Journal of the British Academy

Volume 9, Supplementary issue 2
2021

Transitional Justice Discourse in Post-Conflict Societies in Africa

Edited by

Elias O. Opongo

ISSN 2052-7217

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The British Academy

Journal of the British Academy, **9(s2)**, 1–7
DOI https://doi.org/10.5871/jba/009s2.001
Posted 25 May 2021

Transitional justice discourse in post-conflict societies in Africa: introduction

Elias O. Opongo

Abstract: Post-conflict reconstruction has emerged as one the major issues of concern in Africa in the last three decades. Since the end of the Cold War following the fall of the Berlin Wall in 1989, many African countries embraced multiparty systems that expanded democratic spaces. With this came the claim to justice and consciousness on the need to reconstruct a new vision of the nation, a vision that is based on social cohesion. This led to calls for democratisation in a number of African countries as well as in Latin America, Eastern Europe, and, in particular, former Soviet Union countries. In Africa, the approach taken by different countries varied from elaborate transitional justice processes that involved truth commissions to national dialogue processes that called for political compromise without putting into place any formal transitional justice process.

The articles in this supplementary issue on transitional justice discourse in post-conflict societies in Africa draw attention to diverse contextual issues on post-conflict reconstruction in the continent. These articles bring together divergent discourses, experiences, theorisations, and interpretations of transitional processes while calling for a new way of assessing truth-telling processes within the purview of legal frameworks, gender and cultural sensitivities, peace sustainability, and conflict resolution strategies in Africa. The articles open up debate on the extent to which transitional justice processes contribute to peace and sustainability in Africa, and what could be done to improve this important post-conflict reconstruction initiative.

Keywords: Post-conflict reconstruction, transitional justice, peacebuilding, truth telling, truth commissions.

Note on the author: Elias O. Opongo is a senior lecturer at Hekima University College and the director of the Centre for Research, Training and Publications (CRTP) at the same university. His main research interests include: transitional justice, post-conflict reconstruction, statebuilding and democracy, and religious extremism and violence. He holds a PhD in Peace Studies from the University of Bradford, UK, and an MA in International Peace Studies from the University of Notre Dame, USA.
ORCID ID: https://orcid.org/0000-0002-3320-7222

Post-conflict reconstruction has emerged as one the major issues of concern in Africa in the last three decades. Since the end of the Cold War following the fall of the Berlin Wall in 1989, many African countries embraced multiparty systems that expanded democratic spaces.[1] With this came the claim to justice and consciousness of the need to reconstruct a new vision of the nation, a vision that is based on social cohesion.[2] This led to calls for democratisation in a number of African countries as well as in Latin America and in Eastern Europe, particularly former Soviet Union countries. A number of African countries that had experienced violent conflicts, such as South Africa, Liberia, Sierra Leonne, Mozambique, Ghana, Nigeria, Uganda, Tunisia, Algeria, and Kenya, among others, opened discussions in their respective countries, on how they could address the negative impacts of conflicts and associated historical injustices.[3] The approach taken by all these countries varied from elaborate transitional justice processes that involved truth commissions to national dialogue processes that called for political compromise[4] without putting into place any formal transitional justice process, like the case of Mozambique.

African countries had to learn from the Latin American countries like Argentina and Chile—that had already made good attempts at transitional justice processes in the 1990s and early 2000s. These pioneering truth commissions took place under the cloud of heavy military regimes that had oppressed the people, leading to killings, arbitrary arrests, and systematic human rights violations. Argentina's 'National Commission on the Disappearances of Persons', set up in 1983 by President Raúl Alfonsín, documented gross human rights violations committed by the military dictatorship against civilians. Upon receiving the report in 1984, President Alfonsín decided to open up trials against the military juntas, the first since the Nuremberg trials following World War II, and equally the first to be conducted in a civilian court. Earlier on, Bolivia, in 1982, established a 'National Commission of Inquiry Into Disappearances' following the end of the military regime. Another prominent transitional justice process was that of Chile in April 1990, that established a 'National Truth and Reconciliation Commission', being the first to use the name 'truth and reconciliation commission'. The Commission was tasked with investigating deaths and disappearances that were politically motivated under Augusto Pinochet's rule. The latter was later arrested in London, but died before the conclusion of his trial. Other commissions in Latin America included: 'The Truth Commission' in Ecuador that investigated human rights violations between 1984 and 1988; the Honduras

[1] Rutto & Njoroge (200a).
[2] Fatić *et al.* (2019).
[3] Sriram & Pillay (2011).
[4] Brankovic & van der Merwe (2019); see also Murambadoro (2020).

'Truth and Reconciliation Commission' that investigated violent actions during the 2009 coup d'état; the 'Panama Truth Commission' set up in 2000 to investigate human rights violations by the military regime; and Peru's 'Truth and Reconciliation Commission' established in July 2001 to investigate human rights violations committed between the 1980s and 1990s. In Colombia, following the peace deal between the government forces and the rebel group, FARC, in 2016, the government established a 'Commission for the Clarification of Truth, Coexistence and Non-repetition'. However, this commission has yet to achieve its goal, given the political transitions in the country and the slow nature of the implementation of the peace agreement. The challenge for transitional justice processes in these countries was that some of the military officers (or rebel leaders in the case of Colombia) were still powerful, and hence deciding on the best way forward for the country—whether trials, amnesty, or reconciliation—became a major challenge. Elsewhere, there have been different forms of truth commissions in Germany, Australia, Fiji, Nepal, New Zealand, Sri Lanka, and Taiwan.

The above examples demonstrate that different social mobilisations within a particular historical moment of transition tend to create opportune times for the institution of transitional justice processes. Hence, 'various forms of social struggle in the face of different kinds of past violations and repressive methods are, therefore, highly relevant to the development of transitional justice'.[5] As such, transitional justice processes are centred on power struggles, the delicate balance between retributive and restorative justice, forgiveness and reconciliation, as well as political and institutional reforms for peace and stability.

There are four main functions that guide transitional justice processes. These functions are founded on the principles of social cohesion and nation building. First is that transitional justice documents historical injustices in order to identify the victims and perpetrators. Second, it seeks to address the grievances brought forward by the victims and witnesses in order to ensure the recovery of justice, through consideration of some forms of compensation and reparation. In pursuit of justice, it may recommend prosecution or amnesty for the perpetrators of violence. Third, transitional justice forges forgiveness and reconciliation as a way of attaining social cohesion. Fourth, transitional justice aims at institutional reforms in the executive, judicial, legislative, police, military, and economic structures of the country. To a great extent, therefore, transitional justice focuses on putting in place mechanisms that would prevent past violence from happening again, while placing emphasis on how a broken nation can heal and move forward.

[5] Abrão & Torelly (2011: 30).

The documentation of historical injustices is key to every transitional justice process. The process may not be exhaustive because some of the victims and perpetrators may be dead or untraceable. In some cases, victims, for various reasons, may not be willing to come forward and narrate their stories. The process of documentation could include formal investigations that may require a specialised security unit to help with the investigation. Unless allowed in law, a truth commission may not have the powers to investigate crimes and subpoena victims and perpetrators. In addition, truth commissions often have restricted budgets and time frames that may not allow for a thorough investigation.

Addressing grievances brought forward by the victims is an arduous task. Corroborating what the victims, witnesses, and perpetrators have narrated may not necessarily build enough evidence for prosecution. Besides, truth commissions often do not have the authority to carry out prosecutions. Hence, pursuit of justice is one of the most difficult interventions in transitional justice processes. Also, the perpetrators may still be too powerful to arrest and prosecute or even to force to appear before a truth commission. It is therefore important to apply political and social prudence before deciding on what course of action should be taken. To a great extent, prosecutions are likely to destabilise a country if the perpetrators still command political and military power.[6] A compromise approach could be to offer amnesty and engage in a political dialogue process.

A forgiveness and reconciliation approach is yet another strategy that has been applied by a number of transitional justice initiatives. It involves bringing together victims and perpetrators, and initiating a formal or informal process of encounter between the two through a process of full revelation and acknowledgement of past crimes. The perpetrator may ask for forgiveness, and the victim may or may not be in a position to forgive. However, where the victim is willing to forgive, a formal process could be initiated leading to forgiveness and reconciliation. Reconciliation is a step further than forgiveness and draws the victim and perpetrator to a conversation that acknowledges the past and seeks to rebuild the lost relationship.

In order to prevent future gross human rights violations, it is important to initiate a process of institutional reforms, particularly within key arms of government. This may entail reforms of executive powers, and in legislative, judicial, and security and economic sectors. Reforms in the executive often involve reducing the powers of the executive to avoid future abuse, or giving the executive more powers to initiate prosecutions of past crimes, or both. The legislature may have the tasks of reviewing the law to prevent past abuses but also of introducing new laws that will ensure prosecution of the perpetrators. It is also important to reform the judiciary so that the judges

[6] Hughes *et al.* (2007).

are left free to make independent decisions on prosecutions and the dispensation of justice. Security sector reform is crucial because some past crimes could have been carried out by the government security forces. This was the case in South Africa, Mozambique, Angola, Sierra Leone, and Liberia. Reforms in this sector will ensure professionalism and discipline within the forces, as well as accountability for any acts committed against the law. Lastly, economic reforms are meant to ensure that victims are compensated for past crimes, and that there are clear structures put in place to improve the welfare of the population, especially the poor, and especially through employment opportunities, particularly for the youth.[7]

The articles in this *Journal of the British Academy* supplementary issue on transitional justice discourse in post-conflict societies in Africa draw attention to diverse contextual issues on post-conflict reconstruction in the continent. Ibrahim Magara (2021) focuses on transitional justice process in South Sudan, the youngest nation in the world, having gained its independence in 2011. The country has been marked by protracted conflicts, and attempts towards transitional justice are seen as possible ways of attaining sustainable peace. In his article, Magara demonstrates that the key contestations in the transitional justice process in South Sudan relate to when and how the process should be initiated, and how it could be implemented. The sequencing of the transitional justice process would be important for sustainability of peace in the country, and special caution would need to be taken over whether to carry out prosecutions or not.

The article by Elias Opongo (2021) examines advocacy strategies by critical feminists and human rights groups that draw attention to diverse forms of human rights violations against women in situations of conflict; structures of exclusion of women's concerns; agency and the presence of women in truth commission processes. The author examines the different levels of integration of gender in transitional justice processes, particularly in truth commissions, and emphasises the inclusion of women as truth commissioners, a review of legal frameworks to incorporate gender-sensitive approaches to truth commission processes, and the training of the commissioners and staff of truth commissions on an assessment of violence against women. Marginalisation of women in transitional justice processes has often led to major shortfalls in achieving transitional justice objectives.[8] Hence, women's inclusion is vital for sustainable peace in post-conflict societies.

The article by Susan Kilonzo (2021) focuses on women peacebuilders as silent peacemakers in the North Rift region in Kenya, and the significant influence they have had in peacebuilding efforts in that region. Kilonzo demonstrates that the failure in

[7] Selim & Murithi (2011).
[8] Björkdahl & Selimovic (2015).

state-led transitional justice mechanisms has shifted efforts towards community-led initiatives, and women have played a particularly pivotal role in community mobilisation for peace. While women's initiatives may not be so much in the limelight, their silent peacebuilding strategies in the North Rift region in Kenya have led to conflict transformation This perspective is a pointer towards a re-examination of transitional justice processes that are often de-linked from grassroots initiatives, despite the latter's potential to sustain peace.

Muema Wambua (2021) makes an analysis of victims and interveners and how they perceive the transitional justice process in Kenya. Wambua examines the transitional justice interventions that were initiated after the 2007/8 post-election conflict, and how the mediation led by Kofi Annan resulted in the signing of the National Accord in February 2008. This achievement was a result of multisectoral initiatives to attain peace in Kenya. Wambua's field-based study focuses on the experiences and perceptions of victims and interveners in conflict transformation programmes, with the aim of evaluating the outcomes and impacts of the transitional justice interventions, as a conduit to peacebuilding and conflict transformation. The author emphasises resolution of historical injustices as a strategy for sustainable peace.

Martin Munyao (2021) makes a comparative study between Kenya and South Africa and examines the interfaith engagement in these two countries. This article highlights the challenges and gains made by transitional mechanisms in both Kenya and South Africa, and how religious leaders have played a vital role in building the social links crucial for the success of transitional justice processes. The author appeals for the inclusion of an interfaith agenda in transitional justice initiatives, as a multilevel strategy to address violent conflicts.

Benjamin Thorne (2021) focuses on witness memory at the International Criminal Tribunal for Rwanda (ICTR), with an emphasis on the interplay between liberal international criminal law and legal memory. Thorne aims at deconstructing legal witnessing and memory production at the ICTR, as a critique in legal scholarship that purports that international criminal institutions are able to produce a collective memory of mass rights violations. The article proposes a new conceptual framework based on insights from critical theory, Giorgio Agamben (witness), and Paul Ricœur (memory). This approach exposes the limitations of Western institutions in addressing past atrocities.

These articles draw together diverse discourses, experiences, theorisations, and interpretations of transitional processes while calling for a new way of assessing truth-telling processes within the purview of legal frameworks, gender and cultural sensitivities, peace sustainability, and conflict resolution strategies in Africa. The articles open up debate on the extent to which transitional justice processes contribute to peace and sustainability in Africa, and what could be done to improve this important post-conflict reconstruction initiative.

References

Abrão, P & Torelly, M.D. (2011), 'Democratization and Human Rights: Sharing the Latin American Experience', in International Centre for Transitional Justice (ICTJ) *Transitional Justice Handbook for Latin America* (São Paulo, Brazilian Ministry of Justice Amnesty Commission), 23–31.

Björkdahl A. & Selimovic J.M. (2015), 'Gendering Agency in Transitional Justice', *Security Dialogue*, 46(2): 165–81. https://doi.org/10.1177/0967010614552547

Brankovic, J. & van der Merwe, H. (eds) (2019), *Advocating Transitional Justice in Africa: The Role of Civil Society* (Cham, Springer International). https://doi.org/10.1007/978-3-319-70417-3

Fatić, A., Bachmann, K. & Lyubashenko, I. (2019), *Transitional Justice in Troubled Societies* (London, Rowman & Littlefield International).

Hughes, E., Schabas, W. & Thakur, R. (2007), *Atrocities and International Accountability: Beyond Transitional Justice* (New York, United Nations University Press).

Kilonzo, S.M. (2021), 'Silent Peacemakers: Grass-roots Transitional Justice and Peacebuilding by Women in Kenya's North Rift Conflicts', *Journal of the British Academy*, 9(s2): 53–74. https://doi.org/10.5871/jba/009s2.053

Magara, I.S. (2021), 'Timing of Transitional Justice Mechanisms and the Implications for the South Sudan Peace Process', *Journal of the British Academy*, 9(s2): 9–33. https://doi.org/10.5871/jba/009s2.009

Munyao, M. (2021), '"New Wine, Old Wineskins": A Comparative Study of Interfaith Engagement and Transitional Justice in Kenya and South Africa', *Journal of the British Academy*, 9(s2): 103–125. https://doi.org/10.5871/jba/009s2.103

Murambadoro, Y. (2020), *Transitional Justice in Africa* (Cham, Springer International). https://doi.org/10.1007/978-3-030-48092-9

Opongo, E.O. (2021), 'Gendering Transitional Justice Processes in Africa: A Feminist Advocacy Approach to Truth Commissions', *Journal of the British Academy*, 9(s2): 35–52. https://doi.org/10.5871/jba/009s2.035

Rutto, S.K. & Njoroge, G.K. (2001), *The Democratization Process in Africa* (Nairobi, Quest & Insight).

Selim, Y. & Murithi, T. (2011), 'Transitional Justice and Development: Partners for Sustainable Peace in Africa?', *Journal of Peacebuilding & Development*, 6(2): 58–72. https://doi.org/10.1080/15423166.2011.141478175834

Sriram, C.L. & Pillay, S. (eds) (2011), *Peace Versus Justice? The Dilemma of Transitional Justice in Africa* (Oxford, James Currey).

Thorne, B. (2021), 'Liberal International Criminal Law and Legal Memory: Deconstructing the Production of Witness Memories at the International Criminal Tribunal for Rwanda', *Journal of the British Academy*, 9(s2): 127–54. https://doi.org/10.5871/jba/009s2.127

Wambua, M. (2021), 'Historical Injustices and Transitional Justice Interventions in Kenya: Victims' and Interveners' Experiences and Perceptions', *Journal of the British Academy*, 9(s2): 75–102. https://doi.org/10.5871/jba/009s2.075

To cite the article: Elias O. Opongo (2021), 'Transitional justice discourse in post-conflict societies in Africa: introduction', *Journal of the British Academy*, 9(s2): 1–7. DOI https://doi.org/10.5871/jba/009s2.001

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk

The British Academy

Journal of the British Academy, **9(s2)**, 9–33
DOI https://doi.org/10.5871/jba/009s2.009
Posted 25 May 2021

Timing of transitional justice mechanisms and the implications for the South Sudan peace process

Ibrahim Sakawa Magara

Abstract: The South Sudan peace agreement provides for transitional justice mechanisms aimed at fostering justice and reconciliation. They include the Commission for Truth, Reconciliation and Healing (CTRH) and the Hybrid Court for South Sudan (HCSS). Drawing on qualitative data obtained from interviews, document reviews, and archival research conducted between October 2019 and June 2020 in Addis Ababa, Kampala, and Nairobi, this study delves into the current transitional justice discourses in South Sudan with a particular focus on truth-telling and accountability. The study finds that key contestations relate to when to initiate and implement transitional justice mechanisms, warning that, if not carefully timed, those mechanisms may have a negative impact on the peace process.

Keywords: South Sudan, peace, justice, reconciliation, transitional justice, truth-telling, accountability.

Note on the author: Ibrahim Sakawa Magara is a Policy Leader Fellow at the European University Institute's School of Transnational Governance and a PhD candidate at Loughborough University. Magara is particularly interested in peace and security regionalisms and the role of Africa's regional economic communities (RECs) in conflict management on the continent. He currently researches on the Intergovernmental Authority on Development (IGAD)'s peace process in South Sudan. Magara's recent publications include a chapter co-authored with Hubert Kinkoh entitled: 'China's military positioning in the horn of Africa and its implications for regional and global security outcomes', in *Courting Africa: Asian Powers and the New Scramble for the Continent,* (The Zambakari Advisory Special Issue, Summer 2020), and a chapter co-authored with Anne Munene entitled 'The role of social media in Africa's democratic transitions: Lessons from Burundi', in Carr, P.R., Hoechsmann, M. & Thésée, G. (eds) (2018), *Democracy 2.0: Media, Political Literacy and Critical Engagement* (Leiden, Brill).

Introduction

Approaching transitional justice from a peacebuilding perspective (Lambourne 2009: 29), this article assesses truth-telling and prosecutions in relation to peacebuilding in South Sudan. This article places the case of South Sudan within broader transitional justice theory and practice, accentuating the significance of the timing of truth-telling and accountability mechanisms as provided for in the Revitalised Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) (IGAD 2018).

This article draws on qualitative data obtained from extensive fieldwork that involved interviews, as well as archival research and document reviews. They include thirty-eight interviews conducted between November 2019 and June 2020 in Addis Ababa, Kampala, and Nairobi. With a purposive sampling strategy, participants were largely selected based on their involvement in the South Sudan peace process as members and/or partners of the Intergovernmental Authority on Development (IGAD), technical experts and resource persons, members of various institutions established under the R-ARCSS, representatives of parties to conflict, analysts, scholars, and civil society actors.

The conflict

Barely two years after South Sudan's independence, a deadly political crisis broke out heralded by a factional military battle (Akol 2014: 7–8). President Kiir accused his political rival, Riek Machar—whom he had sacked as Vice President—of plotting a coup, and arrested and detained thirteen political figures (Pinaud 2014: 192) triggering a bloody civil war that quickly took an ethnic dimension (Johnson 2014) claiming about 400,000 lives and displacing millions (ICG 2021: ii).

The conflict is rooted in legacies of a troubled history of a people trying to find their identity away from external ideologies of 'pan-Arabinism' and Islamism (Johnson 2016: 6–7). As argued by De Waal (2014), the civil war was rooted in a system of a violent 'political marketplace' where access to political power is based on a speeded-up, dollarised mode of transactional politics. At independence South Sudan 'was beset with poisonous social dynamics' (Vertin 2018: 147) exacerbated by military factionalism within Sudan People's Liberation Movement (SPLM) (Pinaud 2014: 192) and heavy militarisation (De Waal 2017). South Sudan's political elite 'appeared to have misunderstood independence as the finish' (Vertin 2018: 147) and hence failed to pay attention to historical cleavages which contributed to the civil war (ICG 2021; Jok 2011, 2014).

Following the deadly conflict, IGAD convened an extraordinary summit marking the start of a mediation process culminating in the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCRSS) in 2015 which collapsed a year later (Blackings 2016). IGAD embarked on another phase of a perilous mediation journey that resulted in the R-ARCSS in 2018 whose implementation has been dragging on (Onapa 2019) with the feeling of a failing peace setting in (Awolich 2020: 2). IGAD's involvement in South Sudan is anchored on its founding principle of peaceful settlement of regional conflicts (Apuuli 2015: 125) as well as the UN and AU (African Union) principle of subsidiarity (Apuuli, 2015: 22–3, Asgedom 2019: 84). With numerous ceasefire violations (Onapa 2019: 75) and the emergency of the COVID-19 pandemic (ICG 2020), the state of peace in South Sudan remains uncertain (Bereketeab 2017).

Transitional justice

The International Center for Transitional Justice (ICTJ 2009) conceptualises transitional justice as involving: a particular conception of justice; a field of policy expertise; a branch of research and law; a unique form of human rights advocacy and activism; and an academic discipline. Trials, truth commissions, amnesties, reparations, and lustration are the most common transitional justice mechanisms (Olsen *et al.* 2010: 805). At the core of transitional justice is the demand for justice and the need for peace (Sriram & Pillay 2010). While justice and peace are equally important, overemphasis on either may prove detrimental to the other (Prorok 2017), posing transitional justice's greatest dilemma.

