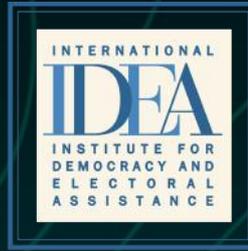




SAHEL

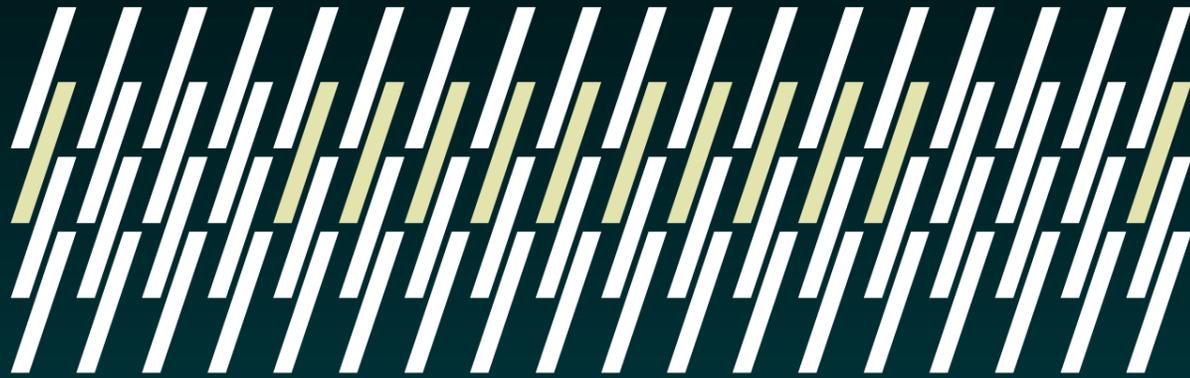


ADDRESSING IMPUNITY

Role of Justice
in Governance

Non-Paper





Introduction



Justice plays a foundational, yet often overlooked role in advancing African security and governance. It is the multidimensional cornerstone of social, economic and political governance that facilitates the rule of law, constitutional order and the respect for human rights. Empirical evidence from Africa suggests that democratic systems swiftly recede, paving the way for authoritarian order and state repression when justice is suppressed, and that the frequency of conflicts and human rights violations speak more to the deficit of justice than anything else. That is why states must fiercely guard against all forms of impunity – blatant or covert. This is particularly crucial in post-conflict and crisis situations where peacebuilding and reconstruction initiatives are often derailed by the prevalence of impunity that fueled instability in the first place. Without effective mechanisms for justice, accountability and redress, hopes for sustainable peace and development would remain deferred and the risks of conflict reoccurrence multiplied.

Academic and policy consensus hold that the decade-long multilayered crisis plaguing the Sahel region, as in many other parts of Africa, is fundamentally a crisis of governance (Clionadh and Dowd, 2013; Bøås & Strazzari, 2020) of which injustice is a potent indicator. Between the throes of authoritarian regimes, coup d'états, unrestrained use of force by state forces and international military interventions conflicts, inter-communal violence, trans-national crimes, terrorist insurgencies, a broad range of serious crimes and human rights violations such as mass killings, sexual and gender-based violence, torture etc., a broad range of serious crimes and human rights violations such as mass killings, sexual and gender-based violence,

torture, etc. have been carried out by all actors, with hardly any form of accountability. This situation has been described by the United Nations (UN) as a “vicious cycle of impunity,” one which is rapidly cascading into a separate crisis within the ongoing crises in the Sahel.

Like other governance components, justice, including in transitional settings, has not been sufficiently prioritized in national and international responses to the Sahelian crisis. Lessons learnt from over a decade of crisis management endeavors, and the intractability of insecurity highlight the need and urgency to rethink the current, largely military-led approaches to conflict management in ways that increasingly begin to consider and give priority to governance and accountability driven approaches. In this respect, it is particularly important to underscore in policy development and implementation processes, the clear leadership role that justice must play in the quest to reconcile reconstruct countries and communities affected by conflicts and repression.

