

Transitional justice and human rights in Africa¹

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Introduction

Africa stands at the cutting edge of the international debate on transitional justice. The Juba talks between the Government of Uganda (GOU) and the Lord's Resistance Army (LRA) juxtapose local initiatives for justice and reconciliation with international demands for prosecutorial justice.² Joseph Kony's failure to show good faith in these talks by extending LRA terror into Democratic Republic of Congo (DRC) villages further evidences the need for Africa to address the demands of the International Criminal Court (ICC). On the other hand, the decision by the Pre-trial Chamber of the ICC to issue a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of Sudan, for war crimes and crimes against humanity raises significant questions concerning the appropriateness of the court's intervention in a growing African crisis.

The situation in the DRC raises similar questions. The trial of rebel leader Thomas Lubanga in The Hague for war crimes relating to the forced recruitment of child soldiers sends a strong message that warlords are not above the law. His trial could at the same time inflame an already fragile ethnic situation in the eastern part of the country, where he is seen as a protector of Hema rights in the ethnic rivalry for control of the region's vast mineral resources. Will the threatened trial of Laurent Nkunda, head of the *Congres National pour la Defense du Peuple*³ (CNDP), whether in The Hague or in Kinshasa, contribute to peace-building or further alienate his Tutsi ethnic followers, recognising that the United Nations (UN) has accused Nkunda's troops as well as government troops of mass killings and rape?⁴

¹ An expanded version of this paper is to be found in Villa-Vicencio [Forthcoming].

² *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army*, Juba, Sudan, 29 June 2007. See also Baines (2007).

³ National Congress for the Defence of the Congolese People.

⁴ Having arrested Nkunda in Rwanda following a joint Rwandan–DRC military initiative, the DRC has asked for his extradition. The question is whether Rwanda will comply; whether the DRC prosecutes him in Kinshasa as a renegade Congolese soldier – which would signal a growing domestic capacity not to rely on the ICC for prosecutions; or

As an increasing number of African states move towards democracy, attempts to impose the ICC's demands for the prosecution of those alleged to be responsible for genocide, crimes against humanity and war crimes are likely to provoke increasing concern among some peace-builders on the continent. The fragile peace agreement between Robert Mugabe's Zimbabwean African National Union (ZANU-PF) and the Movement for Democratic Change (MDC) in Zimbabwe is a case in point.⁵

Confronted by decades of impunity that have spiralled into civil wars, regional conflict, genocide and oppressive rule, the international community insists that perpetrators of such deeds have their day in court. The fact that 30 African states – for whatever reasons – have ratified the Rome Statute, thereby accepting the jurisdiction of the ICC, suggests general acceptance of this proposition.

However, the level of political instability that characterises many African peace initiatives is such that even the most fervent proponents of prosecutions recognise the need to ensure that legal action against perpetrators does not throw the country back into war. Article 16 of the Rome Statute allows the UN Security Council to suspend ICC investigations for renewable one-year increments if those investigations relate to situations with which the Security Council is engaged under its Chapter VII powers relating to matters of peace and stability.⁶ Article 53 of the Statute, in turn, allows for a stay of prosecutions triggered by a State Party or Security Council referral if, taking into account the seriousness of the crime and the interests of the victims, this is judged to be “in the interest of justice” – which presumably includes situations where prosecutions might impede peace initiatives.⁷

Luc Huyse warns that the notion of *the interests of justice* is an “extremely technical and diffuse concept”.⁸ If this means that the criteria by which these technicalities are to be unravelled are solely those of international law, to the

whether he will ultimately face trial in The Hague on charges of genocide, crimes against humanity, or war crimes.

⁵ The fact that Zimbabwe, like Sudan, has not signed the Rome Statute will involve the direct intervention of the UN Security Council for this to happen.

⁶ Rome Statute of the International Criminal Court; available at <http://www.un.org/law/icc/statute/romeofra.htm>; last accessed 15 December 2008.