Since the Nuremberg war crimes trials (Teitel 2003), transitional justice has emerged as a 'globally recognised response to human rights violations after violent conflicts' (Bentrovato 2017: 396) with many countries employing its mechanisms (Teitel 2003: 70–2, 2015, Hayner 2010, Olsen *et al.* 2010: 2, Matsunaga 2016: 25). Examples are amnesties in Spain (Jimeno 2017), mixed courts in Cambodia and Sierra Leone (Stensrud 2009), truth and reconciliation in South Africa (Gibson 2006), among many others (Murphy 2017: 10). Between 1970 and 2007 there were 81 trials in 38 countries, 53 truth commissions in 37 countries, 229 amnesties in 72 countries, 23 reparations programmes in 18 countries, and 34 lustration policies in 23 countries (Olsen *et al.* 2010: 807).

Drawing on the cases of Cambodia, Rwanda, East Timor, and Sierra Leone, Lambourne (2009) sees transformative models of transitional justice as potentially aiding peacebuilding processes. Yet the said transformative model for peacebuilding during transition calls for an interrogation of whose justice it delivers. Lundy and

McGovern (2008) strongly argue for a participatory approach that allows a consensual, broad-based concept of justice acceptable by those concerned. While some pundits warn against narrowing and depoliticisation of transitional justice (Nagy 2008), its broad and political nature raises challenges related to when, to whom, and for what transitional justice apply.

There are normative and practical dimensions to implementing transitional justice mechanisms (Buhm-Suk *et al.* 2016: 11). As argued by Teitel (2005: 1617), 'the central dilemma is how to transform a society that has been subjected to illiberal rule and the extent to which this shift is guided by conventional notions of the rule of law and the responsibility associated with established democracies'. Even the world's advanced democracies, such as the settler states of Canada, USA, Australia, and New Zealand (Winter 2014), continue to face challenges of systematic human rights violations, expanding transitional justice to include addressing harms to indigenous peoples, among others (Matsunaga 2016: 25).

Advocates of transitional justice argue that its mechanisms strengthen rather than weaken peace and democracy (Thomas *et al.* 2008: 11). For example, the reconciliation efficacy of truth-telling is articulated by the Sierra Leonean Truth Commission (2004: 45) when it reports that 'truth telling provided the people of Sierra Leone with a forum for private and public acts of reconciliation'. Sceptics, on the other hand, question the efficacy of transitional justice mechanisms, such as truth-telling in contributing to justice and peace (Mendeloff 2004).

On the basis of an ethnographic study in Bosnia and Herzegovina, Palmberger (2016) illustrates the complexities associated with reconstitution of shared narratives, revealing how certain mechanisms, however well meaning, may actually lead into a reproduction of painful memories. Drawing on the case of Rwanda, Brounéus (2010) presents the psychological health risks associated with truth-telling. Yet through the same *gacaca* mechanisms, Honeyman *et al.* (2004) illustrate the innovative ways through which Rwanda attempted to address its complex situation. Elsewhere, Meierhenrich (2006: 106) posits that, 'if excessive, mechanisms of postwar justice can have disastrous effects for international peace and security. They may exacerbate—rather than cure—the consequences of war'. While truth commissions are deemed to have been relatively successful in situations like South Africa, they are seen to have been less successful in cases like Tunisia and Nepal (Murphy 2017). These cases show the mixed outcomes of truth-telling as a transitional justice mechanism.

Accountability through criminal prosecutions as a transitional justice mechanism reveals similar mixed outcomes. For example, Kenya's situation at the International Criminal Court (ICC) reveals the threat of accountability to stability (Dunaiski 2014). Yet there are findings from other parts of the world, such as Latin America, indicating that human rights trials do not undermine stability (Sikkink & Walling 2007: 427).

These scenarios reveal the complexity and uncertainty that characterise implementation of various transitional justice mechanisms, accentuating the significance of context. How transitional justice mechanisms are designed and implemented, and the context in which they are applied, contribute to further theorisation and innovative practices (Matsunaga 2016: 25). Transitional justice mechanisms can be useful or harmful depending on a number of factors, including timing. How South Sudan will structure and time its truth-telling and accountability mechanisms will go a long way in determining their success.

Transitional justice mechanisms in South Sudan

Foundations of transitional justice

Following the outbreak of the civil war, the AU Peace and Security Council (PSC) established a Commission of Inquiry on South Sudan (AUCISS) with the mandate to investigate human rights violations and propose measures for accountability, healing, and reconciliation. The AUCISS established that the conflict unearthed complex issues characterised by deep divisions and resentment within the South Sudanese society. The Commission concluded that there was a need to establish the truth, acknowledge human rights violations, and ensure justice and accountability in order to achieve healing, reconciliation, and sustainable peace (AU 2014: 275–304).

The recommendations of the AUCISS 'generated the impetus for the inclusion of transitional justice mechanisms—including the CTRH [Commission for Truth, Reconciliation and Healing] and the HCSS [Hybrid Court for South Sudan]—in the IGAD-led mediation process resulting in the drafting of Chapter 5 of the R-ARCSS' (HRC 2020: 3). The R-ARCSS (Article 5.1.3) anticipates that the CTRH and HCSS, together with other mechanisms, should be implemented in a mutually reinforcing manner to 'promote the common objective of facilitating truth, reconciliation and healing, [and] compensation and reparation for gross human rights violations in South Sudan'. This recognition is important in the sense that it highlights transitional justice's perennial theoretical and practical dilemmas and challenges. This has to do with 'the tendency toward binary debates: peace versus justice, punishment versus reconciliation, retributive versus restorative justice, law versus politics, local versus international, individual versus collective' (Clark & Palmer 2012: 4). The same dichotomisation is playing out in the discourses on transitional justice in South Sudan.

The actors

There are multiple actors involved in South Sudan's transitional justice processes. For example, while the AU takes the lead on the HCSS, it works with many other stakeholders. The R-ARCSS—which includes transitional justice mechanisms—is a product of a broad range of actors coming together under IGAD-Plus[1]. There are many other stakeholders that are not part of the IGAD-Plus yet contribute significantly to and/or influence the design of transitional justice mechanisms, each playing different roles at various levels of the peace process. For example, religious groups in South Sudan and beyond have played a major role in shaping the healing and reconciliation discourse while civil society groups have taken a lead in the accountability front (Interview-SC1 23 February 2020). The Catholic Church has been particularly instrumental in facilitating a process led by the Community of Sant'Egidio (2020) engaging parties that are not signatories to the R-ARCSS in a bid to secure a buy-in especially because their non-engagement would pose a major risk to the viability of the peace process. On 8 March 2021 in Naivasha, Kenya, these efforts led to the signing of the Declaration of Recommitment to the Cessation of Hostilities Agreement of 21 December 2017, Rome Declaration on the Peace Process in South Sudan of 12 January 2020, and Rome Resolution on Monitoring and Verification of the Cessation of Hostilities Agreement of 13 February 2020 (IGAD 2021).

The parties that have been involved in the peace process, under IGAD, are many and their roles and contributions diverse. Mapping these actors and analysing their place and role in shaping South Sudan's transitional justice trajectory reveal a multifaceted and politically intricate process that is beyond the scope of the current article but which forms an entire chapter in this author's forthcoming work. The focus of the current article, therefore, is on the inception and implementation of two—CTRH and HCSS—of the transitional justice mechanisms as provided under the R-ACRSS. Departing from the assumption that there is consensus on the need to implement the R-ARCSS, the main argument of this article is that timing is a major factor that will contribute to determining the success of the CTRH and HCSS.

[1] IGAD Plus Members are quite numerous; they include**:** Members of IGAD (Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda); five representatives of AU (Algeria, Chad, Nigeria, Rwanda, and South Africa); the African Union Commission (AUC); the People's Republic of China; the European Union (EU); the Co-Chair of IGAD Partners Forum (Australia, Austria, Belgium, Brazil, Canada, Czech Republic, China, Denmark, Finland, France, Germany, Greece, Japan, India, Ireland, Italy, Luxembourg, The Netherlands, New Zealand, Norway, Russian Federation, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States of America, European Union and the League of Arab States); and the Troika (Norway; UK and USA; and the United Nations (UN). See: https://igad.int/index.php?option=com_content&view=article&id=1187:press-release-participation-of-the-igad-plus-peace-process&catid=1:latest-news

Transitional justice discourses

Discourses on transitional justice in South Sudan revolve around institutional design, historical injustices, human rights violations, truth, healing and reconciliation, reparations, and accountability (Interview-SC1 23 February 2020). These aspects fundamentally touch on the character of the SPLM and the nature of the South Sudanese state (Pinaud 2014: 193) and apparent failure to design a viable polity from its inception (Jok 2014). There are those who think that transitional justice '*should have happened way back in 2011 … preparations for this should have been done during the 6-year transitional period provided for in the Comprehensive Peace Agreement (CPA)*' (Interview-CS1 23 February 2020). Indeed, 'the CPA contained a provision for a national reconciliation process, but the government of the south did not undertake any credible initiative in this regard for fear that it could revive old grievances and jeopardise the outcome of the intended referendum on self-determination' (Oola & Moffet n.d: 6). Arguably, had some of the transitional justice mechanisms, such as accountability, been implemented during that period, the 2013 civil war may have been averted.

The year 2011 when South Sudan attained independence may have been another lost window because transitional justice tends to be successful where and when there is strong political goodwill. In 2011 South Sudan enjoyed internal political goodwill and external support which could have benefitted certain transitional justice mechanisms. Expressing regret, a senior member of the SPLM is reported to have said: 'shame on us, shame on us: we failed to learn the lessons of those African liberation movements that have gone before us' (Vertin 2018: 96). Similar sentiments were shared by one of the former detainees during an interview (Interview-FD 04 March 2020).

Unlike in 2011 when the SPLM was more united and stronger, the R-ARCSS is being implemented with a deeply divided SPLM that has since split into numerous factions, with the largest being the Machar-led SPLM-IO, which is equally now suffering significant internal divisions (ICG 2021). The R-ARCSS has also brought onboard many other actors (Onapa 2019: 75) with more than ten armed and other political groups as signatories (Deng 2018: 3). Furthermore, there are other parties, like SPLM-Former Detainees who signed the agreement with reservations (Onapa 2019: 75–6) and yet others, like the South Sudan National Democratic Alliance (SSNDA), that declined to sign the agreement and who are now engaged in the ongoing Rome process (Community of Sant'Egidio 2020). Bringing all actors together is important for transitional justice. As one of the informants opined, '*transitional justice is about all of us, the people of South Sudan, coming together to talk about our problems and find an agreeable way out*' (Interview-FD 04 March 2020). While inclusivity is vital, it equally means that it is much more difficult to create consensus on when and

how to establish and implement transitional justice mechanisms as provided for in the R-ARCSS.

Political environment

Transitional justice mechanisms are deeply political processes whose successes or failures largely depend on the prevailing and evolving political dynamics. For South Sudan, transitional justice mechanisms are crafted into the R-ARCSS, an agreement that is itself an outcome of contentions and antagonisms between and among many actors both within and outside South Sudan (Verjee 2020).

De Waal (2015), through his 'political marketplace' concept, reveals the complexity characterising politics in South Sudan and their historical and regional dimensions. Even as this discourse on transitional justice goes on, it is worthwhile noting that political goodwill from South Sudanese political elites and their regional and global networks is fundamental. While South Sudanese leaders may publicly claim to support the establishment of the HCSS, which has since been approved (Tut Pur 2021), they do not seem to have the appetite for justice. It is curious, for instance, to note that, among those who were reached for interviews, only respondents who are not affiliated to either of the South Sudan's opposing sides, openly expressed concerns over lack of political goodwill. On their part, protagonists tend to engage in blame games. For example, those aligned to the incumbent government accuse the SPLM-IO of not being willing to participate in the national dialogue (Interview-SSGO2 06 May 2020), while those on the side of SPLM-IO posit that the dialogue was unilateral and one-sided (Interview-IO 13 February 2020). Their shrewdness is even subtle on the question of accountability, although they all claim to support the establishment of the HCSS.

Acceptance and even calls for justice, from either side of the protagonists, may be more about tactical political manoeuvring than expressions of genuine desires for justice. In fact, the positions that each party takes on the matter of HCSS have been found to be quite polarising, leading to more factions within different parties. For example, a senior member of SPLM-IO questions Machar's consent to the HCSS, stating that he had '*difficulties explaining to some of our boys that we will ensure they are not locked in*' (Interview-IO 13 February 2020). This may be fodder for continued insecurity since lower cadre fighters may not feel protected from impending punishment.

The UN Human Rights Council (HRC 2020: 7–8) documents how delay tactics have been employed in frustrating the process of establishing the HCSS. It has taken tremendous diplomatic efforts and strategic pressure to have the hybrid court finally approved. However, approval of the court is one thing and operationalising it is quite another. For example, there is a need to ensure that 'transitional justice is pursued as

an integral component of peacebuilding and development in South Sudan, including by ensuring appropriate allocation of adequate resources' (HRC 2020: 25). Yet the leadership of South Sudan hides behind insufficiency of resources and prioritisation. As one of the diplomats rightly observed, '*this brings about a major dilemma particularly to external actors … are you going to put money on more pressing basic needs like food and healthcare or on pursuing criminal justice?*' (Interview-ED 05 June 2020). This has equally led to lack of coordinated efforts in supporting transitional justice processes as each actor tends to seek different pathways to make their contribution based on their own policies.

The R-ARCSS brings people who deeply mistrust each other together. South Sudanese leaders may not necessarily be establishing transitional justice mechanisms for the purpose of ensuring justice and building peace. To the contrary, they will attempt to use their positions of power to influence the transitional justice mechanisms to their advantage. Criminal prosecutions, for instance, may be weaponised to punish political opponents as opposed to delivering justice, and the truth-telling process may be manipulated to reward certain constituencies through reparations. The level of mistrust and political manoeuvring by South Sudanese political elites, under the current Revitalized Transitional Government of National Unity (R-TGoNU), arguably makes the prevailing political environment unsupportive of the proposed transitional justice mechanisms.

Presentation and discussion of key findings

Truth-telling

The main aim of the CTRH is to uncover the truth about past abuses and promote healing. It is explicitly linked to the Compensation and Reparation Authority (CRA) in terms of reparation of victims through the Compensation and Reparation Fund (CRF) (Akech 2020: 589–90). According to Article 5.4 of the R-ARCSS (IGAD 2018), the CRF will 'provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods'. The CRA will also receive applications from victims recorded by the CTRH and provide them with 'appropriate compensation and reparation' (IGAD 2018). Reparation is a well-established mechanism of transitional justice that has been practised in many countries (Oola & Moffet n.d: 4). While not the immediate focus of this article, in the mutually reinforcing design of South Sudan's transitional justice framework, reparations are closely linked to the CRTH.

There seems to be consensus on the need for truth-telling in South Sudan. There is a recent study (Willems & Deng 2016) indicating that 74 per cent of South Sudanese support truth-telling. A majority at 68 per cent considered such national consultations to be an important means of bringing about reconciliation while 48 per cent saw national dialogue as helpful in finding and documenting what actually happened to their loved ones. Queried on what needed to happen in promoting reconciliation, 64 per cent emphasised grass-roots level public dialogue while 57 per cent saw its importance as lying at the national level. The researchers concluded that 'this illustrates the comfort and faith people have in grass-roots level initiatives, while at the same time understanding that this cannot go without initiatives from and a political solution at the national level' (Willems & Deng 2016: 3).

Respondents to this study were very clear about the right of the people of South Sudan, particularly the victims, to know the truth. For example, a South Sudanese civil society representative opined that '*for many victims to have closure, they need to know what exactly happened, for example, people need to know who killed their loved ones, when, how and why*' (Interview-SC1 23 February 2020). Whether these are demands for the right to truth or mere vocalisation of the benefits of narrating the truth is difficult to ascertain immediately. This is because this study's informants were largely elites whose responses may not represent what the vast majority of South Sudanese actually mean by the right to truth. Even the study cited above may not fully answer this question because it is based on a survey. To get into the depths of what the right to truth may exactly mean for ordinary South Sudanese, especially victims, may require more in-depth engagements, for example, through ethnographic studies. In this article, the right to truth is viewed through the lens of the significance that the people of South Sudan attach to the establishment of a clear record of what exactly happened and how it happened. According to the mutually reinforcing designs of transitional justice mechanisms in South Sudan, the revealed truth should lead to and/or inform other actions, including reparations and accountability.

The healing value of truth-telling is not dominant in current discourse on transitional justice in South Sudan. It is a marginal narrative largely domiciled within sections of religious circles. What is vivid is a view of truth-telling as an acknowledgement of wrongs and as a form of recognition and restoration of dignity to the victims (AU 2014). There is literature that argues in support of these claims. For example, Biggar (2003: 8) opines that 'truth-telling entails recognition of injuries hence acknowledging the dignity of the direct victims'.

The need for truth-telling comes across as one of the few aspects acceptable across the board as representatives both from the incumbent government (Interview-SSGO1 12 March 2020) and the opposition (Interview-IO 13 February 2020) generally agree on the need for the people of South Sudan to know what exactly happened. However, as

Owiso (2019) observes, seeking the 'truth' after a devastating, multilayered, and complex conflict is such a daunting task. Furthermore, those responsible for this process need to pay attention to the fact that management of the truth is an equally complicated undertaking. For example, the case of Rwanda reveals how experiences of truth-telling may result in re-traumatisation (Brounéus 2010). Furthermore, as illustrated through the case of northern Uganda, normatively driven transitional justice mechanisms within a liberal peace framework may have little bearing on lived realities of social accountability in post-conflict settings (Macdonald 2017).

It is therefore important to guard against ills such as a reproduction of problematic liberal peace archetypes of peace through truth-telling mechanisms. Imposing timelines and external interference are some of the factors that may jeopardise the efficacy of truth-telling. The following section uses the experiences of the recently concluded South Sudan National Dialogue (SSND) to illustrate some of the challenges that may be expected and lessons for the proposed truth-telling under the CRTH.

South Sudan National Dialogue (SSND): lessons for the CRTH

This section examines and presents various discourses on the SSND: mainly its challenges and their implications for the CTRH. This is particularly because the proposed truth-telling process under the CTRH emphasises addressing legacies of the conflict, promotion of peace, national reconciliation, and healing (IGAD 2018), objectives similar to those of the SSND (Deng 2017: 17). The major difference between the SSND and the CTRH is that the former was initiated prior to the signing of the R-ARCSS while the latter is part of and an outcome of the agreement. However, given the fact that the SSND dragged on to late 2020, way into the implementation of the peace deal, and the fact that the political terrain in the country has not changed significantly, it is plausible to think of similar and/or related challenges recurring during the CTRH process.

The SSND and its achievements

The SSND was initiated by President Kiir in December 2016, ostensibly with the intention of collecting the views of the people of South Sudan on how to resolve the conflict and foster healing and reconciliation (HRC 2020: 7). The structural framework that was put in place to facilitate the SSND included the 9-member national leadership, a 97-member steering committee (NDSC), the Secretariat, and the stakeholder and partner forums (Vhumbunu 2018). The composition of the 15 subcommittees for regional and grass-roots consultations was by personal choice of the members of the Steering Committee. This means members were free to decide

which regional subcommittee to join so long as each of the committees did not exceed five members (Deng 2017: 70). Multifaceted in the nature of issues to be tackled, the SSND was expected to be broad based and comprehensive with the aim to 'promote peace, national unity, equitable socio-economic development, and a shared sense of national purpose' (Deng 2017: 18).

Generally, 'there were mixed reactions since some people thought it was a noble and indeed timely initiative, and others pessimistically feared that it would not amount to much' (Deng 2017: 69). Nevertheless, the SSND conducted hearings, and gathered and analysed information from both within and outside South Sudan in preparation for a national conference that was scheduled to take place in March 2020. The conference was postponed first due to the business of the President and later due to COVID-19 pandemic (HRC 2020:10). The SSND finally held the national conference on 3–15 November 2020 in which President Kiir was represented by Vice President Hussein Abdelbagi (SSND 2020) and concluded its work by publishing a report. Most of the issues contained in the SSND final report are well documented in other relevant documents. Noteworthy is that the report clearly indicates that 'the people of South Sudan at the grass roots are deeply aware of the leadership failure and the political deadlock which has dogged this country for a long time. So, they demand that both President Kiir and Dr. Riek Machar must leave politics, if South Sudan is to ever move forward' (*Sudans Post* 17 December 2020: 32).

The fate of the outcomes of the SSND is unknown. However, the fact that it recommends the stepping down of Kiir and Machar, the main protagonists in the South Sudan conflict, means that the report may never be implemented under the duo's leadership. This may be the case should either of the two become President following the expiry of the mandate of the R-TGoNU. Certainly, it is difficult for leaders to follow up on initiatives whose recommendations negatively implicate them. In Kenya, for example, it is believed that part of the reason the government has never implemented the recommendations of the 2013 Truth, Justice and Reconciliation Commission (TJTC)[2] is because it implicates people in power, including President Kenyatta's family.

Against the general feeling that the SSND did not amount to much, those in government argue that it was a success. For instance, one of those reached for an interview opined that '*the national dialogue has been a great success … has helped diffuse the violence and foster reconciliation*' (Interview-SSGO1 12 March 2020). Interestingly, another government official, who equally applauds the success of the national dialogue, calls on the '*international community and friends of South Sudan to*

[2] Seattle University School of Law has collected and published all the TJRC documents including all four volumes of the final report. See: https://digitalcommons.law.seattleu.edu/tjrc/

support the CTRH with resources and capacity' arguing that '*government alone cannot manage the tasks of CTRH*' (Interview-SSGO2 06 May 2020). The question that then arises is how the country could have conducted—successfully so—the national dialogue but cannot afford to carry out a truth-telling process, given that the spirit, structure, and operation of the two are strikingly similar.

