



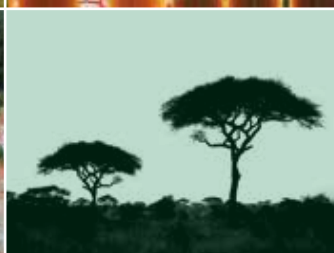
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# RETHINKING THE ROLE OF LAW AND JUSTICE IN AFRICA'S DEVELOPMENT

**An Edited Volume of Discussion Papers**

United Nations Development Programme

DEMOCRATIC GOVERNANCE





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## **Rethinking the Role of Law and Justice in Africa's Development** **An Edited Volume of Discussion Papers**

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The idea to produce this publication was conceived at the inaugural UNDP Democratic Governance Community of Practice (CoP) meeting for sub-Saharan Africa that took place in South Africa in November 2011. The scoping debates covered in this work are inspired by important contributions made by the community of practitioners from across Eastern and Southern Africa (ESA) and West and Central Africa (WACA) as well as key partners, both internal and external to UNDP.

We acknowledge the authors of the discussion papers; namely, Charles Manga Fombad, Warigia Razia, Mark Shaw, Tuesday Reitano, Abraham Korir Sing'Oei and Laura Young. Their collective contributions come together in this volume to provide a framework to inform on-going efforts to promote rule of law as a key variable in achieving inclusive and sustainable development in Africa.

The text benefitted from critical review, input and insights by the Editors Chris Steel-work and Melanie Reimer as well as peer review by several individuals in UNDP; namely, Shelley Inglis, Siphosami Malunga, Khabele Matlosa, Shireen Said, Nicola Palmer, Amanda Serumaga, Forster Akuoko, Violet Korsah Baffour, Eveline Debruijn, Evelynne Change, Martin Borgeaud and Zorana Alimpic.

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## PREFACE

Several countries in sub-Saharan Africa have prioritized the promotion of the rule of law and enhancing access to justice in order to meet the aspirations of their citizens for a just, safe and secure society, and development approaches that result in sustainable livelihoods. Progress has been achieved by most countries in strengthening the rule of law and access to justice; there are examples of good practices. As essential as the rule of law and access to justice are, they are also complex notions whose meaning, content and impact depends on context specific considerations.

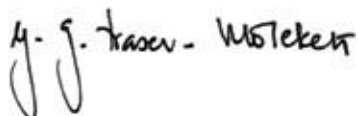
In Africa, UNDP has accumulated significant years of experience in rule of law, access to justice and legal empowerment work across different situations, including in post conflict and transition settings. UNDP uses various contextualized approaches and innovations to meet the requests of its national partners and key stakeholders. By supporting governments, judiciaries, national human rights commissions, correctional and police services, civil society organizations and Parliaments, UNDP has acquired knowledge, comparative advantage and gained confidence with its national partners.

The approach of supporting citizen-driven access to justice and legal empowerment, combined with capacity building of key supply-side institutions contribute to the realization of the citizens' rights particularly for the most marginalized groups. Furthermore, in responding to conditions of deprivation, discrimination, repression, violent conflict and corruption, UNDP support has facilitated the expansion of equitable opportunities and choices for individuals to improve their own lives. The work of UNDP is by no means exhaustive. The fast transforming, volatile and sometimes unpredictable geo-political and geo-economic context in Africa demands a constant review, re-articulation and re-thinking of the rule of law and human rights in the context of justice beyond the narrow juridical constructions.

This edited volume of discussion papers provides knowledge and ideas from practitioners working across the continent that seek to bridge the gap between policy and practice. It highlights the inter-linkages between the rule of law, justice, sustainable development, poverty reduction and human rights. The volume recognizes the promotion of effective rule of law and access to justice and legal security as an outcome of social struggles and policy reforms, producing legal and political outcomes that contribute to achieving sustainable human development by providing the functioning systems necessary to run effective social, economic and political processes like education and healthcare. It documents some achievements in the pursuit of inclusive development through the engagement of historically excluded groups in both policy development and programme implementation the of rule of law and access to justice programmes in a manner that ensures that the conception of justice represents the interests of all people.

In 2012 Member States renewed their commitments at the General Assembly High-level meeting to strengthen the rule of law as a basis for development. The world is framing the post-2015 MDGs and development agenda – a process that provides an opportunity to translate this commitment into action. This publication is therefore timely in ensuring that the knowledge and expanded conceptualization of law and justice, based on evidence from the field, is well linked to ongoing discussions on sustainable human development. It also resonates well with the growing momentum of integrating the expanded notion of law and justice within conflict prevention and recovery programmes. This will go a long way in enriching UNDP strategic thinking and regional programming for the period 2014 to 2018.

This publication is intended for use by UNDP and its partners including government agencies, regional institutions, civil society, universities, research centres and other development agencies. The discussion papers raise contested and yet critical aspects of UNDP work - work we have done for some time now. We hope that they will stimulate quality debates on how the rule of law, access to justice and legal empowerment can enable sustainable human development, inform programming methods and encourage action oriented dialogue.



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## Acronyms

AfDB	African Development Bank
ANCL	African Network of Constitutional Lawyers
APRM	African Peer Review Mechanism
AU	African Union
AUCIL	African Union Commission on International Law
BDP	Bureau for Development Policy
CAADP	Comprehensive African Agriculture Development Programme
CAR	Central African Republic
CBNRM	Community-based natural resources co-management systems
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CITES	Convention on International Trade in Endangered Species
CoP	Community of practice
CSO	Civil society organizations
DDI	Domestic direct investment
DDR	Disarmament, Demobilization and Reintegration
DfID	UKs Department for International Development
DRC	Democratic Republic of Congo
ECOWAS	Economic Community on West African States
EPZ	Export processing zones
ESA	Eastern and Southern Africa
FDI	Foreign direct investment
GDP	Gross Domestic Product
GIZ	German Agency for Technical Cooperation
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
IDP	Internally displaced person
ILO	International Labour Organization
IOM	International Organization for Migration
MDGs	Millennium Development Goals
MPRDA	Mineral and Petroleum Resources Development Act
NAPTIP	National Agency for Prohibition of Traffic in Persons and Other Related Matters
NEPAD	New Partnerships for Africa's Development
NGO	Non-governmental organization
NHRI	National human rights institution
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PAP	Pan-African Parliament
RBA	Regional Bureau for Africa
REC	Regional Economic Communities
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SGBV	Sexual and gender-based violence
TJRC	Kenya's Truth, Justice and Reconciliation Commission
TOKTEN	UNDPs Knowledge Transfer Through Expatriate Nationals Programme
TRC	Truth and Reconciliation Commission
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UN-HABITAT	United Nations Human Settlements Programme
UNODC	United Nations Office on Drugs and Crimes
USAID	United States Agency for International Aid
WACA	West and Central Africa
WHO	World Health Organization

## About the authors

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Charles Manga Fombad is presently a Professor of Law and the head of the African Comparative Constitutional Law Unit of the Institute for International and Comparative Law in Africa (ICLA), based at the Faculty of Law of the University of Pretoria. He holds a Licence en Droit (University of Yaounde), LL.M. and Ph. D. (University of London) and a Diploma in Conflict Resolution (University of Uppsala). Professor Fombad is the author/editor of eight books and has published more than 60 articles in peer-reviewed journals. In 2003, he received the Bobbert Association Prize for the best first article in the *Journal for Juridical Science* and was awarded the Wedderburn Prize. He is a member of several editorial boards including the *African Journal of International Affairs* and is a member of the Steering Committee of the African Network of Constitutional Lawyers (ANCL) and the Executive Committee of the International Association of Constitutional Lawyers (IACL). His research interests are in comparative constitutional law, delict (tort law), media law, international law, and legal history, especially issues of legal harmonization.

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### Mark Shaw and Tuesday Reitano

Mark Shaw and Tuesday Reitano work for STATT ([www.statt.net](http://www.statt.net)), a consulting firm dedicated to building community resilience to transnational threats. Mark was a senior UN officer at the UN Office on Drugs and Crime (UNODC), working in partnership with national governments to build effective responses to organized crime and trafficking within a framework of broader criminal justice reform. Tuesday also comes from the UN, a former UNDP staff member with a background in governance and development policy for countries emerging from crisis and conflict.

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PAPER 3

# Transitional justice in post-conflict and -crisis reconstruction and development in Africa: the controversies, contradictions and tensions

Warigia Razia





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# Transitional justice in post-conflict and -crisis reconstruction and development in Africa: The controversies, contradictions and tensions

Warigia Razia<sup>1</sup>

## 1. INTRODUCTION

---

States emerging from violent conflict or political repression are faced with pertinent questions centred on how best to deal with their painful pasts, while balancing the fragile stability that often characterizes post-conflict and -crisis countries. The dynamics of contemporary conflicts and crises compel us to consider these questions. How can past wrongs be righted without jeopardizing current stability and future prospects? How can cycles of violent conflict and political repression be broken in the medium-to long-term, so that lasting peace, development and a just social order can be achieved? Given the increasing need for mechanisms to address these questions in Africa, it is an apt time for discourse around the role of law and justice in Africa's development, particularly in post-conflict and -crisis contexts, which feature myriad challenges and complex dynamics that require unique solutions.

This paper explores transitional justice in Africa. It begins by locating the discourse in contemporary conflicts, showing the contexts in which transitional justice mechanisms are used. It delves into the development of transitional justice and the specific dynamics of post-conflict and -crisis settings, which are distinct from the historical contexts in which transitional justice

mechanisms emerged. This reveals the controversies, contradictions and tensions in transitional justice, particularly in the African context with its so-called 'new wars'. The implications of these for conflict transformation, peacebuilding and development in Africa are discussed, before concluding with considerations for future policy, strategies and interventions.

The paper argues that a comprehensive approach to transitional justice is essential if these mechanisms are to contribute towards their intended goals, and ultimately to a just social order. It postulates that a change is required from the legal-judicial approach, which has dominated the field since its emergence, to an approach that is multidisciplinary, context specific and nuanced, victim-centred, gender sensitive, long-term and well-resourced, and that addresses legal, political and social aspects of the situation. Furthermore, as transitional justice mechanisms do not function in a vacuum, they need to be accompanied by nation and state building measures, because the state remains the framework within which durable solutions to violent conflict, political repression and underdevelopment will be found.

## 2. CONFLICT AND POST-CONFLICT CONTEXT

### 2.1 Contemporary conflict in Africa

Transitional justice methods are increasingly being applied, particularly in Africa, to conflict and post-conflict contexts, as opposed to the post-authoritarian settings in which transitional justice first appeared. Therefore, to contextualize the discussion, this section provides an overview of contemporary conflict in Africa.

European colonialism had a devastating impact on Africa. To begin with, the artificial boundaries created by the colonial rulers on partition of Africa at the Berlin Conference of 1884–1885 threw together different ethnic groups within a nation and state, without efforts to provide for cultural and ethnic diversity. However, the colonizers created ethnic identities and afforded them hierarchies that had not previously existed. Additionally, one of the colonial strategies – divide and rule – actually pitted ethnic groups against each other. This sowed the seeds for ethnic rivalry, mistrust, competition for power and resources, cycles of ‘correcting’ perceived historical and other injustices.

As a consequence, some African leaders proclaimed the single party state as a means to curb the ethnically driven competition, equitably distribute goods and services, eradicate poverty and develop their countries as they emerged from colonial dominance. However, without the necessary nation building efforts that could have provided a unified societal countercheck, the one party state perpetuated political repression, negative ethnicity and kleptocracy.

The legacy of the Cold War had an equally devastating impact. For 50 years, the polarization of the world between the United States-led liberal democracy model on one hand, and the Union of Soviet Socialist Republics socialist-communist system on the other, led to a perception of wars being a result of the competition between different ideologies or great powers for world domination. Wars were considered to be “between states for clearly defined political aims where victory is absolute”.<sup>2</sup> Africa provided the superpowers a means to achieve geostrategic goals without the risk of nuclear war. Within client states, they did this through extensive aid and violence by proxy, which took the form of cash transfers, the provision of weapons and technology, and advisory or combat

support to insurgent forces or the state itself. Promising post-independence, African leaders who tried to steer a truly independent course faced Western hostility, coups and assassinations, as each superpower feared that such leaders would become a pawn of ‘the other’.