⁷ (ibid.); see also Lovat (2006).

⁸ Huyse & Salter (2008); see also Lovat (2006).

exclusion of the judgement of governments and others directly involved in peace-building, then the ICC effectively has the final word – reducing local and regional initiatives to be, at best, poor cousins in the peace process.

A choice between the ICC and national structures of justice, including African traditional mechanisms for justice and reconciliation, is not the most pressing issue facing African countries. Rather, it is to ensure that perpetrators of gross violations of human rights are held accountable for their deeds, and that there is sufficient political and socio-economic transformation to ensure that victims regain a sense of human dignity. For these developments to take place it is imperative that local and other peace-building initiatives be supported to ensure that the peace process does not slide back into conflict. Peace cannot be restored in conflict situations by persecutions alone. Nor can the international demand for an end to impunity be ignored or played down by less than decisive action being taken against those principally responsible for acts of genocide, crimes against humanity or war crimes.

This requires local initiatives for peace-building to respond to and, where necessary, be adapted to the demands of international law. The ICC, on the other hand, needs to ensure that its activities do not jeopardise local initiatives aimed at ensuring sustainable peace and social development in countries seeking to overcome conflict.

My intent in what follows is to –

- identify the limitations of prosecutorial justice as witnessed in the dominant transitional justice debate
- consider the challenge of traditional African mechanisms to Western notions of conflict resolution and peace-building, and
- ponder the origins and parameters of the transitional justice debate in Africa.

Transitional justice

The 2004 UN Report to the Secretary-General on *The rule of law and transitional justice in conflict and post-conflict societies* defines *transitional justice* as –⁹

⁹ United Nations (2004); see also United Nations (1992)

... processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

A 2006 UN document entitled *Rule of law for post-conflict states: Truth commissions*, on the other hand, provides a much narrower focus for transitional justice and truth commissions, and fails to adequately affirm the necessary link between justice and reconciliation.¹⁰ In brief, the implication of the *Truth commissions* document is that justice is more important than reconciliation, accountability is more important than truth, and reparation is more important than reconstruction.

It is this emphasis in the transitional justice debate that is challenged in what follows. If justice is delivered through ad-hoc tribunals, the ICC or any other body that is perceived to bear the characteristics of 'imposed' or 'outsiders' justice', such body's ability to transform a nation is limited. The former UN Secretary-General acknowledges this as well:¹¹

Peace programmes that emerge from national consultations are ... more likely than those imposed from outside to secure sustainable justice for the future in accordance with international standards, domestic legal traditions and national aspirations.

Given the mandate of the ICC to intervene in national situations only where a State is "unwilling or unable"¹² to carry out investigations and prosecutions of its own, more energy could well be out into empowering and, where necessary, sensitising national courts and/or alternative structures authorised by States to deal with gross violations of human rights in a given situation, rather than taking the decision-making process out of their hands.

Victim demands invariably extend beyond what any formal international or national court of law can provide. This is why transitional justice mechanisms cannot be reduced to prosecutions. They need to include additional formal structures in order to meet victim demands. Differently stated, transitional justice proponents need to acknowledge the inherent limitations of trial justice in order to maximise the contribution of their discipline to peace-building. These limitations include the following:

¹⁰ UNHCHR (2006).

¹¹ Orentlicher (2004).

¹² Rome Statute.

- **Prosecution restrictions:** No legal system can prosecute more than a limited number of alleged perpetrators. The question is this: How does one hold those perpetrators who do not have their day in court accountable for their deeds?
- **Prosecutorial criteria:** The ICC's mandate is to prosecute the major proponents and architects of the most serious crimes under international law: genocide, crimes against humanity, war crimes and (the as yet undefined) crimes of aggression. Given the decisions on ICC persecutions to date, the question is by what criteria some perpetrators are judged to be major proponents and architects of serious crimes and others not.