Challenges of the of the SSND

The timing and manner in which the SSND was established created considerable concern, leading to its rejection by some South Sudanese stakeholders, notably the opposition. It occurred through a presidential decree, while South Sudan was still in conflict, causing profound cynicism among many South Sudanese (HRC 2020: 10). The SSND suffered lack of inclusion, lack of a conducive environment, mistrust and misperceptions by some stakeholders, poorly attended consultation forums, shortage of resources, and fear (Vhumbunu 2018, 31–2). Furthermore, rampant insecurity and poor transport and communication infrastructure and other logistical nightmares significantly limited its operations.

The opposition boycotted the dialogue by claiming it was unilateral and partial (Interview-FD 04 March 2020) with one dismissing it as '*Salva's meaningless project*' (Interview-IO 13 February 2020). This dealt a major blow to the process. As argued by Paffenholz *et al.* (2017: 53–72), national elites are key determinants of the successes of such dialogues. Non-participation of the opposition leaders significantly compromised the SSND's legitimacy and credibility.

Implications for the CTRH

Drawing on some seventeen cases from around the world, Paffenhholz *et al.* (2017: 53–72) have particularly singled out inclusivity as a major factor determining the success of national dialogues. Another factor is political goodwill and international support, both of which were hardly present in South Sudan. This article argues that architects of the CTRH need to pay specific attention to these and related challenges and learn from such experiences for the benefit of the envisaged truth-telling process.

As indicated above, the timing of the SSND was one of the reasons for the challenges the initiative faced. This is something that directly concerns the commencement of truth-telling under the CTRH. There is a feeling that the three-year transitional period may not be sufficient to conduct robust truth-telling in South Sudan. A Sudanese diplomat was particularly unequivocal about the insufficiency of time when he stated that '*it does not seem feasible that meaningful truth-telling can take place within the next three years. … I don't think people are even ready to genuinely engage in*

this important process.' He further added that '*it would be absurd to do it as a formality … to tick the boxes on the tasks spelled out by the agreement*' (Interview-SD 14 December 2019).

The foregoing concerns over the timing of truth-telling in South Sudan are important. For example, it is important to pay attention to claims that '*there is no sufficient infrastructure, resources or capacity to facilitate the work of the CTRH*' (Interview-SD 14 December 2019) or that '*government alone cannot manage the tasks of CTRH*' (Interview-SSGO2 06 May 2020). Experiences of the SSND and the prevailing political environment render '**when**' to constitute the CTRH and/or commence the truth-telling process an open, yet extremely important, question as far as South Sudan's transitional justice process is concerned.

Accountability—the Hybrid Court for South Sudan (HCSS)

South Sudan has approved the establishment of the HCSS (Tut Pur 2021) ushering in a new phase in the accountability discourse. Besides a view of forgiveness and reconciliation as a viable path to peace (Interview-RL 19 November 2019), studies reveal that a majority of respondents, 79 per cent, want those responsible for abuses tried before a court (Willems & Deng 2016: 2).

The mandate of the HCSS is 'to investigate, and where necessary, prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese laws, committed from 15th December 2013 to the end of the transitional period'. By stating that 'no immunity from serious crimes shall be permissible' (Akech 2020: 589), the R-ARCSS underscores the demand for justice that under the HCSS is international in its orientation.

International justice

The justification for internationalisation of justice relates to the nature of the crimes that victimise humanity, and trigger internationalised insecurities and humanitarian crises and insufficiencies of domestic institutions (Drumbl 2007: 6–7). As observed by Owiso (2019: 2), 'violations committed during violent conflict generally fall within the purview of international human rights law and international humanitarian law'. Yet international justice is heavily contested (Krcmaric 2018, Akech 2020: 587–9) largely due its perceived vulnerability to external interference.

The R-ARCSS stipulates that the HCSS should operate outside the structures of the national judiciary and assume primacy over national courts. It further provides that '[the] majority of the judges shall be drawn from African countries other than

South Sudan and that the hybrid court's structure, seat and composition are to be decided by the AUC' (Akech 2020: 587). Furthermore, external actors, like the EU (*Sudan Tribune* 16 November 2015), the UN (Voice of America 12 March 2019), and Western nations (*The East African* 13 0ctober 2018) are outspoken in their support for the HCSS, making it a highly contested topic both in and outside South Sudan.

Contestations of international justice

In his classic work Huntington (1991: 228) warns that 'prosecutions could destroy the necessary basis for democracy'. Bringing in the notion of timing, he argued that, if they should be conducted at all, then trials ought to be conducted immediately after the transition. As recounted by Sikkink and Walling (2007: 428), 'many actors directly involved in transitions were often equally pessimistic'. For example, they cite Jose Zalaquett (1990), a Chilean human rights lawyer, who argued for the inadequacies of trials to 'deal with perpetrators who still wield considerable power'.

Africa and the International Criminal Court (ICC) have featured prominently in recent discourses on international criminal justice (Sunga 2014, Benyera 2018, Chipaike *et al.* 2019). The ICC–Africa question is complex and perforated with controversies. These include claims that the ICC is selectively targeting and/or using Africa as a laboratory or a scapegoat, or that in its quest to achieve legitimacy and credibility the ICC had to begin with the weakest and not necessarily the most criminal elements (Imoedemhe 2015: 82–5). The fact that the ICC is based in the West with most of those standing trial being Africans has seen the debate on the court take an Africa vs the West stance. Differences on foundational philosophies and normative commitments are, in part, causes for the visible friction between the West and Africa when it comes to international criminal justice.

The ICC question is significant to the HCSS given that some of IGAD member states (Kenya and Sudan) that negotiated the South Sudan peace agreement have been at the centre of the Africa ICC tussle. In the case of South Sudan, opinion is divided between those who propose international mechanisms and those who argue in favour of local ones. The debate tends to create a dichotomy that (re)produces the West vs Africa binarism. The implication is that actors from the West agitate for international mechanisms of justice because they have faith in such mechanisms and/or lack faith in local ones, while African leaders propose local mechanisms because they can manipulate them (Interview-ED 05 June 2020). Hybridity emerged out of these debates, yet hybrid mechanisms are equally contentious.

The hybrid option

Hybrid justice mechanisms are generally known to divide judicial responsibilities between the UN, or its entities, and/or other regional bodies and the concerned state. Among many other places, those models have been tried in East Timor, Kosovo, and Sierra Leone (Dickinson 2003). Some experts see 'hybrid' courts as a better model, with Sierra Leone and Cambodia presented as remedial to the challenges of the Rwandan and Yugoslavian tribunals, which were seen as distant, bureaucratic, and expensive (Stensrud 2009: 7).

Although these traditions are not incommensurable with Western systems, and share points of commonality, they differ in significant ways, including when it comes to rationales for and modalities of punishment (Drumbl 2007). While hybridity may be seen as, among other things, a way to bridge the Africa vs the West dichotomy, discourse on the HCSS appear to reproduce the said friction between local and international conceptions and approaches to criminal justice.

The HCSS question

There are those who feel that the push for accountability in South Sudan through the HCSS runs the risk of being hijacked by international actors for foreign interests (Interview-SSA 05 May 2020, Interview-FD 04 March 2020). Others think that internationalised criminal justice processes are too expensive yet achieve so little. For example, a South Sudanese religious leader argues that '*at times you wonder why we have to agitate for processes that require so much money and take too long just to try one individual whose conviction does not even seem to mean anything to the victims*' (Interview-RL 19 November 2019).

There are documented findings, for instance, from northern Uganda, that reveal similar sentiments, including among victims of atrocities of the Lord's Resistance Army (LRA) (Apuuli 2011). The feeling that international justice is distant (Clark, 2018) is partly used as a justification for alternative local and even hybrid mechanisms (Zenati 2019). A Ugandan academic (Interview-MP 23 January 2020) sees hybrid mechanisms as outcomes of the opposition to internationalisation of justice and increasing disapproval of perceived Western imposition of justice on local situations. However, he argues that '*to the extent that those hybrid courts are largely designed and almost entirely funded by international organisations and Western nations, one cannot exactly view them as local*'.

As Akech (2020: 588) contends, 'including the HCSS was a response to growing pressure from international and regional actors … the South Sudanese political leadership is inclined to reconciliation'. One of the diplomats (Interview-UNO

03 March 2020) at the UN office in Addis Ababa, argued that: '*nobody should be cheated that these people* [South Sudanese leaders] *are not afraid of the hybrid court. They are scared. They may be speaking in support of the court in public but privately they are lobbying against it.*' Indeed, there have been reports, in the past, of government of South Sudan hiring an American firm to lobby against the establishment of the hybrid court (Reuters 2019). This reveals the tensions underlying the establishment of the HCSS, its approval notwithstanding.

One of the South Sudanese former detainees (Interview-FD 04 March 2020) expressed his disappointment in the inclusion of the hybrid court in the peace deal calling it a '*landmine on the peace implementation path*'. He wondered '*how do we start putting in place systems to punish the same people who are in the leadership that will implement the peace agreement?*' Another interlocutor opined that: '*given the prevailing situation, I would hesitate to push for the prosecution of anybody in South Sudan at the moment*' (Interview-UFA 29 January 2020). Commenting on the same, a Sudanese diplomat (Interview-SD 14 December 2019) posited that: '*I think that if we push too much for accountability at the moment, we risk eroding the little gains that have been made in this process*', adding that '*the people of South Sudan want and deserve to see justice done … but the time might not be the best*'.

Given the polarisation that has been caused by the conflict, it is curious that these views appear to be shared across the political divide. For example, a South Sudanese diplomat in Addis Ababa (Interview-SSGO1 12 March 2020) held that '*government is not opposed to accountability mechanisms … our concern is that if not done very well, it may cause problems to peace … all we want is peace now … everyone wants peace*'. His counterpart from SPLM-IO (Interview-IO 13 February 2020) argued that '*it does not seem right to insist on accountability at the moment. It may scare away some people or make them start working in bad faith which will kill the spirit of the agreement.*' But he was quick to add that, SPLM-IO is not scared of accountability stating that '*after all, everybody knows who committed atrocities and violated every international law*'. Probed on whom he was referring to; he quickly said: '*of course it is Salva* [President Kiir]'. Therein lies another danger to accountability. There is a level of confidence, in the opposition circles, that if prosecutions were to happen, then President Kiir must be one of the 'big fish to fry'. For example, Machar is alleged to have 'inflated the |facts about initial massacres in Juba … and made accountability his rallying cry' (Vertin 2018: 267) to paint Kiir as the perpetrator.

The view, prevalent among South Sudan's opposition groups that President Kiir should be one of those to be prosecuted may be damaging, especially if he ends up not being prosecuted and/or found guilty. There are some lessons from Kenya's situation at the ICC where some of those, like the current Deputy President William Ruto, who were agitating for the ICC process ended up being the 'clients' of the court. The Kenyan

cases were to collapse later, largely due to government of Kenya's refusal to cooperate with the court. Kenya has yet to institute any mechanism to try those responsible for serious crimes committed during the 2007–8 post-election violence, largely because the people in power and their allies 'cannot fry themselves' (Brown & Sriram 2012). The same scenario may play out in South Sudan where both Kiir and Machar, who are viewed as having committed atrocities (Interview-SC1 23 February 2020, Interview-UFA 29 January 2020, Interview-SD 14 December 2019) are in power.

There is reason to be sceptical of South Sudanese political elites' claims that they support the HCSS. South Sudanese political elites do not seem to have any appetite for justice; hence their postures appear to be largely tactical. With both Kiir and Machar in power, it is unlikely that operationalisation of the HCSS will commence soon. Most likely they will play delaying tactics to buy time in the hope that either of them will be victorious in the future and then use the criminal justice mechanism to punish the other.

Implications for justice and peace

Some of the ongoing discourses on criminal accountability in South Sudan demonstrate a level of discomfort regarding the HCSS. The question that arises is: why the rush to establish the court even with clear indications that it may not be a good idea to push for prosecutions at the moment? It is upon pausing this question that the externality dimension, already presented above, finds its strong empirical support. Observations of a Makerere University Professor (Interview-MP 23 January 2020) are in support of the view that the issue of accountability is being pushed by the international community, particularly Western powers. The inclusion of a transitional justice chapter, including the HCSS, in the R-ARCSS is curious. While it emanates from the AU's Commission of Inquiry (AU 2014), there are concerns that it was heavily driven by external actors operating within or influencing the AU's role in this process. Some interlocutors wonder how possible it is that leaders of IGAD member states—who have had huge challenges with international criminal justice and have been vocal in their opposition to the ICC—would have freely and willingly included mechanisms of international criminal accountability in South Sudan's peace agreement (Interview-FD 04 March 2020, Interview-MP 23 January 2020)

The US, which has a long-standing involvement in South Sudan (Vertin 2018), is increasingly fingered as a major foreign power apparently pushing for quick accountability and perhaps a key driving force behind the inclusion of the HCSS in the R-ARCSS. A South Sudanese academic based in Rumbek (Interview-SSA 05 May 2020) observed that: '*I think the US may be keen to see certain individuals punished. May be those who betrayed them after independence … or even to ensure that South*

Sudan is politically organised in a way that favours its interests.' Another interlocutor (Interview-CS1 23 April 2020) argued that '*there is obviously tension between those who want to see justice and those who think that justice is not a priority at the moment*'. Additionally, one other informant (Interview-FD 04 March 2020) asserted that '*it may cause more problems because of their push for quick accountability*'. A diplomat from one of the European countries, argued that '*with my experience working within this context, I think that we need to be very careful with our rush*'. Further, he stated that '*there is a way that we* [in reference to the West] *want to have things done by yesterday. This could be our way of doing things but I am afraid it isn't helping the situation much over here*' (Interview-ED 05 June 2020). These voices are quite revealing of experts' views on the question of HCSS, conveying the need for caution in timing of accountability measures in South Sudan.

Other than the perceived external pressure to establish the HCSS (Akech 2020: 588), it is noteworthy that civil society in South Sudan seems to be pushing for quick prosecutions as well. For example, an informant (Interview-SC1 23 February 2020) from the sector argued that '*transitional justice is a civil society agenda … all the mechanisms provided for in the agreement are long overdue*'. His counterpart (Interview-CS2 16 April 2020) was of the view that '*justice it too important to wait. The people of South Sudan, particularly the victims, most of whom are women, have waited for far too long. They cannot wait any longer for justice. The time for justice is now*.' Positioned as the voice of the people against the powerful elites as well as its well-established links to external actors (such as through donor-aid) are arguably some of the reasons for civil society's posture on this matter.

The position of civil society notwithstanding, a vast majority of those who were interviewed, are of the opinion that South Sudan is not yet ready for criminal prosecutions. Many of them are concerned that a push for quick accountability may undermine the fragile peace process. Putting this into perspective, a South Sudanese Lawyer (Interview-SSL 21 May 2020), based in Juba, asserted that '*perceptions on the hybrid court are divided … as expected there are those who feel that this is a foreign agenda and those who argue that instead of the hybrid court, we should rather invest in local courts*'. He maintained that '*it is always a desire to have justice done within each jurisdiction but our judicial system is too weak*'. He concluded that '*the current political environment does not allow for the proper functioning of the hybrid court, but from a legal point of view, the longer you take to prosecute the more complicated those cases become due to collecting of evidence, reliability of evidence …*'. This clearly captures the dilemma at play when it comes to prosecutions under the HCSS in South Sudan.

Conclusion

Whereas the need for truth and demands for accountability in South Sudan appears not to be in question, there are concerns over the timing of various mechanisms of transitional justice, particularly truth-telling and prosecutions. It is difficult to spell out the 'right timing' for truth-telling and accountability measures in South Sudan. While there could be an argument, for example, that, due to challenges associated with prosecutions, it would be good for South Sudan to pursue alternative mechanisms such as reconciliation and national cohesion, this article does not prescribe those alternatives as a replacement but rather as available options and possibilities that the people of South Sudan are free to explore, especially within the framework of the CTRH. Empirical evidence suggests that the people of South Sudan have shown a leaning towards the demand for justice through prosecutions of certain key perpetrators of atrocities. This article's position is, therefore, that there are specific conditions that support the success of various transitional justice mechanisms and that those conditions do not appear to exist in South Sudan at the moment. In view of this, the notion of timing in transitional justice is not to be taken in its temporal conception, but rather in relation to when such conditions become available as the most appropriate time for certain mechanisms to be implemented. Architects of various transitional justice mechanisms in South Sudan need to pay attention to the evolving context, the political mood, and the contours of the implementation of the peace agreement. Paying attention to the prevailing political conditions and in the interest of the needs of the people of South Sudan, the CTRH and HCSS need to be carefully planned and prioritised in view of the country's delicate transition out of conflict and the sustainability of peace in the long term.

Acknowledgement

This research was funded, in part, by the Peace Research Grant Program of the International Peace Research Association Foundation.

References

Akech, J.G. (2020), 'Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation', *International Journal of Transitional Justice*, 14: 585–95. https://doi.org/10.1093/ijtj/ijaa015

Akol, Z.D. (2014, 7 December), 'Inclusivity: A Challenge to the IGAD-led South Sudanese Peace Process', *Policy Briefs* (The Sudd Institute). https://www.suddinstitute.org/publications/show/inclusivity-a-challenge-to-the-igad-led-south-sudanese-peace-process [accessed 25 May 2020].

Apuuli, K.P. (2011), 'Peace Over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs. the International Criminal Court (ICC) in Northern Uganda', *Studies in Ethnicity and Nationalism*, 11(1): 116–29. https://doi.org/10.1111/j.1754-9469.2011.01101.x

Apuuli, K.P. (2015), 'IGAD's Mediation in the Current South Sudan Conflict: Prospects and Challenges', *African Security*, 8(2): 120–45. https://doi.org/10.1080/19392206.2015.1036671

Asgedom, M. (2019), 'The African Union (AU) and Intergovernmental Authority on Development (IGAD) Partnership in Peace and Security: Achievements and challenges', *Journal of Citizenship and Morality*, 2(1): 80–100.

AU (African Union), (2014, 15 October), 'Final Report of the African Union Commission of Inquiry on South Sudan'. https://www.peaceau.org/uploads/auciss.final.report.pdf [accessed 27 February 2021].

Awolich, A.A. (2020, 7 June), 'The Boiling Frustrations in South Sudan', *Weekly Bulletin* (The Sudd Institute). https://www.suddinstitute.org/assets/Publications/5edf110da7365_TheBoiling FrustrationsInSouthSudan_Full.pdf [accessed 10 July 2020].

Bentrovato, D. (2017). 'Accounting for Genocide: Transitional Justice, Mass (Re)education and the Pedagogy of Truth in Present-day Rwanda', *Comparative Education*, 53(3): 396–417. https://doi.org/10.1080/03050068.2017.1317997

Benyera, E. (2018), 'Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States', *Politeia*, 37(1): 1–30. https://doi.org/10.25159/0256-8845/2403

Bereketeab, R. (2017), 'The Collapse of IGAD Peace Mediation in the Current South Sudan Civil War', *Journal of African Foreign Affairs*, 4(1/2): 67–84. https://doi.org/10.31920/2056-5658/2018/v4n1_2a4

Biggar, N. (2003), 'Making Peace or Doing Justice: Must we Choose?', in N. Biggar (ed.) *Burying the Past: Making Peace and Doing Justice After Civil Conflict* (Washington, DC, Georgetown University Press), 14–41.

Blackings, M.J. (2016), 'Why Peace Fails: The Case of South Sudan's Agreement on the Resolution of the Conflict in South Sudan' (Nairobi, Friedrich-Ebert-Stiftung). https://library.fes.de/pdf-files/bueros/fes-pscc/14355-20180511.pdf

Brounéus, K. (2010), 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health', *Journal of Conflict Resolution*, 54(3): 408–37. https://doi.org/10.1177/0022002709360322

Brown, S. & Sriram, C.L. (2012), 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-election Violence in Kenya', *African Affairs*, 111(443): 244–60. https://doi.org/10.1093/afraf/ads018

Buhm-Suk, B., Collins, L. & Yuri, K. (2016), 'Transitional Justice in Post-Unification Korea: Challenges and Prospects', in R.G. Teitel & B. Buhm-Suk (eds) *Transitional Justice in Unified Korea* (New York, Palgrave Macmillan), 11–34. https://doi.org/10.1007/978-1-137-53454-5_2

Chipaike, R., Tshuma, N. & Hofisi, S. (2019), 'African Move to Withdraw from the ICC: Assessment of Issues and Implications', *India Quarterly*, 75(3): 334–50. https://doi.org/10.1177/0974928419860918

Clark, P. (2018), *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108576260

Clark, P, & Palmer, N. (2012, 1 October), 'Challenging Transitional Justice: Critical Perspectives in Transitional Justice', (Brussels, Intersentia Publishing). https://ssrn.com/abstract=2635502; http://dx.doi.org/10.2139/ssrn.2635502 [accessed 2 March 2021].

Community of Sant'Egidio (2020, 14 February), 'South Sudan, Sant'Egidio: New Progress Towards Peace'. https://www.santegidio.org/pageID/30284/langID/en/itemID/34552/South-Sudan-Sant-Egidio-new-progress-towards-peace.html [accessed 10 June 2020].

Deng, D. (2018, December), 'Compound Fractures Political Formations, Armed Groups and Regional Mediation in South Sudan', Institute for Security Studies (ISS). https://issafrica.org/research/east-africa-report/compound-fractures-political-formations-armed-groups-and-regional-mediation-in-south-sudan [accessed 2 May 2020].

Deng, F. (2017, October), 'South Sudan National Dialogue: Conceptual Reflections'. https://www.ssnationaldialogue.org/wp-content/uploads/Conceptual-Reflections-on-South-Sudan-National-Dialogue-by-Francis-Deng.pdf [accessed 7 May 2020].

