

International Criminal Justice Series

Volume 25

Series Editors

Gerhard Werle, Berlin, Germany

Moritz Vormbaum, Münster, Germany

The series aims to create a platform for publications covering the entire field of international criminal justice. It therefore deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars.

More information about this series at <http://www.springer.com/series/13470>

Marian Yankson-Mensah

Transitional Justice in Ghana

An Appraisal of the National Reconciliation
Commission



ASSER PRESS



Springer

Marian Yankson-Mensah
International Nuremberg
Principles Academy
Nuremberg, Germany

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-378-8 ISBN 978-94-6265-379-5 (eBook)
<https://doi.org/10.1007/978-94-6265-379-5>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2020

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature.

The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

*To my daughters, Naa Dromo Mensah
(may she rest in peace) and Evette Ama
Kumah Mensah*

Foreword

Marian Yankson-Mensah's study of the Ghanaian National Reconciliation Commission (NRC) provides a reminder of the recurring nexus between time, place, ideas and values in the quest for national as well as international justice. No community, nation, region or continent is an island unto itself—especially not in the age of global media. Each nation is directly and indirectly influenced by the trends, ideas, lessons and ideologies of others, as well as the wish of all people in every part of the world to be free from oppression, exploitation and dictatorship.

The book provides a lucid and exemplary study of the African struggle for accountability and the endeavours in Ghana for political stability—within the parameters of the scholarly debate on the continuity between norms of international justice and the pursuit of peace. It traces this debate from the escalation of democracy in African and Latin American nations in the 1980s, which gave rise to the proliferation of truth commissions in global politics.

No one model or size fits all. The debate on which comes first, justice or peace, and the inevitable quest for a balance between the two, requires careful contextual analysis and realistic choices, grounded in an ethic of responsibility rather than abstract forms of idealism. It involves a realistic commitment to international law, which requires a process of prosecutions for gross violations of human rights and a commitment to 'ultimate ends' that serve the emotional and material needs of victims. This aspires to the restoration of the basic principles and praxis of social justice by seeking to redress losses suffered by victims of past abuses as well as the creation of institutional structures that minimise the repetition of atrocities.

In a formative essay on the study of transitional justice written in the wake of the Chilean National Commission on Truth and Reconciliation, José Zalaquett argues that the ultimate goal of transitional justice involves the creation of a policy that furthers two overall objectives: the prevention of the recurrence of past abuses, and to the extent that this is possible, reparations for the damage caused by these atrocities. Allowing for the pursuit of these ideals to be exercised with different levels of severity or prudence, Zalaquett insists that this discretion needs to reflect the sovereign will of a nation. It is at the same time pertinent to recognize that the Rome Statute of the International Criminal Court (ICC), ratified on 1 July 2002,

states that the four core crimes under international law: genocide, crimes against humanity, war crimes, and the crime of aggression ‘shall not be subject to any statute of limitations’. Where states are ‘unable’ or ‘unwilling’ to investigate and prosecute such crimes, the ICC has jurisdiction to do so, provided such crimes are committed in the territory of a state party or by a national of a state party. In addition, the ICC may exercise its jurisdiction with respect to cases committed in the territory of or by a national of a non-state party where such a case is referred to the prosecutor by the United Nations Security Council.

Important, not least in the African situation, where presidents often endeavour to be ‘presidents for life’, Article 27(1) of the Rome Statute applies jurisdiction ‘equally to all persons without any distinction based on official capacity’. A head of state or a government official, serving in an official capacity, shall not be exempted from criminal responsibility. Article 27(2), in turn, states that ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not prevent the ICC from exercising its jurisdiction over such a person’.

The African Union and some of its member states, together with scholars elsewhere in the world, have frequently resisted the investigation of heads of state as well as other government officials investigated in pre-trial structures of the ICC. Some African states have, in turn, threatened to withdraw from the ICC in protest against the threat of such investigations. Other reasons for resistance to the court by African states include its apparent reluctance to prosecute the alleged atrocities of major powers and permanent members of the United Nations Security Council. African nations have further objected to what is perceived as an undue focus by the ICC on African states.

However, international legal norms have not been consistently applied as seen in transitional justice processes in Ghana, South Africa and other parts of the world. Written within the context of this debate, Yankson-Mensah provides a pertinent case-study on the Ghanaian NRC, which suggests that prosecution of perpetrators was not realistically possible. Unlike the South African Truth and Reconciliation Commission, it did not make allowance for perpetrators to apply for amnesty as an incentive to uncover past atrocities and did not name individual perpetrators in its final report.