When Dr Irae Baptista Lundin, a Maputo-based political analyst, was recently asked whether she thought Mozambique ought to have instituted criminal trials against those alleged to be responsible for gross violations in the post-independence conflict between the *Frente de Libertação de Moçambique*¹³ (FRELIMO) and the *Resistência Nacional Moçambicana*¹⁴ (RENAMO), she responded with a counter question: “Who ought we to have prosecuted? If not the Rhodesians, South Africans and other international players who funded the war, why RENAMO and FRELIMO?”¹⁵

- **Fixed charges:** Courts are required to prosecute against a fixed charge sheet. This means that, while trials are able to deliver justice on specific gross violations of human rights, they are unable to address broader aspects and patterns of injustice that have destroyed the lives of individual victims and communities. Included among the latter are invariably those who have neither the economic capacity nor the emotional will to resort to the courts.

To cite but one example, Saddam Hussein was convicted of crimes against humanity for the killing and torture of 148 Shi'ite villagers in Dujail following a failed attempt in 1982 to assassinate him. Hussein was sentenced to death and subsequently hanged. The courts did not address the more extensive record of his reign of terror. Questions about the United States (US) and the West encouraging Hussein to invade Iran in 1980 – an invasion that

¹³ Front for the Liberation of Mozambique.

¹⁴ Mozambique National Resistance Movement.

¹⁵ Maputo, May 2008.

led to the deaths of 1.5 million people – were not posed. Also not part of the court record is the supply of components of the chemical weapons with which Saddam drenched Iran and the Kurds. The chaos that resulted from the 2003 invasion of Iraq by US and allied forces and the subsequent use of Saddam's Abu Ghraib torture chambers by US soldiers are similarly not part of any court record.

- **Truth-telling:** Trials contribute to the demand for truth. Frequently, however, there is a need to go beyond the confines of the court in order for victims to engage perpetrators in face-to-face encounters, confrontation and dialogue in their quest for truth regarding their ordeal. Only through this process can they begin to understand the causes, motives and perspectives of those responsible for their suffering, which opens the possibility for victims to begin to bring closure to their trauma. This level of truth-telling takes time and levels of encounter between enemies and adversaries for which courts are ill-equipped.
- **Perpetrator responsibility:** Judgements handed down by courts can prescribe community service as a form of restorative justice, but the broader community is largely excluded from this process. Traditional community structures, on the other hand, provide a framework within which the responsibilities of perpetrators can be implemented and a context within which victim reparations and restoration can be delivered.
- **Reparations:** Deep and lasting community reparations and restitution can only happen as a result of dialogue and negotiation between an aggrieved and violated community and the State. The physical, psychological and material cost of suffering can be partially compensated by a court of law. This can open space within which victims can better more successfully aspire towards the restoration of their human dignity. Ultimately, however, the restoration victims' human dignity in a more complete sense is something that can only be achieved through their direct involvement in political struggle, social dialogue and self-determination.
- **Confrontation:** Courts are places of confrontation between prosecutor and accused. Prosecutorial justice can contribute towards the attainment of a holistic form of justice involving acknowledgement, truth recovery, political

reconciliation, comprehensive forms of reparation, and restoration of human dignity. However, far more is required to bring this process to completion, including the institution of appropriate forms of political, economic and social (re)construction – which are beyond the scope of formal courts.

Addressing the needs of victims, their communities and society as a whole, scholars and practitioners of peace-building are increasingly exploring the extent to which African traditional structures for justice and reconciliation can contribute to meeting these needs. In summary, there are immense moral, legal, political and practical concerns at the level of victim and community needs to which courts can contribute, but are invariably unable to bring closure.