De Waal, A. (2014), 'When Kleptocracy Becomes Insolvent: Brute Causes of the Civil War in South Sudan', *African Affairs*, 113(452): 347–69. https://doi.org/10.1093/afraf/adu028

De Waal, A. (2015), *The Real Politics of the Horn of Africa: Money, War and the Business of Power* (Cambridge, Polity Press).

De Waal, A. (2017), 'Peace and the Security Sector in Sudan 2002–11', *African Security Review*, 26: 180–98. https://doi.org/10.1080/10246029.2017.1297582

Dickinson, L.A. (2003), 'The Promise of Hybrid Courts', *The American Journal of International Law*, 97(2): 295–310. https://doi.org/10.2307/3100105

Drumbl, M.A. (2007), *Atrocity, Punishment, and International Law* (Cambridge, Cambridge University Press). https://doi.org/10.1017/CBO9780511611100

Dunaiski, M. (2014), 'Accountability vs Stability? Assessing the ICC Intervention in Kenya', (E-International Relations). https://www.e-ir.info/2014/01/09/accountability-vs-stability-assessing-the-iccs-intervention-in-kenya/ [accessed 2 March 2021].

The East African (2018, 13 October), 'South Sudan Now Under Pressure to Set Up Hybrid Court'. https://www.theeastafrican.co.ke/news/ea/South-Sudan-now-under-pressure-to-set-up-hybrid-court/4552908-4804110-format-xhtml-c5nec/index.html [accessed 20 June 2020].

Gibson, J.L. (2006), 'The Contributions of Truth to Reconciliation: Lessons from South Africa', *Journal of Conflict Resolution*, 50(3): 409–32. https://doi.org/10.1177/0022002706287115

Hayner, P.B. (2010), *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edn (London, Routledge). https://doi.org/10.4324/9780203867822

Honeyman, C., Hudani, S., Tiruneh, A., Hierta, J., Chirayath, L., Iliff, A. & Meierhenrich, J. (2004), 'Establishing Collective Norms: Potentials for Participatory Justice in Rwanda', *Peace and Conflict*, 10(1): 1–24. https://doi.org/10.1207/s15327949pac1001_1

HRC (UN Human Rights Council) (2020, 5 October), 'Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan'. https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session45/Documents/HRC_45_CRP.4.docx [accessed 5 March 2021].

Huntington, S.P. (1993), *The Third Wave: Democratization in the Late Twentieth Century*, vol. 4 (Norman, OK, University of Oklahoma Press).

ICG (International Crisis Group) (2020, 24 March), 'COVID-19 and Conflict: Seven Trends to Watch'. https://www.crisisgroup.org/global/sb4-covid-19-and-conflict-seven-trends-watch [accessed 27 May 2020].

ICG (International Crisis Group) (2021, 10 February), 'Toward a Viable Future for South Sudan Crisis Report No. 300'. https://www.crisisgroup.org/africa/horn-africa/south-sudan/300-toward-viable-future-south-sudan [accessed 4 March 2020].

ICTJ (International Center for Transitional Justice) (2009), 'What is Transitional Justice?'. http://www.ictj.org/about/transitional-justice [accessed14 June 2020].

IGAD (Intergovernmental Authority on Development) (2018, September), 'Agreement on the Resolution of the Crisis in South Sudan (ARCISS)'. https://jmecsouthsudan.org/index.php/arcss-2015/igad-hlrf-agreement [accessed 20 June 2020].

IGAD (Intergovernmental Authority on Development) (2021, 10 March), 'Parties sign Declaration of Recommitment to the Cessation of Hostilities Agreement'. https://www.igad.int/programs/115-south-sudan-office/2630-parties-sign-declaration-of-recommitment-to-the-cessation-of-hostilities-agreement [accessed 10 March 2021].

Imoedemhe, O. (2015), 'Unpacking the Tension Between the African Union and the International Criminal Court: The Way Forward', *African Journal of International and Comparative Law*, 23(1): 74–105. https://doi.org/10.3366/ajicl.2015.0111

Jimeno, R. (2017), *Amnesties, Pardons and Transitional Justice: Spain's Pact of Forgetting* (New York, Routledge). https://doi.org/10.4324/9781315107950

Johnson, D.H. (2014), 'Briefing: The Crisis in South Sudan', *African Affairs*, 113(451): 300–9. https://doi.org/10.1093/afraf/adu020

Johnson, D.H. (2016), *South Sudan: A New History for a New Nation* (Athens, OH, Ohio University Press).

Jok, J.M. (2011), *Diversity, Unity, and Nation Building in South Sudan* (Washington, DC, US Institute of Peace). https://www.usip.org/sites/default/files/Diversity,%20Unity,%20and%20Nation%20Building%20in%20South%20Sudan%20(Jok).pdf

Jok, J.M. (2014, 4 January), 'South Sudan and the Prospects for Peace Amidst Violent Political Wrangling', *Policy Brief* (The Sudd Institute). https://www.suddinstitute.org/assets/Publications/572b7eb49503e_SouthSudanAndTheProspectsForPeaceAmidst_Full.pdf [accessed 3 May 2020].

Krcmaric, D. (2018), 'Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice', *American Journal of Political Science*, 62(2): 486–98. https://doi.org/10.1111/ajps.12352

Lambourne, W. (2009), 'Transitional Justice and Peacebuilding after Mass Violence', *International Journal of Transitional Justice*, 3(1): 28–48. https://doi.org/10.1093/ijtj/ijn037

Lundy, P. & McGovern, M. (2008), 'Whose Justice? Rethinking Transitional Justice From the Bottom Up', *Journal of Law and Society*, 35(2): 265–92. https://doi.org/10.1111/j.1467-6478.2008.00438.x

Macdonald, A. (2017), 'Transitional Justice and Political Economies of Survival in Post-conflict Northern Uganda', *Development and Change*, 48(2): 286–311. https://doi.org/10.1111/dech.12298

Matsunaga, J. (2016), 'Two Faces of Transitional Justice: Theorizing the Incommensurability of Transitional Justice and Decolonization in Canada', *Decolonization: Indigeneity, Education & Society*, 5(1): 24–44.

Meierhenrich, J. (2006), 'The Ethics of Lustration', *Ethics & International Affairs*, 20(1): 99–120. https://doi.org/10.1111/j.1747-7093.2006.00005.x

Mendeloff, D. (2004), 'Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?', *International Studies Review*, 6(3): 355–80. https://doi.org/10.1111/j.1521-9488.2004.00421.x

Murphy, C. (2017), *The Conceptual Foundations of Transitional Justice* (London, Cambridge University Press). https://doi.org/10.1017/9781316084229

Nagy, R. (2008), 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly*, 29(2): 275–89. https://doi.org/10.1080/01436590701806848

Olsen, T.D., Payne, L.A. & Reiter, A.G. (2010), 'Transitional Justice in the World, 1970–2007: Insights from a New Dataset', *Journal of Peace Research*, 47(6): 803–9. https://doi.org/10.1177/0022343310382205

Onapa, S.A. (2019), 'South Sudan Power-sharing Agreement R-ARCSS: The Same Thing Expecting Different Results', *African Security Review*, 28(2): 75–94. https://doi.org/10.1080/10246029.2019.1680402

Oola, S & Moffet, L. (n.d.), 'Reparations in South Sudan: Prosects and Challenges'. https://reparations.qub.ac.uk/new-report-reparations-in-south-sudan-prospects-and-challenges/ [accessed 5 March 2021].

Owiso, O. (2019, September), 'Seeking "Truth" After Devastating, Multi-layered Conflict: The Complex Case of Transitional Justice in South Sudan', paper delivered to the Association of Human Rights Institutes (AHRI) Annual Conference held at the University of Potsdam on 5–7 September 2019.

Paffenholz, T., Zachariassen, A. & Helfer, C. (2017, October), 'What Makes or Breaks National Dialogues? *Inclusive Peace and Transition Initiative Report* (The Graduate Institute of International and Development Studies). https://www.inclusivepeace.org/sites/default/files/IPTI-Report-What-Makes-Breaks-National-Dialogues.pdf [accessed 4 June 2020].

Palmberger, M. (2016), *How Generations Remember: Conflicting Histories and Shared Memories in Post-war Bosnia and Herzegovina* (London, Palgrave Macmillan).

Pinaud, C. (2014), 'South Sudan: Civil War, Predation and the Making of a Military Aristocracy', *African Affairs*, 113(451): 192–211. https://doi.org/10.1093/afraf/adu019

Prorok, A.K. (2017), 'The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination', *International Organization*, 71(2): 213–43. https://doi.org/10.1017/S0020818317000078

Reuters (2019, 29 April), 'South Sudan Hires U.S. Lobbyists to Help Block War Crimes Court: Contract'. https://www.reuters.com/article/us-southsudan-justice/south-sudan-hires-u-s-lobbyists-to-help-block-war-crimes-court-contract-idUSKCN1S51Z2 [accessed 7 June 2020].

Sikkink, K. & Walling, C. B. (2007), 'The Impact of Human Rights Trials in Latin America', *Journal of Peace Research*, 44(4): 427–45. https://doi.org/10.1177/0022343307078953

Sriram, C.L. & Pillay, S. (2010), *Peace Versus Justice? The Dilemma of Transitional Justice in Africa* (Woodbridge, James Currey).

SSND (South Sudan National Dialogue) (2020, 9 November), 'National Dialogue Conference', press release. https://www.ssnationaldialogue.info/press-release/national-dialogue-conference-going-juba-3rd-15th-november/ [accessed 7 March 2021].

Stensrud, E.E. (2009), 'New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia', *Journal of Peace Research*, 46(1): 5–15. https://doi.org/10.1177/0022343308096152

Sudan Tribune (2015, 16 November), 'EU Vows to Support Hybrid Court on South Sudan'. https://www.sudantribune.com/spip.php?article57051 [accessed 23 May 2020].

Sudans Post (2020, 17 December), 'Final Report of South Sudan's National Dialogue'. https://www.sudanspost.com/final-report-of-south-sudans-national-dialogue/ [accessed 5 March 2021].

Sunga, L.S. (2014), 'Has the ICC Unfairly Targeted Africa or Has Africa Unfairly Targeted the ICC?', in T. Mariniello (ed.) *The International Criminal Court in Search of its Purpose and Identity* (Abingdon, Routledge), 147–73.

Teitel, R.G. (2003), 'Genealogy of Transitional Justice', *Harvard Human Rights Journal*, 16: 69–94.

Teitel, R.G. (2005), 'Transitional Justice: Postwar Legacies', *Cardozo Law Review*, 27(4): 1615–31.

Teitel, R.G. (2015), *Globalizing Transitional Justice: Contemporary Essays* (New York, Oxford University Press). https://doi.org/10.1093/acprof:oso/9780195394948.001.0001

Thomas, O. N., Ron, J. & Paris, R. (2008), 'The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners' (working paper; Ottawa, Centre for International Policy Studies).

Truth and Reconciliation Commission (2004), 'Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission' (Accra, Graphic Packaging Limited). http://www.sierraleonetrc.org/ [accessed 3 March 2021].

Tut Pur, N. (2021, 31 January), 'A Glimmer of Hope for South Sudan's Victims: The Government Approves War Crimes, Other Measures' (Human Rights Watch). https://www.hrw.org/news/2021/01/31/glimmer-hope-south-sudans-victims [accessed 4 March 2021].

Verjee, A. (2020), 'How Mediators Conceive of Peace: The Case of IGAD in South Sudan, 2013–15', in S.M.H. Nouwen, L. James & S. Srinivasan (eds) *Making and Breaking Peace in Sudan and South Sudan: The Comprehensive Peace Agreement and Beyond* (Oxford, Oxford University Press).

Vertin, Z. (2018), *A Rope from the Sky: The Making and Unmaking of the World's Newest State* (Stroud, Amberley Publishing).

Vhumbunu, H.C. (2018), 'The National Dialogue Initiative in South Sudan: Assessing Progress and Pitfalls', *Conflict Trends* (African Centre for Constructive Resolution of Disputes), 1: 27–34.
Voice of America, (2019, 12 March), 'UN Investigators Propose Hybrid Court for South Sudan'. https://www.voanews.com/africa/un-investigators-propose-hybrid-court-south-sudan [accessed 28 May 2020].
Willems, R. & Deng, D.K. (2016, September), 'Perceptions of Transitional Justice in South Sudan'. https://www.paxforpeace.nl/media/files/perceptions-of-transitional-justice-in-south-sudan---final-report.pdf [accessed 27 May 2020].
Winter, S. (2014), *Transitional Justice in Established Democracies: A Political Theory* (Basingstoke, Palgrave Macmillan). https://doi.org/10.1057/9781137316196
Zalaquett, J. (1990), 'Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints', *Hamline Law Review*, 13: 623–60.
Zenati, R. (2019), 'Distant Justice and Ineffectiveness of the International Criminal Court: A Role for Hybrid Tribunals?', thesis (Leiden University Repository). https://studenttheses.universiteitleiden.nl/handle/1887/77781 [accessed 22 April 2021].

Interviews

Personal Interview with a European Diplomat (ED) held in Nairobi on 5 June 2020
Personal Interview with a South Sudanese Lawyer (SSL) held virtually on 21 May 2020
Personal Interview with South Sudan Government Official (SSGO2) held virtually on 6 May 2020
Personal Interview with a South Sudanese Academic (SSA) held virtually on 5 May 2020
Personal Interview with a Civil Society Actor (CS2) held virtually on 16 April 2020
Personal Interview with South Sudan Government Official (SSGO1) held in Addis Ababa on 12 March 2020
Personal Interview with a member of Sudanese Former Detainees (FDs) held in Addis Ababa on 4 March 2020
Personal Interview with a United Nations Official (UNO) held in Addis Ababa on 3 March 2020
Personal Interview with a South Sudanese Civil Society Activist (CS1) held virtually on 23 February 2020
Personal Interview with Sudan People's Liberation Movement in Opposition (IO) held in Nairobi on 13 February 2020
Personal Interview with a Diplomat at Uganda Foreign Affairs (UFA) held in Kampala on 29 January 2020
Personal Interview with a Makerere Professor (MP) held in Kampala on 23 January 2020
Personal Interview with Sudanese Diplomat (SD) held in Nairobi on 14 December 2019
Personal Interview with a South Sudan Religious Leader (RL) held in Nairobi on 19 November 2019

To cite the article: Ibrahim Sakawa Magara (2021), 'Timing of transitional justice mechanisms and the implications for the South Sudan peace process', *Journal of the British Academy*, 9(s2): 9–33.
DOI https://doi.org/10.5871/jba/009s2.009

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk

The British Academy

Journal of the British Academy, **9(s2)**, 35–52
DOI https://doi.org/10.5871/jba/009s2.035
Posted 25 May 2021

Gendering transitional justice processes in Africa: a feminist advocacy approach to truth commissions

Elias O. Opongo

Abstract: Highlighting the place and role of women in transitional justice processes draws attention to two main aspects: the need for a holistic approach to transitional justice processes, and paying attention to the sensitive nature of gender-based violence in the whole cycle of truth commissions from articulation of the mandate of the commission, composition of the commissioners, categorisation of crimes, to the writing and implementation of the final report. A feminist advocacy approach to transitional justice is framed under a critical feminist strategy that draws attention to diverse forms of human rights violations against women in situations of conflict; structures of exclusion of women's concerns; the agency and presence of women in truth commission processes. Hence, discourse on gendering transitional justice processes has recently emerged, especially given that women have been targeted in conflict situations, giving rise to sexual and gender-based violence, and indiscriminate killing of women despite their non-combatant role. This article discusses the extent of marginalisation of cases of women's gross human rights violations in truth commission processes, while acknowledging positive attempts made so far, through critical feminism, to include women's concerns in these processes.

Keywords: Transitional justice; feminism, critical feminism, truth commissions, gender, gendering, sexual and gender-based violence, human rights violations.

Note on the author: Elias O. Opongo is a senior lecturer at Hekima University College and the director of the Centre for Research, Training and Publications (CRTP) at the same university. His main research interests include: transitional justice, post-conflict reconstruction, statebuilding and democracy, and religious extremism and violence. He holds a PhD in Peace Studies from the University of Bradford, U.K. and MA in International Peace Studies from the University of Notre Dame, USA.
ORCID ID: https://orcid.org/0000-0002-3320-7222

Introduction

African societies have been dealing with transitional processes in their quest to come to terms with the traumas of slavery, colonialism, apartheid, systematic repression, and civil war.[1] With the emerging post-colonial conflicts and wars in the African continent in the past few decades, the discourse on gender in transitional justice processes has recently emerged as an important issue of concern, particularly in relation to inclusion in truth commissions of cases of human rights violations against women. The rising number of women victims of violence has been underscored by the practice of sexual and gender-based violence targeting women in situations of conflict, the indiscriminate killing of women despite their non-combatant role, and forced bondage of women as wives or concubines to militia groups.[2] Wartime sexual violence has gained prominence in human security and historical studies, peace studies, and post-conflict reconstruction processes.[3]

Numerous approaches to transitional justice have been adopted, including the establishment of war crime tribunals and truth and reconciliation commissions (TRCs) that have been implemented in South Africa, Sierra Leone, Kenya, and Liberia, among other countries. Additionally, the international community's concern about human rights violations during war has led to the establishment of the International Criminal Court (ICC), where a number of African leaders and warlords involved in war crimes have been prosecuted. The ICC has paid special attention to violence against women, and established a legal framework for the identification, investigation, and prosecution of such crimes. Local initiatives to address war crimes have also been of great significance in the continent, with Rwanda making use of the *gacaca* courts to ensure that victims of violence in the 1994 genocide get justice.

This article draws attention to a critical feminist advocacy approach to truth commission processes, focused on diverse forms of human rights violations against women in situations of conflict, structures of exclusion of women's concerns, and agency and presence in transitional justice processes. The article notes that earlier truth commissions, such as in Argentina and Chile, paid minimal attention to categories of violence against women. However, later ones in South Africa, Kenya, Sierra Leonne, Ghana, and Liberia considered inclusion of violence against women. The inclusion of different forms of violence against women in truth commissions in Africa can largely be attributed to critical feminist advocacy that has been advanced by different civil society and women human rights groups, local and international

[1] African Union (2019).
[2] Denov (2006); see also Tripp (2010).
[3] Denov (2006); see also Human Rights Watch (2003).

organisations, as well as individuals committed to advocating for the rights of women. There is, however, a lot of work that still needs to be done in deconstructing local justice systems to pay more attention to prosecuting cases of violence against women.

In general, the term 'gender' has diverse implications as a socially constructed concept. As such, the term 'gender' can be instrumentalised to imply different social, political, economic, or religious connotations and underpinnings. For the purposes of discussion in this article, the term 'gender' will refer to social differentiations of women and men, with the intention of highlighting the place of women in truth commission processes. This is complemented by a critical feminist approach that takes into account the social dynamics of male–female interactions, power relations, and women's agency in implementation structures of truth commissions in Africa.

The discussion in this article will first focus on a conceptualisation of the transitional justice process, and its broader definitions and articulations, with particular reference to truth commissions. Then it moves on to unpacking the theoretical framework that will guide the discussion, and ends with an analysis of critical feminist advocacy on the inclusion of human rights violations against women in the truth commission processes.

Conceptualising transitional justice processes

Transitional justice refers to broad processes of post-conflict reconstruction largely based on addressing past crimes, holding accountable individuals and institutions that have committed crimes, and ensuring that victims attain justice. The International Center for Transitional Justice (ICTJ) defines transitional justice as 'ways in which countries emerging from periods of conflict and repression address large-scale or systematic human right violations so numerous and so serious that the normal justice system will not be able to provide an adequate response'.[4] This definition acknowledges the immensity of gross human rights violations that often local justice systems may not be able to handle. More and more nations have come to realise that 'the demand that every polity confront its past in an open-minded and critical fashion has become widely accepted'.[5] In the words of Kofi Annan, the former United Nations (UN) Secretary General, sovereignty is responsibility and as such nations have the responsibility to protect their citizens.[6] The concept of 'responsibility to protect' was further developed and adopted by the United Nations as a principal modus operandi

[4] ICTJ (n.d.).
[5] Bakiner (2016: 14).
[6] United Nations (n.d.).

for states, while the UN and regional governments had the responsibility to intervene in situations where a state had failed to protect its own citizens.[7]

Transitional justice, however, goes beyond simply holding the state responsible for the protection of its citizens, and brings awareness to common responsibility that cuts across all sectors of society. In other words, individuals and institutions responsible for the crimes committed are held accountable for their actions. In a sense, the transitional justice process attempts to bring a closure to historical injustices, while maintaining a delicate balance of sustaining peace given the fact that in most cases perpetrators may still have a strong influence, and could destabilise the country if not properly handled.

The African Union (AU), in 2019, adopted a Transitional Justice Policy (TJP) as 'an African model and mechanism for dealing with not only the legacies of conflicts and violations, but also governance deficits and developmental challenges with a view to advancing the noble goals of the AU's Agenda 2063, The Africa We Want'.[8] The AU commitment to transitional justice processes reflects a new shift to social–political accountability and recognition that conflicts tend to retard development, and unaddressed historical injustices weaken social cohesion, and subsequent nation-building efforts.

Olsen *et al.* observe that there are four possible approaches to transitional justice process.[9] First is a *maximalist* approach that emphasises prosecution of past crimes and the rendering of retributive justice to the victims; second is the *moderate* approach that advocates for truth commissions with a focus on a 'victim-oriented restorative justice mechanism that holds perpetrators accountable through non-judicial processes';[10] third is the *minimalist* approach that is cautious and prefers not to hold perpetrators accountable, and instead opts for amnesty; fourth is a *holistic* approach that brings together the three approaches above, depending on the socio-political imperatives of a particular context. In other words, what Olsen *et al.* are proposing here is that the transitional justice process is a delicate balance, and the instituted process ought to juggle between rendering justice to the victims, holding perpetrators accountable, and sustaining peace in a fragile post-conflict context. The discussion in this article focusses on truth commissions as a tool for a transitional justice process.