The formal discussion on ‘The Role of Truth Commissions and Prosecutions’, organised by the Ghana Centre for Democratic Development, after the presentation of the NRC report to President John Agyekum Kufuor, is representative of the enduring tensions concerning the possibility of future prosecutions of past human rights abuses in Ghana. The president is reported to have neither anticipated nor eliminated the possibility of prosecutions. This, it appears, will be left to the discretion of the judicial and political leadership, the will of the people through democratic and civil processes.

The focus and subsequent response to the NRC in Ghanaian civil society, political debate and scholarly circles is primarily focused on the objectives, methodology and praxis of the commission, its impact on the pursuit of national reconciliation and the right of victims to reparations as well as the need for

institutional reforms. Yankson-Mensah provides a penetrating legal and contextual analysis of these and related objectives in her concluding chapters, providing an important assessment of the NRC and possible future developments in the pursuit of human rights in Ghana—and by implication in other African countries. Her study makes a pertinent contribution to the global transitional justice debate.

Cape Town, South Africa
2019

Prof. Charles Villa-Vicencio
Former National Research Director
South African Truth and Reconciliation Commission
Visiting Professor in Conflict Resolution
Georgetown University
Washington, DC, USA

Professor Emeritus
University of Cape Town
Cape Town, South Africa

Acknowledgements

The study that led to this book was conducted with funding from the Deutscher Akademischer Austauschdienst (DAAD) through the South African-German Centre for Transnational Criminal Justice, a former DAAD Centre of Excellence in Africa. I therefore wish to extend my sincerest appreciation to the DAAD and the South African-German Centre for Transnational Criminal Justice, for equipping me with the financial means, the needed research materials and for providing me with a supportive research environment in Berlin and Cape Town to enable me to complete this research.

I am immensely grateful to my supervisors, Prof. Dr. Moritz Vormbaum and Prof. Dr. Gerhard Werle for their invaluable guidance and support in the course of undertaking this study. I deeply appreciate their patience and their encouragement, especially during my maternity break. Their support gave me the courage to work harder, and I am truly thankful to them for believing in my abilities throughout my studies. I am also very grateful to Prof. Lovell Fernandez of the University of the Western Cape, for his encouragement, constructive guidance and proofreading at the beginning of this book.

I would also like to say a big thank you to all the experts and respondents who participated in the surveys that led to the writing of this book. I am especially grateful to Prof. Kumi Ansah-Koi, Department of Political Science, University of Ghana; Prof. Kwame Bofo-Arthur, Department of Political Science, University of Ghana; Dr. Franklin Oduro, deputy director, Ghana Centre for Democratic Development; and Dr. Isaac L Annan, director and chief investigator, Commission on Human Rights Administrative Justice. Undoubtedly, your invaluable responses contributed immensely to the depth and richness of this book.

My sincere thanks goes to the staff of the South African-German Centre for Transnational Criminal Justice in Cape Town and Berlin, especially Frau Anja Schepke, Miss Anna Krey, Dr. Leonie Steinl and Dr. Aziz Epik for their diverse administrative roles that made my study life comfortable and successful.

I greatly appreciate the love and support I received from my family and friends in Ghana, Berlin and Cape Town. I am particularly grateful to my partner, Dr. Daniel K. A. Mensah, for his support and encouragement during this study. I thank my

sweet daughter, Evette, who had to forgo important childhood moments to enable me to complete this book. I am also grateful to my brother, Dr. Eric Yankson, for his input, particularly with respect to editing and proofreading my draft. My greatest appreciation goes to my dear parents, Anthony Kobina Yankson and Grace Yankson, and my siblings, Cynthia, Ernest, Eric and Anthony, for their constant prayers, encouragement and support in the course of this research. I also say a big thank you to my dear friends, Dr. Seada Adem Hussein, Philippa Bogere, Franziska Tolksdorf, Dr. Marshet Tadesse Tessema, Victoria Ojo Adewuyi, Kennedy Paschal Anaba, Ellen Lordina Serwaa Mireku, Papa Yaw Owusu-Ankomah, Nana Adwoa Gyanoah Ansaah and all my classmates in my master's class at the University of the Western Cape. You have all inspired me in different ways, and I owe this achievement to you all.