African traditional justice systems

The political potency and appeal of African traditional systems is perhaps not essentially at the level of specific practices, recognising that practices are often culture-specific – differing not only from one country to another, but also between ethnic groups and clans within countries. Rather, this potency and appeal lie at the level of social legitimacy, grounded as these differing practices are in community involvement and established traditions. It is frequently pointed out that African traditional practices fall short of Western notions of due process and procedure. These traditional practices have also not demonstrated an obvious capacity to meet the sheer magnitude and complexities of contemporary political conflicts on the continent. Traditional courts and structures are often criticised for being gender-insensitive, although in some situations women preside over courts and ceremonies. While this is the case in the *gacaca*¹⁶ courts in Rwanda, where 30% of the *inyangamugayo*¹⁷ are women, many women continue to find the process intimidating in cases that involve issues of rape and sexual violence.¹⁸ In recent years, women have become *Bashingantahe*¹⁹ in Burundi, and women exercise significant power among traditional matriarchal groups in parts of Ghana, Mali, Mozambique and elsewhere on the continent. This said, Africa is largely a male-

¹⁶ A current adaptation of traditional courts.

¹⁷ Judges.

¹⁸ This resulted in cases of sexual violence being excluded from *gacaca* jurisdiction in 2004, although they were reinstated to their jurisdiction in 2008. It is not clear what changes have been introduced to address the earlier problems. For a discussion on the *gacaca* courts, see Clarke (2008a).

¹⁹ Community leaders and counsellors.

dominated society, which is reflected in most traditional judicial and governance structures. There are also situations where the competency and legitimacy of the presiding elders and other officials are questioned by local communities.

It is both wrong and unhelpful to overvalue the role of traditional African structures in dealing with crime and conflict. It is generally recognised that African traditional mechanisms need to undergo revision. The *gacaca* courts in Rwanda, for example, constitute an adaptation of original practices; and the July 2007 communiqué on the Juba talks between the GOU and the LRA refer to the need for “necessary modifications” to traditional Acholi, Iteso, Langi and Madi practices.²⁰ At the same time, it is important to acknowledge that political elites in Africa and elsewhere often seek to manipulate both international institutions and local practices to their own advantage or that of their cronies.

African traditional practices of justice and reconciliation clearly do not offer a panacea for Africa’s conflict. Assessing traditional African practices of justice and reconciliation in the Horn of Africa and, more particularly, Ethiopia, Tarekegn Adebo suggests that –²¹

African traditional structures have in many instances over the years been discredited and marginalised by colonial authorities and missionaries as well as by post-independent governments. This has often resulted in the emergence of incompetent elders and leaders who are open to manipulation and corruption.

Adebo suggests, however, that this does not detract from the fact that these institutions – though often compromised – are the carriers of traditional values and principles that people continue to place in high regard:²²

It is these ideas and values, rather than the existing structures or the presiding elders within these structures that should be incorporated into current peace-building structures.

Acknowledging the tension between tradition and modernity, he argues that the historic value and integrity of traditional institutions can be identified and adjusted to meet the demands of international law.

²⁰ *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army*. Juba, Sudan, 29 June 2007.

²¹ Uppsala, October 2007.

²² (ibid.).

In the past, traditional reconciliation structures were rarely authorised or equipped to deal with blood feuds or murder. This, suggests Adebo, provides the required space within which traditional and modern judicial demands can meet. In parts of present-day Ethiopia, for example, traditional structures continue to be used to settle less serious crimes, while high-level crimes are referred to national courts. Similarly, in Rwanda, the *gacaca* courts deal with crimes up to a certain level, while so-called Category 1 crimes – involving those alleged to be involved in planning, organising, inciting, supervising or instigating the 1994 genocide or other crimes against humanity – being referred to the formal courts or the International Criminal Tribunal for Rwanda in Arusha.²³

Clearly, traditional justice and reconciliation practices continue to prevail across the continent. The question is whether and how these practices can be incorporated into the dominant transitional justice debate – with increasing evidence of African governments as well as scholars of transitional justice on the African continent and elsewhere addressing this concern.²⁴

Without addressing specific practices of African traditional mechanisms for justice and reconciliation, which in any event differ from context to context, the following tensions reflect a common – albeit apparently contradictory at first – dialectic that holds together the goals of these practices:

- **Individual and community accountability:** The strength of traditional reconciliation mechanisms is located in their participatory, community focus. The individual offender is encouraged to make peace with the victim, whether living or dead, as well as with the family, clan, community and their ancestors. What is important is the communal responsibility to restore the damage done to the victim and his or her community, through the affirmation of social values that have traditionally sustained the community. The latter requires the participation of the ancestors.