The end of the Cold War raised various expectations and speculations about its consequences. Some predicted that the end of the Cold War was going to lead to a worldwide reduction in military expenditure and investment in development and peace, because liberal democracies were seen to have triumphed. The world after the Cold War saw not only the collapse of the interstate system based on a bipolar world order, but also in many places, the collapse of the state itself. As focus shifted from maintaining the external bipolar world order, it turned inward and state viability came into sharp focus.<sup>3</sup> “State collapse is a deeper phenomenon than mere rebellion, coup or riot. It refers to the situation where the structure, authority [legitimate power], law, and political order have fallen apart and must be reconstituted in some form, old or new ... it is not necessarily anarchy”.<sup>4</sup>

As the old order collapsed, illegitimate and corrupt regimes that had been supported as part of the strategic competition between the superpowers found themselves in crisis. States changed from nationalistic post-colonial regimes, to authoritarian, to new successor regimes, as they grappled with the changing world order as well as internal dynamics. This in turn brought about a retreat to ethnic nationalism as the residual and viable identity, with order and power (but not always legitimacy) cascading down to local groups – who were ethnically, regionally or commercially based and had access to small arms and light weapons. Governmental authority at the centre no longer held sway over the periphery. With no external aid and underdeveloped productive capabilities, there was little to no governmental capacity to generate and manage revenue, which was compounded by weak institutions. Moreover, weak legitimacy to maintain a hold on power amidst growing grievances, such as high inequality and lack of political rights, opportunities for predation by state and non-state actors to control primary commodity exports, and lack of social capital to mitigate fragility, all contributed to cycles of civil war and political unrest in a number of sub-Saharan African countries. Unpleasant tactics and atrocities accompanied the

### Box 1: One face of post-conflict and post-crisis reconstruction and development in Africa

Statistics vary widely on the number of women and girls raped during the 1994 Rwanda genocide, with some studies claiming that 250,000 to 500,000 women and girls were raped in less than 100 days. "In a survey of Rwandan women in 1999, 39 percent reported being raped during the 1994 genocide, and 72 percent said they knew someone who had been raped." "In 2000, a survey of 1,125 women who survived rape during the genocide found that 67 percent were HIV positive." The statistics, whether accurate or not, do not reveal the depth of violence to which women and girls were exposed. Neither do the numbers reveal the magnitude of the consequences that the victims of rape continue to suffer long after the genocide, resulting from the terror they experienced as they became casualties of war through rape. It is only when one hears personal accounts that one begins to understand the depth of that terror.

Meet Ingabire\*, a survivor of the genocide. "When the genocide happened, I was only 14 years old. My parents and siblings were killed, and I was raped. I could not tell anyone what had happened to me. It was only after the war, when I found myself very sick and weak, that I went to the clinic and was checked. Tests revealed that I was pregnant and HIV positive. I did not know what to do. I was angry and sad, and did not want to continue living. The government had a programme that was helping survivors of the genocide, who had been raped and infected, with medicine [antiretroviral drugs]. I immediately began to take it, and my son was born HIV negative.

When my son was born, I did not want to take care of him. I hated him. Every time I saw him I remembered what had happened to me. I was cruel to him as he began to grow up. This continued for the first five years of his life, until I joined a women's support group. Through this group I began to share my experiences with other women who had similar experiences. We also went through healing sessions, and were equipped to live positively in spite of the rape and HIV positive status. We later began income-generating activities as a group. As a result of the healing and support I got from the group, I began to realize that my son was innocent, and I could not continue punishing him for the rape. I also began to appreciate him for the gentle, helpful, loving and sweet boy that he is. He always helps and takes care of me when I am unwell, in spite of his young age or how cruel I treated him. I feel bad that I wasted five years of his life mistreating him, instead of being the mother he needed.

It does not end there. Now that he is 13, I am faced with a new dilemma. He is now starting to ask who his father is, and where he is. I told him that his father was killed during the war. One day, during last year's genocide memorial, we were un-burying bodies from a mass grave and re-burying them in individual graves. My son asked me if his father was one of the bodies. Before I could answer him, one of my neighbours who overheard his question and suspected that I had been raped shouted back, 'No, your father is in prison with the killers.' My son was hurt and in shock, as I was. I did not know what to tell him. I still do not know what to tell him a year later, and I see the confusion and hurt at war in him. What should I tell him? Should I tell him the truth, that he was conceived as a result of rape? Do I continue to lie about his father? What does one do? What would you do if you were in my shoes?"

See Kamau (2007a); UN OCHA/IRIN (2007); and UN Women (2011) for some statistics.

\*Her name has been changed to protect her identity. Consent was given at the time of the interview to share the testimony using a pseudonym.

conflicts, including ethnic cleansing, the use of child soldiers, rape and other forms of sexual violence.<sup>5</sup>

The retreat to ethnic nationalism as a viable identity saw pundits like Samuel Huntington postulate that future wars and competition would occur between civilization blocs, because "culture and cultural identities, which at the broadest level are civilization identities, are shaping the patterns of cohesion, disintegration, and conflict in

the post-Cold War world".<sup>6</sup> Others, such as Mary Kaldor,<sup>7</sup> contributed to fundamentally changing the way contemporary war was understood after the Cold War by demonstrating that what was perceived as war – war between states in which the aim is to inflict maximum violence – was becoming a relic. In its place was a new type of organized violence, which could be described as a mixture of war, organized crime and massive violations of human rights and international humanitarian law.



In this framework, contemporary wars were differentiated from 'old wars'. Their goals (particularistic political ones), protagonists (global and local), methods of funding (public and private), and the very mode of warfare (tactics of terror and destabilization) were said to be completely different and more complex than wars of the past. The 'new wars' shifted away from the aim of gaining control of state power and spreading the ideology of socialism or democracy, and instead focused on 'identity politics', using identity as a method of acquiring power, as the autonomy of the state decreased and it could no longer maintain its former role of modernizing agent and promoter of economic development.<sup>8</sup>

"At the turn of the 21st century, more people were being killed in wars in this region than in the rest of the world combined." Moreover, most of the world's armed conflicts were being fought in sub-Saharan Africa.<sup>9</sup> The disproportionate levels of violent conflict in the region have been variously attributed in the literature to a diverse set of factors,<sup>10</sup> including:

- low income and poverty;
- slow economic growth compounded by unfair global economic practices;
- dependence on the export of natural resources;
- scarcity of resources essential for survival, such as grazing fields and watering sources for pastoralists, and land for agriculturalists;
- high population density coupled with poor service delivery;
- high levels of crime and corruption;
- alien models of governance, as some independence leaders sought to move into authoritarian positions vacated by colonial rulers rather than seek legitimacy;
- unstable and inequitable political institutions;
- concentration of power at the centre;
- weak state capacity;
- ethnically-based domination, discrimination and competition for power and resources;
- the presence of military entrepreneurs ready to engage in violent conflict;
- availability of small arms and light weapons;
- 'neighbourhoods' of crisis ridden states with spillover effects;
- artificial boundaries cutting across ethnic groups, creating cross-border tensions and internal power imbalances; and
- geographical factors, including mountainous terrain and some large territories with populations dispersed around the periphery, providing ample places for armed forces to hide.

Africa's conflicts have been diverse, complex and intractable, and it is difficult to generalize about them. However, the study of conflict trends reveals that in many cases they:

- erupt where there is limited scope for action by citizens to hold leaders accountable;
- intensify authoritarian and militaristic government;
- originate with, or develop, an ethnic element, which in extreme cases can result in ethnic cleansing and genocide;
- create a spiral of grievance and reprisal, which can leave countries and whole regions in a cycle of violent conflict;
- result in humanitarian crisis, including mass displacement, famine and loss of life;
- employ "rape as a weapon of war", leaving women and girls with "broken bodies and broken dreams" long after the guns have gone silent;<sup>11</sup>
- use forced enlistment, necessitating subsequent demobilization, disarmament, and reintegration (DDR) programmes;
- stem from or result in a breakdown in the rule of law and a culture of impunity;
- intensify poverty, economic stagnation and/or regression, and destruction of property, infrastructure, systems and institutions;
- cause a breakdown of social infrastructure and loss of social capital;
- result in individual and collective trauma that can continue for generations; and
- conclude in political agreements that leave 'unfinished business', as no settlement can satisfy all parties.<sup>12</sup>

Post-colonial conflicts have included civil war in Burundi, the Democratic Republic of Congo (DRC), Liberia, Sierra Leone and the Sudans, genocide in Darfur and Rwanda, and political repression and violence in Ethiopia, Kenya, Uganda and Zimbabwe, among others. Both strong states (such as Ethiopia and Rwanda) and weak states (such as DRC and Liberia) have been affected by protracted or severe violent conflict. Authoritarian states (Sudan and Uganda) as well as states at various points in transitions to democracy (Ethiopia in 1998, Rwanda in 1994 and Sudan in 1986) have succumbed to violent conflict. Ethnically homogenous states, for example, Somalia, have been immersed in conflict, as have some states with sharp ethnic cleavages.<sup>13</sup>

Conflict trends in the 21st century indicate a shift away from intrastate wars. Most violent conflicts are being managed, resolved or transformed, with conflict-affected states transitioning from early recovery to post-conflict and post-crisis reconstruction and development. The global financial crisis, environmental degradation and climate change, fuel and food crises, rapid urbanization, limited economic opportunities, rising economic disparities, exclusion of vulnerable groups and a growing youth bulge in an information age are all linked to increasing unrest around claims for economic rights and against corruption.

This could eventually result in a retreat to class or generation, as opposed to ethnic or religious identity, as groups are faced with similar structural issues that they are seeking to redress. On the other end of the continuum, it could result in new nationalist movements coalescing around economic rights, instead of the civil and political rights that were the focus of past movements. Initial analysis of some current unrest and violent conflict that is manifesting in the continent as religious, primarily Muslim against Christian, is revealing the influence of economic drivers.

Geopolitically, Africa is likely to see heightened competition for resources and influence from China and the United States, and potentially a new form of Cold War. A new wave of proxy wars, which may already have started with Libya, Somalia and the Sudans, will focus on access to strategic resources rather than ideology, as Africa has a wealth of mineral and energy resources that are still largely unexploited and crucial for the survival of China and the United States. More than 50 years since independence, many African states are still beset by weak regimes and institutions. This makes them vulnerable to internal conflict and thus valuable candidates for assistance from either China or the United States, who may provide diplomatic, economic and/or military assistance to one or both sides of the internal conflict.

It is critical that academics, policy makers and practitioners alike remain alert to the rapidly changing context and dynamics, to ensure that present and future transitional justice mechanisms take comprehensive approaches that are context specific and sensitive, and which provide tailored solutions for complex realities.

## 2.2 Post-conflict and -crisis contexts

Experiences of violent conflict involve immeasurable human development costs, which erode and/or negate developmental gains made previously. In addition, countries emerging from violent conflict have a greater potential to return to it within five to 10 years of peace and/or political agreements. “The typical post-conflict country has little better than a fifty-fifty chance of making it through the first decade in peace. Indeed, about half of civil wars are post-conflict relapses”.<sup>14</sup> Furthermore, “the risk that a country in the bottom billion falls into civil war in any five-year period is nearly one in six”.<sup>15</sup>

Cessation of hostilities does not necessarily usher in social or political peace. On the contrary, post-conflict settings are plagued with an increase in homicides, crime and sexual violence, which in the author’s experience can be attributed to a culture of violence, weakened rule of law and institutions, and a fragmented social fabric. Unresolved trauma, feelings of resentment and victimhood, and a culture of impunity contribute towards acts of revenge in the immediate aftermath of conflict and to cycles of violent conflict and political repression in the long-term. Unresolved trauma affects not only those directly traumatized, but their families and future generations as well. It also negatively impacts on humanitarian and early recovery efforts.

Studies in some post-conflict and transition contexts have shown that trauma survivors tend to demonstrate apathy or simply lack the energy to begin the process of recovery and engage in productive activities.<sup>16</sup> This has seen early recovery efforts – such as support to shelter and livelihoods – fail or have reduced impact, because survivors are dysfunctional and lethargic, and unable to work towards their recovery. For instance, a group of genocide survivors in Rwanda who had received materials to construct shelters, instead sold off the materials and sought assistance for ready-made shelter elsewhere. In another instance, during early efforts to bring genocide survivors together for income generation activities, some survivors were unable to interact with neighbours of different ethnicity or showed serious mistrust in them, which negatively impacted the functioning of groups. The lessons learned from this prompted the organization in question and others to adopt trauma healing as an integral part of their post-genocide recovery and development efforts, following which there were improved outputs and outcomes.<sup>17</sup>

There is a saying that, “peace is more than the absence of war”. For peace to take root, it is necessary that transformation occurs at every level (individual, family, community, and systems and structures). This refers to the transformation from destructive expressions of conflict toward constructive development and growth.<sup>18</sup> Violent conflict must become the last resort in the assertion of rights, not the first response. Opportunities for conflict transformation need to be created for a society to overcome the effects of violent conflict and political repression. Those processes must focus on ensuring accountability, serving justice, providing remedies to victims, promoting healing and social cohesion, upholding the rule of law and promoting institutional change that restores confidence in the state. This transformation will encompass an end to the undesirable state of affairs and efforts to ensure its non-recurrence, collectively building something desirable. The actualization of such transformation is challenging and it does not happen in a linear progression.