This non-paper aims to refocus attention on the invaluable role that the justice dimension plays in any holistic reflection on the governance challenges in the Sahel. More specifically, it examines the progress, challenges and opportunities for an inclusive and responsive judicial system as the foundation for a strong social governance compact. After overviewing the state of justice and rule of law in the Sahel, it critically charts the progress, issues and dilemmas confronting national and multilateral efforts at tackling injustices. It further explores opportunities and generates recommendations.



Addressing Impunity: Role of Justice in Governance Non-Paper

Copyright © 2022 United Nations Development Programme

UNDP is the leading United Nations organization fighting to end the injustice of poverty, inequality, and climate change. Working with our broad network of experts and partners in 170 countries, we help nations to build integrated, lasting solutions for people and planet.

United Nations Development Programme
Sub-Regional Hub for West and Central Africa
Point E, Complexe Citamil, Immeuble E
Dakar - Senegal





Brief Overview of the State of Rule of Law and Justice in the Sahel

Spanning ten countries in Central, North and West Africa, the Sahel region occupies the geostrategic belt wedged between the desert to the north and tropical forests and savannah to the south.

Due to long-standing structural problems, including weak state institutions, ineffective and poor governance, fragile social cohesion, a deep-rooted sense of neglect, marginalization, and unfair treatment by the central governments of the Sahel countries toward the rural areas as well as lack of political participation by women, youths and other vulnerable groups, the region is now famous for one of the most prolonged multi-layered crisis on the continent. Over the past decade, for instance, the Sahel region has become the hotbed of an intricate web of crises including, state fragility, extreme poverty, food shortage, corruption, political tensions, violent extremism, illicit trafficking, environmental degradation, climate change, and economic shocks, as well as the unprecedented external shock of the 2011 Libyan crisis. These have had a dismal and protracted consequence on the respect for human rights, including women rights, and some of them have combined to erode the rule of law, while challenging the efficacy of judicial systems and constitutional order in Sahelian countries. A cursory glance at the human rights profile of the Sahel region tells a tale of contradictions: a growing affluence of norms sharply contrasted by acute implementation deficiencies. To be more explicit, despite adherence by countries in the Sahel to core regional and international instruments promoting human rights and the rule of law, and the elaboration of national criminal legislations; weak state institutions, poor human rights track-records, poor governance, lack of women participation in decision-making and corruption remain widespread in the justice sector in ways that threaten and undermine the rule of law.

According to the World Justice Project (WJP) 2021 Rule of Law Index, which presents a portrait of the rule of law in 139 countries, only Senegal (57) and Burkina Faso (75) performed near the global median score. The Gambia ranks

next at 89, closely followed by Niger (111), Mali (115) Guinea (120), Nigeria (121). At 133 and 135, Mauritania and Cameroon respectively round out the bottom of the list: only Afghanistan, Cambodia, Venezuela, and the Democratic Republic of Congo fare worse. The scores and rankings are based on eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. Overall, most countries in the Sahel experienced consecutive declines in rule of law performance the past three years. States showcased insufficient operational capacities for law enforcement at all levels of administrative, civil, or criminal proceedings: information gathering, investigation, trials etc. Against this backdrop, it is hardly surprising that most crimes and human rights violations escape accountability or that due process generally falters. The result is the widescale prevalence of impunity which is in many respects, the highest form of injustice.

The above situation has attracted much international and regional attention. Multilateral endeavours towards reinforcing justice sector reform and capacity/institutional building is gaining momentum through the inclusion of justice and rule of law priorities in the governance arm of strategic frameworks such as the UNIS, the AU G-5 Sahel Strategy, ICC reinforcement, and the inclusion of transitional justice blueprints in national peace and reconciliation processes. Regional cooperation initiatives like the Network of West African Central Authorities and Prosecutors Against Organized Crime (WACAP) which aims to facilitate international cooperation in criminal matters for all transnational organized crime, including terrorism is also noteworthy. However, these efforts pale in the light of overwhelming evidence of systemic injustices that persist in the region.

Addressing Impunity: Issues and Dilemmas Confronting National and Multilateral actors



Progress towards curbing impunity in the Sahel remains strangled by **a spectrum of theoretical, normative, institutional, procedural and contextual dilemmas that must be acknowledged and confronted.**

Progress towards curbing impunity in the Sahel remains strangled by a spectrum of theoretical, normative, institutional, procedural and contextual dilemmas that must be acknowledged and confronted.

