and a process towards reconciliation.²² In spite of what seems to be the potential merits associated with these neo-traditional community-based approaches to transitional justice,²³ there are difficulties associated with them that challenge their legitimacy.

¹⁹ See Human Rights Watch, "Policy Statements on Accountability for Past Abuses"; and Amnesty International, "Policy Statement on Impunity" in Kritz (ed), pp.217-218; pp 219-222

²⁰ Arthur Molenaar, *Gacaca: Grassroots justice after genocide*, Research Report 77, (Leiden: African Studies Center, 2005), p.43

²¹ It is argued that in transition that is of the transformation type, it may make political sense not to insist on judicial process and, sometimes, focus on restoring the dignity of the victims and not to forget, as insisting on criminal trials could undermine the transition to democracy. Huntington uses these cases, including that of Uruguay and others in Latin America and in Southern Europe, Spain and Greece, to discuss the question of pardon or punishment to demonstrate the type of transitional justice adopted based on the nature of transition. See detailed discussion in his "The Third Wave: Democratization in the Late Twentieth Century", pp. 231-252

²² Notable among these neo-traditional community-based responses to promoting reconciliation are the Gacaca system in Rwanda and the Acholi culture, values and institutions, known as 'Mato Oput' in Northern Uganda. The rise of these traditional community-based approaches as alternatives to judicial responses, such as the International Criminal Tribunals, is fundamentally a problem of what is perceived as a Western legal system, detached from victims and communities they are meant to serve and viewed by many as not responding to the need for local processes of reconciliation. See Longman, 'Justice at the grass roots? Gacaca trials in Rwanda', p.209. Also Hayner mentions similar forms of community-based reconciliation, different from the conventional forms of transitional justice, in her study of Mozambique. See Hayner in *Unspeakable Truths: Confronting State Terror and Atrocity*, pp. 186-195

²³ It has speed to its advantage and perceived to be more time efficient. As argued by Peter Uvin, prior to the Gacaca system it would have taken more than a century to finish the trials of the 130,000 persons who were imprisoned considering Rwanda's nascent justice system. Further, the traditional and/or cultural forms of transitional justice practices involve the entire community and are more victim-centric

Although this is not the focus of the paper, two of these challenges are highlighted to show how the notion of restorative justice can sometimes be inimical.

First and the most important, it is argued that relying on traditional and community approach of transitional justice renders the individual less important. This type of 'justice' could disempower individual victims, who may otherwise prefer other forms of justice (criminal), especially when the expressions of penitence and confessions may not be genuine, but rather opportunistic and self-interested gestures. Second, it is also noted that its procedures usually fail to meet international standards of due process, gender rights and accepted forms of legitimate punishment.²⁴

The contest between criminal justice and restorative justice appears to be more concerned with the choice of a kind of justice that will have the maximum impact on the goals of transitional justice. However, there are others who think that the stress on either criminal or restorative justice becomes less of an issue if the notion of justice is viewed broadly. Bloomfield, for example, agrees that justice is core in any transitional justice process that emphasizes reconciliation as an outcome. Yet, he argues that if justice is defined from a multi-dimensional position to include, not only crime and punishment, but also the restoration of broken relationships, promotion of fairness and equality of all persons on the basis of a fair society, then the trade-off between reconciliation and justice will become less of a problem.²⁵

Chinapen and Vernon also seem to agree with Bloomfield when they observe that both criminal and restorative justice-effected through truth commissions-aim at the idea of a moral equilibrium that needs to be restored when basic equality is violated and that the circumstances of the transition provide sufficient explanation of the differences in their respective practices. Indeed, the authors put it succinctly that "while there may be contexts in which it is valuable to distinguish a restorative conception of justice from the standard retributive model, the context of transitional justice is not among them, for it is important to stress the affirmation of basic equality as the goal of the transition."²⁶

The nature and type of transition in a country is also equally important in explaining how the concept of justice is applied in the context of transitional justice. If the notion of transition to democracy is in the nature of what has been labeled the 'paradigmatic transition' or one 'transitional moment', then the choice of a justice model is most likely to be biased towards a transitional justice that emphasize on retrospective justice and also seek the transformation of democratic institutions.²⁷

than regular trials. Additionally, because these practices usually focus on restorative justice they appear to offer an accepted, familiar and respected means by which to foster reconciliation, based on a local custom that gives the process more legitimacy. See Longman, 'Justice at the grass roots? Gacaca trials in Rwanda', p.209; Peter Uvin. 'The Gacaca Tribunals in Rwanda', in David Bloomfield, Teresa Barnes and Luc Huyse (eds.) *Reconciliation After Violent Conflict: A Handbook*, p.116; and "An Overview of Initiatives for Peace in Acholi, Northern Uganda," p. 21

²⁴ This is typical of the neo-Gacaca system, which is the result of a compromise between the traditional Gacaca and Western legal practices and standards. Longman, 'Justice at the grass roots? Gacaca trials in Rwanda', p.210