Creating opportunities for the transformation of post-conflict and -crisis contexts through existing justice and rule of law mechanisms remains pertinent. Various forms of weakness affect institutions, including formal justice systems, following a conflict or crisis. A look at them prior to the conflict and crisis often reveals institutions that were already under strain and poorly resourced, based on laws and policies not harmonized to international legal norms. These limitations hamper their ability to deal with international crimes, such as those committed during violent conflict.

Formal justice systems are normally centrally located and expensive, which makes them physically inaccessible and unaffordable for much of the general public. Public needs often outweigh the capacity to respond, as the number of victims and cases resulting from a conflict can easily overwhelm the formal justice system. Consequently, cases either never make it to court or are delayed for months or even years, thus intensifying the frustrations of the conflicting parties. The period between the violation, the submission of a case and the hearing of the case in court is of critical importance, because that is when tensions are likely to escalate and trauma deepen.

Where people can be identified clearly as victims and offenders, formal justice systems play an important role in establishing order. However, those systems are of limited value in cases where identification is problematic. The sheer number of offences and delays in investigations

into war crimes make identifying offenders difficult, time-consuming and expensive. Furthermore, offenders are often unwilling to confess their crimes for fear of punishment, and because they see their actions as a form of self defence or an effort to achieve their own sense of justice.<sup>19</sup>

The key justice needs of victims have been found to include the need for: safety; information/answers/truth-telling from offenders; story-telling by the victims of their victimization; recognition and acknowledgement of atrocities committed against them by offenders and institutions; restitution; empowerment in the justice process; and accountability, including measures that ensure the non-recurrence of atrocities.<sup>20</sup> Formal justice systems tend to focus on identifying what laws have been broken, who broke them and how the state should punish the offender. Offenders are held accountable to the state instead of to their victims. Victims are usually left out of the process of criminal justice completely, and their needs and trauma are not addressed. Offenders are not encouraged to understand and address their responsibility to those they harmed. This is particularly true of common law legal systems. Victims have a larger role to play in civil law or mixed systems that incorporate elements of common and civil law. This focus on the punishment of the offender and lack of attention to the victim serves to further limit the value of formal justice systems in meeting post-conflict and -crisis needs.

Informal justice systems adopt a restorative justice approach in some cases. Restorative justice holds that offenders should be punished for their crimes, but that the methods and outcomes of punishment should be facilitated to promote reconciliation between offenders and victims.<sup>21</sup> Though more accessible and affordable than formal criminal justice proceedings, if these methods are not harmonized to basic justice norms and victim needs to ensure that basic principles of equity and fairness are upheld, they can be unjust and fail to achieve their goals of healing trauma and transforming people (victims and offenders) and relationships.

These challenges faced by formal and informal justice mechanisms in responding to post-conflict and -crisis reconstruction and development needs gave rise to a new approach, which is commonly called ‘transitional justice’. The next section introduces the concept of transitional justice, before looking at its application in Africa.

## 3. TRANSITIONAL JUSTICE

### 3.1 An introduction to transitional justice

#### Box 2: A history of transitional justice

1940s: The origins of transitional justice can be traced to World War I. However, it was only following World War II, when the International Military Tribunal (often referred to as the “Nuremberg Trials”) in Nuremberg, Germany was established as a special court to try Japanese and German leaders and soldiers for war crimes, that transitional justice became understood as an extraordinary and international approach. This development was not enduring, due to the unique political conditions of the post-war period. In spite of this, the legacy of Nuremberg was the criminalization of state wrongdoing as part of a universal rights scheme, which became the basis of modern human rights law.

1970–1980s: Transitional justice was focused on criminal justice with an emphasis on human rights promotion. Universal conceptions of ‘justice’ became the platform on which transitional justice was anchored. Lawyers, law and legal rights, defining laws and processes on how to deal with human rights violations, and holding people accountable, were the aspects that dominated initial literature. The legacy from this phase was a victim-centred approach, which transitional justice retains to date.

1980–1990s: Transitional justice was influenced by the worldwide wave of democratization. It became associated with globalization, and typified by conditions of heightened political instability and violent conflict. The scope broadened from jurisprudence to the political considerations of developing stable democratic institutions and renewing society. The emphasis turned to questions such as settling past accounts without derailing democratic progress, developing judicial or third party forums capable of resolving conflicts, working out reparations, creating memorials, and developing educational curricula to redress cultural cleavages and unhealed trauma.

1990s: Transitional justice evolved from being seen as a special or ‘soft’ form of justice to become a paradigm of the rule of law. Beginning with Argentina (1983), Chile (1990) and South Africa (1995), truth commissions became its symbol, appearing in transitional contexts in Africa, Asia, Eastern Europe and Latin America. Following the 1994 Rwanda genocide, there were proposals for truth and reconciliation commissions in conflict and post-conflict contexts in other parts of Africa and the Middle East. However, truth seeking, including through truth and reconciliation commissions, is but one form of transitional justice. Other forms of this era included prosecutions, reparations, memory and memorials, and institutional reform. These methods have been employed either individually or in combination. The legacy of this phase was the construction of a body of law associated with pervasive conflict, which contributed to laying the foundation for the law on terrorism.

2000s: The creation of the International Criminal Court (ICC), following adoption in 1998 of the Rome Statute of the International Criminal Court and its entering into force in 2002, represented a major stride for international justice. (The *ad hoc* international criminal tribunals in the Balkans and Rwanda preceded it.) The ICC is a permanent international tribunal charged with the investigation and prosecution of genocide, crimes against humanity, and war crimes. In an unprecedented move, the Rome Statute classified sexual violence as a crime against humanity and war crime.

2010s: The crime of aggression was mentioned in the Rome Statute, but the states parties could not agree on its definition and the conditions for the exercise of the ICC’s jurisdiction over this crime until the 2010 Kampala Review Conference. There, it was agreed that the crime would constitute the use of armed force by one state against another, or one state allowing its territory to be used by a different state or non-state actors to carry out acts of armed force against another state. However, the Court will not be able to exercise jurisdiction until a decision is taken by states parties in January 2017.

Beyond this, momentum is growing towards a comprehensive transitional justice approach that contributes to the accomplishment of multiple objectives: preventing the recurrence of crises and future violations of human rights, while promoting social cohesion, nation-building, ownership and inclusiveness at national and local levels. The first UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence of serious crimes and gross violations of human rights was appointed in September 2011. One of the expected outcomes of this much-needed mandate is an increase in the visibility of transitional justice issues. Thus far, this phase has emphasized the integration of transitional justice with peace, security and development through context specific, victim-centred and gender sensitive approaches.

See International Criminal Court (2002); Lemarchand (2008); Teitel (2003); and Wikipedia, Transitional Justice, [en.wikipedia.org/wiki/Transitional\\_justice](http://en.wikipedia.org/wiki/Transitional_justice)

As discussed in Box 2, the origins of transitional justice date back to World War I. However, it was not until the late 1980s and early 1990s that people began to use the term 'transitional justice'. It was during that era that human rights activists and others were seeking to address systematic abuses by former regimes without endangering the political transformations that were underway. Those sweeping changes were popularly referred to as 'transitions to democracy'.<sup>22</sup>

Transitional justice can be defined as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes".<sup>23</sup> Over time, transitional justice has also become a popular term to describe both judicial and non-judicial mechanisms, used to respond to human rights violations, atrocities or large-scale abuse, committed during violent conflict and political repression.

Transitional justice first emerged in post-authoritarian settings. Those contexts had well-developed institutions and legal systems to regulate state-society relations. However, they were unable to prevent the gross violations that occurred, and were actually instruments in the abusive exercise of state power. The transitional justice measures used in that era sought to respond to this particular situation. Therefore, the transitional justice measures endeavoured to restore institutions and traditions that had been brutalized.

More recently, transitional justice mechanisms have been transferred from post-authoritarian settings to conflict and post-conflict ones, as well as settings where no transition has taken place. Unlike in post-authoritarian settings, the significant violations in post-conflict and -crisis contexts are the result of generalized social conflict, with a plethora of offenders. In addition, the latter contexts are faced with weak institutions and economic challenges.

As a result of this evolution, the present day concept of transitional justice is not easy to define; it encompasses a series of discreet though overlapping and often conflicting actions, policies, processes and objectives, and their related institutions. It is informed by a society's desire to build (or rebuild) the social fabric, justice system, and a legitimate system of governance. Its mechanisms, therefore, focus on setting up new or strengthening existing justice systems that integrate the needs and desires of the local people, cultures and institutions, respect international human rights norms; and to do justice in a way that builds peace.

Transitional justice mechanisms increasingly offer a range of measures including institutional transformation, truth seeking (truth and/or reconciliation commissions), prosecutions (domestic trials, and international and hybrid tribunals), reparations, memory and memorials, and informal justice and conflict resolution mechanisms that employ restorative justice principles.<sup>24</sup> Restorative justice focuses on the needs of victims, as described above, as well as the needs of offenders, and the deeper causes of their behaviour in a bid to rehabilitate them. Transitional justice mechanisms are said to contribute towards achieving six themes or objectives, namely, truth, justice, forgiveness, healing, peace and reconciliation.<sup>25</sup>

Different post-conflict and -crisis contexts will choose to adopt different measures, focus on different objectives, in different ways, and in different sequence. The overlapping and often conflicting nature of the measures and objectives, coupled with the complexities and dynamics of the contexts, make transitional justice a highly contested terrain replete with many contradictions, controversies and tensions.<sup>26</sup>

### 3.2 Transitional justice in Africa

The challenges faced by African countries are exacerbated by the fact that many are emerging "from violent conflicts, many of which were protracted, recurrent and regional".<sup>27</sup> Transitional justice mechanisms can contribute to conflict transformation and peacebuilding processes, but can also serve as impediments, particularly where the conflict is regional and the pursuit of justice in one locale may impact upon conflict transformation or justice in another. In spite of the risks and frequently strong opposition from current and former state officials and political elites, transitional justice mechanisms have become increasingly common<sup>28</sup> and are playing a key role in building lasting peace and viable states in Africa.

Many senior state officials and political elite were immune from national and international human rights law during much of Africa's post-colonial era. However, the last decade has seen a reversal of this trend. This was catalyzed by the International Criminal Tribunal for Rwanda (ICTR), which has indicted and prosecuted some of those most responsible for the 1994 Rwanda genocide; and the Special Court for Sierra Leone (SCSL), which pursued war criminals in Liberia and Sierra Leone. In addition, the ICC, which has five African judges, is engaged in investigations or prosecutions in eight sub-Saharan African situations; Central African Republic (CAR), Côte d'Ivoire, Darfur, DRC, Guinea, Kenya, Nigeria,



and northern Uganda. There has also been a proliferation in the use of truth seeking, traditional conflict resolution, and domestic trials. Below are descriptions of key transitional justice mechanisms that have so far been utilized in sub-Saharan Africa (in alphabetical order by name of country).<sup>29</sup>

### **Burundi**

1995: UN established International Commission of Inquiry into 1993 assassination of President Melchior Ndadaye.

2012: Truth and Reconciliation Commission expected to be established in January, but this has been delayed to later in the year. Its 24-month mandate will be to establish the historical facts of the conflict, determine its causes and nature, classify the crimes committed since independence in 1962, and identify those responsible. Thereafter, a special chamber within Burundi's judicial system will be set up to prosecute those bearing the greatest responsibility for genocide, crimes against humanity and war crimes. Delays in its establishment have heightened concern that the Commission's mandate will coincide with the next electoral cycle, which begins in early 2013. This may have negative ramifications for its impact.

### **Central African Republic (CAR)**

9 September to 27 October 2003: National Reconciliation Forum to enable dialogue and reconciliation between different political, social and religious affiliations, and to suggest how to transform relationships and build social cohesion after the war. Major political players were not involved.

January 2005: Government sends referral to the ICC to investigate war crimes.

May 2007: ICC Prosecutor opens investigations.

November 2010: ICC trial of Jean-Pierre Bemba Gombo for war crimes and crimes against humanity begins.

### **Côte d'Ivoire**

April 2004: Independent Commission of Inquiry appointed by UN to establish the facts and responsibility for alleged atrocities committed on 25–26 March 2004 in Abidjan.

January 2005: Côte d'Ivoire, which is not party to the Rome Statute, asks the ICC to conduct investigations to determine whether crimes committed since September 2002 come under its jurisdiction.

April 2007: A new law provides amnesty for crimes committed since 2000; it does not exclude war crimes or crimes against humanity. However, international law expressly forbids amnesty for war crimes or crimes against humanity.

December 2010 and May 2011: President of Côte d'Ivoire confirms the country's acceptance of the ICC's jurisdiction.