Truth commissions have become practical platforms for peace sustainability in fragile post-conflict societies. The commission brings together victims and perpetrators

[7] Ibid.
[8] African Union (2019).
[9] Olsen *et al.* (2010: 982–3).
[10] Ibid.

with the intention of discovering the truth, and rendering justice to victims, and accountability to perpetrators. The operating definition for the truth commissions in this discussion is the one provided by Mark Freeman, who defines a truth commission as:

> an ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.[11]

The above definition is complemented by the conceptualisation of truth commissions advanced by Eric Wiebelhaus-Brahm who observes that there are four main characteristics of truth commissions: first, that they tend to focus strongly on recent past human rights abuses; second, that they investigate crimes committed during a particular political period (such as civil war, political upheaval, or rule by dictatorial regime); third, they are temporary and may run for a span of six months to two years; fourth, truth commissions, while independent, are also officially sanctioned, often within legal frameworks. [12]

While truth commissions have had a tremendous impact on post-conflict reconstruction, there have been concerns that the commissions have not adequately addressed human rights violations against women in situations of conflict. Gendered agency in the transitional justice process is fundamentally important. Annika Björkdahl and Johanna Selimovic argue that gendered agency 'delivers more credibility and substance to the notion of just-peace and enables a theoretical conceptualization more reflective of justice concerns that emanate from the "bottom up"'.[13] It is therefore crucial to consider a gendered approach to transitional justice, and particularly in the truth commission processes, given that women have often suffered the brunt of war and conflict.

Diverse research has shown that war is gendered[14] and that in recent years, women and children have been the main victims. For example, according to Jan Pettman, 80 per cent of the casualties in World War I were soldiers who were largely men.[15] However, only 50 per cent of the victims in World War II were soldiers. Furthermore, soldiers accounted for only 20 per cent of deaths in the Vietnam War, whereas other

[11] Freeman (2006: 18); see also Hayner (2001: 14).
[12] Wiebelhaus-Brahm (2010: 14).
[13] Björkdahl & Selimovic (2015: 166).
[14] Pankhurst (2007); see also Kandiyoti (1998: 274–90).
[15] Pettman (1996: 89).

casualties were civilians, mostly women and children.[16] By the 1990s, 90 per cent of deaths were mainly civilians, with women and children again making up the majority.[17] It is estimated that between 215,000 and 257,000 women were victims of sexual assault during the war in Sierra Leone.[18] Hence, the gendering of violence has rendered women more vulnerable, particularly in situations of conflict.

The UN Security Council Resolution 2106 (2013) on conflict-related sexual violence focuses, predominantly, on investigating sexual and gender-based violence (GBV) during and after conflict in an attempt to prevent future atrocities.[19] Notwithstanding its importance, this Resolution, as is the case with many other similar initiatives, addresses the important issues of investigating, documenting, and litigating past acts of violence, especially GBV, but does not necessarily create much scope for building the necessary platforms to create the right conditions for women's diverse voices to be heard, their varied experiences acknowledged, and their diverse needs recognised.[20] In order to put into effect the previous Resolution 1889 (2009), stressing the participation of women and creating a commitment to provide resources for 'advancing gender equality', there is need for greater recognition of gender equality in all spheres of life (including social, economic, and political) for the future of the application and implementation of transitional justice.[21]

The UN Security Council Resolution 1325 of the year 2000 calls on 'all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict'.[22] The focus on sexual and gender-based violence (SGBV) has raised awareness of the need to develop new frameworks for addressing such situations of violence in post-conflict contexts.

To a great extent, transitional justice and peace-building practices tend to re-entrench gendered hierarchies, based on male dominance, by ignoring women or by limiting their participation to passive victims in need of safety and security.[23] According to the International Center for Transitional Justice report (2006), a 'Women's experience of political violence is often neglected in transitional justice approaches. Far too often, truth commission mandates, judicial opinions, and policy proposals for reparations and reform have been written, interpreted, and implemented with little regard

[16] Ibid.
[17] Roberts (2010: 115–35).
[18] Graybill (2017: 53–73).
[19] United Nations (2013).
[20] Graybill (2017: 53–73).
[21] United Nations (2009).
[22] United Nations (2000); ICRC (2019).
[23] Björkdahl & Selimovic (2015: 165–82).

for the distinct and complex injuries women have suffered.'[24] Hence, the critical feminist approach to advocating inclusion of human rights violations against women, gained momentum in a number of truth commissions in Africa, drawing attention to the need for a more holistic and inclusive approach to truth-telling processes in post-conflict settings.

Critical feminism in truth commission processes

This article applies critical feminism as a theoretical framework for understanding strategies that have been applied to integrate women's experiences of violence into the truth commission process. Feminist theories tend to be focused more on power relations, agency, individual or group experiences, socially constructed systems, and knowledge that tend to marginalise women's concerns.[25] Feminist and critical theories seek to disrupt the comfort of the status quo while emphasising individual women's experiences as point of departure. Hence, critical feminism brings to consciousness issues around power imbalances, patriarchy, social justice, marginalised narratives, and cultural, racial, and political biases, while drawing attention to women's agency in driving the desired social change.[26] Borrowing from Deborah Rhode's[27] interpretation of application of critical feminism, a number of interpretive frameworks relevant to gendered perspectives in truth commissions can be deduced: on a political level, critical feminists seek to advocate for equal treatment between men and women in the design and implementation of the truth commissions. At the substantive level, critical feminists aim to make gender a focus of analysis in which specific legal frameworks within the truth commission processes are observed. This is crucial because the development of local and international legal frameworks that recognise human rights violations against women is crucial to the integration of gendered perspectives in truth commissions. On the methodological level, critical feminists aim at correcting ways in which truth commission processes have been conducted, without in-depth cognisance of the variation in female representation of cases of sexual and gender-based violence; as statement taking; and articulation of the findings of crimes against women.

Gender concerns are often reduced to constitute a subject matter of women and girls alone. Critical feminism takes a different approach, and draws attention to the

[24] (ICTJ 2006: 3).
[25] Acker *et al*. (1991: 423–35); see also Tisdell (1995).
[26] Collins (1990); see also Lather (1991).
[27] Rhode (1990: 617–38).

fact that gender framing in transitional justice processes has tended to be patriarchal, with strong undertones of male dominance. Moreover, the reference to women's conflict experiences is often reduced to sexual violence, where women are portrayed unilaterally as victims. But the complexities in truth commission processes in terms of categorisation of crimes, identification of victims, truth-telling process, and witness interrogation are fundamental to the generation of gender-sensitive processes. While there are limitations on the extent to which truth commissions can conduct a full investigation into past crimes, they can nevertheless highlight differential gendered experiences of violence. Vasuki Nesiah *et al.* note that:

> Truth commissions usually operate with a balance of probabilities test, rather than the harsher proof-beyond-doubt criteria required for most criminal prosecutions; thus, the evidentiary requirements are more victim friendly. Nevertheless, sensitivity to the embedded gender biases in rules of evidence and procedure is important when truth commissions make findings and establish the official record.[28]

Consequently, by mainstreaming gender into the truth commissions, many women recognise that 'truth commissions can provide an extraordinary window of opportunity to highlight neglected abuses, research the enabling conditions of gendered violations, provide a forum for victims and survivors, recommend reparations that redress injustices, and leave a long-term legacy that is responsive to women's history and quest for reform'.[29]

Gender-mainstreaming in truth commissions

There has been a great push by different women's groups to consider gender mainstreaming in transitional justice processes, away from the androcentric approach in truth commissions that had dominated earlier truth-telling processes. Mainstreaming women's concerns in truth commissions implies the full integration of women's concerns—from the establishment of the mandate of the truth commission, appointing of commissioners, recruitment of staff to the collection of evidence, documentation, and public hearings, to the final report writing. The aim of these feminist perspectives is to focus on particular processes that incorporate gender into the corresponding actions, whether on training the commission and its staff on gender issues, or making sure that the writing of the truth commission reports pays attention to fundamental gender issues.[30]

[28] Nesiah *et al*. (2006: 23).
[29] ICTJ (2006: 2).
[30] Sarkin & Ackermann (2019).

Recent truth commissions in South Africa (1995), Burundi (1995),[31] Nigeria (1999), Sierra Leone (2002), Ghana (2002), Liberia (2007), and Kenya (2013) made good attempts to integrate gender-based violence. However, from a critical feminist perspective, to attain high levels of consciousness on gender-related violence in truth commissions, it took consistent campaigns, consultations, and lobbying by feminist groups, civil society organisations, and human rights groups. For example, the Truth and Reconciliation Commission (TRC) in South Africa, which was the first and most prominent in Africa, held a limited purview on women's human rights violations, particularly given that it hardly probed the intersectional aspects of race, ethnicity, class, and gender.[32] As will be discussed later, with persistent lobbying and advocacy, more attention was given to women's issues of concern by the South African TRC. Earlier commissions in Chile and Argentina hardly invoked gender perspectives in their approach to addressing historical crimes against humanity.[33]

In Ghana, Sierra Leone, and South Africa there were concerted efforts to integrate gender concerns into the truth commissions. For example, the National Reconciliation Commission (NRC) in Ghana did not mainstream gender issues in the first two years, but adopted gender concerns in its operations later on.[34] This was a result of aggressive lobbying by women's groups and civil society organisations that raised concerns over the importance of including cases of violence against women. This was particularly important because women formed 42.9 per cent of the victims of sexual violence in Ghana.[35] In the case of Sierra Leone, women comprised '100 percent of cases of sexual slavery and rape, and 38.5% of cases of reported sexual abuse'.[36] In the 1996 elections and the peace settlement in 1999 (Lomé Peace Agreement)[37], women played a crucial role in achieving peace by putting pressure on the leading warring parties to come to the negotiating table.[38] Further, the women advocated for the inclusion of SGBV in the processes of the Truth and Reconciliation Commission (TRC). Gendering transition in Sierra Leone was therefore conceived from the beginning of the transitional justice process, instead of being a concession at a later stage.

[31] In 1995 the UN Security Council set up an International Commission of Inquiry for Burundi. The Commission was to investigate human rights violations related to the assassination of the former president, Melchior Ndadaye on 21 October 1993 as well as other massacres that took place during the same period. So, strictly speaking, this was not a truth commission. The commission interviewed 667 witnesses (United States Institute of Peace 1995a).
[32] Meintjes (2011: 97).
[33] ICTJ (2006: 3).
[34] Gyimah (2009).
[35] Nesiah *et al*. (2006: 23).
[36] Nesiah *et al*. (2006).
[37] United Nations (1999).
[38] Sarkin & Ackermann (2019).

In the South African Truth and Reconciliation Commission (TRC), women accounted for 54.8 per cent of all the statements taken, while at the same time women represented only 43.9 per cent of the number of those who reported personal direct experiences of human rights violations.[39] Helen Scanlon and Kelli Muddell, noted that in the South Africa's TRC process, in most cases, women told stories of other people (husbands, children, relatives, or friends) who had been victims of the apartheid system, rather than their own stories.[40] Even when they had to tell their stories as victims of violence, they hardly got a platform to explain their role in the liberation struggle, even though to a great extent the TRC emerged as a 'microcosm of broader struggles'.[41] Hence, efforts by feminist groups to get women to articulate their experiences of violence was important. As a result, out of those women who reported direct experiences of violence, 85 per cent of them suffered severe maltreatment that affected them physically, psychologically, and economically. In total '446 statements coded as sexual abuse, 40 per cent of those in which the sex of the victim was specified reported the abuse of women'.[42]

The challenge with mainstreaming gender in all aspects of the truth commissions is the danger of pitting gender issues into opposition or competition with all other important issues. Most cases involving gross human rights violations have different social justice layers with diverse actors. A case concerning human rights violations could involve women both as victims and perpetrators, at the same time being embedded in historical injustices which the society has experienced over the years. Conducting contextual and historical research in order to 'provide a fuller understanding of the systematic aspects of the abuse of a particular political regime or political system'[43] would highlight the complexities of the diverse issues at hand. It is therefore important to adopt '[a] multidimensional analysis of the community's fault lines and political struggles'.[44] Besides, even when the commissioners are trained on gender sensitivity upon recruitment, often the gender focus tends to fade away. In a number of commissions, 'the majority of commissioners and staff have not had extensive and rigorous exposure to the history of women's human rights abuse or even to a critical and vigilant approach to gender bias'.[45] For example, in the case of Peru's truth commission which had a gender unit, the individual commissioners and staff members were well exposed to the gender justice issues and some had worked with feminist movements,

[39] Kusakufa (2009).
[40] Scanlon & Muddell (2010: 12).
[41] Meintjes (2011: 105).
[42] Kusakufa (2009).
[43] Ibid. (97).
[44] ICTJ (2006: 5).
[45] Nesiah *et al.* (2006).

yet 'there appears to be wide consensus that a gender-conscious approach did not permeate the other units' everyday functioning'.[46] There is a general limitation on the extent to which gender issues can be integrated into truth commission processes. Despite these limitations, gender sensitivity ought to be a vital component of truth commissions.

Critical feminist advocacy in truth commissions

Critical feminism questions the different dimensions of social structures that perpetuate marginalisation of women. As such, critical feminist advocacy pays attention to strategies that can be applied to change structures of marginalisation, increase opportunities and participation of women in these structures, as well as pursue new frontiers for women to realise their goals in life. The discussion in this section will emphasise diverse perspectives and advocacy strategies in truth commissions that increase women's visibility and concerns around human rights violation against women. These include: ensuring women's participation in the membership of truth commissions; training commissioners to be gender sensitive in executing transitional justice processes; establishing a gender unit that addresses women's issues in the truth commission processes; developing legal frameworks, at both local and international levels, to address violence against women; and training statement takers and truth commission staff in accurate recording of human rights violations against women.

While it is debatable whether having women commissioners on truth commissions can make a difference in ensuring sensitivities on gender-based violence, it is at the same time important that visibility of women in the commission is encouraged. For the case of Sierra Leone, it was a requirement in the TRC Act that women be selected as commissioners of the TRC. This ultimately led to the appointment of three women commissioners, including a female deputy chair, out of seven members in total (43 per cent).[47] The Women's Task Force, an umbrella organisation for women's groups and other local and international non-governmental organisations (NGOs) and civil society organisations focusing on women's rights, operated as a forum on the role of women in the TRC as well as in the Special Court of Sierra Leone.[48] The activist advocacy approach by these women's organisations brought into the limelight concerns about violence against women survivors. In Liberia, of the nine commissioners of the Liberian TRC, four were women constituting 44.4 per cent. Three of them were

[46] Ibid. (4).
[47] Ibid.
[48] Ibid.

drawn from a background that dealt with women's issues. In South Africa, commissioners were recruited in a consultative and transparent manner. Out of the seventeen members of the commission selected, eight were women drawn from the representatives of women's groups[49] and NGOs as well as legislative representatives and scholars. These women collectively influenced the commission to include gendered perspectives in their mandate.

Equally important is the training of the commissioners of the truth commissions on the categorisation, representation, narration, documentation, and perception of women's experiences of violence. The training puts everyone in the commission at the level of understanding and interpretation of cases of violence against women. In the case of Sierra Leone, all commissioners, including a few employees of the TRC, were trained by international, transnational, and national women's organisations on women's issues related to the work of the truth commission.[50] The TRC evaluated the impact of the conflict on women and promoted gender sensitivity, in particular with regard to the testimony of women witnesses and victims during public and closed hearings. Additionally, the female victims and witnesses were provided with psychosocial support and most women's groups expressed their confidence in the TRC because they had addressed gender issues. Since the Sierra Leonian TRC's concern was on how female victims could find a platform to express themselves and forge a common future through forgiveness and reconciliation, the commission recommended, 'changes in discriminatory laws that made women vulnerable to violence'.[51] In Liberia, the TRC's induction prepared the commissioners and staff to pay special attention to the issue of sexual and gender violence, particularly children's and women's experiences during armed conflicts.[52] The Commission's mandate included addressing sexual harassment and sensitivity to sex and gender-based abuses of human rights. Moreover, the Commission's composition, work, operations, and functions required gender mainstreaming.[53]

A special gender unit in truth commissions, focused on investigating and reporting human rights violations against women, is fundamentally important. Such a unit once established, focuses specifically on addressing differential gendered concerns in experiences of violence. For example, in Peru's truth commission, a special gender unit was established to look at the sexual and gender-based violence against women.[54] The unit acquired a 'watchdog function for the commission' ensuring that gender matters were

[49] United States Institute of Peace (1995b).
[50] Ibid.
[51] Scanlon & Muddell (2010: 11).
[52] Sarkin & Ackermann (2019).
[53] Meintejes (2010: 89–93).
[54] Nesiah *et al.* (2006: 4).

not marginalised.[55] The Liberian TRC was the main mechanism for the mainstreaming of gender in its operations through a separate gender unit and an associated committee.[56] The Gender Committee was set up as a separate organisation, consisting of women's groups and government officials. The Liberian TRC also held a hearing to which women's groups came to share their experiences of the civil war, and this was broadcast live on radio and television. Hence, the Liberian TRC gender-related work focused exclusively on women.

The South African TRC lacked a gender unit and from the onset did not consider gender issues separately, until later when feminist groups and other institutions raised awareness of the need to consider special category of women's cases of abuse. For example, the Women's National Coalition (WNC) called for a more integrated approach to addressing issues important to women at the TRC.[57] Furthermore, the WNC demanded recognition of the roles that women play in society and how gendered discrimination and violence had affected them during the apartheid era.[58] In addition, a submission produced by University of Witwatersrand's Centre for Applied Legal Studies (CALS) following broad consultations with women's groups influenced the Commission's approach to the roles and experiences of women in and during apartheid.[59] The submission by CALS indicated that there were differential representations of experiences of violence by both women and men during the apartheid period, and that it was important that the commission paid special attention to women. As a result, the Commission was persuaded to special consideration to women's cases, such as: 'holding special women's hearings, creating gender-sensitive statement-taking protocols, conducting research on gender, and having a chapter on women in the final report'.[60] Consequently, public hearings on women's experiences of apartheid were organised and broadcast. Women who were scheduled to meet the killers of their sons and daughters received counselling and psychosocial support before going through the process.[61] However, the commission had limited funding to accompany these women for a longer period after the traumatic experiences of meeting killers of their relatives, children, husbands, and friends.

Establishing legal frameworks that recognise sexual and gender-based violence is crucially important. Aili Tripp notes that post conflict countries have made tremendous efforts in including sexual and gender-based violence within legal frameworks

[55] Ibid.
[56] Ibid.
[57] Goetz (1998: 241–62).
[58] Ibid.
[59] Sarkin & Ackermann (2019).
[60] Kusakufa (2009).
[61] Gobodo-Madikizela (2006).

for effective prosecution of such crimes.[62] In another study, Milli Lake underscores that a critical feminist approach by lobbyist civil society organisations and NGOs has contributed to the inclusion of SGBV among crimes for prosecution in the local courts of the Democratic Republic of Congo (DRC).[63] At the international level, critical feminist lobbyists pushed for the inclusion of SGBV, amongst crimes against humanity. This was provoked by the fact that the ICC charged a rebel leader from the DRC, Thomas Lubanga, with forced recruitment of child soldiers, but excluded sexual enslavement despite the persistence of gender activists. Helen Scanlon and Kelli Muddell observe that two more DRC militia leaders, Germain Katanga and Mathiei Ngudjolo, were charged with crimes against humanity, excluding gender violence.[64] Following strong feminist advocacy campaigns, sexual slavery charges were included and witnesses recruited. Up to 2014, a total of 63 per cent of the SGBV cases were confirmed by the ICC at the pretrial stages.[65] There has, therefore, been an increased awareness at the level of ICC to include different categories of human rights violations against women. Today SGBV refers not only to violence against women, but also against men and children. On its policy paper on Sexual and Gender-Based Crimes, the ICC states that, 'The Office recognizes the need to strengthen its in-house expertise on sexual and gender-based crimes relating to women and girls, and men and boys, both in conflict and non-conflict situations. It will continue to recruit persons with the required expertise and experience in this field.'[66] This means the phenomenon of SGBV consciousness has gained positive attention at the ICC, and the organisation has been putting mechanisms into place to professionalise the response to SGBV cases. While there has been positive progress in addressing SGBV in post-conflict reconstruction processes, it is important to note that recognition of these crimes alone is insufficient. There is a need for a more systematic approach that will highlight gross human violations against women in truth commission processes.

An accurate recording of human rights abuses affecting women is crucial, increasing the prominence of SGBV in transitional justice processes. To achieve this, the persons who take statements from victims play an important role in truth-telling and should be gender sensitive in their recording of the statements. They should be trained in approaches to such recording, thereby deepening their ability to engage with different genders—as well as with different cultural, social, and political sensitivities—and the psychosocial status of the victims. In the transitional justice processes in Peru, Ghana, and Timor-Leste, the persons who took statements were trained in

[62] Tripp (2010: 7–20).
[63] Lake (2019).
[64] Scanlon & Muddell (2010).
[65] Ibid.
[66] ICC (2014: 115).

gender sensitivity and consciousness. In Timor-Leste, 'organizing its household-mortality survey, the Commission included at least one woman in each research team who conducted a separate interview with at least one adult woman in every household'.[67] This demonstrates that it is important to take into account the fact that, in some cases, female victims prefer to talk to fellow women about their experiences of human rights violations. Hence, the commission has to be sensitive to this fact in the statement-taking process.