²⁵ David Bloomfield, *On Good Terms: Clarifying Reconciliation*, (Berghof Report No.14, October 2006), p.29

²⁶ Chinapen and Vernon, "Justice in Transition", p.133

²⁷ See Ni Aolain and Campbell, "The Paradox of Transition in Conflicted Democracies", pp. 179-182. The authors avert our minds to the fact that "in many of the states that form the subject matter of transitional justice analysis, there is not only a movement towards democracy, there is also a movement away from violent conflict" (p.182) The authors observe that this 'paradigmatic' transition sees itself as a process of closure, a movement from non-democratic state to a democratic one, and/or sometimes a movement away from violent conflict to peace, and is typically followed by a period of constitutional

However, if the idea of transition is conceived of as a movement within a democracy itself (in this case a ‘conflicted democracy’), that is a movement towards a liberal and matured democracy-then the focus of transitional justice in this ‘conflicted democracy’ may be considered a more forward looking exercise targeting reforms of institutions that will promote the ideals of liberal democracy.²⁸ It must, however, be noted that in spite of the dual nature of the transition, the end goals of transitional justice are inherently the same either in a ‘paradigmatic transition’ or in a ‘conflicted democracy’. A brief outline of these goals is noted in the next section of the paper.

Transitional Justice Goals in Conflicted Democracies

A point made earlier in this discussion suggests that the transformation of institutions to promote democracy is one of the many crucial things that ‘paradigmatic’ transitional societies seek, whereas in ‘conflicted democracy’ reform is the key goal. As Ni Aolain and Campbell observe in transitional context, “whereas non-democratic societies may be faced with demands for institutional transformation, in democratic societies the imperative is typically to reform rather than to transform”.²⁹ To be sure, this is not a straight forward conclusion. The need to transform may be equally important as in the conflicted democracies.³⁰ In a conflicted democracy, the assumption is that there is a hang-over of legacies of abuses, tensions, conflicts and divisions from the past that threaten the peace, stability and democratic governance of the present.

The need to confront these legacies of the past is paramount for the future of democracy of that society. Transitional justice goals, whether in the mechanism of trials, truth commissions or inquiries of various kinds, provide the forum and means to confront the legacies and human rights abuses of the past.³¹ In particular, truth commissions established in these societies provide the avenue to make amends to victims who have suffered in the past as a result of the abuses inflicted upon them by the state and its apparatus; put an end to the cycle of vengeance, impunity and to enhance the respect for the rule of law; develop structures that will forestall a future repetition of regime-sponsored crimes; and attend to equality as a value that strengthens the legitimacy of a society and its government.³²

There is the tendency to assume that once a country has become a democracy and established some minimum form of democratic principles then all is well. As Ni Aolain and Campbell put it, in such societies “that the rule of law operates fairly...”³³ unlike in authoritarian regimes. However, in many of these societies, and, in particular, in a conflicted democracy, this assumption is far from reality. What appears to be an operation of the rule of law and evident of democratic stability (in the case of Ghana through series of elections and a change-over of government) can in fact conceal the

and institutional change or transformation of these institutions. More often than not transitional justice discourse associated with this transition has at its center of action a preoccupation with and tension around dealing with human rights violations of the previous regimes. This makes it more of a backward looking exercise.

²⁸ Ibid, p.187

²⁹ Ni Aolain and Campbell, “The Paradox of Transition in Conflicted Democracies”, p.187

³⁰ The authors argue that in such conflicted democracies, reform alone may not be enough to respond to the institutional and structural changes demanded by the transitional process. See Ni Aolain and Campbell, “The Paradox of Transition in Conflicted Democracies”p.187

³¹ Ibid. Ni Aolain and Campbell, for instance, cite the important role of using the law and legal procedure to address the human rights violations of the previous regimes, pp.187-188

³² See Bofo-Arthur, “The Quest for National Reconciliation in Ghana: Challenges and Prospects”, pp. 132-133 on general discussion on the potential benefits of truth commissions.

³³ Ni Aolain and Campbell, “The Paradox of Transition in Conflicted Democracies”, p.188

extent of decay in a state.³⁴ Transition and, indeed, transitional justice, in a conflicted democracy requires the need to build or rebuild trust in the society and its institutions. Accounting for the past through a transitional justice mechanism creates the platform for such society to focus on translating the procedural form of democracy to a more substantive one. A process towards a substantive democracy demands building and generating strategies that promote inclusiveness, especially where experience of exclusion has been manifested due to the past violence.³⁵ In other words, the emphasis in a conflicted democracy is on the future through addressing the legacies of the past that threaten the unity, stability and the journey towards the deepening and subsequent consolidating of democratic rule.

In effect, the transitional justice goals in a conflicted democracy are not really different from the paradigmatic transitions. They both have a common end goal of a liberal democracy as the ideal.³⁶ Having analyzed the contesting debates and some emerging theoretical engagements in the field of transitional justice, the next section of the paper illustrates this with an examination of the Ghanaian case study.