3 October 2011: Investigations begun by ICC into alleged crimes committed since 28 November 2010.

23 November 2011: Arrest warrant issued by ICC for Laurent Gbagbo for four counts of crimes against humanity.

30 November 2011: Gbagbo transferred to the ICC detention centre at The Hague by Ivorian authorities.

5 December 2011: Initial appearance in court, and date for hearing of confirmation of charges set for 18 June 2012.

August 2012: Confirmation of charges hearing scheduled to start, but postponed until the issue of Gbagbo's fitness to take part in the hearing is resolved.

### **Democratic Republic of Congo**

August 1991 – January 2002 and April–December 2002: Sovereign National Conference established by Mobutu's government to examine the country's history and find a way to deal with the multidimensional crisis. The Conference recommended the establishment of political institutions to manage the country's transition to multiparty democracy. The government did not officially endorse the recommendations and the institutions were not established.

May 2004: President Kabila sends a blank referral to the ICC to investigate crimes committed in DRC since July 2002, just as the ICC is about to initiate investigations on its own initiative.

November 2004: Truth and Reconciliation Commission established as one of the organs of the Pretoria Agreement (2002) on power sharing during the transition. It was charged with investigating political crimes and human rights violations that took place from 30 June 1960 to the end of the transition. As its mandate was coming to an end with elections in 2006, there was large-scale criticism of its work, with many recommending a second and more in-depth process over a longer period of time, given the extent of the mandate.

June 2004: ICC Prosecutor launches investigations with a focus on eastern DRC.

January 2009: The first trial in the case of Thomas Lubanga Dyilo begins.

November 2009: Second trial begins, in the case of Germain Katanga and Mathieu Ngudjo Chui.

September 2011: Confirmation of charges hearing in the case of Callixte Mbarushimana takes place.

December 2011: Pre-Trial Chamber I declines to confirm charges against Callixte Mbarushimana, and he is released from custody.

March 2012: Thomas Lubanga Dyilo found guilty of the crimes of enlisting and conscripting of children under the ages of 15 years and using them to participate actively in hostilities.

July 2012: Thomas Lubanga Dyilo sentenced to 14 years of imprisonment.

July 2012: Second warrant of arrest issued by Pre-Trial Chamber II for Bosco Ntaganda. Warrant of arrest also issued for Sylvestre Mudacumura. Both are still at large.

### Ethiopia

August 1992–Present: Special Prosecutor’s Office set up to “establish for public knowledge and for posterity, a historical record of the abuses of the Mengistu regime; and to bring those criminally responsible for human rights violations and/or corruption to justice”. It is accountable to the Prime Minister. It was expected to conclude operations in 1998, but has not formally done so to date.

### Ghana

May 2002–October 2004: National Reconciliation Commission established to “seek to promote national reconciliation among Ghanaians by establishing an accurate historical record of human rights violations and abuses inflicted on persons by public institutions and officers between 6 March 1957 and 6 January 1993, and to recommend redress for the wrongs committed”.<sup>31</sup> It had power to compel presence, as it did in the case of former President Jerry Rawlings.

### Kenya

2002: Kenyans begin advocating for the establishment

of a truth commission. The Kenya Task Force on the Establishment of a Truth, Justice and Reconciliation Commission is created. Its final report noted that 90 percent of Kenyans wanted an effective truth commission established. Its recommendations were not implemented.

2006–2012: The Mau Mau War Veterans and the Kenya Human Rights Commission initiated a process to seek reparations on behalf of five elderly Kenyans, who alleged that they had been tortured by the British authorities between 1952 and 1960. After unsuccessful attempts to get the British Government to respond to the claim satisfactorily, in 2009 the Commission filed a lawsuit on behalf of the survivors in the British High Court. On 21 July 2011, the Court ruled that the claimants had an arguable case, which was the first step towards a full hearing and thus a victory for the victims. On 5 October 2012, the Court further ruled that the claimants had the right to sue Britain. The British Government has decided to appeal on the grounds that the normal time limit for bringing a civil action is three to six years. In this case over 50 years have elapsed, and the key decision makers are dead and unable to give their account of what happened. Additionally, they argue that the claimants should have instead sued the Kenya Government, which took over all liabilities after independence.

March 2008–September 2009: Commission for the Inquiry into Post-Election Violence established to investigate the facts and circumstances surrounding the violence following the 2007 election and the conduct of state security agents in their handling of that violence, and to make recommendations concerning these and other matters.

March 2009–Present: Truth, Justice and Reconciliation Commission began work in January 2010 as part of the arrangements of the political agreement (2008) following the post-election violence. Its mandate is to investigate historical injustices, human rights violations and major economic crimes committed by the state, groups or individuals between 12 December 1963 and 28 February 2008. No blanket amnesty is to be provided for past crimes, but individual amnesties may be recommended.

The Commission is not mandated to recommend prosecutions. Victims could apply to the Commission for reparation. The final report was slated for submission to the President on 3 August 2012, and should be made public within 14 days after submission. The final report was not submitted as scheduled, and the fate of the Commission

hangs in the balance following Parliament's rejection of a bill seeking to extend its mandate for an additional nine months.

March 2010: Pre-Trial Chamber approved ICC Prosecutor's request to investigate the 2007–2008 post-election violence after the Kenyan Government took no action to launch prosecutions. This is the first ICC investigation begun on the Prosecutor's initiative, as previous cases have all been referred by states parties or by the UN Security Council.

April 2011: Six Kenyan suspects voluntarily appeared before the Pre-Trial Chamber of the ICC.

September 2011: Confirmation of charges hearings held by ICC.

January 2012: ICC confirmed charges against four of the suspects, namely, William Samoei Ruto, Joshua Arap Sang, Francis Kiriimi Muthara, and Uhuru Muigai Kenyatta, and declined to confirm the charges against two others, Henry Kiprono Kosgey and Mohammed Hussein Ali. Trials are scheduled to open in April 2013.

## Liberia

February 2006–December 2009: Truth and Reconciliation Commission established to promote national peace, security, unity and reconciliation by: investigating gross human rights violations and violations of international humanitarian law as well as other abuses committed from January 1979 to 14 October 2003 (the Commission was also allowed to explore the period before 1979, if it chose); providing a forum to address impunity; establishing an independent, accurate and objective record of the past, paying particular attention to gender-based violence; and compiling a report with findings and recommendations.

The final report of the Commission was released in December 2009. It called for: criminal accountability through establishment of an extraordinary tribunal, domestic criminal prosecutions, investigations and prosecutions of economic crimes, confiscation and seizure of private and public property, and repatriation of unlawfully acquired monies; reparations through the establishment of a Reparations Trust Fund; memorialization through a national memorial and unification day; a traditional truth seeking and reconciliation process through a 'Palava Hut' system; the protection and promotion of the rights of women and children; institutional reforms, including the banning from public office of 49 individuals

(including President Ellen Johnson Sirleaf) for 30 years; and a process of national renewal.

2006–2010: A United States court tried and sentenced Charles Taylor's son, Charles McArthur Emmanuel (also known as "Chuckie Taylor") to 97 years in prison for torture and war crimes committed while head of a Liberian paramilitary unit. Chuckie Taylor was the first American citizen to be charged and convicted of war crimes committed outside the country.

2011: Peace and Reconciliation Commission established by President Ellen Johnson Sirleaf to take the findings of the Truth and Reconciliation Commission further. The Peace and Reconciliation Road Map expected to be released in November 2012.

## Rwanda

January 1993: International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990 established by a coalition of Rwandan and international human rights organizations, to look into human rights violations committed between October 1990 and January 1993.

November 1994: International Criminal Tribunal for Rwanda established by the UN Security Council, to prosecute those most responsible for organizing and executing the genocide and serious violations of international humanitarian law in Rwanda and neighbouring countries between 1 January 1994 and 31 December 1994.

1998: International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events established, by the Organization of African Unity (since replaced by the African Union), to determine how the genocide was planned and executed, and to "determine culpability for the failure to enforce the (1948) Genocide Convention in Rwanda and in the Great Lakes Region".<sup>32</sup>

1999: National Unity and Reconciliation Commission established by the government with a broad mandate to promote reconciliation in the country. The Commission has since become a permanent institution that focuses on civic education, conflict mediation and community-based reconciliation initiatives.

March 2001: *Gacaca* courts, a modernized form of traditional justice, established by the government to speed up the trials of hundreds of thousands of genocide



suspects. The jurisdiction of the *gacaca* courts was limited to crimes of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994. Those who bear the greatest responsibility for the genocide were tried either by the ICTR or by the national courts.

### Sierra Leone

February 2000 – October 2004: Truth and Reconciliation Commission established by Parliament and began work in 2002. Its mandate was to investigate and describe the causes, nature and extent of the abuses committed from the war's beginning in 1991 until the signing of the Lome Peace Accord on 7 July 1999. The Commission had the power to compel persons to appear. It made its final report to both the government and the UN Security Council in 2004. The final report includes the names of individual perpetrators and recommendations for the government moving forward.

January 2002–Present: Special Court for Sierra Leone established, and began hearing cases on 3 June 2004. Its mandate is to try those who have greatest responsibility for crimes against humanity, war crimes and other serious violations of international law committed since 30 November 1996. Charles Taylor was indicted in 2003, detained in 2006 in Sierra Leone, then moved to The Hague due to concerns that he could destabilize the region if he remained. He was found guilty in April 2012 of all 11 charges levied by the Special Court, including terror, murder and rape. He was sentenced to 50 years in prison in May 2012.

2008–Present: Reparations Programme established by the government in collaboration with the UN, to provide material and symbolic reparations to war victims in line with the recommendations of the Truth and Reconciliation Commission. The National Commission for Social Action is running the programme.

### Sudan

June 2005: ICC began its formal investigation of the situation in Darfur, and has since opened seven cases. Warrants of arrest were issued by the Pre-Trial Chamber. Three of the suspects remain at large while three have had confirmation of charges hearings, with charges not confirmed against Bahar Idriss Abu Garda; the execution of arrest warrant is pending for one of the suspects. The ICC decision to issue an arrest warrant for President Omar al-Bashir received divergent responses from African states and civil society groups, who debated the mandate of the

ICC in Sudan. In 2009, the African Union (AU) at its 13th Ordinary Session declared a position of non-cooperation with the ICC warrant. Civil society groups challenged this position, particularly for those states that have ratified the Rome Statute.<sup>33</sup>

June 2005: Special Criminal Court on the Events in Darfur, a hybrid panel of local and international judges backed by the AU, is created exactly one day after the ICC begins its formal investigations.

February 2009: High Level Panel on Darfur established by the AU to investigate and address the conflict and human rights violations in Darfur. The panel, headed by former South African President Thabo Mbeki, began its work in March 2009 and released a comprehensive report in October 2009, offering a range of recommendations on the revitalization of the Sudanese judicial system, including national legal reform and the use of a hybrid court. The panel's recommendations, in combination with the "ICC's announcement that it would reintroduce the charge of genocide against Bashir, has prompted the Sudanese government to revitalize the Special Criminal Court on the Events in Darfur".<sup>33</sup>

### Uganda

January 2000: Amnesty Commission established by Uganda Parliament in an effort to build security in Uganda. By the end of 2008, nearly 23,000 rebels had received amnesty.

December 2003: President Museveni requests the ICC to investigate war crimes committed by the Lord's Resistance Army (LRA) in northern Uganda. The ICC has charged several LRA commanders with crimes against humanity and war crimes.

2006: The use of traditional mechanisms such as *mato oput*, rather than blanket amnesty or prosecutions, continues to shape dialogue related to justice and peacebuilding in Uganda. *Mato oput* is a northern Uganda traditional justice process, which has been used to promote reconciliation and reintegrate former LRA rebels into communities.

2008: International Crimes Division established within the High Court to facilitate prosecutions of those accused of committing war crimes in the north.

May 2010: United States Congress passes a bill obliging the government to aid the Uganda Government in

tracking down and dismantling the LRA, as well as aiding communities affected by the conflict to recover.

October 2011: United States Government sends military advisers to train and advise the Ugandan army in the fight against LRA.

### Zimbabwe

1985: Commission of Inquiry established by President Mugabe to investigate government repression of 'dissidents' in the Matabeleland region of the country during 1983. The final report was kept confidential on the grounds that it could spark violence over past wrongs.

2003: A group of Canadian and Zimbabwean lawyers filed a draft indictment with the Canadian Minister of Justice against Robert Mugabe and his close associates for crimes against humanity. The move, supported by a number of Canadian Members of Parliament, would make Robert Mugabe and officials liable for arrest and extradition to Canada in any country that has an extradition agreement with Canada. The various crimes included persecution, enforced disappearance of persons, torture and extermination by denying people food. They carry life imprisonment under the Canadian Crimes Against Humanity and War Crimes Act.