The dialectic between individual culpability and community responsibility stresses the negotiated nature of justice, which requires the democratic participation of citizens in the creation of structures of authority, and agreement on the rules by which people are governed. Disregard of the

²³ Since 2008, however, some Category 1 cases are being dealt with by *gacaca* courts, where those accused of ‘lesser’ crimes – including complicity in genocide – are tried.

²⁴ See Huyse & Salter (2008).

values, perceptions and demands of communities by international bodies, not least in volatile political situations, can have significant consequences for peace and social justice in a given situation. Demands by international bodies for individual culpability need to adjust to the implications of a broader African sense of responsibility as a basis for ensuring both acceptance and sustainable peace.

- **Retributive and restorative justice:** If the focus of formal justice systems is retributive, the focus of African traditional courts is essentially restorative. However, it would be quite wrong to castigate international justice as entirely punitive and romanticise African justice as entirely restorative. Both forms of justice are important, especially in societies seeking to extricate themselves from lawlessness and disregard for the rights of victims in an abusive society. This requires the transitional justice debate to draw on the essential principles of both retributive and restorative justice.

African traditional mechanisms offer a space within which not only the political elite may talk, but also the rank and file members of aggrieved and warring groups can encounter one another. It provides a platform for citizens to engage State-appointed custodians of justice, who often isolate themselves from the challenges of broader society.

- **Individual and social truth-telling:** From the perspective of Western-trained lawyers, African traditional ways of evidence-giving, which frequently reach beyond the confines of a specific charge sheet required in conventional court systems, are seen to fall short of the rigour and specificity required by Western jurisprudence. African traditional ways of giving evidence and of story-telling, on the other hand, can offer the possibility of a level of truth-telling overlooked by formal courts.

The quest for this broader understanding of truth-telling is captured in the discussion on four different levels of truth identified in the South African Truth and Reconciliation Commission (TRC) Report which includes factual or forensic truth, personal or narrative truth, social truth or dialogical truth, and healing and restorative truth.²⁵ This complexity of truth-seeking by victims and survivors in a post-conflict situation as well as by the broader

²⁵ Truth and Reconciliation Commission of South Africa (1998:110–114).

society involved in the conflict is largely beyond the capacity of courts to deliver. Recognising that while different victims and survivors demand different kinds of truth, in principle, trials only satisfy the demand for what is seen to be objective or factual truth.

Albie Sachs, an important participant in the debates preceding the establishment of the Commission and presently a Constitutional Court judge, suggests that “dialogue truth is social truth, the truth of experience that is established through interaction, discussion and debate”.²⁶ It is this level of ‘engaged truth’ that is required to enable societies of deep conflict to explore the possibility of transcending their own often narrow perceptions of the truth as a basis for overcoming the polarisation in them that bedevils fuller truth recovery. Courts of law can contribute to this process by helping to get disclosure on *who did what to whom*. However, more is required to uncover the cause, motives and perspectives of those involved in the conflict. It is this level of personal and narrative truth, social or dialogical truth, and healing and restorative truth that formal court processes rarely deliver. African traditional mechanisms offer the possibility of addressing these needs.