Finally yet importantly, I am eternally grateful to the Almighty God, in whom I live and have my being. His grace has brought me thus far and I am forever grateful.

Nuremberg, Germany

Marian Yankson-Mensah

Contents

1	Introduction	1
1.1	Background to the Study	2
1.1.1	Defining Transitional Justice	3
1.1.2	Tracing the Roots of Transitional Justice	4
1.1.3	Transitional Justice and Truth Commissions	6
1.1.4	The Origin of Truth Commissions	7
1.1.5	The Right to Truth	9
1.1.6	Benefits and Shortcomings of Truth Commissions	12
1.2	Objectives and Methodology	13
1.2.1	Historical Review	15
1.2.2	Normative Analysis	15
1.2.3	Comparative Analysis	16
1.2.4	Empirical Analysis	17
1.3	Structure of the Book	20
	References	21
2	Historical Background to the Establishment of the National Reconciliation Commission	27
2.1	Introductory Remarks	28
2.2	Early Signs of Social Division in Ghana	29
2.2.1	Nkrumah and the United Gold Coast Convention	29
2.2.2	The National Liberation Movement	30
2.2.3	The Togoland Factor	31
2.3	Ghana's First Republican Regime (6 March 1957 to 24 February 1966)	31
2.4	The Genesis of Military Rule: The National Liberation Council (24 February 1966 to 1 October 1969)	36
2.5	A Second Venture into Constitutional Democracy: The Government of the Progress Party (1 October 1969 to 13 January 1972)	37

2.6	The Return to Military Rule (1972–1979)	39
2.6.1	The National Redemption Council and the First Supreme Military Council (13 January 1972 to 5 July 1978)	39
2.6.2	The Second Supreme Military Council (5 July 1978 to 4 June 1979)	41
2.6.3	The Armed Forces Revolutionary Council (4 June 1979 to 24 September 1979)	41
2.7	The Third Republic: Peoples’ National Party (24 September 1979 to 31 December 1981)	43
2.8	The Second Coming of Rawlings: The Provisional National Defence Council (31 December 1981 to 7 January 1993)	45
2.9	Transition to Democracy and the National Reconciliation Commission	49
2.10	Chapter Summary	53
	References	53
3	The Legal Framework of the National Reconciliation Commission	57
3.1	Introductory Remarks	58
3.2	Reasons for the Establishment of the National Reconciliation Commission	60
3.2.1	The Amnesty Provisions Under the 1992 Constitution	60
3.2.2	Complexities with Amending the Amnesty Provisions	61
3.2.3	Absence of a Transitional Justice Policy for the Country	62
3.2.4	The Principle of Legality (<i>Nullum Crimen, Nulla Poena Sine Lege</i>)	63
3.2.5	Other Factors	65
3.3	The Features of the National Reconciliation Commission	66
3.3.1	Time Frame for Operation	69
3.3.2	Membership and Staffing	70
3.3.3	Independence of the National Reconciliation Commission	75
3.3.4	Confidentiality of Information	77
3.3.5	Objects and Mandate of the National Reconciliation Commission	79
3.3.6	Powers of the National Reconciliation Commission	84
3.3.7	Funds of the National Reconciliation Commission	94
3.3.8	Provisions on the Report	95
3.3.9	Offences and Penalties	97
3.4	Chapter Summary	98
	References	98

4	The National Reconciliation Commission in Practice	103
4.1	Introductory Remarks	104
4.2	The Work of the National Reconciliation Commission	104
4.2.1	Interpretation and Implementation of the Mandate	105
4.2.2	Structures and Offices	106
4.2.3	Statement Taking and Processing	109
4.2.4	Conduct of Investigations	110
4.2.5	Hearings	111
4.2.6	Assistance of Witnesses	112
4.3	Challenges	113
4.3.1	Inadequacy of Funds and Logistics	114
4.3.2	Weak Investigative Capacity	115
4.3.3	Condemnation of and Resistance to the Commission’s Work	116
4.3.4	Political Resistance to the Commission’s Work	119
4.3.5	Difficulty in Engaging Perpetrators	121
4.4	Outcome of the Commission’s Work	124
4.4.1	Overview of the Report	124
4.4.2	Interim Analysis of the Commission’s Report and Recommendations	132
4.4.3	Publicity of the Report	137
4.4.4	Implementation of the Report	139
4.5	Chapter Summary	142
	References	142
5	The National Reconciliation Commission in Hindsight: An Evaluation of Impact	145
5.1	Introductory Remarks	146
5.2	The Concepts of ‘Impact’ and ‘Success’	147
5.3	The Assessment Criteria	148
5.4	The Impact of the National Reconciliation Commission on Truth	152
5.4.1	Overview of the Goal of Truth	152
5.4.2	Perceptions of the National Reconciliation Commission’s Impact on the Establishment of Truth	153
5.4.3	Discussion	157
5.5	The Impact of the National Reconciliation Commission on Justice	160
5.5.1	The National Reconciliation Commission and the Pursuit of Victims’ Rights to Remedies	161
5.5.2	Preventing the Recurrence of Human Rights Violations	167
5.5.3	Summary	173