Part II: Ghana's NRC

Background to the NRC

By an Act of Parliament (Act 611) passed by the National Parliament in December 2001 and assented to by the President in January 2002, the NRC was created in April 2002. The NRC was mandated by the Act to:

“seek and promote national reconciliation among the people of this country by recommending appropriate redress for persons who have suffered any injury, hurt, damage, grievance or who have in any other manner been adversely affected by violations and abuses of their human rights arising from activities or inactivities of public institutions and persons holding public office during periods of unconstitutional government and to provide for related matters”.³⁷

Indeed, the object of the NRC was to investigate, document and establish an accurate record of all these violations and make recommendations to the President for redress from the period of the attainment of independence in 1957 to 1993 when Ghana made the transition in its fourth attempt to democratic governance.³⁸ The period of the NRC mandate is significant in the sense that Ghanaians acknowledged that it is not only in military uprising and rule that have caused violence, human rights abuses and pain in the body politic but also in civilian democratic regimes as well. In reality, military uprisings and rule in Ghana have appeared in the political scene to respond to

³⁴ Ni Aolain and Campbell, “The Paradox of Transition in Conflicted Democracies”, pp.188-189, the authors note that the state’s adherence to democratic principles may be taken to guarantee the legitimacy of its laws and institutions but there may also be the loss of legal and institutional legitimacy within the body politic as a result of the prolonged violence. In the case of Ghana, this appears to be so as the effects of both military rule and to some extent previous democratic civilian rule had polarized the society. See accounts of this in Boafo-Arthur, “The Quest for National Reconciliation in Ghana: Challenges and Prospects”; and Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative”

³⁵ Ni Aolain and Campbell, “The Paradox of Transition in Conflicted Democracies”, p.189

³⁶ Ibid, pp.183-185

³⁷ Government of Ghana, *National Reconciliation Act (Act 611), 2002* (Accra: Government Printer Assembly)

³⁸ Government of Ghana, *National Reconciliation Act (Act 611), 2002*

abuses and misrule of the previous civilian regimes. Nevertheless, their regimes have tendered to be worse offenders of abuses and bad governance.³⁹

The NRC started operations with public hearings in January 2003 and completed its work with the submission of a five-volume report to the President in October 2004. The Commission investigated over 4000 cases of which it conducted public hearings for over 1800 cases. Unlike many other truth commissions created as part of a transition to peace and /or democratization process, Ghana's NRC defied the norm. In fact, Ghana's transitional justice process, coming after almost ten years of democratic rule, was a misnomer. As Attafuaah had established, the timing of the creation of Ghana's NRC "runs against the grain of virtually all truth and reconciliation commissions, which generally emerge at the transitional phase of democratization".⁴⁰ Particularly so is the fact that Ghana is not known to have experienced any violent ethnic and civil conflict as in its neighbors such as Sierra Leone, Liberia, or even Cote d'Ivoire in the West African sub-region. Furthermore, having enjoyed four successive elections from 1992 to 2000, with the first ever change in government through the ballot box-a rare feat in sub-Saharan Africa-Ghana could be described as relatively stable and peaceful country in the region. And so really, was there any need for the setting up of the NRC? Indeed, such was the debate that characterized the discussion leading to the establishment of the NRC.⁴¹ The paper examines the reasons for setting up the NRC next.

Rationale for NRC

Contrary to the strong temptation to consider Ghana as peaceful and stable nation, at least in comparison to its neighbors, the country has had its fair share of political infractions. Political and ethnic conflicts-the result of both past civilian and military dictatorships, four successful military coups, several ethnic conflicts during which various types of massacre and human rights violations were inflicted upon Ghanaian citizens-have left indelible blemish in the socio-political structure of the society. The detail nature and trend of human rights abuses and impact of these dictatorships on the society have been documented elsewhere.⁴² And so there is no

³⁹ For detailed discussion of Ghana's checkered political history and human rights violations by both civilian and military regimes see Boafo-Arthur, "The Quest for National Reconciliation in Ghana: Challenges and Prospects"; Oduro, "Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana's National Reconciliation Initiative"; Robert Kwame Ameh, "Doing Justice After Conflict: The Case for Ghana's National Reconciliation Commission", *Canadian Journal of Law and Society*, Vol.21, No.1 (2006), pp. 85-109; also in his "Uncovering Truths: Ghana's National Reconciliation Excavation of Past Human Rights Abuses", *Contemporary Justice Review*, Vol. 9, No. 4 (2006), pp. 345-368; and Mike Oquaye, *Politics in Ghana, 1972-1979*, (Accra: Tornado Publications, 1980) and also in *Politics in Ghana, 1982-1992: Rawlings, Revolution and Populist Democracy*, (Accra: Tornado Publications, 2004)

⁴⁰ Ken Agyeman Attafuaah, "An Overview of the Ghana's National Reconciliation Commission and its Relationships with the Courts", *Criminal Law Forum*, Vol. 15 (2004), p.126.