An Extradition Bid Committee comprising victims of torture, human rights activists and lawyers was formed to collect evidence against Mugabe and his associates. However, in November 2006, the Canadian Justice Minister refused to charge Mugabe on the grounds that Canada had no jurisdiction to prosecute him, because he enjoys immunity as head of state and the crimes he is alleged to have committed have no direct links with Canada. Zimbabwean civil society plans to appeal the decision, to study other jurisdictions in which Mugabe can be prosecuted (such as private prosecution in New Zealand), and to advocate for Canada to at least indict some of Mugabe's associates who do not enjoy immunity.<sup>34</sup>

2005–Present: Various calls have been made for the situation in Zimbabwe (and Robert Mugabe specifically) to be referred to the ICC by the UN Security Council.

### 3.3 Gender and transitional justice<sup>35</sup>

The aftermath of conflict and crisis mainly affects women and children, albeit in different ways. As varied as the contexts and conflicts have been, there are certain

commonalities with regards to women's experiences across the African continent.

Women in Africa suffer from unequal status prior to the conflict, which is exacerbated by violent conflict and political repression and their resulting consequences. Women are disproportionately singled out for sexual and gender-based violence (SGBV) during violent conflict. One unfortunate feature of the 'new wars' was the adoption of sexual violence as a deliberate weapon of war by parties to the conflict. Sexual violence is widespread and systematically used to destroy the social fabric of communities, to deliberately spread HIV, to impregnate women, to drive the displacement of populations, to terrorize whole communities and to simply demonstrate power.

There is an intersection of gender with other identities, such as ethnicity, religion, geographic location and language, which drives the extent and impact of sexual violence. Shame and stigma usually accompany SGBV crimes, which leads to underreporting. Generalized impunity surrounds crimes against women, but is even worse for conflict-related SGBV. In general, formal justice systems are unable to properly address conflict-related SGBV, as they are hampered by resource scarcity and national law that is not harmonized to international norms that codify SGBV as crimes against humanity. Lack of access to justice for women is not necessarily a result of inadequate policy, but rather the absence of substantive measures to ensure that justice processes meet the needs of women victims.

"Where women's experiences have been addressed through transitional justice mechanisms, they have generally been 'added' to the agenda as an afterthought."<sup>36</sup> While peace agreements may stop the killing, failure to address SGBV in ceasefires or peace agreements means that these crimes continue long after the guns have fallen silent. Post-conflict and -crisis contexts are often characterized by ongoing and sometimes increased levels of crime, violence and insecurity, in general.<sup>37</sup> This can be attributed to violence being 'normalized' during violent conflict, ineffective or non-existent DDR processes, trauma and impunity.

Women and girls (and boys in the cases of Burundi and Somalia<sup>38</sup>) are again disproportionately targeted. For instance, a study in Liberia in 2007 (four years after the end of the violent conflict) found that in Nimba County, 26 percent of single women and 74 percent of married

or separated women had been raped in the previous 18 months.<sup>39</sup> Safety, security and protection are paramount needs for survivors of conflict. Women's justice priorities in the period following conflict or crisis, when the struggle for everyday survival increases their vulnerability to SGBV, reveal that after safety, security and protection needs are met, women's demands are often for basic services and the means to rebuild shattered lives. Economic justice, therefore, becomes more important to women after the conflict than justice for SGBV crimes. And when SGBV crimes are addressed, the priority of women is the recognition of atrocities committed against them, as well as reparations to enable them to recover and rebuild.<sup>40</sup>

In spite of the numerous challenges that women face during conflict and crisis, post-conflict and -crisis settings have at times revealed opportunities. Looking at the history of international law and specifically transitional justice, there have been great leaps forward in the recognition of SGBV crimes in the past two decades. The shift has been seismic, from a time when rape was accepted as an inevitable part of conflict, to the unprecedented codification of SGBV crimes in the Rome Statute of the ICC as both war crimes and crimes against humanity, and thereafter to the recognition in five resolutions by the UN Security Council that sexual violence is a threat to international peace, security and development.

Of equal importance is the growing recognition that post-conflict and -crisis contexts provide an opportunity to transform the pre-conflict status quo and address underlying inequalities through a transformative approach to transitional justice, which is gender sensitive. During violent conflict traditional gender roles are unseated, women take on new roles, and the foundations for a new society are established. Post-conflict and -crisis contexts open up possibilities to promote women's leadership, enhance access to justice and build momentum for fundamental women's rights. In sub-Saharan Africa, some of the most significant changes with respect to the status of women have occurred in the post-conflict and -crisis context, because as the nation and state are being transformed at all levels, there are more opportunities to transform relationships between women and men, and 'rewrite the rules' of the social and political order.

In spite of the significant gains, the major challenge lies in translating these achievements into justice for women on the ground. This challenge is not unique to transitional justice, but rather cuts across all law reform efforts. The

only difference is that justice infrastructure has usually been shattered during the conflict or crisis, which exacerbates the problem. Transitional justice mechanisms on the continent have often failed to adequately tackle the extensive SGBV committed during conflict.<sup>41</sup> "From DRC to Haiti, from Bosnia to Liberia, rape has been the slowest to register in the security radar, and lowest on the hierarchy of wartime horrors. It has been called 'history's greatest silence' and the 'world's least condemned war crime.'<sup>42</sup>

In addition, when SGBV has been addressed, it has been reduced to a 'women's problem'. Transitional justice mechanisms have not explored how men are affected by violent conflict. There are an increasing number of men who have been victims of conflict-related rape, for instance. Governments, aid agencies, non-governmental organizations (NGOs) and the UN barely acknowledge its possibility, let alone provide interventions to address it in post-conflict reconstruction and development, yet it does exist. Male survivors are beginning to privately speak about it in the Great Lakes Region and Somalia,<sup>43</sup> though it is still possibly the biggest secret of violent conflict. A reflection on the stated aims of sexual violence in conflict reveals that this would be the worst form of attack against males from the opposing side of the conflict.

Yet another challenge lies in the low number of prosecutions for SGBV crimes, resulting in widespread impunity; this is also common with other crimes committed during violent conflict and political repression. Lastly, considerations of gender and transitional justice are often limited to sexual violence, thereby missing other forms of victimization and gendered dimensions of violent conflict and political repression for women, children and men, and failing to recognize women's multiple roles beyond that of passive victims, and the roles of men beyond being perpetrators.

For transitional justice mechanisms to contribute towards gender justice in Africa's post-conflict and -crisis reconstruction and development, a holistic and transformative approach is needed. This would encompass establishing participatory procedures for the design and implementation of measures that take into consideration the different needs and opportunities of women and men, and of children, as they will not be equally served by the same measures. This will also entail integrating requirements for equality and fairness, which are underlying principles for any viable justice system, into domestic law and policy as well as state institutions.

## 4. THE CONTROVERSIES, CONTRADICTIONS AND TENSIONS OF TRANSITIONAL JUSTICE

### 4.1 Balancing objectives

The legal-judicial paradigm has been dominant in the study of conflict and post-conflict contexts, proffering procedural, academic and institutional “remedies that too often fail to recognize other important perspectives”.<sup>44</sup> For durable peace and a just social order to be established, it is essential that a holistic approach is taken. This will seek to respond to the physical and psychosocial needs of individuals and groups, during and after violent conflict and political repression, as well as contribute to institutional transformation and a legitimate state.

Justice is a key transitional justice objective; however, it is only one of six objectives as discussed above. It cannot be pursued in isolation, but rather needs to form part of a comprehensive approach. Elevating it above or neglecting the other objectives contributes to a continued culture of violence and impunity, untransformed institutions and an illegitimate state, and unjust social order. For instance, reconciliation, which is both a process and an endpoint, aims for much more than peaceful coexistence, and also includes the reshaping of parties’ relationships for future constructive engagement. Without reconciliation, there can be no sustainable peace and the possibility of violent conflict remains.<sup>45</sup>

The culture of violence must be replaced by one of peace, which is also a process. The effects of the so-called ‘normalization’ of violent conflict have been demonstrated in a number of contexts that witnessed an overall increase in crime, insecurity and violence following the conflict or crisis. Victims’ identification of their own needs reveals the importance of knowing what happened, of finding the truth.<sup>46</sup> Truth is, therefore, an objective as well as a measure, often described as truth seeking. Recognition of the atrocities committed is critical for forgiveness and healing to take place. Unresolved trauma together with a lack of forgiveness contribute to tomorrow’s atrocities, as yesterday’s victims, knowingly or unknowingly, become tomorrow’s perpetrators.<sup>47</sup>

In addition, due to decades of impunity and unbroken cycles of violent conflict, it is difficult to reach a clinical definition of victims and perpetrators. In addition to the challenges in identifying perpetrators following

generalized social conflict, it often happens that past offenders become victims and vice versa, through cycles of violent reprisals. This creates grey areas and blurs ethical parameters<sup>48</sup> in the pursuit of justice. Whether retributive, deterrent or restorative justice is pursued, it remains undisputed that there is need for justice in post-conflict and -crisis contexts. Whether it is arrived at formally or informally, it needs to be nuanced and form part of a comprehensive approach that meets multiple objectives.

Forgiveness is a recent area of investigation in the study of post-conflict and -crisis contexts. A dilemma often exists as to whether to set up a justice mechanism that seeks to hold offenders accountable, without necessarily establishing a full account of the past, or whether to have a truth seeking mechanism that delves deeper into the actual events, without pursuing some form of justice. There is no guarantee that knowing the truth will result in forgiveness, as is commonly assumed. What seems critical to forgiveness is that accountability is pursued through an agreed mechanism, comprising measures that ensure the non-recurrence of atrocities, accompanied by recognition and authentic acknowledgement, including restitution.

Those who seek to implement or promote transitional justice face the fundamental questions of which of the six objectives to pursue, and in what way. These objectives must often be pursued simultaneously, which can prove to be problematic as the aims are not necessarily complementary. It must be decided whether it is feasible and necessary to punish perpetrators, and if it is, then what the punishment is designed to achieve – to bring the guilty to account, to deter future perpetrators by curbing impunity or to contribute towards wider objectives like healing, reconciliation and truth. Different transitional justice mechanisms have focused on different objectives with varying outcomes.

The justice versus truth nexus has seen debates on whether seeking to punish perpetrators will block the truth from emerging. Additionally, there is the peace versus justice nexus, which brings out the concern that pursuing justice may result in renewed violence and conflict. These concerns have, among other factors, informed decisions to grant amnesty to perpetrators.<sup>49</sup> In South Africa, for example,

the Truth and Reconciliation Commission (TRC) offered the possibility of amnesty in exchange for truth about crimes committed, due to concerns that punishing apartheid leaders could foment civil conflict. On the contrary, the International Criminal Tribunal for Rwanda is based on the conviction that it is necessary to punish perpetrators to fulfil the moral obligation to bring them to account and to contribute towards national peace and reconciliation.<sup>50</sup> Thus, while in South Africa it was deemed that punishment and reconciliation were contradictory objectives, Rwanda decided that, in fact, the two are inextricably linked.

The use of amnesty may contribute to short-term stability, but if accountability of offenders is forfeited in the long term, lasting peace may prove elusive owing to a culture of impunity, unresolved trauma and grievances. Therefore, it becomes a matter of careful sequencing. Some post-conflict contexts have opted initially to grant amnesty for the sake of stability in the immediate aftermath of violent conflict. Once stabilization goals have been attained, and justice and security systems and structures are in place to address potential backlash, the amnesty is lifted for accountability measures to be implemented.

Whether retributive justice results in deterrence of future perpetrators is another dilemma over which there is considerable difference of opinion. The argument for deterrence is that if the orchestrators and perpetrators of mass violence are punished, it will send a clear message that future orchestrators and perpetrators will also be punished, thus dissuading them from committing atrocities. It is argued that one of the root causes of the 1994 Rwanda genocide was a culture of impunity, as political leaders had not been held accountable for earlier crimes;<sup>51</sup> that encouraged them to continue orchestrating violence, thus creating an environment that culminated in the genocide. The Commission of Inquiry into the Post-Election Violence in Kenya was informed by similar thinking when they recommended that a domestic tribunal be established to try perpetrators, failing which the ICC should take over. They asserted that a culture of impunity had contributed to an environment that allowed the post-election violence to happen, and that impunity had to be addressed to prevent future violent conflict.<sup>52</sup>

Research indicates that the establishment of the ICTR contributed towards ending the violence perpetrated directly after the Rwanda genocide, including in the refugee camps in eastern DRC, especially after the indictment and arrest of principal *genocidaires*.<sup>53</sup> On the other hand, the International Criminal Tribunal for the former Yugoslavia

(ICTY) had already been established in 1993 in response to the atrocities in the Bosnian conflict, with jurisdiction over the entire former Yugoslavia, including Kosovo, when the conflict fully broke out in the latter. It was thought that the ICTY would serve as a deterrent or at least limit the violence; however, it seemed to have little or no effect on the violence in Kosovo.