○ Theoretical Dilemmas

The push for justice and accountability in post-conflict contexts and those experiencing repressive rule is often the subject of two major theoretical debates from which the Sahel is not exempted. The first centres on the justice versus peace dichotomy - the perceived dialectic between justice and peace concerns (Mojtahedi and Wijk 2021). This dilemma views the quest for justice as the prolongation of hostilities, and of peace as acquiescence to injustice (Manas 1996:43). The Truth and Reconciliation Commission of Sierra Leone seemingly endorsed this dissociative vision by stating that: “Those who argue that peace cannot be battered in exchange for justice must be prepared to justify the likely prolongation of conflict (Report Vol. 36 N 11). Generally, peace proponents (Sriram and Pillay 2009; Hayner 2009) are of the view that transitional justice could derail peace negotiation and undermine post conflict state building; and Rigby (2001) argues that societies must give up on all aspirations for justice in order to achieve peace. Interposing both differing perspectives, Monsour and Riches (2017) view the peace versus justice debate as a false dichotomy, and argue that justice is integral to peace and that long term peace would not be attained without accountability for mass crimes and root causes of conflict. While this is largely the theoretical approach envisaged and advocated for the Sahel, the reality on the ground is that there remains a general penchant for delaying, not to say compromising justice. Thus, in theory, most conceptions of peacebuilding already include justice sector institutions. The bigger challenges lie in practice.

The second predominant theoretical dilemma lies with the split between retributive and restorative justice models in transitional settings (Bucley-Zistel et al 2014). The former favours criminal accountability through prosecution and punishment, while restorative justice esteems inclusion and participation as instruments of repair to mass atrocities (Webber 2012). More recently, a syncretic approach which reconciles restorative and retributive models is increasingly advocated as a pathway for sustainable peacebuilding (Lambourne 2009), including in the Sahel. This transformative vision of justice is seen to be more victim-centred and forward-looking in terms of its aim to address both the legacies and root causes of conflict, and draw attention to socio-economic rights in transitional justice (Cahill-Ripley 2014; Ochoa-Sanchez 2019). However, in the Sahel, as elsewhere across the continent, transformative justice goals are still stifled by the looming tension between retribution and restoration. The negotiation and signing of the 2015 Agreement for Peace and Reconciliation in Mali, and other agreements between the government of Niger and specific local communities were, and continue to be, subject to the scrutiny of both theoretical debates.



○ Normative and Legal Frameworks Issues

Four main normative hurdles with implications for addressing impunity are worth evoking: the question of amnesty in peace agreements; presidential immunities in constitutions, separation of powers, gender and youth representation, and colonial remnants in constitutions/criminal laws.

- Amnesty Questions in Peace Agreement: Amnesty is a recurrent demand in ongoing peace endeavours. This is a delicate question as amnesty, in the eyes of the average citizen, victims and survivors, means exoneration from criminal responsibility. Another key concern lies with the potential instrumentalization of amnesty provisions by high-ranking military officials or political leaders involved in transition endeavours, to elude accountability for serious crimes, especially because the preconditions for pardon are often unclear. The jurisprudence of various international and regional human rights mechanisms reveal that, in many cases and for several crimes, amnesty represents a violation of international obligations incumbent on States. This is asserted in the African Court on Human and Peoples' Rights' ruling in the matter of *Ajavon vs Benin* (2020) where the court underscores that amnesty "constitutes a major obstacle to the referral to criminal courts or to the continuation of an action brought before criminal courts which, adjudicate on the criminal proceedings, and at the same time, rule on civil reparations." Generally, there remains an organic view that amnesty laws are inconsistent to human rights protection obligations. Demands for amnesty pose a challenge to addressing the legacies of armed conflicts.
- Presidential immunities in constitutions: Addressing impunity is a near impossible venture where constitutions enshrine wide ranging provisions for presidential immunities which forestall accountability for regime crimes and violations. For instance, articles 62 of the 1992 Malian Constitution gives wideranging immunities to members of Parliament which, unless revoked by the Parliament, presents a potential bulwark for accountability for crimes or abuse.
- Separation of Powers: This fundamental principle of effective governance stands compromised in most countries across the Sahel. One important consequence of excessively powerful executive arms of government is the erosion of the powers of both the judiciary and legislative arms of government. This trend undermines the principles of checks and balances among key organs of the state as well as separation of powers. With sweeping presidential powers, regime security is prioritized over security of their citizens. Power becomes centralized in the hands of the president, and not the people - a direct opposite of the fundamental principle of democracy, which gives more power to the people. Perhaps the problem is not so much a strong executive as its often excessive abuse. In the Sahel context of fragile state institutions, blended regimes and state security, where the military still looms large behind a facade of civilian rule (Burkina Faso, Cameroon, Chad, Mali, Niger etc) the probability for abuse is high and this constitutes a major threat to efforts at addressing impunity.