⁴¹ See Ameh, "Doing Justice After Conflict: The Case for Ghana's National Reconciliation Commission", pp. 86-89

⁴² See Boafo-Arthur, "The Quest for National Reconciliation in Ghana: Challenges and Prospects"; and in his "National Reconciliation or Polarisation? The Politics of Ghana's National Reconciliation Commission" in W. Alade Fawole and Charles Ukeje (ed) *The Crisis of the State and Regionalism in West Africa: identity, Citizenship and Conflict*, (Dakar: Codesria, 2005), pp. 97-119; and also in Oduro, "Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana's National Reconciliation Initiative"; Ameh, "Doing Justice After Conflict: The Case for Ghana's National Reconciliation Commission", also in his "Uncovering Truths: Ghana's National Reconciliation Excavation of Past Human Rights Abuses"; Attafuaah, "An Overview of the Ghana's National

need for repetition in here except to note of the most gruesome period of human rights violations in the history of the nation.

The two reign of Jerry John Rawlings, first in 1979, under the Armed Forces Revolutionary Council (AFRC) and the second from 1981 to 1992, under the Provisional National Defence Council (PNDC), what Ameh has referred to as the “11 years of a socialist-inspired revolution”⁴³, saw the worse of human rights violations. The two eras witnessed, among other abuses, men and women arrested, stripped naked and publicly flogged either for hoarding essential commodities or selling them above prices stipulated by government controlled prices. What was worse of human rights violations and abuses was the arrest and summary execution, without recourse to the law, of eight high ranking military officers, including three former Heads of State by the AFRC.⁴⁴ It is also on record that over 300 people were reportedly extra-judicially killed or proclaimed missing during the era of PNDC, in addition to the black spot of this era-the abduction and murder of three senior judges and retired military officer in 1982-allegedly by pro-government death squad.⁴⁵ Boafo-Arthur has described this period of PNDC rule as “a decentralized structure of tyranny and violence”.⁴⁶

Against this turbulent history with poor human rights record that had caused deep seated social cleavages, rancor and bitterness, there is no doubt in the minds of many Ghanaians that Ghana needed a healing and a strategy of reconciliation. As Boafo-Arthur notes, it was “prudent to re-visit the past, not necessarily for revenge or vengeance, but to draw critical public attention to societal wrongs committed in the name of the State, and to face the future with a renewed national purpose, national commitment and national unity”.⁴⁷ Thus, the NRC envisioned futuristic goal. While the recognition of the need for the nation to atone for its past human rights violations was evident way back before the transition in 1993, it was not to take place until 2002. Attafuaah has argued that Mr. Rawlings, who had then become a civilian President under the National Democratic Congress (NDC) following the transition, had no interest in creating a special statutory agency to pursue the goal of national reconciliation.⁴⁸ Whereas he had apologized on two occasions for the excesses of his regimes⁴⁹, he was not prepared to institute any formal transitional justice process.

Even not when the nation’s civil society organizations such as the Ghana Bar Association and religious groups had consistently, since the mid 1980s, mooted an idea

Reconciliation Commission and its Relationships with the Courts”; and Oquaye, *Politics in Ghana, 1972-1979*, and also in *Politics in Ghana, 1982-1992: Rawlings, Revolution and Populist Democracy*,

⁴³ Ameh, “Doing Justice After Conflict: The Case for Ghana’s National Reconciliation Commission”, p. 85

⁴⁴ Boafo-Arthur, “National Reconciliation or Polarisation? The Politics of Ghana’s National Reconciliation Commission”, p. 104

⁴⁵ See E. Gyimah-Boadi, “Ghana’s Transitional Justice Experience”, unpublished paper presented at an International Conference on Transitional Justice and Human Security organized by the International Center for Transitional Justice. (Cape Town, March 28-April 1, 2005)

⁴⁶Boafo-Arthur, “National Reconciliation or Polarisation? The Politics of Ghana’s National Reconciliation Commission”, p. 105. Indeed, records from the NRC case data indicate that the AFRC and PNDC eras had the highest (84%) cases of abuses brought before it. See *Never Again: Summary of the NRC Final Report*, published by the Ghana Center for Democratic Development (Accra: CDD-Ghana, 2005)

⁴⁷ Boafo-Arthur, “The Quest for National Reconciliation in Ghana: Challenges and Prospects”, p.136

⁴⁸ Attafuaah, “An Overview of the Ghana’s National Reconciliation Commission and its Relationships with the Courts”, p. 126.