While the above discussion has largely focused on the live period of the commission's mandate, it is important to consider the impact of the truth-telling process on women survivors of violence, especially after the process is over.[68] This is because the post-truth-commission period often exposes victims of human rights violations to possible backlash, which can re-victimise them. A study by Karen Brounéus on women witnesses at the Rwanda *gacaca* truth-telling process indicates that women who tell their stories of abuse and torture can later be pursued by their perpetrators, causing more injury to persons who are already vulnerable.[69] Furthermore, the traumatic experiences of truth-telling processes have sometimes led to post-traumatic stress disorder that prevents healing and reconciliation.[70]

In addition, it is important to note that the process of truth-telling and truth-seeking ought to be viewed as a dialectical process—where the victims tell their stories, encounter their perpetrators, and develop mechanisms for coexistence, either through reparation, reconciliation, or compensation. The commission's mandate may not extend to assisting victims in finding justice and resettlement, but it should propose mechanisms for supporting the victims. In principle, it is the task of government to ensure that victims are supported in the post-commission period.

Conclusion

The analysis of processes of truth commissions discussed in this article indicates that it had to take a critical feminist advocacy to incorporate women's concerns in the proceedings of the commissions. While men and women suffer differently in situations of conflict, women tend to be highly vulnerable to more extreme abuses than men. Highlighting women's experiences of violence in truth commission processes seeks to attain a more holistic approach to addressing human rights violations. This is

[67] ICTJ (2006: 19).
[68] Ephgrave (2015).
[69] Brounéus (2008: 55–76).
[70] Brounéus (2010: 408–27).

particularly important given that truth-telling and testimonies of survivors are of great value to healing a nation and realising social cohesion. Hence, truth commissions provide a positive platform that can highlight the major concerns relating to the marginalisation of women.

Women's participation in truth commissions as agents of execution of the truth-telling process is equally important. As such, there is a need to have significant representation of women commissioners and staff, while paying attention to their qualifications, passion, and commitment. Such women work as personnel for gender units, statement-takers, or researchers on women's and gender issues. However, it is not enough to simply have women as commissioners or in leadership positions without substantial transformation of structures of violence and marginalisation against women.

At the core of truth commission processes is the desire to have a different nation where inclusion, justice, respect, dignity, and equity are experienced and shared by all. Truth commissions are by themselves limited in realising such a transformation, but provide a good platform for initiation of particular reforms that can move the nation onto a new page. Social–political accountability is one of the key desired achievements of truth commissions, particularly in relation to respect of human rights, and in the case of discussion in this article, protection of the rights of women at different levels of society.

References

Acker, J. (1991), 'Thinking about Wages: The Gendered Wage Gap in Swedish Banks', *Gender & Society*, 5: 390–407. https://doi.org/10.1177/089124391005003008

African Union (2019), *Transitional Justice Policy* (Addis Ababa, African Union).

Bakiner, O. (2016), *Truth Commissions: Memory, Power, and Legitimacy* (Philadelphia, PA, University of Pennsylvania Press). https://doi.org/10.9783/9780812291926

Björkdahl, A. & Selimovic, J.M. (2015), 'Gendering Agency in Transitional Justice', *Security Dialogue*, 46(2): 165–82. https://doi.org/10.1177/0967010614552547

Brounéus, K. (2008), 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts', *Security Dialogue*, 39(1): 55–76. https://doi.org/10.1177/0967010607086823

Brounéus, K. (2010), 'The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health', *The Journal of Conflict Resolution*, 54(3): 408–37. https://doi.org/10.1177/0022002709360322

Collins, P.H. (1990), *Black Feminist Thought, Knowledge, Consciousness, and the Politics of Empowerment* (Boston, MA, Unwin Hyman).

Denov, M.S. (2006), 'Wartime Sexual Violence: Assessing a Human Security Response to War-affected Girls in Sierra Leone', *Security Dialogue*, 37(3): 319–42. https://doi.org/10.1177/0967010606069178

Ephgrave, N. (2015), 'Women's Testimony and Collective Memory: Lessons from South Africa's TRC and Rwanda's Gacaca Courts', *European Journal of Women's Studies*, 22(2): 177–90. https://doi.org/10.1177/1350506814547057

Freeman, M. (2006), *Truth Commissions and Procedural Fairness* (Cambridge, Cambridge University Press). https://doi.org/10.1017/CBO9780511584473

Gobodo-Madikizela, P. (2006), *A Human Being Died That Night: Confronting Apartheid's Chief Killer* (London, Portobello).

Goetz, A.M. (1998), 'Women in Politics & Gender Equity in Policy: South Africa & Uganda', *Review of African Political Economy,* 25(76): 241–62. https://doi.org/10.1080/03056249808704312

Graybill, L.S. (2017), *Religion, Tradition, and Restorative Justice in Sierra Leone* (Bloomington, IN, University of Notre Dame Press). https://doi.org/10.2307/j.ctvpj7dnn

Gyimah, A. (2009), 'Gender and Transitional Justice in West Africa: The Cases of Ghana and Sierra Leone', ALC Research Report No. 4, August. https://www.africanleadershipcentre.org/attachments/article/43/ALC%20Report%20No.%204%20Gyimah.pdf

Hayner, P.B. (2001), *Unspeakable Truths: Confronting State Terror and Atrocity* (New York, Routledge). https://doi.org/10.4324/9780203903452

Human Rights Watch (2003), 'We'll Kill You If You Cry: Sexual Violence in the Sierra Leone Conflict'. http://www.hrw.org/reports/2003/sierraleone/ [accessed 22 February 2021].

ICC (International Criminal Court) (2014), 'Policy Paper on Sexual and Gender-based Crimes' (Geneva, International Criminal Court).

ICRC (International Committee of the Red Cross) (2019), 'ICRC Statement on Women, Peace and Security'. https://www.icrc.org/en/document/icrc-statement-women-peace-and-security-wps [accessed 12 January 2021].

ICTJ (International Center for Transitional Justice) (2006), *Truth Commissions and Gender: Principles, Policies, Procedures* (New York, International Center for Transitional Justice).

ICTJ (International Center for Transitional Justice) (n.d.), 'What is Transitional Justice'. https://www.ictj.org/about/transitional-justice [accessed 2 March 2021].

Kandiyoti, D. (1988), 'Bargaining with Patriarchy', *Gender & Society*, 2(3): 274–90. https://doi.org/10.1177/089124388002003004

Kusakufa, A. (2009), 'Truth Commission and Gender: A South African Case Study', *Africa Journal of Conflict Resolution*, 2. https://www.accord.org.za/ajcr-issues/truth-commissions-and-gender/; https://doi.org/10.4314/ajcr.v9i2.52172 [accessed on 12 February 2021].

Lake, M. (2019), *Strong NGOs and Weak States: Pursuing Gender Justice in the Democratic Republic of the Congo and South Africa* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108297745

Lather, P. (1991), *Getting Smart, Feminist Research and Pedagogy with/in the Postmodern* (New York, Routledge). https://doi.org/10.4324/9780203451311

Meintjes, S. (2010), 'Gender and Truth and Reconciliation Commissions: Comparative Reflections', in C.L. Sriram & S.P. Sriram (eds) *Peace Versus Justice? The Dilemma of Transitional Justice in Africa* (Woodbridge, James Currey).

Nesiah, V. *et al*. (2006), *Gender, Women, and Truth Commissions: The Canadian and South African Truth and Reconciliation Commissions* (New York, International Center for Transitional Justice).

Olsen, T.D., Payne, L.A. & Reiter, A.G. (2010), 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', *Human Rights Quarterly*, 32(4): 980–1007. https://doi.org/10.1353/hrq.2010.0021

Pankhurst, D. (2007), *Gender Issues in Post-war Contexts: A Review of Analysis and Experience, and Implications for Policies* (Bradford, University of Bradford).

Pettman, J. (1996), *Worlding Women: A Feminist International Politics* (London, Routledge).

Rhode, D.L. (1990), 'Feminist Critical Theories', *Stanford Law Review*, 42(3): 617–38. https://doi.org/10.2307/1228887

Roberts, A. (2010), 'Lives and Statistics: Are 90% of War Victims Civilians?', *Survival*, 52(3): 115–36. https://doi.org/10.1080/00396338.2010.494880

Sarkin, J. & Ackermann, S. (2019), 'Understanding the Extent to which Truth Commissions are Gender Sensitive and Promote Women's Issues: Comparing and Contrasting these Truth Commission Roles in South Africa, Guatemala, Peru, Sierra Leone and Liberia'. https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/10/GT-GJIL190031.pdf [accessed 20 June 2020].

Scanlon, H. & Muddell, K. (2010), 'Gender and Transitional Justice in Africa: Progress and Prospects', *African Journal on Conflict Resolution*, 9(2): 9–27. https://doi.org/10.4314/ajcr.v9i2.52170

Tisdell, E. (1995), *Creating Inclusive Adult Learning Environments: Insights from Multicultural Education and Feminist Pedagogy* (Darby, PA, Diane Publishing).

Tripp, A.M. (2010) 'Legislating Gender-based Violence in Post-conflict Africa', *Journal of Peacebuilding & Development*, 5(3): 7–20. https://doi.org/10.1080/15423166.2010.981435347428

United Nations (n.d.), 'Responsibility to Protect'. https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml [accessed 1 March 2021].

United Nations (1999), *Peace Agreement between the Governement of Sierra Leone and the RUF (Lomé Peace Agreement)*. https://peacemaker.un.org/sierraleone-lome-agreement99

United Nations (2000), *UN Security Resolution 1325*. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement

United Nations (2009), *UN Security Resolution 1889*. https://undocs.org/en/S/RES/1889(2009)

United Nations (2013), *UN Security Council Resolution 2106 (On Sexual Violence in Armed Conflict)*. https://digitallibrary.un.org/record/751023?ln=en

United States Institute of Peace (1995a), 'Commission of Inquiry: Burundi'. https://www.usip.org/publications/1995/09/commission-inquiry-burundi

United States Institute of Peace (1995b), 'Truth Commission: South Africa'. https://www.usip.org/publications/1995/12/truth-commission-south-africa

Wiebelhaus-Brahm, E. (2010), *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London, Routledge). https://doi.org/10.4324/9780203862025

To cite the article: Elias O. Opongo (2021), 'Gendering transitional justice processes in Africa: a feminist advocacy approach to truth commissions', *Journal of the British Academy*, 9(s2): 35–52.
DOI https://doi.org/10.5871/jba/009s2.035

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk

The British Academy

Journal of the British Academy, **9(s2)**, 53–74
DOI https://doi.org/10.5871/jba/009s2.053
Posted 25 May 2021

Silent peacemakers: grass-roots transitional justice and peacebuilding by women in Kenya's North Rift conflicts

Susan Mbula Kilonzo

Abstract: African Union's Transitional Justice Policy (AUTJP) acknowledges that conflicts affect women and girls disproportionately. Implied in this is the need for transitional processes that take into account the gendered nature of conflicts as well as the role of women in contributing to peacebuilding processes and transitional mechanisms. The article contextualises transitional justice within the framework of gender and grass-roots peacebuilding. From both theoretical and empirical perspectives, the article discusses snippets that depict women as contributors to peacebuilding and transitional justice mechanisms in Kenya's North Rift conflicts. The study shows that women have used responsibility in burdens; advocacy; membership in village peace committees; negotiation with patriarchy; sensitisation and memorialisation; and socio-economic empowerment, as approaches to build peace and transition communities at the grass-roots level. These efforts feed into transitional justice's tenets of peace processes, reconciliation, social cohesion, memorialisation, and local ownership. The paper illustrates the need for peacebuilders to focus more on integrating women's voices in local and mainstream peacebuilding mechanisms.

Keywords: Women, transitional, justice, grass-roots, peacebuilding, North Rift, Kenya.

Note on the author: Susan Mbula Kilonzo is an Associate Professor of Sociology of Religion at the department of Religion and Philosophy, Maseno University, Kenya. Her research interests are in the intersection of religion, peace, security, and development. Susan's current research interest has paid keen attention to the place of youth and women in grass-roots peacebuilding and transitional justice. Two recent publications on this area: Kilonzo, S. (2020), 'Youth, Religion and Development in Africa', in E. Chitando, M. Gunda & L. Togarasei (eds) *Religion and Development in Africa* (Bible in Africa Studies (BiAS) 4; Bamberg, University of Bamberg Press), 101–22; and, Kilonzo, S. & Onkware, K. (2020), 'Gendered Conflict Resolution: The Role of Women in *Amani Mashinani's* Peacebuilding Processes in Uasin Gishu County, Kenya', *The Journal of Social Encounters*, 4(1): 44–56.
Orchid ID: https://orcid.org/0000-0003-1982-2250.

Introduction

Various definitions of transitional justice seem to agree that it applies to the various formal and non-formal/traditional policy measures and institutional mechanisms that societies adopt in order to overcome past violations, divisions, and inequalities, with an aim of achieving secure and democratic transformation while responding to past human rights abuses (ICTJ 2009, UN 2014, AU 2019). Transitional justice processes aim for dialogue, memorialisation, reparation, reconciliation, accountability, and justice, among the affected. Peacebuilding efforts can therefore be contextualised within this big umbrella of transitioning from conflicts, and the search for positive peace. In fact, peacebuilding processes, and peace negotiations, as pursued by women and other community groups are all indicative elements of transitional justice (AU 2019). Galtung (1976) sees peace as the absence of widespread physical violence and distinguishes between positive and negative peace, with the former addressing root causes of violence and building relevant structures for healthy relationships. The aim of peacebuilding therefore, as Mung'ou (2018) argues, is to normalise relations and to build institutions that can manage conflicts without resorting to violence. Subsequently, in building peace, just as in transitional justice, there is a need to mainstream a set of activities and structures that promote long-term justice and the healing of relationships (SAIS 2006, Mung'ou 2018).

Kenya has experienced diverse periodic moments of injustice, during the colonial and post-independence period; most of which remain unaddressed. During the colonial period citizens suffered injustices such as loss of prime land to colonial government; violence against the population; torture and murder of freedom fighters; forced labour and little or no pay; among other vices. Systemic ethnicisation as a result of colonial rule and which in the run towards independence worsened with the formation of local/ethnic rather than national parties, to date, still haunt peacebuilding efforts and transitional justice processes. In the post-independence era most violence has been largely politically motivated, aimed at ensuring maximum control of power by the ruling government. A few landmark periods stand out: 1991/2; 1997; 2007/8; 2013. All these were election years, and the government used regional balkanisation and instrumentalisation of ethnic violence to evict minority communities in certain parts of the country, such as the Central, Western, and Rift Valley regions (Lonsdale 1994, Klopp 2002 Kagwanja 2005, Lynch 2006, 2008, Branch & Cheeseman 2009, Kambogah 2011).

The hotly contested election of 2007 is seen as the climax of ethnic violence. It resulted in mass deaths and displacements. The Kenya National Dialogue and Reconciliation (KNDR) enabled the settlement of election disputes through the creation of a coalition government (Hansen 2011). During this time, middle-class

women and women leaders rallied around to reach out for networks in the constituencies as a way of forming recognisable and formal alliances. The Women's Consultation Group (WCG), for instance, is said to have built both horizontal and vertical alliances through already-existing networks as a way of ensuring political and elite connections while maintaining local/grass-roots networks (Chang *et al*. 2015). Other efforts at the time were in the form of gender-responsive reparation as seen in the 'Nairobi Declaration on Women's and Girls' Rights'. This declaration was made from the observation that the frameworks available at the time did not quite address the needs of women and girls who had survived sexual violence during the conflicts (Moore *et al.* 2016). Other efforts were from women's collaborations with existing civil society organisations (CSOs) and non-governmental organisations (NGOs) to reach out to the displaced, physically and emotionally traumatised women, girls, children and the aged.

Among the eminent persons in the panel of Kenya National Dialogue and Reconciliation (KNDR) led by a UN mediator, Kofi Annan, and which was aimed at resolving the dispute over results of presidential elections, was Mrs Graça Machel (McGhie & Wamai 2011). On the side, she lobbied for women to join hands and speak in one voice so that their contribution to the peacebuilding processes could find a place at the table of decision-making. Other women took up advisory roles or were senior members of political delegations. While the formal process was taking place, women organised a range of forums at local and national levels (Chebet 2011).

The follow-up to the KNDR led to the enactment of Truth, Justice and Reconciliation Act on 23 October 2008 (Juma n.d., McGhie & Wamai 2011, Kariuki 2015), with commissioners appointed in July 2009. Although in previous conflicts there had been efforts by CSOs, NGOs, religious organisations, and in general efforts from various communities, an act for justice and reconciliation had not been enacted. The new Truth, Justice and reconciliation Commission (TJRC) was challenged from the start as the appointed chair received public opposition because of accusations of past violations of human rights. The vice chair, a woman, took over after almost a year of court battles. The commission's work led to a collection of 40,098 statements. The report was submitted on 21 May 2013 after a long delay. The recommendations of the report have to date hardly been implemented (Hansen 2011, Kariuki 2015). An earlier Commission of Inquiry into the Post-Election Violence (CIPEV), popularly known as the Waki Commission, did its work more quickly and recommended the formation of a local accountability process through a special tribunal to prosecute those who were responsible for organising the violence. It was out of this commission that a list was later to be released to the International Criminal Court (ICC) when the local tribunal failed in its mandate (Hansen 2011, Kariuki 2015). None of those alleged to be perpetrators were indicted at the ICC.

From this backdrop of transitional justice in Kenya, a top-down approach that is state-led with defined resources and time-frame is evidently slow and yields very little fruit. Seemingly, it is also marred by clientelism and patronage. The challenges faced by top-down government efforts to tackle the root causes of Kenya's conflicts have encouraged grass-roots-level organisations and individuals to pursue transitional justice at community level. This is largely preferred in encouraging dialogue, restitution, forgiveness, and reconciliation at community level (ACHPR 2019, AU 2019), where conflicts happen.

The role of non-state actors in transitional justice, especially at the grass-roots level, has been largely explored (Shitemi 2003, Mung'ou 2018). Furthermore, as Mueller-Hirth (2019) explains, there is a considerable amount of literature linking gender and peace. However, there are limited accounts of lived experiences of women peacebuilders, especially in the context of transitional justice, yet, as Porter (2008) shows, women are very active in informal activities at the grass-roots level but remain largely marginalised in formal peace processes. It remains important to show how women's activities at community level contribute to transitional justice and peacebuilding processes, because transitional justice processes seem to largely ignore women or include just a few women in the processes (Chebet 2011, McGhie & Wamai 2011). Furthermore, the literature depicts knowledge gaps in grass-roots transitional peacebuilding processes that enhance forgiveness, reconciliation, and healing within and among the affected communities (Abdalla 2001, Klopp *et al.* 2010). More specifically, the focus seems to be on gendered peacebuilding processes by both political and middle-class elites (Klopp *et al.* 2010, Arostegui 2013, 2015, Coomaraswamy 2015). Approaches applied by women at local levels to transitional justice efforts aimed at achieving peace and justice are to a large extent missing.

Literature and other knowledge systems represent women's participation in transitional justice and peacebuilding processes in two ways: women's active participation and subsequent agency in peace processes; and constant advocacy for the inclusion of women's issues of concern in the contents of peace talks (McGhie & Wamai 2011). This is because in situations of conflict, women, men, youths, and children are affected variously (AU 2019, Mueller-Hirth 2019). Men may suffer physical violence as they are perceived to be security providers and as a result are in the forefront of war. Their absence as a result of their direct involvement in the violence (Gichohi 2016), forces women to be head of households as breadwinners and taking the roles that traditionally are meant for men in the African context (Bouta & Frerks 2002, Kaol 2020). De Alwis (2002) calls it changing the nature of women's roles during or after the conflict, which he describes as shifting from 'traditional roles' to 'non-traditional roles'. It is referred to here as 'responsibility for burdens'. Among the Karamoja of Uganda, women have been taking up new roles to sustain their own and

their children's livelihoods, especially when their husbands are unable to participate in conflicts to raid cattle or provide for their families through livestock farming (Dolan 2002, Mkutu 2007). Mkutu (2008a) argues that, in the case of Northern Uganda, women have to make decisions about guns and ammunition, which gives them more power to determine their own welfare against aggressors. In the context of Rwanda, Adler *et al.* (2007) show that such decisions had a multiplicative effect on women, who felt increasingly threatened. All these are adaptive strategies by women to deal with conflicts. Shitemi (2003) shows that, after conflicts, women are overwhelmed by burdens that spill over from the clashes, poverty, and other sociocultural factors. She argues that their trauma is evidenced in their silence in peacebuilding convenings. This calls for support forums where women can speak up and share their stories, losses, hopes, and visions to transitions from the effects of conflicts.

Although in the past two or so decades there have been efforts to identify and address the differential effects of conflict and violence, women's voices and participation in post-conflict peacebuilding processes, especially at the local level, are still not as pronounced as they should be. This essay focuses on the place and role of women in the North Rift region, exemplifying how they have navigated the challenges posed by conflicts to them and how they continue to contribute to transformational and transitional conflict resolution agendas at the local level, within the grass-roots transitional justice framework.

Methodology

The article is based on both theoretical and empirical research. A literature review is corroborated and complemented with field data. For the field data, a broader study was carried out between July 2018 and May 2020, on the role of non-state actors in peacebuilding in the North Rift region. Although the study focused largely on the models applied by the Catholic Church in transitional justice in the region, a silent theme on gendered transitional justice emerged. The main methodological approach to the field study was in-depth interviews with church leaders, elders, coordinators of conflict resolution projects, women's and men's group leaders, youth leaders, and local government leaders in the study area to amplify Kenya's North Rift case. The key respondents were selected purposively, through visits to churches and development projects; and sometimes through snowballing. Most of the participants had either experienced ethnic violence or had been response persons or part of response teams. For this paper, a total of fourteen oral in-depth interviews and four focus group discussions (FGDs) have been used to form themes based on specific experiences in peacebuilding, such as: responsibility for burdens, advocacy, membership of village

peace committees, negotiators of culture and patriarchy, sensitisation processes, and socio-economic roles—as part of the constant struggle to transform situations of conflict. The thematic explanations are aligned to the AUTJP framework that defines transitional justice as 'the various (formal and traditional or non-formal) measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation' (AU 2019: 4). The analysis of the role played by women therefore depicts stories of determination, tactics in peacebuilding, and building a different future full of hope for positive change, especially for vulnerable women and their families and for the community at large.