- Gender and Youth Representation: Although research has amply proven that meaningful gender representation, participation in politics and decision-making are associated with a lower risk of civil war and a reduced likelihood of state-perpetrated political violence—fewer killings, forced disappearances, torture, and political imprisonments (Melander (November 2005); Melander (March 2005), the existing normative frameworks of countries in the Sahel, are not sufficiently enabling of sectoral inclusion.

- Colonial vestiges in constitutions/ criminal laws: The constitution and criminal laws of former colonies on the Sahel is akin to the Gallic system that can be traced back to pre-revolutionary France. Under this model, the president is the custodian of the independence of the judiciary, clearly suggesting judicial subordination to the executive. Furthermore, some of the laws and concepts inherited from the colonial period are detrimental to peace, just societies and accountability. For instance, police and security forces. During the precolonial period, the many and diverse states and societies of sub-Saharan Africa generally did not have professional full-time law enforcement organizations. European colonial powers imposed written laws and created dedicated police forces were created to enforce them. But these forces were never meant to protect the citizens, they were rather meant to protect the colonial elite from the citizens. The rise of different types of dictatorships and authoritarian regimes meant that postcolonial African police forces became politicized and often continued their role of violently suppressing political opposition to the state. And so, it will require a paradigm shift, to move from the (still) colonial mentality of defense forces who act as law enforcement agents (at best), but often tormentors if not perpetrators, to protectors and service providers. Such a shift will also mean that these forces will be more accountable. Equally important is the fact that constitutions do not sufficiently foresee the traditional powers, considering how much justice is sought in the Sahel via the traditional means.

○ Institutional Challenges

Weak human rights and justice mechanisms: the prevalence of impunity in the Sahel is indicative of the absence, collapse, enfeeblement, dysfunctionality, gender-blindness, corruption or wholesale hijack of the justice system. The lack of commensurate human, technical and financial resources to meet the enormous and growing justice demands complicates this challenge.



- High executive overreach and lack of judicial independence: Presidential overreach, and the gross abuses that go with it, remain a monumental challenge. Despite constitutional guarantees, effective judicial independence in Sahelian countries remain overshadowed by encroaching dominance of the executive arm. Manifest legal dictatorship is seen through direct or indirect executive intervention in the appointment process, especially over the judiciary.

- International criminal and human rights mechanisms: These play an important complimentary role, especially in contexts where the nature of crimes committed evoke international jurisdiction; or when national capacities are manifestly weak. However, state cooperation is primordial, as well as the timing and sequencing of their interventions.

○ Operational Dilemmas

Critical operational dilemmas confronting efforts at enhancing accountability for abuses that require careful reflection include:

- Access to justice: this refers to the ability of ordinary people to resolve justice problems in a manner that is timely, affordable, and fair. Access to justice is the entry point for redress and accountability. While equal access to justice is codified in the fundamental law and applicable human rights instruments within the framework of equal protection by the law; poverty, lack of information, bureaucratic inefficiency, patriarchal norms and lack of trust deprive many of this right.
- Entrenched judicial corruption: The justice sector is amongst the most corruption-prone in the Sahel. The failure to enforce the law due to clientelism, justice-buying and manipulation of judicial processes, not only contributes to insecurity but also opens the door to other forms of systemic criminality, often with the complicity of government actors.
- Documenting and addressing abuses, including those carried out during counterterrorism operations: International organisations and national human rights commissions (Niger, Chad etc) have made some endeavours in this regard. However, these remain insufficient, in the light of the scope and continuous nature of violations. Data shortage means that much of the crimes/violations committed remain unknown, let alone addressed.
- State complicity with organized crime has contributed to the region's high baseline rate of impunity. Examples of high-profile cases security officials and diplomats implicated in transnational drug trafficking etc abound.