⁴⁹ Ibid

for a formal national reconciliation process for the country would be listened to.⁵⁰ Instead, Rawlings instituted his own reconciliation exercise during his civilian regime (1993-2000), what Attafuah has called a ‘low-key national reconciliation exercise’.⁵¹ These gestures-apology and selective de-confiscation of assets-were seen to be inadequate and thus did not provide any meaningful justice or reconciliation during the transition. Rawlings approach was considered to be lacking transparency; was piecemeal in nature; it lacked coherence and structure; and it was not comprehensive. In addition, the process did not allow for historical clarification and complete record of human rights abuses and most, critically, it did not involve the people.⁵²

It was in this context of wanton disregard of injustices of the past and its simmering potential negative effect on Ghana’s democratic transition⁵³ that on the eve of the December 2000 elections, almost all the political parties had made it as part of their agenda to set up a process of national reconciliation, once elected. The New Patriotic Party (NPP), the main opposition party that won the elections, had made it part of its manifesto to seek a process of national reconciliation by healing the festering sores within the Ghanaian body politic.⁵⁴ The euphoria that greeted the inauguration of the NPP in 2001 marked what has been described elsewhere as the ‘second’ democratic transition in Ghana⁵⁵ In an accompanying memoranda to the Bill submitted to Parliament in the same year, the government noted that this was the beginning of a process to wipe the slate clean and bring the cycle of vendetta to an end for the promotion of reconciliation, unity, and eventually towards the consolidation of democracy and economic growth.⁵⁶

As was expected Ghanaians had given an overwhelming endorsement to the new government initiative. In a nation-wide pre-NRC survey conducted by an independent civil society think tank in early 2001 to seek opinions on Ghanaians on the reconciliation initiative, majority of respondents (out of a sample of 1000) 89% supported some form of national reconciliation.⁵⁷ The same survey report had majority

⁵⁰ See H.J.A.N Mensa-Bonsu, “Reconciliation and National Integration” in *Public Forum on Reconciling the Nation*, a compilation of presentations in a national symposium organized by the Ghana Academy of Arts and Sciences (GAAS) and the Friedrich-Ebert Foundation (FES), (Accra: FES, 2005)

⁵¹ Rawlings and his NDC government embarked on quietly selective de-confiscation of seized assets during the era of AFRC and PNDC to key opposition figures. Attafuah, “An Overview of the Ghana’s National Reconciliation Commission and its Relationships with the Courts”, p. 126

⁵² See Attafuah, “An Overview of the Ghana’s National Reconciliation Commission and its Relationships with the Courts”, pp. 126-127; also see E. Gyimah-Boadi examples of cases of Rawlings-led NDC secretly selective reconciliatory process in “Confronting the Legacy of Human Rights Abuse in Africa: Lessons from Ghana”, unpublished paper presented in an International Conference on Transitional Justice in Africa: Future Directions organized by the International Center for Transitional Justice (Bellagio, March 25-29, 2004)

⁵³ Rawlings was stepping down after almost 20 years in power and the opportunity had come for victims and opponents who had scores to settle with him or his regime to take action, including taking the law into their own hands. The net effect of such an action was a potential destabilization, considering the Rawlings ‘factor’ in Ghanaian politics and his record as a coup expert. See a discussion on the Rawlings ‘factor’ in Ghanaian politics as against the discussion leading to the establishment of the NRC in Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative”, pp. 340-342

⁵⁴ Attafuah, “An Overview of the Ghana’s National Reconciliation Commission and its Relationships with the Courts”, p.127

⁵⁵ Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative”, p.338

⁵⁶ Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative”, p.339

⁵⁷ Ghana Center for Democratic Development (CDD-Ghana), *Public Opinion on National Reconciliation in Ghana: Survey Evidence*, Research Paper, No. 10, (Accra: CDD-Ghana, 2001)

of Ghanaians showing preference for criminal justice-63% supporting trials and punishment of alleged perpetrators of human rights violations and 82% opposed to any form of amnesty or indemnity-yet, the Ghanaian transitional justice approach was non-retributive but of restorative justice. What accounted for Ghana opting for restorative justice?

Ghana and Restorative Justice

To a large extent Ghana adopting a restorative justice mode of transitional justice was by default and not by design or choice. As noted from above (survey respondents), it seems majority of Ghanaians would have preferred seeing perpetrators of heinous crimes against fellow citizens tried and punished. However, the Act (611) establishing the NRC chose the option of a non-retributive approach to addressing the legacies of past human rights violations. An entrenched indemnity provisions inserted into the 1992 constitution by the PNDC on the eve of the transition to democracy in 1993 made it impossible for Ghana to have chosen a criminal justice approach of transitional justice. The Act (611) was influenced by this indemnity provisions that gave self amnesties to all the leaders and persons connected to the AFRC and PNDC military regimes (regimes associated with Jerry Rawlings), and, indeed, all previous military regimes in the country's political history. Section 34 (3) of the Transitional Provisions of the 1992 Constitution states:

“For the avoidance of doubt, it is declared that no executive, legislative or judicial action taken or purported to have been taken by the Provisional National Defence Council or the Armed Forces Revolutionary Council or a member of the Provisional National Defence Council or the Armed Forces Revolutionary Council shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act”.⁵⁸

The above stated clause in the Constitution effectively foreclosed all avenues for debating and redressing human rights violations or prosecuting the perpetrators. Indeed, section 34 together with section 35 were entrenched and indemnified any member of the AFRC and PNDC as well as all former operatives of previous military regimes thereby granting amnesty to all be perpetrators of human rights violations. Such was the nature of this obnoxious indemnity laws that prior to the creation of the NRC there were credible fears to the extent that the NRC could even be illegal if a strict interpretation of the indemnity provisions is applied. Nonetheless, the same 1992 Constitution in Article 281 (1) gave powers to the President to appoint a commission to investigate any matter of national importance.⁵⁹ Thus, taking refuge in Article 281 (1), the new NPP government passed the law given birth to the NRC but with a mandate to seek the truth of Ghana's dark past and recommend appropriate ways to restore the dignity and respect of victims of state meted violence.