- 5.6 The Impact of the Commission on National Reconciliation 173
 - 5.6.1 Perceptions of the Commission’s Impact on National Reconciliation 175
 - 5.6.2 Discussion 178
- 5.7 The Impact of the National Reconciliation Commission on Peace 180
 - 5.7.1 Perceptions of the National Reconciliation Commission’s Impact on Peace 181
 - 5.7.2 Discussion 183
- 5.8 Chapter Summary 185
- References 186
- 6 After the National Reconciliation Commission: The Way Ahead . . . 191**
 - 6.1 Introductory Remarks 192
 - 6.2 Issues Related to the Duty to Prosecute 193
 - 6.2.1 The Scope of the Duty to Prosecute 193
 - 6.2.2 Discussion 197
 - 6.3 Issues Related to the Amnesty Provisions in the 1992 Constitution 202
 - 6.3.1 The Legality of Amnesties under International Law 202
 - 6.3.2 Ghana’s Amnesty Law Under International Law 206
 - 6.4 Issues Related to the Right to Reparations 209
 - 6.4.1 The Scope of the Right to Reparations 209
 - 6.4.2 Has Ghana Fulfilled Victims’ Rights to Reparations? 210
 - 6.5 Institutional Reforms 213
 - 6.5.1 The Basis and Scope of Institutional Reform 213
 - 6.5.2 Gaps in Institutional Reform 215
 - 6.6 Chapter Summary 216
 - References 217
- 7 Conclusion 221**
 - 7.1 Research Summary and Findings 221
 - 7.2 Recommendations 224
 - 7.3 Final Thoughts 226
 - References 227
- Appendix A: Qualitative Survey Questions 229**
- Appendix B: Quantitative Survey Questions 231**
- Appendix C: Demographic Details of Respondents 243**
- Index 245**

Abbreviations and Acronyms

NRC National Reconciliation Commission
TRC Truth and Reconciliation Commission

List of Figures

Fig. 4.1 Organisational structure of the NRC
(Source The author 2018). 107

Fig. 5.1 Perceptions of the Commission’s Impact on Establishing Truth:
 What reasons explain your points of view in statements
a and **b** above? (Please select all that apply)
(Source The author 2018). 155

Fig. 5.2 Perceptions of the Commission’s Impact on the Right
 of Victims to Remedies: What reasons explain your points
 of view in the statement above? (Please select all that apply)
(Source The author 2018). 163

Fig. 5.3 Perceptions of the Commission’s Impact on Preventing
 the Recurrence of Human Rights Violations: What reasons
 explain your points of view in the statement above?
 (Please select all that apply) *(Source The author 2018)* 169

Fig. 5.4 Perceptions of the Commission’s Impact on Reconciliation:
 What reasons explain your points of view in the statement
 above? (Please select all that apply)
(Source The author 2018). 176

Fig. 5.5 Perceptions of the Commission’s Impact on Peace: What
 reasons explain your points of view in the statement above?
 (Please select all that apply) *(Source The author 2018)* 182

List of Tables

Table 5.1	Perceptions of the Commission’s Impact on Establishing Truth: What are your opinions regarding the following statements?	154
Table 5.2	Perceptions of the Commission’s Impact on the Right of Victims to Remedies: What are your opinions regarding the following statements?	162
Table 5.3	Perceptions of the Commission’s Impact on Preventing the Recurrence of Human Rights Violations: What is your opinion regarding the following statement?	168
Table 5.4	Perceptions of the Commission’s Impact on Reconciliation: What is your opinion regarding the following statement?	175
Table 5.5	Perceptions of the Commission’s Impact on Peace: What is your opinion regarding the following statement?	181