Contextualising conflicts and the place of women in Kenya's North Rift

The North Rift region consists of Turkana, West Pokot, Trans Nzoia, Elgeyo Marakwet, Uasin Gishu, and Nandi counties. Ethnic conflicts characterise the region and result mainly from contentions over resources, such as land, pasture, and water (Mkutu 2006, 2008b, Bevan 2007, Eaton 2008, Greiner 2013, Bolton 2017). However, these seem to heighten during electioneering years, especially during disputed elections, which is a common occurrence in presidential elections. Trans Nzoia and Uasin Gishu Counties, for instance, are largely occupied by the Kalenjin, but with a good proportion of Kikuyu and other ethnic groups such as Luhya, Luo, and Kisii. Land conflicts have been evident in these counties during electioneering periods since 1992 (Lynch 2008, Branch & Cheeseman 2009, Rutten & Owuor 2009). The Kalenjin claim the region is their ancestral home, and that any other tribe is settled there illegally as beneficiaries of the 1963–78 ruling regime. The instrumentalisation of violence that had its roots in 1991 after the repeal of Section 2A of Kenya's Constitution to change Kenya into a multiparty democracy (Klopp 2002), spread to areas where Kikuyus had been settled by the first President (who was a Kikuyu). Subsequently, from 1992 to the present, in electioneering years, Kikuyus and other tribes living in predominantly Kalenjin regions are considered *madoadoa*, Swahili for 'aliens'. The natives therefore use election violence that happens across the country during the electioneering period, to evict Kikuyu and other communities, mostly perceived to be 'aliens', and opponents of their preferred aspirants, out of the regions.

Elgeyo Marakwet, West Pokot, and Turkana Counties experience conflicts related to land and cattle rustling. There are a number of associated factors, such as proliferation of small arms and light weapons, political incitement, competition over scarce and diminishing water and pastures, celebration of a culture of heroic raiders,

marginalisation by successive governments, and little presence of state security (Mkutu 2008b, Greiner 2013, Okumu 2013). These conflicts sometimes heighten during electioneering periods, with politicians said to be the beneficiaries of cattle theft (Mkutu 2008b, Greiner 2013).

The effects of these ethnic conflicts have been documented (e.g., Klopp 2002, Lynch 2008, Kambogah 2011). They include evictions/displacement, killings, physical injury, rape, destruction of property, and theft, which deepen the physical, emotional, and psychological trauma of communities. Men, women, youths, children, and the physically challenged experience these effects variously. The conflicts also redefine the socially ascribed duties and responsibilities of men and women variously (Gichohi 2016), with men, culturally perceived to be playing active roles of fighting and protecting the community, and women playing passive roles of care. This perception, as Gichohi argues, is likely to conceal the active and various important roles played by women, especially in communities transitioning from conflicts. Although they may not be in the forefront on battlefields, they suffer personal, social, and infrastructural loss from the above listed effects. Their roles in peacebuilding and transitional justice should therefore be evident.

The lived experiences of women in contexts of conflict have demonstrated women's agency in peacebuilding and social transformation. The burdens they bear only serve to contribute to their resilience as agents of peacebuilding as seen in studies from Kenya, Uganda, and Rwanda (Sharlack 1999, Shitemi 2003, Adler *et al*. 2007, Arostegui 2013, Mueller-Hirth 2019). The negative and positive experiences of women in the context of conflict prove that they are not naïve to the processes and intricacies of war, but are able to use these experiences as springboards for transitional justice. Women have had to apply different roles and diverse strategies in grass-roots peacebuilding within the framework of transitional justice, as will be discussed below. Such roles and strategies have included advocacy, membership of village peace committees, negotiators of culture and patriarchy, sensitisation processes, silent protectors, socio-economic roles, and silent peacemaking gestures. The discussion below is built around these roles and strategies.

Women's role in transitional justice at the grass roots in Kenya's North Rift

Although most accounts on women's participation in transitional justice and peacebuilding processes through CSOs, political representation, negotiation, and mediation teams, among other platforms, imply that women have to hold elite positions, there are grass-roots initiatives by women at community level that contribute

to transitional justice and peacebuilding. How these women take individual and collective responsibility to transition from situations of conflict, bring back normalcy, and hold their families together, are concerns that require scholarly attention. Given the lack of political will and accountability on the part of the government, women's own efforts in transitioning communities from conflicts remain key.

In the section that follows, the article provides a discussion on the place of women in grass-roots transitional justice, which is a coinage that means a framework without formal time and activity, and which serves well to tackle the present effects of conflicts during a transitioning period, while at the same time addressing historical injustices, in ways that women understand better, and in line with their (and community's) immediate and future needs. This model therefore serves a more long-term objective of not just stopping the conflicts, but reconciling communities and building more sustainable peace by strengthening relations between and among them. The snippets presented are lived experiences and roles of women in situations of conflict in the Kenya's North Rift. Although these roles by women at community's grass roots hardly find a place in the policy agenda, they are evident from the grass-roots voices. Subsequently, in this section, women are portrayed as 'silent peacemakers' at grass-roots levels.

Taking up responsibility of burdens during conflicts

When conflicts erupt, women seem to be more burdened than men in regards to the care and responsibility required of them towards children, the sick, the elderly, and their property. Their husbands, male relatives, and sons, who are mainly the warriors during conflicts, leave them behind. While in other instances, some of their spouses and sons are may be away at work, others are widowed. This further exposes their vulnerabilities during conflicts. There is hardly anyone to protect them and take care of their vulnerabilities, as a Kikuyu woman at Kiambaa in Eldoret, whose house had been torched during the 2007 post-election violence, noted, '*property is destroyed, houses burnt down, girls and women are raped, children traumatised, hospitals and schools are closed and some women give birth in the fields without help*'. These are just a few of the challenges that women and children suffer as men fight, work, or flee. This was corroborated by an account of a Kikuyu man who worked in a gas station at the height of 2007/8 violence in Uasin Gishu. He narrated:

> *when the youth from the other community decided to attack us around this area, we were caught unaware. At the time I worked at a gas station. When I saw the marauding crowd I had to scamper for safety and I ran towards the valley and hid under the cover of the forest the whole night, taking short walks towards a police station where I thought I would be safe. I was so scared for my family especially because we have a physically*

> *challenged daughter, and I knew my wife couldn't leave any of our children behind. However, I also thought it was safe for them because I was not there since I know mostly the fighters target to kill men and not women and children.*

This narrative points to the notions of insecurity that men have in situations of conflicts. Their absence also exposes women's vulnerability, and without a helping hand, this complicates the women's security. As bearers of the burden for their children, the sick, the elderly, the physically challenged, and extended communities when they are not the targeted victims, such determination becomes useful in building the agency required for transitional justice processes.

Furthermore, during conflicts, when men are on battlefields and others are guarding their communities, women become the decision-makers in the homes at that point in time. Loss of their husbands to the war implies that they become the heads of their homes. Whether experienced or not, they are in control of their households. Feeding and protecting the family becomes their primary concern. It is for this reason that the women develop survival mechanisms to provide for their families during and after conflicts. As seen in the case of the women above, the changing roles of women as necessitated by conflicts demands a change in culturally held notions of men as financial and economic providers (Adler *et al.* 2007).

The AUTJP as an African model and mechanism for dealing with conflicts, violations, and governance deficit encourages African traditional justice processes that embrace the taking up of responsibility and local ownership of processes that ensure local needs and aspirations that contribute to a shared vision. A female voice of reason and respect among the Turkana, Pokot, and the Marakwet is Tegla Loroupe, a renowned world marathon champion, who founded The Tegla Loroupe Peace Foundation in 2003. The aim of the foundation was to use sports as one of the avenues for achieving social interaction that would then translate into social cohesion through healing of past differences, and building trust and amicable solutions to conflicts in the North Rift and Horn of Africa. The foundation established mitigation programmes that included education for peace, enterprises for improving livelihoods and the environment; and conflict management projects (Mganda 2013). Through this initiative, voices like those of Naisula Lesuuda, a former journalist and now a senator, calling on communities to unite and live in peace, have been heard nationally (Okumu 2013). A similar approach was adopted by the late Bishop Cornelius Korir in the Catholic Church's peacebuilding activities in various places in the North Rift region (Mutua & Kilonzo 2016).

Advocacy on forgiveness, reconciliation, and empowerment

Women's roles in advocacy are seen in their interventions during and after conflicts. The Coalition for Peace in Africa (COPA 2014) documents a few cases of women's narratives on peacebuilding in the North Rift region. For instance, Mary Chepkwony, a Kalenjin woman affected by ethnic clashes between the Kalenjin and Kikuyu in the 1992 and 2007 elections, was evicted with her three children from her home in Burnt Forest, only to return later in the year to mobilise Kalenjin and Kikuyu women to form the Toror Chepsiria Group, named after a wild tree that grows in Uasin Gishu and towers above all the other trees, bearing fruit throughout the seasons, dry or wet. The vision was for women to give hope to all at all times. Together with Rose Barmasai and Selline Korir, they formed 'The Dream Team' and with training and the help of the National Christian Council of Churches of Kenya (NCCK), worked in different pockets of Uasin Gishu and Trans Nzoia Counties to build peace, especially during the 2007 post-election violence. With the help of USAID, in April 2008, they organised a total of eighteen dialogue forums with elders, men, women, and youth to chart the way forward for coexistence (COPA 2014).

These women illustrate a journey of determination to build and transition communities, but also to provide a model for other women to work for the same course. For instance, Beatrice Kimani, a Kikuyu woman married to a Kalenjin man, and a primary school teacher by profession, lost all the possessions she had in the 1992 Burnt Forest ethnic clashes and had to leave for her parents' home in Nyeri, even though she considered herself to be a member of the Kalenjin community, by virtue of her marriage. She later returned to help students go back to school and through the area chief, she returned to work. Although the teachers and pupils were not ready and feared for their lives, she walked door to door, taking personal responsibility for their safety, and convinced parents that their children would be safe in school. Beatrice would later in 1999 join Mary Chepkwony and Selline Korir, who at the time had started the Rural Women Peace Link (RWPL) movement, to pursue her passion for peacebuilding (COPA 2014). Shitemi (2003), while studying the RWPL, argues that such organisations are aimed at helping women cope with economic pressure and changes resulting from conflicts. They are platforms for encouragement, inspiration, and practical ideas to solutions for basic survival, bettering the individual, family, and community as a whole. These platforms deconstruct cultural notions and narratives, such as the passive roles of women in public participation for peacebuilding and transitioning communities.

In the 2007/8 conflicts, a Kikuyu woman, who was a renowned local liquor brewer, and whose community seemed to be the target for ethnic cleansing, approached a priest and asked if with the help of others they could try organise and convene a

meeting with ten elders from the two ethnic groups to initiate the peacebuilding process. This initiative is a sign of commitment and resilience of women, whose interests are in transitioning warring communities towards peace. Although this woman did not have any form of political power, or power at the community level, she knew the men (and elders) who came for the local brew in her den. Through her efforts, the church leadership was able to convene the first meeting in the local market, and later on in the church compound for peace talks to start. Although she was not part of the meeting since elders are mainly men in the two communities, she was a true silent advocate for brokering the dialogue process and reconciliation that happened in the end.

In the FGDs held with both men and women as a way of determining gender relations in peacebuilding processes, it seemed that men held the leadership roles and determined most of the discussion agenda. Women were 'silent listeners.' Although, as observed during the FGDs, women were keen to follow the proceedings of the peace meetings their 'silent advocacy' manifested in the sense that the work that went into the processes was much more important for them than the taking of leadership roles in peace meetings. They did not want to conflict with the broader agenda set out by the peace caucuses that were mainly led by men. Their role was to internalise the general peace agenda, and implement the activities, share peace messages, and encourage those suffering and affected. All these actions, by these various women, are indicative elements of transitional justice. As AU (2019) explains, these are peace processes and negotiations that lead communities to agree on issues that in the first place antagonise them. The formation of movements like the RWPL is a basis for functional local advocacy, dialogue, and reconciliation platforms that women can use, and by extension, involve men and youth to speak to broader transitional mechanisms.

Membership of village peace committees

One of the post-conflict transitional agendas is to encourage dialogue, retribution, forgiveness, and reconciliation. For this to happen, the transitional process may require more than the perpetrators and victims. Subsequently, the involvement of different stakeholders is necessary. Village peace committees result from a collaboration between the government, religious bodies, community based organisations (CBOs), and community members. The aim is to build communities of practice within villages and strengthen activities aimed at dialogue, reconciliation, and accountability. The village peace committees, therefore, may take traditional or legal forms. The former can be done through the use of clan or customary convening, mainly through

the use of elders. The latter can be through community–local governance relations. The clan peace committees were common among the Pokots and Turkanas, where peace and conflict deliberations are made at kraal or clan level, involving different stakeholders. The community–local government peace committees were witnessed in Burnt Forest. Each village has five peace committees depending on the number of sub-villages. Each of these committees is attached to a constituent peace committee (constituting a government jurisdiction made up of several wards). The peace agenda from the different villages is channeled to the constituent peace committee for government action and/or monitoring and evaluation. This way, there is synergy towards community and statebuilding. Bringing together the five villages ensures that there is a good mix from the different ethnic groups. This mix is relevant for cohesion and coexistence.

At the time of data collection, only one committee, the Olare Peace Committee, had a female organising secretary, whose role is to coordinate all the peace activities of the five villages. She mobilises both men and women and coordinates the meetings between the committee and local government. She not only manages the agenda of the peace committee but also ensures follow-up for all the activities. In the first interview, she made an FGD meeting with members possible and it seemed they were keen to get directions from her. In an oral interview she explained:

> *Facilitation and coordination of the groups' meetings and activities is often emotional demanding, particularly when the community members have suffered the effects of the conflict. It is traumatising and hard when a facilitator of such a group identifies with the stories of the group members, stirring up their unresolved trauma. Constant training and therapy sessions are needed to help organisers deal with their experiences before addressing others.*

This particular instance implies that women have the ability to take up leadership roles in the peace processes at the community's grass roots. Although the numbers of such women leaders are not many, these few instances are indications that given a chance, or if they seek earnestly for these positions, they are able to provide the needed community-level leadership for transitional justice.

COPA (2014) documents the story of Florence Njeri Gathungu, who was touched by the incidence of women giving birth prematurely from the stress of conflicts during the 2007 conflicts. As a secretary to a local Catholic Church where she lived, she was able to reach out to the then Bishop, who with the help of Catholic Relief Services (CRS) provided humanitarian support to these women, and the elderly who were at the time sheltering in the church and school premises. Njeri and other women, as COPA (2014) shows, have worked with church leaders, CRS and other NGOs and CBOs to facilitate peacebuilding activities and transitioning from conflicts. AU (2019: 21)

encourages that transitional justice should take into account the situation of women, children, and other vulnerable groups and ensure the representation of women in the decision-making processes.

Negotiating patriarchy for conflict-prevention, reconciliation, and accountability

How is indigenous culture understood in the context of transitional justice and how would women negotiate with the patriarchy to institute their agency in conflict resolution efforts? Although in almost all the communities represented in the Kenya's North Rift, the custodians of culture are men, there are instances where women's voices are necessary. Gichohi (2016) explains that, in Turkana, women are involved in peace meetings at the kraal level where women are invited to give information during mapping hotspots of conflicts. They are also called to give information on impending raids and early warnings of attacks such as seeing footprints. During data collection at Kainuk, the border between West Pokot and Turkana Counties, a woman who had suffered the loss of her two sons from ethnic conflicts explained:

> *We hear when our spouses and warriors plan not to go to market to buy or sell their animals and we know there is impending danger. When the warriors disappear for a number of nights, we understand that they are deep in the forest planning for war. Although some women would be allies and side with men, in a number of instances we sympathise with our fellow women from the targeted community and issue warnings to them for their husbands to prepare for the attacks.*

Although sometimes this information cannot be useful for averting the violence given its spontaneity, it gets the target community ready to avoid ambushes. They are able to run away, hide, or fight back.

Data showed that women have influenced the process of war, dialogue, and reconciliation silently, either through their spouses or through negotiations that influence the decisions of the elders. Among the Kikuyu, Pokot, and Marakwet, it emerges that there are instances where respectable elderly women who hold the status of female elders are allowed to sit in the council of elders' meetings. In this position, they are able to negotiate when need be. When and where their opinions are not considered, since this is the prerogative of the male elders, having followed the proceeding of the meetings, the women can silently and secretly influence their spouses to make decisions that favour peace in place of conflict. The power dynamics at play seem not to deter their willingness to have communities reconcile and transition them into peaceful coexistence.

Oaths have been culturally used to start or prevent wars. Once an oath is taken with the aim of stopping conflict, if there is a need for men to go back to war, only another oath can be used to neutralise the first one. If they go against the cease-war oath, calamities befall them and the community at large. Women are at times said to influence or support the men to take oaths. In one of the FGDs in Uasin Gishu County, women were in support of an oath-taking activity that was to hold men responsible and accountable for ethnic conflicts. *Muma* and *kwanyan* for the Kikuyu and Kalenjin communities, respectively, was to be taken by men, who are mainly the perpetrators of violence, and also the custodians of culture. The shedding of the bull's blood, which is slaughtered during the ceremony, and the sharing of the blood and meat, is a symbol of unity for elders and warriors from both communities. Once this is done, both men and women are assured of safety. This ceremony holds them accountable for future actions, and, as AU (2019: 12) shows, the participation of victims, perpetrators, and community members in such traditional resolution mechanisms is a benchmark for a successful African traditional justice mechanism.

The Pokot and Turkana used a similar oathing process in Kainuk in the Turkwel conflict corridor in early 2015 during a time when cattle rustling had claimed the lives of several people in the region. However, the Pokots had already taken an oath called *mis*, which binds them together for war. For the *mis* to be broken, a *kwanyan* ceremony was needed, and as such they had to assemble the twelve elders (mainly men) from the different Pokot clans. The mediator of the peace talks at the time was a church leader, the Bishop of a Catholic Church, who, given his age and position, was considered an elder. The negotiation meeting took only ten minutes and a deal was brokered for transitional justice processes to begin. Afterwards, the Bishop had to convince the elders from both communities, who are very protective of their women, to allow him to engage women and youth in the peacebuilding process. They immediately agreed to dialogue, to suspend daily killings, and for the youth and women to be engaged in the transitioning processes.

In high-level cultural meetings, women are not allowed to take part in the conflict resolution conversations. However, women may invoke certain cultural practices to either stop war or allow it to happen. The Turkana women, for instance, use a *rokatio*, a belt that is used to tie the waist of a woman who has recently given birth. Once the stipulated period for the use of the belt is over, the belt is removed through a traditional ceremony. It is a taboo for the men in the family of this woman who is using a *rokatio* to fight. The belief is that, if they do, they will lose the fight to their opponents and many of them would be killed. In some instances, women are known to prolong the period of the use of the belt just to hold back their men from going into war.

This picture may be contrasted with that of the Acholi of Northern Uganda. As Langole (2014) shows, women are seen to occupy and make decisions at certain

levels of peacebuilding meetings—*ekoi*, *etem*, and *akiriket*. Langole explains that *ekoi* and *etem* are more inclusive while the *akiriket* is the preserve of elders. Both female and male elders play a role in the *ekoi*. *Akiriket* is the preserve of male elders and handles issues related to more complex conflicts. It is an expensive ritualised affair and the deliberations take more time that *etem*. Similar accounts of women's involvement, although with limited power, have been described for the Pokot women. This participation in the peace committees and cultural meetings provides latitude for women to follow the proceedings of the meeting and be better placed to make certain decisions about conflict transformation.

Youth too are able to use the same culture to influence the decisions of elders. A male coordinator of a peace programme, and who in 2008 was 25 years old, seemed to sympathise with the position of women and children in conflict situations. He rescued a group of defenceless women, children, and youth, who had been surrounded by warriors from a different ethnic group in the 2007/8 elections, using the very culture that the elders had taught him as a youth. He, together with other warriors had been invited by the elders to strategise on how they would evict members of the other different ethnic group but, in his mind, he knew the victims who were defenceless women and children (since most men had already escaped and others had been killed), needed help. The community to which the young man belonged, Kalenjin, view bloodshed as a curse on mother earth. A common saying among the Kalenjin states: 'you cannot shed blood on the soil that feeds you and your children'. This is a curse and contamination for present and future generations. This man, who was aged 37 at the time of the interview, during the planning meeting, repeated the same words to the elders and this was a 'silent bargain' to have the victims escorted away without bloodshed to a police station. This would then allow the perpetrators to possess the land of the victims. This may be juxtaposed with the practices of the Acholi of Northern Uganda. In their conflict resolution meetings, particularly *etem*, the youth, who are perceived as implementers of certain key decisions are invited and given more latitude for their opinion and are listened to by the male and female elders so that sound resolutions about conflicts and punishments, including corporal punishment, are made (Langole, 2014: 94).

Sensitisation and memorialisation for transitional justice

Sensitisation and memorialisation remains an important indicative measure of transitional justice, as AU (2019: 14) shows. Dialogue across generations and public acknowledgement mark commemorative activities that keep the communities aware of the past and how it is likely to influence the present and the future. Long-term activities and monuments, such as peace roads, bridges, monuments, and burial

sites, are all part of sensitisation and memorialisation processes as seen from the study area.