Ghana's approach to transitional justice process provides a context to help clarify how a particular type of transition to democracy can influence the choice of a particular justice model. As noted earlier, Ghana's transition to democracy characterized the transformation model of Huntington's transitions to democracy frameworks. As a result, the military junta leading the transition was able to

⁵⁸ Government of Ghana, *The 1992 Constitution of Ghana*, (Accra: Government Press)

⁵⁹ Government of Ghana, *The 1992 Constitution of Ghana*

manipulate the process in their favor so as to give themselves an entrenched amnesty.⁶⁰ As Boafo-Arthur notes, the transitional provisions were inserted into the 1992 Constitution by the military leaders after the Consultative Assembly set up to draft the Constitution had completed and without any debate on the floor of the assembly.⁶¹

In spite of a non-retributive mandate the NRC conducted its business as required of it. With the findings and recommendations, it is hoped that the nation would be able to come to grips with its past, provide a platform for national unity and for the deepening of the culture of democracy. In all this the question of justice is paramount. Are Ghanaians, and in particular victims of human rights abuse content with the nature of justice produced by the NRC? How well and what kind of justice has been served by the NRC? In what follows the paper explores this subject.

Part III: Has Justice Been Served?

Post NRC

It has been closed to two and half years when the NRC submitted its final report to the Government. The government issued a white paper on the report, accepting it in full and pledging to implement the recommendations contained in it. Except for payment of monetary reparations made by the government in the latter part of 2006 to victims recommended in the report, there has not been any formal policy document articulating government's action plan on the implementation of the findings and recommendations. But the question of government's commitment to seeing through the implementation of the entire recommendations contained in the report will be saved for another day. For now, this paper focus is on what kind of justice has the NRC served. Two fundamental questions need to be addressed. First: was the NRC able to fulfill its mandate of promoting restorative justice; and second: has the work of NRC foreclosed any interest and demand for criminal justice?

Ghanaians, both ordinary and victims who appeared before the NRC, appear to be generally satisfied with the work of the NRC. They also hoped that its work and outcomes would contribute to national unity and peace, promote justice and enhance democratic consolidation. Data from series of opinion surveys conducted between 2005 and 2006 by separate research institutions confirms these observations.⁶² On justice specific, majority of the respondents in both victims survey one (60%) and two (61%) agreed that the NRC promoted justice in the manner that it was supposed to address justice-restorative justice. The respondents acknowledged that the NRC did not have the power to recommend prosecution and for that matter punishment of perpetrators, yet through knowledge of truth, hearings, confession, fairness and

⁶⁰ Parliament had no power to amend sections 34 and 35. Any amendment of these sections required rigorous process, including national referendum that requires at least 50% voter turn out and at least 75% of them voting in favor, and then having two-thirds of parliament voting approving. It is even on record that the nation's Supreme Court on the basis of these clauses thwarted all actions brought before it in the past.

⁶¹ Boafo-Arthur, "National Reconciliation or Polarisation? The Politics of Ghana's National Reconciliation Commission", p. 110

⁶² In both Victims Surveys 1 and 2 conducted by ICTJ/CDD and CDD in 2005 and 2006 respectively about 60% of the respondents were satisfied with the work of the NRC and agreed to fulfilling its mandate. See unpublished ICTJ/CDD National Reconciliation Commission Victims Survey conducted in April 2005 and A CDD-Ghana Survey Report, *Opinions of Victims of Past Human Rights Abuse in Ghana after the National Reconciliation Commission's Public Hearings*, (Accra: CDD-Ghana, 2006). In another research conducted by the Department of political science, University of Ghana, an overwhelming 96% of the respondents indicated their agreement with the goals of the NRC. See Boafo-Arthur, "The Quest for National Reconciliation in Ghana: Challenges and Prospects", pp.145-146. Note that all these research surveys took place before monetary reparations were paid.

compensation some form of justice has been served to the victims. In fact, the issues of compensation or reparations held high in the minds of the victims who appeared before the NRC.⁶³ Besides the victims, ordinary Ghanaians also seem to have endorsed the process adopted by the NRC in achieving its goals of promoting restorative justice. Close to 90% of ordinary Ghanaians agreed that the goals of the NRC were achieved.⁶⁴