## 4.2 Tensions in transitional justice

Turning now to the tensions<sup>54</sup> that exist in the realm of transitional justice, they include tension between aspirations in the post-conflict and -crisis context and the available capability and resources. As discussed above, these contexts tend to have limited capabilities and resources to meet the overwhelming needs, a challenge that is often compounded by past or ongoing conflict and a traumatized society. There are tensions within the objectives. For example, tensions within the justice objective include the debate over whether retributive, deterrent or restorative justice should be pursued. There are also tensions between the objectives, on whether to pursue more profound or pragmatic objectives, given the urgency of all the needs in societies emerging from conflict or crisis. For instance, should Rwanda have begun with the physical rebuilding of a shattered society, providing physical and psychological healthcare to survivors and reconstructing homes and roads, or with social reconstruction, pursuing the aims of justice and reconciliation?

Tension exists on the question of whether the past needs to be addressed, and if so, how far into the past transitional justice mechanisms need to delve to meet agreed objectives and victim needs. For instance, Kenya's Truth, Justice and Reconciliation Commission (TJRC)'s mandate extends back to independence. However, during the drafting of the TJRC bill there were calls for the mandate to go back to the colonial period, as the politically repressive post-colonial state can be linked to the legacy of colonialism.<sup>55</sup>

Tensions are also evident in relation to the practical operation of transitional justice mechanisms. For instance, the location of the mechanism is often subject to debate, including whether having the mechanism based near the site of atrocities may raise security concerns or trigger further unrest, but on the other hand whether remotely locating the mechanism will fail to meet victim needs to engage in the process, thus jeopardizing the objectives.



The latter issue has plagued the ICTR, and some argue that it has not contributed to national healing and reconciliation because it is based outside Rwanda. It is also claimed that it would have cost less to host it in Rwanda, and the resources set aside for it would have been maximized and contributed to much-needed transformation of, and capacity building for, the national justice system and related institutions, as the hybrid SCSL has done in Sierra Leone.<sup>56</sup>

There is also tension with respect to the terms used, such as transitional justice and post-conflict reconstruction. The famous William Shakespeare play of *Romeo and Juliet* contains the well-known line, "What's in a name? That which we call a rose, by any other name would smell as sweet."<sup>57</sup> This may hold true for many things: that what we call them does not change their nature. However, in the case of transitional justice, theory and practice have shown that the terminology used has in fact impacted on its focus. Does the term transitional justice truly do justice to the number of non-judicial mechanisms it encompasses? It gives the impression that justice has been prioritized above the other objectives of the process, which are all important. In addition, the conflict or crisis may not result in any transition, thus making transitional justice a misnomer.

On the other hand, 'reconstruction' presupposes that there was something prior to the conflict or crisis that was eroded and should be rebuilt. In most instances, however, there was an illegitimate state with floundering institutions and negative peace, which would not be desirable to reconstruct. Negative peace is considered to be the absence of violent conflict, but where structural violence exists. Conversely, positive peace is the "integration of human society"<sup>58</sup> or a state of social cohesion, where structural violence has been addressed and measures put in place for conflict to be peacefully resolved.

Given the realities of many post-conflict and -crisis contexts, at least in sub-Saharan Africa, the terms "post-conflict and crisis transformation" or "transformative justice" may serve better than continuing the use of 'transitional justice',<sup>59</sup> because what is really needed is a transformation of relationships, institutions, systems and structures towards building and supporting viable states, durable peace, social cohesion and development in the medium to long term. In line with this, Malan (2008) proposes that 'transitional justice' could more appropriately be called 'transformative' justice. "'Transition' refers to top-down processes ... Transformation on the other hand, calls upon society to 'reinvent itself.'<sup>60</sup>

### 4.3 The International Criminal Court

The creation of a permanent international justice system, in the form of the International Criminal Court or ICC, is testament to the growing agreement among nations of the world on the principles of international justice and the means of their enforcement. The ICC represents a piece of the post-conflict and -crisis response, however, it is fraught with dilemmas and challenges. Under the principle of complementarity,<sup>61</sup> the ICC is supposed to work as a complement to, and not a replacement of, national jurisdictions. The Court is mandated to investigate and prosecute those accused of the most serious crimes of international concern, but only if the national jurisdiction is unable or unwilling to do so. Difficulties arise when the national jurisdiction is reluctant to prosecute. For example, the Kenyan Government publicly declared their willingness to try perpetrators of the post-election violence. The country's justice system appeared able to try the cases; therefore, it seemed initially that the 'unwilling or unable' clause of the Rome Statute did not apply to give jurisdiction to the ICC.

However, Parliamentarians unequivocally voted twice against a bill to set up a national tribunal, claiming preference for the ICC trying key suspects as they had no faith in the integrity of the Kenyan judiciary. Nevertheless, once the ICC Prosecutor began to investigate the suspects and set court dates, efforts were successfully employed by the Kenyan Government with the AU (though it was unsuccessful at the UN Security Council) to stop ICC proceedings,<sup>62</sup> and initiate the national tribunal. The ICC proceedings continue to date, as noted above.

The principle of complementarity was adopted for fear that the ICC would become a supranational court and result in countries losing domestic control of criminal prosecutions. This is understandable under the principle of sovereignty. However, given the responsibility to protect,<sup>63</sup> especially where mass atrocities have been committed, there is a place for a supranational mechanism that is protected from national and international manipulation. Such a mechanism is especially important because the principle of complementarity can be abused to shield those bearing the greatest responsibility, for example through governments trying perpetrators in national courts that do not comply with the basic tenets of justice and are merely going through the motions of a trial, thus fulfilling neither international obligations nor local needs for justice.

The ICC's focus on prosecuting those bearing the greatest responsibility creates a risk of an 'impunity gap' as other perpetrators go unpunished, particularly if the national jurisdiction does not play its role as expected.<sup>64</sup> The ICC also faces the above-mentioned tension of physical locality, given its headquarters in the Netherlands. Like the ICTR, it is removed from the citizens whom it seeks to assist. Since its inception, it has been beleaguered by limited funding and human resources, which has forced the Court to prioritize the situations it responds to, leaving it unable to address all the situations begging for its attention. This has contributed to criticisms that the ICC is no more than "a Western tool, deployed against the global south".<sup>65</sup> The ICTY and ICTR are seen to have heralded a new era in supranational justice, in which the process is not necessarily controlled by the victors, as was the case in the Nuremberg and Tokyo trials. It is, therefore, crucial that the ICC guard against this growing perception.

The existence of the ICC, especially given its attempts to be more responsive, has allowed for situations like Côte d'Ivoire and Kenya to be handled with unprecedented speed. The ICC could have the effect of creating incentives for conflicting parties to submit to peacemaking efforts, as well as a deterrent effect, as political and military leaders see others identified and indicted even before the guns fall silent. The Court could also contribute towards

addressing impunity at the level of the political elite, who have historically managed to evade justice. Similar to the ICTY and ICTR, the ICC will need to be sensitive to political considerations, to ensure that it receives the cooperation of sitting governments and takes an even-handed approach towards investigations and prosecutions of various 'sides' to a conflict, including those who gain power after violence.<sup>66</sup> The latter will be challenging to accomplish, but it remains essential in building the credibility of the Court.

Transitional justice processes usually do not delve into a whole range of unstated or unspeakable truths, such as: SGBV, including the rape of women and men, boys and girls; economic crimes; external collaborators; and shady financiers of merchants of terror. The Western – and now eastern – foreign capital interests that have fuelled conflicts in Africa are never subject to international justice proceedings. The beneficiaries of Sierra Leone's 'blood diamonds' and Congolese gold, coltan, diamonds and other minerals; the harvesters of opium in Rwanda during the genocide; the oil merchants from Angola; and those who fuel instability in the Great Lakes Region of Africa by providing small arms and light weapons, are hardly ever detained and brought before international criminal tribunals.<sup>67</sup> This leaves an impunity gap that the ICC needs to address.

## 5. LESSONS LEARNED

When one looks critically at the nature of contemporary conflict in Africa, it becomes apparent that violent conflict must be geographically contained to avoid it spilling over into neighbouring countries or the sub-region. Further, to ensure stability, a regional approach is preferable to individual neighbouring countries interfering in conflicts or political agreements. Post-conflict and -crisis contexts must be carefully managed, starting as early as possible. The implementation of political agreements should be closely monitored, including clear benchmarks, because failures in this regard are a major reason for violent conflict re-igniting. It must be borne in mind that extremist ideologies, including ethnic exclusion, are fostered during violent conflict and remain a threat to peace even after agreements have been signed. Cleavages, therefore,

must be addressed and cannot be glossed over as part of conflict avoidance, as this will only work in the short-term. The politicization of ethnicity, and subsequently of the state, economy, all public life, history, truth and even of the reconciliation process, remains a major challenge for transitional justice mechanisms, including the ICC, to guard against.<sup>68</sup>

Transitional justice mechanisms have an important role to play in establishing or strengthening the rule of law and in transforming institutions and the social fabric. Because accountability and non-recurrence are but some of the needs of victims, and justice but one of six objectives, effective transitional justice mechanisms need to go beyond the legal-judicial aspects to ensure

a comprehensive approach that satisfies victims' stated needs as well as identified objectives. This does not negate justice, but rather lends itself to an appreciation and application of measures that meet the other objectives, such as informal mechanisms, which are often considered to fail in meeting the Western notion of justice.

Some of these informal mechanisms include Burundi's *bashingantahe*, Rwanda's *gacaca* and *abunzi*, and Uganda's *mato oput*. They may not hold perpetrators accountable according to Western perceptions, but they do contribute to meeting the other objectives, such as healing, forgiveness, reconciliation and truth, and can be simultaneously applied with accountability mechanisms. The preference of the West for the legal/judicial paradigm is seen in much of the criticism of Rwanda's *gacaca* process, which adopted a restorative justice approach.<sup>69</sup>

*Gacaca's* primary aim was not to seek "punishment alone, but also reconciliation, seeking to restore a sense of social cohesion by facilitating face-to-face resolution between victims and perpetrators".<sup>70</sup> Critics stress that when *gacaca* is evaluated from the Western perspective, which sees justice as a neutrally-determined, universal virtue and free from all value-laden claims, it falls short and actually violates justice norms. When evaluated against victim needs, such as truth, recognition and acknowledgement of atrocities committed against them, story-telling by the victims, restitution, and empowerment in the justice process, *gacaca* has had some degree of success in providing a platform for genocide survivors and perpetrators to engage, thus contributing to a crucial ethos for reconciliation.<sup>71</sup> Regarding accountability and ensuring measures for the non-recurrence of atrocities, *gacaca* has largely not met those needs. Evaluating *gacaca's* success from a retributive justice perspective alone ignores its social outcomes. The jury is still out on the success of *gacaca* in the social arena; however, it is certainly not the failure that some human rights and justice pundits have claimed it to be.

The purpose and legitimacy of any transitional justice mechanism needs to be critically examined in light of the context, and the articulated needs and objectives of society. One size does not fit all, and mechanisms need to be participatory from the outset, context specific, victim-centred, gender sensitive, timed and sequenced accordingly, as well as long term in perspective. In some cases, accountability procedures can be significantly delayed to suit the situation. Charles Taylor was indicted by the SCSL in 2003. He was granted exile in Nigeria in

the same year and thus protected from prosecution. In 2006, he was finally extradited to face trial before the SCSL. In another example, Ghana's National Reconciliation Commission was established in 2002, some nine years after the country's transition from military to civilian rule.<sup>72</sup>

Transitional justice mechanisms need to meet the basic minimum needs of: accountability, including measures of non-recurrence, recognition of atrocities committed and authentic restitution. For each context, this will entail using multiple measures, staffing capacity in line with the different measures and objectives; and sequencing the objectives as necessary. More often than not, multiple objectives are pursued simultaneously. As discussed above, this could be problematic as their aims are not necessarily complementary. Therefore, it becomes a question of timing and sequencing to meet the local needs and demands for justice. "It is not a matter of an either/or choice", as discourse and practice has demonstrated in the evolution of transitional justice; "it is rather a both/and package",<sup>73</sup> which carefully considers 'when'. Given the repeated cycles of violent conflict and political repression, the timeline of events included in the mandate of any mechanism remains a key consideration. This ensures that the different cycles are addressed, so that multiple victims and perpetrators are included in the process.

Capacity bridging and building and empowerment are an important factor in the aftermath of conflict or crisis. Knowledge and skills in the following, among other areas, are pertinent: conflict analysis, conflict and gender sensitivity, rights-based programming and development, peacebuilding, nation and state building, and coherence and coordination. Equipping actors across the range of key governmental and non-governmental partners, and not just among traditional legal partners and institutions, is beneficial. This also provides an opportunity to ensure that systems and structures are transformed for gender responsiveness and equity, as well as ensuring gender representation.