○ Contextual Challenges

- Ongoing conflict and political instability: The deteriorating security profile of the Sahel is disabling to all governance and peacebuilding initiatives.
- Terrorism, driven by weak governance, deprivation and marginalisation (UNDP, 2017), has increased fivefold over the past five years, and the region has seen multiplication of extremist groups. Counterterrorism efforts, mostly military-led, have also recorded unintended consequences for human rights protection.
- The ongoing crisis of internal displacement, estimated at over 2.7 million people, creates room for further violations, including gender-based violence, increases the burden of justice delivery and adds additional conflicting governance priorities in the Sahel.
- Poverty: With up to 80% of its people living on less than \$2 a day, the Sahel is marked by high levels of poverty. This influences, not just the standard of living, but also individual and state capacity for access and delivery of justice respectively. It is equally worth highlighting, that soaring levels of poverty is indicative of inequalities and social injustices
- Long-standing social and cultural norms and gender stereotyping: The root causes of violence against women and the impunity in that regard is largely due to long-standing social and cultural norms and gender stereotyping that dictate relationships, roles, and responsibilities between men and women, as well as unequal access to power, resources, and privileges. These are further reinforced by a range of discriminatory laws, including statutory and customary laws. Even when national laws are enacted to address these inequalities, effective enforcement has always been the major challenge. This is largely due to the deeply held traditional practices and sociocultural norms that reinforce discrimination. A patriarchal society has created deep (and worsening) gender inequalities, leading to widespread social exclusion, accepted violence and domination.
- COVID-19: The COVID-19 pandemic has dealt a severe blow to the rule of law and justice delivery. To respond to the COVID-19 pandemic, governments arrogated to themselves de facto emergency powers exercised through states of emergency and instituted through a broad range of lockdown measures including on judicial mechanisms. The consequences include: prolonged due justice/pre-trial detentions, human rights violations by security forces, increase in sexual and gender-based violence, shrinking of civil space, discrimination and justice delays. Impunity cannot be addressed without due processes and proportional justice.
- Other emerging factors which also limit the Sahelian governments to deliver prosperity and justice include: environmental degradation, and climate change effects, economic constraints and the ripple effects of war in Ukraine.



Opportunities for Inclusive and Responsive Justice Systems in the Sahel: Lessons Learnt and Perspectives

○ Normative and institutional opportunities abound

- The African Union Transitional Justice Policy embodies a new, innovative and inclusive vision of transformative justice and a useful tool for reinforcing the role of justice in governance in its goal to address the root causes and legacies of abuse (past, present and future).
- The African Union's Agenda 2063 lists justice, rule of law, and human rights as necessary pre-conditions for a peaceful and conflict-free continent. Nonetheless, African security sectors are not always set up to integrate justice and rule of law into their approaches. This has to change.
- National and Regional Frameworks for Advancing Human Rights and the Rule of Law in Mali and the Sahel.
- 344 Resolution on the fight against impunity in Africa - ACHPR/Res.344(LVIII)2016
- The integration of justice initiatives within conventional security efforts can mitigate conflict, improve societal resilience, and build a stronger culture supportive of the rule of law.
- AU's renewed strive for constitutionalism and rule of Law captured in the 2022 Accra Declaration, and ongoing efforts to elaborate an ACDEG Protocol on unconstitutional changes of government offers viable tools for addressing governance deficits, including impunity.
- The increased activism by Africa's growing youth movement is largely focused on matters of justice. (Nigeria)
- African Human Rights Protection and Criminal Justice mechanisms
- Post-COVID-19 context offers new development opportunities within which justice and equity could be advanced.
- Recent transitional Justice efforts such as Mali and the Gambian Truth Commissions, and the Extraordinary African Chambers in Senegal offer important good practices for for similar initiatives across the Sahel.