The broad and liberal definition of human rights abuses adopted by the NRC also facilitated inclusiveness of those who were already excluded from society. The NRC drew from international human rights law, humanitarian law principles and common law understanding of violations. This made it possible to widen abuses suffered by Ghanaians during the period of investigation. A chunk of abuses heard and addressed by the NRC involved labor-related issues and other administrative injustices, including wrongful dismissal as well as lost of citizenship both as a result of forced exile and revocation. As it has been stated, limitations placed on the mandate, regarding types of violations, of truth commissions have been a source of exclusion and discontent for victims rather than a source of acknowledgment.⁶⁵ The NRC's ability to consider these administrative injustices as abuses and addressing them in order to re-establish their status indicated a positive demonstration of its willingness to reflect a full range of victims' experiences, confer acknowledgment as widely as possible and promote restorative justice.⁶⁶

Whereas the evidence above confirm a largely positive response of both victims of human rights abuses and ordinary Ghanaians to the NRC working to promote restorative justice, it is significant to note the margin of acceptance in these responses from the two groups. While in the case of the victims, the two surveys showed a response rate of around 60% of respondents acknowledging the impact of the NRC in restoring their dignity and respect regarding their sufferings from past human rights violations, overwhelming majority (90%) of ordinary Ghanaians said so. It is noteworthy to point out that a considerable number of the victims expressed otherwise. Indeed, the two victims' surveys noted that close to 40% of the victims interviewed preferred criminal justice. Of the 40% who supported prosecution, while knowing that the NRC could not recommend that, argued that such prosecution and punishment would serve as a deterrent for future abuse and more importantly the refusal of some of the allege perpetrators to confess should result in prosecution.⁶⁷

This finding seems to resonate with an earlier pre-NRC nationwide survey observed earlier in the paper that had 63% of Ghanaians opting for prosecution and punishment. The second CDD post-NRC victims' survey sums it up clearly the responds of the victims. Asked to offer any recommendation regarding any future NRC, the victims' response was strongly in favor of punishment of perpetrators. The

⁶³ Available data from the NRC database suggest that 89% of petitioners came to the NRC in order to seek compensation, while only 6.4% stated their demand for justice as reasons for petitioning. See NRC Final Report, Vol. 3, Chapt.3, pp.167-168, available online at the Ghana Government website: <http://www.ghana.gov.gh/NRC/>. This data confirms that majority of the victims were aware that the NRC process could not offer any platform for criminal justice.

⁶⁴ Boafu-Arthur, "The Quest for National Reconciliation in Ghana: Challenges and Prospects", p.149. Please note that this response was in direct reference to how they perceive the work of the NRC according to its mandate but not necessarily the ideal expectations of what kind of justice is preferred.

⁶⁵ Nahla Valji, *Ghana's National Reconciliation Commission: A Comparative Assessment*, A Publication of the International Center for Transitional Justice (ICTJ), (New York: ICTJ, 2006), p.17

⁶⁶ Valji, *Ghana's National Reconciliation Commission: A Comparative Assessment*

⁶⁷ Unpublished ICTJ/CDD National Reconciliation Commission Victims Survey

report notes: “any future NRC should be able to “arrest and punish perpetrators” and that the NRC be given the power to recommend punishment”.⁶⁸

The Ghanaian NRC experience exhibits a sense of inconsistency. On the one hand, the evidence show that both victims and ordinary Ghanaians are receptive to the work of the NRC as promoting the needed restorative justice which the victims, especially, knew before availing themselves to the process, as the core mandate of the NRC. On the other hand, a sizeable number of the victims appear not to be satisfied with only restorative mode of justice. In fact, there appears to be some victims who refused to take advantage of the NRC due to its non-criminal justice nature and preferred international judicial inquiries. This paradox brings to focus the question of whether there can be justice without punishment for crimes. Recent developments in the Ghanaian political landscape seem to echo this fundamental question of justice without punishment. There are indications that some families who suffered human rights abuses in the past, either in themselves or in their love ones, and hitherto took advantage of the NRC work yet are not satisfied with the outcomes, are seeking international judicial inquiry to some of the abuses involving the former military leader (J.J. Rawlings).⁶⁹

There is no doubt that the NRC provided the victims the forum to air their grievances and in doing so facilitated accountability and restorative justice. It has also helped to document past human rights abuses that can potentially serve as the nation’s historical record of abuses, and this may in itself act, to some extent, as a deterrent to future abuses. Nonetheless, the question of justice for victims of past human rights abuses remains elusive. It may be argued that the NRC, through its work and in the context of indemnity clauses, has served justice, even if it is limited to restorative justice. However, if a substantial number of victims seem not to accept this form of justice and appear to be seeking for an alternative, especially against the background of calls for a repeal of the ‘Transitional Provisions’⁷⁰, then there is much for concern for this kind of justice served by the NRC. It seems the desire of retributive justice in the minds of many Ghanaians remain strong, in spite of what the NRC was able to achieve.⁷¹