- **Victims and perpetrators:** Pertinent to transitional justice is the question of how to address individual culpability within a context of collective victimisation. The difficulty involved is graphically presented in a Justice and Reconciliation Project (JPR) field note on Dominic Ongwen, a high-ranking LRA soldier whose military career began when he was abducted at the age of 10 on his way to school in the Gulu District in Uganda in 1980.²⁷ He is reported to have been “too little [sic] to walk” and having been denied adequate social and moral development, he is seen to be unable to make responsible decisions in later life.²⁸ However, Ongwen cannot simply be viewed as a child who was forced to kill: he embraced his assigned task in a manner that resulted in his promotion into the high command of the LRA, and is allegedly responsible for an array of gruesome deeds.

Most advocates of formal trials would argue that perpetrators such as Ongwen need to have their day in court, contending that this kind of

²⁶ (ibid.:113).

²⁷ Justice and Reconciliation Project (2008).

²⁸ (ibid.).

decisive intervention by the courts will contribute to sustainable peace, help establish the rule of law in the wake of lawless rule, and counter the desire for revenge by victims. Above all, prosecution is seen to be a deterrent to future gross violations of human rights – although there is no evidence to date that the ICC indictments have deterred either government or rebel forces in Uganda, the DRC or elsewhere to stop committing atrocities. The question is whether the threat of prosecution in polarised communities – where killers are often driven by deep beliefs based on clan, ethnicity and other ideologies – is ever enough to deter killing. When prosecutions are seen as a form of victor’s justice imposed by outside agencies, which is often the case in international tribunals and the ICC, prosecutions may indeed do little more than intensify the spiral of violence.

While the moral status of Ongwen and others in similar situations can never be conclusively resolved, an African traditional approach to the complexities of his position offers a space within which the aftermath of armed conflict and war can be grappled with by those most affected by it. Most importantly, such traditional structures offer opportunities for the community to decide on the nature and extent of penalties that offenders like Ongwen ought to face, and on what terms they can be reincorporated into communities that include families, bush wives²⁹ and children. In brief, formal courts impose judgements, whereas African traditional structures reach for negotiated settlements. In post-conflict situations, the latter can contribute to preserving the peace. The question is whether such settlements are also forms of impunity that fail to re-establish the rule of law so desperately needed in emerging democracies.

- **Reparations and development:** A litmus test of any judgement is its implementation. This is especially true in situations where retributive justice is replaced by restorative measures. Bluntly stated, if reparations and restoration do not happen in restorative justice situations, victims are often left without any positive outcome in their quest for justice.

The gap between proposed reparations and the actual monetary compensation paid out in places like Malawi and Rwanda in the wake of the rule of Hastings Banda and the 1994 genocide, respectively, is sometimes identified

²⁹ Women with whom soldiers have had conjugal relations during the war.

as evidence of the failure of restorative as opposed to retributive responses to the rights of victims and survivors. In South Africa, the five-year delay in the government's response to the TRC's recommendations on reparations has, together with the drastically reduced amount ultimately paid to victims, in turn raised further questions about the integrity of restorative justice.³⁰

The value of community participation in decision-making with regard to reparations through African traditional mechanisms potentially results in a level of pressure from local chiefs and elders as well as clan-based forms of social pressure to deliver on agreed forms of compensation and reparation. In some situations, this level of community participation also results in a measure of benefit for parties on both sides of a conflict through the sharing of land and cattle, and the development of cooperative community projects.

- **Ritual and procedural accountability:** Rituals, ceremonies and symbols are high on the priority list of exploring options for justice and reconciliation in the wake of conflict and war in African traditional justice and reconciliation mechanisms. Such social practices and structures constitute an important space within which discussion on guilt, responsibility and restoration can happen.

These ceremonies can be one-off events, which is often the case in the Acholi practice of *Mato Oput*, which is augmented by related ceremonies. Magama spirit ceremonies in post-war Mozambique similarly comprise a single event, despite involving several components, and are seen to be a culmination of healing initiatives. In other situations the ceremonies are repetitive and cumulative, akin in some ways to successive counselling sessions. This is evident in traditional *palaver* ceremonies in Liberia and in other Mano River countries. It is also the case in serial encounters with the spirits of the dead in Sierra Leone; in the *abashingantahe* practices of dispute resolution in Burundi and in *Barza Intercommunautaire* in the DRC's North Kivu Province,³¹ and in southern African countries, where one's ancestors need to be consulted and appeased as part of ongoing negotiations between former enemies and adversaries.