Questions for Discussion

- How can justice promotion contribute to effective governance and rule of law?
- How can transitional justice contribute to peacebuilding and overall reinforcement of governance and rule of law?
- What assessment can be made of the human rights, justice and rule of law situation in the Sahel?
- What are the main drivers of impunity in the Sahel?
- What appraisal can be made of the existing normative frameworks and institutional guarantees? What kind of justice/institutional reforms are needed to mitigate systemic drivers of impunity?
- What specific role can Justice actors play in addressing the crisis of governance in the Sahel?
- What is the role of traditional and alternative dispute mechanisms in addressing impunity in the Sahel?
- What kind of competences/skillsets are needed to reinforce judicial capacity of Sahel States?
- How can questions of immunity, amnesty and pardon be addressed in ways that do not compromise accountability and redress for crimes and human rights violations?
- How can access to justice be improved to contribute to security, stability, democracy, and the rule of law?
- How can multilateral programmatic assistance and funding modalities be better reconfigured to improve home-grown solutions to the challenges of impunity and injustice in the Sahel?
- What lessons can be learned from addressing impunity/ state practice. How can these be reinforced?



Recommendations/ Policy Considerations



The strive towards ending impunity is gaining momentum as a direct outcome of strategies such as UNMIS and AU G5 Sahel Strategy. Notwithstanding, measurable results are yet to gain visibility due to a plethora of challenges. To reinforce ongoing initiatives, the following recommendations are proffered:

- The emerging practice and jurisprudence on impunity, amnesty and pardon should be crystallised into a guiding framework. In approaching this, such a framework should focus on clarity of definition to prevent ambiguity of response, articulate stance on zero tolerance, and provide guidance on mapping vulnerabilities and designing concrete responses. This will provide clarity and consistency for the UN/AU/REC in its management of the crisis of impunity; and serve as a tool of advocacy for civil society watchdogs.
- A robust sustained anti-corruption campaign and advocacy in the judicial sector is needed.
- Institutional Reforms/ Separation of powers aimed at reinforcing checks and balances
- Strengthening the rule of law and justice systems through needs assessment, and needs-based technical assistance and capacity building.
- Increasing women's participation in judiciary, transitional justice and peace processes.
- Reviewing and addressing the obvious gaps in the existing normative frameworks, regarding: procedure, pre-trial detentions, obsolete colonial antecedents.
- Elevating the attainment of the socio-economic goals of Africa's integration process to be a central part of continental preventive action against access to Justice challenges.
- Addressing socio-economic variables central to access to justice: The use of targeted developmental initiatives which alleviate the plight of the poor and address horizontal inequalities that deprive victims of access to justice and minimise the likelihood of impunity.
- Promote constitutionalism by incorporating most of the core elements of modern constitutionalism such as separation of powers, judicial independence and Bill of Rights.
- Integrating Justice and Security: Justice and rule of law underpin the development and governance that is critical to realizing security for all. Justice institutions, therefore, are an important, though often overlooked, element of the security sector.
- Strengthening the social contract between the government/state institutions and the community: need to build people's confidence that their governments can provide justice and fair resolutions of popular grievances.
- A renewed commitment to strengthening human rights and the rule of law requires first the ratification of the regional and international instruments adopted to advance democracy, governance and human rights. Some countries are yet to ratify the AU charter promoting democracy, elections and governance. Beyond ratification, countries in the Sahel must fulfil their treaty obligations by adopting the necessary measures, including legislative, executive and administrative, to ensure the implementation of the principles proclaimed by the ACDEG, the ECOWAS Protocol on Democracy and Good Governance, as well as all human rights instruments ratified at regional, continental and global levels.
- Comprehensive transformative justice processes must be implemented in countries emerging from crisis, to address past human rights abuses and their root causes.
- Early warning systems for human rights and justice: Multilateral actors must be proactive in engaging member states when there is ample evidence pointing in the direction of a possible/ongoing violations/impunity.



United Nations Development Programme
Sub-Regional Hub for West and Central Africa
Point E, Complexe Citamil, Immeuble E
Dakar - Senegal

Connect with Us

 @UNDPWACA
www.undp.org/africa

© UNDP 2022