Conclusion

The Ghanaian NRC experience offers three broad useful insights into the transitional justice field. First, it brings to fore the element of timing of a transitional justice policy. In other words, when is it ripe for a transitional justice process? Must transitional justice be limited to paradigmatic transitions which transitional justice

⁶⁸ CDD-Ghana Survey Report, *Opinions of Victims of Past Human Rights Abuse in Ghana after the National Reconciliation Commission’s Public Hearings*, p. 24

⁶⁹ There are reports of a group of Ghanaians living in the UK who have instituted legal actions in the UK Courts against the former leader regarding gross human rights abuses that occurred during his two military regimes (the AFRC and the PNDC), including the murder of the three judges. See “Rawlings for court in the UK” sourced on May 7, 2007 from:

<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=121621>

⁷⁰ One of the recommendations in the NRC report is for the government to take steps to remove the indemnity clauses contained in the ‘Transitional Provisions’ of the 1992 Constitution because of the recognition that a stable constitutional order cannot be founded on injustice and impunity. There appears to be a genuine concern and need for this law to be repealed following interest generated by media discussion. However, it seems that any attempt to subject the provisions to a national referendum will require wider consultation and broad based political endorsement. See *The Statesman Newspaper*, (A Ghanaian Daily), Special Christmas Edition, Vol. 8, No.33, Friday, December 22, 2006: Online:

www.thestatesmanonline.com

⁷¹ See Valji, *Ghana’s National Reconciliation Commission: A Comparative Assessment*, pp. 31-35

literature has traditionally been associated with or it can equally be applied to societies defined as conflicted democracies? The analysis in this paper suggests that the end goal for instituting a transitional justice process in both types of transitions is the same: looking into the past as a way to reaching forward to establish and deepened a liberal democracy.

The paper has argued that in the case of Ghana the institution of a policy of transitional justice was conceptualized as a change in terms of a movement from procedural to substantive democracy: a deepened of democratic standards. In such situations there should not be a debate over the timing on when a transitional justice process is to be established. The nature and type of the transition plays a very important role in the timing of a transitional justice process. This leads to another useful insight from this case study: what is considered transition in the field of transitional justice?

A second vital effect of this analysis is the need to conceive of transition in this field not as involving just the paradigmatic transition (a transition implying a start point and an end point). In other words, once a society has crossed over from an authoritarian regime or from war to a democracy or peace respectively, then the transition is complete within the language of transitional justice. This transitional journey needs some clarity in the field of transitional justice. As noted earlier, in transitional societies the question of transition has a dual purpose-one, a movement away from conflict and the other movement towards democracy. Of course, there are contexts that a single transition will engage the two movements, but it seems the paradigmatic transition type has dominated the transitional justice debate. The Ghanaian case study exemplifies a transition of the second type-a journey towards a deepened democracy. The transitional justice discourse will be enhanced with substantive analysis if a lot more engagement is done with transitions that fall outside of the paradigmatic transitions.

A third and final lesson from the case study is the age-old debate over the usefulness of criminal versus restorative justice in the transitional justice debate. Both aspects of justice have their strengths and downsides. There is no doubt that the preference of criminal justice approach of transitional justice is desired in all transitional societies, including Ghana. But at the same time, it is important to recognize what Huntington said: “justice was a function of political power”⁷² How and what particular aspect of justice is applied in a policy of transitional justice depends on the nature of the transition. As noted with the Ghanaian case, with the transformation type of transition, it is usually difficult to apply the criminal mode of transitional justice. This, however, does not suggest for any moment that without a criminal justice process, there can not be any meaningful transitional justice. Depending on the focus and object of the transitional justice of a particular society a restorative mode of transitional justice can equally serve a purpose. The Ghanaian case study showed this effect. Even so the paper also noted how interest and demands for criminal justice is on the list of sections of the victimhood. It raises the critical question of when the national or societal interests supersede that of individual in the quest for justice.

Sometimes it may make good political and not legal sense to not contest such illegal indemnity provisions at a time of paradigmatic transition just for the purposes of aiding a smooth transition to democracy or end a violent conflict. Once some sense of peace, stability and democracy have been instituted and achieved, then the past can be revisited to contest these illegalities for the proper and desired justice to be

⁷² Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, p.228

effected.⁷³ This is not to say that transitional justice processes must not strive to the ideal at any point in time, but to acknowledge the tension between instituting practical logical policies in times of transition to promote long term peace, stability and democracy, and adhering to legal standards that may risk compromising the transition. For one thing, this paper has argued that transitional justice must not be time bound. It must strive to punish when it can, but must not be discarded because it cannot punish.

⁷³ Recent national and international transitional justice developments in the pursuit of justice for individuals responsible for past human rights violations -for example, Chile's late Pinochet and the hunting of former military juntas in Argentina as well as former Liberian leader, Charles Taylor, Chadian leader, Hissene Habre and former Prime Minister of Ethiopia, Mengistu Haile Mariam- attest to this position.