³⁰ De Greiff (2006); see also Doxtader & Villa-Vicencio (2004).

³¹ The *Barza Intercommunautaire* is rejected in South Kivu as an attempt to ensconce government stooges at the local level; see Clarke (2008b).

The *gacaca* courts in Rwanda, among others, bring people together in an attempt to deal with genocide and related crimes, on the assumption that talking and social encounter creates the opportunity for social re-engagement between victims and offenders. The former head of the Rwandan National Unity and Reconciliation Commission, Aloisea Inyumba, put it as follows:³²

The very act of meeting under a tree or in a local council hall, with local judges in formal attire and the authority to rule on disputes, takes on a ritualistic form of its own. The process is as important as the content and detail of testimony and evidence offered in the hearings. The medium becomes a significant part of the message. It helps create a milieu conducive to reconciliation.

Ritual and ceremony provide an important space for both *preverbal* and *non-verbal* reflection, conversation and decision-making in African traditional justice and reconciliation mechanisms. The process seeks to break the silence on issues of suffering and aggression that often prevails, thus enabling perpetrators and victims to make a behavioural shift from a prelinguistic state to the point where they can begin to talk about their experiences. The aim is to enable perpetrators to acknowledge their violation of human rights, and victims to begin to deal with their suffering and resentment.

The link between ritual and behavioural response is a contested field. Some scholars working on the relationship between ritual and peace-building draw on neurobiological research to suggest ritual can impact on the physical structure of the brain, decision-making and behavioural change. Briefly stated, it is suggested that rituals, symbols and ceremonies impact on different levels of human consciousness, resulting in different ways of thinking – allowing a person to respond more thoughtfully and with less spontaneous aggression to the situation they face.³³

Transitional justice in Africa

At the heart of the transitional justice debate is the question: *Transition to what?* A narrow focus on legal impunity too frequently neglects major issues of social and economic impunity, which underpins every oppressive society on earth.

³² Kigali, September 2006.

³³ Schirch (1990); Schechner (1993).

It further neglects the need to create restorative cultures, inclusive histories, appropriate memorials, and the development of a restorative society. In brief, criminal prosecution alone is too weak a premise on which to build social stability and redress deep-seated historical conflicts.

The strength of African justice and reconciliation mechanisms is that they are grounded in the social fabric of the communities they represent. They seek to overcome social polarisation and, where appropriate, they explore ways of reintegrating perpetrators into society. They have community reconciliation as an ultimate goal, against which censure, retribution and restoration need to be measured.

To the extent that the ultimate goal of transitional justice is to hold perpetrators accountable for their deeds, restore the human dignity of victims, overcome political polarisation, (re)build societal structures, and promote civic trust, the exploration of complementary partnerships between the ICC and African traditional mechanisms for justice and reconciliation are both desirable and realistically possible.

Few scholars and practitioners have a principled objection to promoting a viable relationship between the ICC and domestic governments or traditional courts to ensure that these objectives are met. Difficulties emerge when it is assumed that international justice is the measure of all justice. This is particularly problematic on the African continent, which is burdened with the memory of colonialism and internationally imposed ‘solutions’ to domestic problems that have resulted in the endless suffering of African people. The question is how to accomplish a realistic level of complementarity between international and domestic institutions.