Transitional justice should form part of an integrated peacebuilding framework that includes the engagement of all relevant actors (local and international). As already discussed, needs related to post-conflict and -crisis transformation and development are numerous, and can easily overwhelm states with weak capacities, systems and structures, especially when everything is seemingly urgent and resources are limited. With this in mind, it is essential for various actors and interventions not to



operate in isolation, but rather to ensure effective coordination and coherence from planning stages through to evaluation. This will help to maximize available resources and improve outcomes, as each actor plays a complementary role based on their expertise.

Transitional justice mechanisms alone will clearly not suffice in effectively addressing the challenges in Africa's post-conflict and -crisis transformation and development. They are not able to deal with the range of factors discussed above, inherent in Africa's states and society, which have made the continent especially prone to war, violent conflict and political repression in the post-colonial and post-Cold War eras. Measures of state and nation building are necessary, as part of the integrated peacebuilding framework. There is a critical role for law and justice, but only in tandem with other efforts.

Political repression, exclusion and trauma tend to cause people to retreat. They retreat into ethnic nationalism, kin, religious or other identities, enclaves, clans or other tight-knit groups, as a defence mechanism or coping strategy that impedes transformation and development efforts. Therefore, for any transitional justice mechanism to have lasting social cohesion benefits, it needs to address the causes and consequences of political repression and exclusion, as well as trauma. The political repression and exclusion aspects are often recognized, with efforts made to address the same through institutional transformation. However, trauma healing is often not incorporated into transitional justice mechanisms. "Politicians, negotiators, peacebuilders and the general public alike tend to think of trauma healing as soft, a warm fuzzy that has little or nothing to do with realpolitik, and no role to play in reducing violence."<sup>74</sup>

So far, transitional justice has been reactive, responding to the consequences of violent conflict and political repression. It is critical that a dimension of prevention be added to its use. This can be done through the integration of peacebuilding, nation and state building measures. For instance, conflict analysis can be incorporated into existing frameworks for periodic democracy and rule of law assessments. Based on developed indicators, early warning information on potentially conflict prone areas can be identified, together with the drivers and triggers for potential violent conflict. This can then be linked to early response interventions. As the old adage goes, "prevention is better than cure".

Early recognition of state fragility, early warning for conflict, and disaster risk preparedness linked to early response can all mitigate and/or prevent political exclusion and repression, state collapse, violent conflict and natural disasters together with their devastating consequences. Transitional justice mechanisms can also be adopted as prevention mechanisms, rather than being limited to during and after violent conflict and crisis. For instance, political and conflict analysts claim that had Kenya instituted the TJRC as recommended in 2003, it would have begun a process of truth seeking, story-telling, recognition of historical atrocities, and measures towards non-recurrence which could have prevented or mitigated the 2007–2008 post-election violence.<sup>75</sup> In that case, the TJRC could have served as a framework for prevention instead of response. The same could be argued of delays in implementing 'peacetime' transitional justice mechanisms in DRC, Ethiopia and Zimbabwe, among others.

Some policy recommendations follow.

### 5.1 For development partners

- 1 Provide adequate resources for post-conflict and -crisis transformation. It is difficult, if not impossible, to overcome the challenges that lie at the root of violent conflict or political repression and state collapse, without the requisite resources to manage the crisis, facilitate early recovery, and thereafter for stabilization, peacebuilding and development. An accessible and flexible pool of funds that is jointly managed by development partners and partner states can facilitate the process until the state has restored its capacity to generate and allocate resources, and provide goods and services.
- 2 Adopt an integrated peacebuilding framework that incorporates transitional justice, nation and state building, as well as other pertinent post-conflict and -crisis interventions such as development and security, and allocate the requisite resources in a coordinated and coherent manner. In doing this, ensure that support builds local capacities and utilizes local resources.
- 3 Support transitional justice that is comprehensive, transformative and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully

designed, well-resourced system of legal, political and social measures. This system will contribute towards a just social order, through strengthening the rule of law, transforming institutions and repairing the social fabric.

- 4 Within the above system, secure and prioritize resources for trauma healing as an integral part of transitional justice and a key factor in advancing from fragility to resilience. An abundance of resources and energy has been expended on projects that achieved little change in communities because they were not thoughtfully built on the foundations of peace, healing and social cohesion.
- 5 Invest resources in the conceptual and practical development of transitional justice and nation and state building as frameworks for prevention. This will need to be coupled with investments in regular, systematic and structured conflict and context analysis integrated into democracy and rule of law assessments. It must be borne in mind that it is challenging to measure the impact of prevention interventions.
- 6 Determine, prioritize and safeguard quotas within transitional justice funding for gender sensitive and gender justice programming, and include incentives for the quotas being met by state partners.
- 7 Bear in mind that transitional justice, the transformation of relationships, systems and structures, and building social cohesion will take time and a heavy financial investment. This means that progress cannot be measured using traditional indicators, and that impact will only be measurable over a considerable period of time. Therefore, secure sufficient resources for the long term and allow for the development and utilization of innovative ways to measuring progress.

## 5.2 For African governments

- 1 Transformation is most effective when it starts with the individual, family, community and then state, in a bottom-up manner. Social cohesion and healing cannot be institutionalized or legislated. Approaches that take into consideration the victims' needs and secure their actual involvement are most effective. While there is almost always a

local demand for justice, there is not necessarily demand for specific mechanisms to be created.<sup>76</sup> It is important to ensure that whatever method is adopted, it has local support, and is neither an external imposition nor a top-down national government initiative. The latter in particular may have the unwanted result of communities 'pretending peace' and existing in negative peace rather than transformed relationships. The role of government is to create an enabling environment to facilitate these organic processes that must be driven by those affected, and to allow its members to get involved in their personal capacities as part of their personal journey towards healing.

- 2 Guarantee transitional justice mechanisms that will advance accountability, including measures for non-recurrence of violence, recognition of atrocities committed, and authentic restitution to victims. Reject amnesties for crimes of genocide, war crimes, crimes against humanity and gross violations of human rights, including SGBV.
- 3 Support favourable national jurisdiction that comprises effective judicial mechanisms, laws and policies, which incorporate the national ownership of rule of law principles based on international norms.
- 4 Transitional justice mechanisms alone do not suffice for meeting post-conflict and -crisis needs. The state remains the framework within which solutions to violent conflict, political repression and underdevelopment will be found. Therefore, allow for measures of nation and state building to be incorporated into transformation and development efforts, so that states become more viable, thus reducing or eliminating risks associated with violent conflict. Create opportunities for more South-to-South peer learning among the leaders of the continent; develop means of holding each other accountable and supporting each other; and establish a leadership mentoring system to identify and equip the next generation of leaders for smooth political transitions.

Transformation of the state is necessary, but this is missed in the oft-piecemeal and quick-fix institutional reform approach, which only scratches the surface. It will take time, concerted efforts and resources to effectively transform the state. Like

social cohesion and healing, it is not an automatic process. “Sovereignty needs to be reasserted as a responsibility, not as a cover for tyranny or a relic of the world order past.”<sup>77</sup> In addition, support efforts to rebuild civil society, which must accompany efforts to transform the state and reinforce sovereignty. That said, given the challenges in post-conflict and -crisis contexts, allow for external assistance. Given the urgent needs, external assistance can provide interim structures and functions until the state can perform them again. “External assistance should be available as long as it must, but it should leave as soon as it can.”<sup>78</sup>

- 5 Build and strengthen sub-regional, regional and continental capacities and structures that can provide external assistance that is context specific. Existing mechanisms, such as the AU Panel of the Wise, Friends of the Panel of the Wise, and Panel of Eminent Africans, the AMANI Forum (also known as Great Lakes Parliamentary Forum on Peace), the Association of European Parliamentarians for Africa, and the Club of Madrid, provide relevant models for the formation of sub-regional, regional and continental mechanisms and rosters. Those mechanisms could mobilize former heads of state, legislators/parliamentarians and state officials to systematically accompany post-conflict and -crisis contexts through hands-on coaching and mentorship, for as long as needed. The criteria for personalities selected will be key to ensuring that persons of integrity and positive legacy are selected, to ensure that the peer learning is constructive.

### 5.3 For non-governmental organizations

- 1 Play an active and constructively critical role to ensure a transitional justice process that is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully designed, well-resourced system of legal, political and social measures. Provide human resources and expertise to contribute to its objectives. This includes, but is not limited to, knowledge and expertise in conflict prevention and transformation, peacebuilding, nation and state building, and trauma healing, in addition to traditional legal and rule of law expertise. They should play a dynamic accountability role to ensure

that said mechanisms have local support, meet the needs and objectives articulated by victims, enhance local capacities for peace and justice, and adopt conflict and gender sensitivity, as well as a rights-based approach.

- 2 Actively engage in coordinated, regular, systematic and structured conflict and context analysis as part of democracy and rule of law assessments, using tools that are context specific. These tools will measure political exclusion and repression, state fragility and viability, conflict early warning signs, and disaster risk preparedness and reduction. Utilize the resulting data to inform interventions and evidence-based advocacy work.
- 3 As part of nation and state building efforts, work towards the parallel transformation of civil society along similar principles, to contribute to more viable states. “State functions cannot be left to even well functioning society, any more than society can abdicate its activities to the state.”<sup>79</sup> Play this role responsibly, while maintaining critical engagement to hold the state accountable.

### 5.4 For UNDP

UNDP is uniquely positioned to address the myriad challenges facing Africa in post-conflict and -crisis transformation and development, because it works across the spectrum in fighting poverty, building democratic societies, preventing crisis and enabling recovery, protecting the environment, halting and reversing the spread of HIV and AIDS, empowering women, and building national capacity.

UNDP has done substantial work in strengthening the rule of law in crisis affected and fragile situations. Their approach is underpinned by a conviction that in the aftermath of violent conflict and crisis, and other fragile situations, unobstructed access to legitimate rule of law institutions is a decisive factor in efforts to rebuild societies and prevent a downward spiral into violent conflict. UNDP’s work in this area seeks to enhance physical and legal protection of people and communities, ensure legal representation, access to justice and law enforcement institutions, and ensure that institutional security providers are subject to civilian oversight. Their engagement seeks to be gender sensitive, and particular emphasis is placed on tackling SGBV in areas affected by

violent conflict and fragility. UNDP's clear commitment to strengthening the rule of law contributes toward meeting the justice objective of transitional justice. Further, their engagement helps to address the following victim needs: safety; recognition of atrocities; accountability, including measures for non-recurrence; empowerment in the justice process; and restitution.

UNDP's involvement in solving post-conflict and -crisis transformation and development challenges could be enhanced by:

- 1 Enhancing institutional reform strategies to include nation and state building. It is essential that state fragility and collapse be anticipated and prevented, in addition to conflict prevention and disaster preparedness. If viable nation states are established and strengthened, they will be better able to engage in conflict prevention and disaster preparedness and manage the transition from fragility to resilience. Focusing on building resilience limits UNDP to addressing the symptoms or consequences of systemic failure or malfunction. A viable state is considered to serve the multiple functions of sovereign authority, decision-making institution, guarantor of security for the territory, source of identity and arena of politics. Because all these functions are intertwined, it becomes difficult to perform them separately, and a weakness or non-performance in one area negatively impacts on the others.<sup>80</sup>
- 2 Broaden the role of law and justice in post-conflict and -crisis transformation and development to ensure that the transitional justice process is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred and gender sensitive; and consists of a carefully designed well-resourced system of legal, political and social measures. This would include ensuring that mechanisms have multidisciplinary expertise, and not solely legal and rule of law experts; adopt conflict and gender sensitivity and a rights-based approach from design, through to implementation to monitoring and evaluation; are designed to serve and meet specific objectives informed by the local context and not by external interests; build local capacities for peace and justice so as to enhance resilience; and are long term in perspective, with flexible funding to cater to early response and prevention interventions.
- 3 As part of its capacity building support, integrate systematic and structured South-to-South peer learning, coaching and mentoring, while maintaining a nuanced approach that is context specific. In addition, ensure that any political missions/interim structures and functions that the UN and AU support in post-conflict and -crisis situations are resourced from the sub-regional, regional and continental external assistance mechanisms and rosters proposed above.
- 4 Given how dynamic and fragile most post-conflict and -crisis contexts are, incorporate baseline studies as well as periodic conflict and context analysis into existing democracy and rule of law assessments. Develop and standardize context specific tools for those purposes that can be used by all stakeholders in a given context. Actors in post-conflict and -crisis contexts are increasingly recognizing the importance of analysis and assessments to maximize the positive impact of their interventions. However, many contexts are plagued with a variety of different actors, each with its own methodology and tools, and in some cases lacking the capacity and knowledge to undertake such research in post-conflict and -crisis contexts. This limits the usefulness and accuracy of the collected data.
- 5 Take the lead in further conceptualizing and implementing transitional justice as a framework for the prevention of violent conflict, political exclusion and repression, and state fragility and collapse.
- 6 In relation to sexual and gender-based violence: continue and expand strategies to promote women's security and equal access to justice, including through mobile legal aid clinics; increase and finance efforts to challenge impunity for SGBV crimes against women and men, girls and boys; support increased prosecutions of SGBV crimes to reduce the impunity gap; strengthen gender responsiveness of national law and policies, as well as justice systems and transitional justice mechanisms; prioritize trauma healing for SGBV survivors; and go beyond formal justice to promote the equitable treatment and participation of women in all aspects of post-conflict and -crisis transformation and development, including the negotiation of peace agreements, where transitional

justice decisions are made, and the implementation of UN peace operations.<sup>81</sup> Additionally, highlight the need for, and support of, programming that addresses 'under the radar' consequences of SGBV, such as children born out of conflict-related rape, and the rape of men.