For this complementarity to emerge, it is necessary to address a range of concerns, which include the following:

- **The need for a higher level of transparency and debate concerning the priorities of the ICC:** When the ICC opened its investigations in northern Uganda, the Prosecutor indicated that the court’s intervention would help end the war, stating that the role of the court was to contribute directly to peace. However, when Joseph Kony indicated a willingness to enter into peace negotiations provided charges against him were dropped, this

provoked the Prosecutor to say it was his job to prosecute and not to make peace. What, then, is the role of the Prosecutor, and how does this impact on Articles 16 and 53 of the Rome Statute?

- **The impact of international justice in particular situations:** To what extent, for example, does the arrest of former Liberian dictator Charles Taylor through the agency of the Sierra Leonean Special Court entrench other dictators in their positions in terms of refusing to accept political asylum or amnesty as a ‘reward’ for surrendering power – fearing that they may face the same fate as Taylor? To what extent ought local and regional leaders to be consulted in deciding whether justice or peace should be prioritised in situations of entrenched armed conflict and mass atrocities?

The extent of the legitimacy of international law in local or domestic situations, especially in isolated communities that are struggling to bring an end to armed conflict, war and mass atrocities: Jurgen Habermas reminds us that neither moral nor legal values emerge from some normative metaphysical or universal source: law, whether international or customary, is a social construction attainable through debate, persuasion and inclusive legal discourse involving the participation of everyone concerned.³⁴ Writing at the time of the first wave of African independence, Lon Fuller argued that, at its best, law was based on societal consensus concerning the “best route to a better future”, giving expression to “who we want to be” and the “kind of community we aim to have.”³⁵ While the moral legitimacy of international law is broadly accepted and established, the contextual efficacy of international law needs to be repeatedly questioned and renegotiated. In the words of Michael Ignatieff, “For the truth to be believed it has to be allowed by those who suffer its consequences”.³⁶

- **The fact that only Africans have been indicted by the ICC since its inception in 2002:** This elicits sentiments within the transitional justice debate that often detract from the thoughtfulness needed to promote justice and sustain peace. Questions are raised as to why certain African rebel leaders have been indicted to the exclusion of others, and why some heads of state are seen to be exempted from prosecutions while others are not. The

³⁴ Habermas (1998:222).

³⁵ Fuller (1958:630).

³⁶ Ignatieff (2004:214).

situations in the Central African Republic, the DRC, Sudan, and Uganda are clearly demanding of international attention in this regard. The resultant level of suspicion towards the ICC by many Africans could be resolved by greater candour and transparency on the part of the ICC.

- **The continuing underlying dichotomy between African communitarianism and colonial forms of liberal individualism:** Western notions of law and individual responsibility were an inherent part of colonialism. In the process, traditional law mechanisms were suppressed. With few exceptions, resistant traditional leaders were replaced by hand-picked collaborators. Post-colonial leaders rarely saw the need to deviate from such practices.

It is too late and it would also be quite wrong to attempt to undo centuries of history. Times and needs have changed. The challenge is to find ways to identify and introduce such communal values and practices into international law that can contribute to the creation of the kind of social cohesion and stability that so many African countries need.

The often-quoted observation by Kofi Annan, the former UN Secretary-General, on the mandate of the ICC and the South African experiment in transitional justice through a TRC to deal with its apartheid past, is pertinent here:³⁷

The purpose of the clause in the Statute [which allows the ICC to intervene where the State is 'unwilling or unable' to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

Although the Rome Statute did not exist at the time of the South African TRC, the words of the former Secretary-General raise the question whether present and future African settlements can be considered in a similar, albeit modified, manner.

³⁷ Annan (1998).

Peace-building invariably involves political concessions, deal-making and moral compromises. The African contribution to this process is to turn a necessity into a potential for virtue by favouring maximum inclusivity and the pursuit of reconciliation in dealing with issues of conflict and national security. It offers the opportunity to rise above violent conflict and abuse through the repair of relationships and the rediscovery of the humanity of even those who seem to have sacrificed their right to be regarded as human. Africa, at the same time, needs to face the reality that where perpetrators are not willing to make peace, they need to face the strong arm of retribution and exclusion from society.

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