- 7 Taking into account the time and resources needed to transform relationships, communities, systems and structures, and to build viable states with social cohesion, take the lead in developing innovative measures of progress, evidence-based data gathering, and documentation without compromising transitional justice processes. Advocate for a shift away from a focus on quick impact and results, which can often lessen impact and cause more harm than good. For instance, elections are considered to be critical indicators of democracy and good governance, political participation and institutional reform. However, in the vacuum created by state fragility and/or collapse, the organization of election campaigning has the potential to trigger local level conflict or tensions, making it pertinent to re-think the sequencing of elections in the post-conflict and -crisis context.<sup>82</sup>

## 5.5 For the UN system

- 1 In merging UN rule of law and peacebuilding architecture efforts in post-conflict and post-crisis contexts, political missions provide a better platform for ensuring coherence and coordination than separate UN agency interventions; therefore, these should be encouraged, strengthened and resourced in all such contexts in Africa. Including member states and other national stakeholders through active coordination will make them more robust and better placed to serve as much-needed interim structures. As part of efforts to support local/continental capacities and mechanisms, ensure that any interim structures or functions are resourced from the sub-regional, regional and continental external assistance mechanisms and rosters proposed above. Additionally, work with the AU to strengthen its capacity.
- 2 Apply conflict and gender sensitivity and a rights-based approach as underlying principles when formulating and implementing policies and resolutions, and in the design and implementation of all interventions, to ensure that they leave a positive impact on the context, do not exacerbate conflict, and uphold the dignity of all genders and peoples, as well as contribute to building viable African states from the inside out.
- 3 Link emergency response/humanitarian action, early recovery, and development in a seamless and coherent system that will not necessarily be sequential, but rather will overlap in many cases. Ensure that this system incorporates a transitional justice process that is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully designed well-resourced system of legal, political and social measures. Lastly, ensure that this system encompasses nation and state building, and prioritizes trauma healing. As the nation and state building measures remain weak, utilize the proposed 2012 High Level Meeting of the General Assembly on the Rule of Law at National and International Levels, and its proposed Programme of Action, to discuss how to incorporate these in rule of law efforts in post-conflict and -crisis situations. In addition, explore with states parties how to generate political will and increase levels of national ownership of those measures.
- 4 Considering advances made in conflict and post-conflict contexts to assist in establishing the rule of law by ensuring accountability and reinforcing norms, building confidence in justice and security institutions, and promoting gender equality,<sup>83</sup> and progress in prioritizing women's justice and security needs in the conflict and post-conflict continuum through a number of UN Security Council Resolutions (1325, 1820, 1888, 1889 and 1960), devote greater support and resources to supporting UN Women fulfil its mandate in general; and specifically to ensuring gender-responsive transitional justice and nation and state building, in concert with UNDP and others in the rule of law sector in the UN system and beyond.

## 6. CONCLUSION

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The daily realities in post-conflict and -crisis contexts include, but are not limited to, experiences like that of Ingabire and her son, which were described earlier in this paper. Long after the 1994 Rwandan genocide, following the implementation of humanitarian action, early recovery, peacebuilding and developmental efforts, as well as a number of transitional justice mechanisms (including national prosecutions, *gacaca*, trauma healing and survivor support groups, and memorialization which were still underway) in 2007, she was still facing real dilemmas and challenges. Based on observations from similar contexts, one can imagine the difficulties that her son has faced since then, which could include lingering trauma from early childhood mistreatment, stigmatization by the community based on his mixed ethnic heritage and the circumstances under which he was conceived, identity crisis stemming from uncertainty about his parentage, disenfranchisement and exclusion. His current situation and future depend greatly on whether these problems have been addressed and the extent of his healing and inclusion in the community. If unhealed and excluded from society, he could be tomorrow's *genocidaire* or mercenary and agent of destabilization in the Great Lakes Region or elsewhere on the continent.

Without a doubt there is a role for law and justice in Africa's post-conflict and -crisis contexts. This role will be well served by a nuanced approach to transitional justice. An approach that is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully designed well-resourced system of legal, political and social measures. However, that alone will not fully meet the needs of post-conflict and -crisis contexts. Nation and state building remain key to transformation and development; so that African states can prevent experiences such as that of Ingabire and her son, as well as deal effectively with those that have already occurred. Given the untold consequences of doing nothing, or acting ineffectively, it is time that we got it right and invested the requisite time and resources for a just social order and prosperity in Africa. The future of the continent should increasingly witness transformed and healed relationships, communities, systems and structures for durable peace and sustainable development, situated in viable states that do not resort to violent conflict and political repression within or beyond their borders.



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## NOTES

- <sup>1</sup> Written by: Warigia Razia, a conflict prevention and peacebuilding specialist engaged in independent consulting.
- <sup>2</sup> See Clausewitz (1976); Anonymous (2000a); and Zartman (1995).
- <sup>3</sup> See Anonymous (2000a); Zartman (1995).
- <sup>4</sup> Zartman (1995).
- <sup>5</sup> See Zartman (1995); Anonymous (2000a).
- <sup>6</sup> See Huntington (1996).
- <sup>7</sup> See Kaldor (2007).
- <sup>8</sup> See Zartman (1995).
- <sup>9</sup> Human Security Group (2006).
- <sup>10</sup> See Anonymous (2000a); Collier (2007); Gasana (2008); and Zartman (1995).
- <sup>11</sup> See Human Rights Watch (2002); UN OCHA/IRIN (2007); and UN OCHA/IRIN (2005).
- <sup>12</sup> See Anonymous (2000b).
- <sup>13</sup> *Ibid.*, p. 32.
- <sup>14</sup> Collier (2007: 34).
- <sup>15</sup> *Ibid.* p. 32.
- <sup>16</sup> Gasana (2008: 145–169).
- <sup>17</sup> *Ibid.*
- <sup>18</sup> Schirch (2004: 45–55).
- <sup>19</sup> *Ibid.*
- <sup>20</sup> See Yoder (2005); and Lemarchand (2008: 65–76).
- <sup>21</sup> See Schirch (2004: 45–55); Zehr (2002).
- <sup>22</sup> International Centre for Transitional Justice (2009: 1).
- <sup>23</sup> Teitel (2003).
- <sup>24</sup> Schirch (2004: 45–55); and Sriram and Pillay (2009: 1).
- <sup>25</sup> Clark and Kaufman (2008: 191–205); and Clark (2010: 29–46).
- <sup>26</sup> See Kagoro (2009).
- <sup>27</sup> Sriram and Pillay (2009: 2).
- <sup>28</sup> *Ibid.*
- <sup>29</sup> See Centre for the Study of Violence, 'Justice in Perspective' (a), International Criminal Court 'Situations and Cases'.
- <sup>30</sup> Centre for the Study of Violence (b) 'Justice in Perspective'.
- <sup>31</sup> Centre for the Study of Violence (c) 'Justice in Perspective'.
- <sup>32</sup> Centre for the Study of Violence (d) 'Justice in Perspective'.
- <sup>33</sup> Centre for the Study of Violence (e) 'Justice in Perspective'.
- <sup>34</sup> Centre for the Study of Violence (f) 'Justice in Perspective'.
- <sup>35</sup> There can be no thorough discussion on transitional justice without an in-depth look at gender and transitional justice or 'gender justice' as some call it. However, due to the limitations of space this section only attempts to capture key issues, which would need a separate paper for thorough exploration and analysis.
- <sup>36</sup> UNIFEM (2010a).
- <sup>37</sup> Razia (2011) and Kamau (2007c).
- <sup>38</sup> *Ibid.*
- <sup>39</sup> UN Women (2011: 84).
- <sup>40</sup> Kamau (2007a); UNIFEM (2010a); UN Women (2011).
- <sup>41</sup> See Scalon and Muddell (2009); and Storr (2011).
- <sup>42</sup> Margot Wallstrom, Special Representative of the Secretary-General on Sexual Violence in Conflict, at the Commission on the Status of Women, March 2010, in UNIFEM (2010c).
- <sup>43</sup> Razia (2011); Scalon and Muddell (2009); and Storr (2011).
- <sup>44</sup> Clark and Kaufman (2008: 1).
- <sup>45</sup> See Lederach (2003, 1999, 1997, 1995).
- <sup>46</sup> Clark (2008).
- <sup>47</sup> See Mamdani (2002).
- <sup>48</sup> See Kagoro (2009).
- <sup>49</sup> International Crisis Group (2009).
- <sup>50</sup> See Clark (2008: 191–205).
- <sup>51</sup> See Ngoga (2008: 321–332).
- <sup>52</sup> Commission of Inquiry (2008).
- <sup>53</sup> Reference to Nsanuwerwa, F.X. 'The ICTR Contribution to National Reconciliation', 944–99 cited in Jallow (2008: 266).
- <sup>54</sup> See Clark, et al. (2008: 381–391).
- <sup>55</sup> Kamau (2008); See also International Centre for Policy and Conflict, Monitoring Report of the Truth Justice and Reconciliation Commission (April 2008–June 2010) 'Case of Concealing Truth to Reward Impunity', Nairobi, which refers to the challenge of the timing being a limitation. Also author's personal experience.
- <sup>56</sup> See Ngoga (2008: 321–332).
- <sup>57</sup> Shakespeare, W. (2005) *Romeo and Juliet*, Delaware, Prestwick House Inc.
- <sup>58</sup> Galtung (1964) 'An editorial', *Journal for Peace Research*, 1(1): 2.
- <sup>59</sup> Malan (2008: 147).
- <sup>60</sup> *Ibid.*
- <sup>62</sup> The principle of complementarity is a fundamental principle on which the functioning of the ICC is based. The ICC was designed as a court of last resort, therefore, under the Rome Statute it can only exercise its jurisdiction where the state party concerned does not, cannot or is unwilling genuinely to prosecute. See Wikipedia 'International Criminal Court', en.wikipedia.org/wiki/International\_Criminal\_Court, (accessed January 2012).
- <sup>63</sup> Author's own witness. Also *The Star*, Kenya (2012); Capital News (2011).
- <sup>64</sup> The responsibility to protect is an emerging norm based on the idea that sovereignty is not a right but a responsibility. It focuses on preventing and halting the crimes of genocide, war crimes, crimes against humanity and ethnic cleansing, which are collectively referred to as mass atrocities. The responsibility to protect has three pillars: a state has the responsibility to protect its population from mass atrocities; the international community has the responsibility to assist a state to fulfil this primary responsibility; and if a state fails to protect its citizens from mass atrocities and peaceful means have failed, then the international community has the responsibility to intervene through coercive measures, such as economic sanctions. Military intervention is the last resort. See Wikipedia 'Responsibility to Protect', en.wikipedia.org/wiki/Responsibility\_to\_protect, (accessed September 2012). There are concerns about the abuse of the responsibility to protect by some countries, but that lies beyond the scope of this paper.
- <sup>65</sup> Bergsmo and Webb (2008: 357).
- <sup>66</sup> International Crisis Group (2009).
- <sup>67</sup> Zaum (2008: 370).
- <sup>68</sup> See Kagoro (2009).
- <sup>69</sup> *Ibid.*
- <sup>70</sup> See Clark (2008: 297–319); and Clark (2010).
- <sup>71</sup> Clark (2008: 302).
- <sup>71</sup> *Ibid.* 191–205; and Clark (2010).
- <sup>72</sup> Sriram (2009: 6).
- <sup>73</sup> Malan (2008: 147).
- <sup>74</sup> Yoder (2005: 5).
- <sup>75</sup> Author participated in discourse through various fora, with key actors in peacebuilding and human rights, following the post election violence.
- <sup>76</sup> Sriram (2009: 6).
- <sup>77</sup> Zartman (1995: 268).
- <sup>78</sup> *Ibid.* 272.
- <sup>79</sup> *Ibid.* 267.
- <sup>80</sup> See Zartman (1995).
- <sup>81</sup> See Scalon and Muddell (2009); Storr (2011); UNIFEM (2010a); UNIFEM (2010b); UN Women (2011).
- <sup>82</sup> Zartman (1995: 271).
- <sup>83</sup> United Nations (2011).



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