In all the counties, the powerful role of histories and how men and women pass them down to younger generations is crucial. Both educate the young men and women on the histories and genesis of violence in ways that can be harmful or beneficial. One of the distorted narratives told by men and women in the region is that one ethnic community does not belong and is seen as 'the other'. The narrative goes that this 'other' community acquired land illegally because they found favour from the then president, who belonged to their own ethnic group. Follow-up discussions with some of the community elders and members of the 'other' community revealed that the information was distorted in order to justify the perennial evictions of the 'other'. They had documents to prove that they bought land legally and were constitutionally justified to live in their homes. This is an indication of the roles that older generations, both men and women, can play to avert conflicts. The youth, who are mainly the perpetrators of violence, respect the voices of elders. They only need to be provoked to start the conflicts, or warned to end the violence. The way in which information is shared is what Rehn and Johnson (2002) refer to as one way of making future generations aware of their past. However, if the information is distorted and lacks credibility, especially among communities where conflicts are rife, the consequences can only be projected. Enshrined in this approach, where information about land and resources seems to be relevant to the male child, is a gender issue that needs to be checked and deconstructed. Wright (2014) suggests the promotion of notions of masculinities which favour nonviolence and gender equality. This, as Wright suggests, can be done in a number of ways, including developing approaches for engaging men and boys to promote gender equality and non-violence; and encouraging a culture where both male and female children are prioritised and given equal opportunities. This is likely to have valuable impacts on the lives of men and women.

Other memorialisation activities in the region include projects such as peace roads and bridges to join two villages of different ethnic communities, as seen in Yamumbi and Kapteldon, villages occupied by Kikuyu and Kalenjin ethnic groups, respectively. The youth from both villages built an eight-kilometre road, broadening what initially was a footpath to a good murram road that connects the villages at the river Lemook. At the connecting point they also built a bridge. The Catholic Relief Services and Caritas Australia supported these activities (Korir 2009: 36). While the youth worked, the women looked for food and cooked for them under the *tree of peace* next to the river. The tree would later become very significant to the two communities. In site visits in 2018 and 2019 during data collection, the community meetings were still held under the same tree, the tree of peace next to the river, as a sign of memorialisation. In Burnt Forest, the Olare and Olenguse bridges were also built to link different ethnic groups.

Another memorialisation activity was witnessed at Kapsait, the border of the Pokots and Marakwets, where members of both communities constructed a huge cross and put it on top of a hill at Kapsait border. They named the place Kapsait Lady Queen of Peace. The name in itself reflects the peace roles that women play in communities. Every 1 January they join in a procession to the cross and later gather at Kapsait Catholic Church to celebrate the peace success stories of the past year. Women prepare meals for the congregation to celebrate. These accounts support the argument that women have played varied roles in times of conflicts and transitioning (Rehn & Johnson 2002).

Compensation and empowerment through socio-economic engagements

In the 1991/2 conflicts, individual efforts are exemplified through the efforts of women like Mary Chepkwony, who, as already discussed earlier, organised a Kikuyu and Kalenjin women's group to empower themselves, and reach out to other affected members of the community. Through the contributions of group members, they built new homes for victims whose houses had been torched, demolished, or vandalised; bought sheep for each member of the group and engaged in other economic activities to enhance the empowerment of members (COPA 2014).

In the aftermath of violence in 2007/8, in West Pokot and Uasin Gishu counties, women participated in NGO, church, and community initiatives that aimed at distributing planting materials—seeds and fertiliser—to communities to start settling back into their homes. The initiators of development activities encouraged youth and men to join in the farming as a way of distracting them from relapsing into war. The leaders encouraged the conflicting communities to share seeds from the same bag, a subtle sign that the communities were in silent communication and were transitioning from conflicts.

During and immediately after the conflicts, the communities were very suspicious of each other and no one wanted to converse with anyone from ethnic groups deemed rivals. Through the humanitarian organisations and churches, a few homes benefited from a goat project. Since goats are reared mainly within the confines of the homestead under women's jurisdiction, women were to take care of these goats. Once the goat bore the first kid, the kid would be given to a neighbour, who was of a different ethnic group. If the beneficiary had been a Kikuyu, she would then donate the first kid to a Kalenjin woman. Again, this was translated as cultural gesture of reconciliation and empowerment. The families were encouraged to share in the farm produce from the seeds they had benefited from. In this kind of interaction, women would start dialogue and relieve the pain of the conflict as a way of healing.

In the sites visited, various development activities formed in the aftermath of the conflicts in 2008, with the aim of bringing women and men from the different ethnic groups together, were still in existence. A recurrent example was table-banking, an initiative that began in one of the areas in Uasin Gishu, and quickly spread to other areas that had suffered the same effects of conflicts. The table-banking concept is a simple way of loaning money to people who want to invest it in business. About fifteen to twenty members come together once a week, contribute an agreed amount of money into a pool, and then loan to two or three individuals who return the money at an agreed time with a small percentage of interest. Every week different people benefit from the pool. These meetings, besides helping in personal development, are meant to encourage dialogue amongst warring ethnic groups and encourage transitioning towards peaceful coexistence. The table-banking idea was born out of the merry-go-round concept that is largely associated with women. In some of the sites, some women would meet to contribute money on a rotational basis, others kitchenware, and others labour on their farm. The spirit is that if they are many, they would do more; but if one is working on their own, the benefits would be less. All these efforts, as AU (2019) explains, are traditional and complementary justice mechanisms that allow for local processes for communities to address disputes and restore the loss caused by violent conflicts. Community-based dialogues, and customary and clan courts are used alongside other formal mechanisms to address the justice, healing, and reconciliation needs of the affected communities (AU 2019: 12).

Way forward and conclusion

The need to understand women's experiences and contributions in conflicts and post-conflict transformation in transitional justice processes, is fundamentally important. Linking these grass-roots efforts to the larger transitional justice framework means that women's efforts in peacebuilding have become the holding filament that transforms into stronger roots enhancing social cohesion in the community. At the grass-roots level, their contribution may go unnoticed and unaccounted for. The women at the grass roots need to make efforts to make their contribution known to CSOs, NGOs, and the government. These organs should deliberately target women, and mainstream gender in formal peacebuilding and transitional justice processes. Secondly, women, on their own and together with their networks, should take stock of their contribution towards peacebuilding and transitional justice. There is a gap in this evidence, and the assumption then becomes that women are not quite involved in the processes. Evidence of their involvement is important to prove their credibility. Thirdly, the persistent inequalities in access to decision-making, political power,

influence and resources should be addressed if the efforts of women are to multiply and contribute to statebuilding. There should be deliberate support for their efforts and implementation of affirmative action should be taken seriously. It might be worth noting that the progress of women's community-based peacebuilding and transitional justice processes may be hindered by lack of expertise. Women should therefore work with groups of experts to help shape their understanding of peacebuilding processes and sharpen their agenda for greater gains. The current research findings show that, where women and communities at large partnered with churches and other organisations, the benefits were greater. As all these things happen, it is also important not to remain blind to the efforts of men. Wright (2014) shows that men's attitudes, values, and behaviours are rarely considered from a gender perspective.

Hence, the critical roles played by all the stakeholders in conflicts and conflict transformation should be building blocks in learning towards more integrated peacebuilding processes. The idea is to take a more nuanced and all-encompassing perspective in addressing conflicts and conflict transformation. As the literature has shown, men dominate the field of peace and security. Implementation of United Nations Security Council Resolution 1325 (United Nations 2000) and other related resolutions should not just target the formal mechanisms of transitional justice as platforms to include women. Greater political will and resources, as Wright (2014) explains, are urgently needed to advance the women's peace and security agenda; at the same time, the socially constructed gender roles and identities of men and boys must not be neglected.

Acknowledgement

The research project received a grant from the Nagel Institute for the Study of World Christianity, Calvin University, Grand Rapids, MI, USA, which was funded for the African Theological Advance initiative by the Templeton Religion Trust, Nassau, Bahamas.

References

Abdalla, A. (2001), 'Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature', *Journal of Law and Religion*, 15(1/2): 151–84. https://doi.org/10.2307/1051517

ACHPR (African Commission on Human and People's Rights) (2019), 'Study on Transitional Justice and Human and People's Rights in Africa' (Banjul. Gambia, African Commission on Human and People's Rights).

Adler, R. Loyle, C. & Globerman, J. (2007), 'A Calamity in the Neighborhood: Women's Participation in the Rwandan Genocide', G*enocide Studies and Prevention: An International Journal*, 2(3): 209–33. https://doi.org/10.3138/gsp.2.3.209

Arostegui, J. (2013), 'Gender, Conflict, and Peacebuilding: How Conflict can Catalyse Positive Change for Women', *Gender & Development*, 21(3): 533–49. https://doi.org/10.1080/13552074.2013.846624

Arostegui, J. (2015), 'Gender and the Security Sector: Towards a More Secure Future', *Connections*, 14(3): 7–30. https://doi.org/10.11610/Connections.14.3.02

AU (African Union) (2019), 'African Union Transitional Justice Policy' (Addis Ababa. Ethiopia, African Union).

Bevan, J. (2007), 'Between a Rock and a Hard Place: Armed Violence in African Pastoral Communities' (Nairobi, United Nations Development Programme).

Bolton, M. (2017), 'How to Use the Arms Trade Treaty to Address Armed Violence in Pastoralist Communities', Arms Trade Treaty Academy, A Project of the Control Arms Secretariat, and Pace University International Disarmament Institute (New York, Pace University). https://cpb-us-w2.wpmucdn.com/blogs.pace.edu/dist/0/195/files/2017/04/Pastoralist-Conflict-Final-13476oq.pdf

Bouta, T. & Frerks, G. (2002), 'Women's Roles in Conflict Prevention, Conflict Resolution and Post-Conflict Reconstruction' (Clingendael, The Netherlands, Netherlands Institute of International Relations Conflict Research Unit). https://www.clingendael.org/sites/default/files/pdfs/20021101_cru_bouta.pdf

Branch D. & Cheeseman N. (2009), 'Democratization, Sequencing and State Failure in Africa: Lessons from Kenya', *African Affairs*, 108(430): 1–26. https://doi.org/10.1093/afraf/adn065

Chang, P., Alam, M., Warren, R., Bhatia, R. & Turkington, R. (2015), 'Women Leading Peace: A Close Examination of Women's Participation in Political Processes in Northern Ireland, Guatemala, Kenya and the Philippines' (Washington, DC, Georgetown Institute for Women, Peace and Security).

Chebet, G. (2011), 'The Role of Women in Conflict Management in the Great Lakes Region: The Case of Kenya's Post Election Violence', MA dissertation in International Relations, University of Nairobi.

Coomaraswamy, R. (2015), *Preventing Conflict, Transforming Justice,Ssecuring the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (New York, UN Women). https://reliefweb.int/sites/reliefweb.int/files/resources/UNW-GLOBAL-STUDY-1325-2015.pdf

COPA (Coalition for Peace in Africa) (2014), *Stories of Women Building Peace: Transforming Inter-ethnic Violence in North-Rift Region, Kenya* (Nairobi, Kenya, UN Women). http://copafrica.org/wp-content/uploads/2017/01/Stories_of_women_building-peace_-transforming_inter-ethnic_violence_in_North_Rift_Kenya.pdf

De Alwis, M. (2002), 'The Changing Role of Women in Sri Lankan Society', *Social Research: An International Quarterly*, 69(3): 675–91.

Dolan, C. (2002), 'Collapsing Masculinities and Weak States: A Case Study of Northern Uganda', in F. Cleaver (ed.) *Masculinities Matter! Men, Gender and Development* (London, Zed Books), 57–83.

Eaton, D. (2008), 'Violence, Revenge and the History of Cattle Raiding Along the Kenya–Uganda Border' (Halifax, Dalhousie University).

Galtung, J. (1976), 'Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding', in J. Galtung (ed.) *Peace, War and Defence—Essays in Peace Research* (Copenhagen, Christian Ejlers), 282–305.

Gichohi, A. (2016), 'Women's Experiences in Peacebuilding Processes: The Case of Turkana County, Kenya', MA thesis in Development Studies, University of Nairobi.

Greiner, C. (2013), 'Guns, Land and Votes: Cattle Rustling and the Politics of Boundary Re(making) in Northern Kenya', *African Affairs*, 112(447): 216–37. https://doi.org/10.1093/afraf/adt003

Hansen, O. (2011), 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns', *International Law Journal*, 42(1): 1–36.

ICTJ (International Center for Transitional Justice), (2009), 'What is Transitional Justice?'. http:// ictj.org/about/transitional-justice [accessed 15 March 2021].

Juma, M. (n.d.), 'Unveiling Women as Pillars of Peace: Peacebuiding in Communities Fractured by Conflict in Kenya' (New York, Management, Development and Governance Division Bureau for Development Policy, United Nations Development Programme).

Kagwanja, P. (2005), 'Power to Uhuru: Youth Identity and Generational Politics in Kenya's 2002 Elections', *African Affairs*, 105(418): 51–75. https://doi.org/10.1093/afraf/adi067

Kambogah, G. (2011), 'Women and Conflict: Strengthening the Agenda for Peacebuilding' (Nairobi. Kenya, Maendeleo ya Wanawake Organization).

Kaol, L. (2020), 'Re-thinking Women in Peacebuilding: A Case Study of the 2007 Post-election Violence in Nairobi, Kenya', MA dissertation in Social Studies of Gender, Lund University.

Kariuki, N. (2015), 'Transitional Justice in Kenya. How Far Should We Go in Defining the Past?' (The Hague, Global Partnership for the Prevention of Armed Conflict and Nairobi Peace Initiative Africa).

Klopp, J. (2002), 'Can Moral Ethnicity Triumph Political Tribalism? The Struggle for Land and Nation in Kenya', *Journal of African Studies*, 61(2): 269–94. https://doi.org/10.1080/0002018022000032956

Klopp, J., Githinji, P. & Karuoya, K. (2010), 'Internal Displacement and Local Peacebuilding in Kenya: Challenges and Innovations' (Washington, DC, United States Institute of Peace).

Korir, C. (2009), '*Amani Mashinani* (Peace at the Grassroots): Experiences of Community Peacebuilding in the North Rift Region of Kenya' (Eldoret, Catholic Diocese of Eldoret).

Langole, S. (2014), 'The Significance of Indigenous Peace Building Initiatives as Non-formal Peace Education Systems in Northern Uganda', in S. Kilonzo & A. Njageh (eds) *Alternative Approaches to Peace Building in Africa. Journal of International Politics and Development (JIPAD)*, Special Edition, 12(2): 85–104.

Lonsdale, J. (1994), 'Moral Ethnicity and Political Tribalism', in P. Karsholm & J. Hultin (eds) *Inventions and Boundaries: Historical and Anthropological Approaches to the Study of Ethnicity and Nationalism*, Occasional Paper 11: 131–50.

Lynch, G. (2006), 'The Fruits of Perception: Ethnic Politics and the Case of Kenya's Constitutional Referendum', *African Studies*, 65(2): 233–70. https://doi.org/10.1080/00020180601035674

Lynch, G. (2008), 'Courting the Kalenjin: The Failure of Dynasticism and the Strength of the ODM Wave in the Kenya's Rift Valley Province', *African Affairs*, 107(429): 541–68. https://doi.org/10.1093/afraf/adn060

McGhie, M. & Wamai, N. (2011), 'Beyond the Numbers: Women's Participation in the Kenyan National Dialogue and Reconciliation' (Geneva, Switzerland, Centre for Humanitarian Dialogue).

Mganda, P.A. (2013), 'Sports in Cross-border Cattle Rustling Conflict Management: The Case of Tegla Loroupe Peace Foundation', M.A thesis in International Conflict Management, University of Nairobi.

Mkutu, K.A. (2006), 'Small Arms and Light Weapons Among Pastoral Groups in the Kenya–Uganda Border Area', *African Affairs*, 106(422): 47–70. https://doi.org/10.1093/afraf/adl002

Mkutu, K.A. (2007), 'Impact of Small Arms Insecurity on the Public Health of Pastoralists in the Kenya–Uganda Border Regions', *Crime, Law and Social Change*, 47(1): 33–56. https://doi.org/10.1007/s10611-007-9056-6

Mkutu, K.A. (2008a), *Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms* (Oxford, James Currey).

Mkutu, K.A. (2008b), 'Uganda: Pastoral Conflict & Gender Relations', *Review of African Political Economy*, 35(116): 237–54. https://doi.org/10.1080/03056240802194133

Moore, J., Friedman, R., Applebaum, A. & Mawby, B. (2016), 'Women and Transitional Justice' (Occasional Paper Series Volume 2; Washington, DC, Georgetown Institute for Women, Peace and Security).

Mueller-Hirth, N. (2019), 'Women's Experiences of Peacebuilding in Violence-affected Communities in Kenya', *Third World Quarterly*, 40(1): 163–79. https://doi.org/10.1080/01436597.2018.1509701

Mung'ou, C. (2018), 'The Role of Non-state Actors in Enhancing Peacebuilding Among Women in Mount Elgon Region, Kenya', *Journal of African Conflicts and Peace Studies*, 4(1): article 1. https://scholarcommons.usf.edu/jacaps/vol4/iss1/1; https://doi.org/10.5038/2325-484X.4.1.1099

Mutua, E. & Kilonzo, S. (2016), 'Transforming Conflict in the Hands and Hearts of Communities in Kenya: Understanding the Relevance of *Amani Mashinani* Model', in S. Gibson & A. Lando (eds) *Impact of Communication and the Media on Ethnic Conflict* Hershey, PA, IGI Global), 273–87. https://doi.org/10.4018/978-1-4666-9728-7.ch016

Okumu, W. (2013), 'Trans-local Peace Building Among Pastoralist Communities in Kenya: The Case of Laikipi Peace Caravan', master's thesis, Cologne African Studies Center, Cologne. https://kups.ub.uni-koeln.de/8519/

Porter, E. (2008), 'Review. Why Women's Contribution to Peacebuilding Matters', *International Studies Review*, 10(3: 632–4. https://doi.org/10.1111/j.1468-2486.2008.00813.x

Rehn, E. & Johnson, E. (2002), *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (New York, UNIFEM).

Rutten, M. & Owuor, S. (2009), 'Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya', *Journal of Contemporary African Studies*, 27(3): 305–24. https://doi.org/10.1080/02589000903118904

SAIS (School of Advanced International Studies) (2006), 'The Conflict Management Toolkit: Approaches' (Baltimore, MD, The Conflict Management Programme, Johns Hopkins University). http://www.sais-jhu. edu/resources/middle-east-studies/conflict-management-toolkit.

Sharlack, L. (1999), 'Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide', *Journal of Genocide Research*, 1: 387–99. https://doi.org/10.1080/14623529908413968

Shitemi, N. (2003), 'Rural Women Peace Link Network Groups of Western Kenya', *Canadian Woman Studies/Les Cahiers de la Femme*, 22(2): 93–8.

United Nations (2000), *UN Security Resolution 1325*. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement

United Nations (2014), 'Transitional Justice and Economic, Social and Cultural Rights', HR/PUB/13/5. (New York, UN Human Rights Office of the High Commissioner). https://digitallibrary.un.org/record/766288?ln=en

Wright, H. (2014), 'Masculinities, Conflict and Peacebuilding: Perspectives on Men Through a Gender Lens' (London, Saferworld). https://www.saferworld.org.uk/resources/publications/862-masculinities-conflict-and-peacebuilding-perspectives-on-men-through-a-gender-lens

To cite the article: Susan Mbula Kilonzo (2021), 'Silent peacemakers: grass-roots transitional justice and peacebuilding by women in Kenya's North Rift conflicts', *Journal of the British Academy*, 9(s2): 53–74.
DOI https://doi.org/10.5871/jba/009s2.053

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk

The British Academy

Journal of the British Academy, **9(s2)**, 75–102
DOI https://doi.org/10.5871/jba/009s2.075
Posted 25 May 2021

Historical injustices and transitional justice interventions in Kenya: victims' and interveners' experiences and perceptions

Muema Wambua

Abstract: This article examines historical injustices and transitional justice interventions that were initiated after the 2007 electoral conflict in the quest for conflict transformation in Kenya. During the mediation led by Kofi Annan that culminated in the signing of the National Accord in February 2008, transitional justice was emphasised as critical in attaining conflict transformation. In response, the Truth, Justice and Reconciliation Commission (TJRC) and International Criminal Court (ICC) interventions initiated a complementary restorative–retributive approach in the pursuit of transitional justice in the country. Based on content analysis of fieldwork data extracted from twenty-five focus group discussions within a sampled cluster of ten counties, this study examines and presents the experiences and perceptions of victims of historical injustices, on the one hand, and the experiences and perceptions of interveners of conflict transformation programmes, on the other hand. This is with a view to explicating the outcomes and impacts of transitional justice interventions in conflict transformation in Kenya in the post-National Accord era. In the findings, a key argument is raised that unresolved three-tier historical injustices remain critical constraints in the pursuit of transitional justice and in the quest for effective conflict transformation in Kenya.

Keywords: Conflict, conflict transformation, historical injustices, ICC (International Criminal Court), interventions, Kenya, transitional justice, TJRC (Truth, Justice and Reconciliation Commission).

Note on the author: Muema Wambua is a three-time recipient of the SSRC Next Generation Fellowship. He holds a PhD in International Relations from the United States International University—Africa. He is the author of 'The Ethnification of Electoral Conflicts in Kenya: Options for Positive Peace', *African Journal on Conflict Resolution*, 17(2): 9–40 and 'Transitional Justice and Peacebuilding: The ICC and TJRC Processes in Kenya', *African Conflict and Peacebuilding Review*, 9(1): 54–71.
ORCID iD 0000-0001-9336-0395

Transitional justice and the conflict situation in Kenya

Transitional justice is instrumental in conflict transformation in post-intervention states. States recovering from periods of protracted structural or manifest conflict initiate interventions that seek to address underlying structural issues and past injustices with a view to attaining conflict transformation. In the wake of the 2007 electoral conflict in Kenya, there was heightened attention on the need to address protracted historical injustices that have constrained the quest for peace. The political stalemate that persisted between President Mwai Kibaki and Orange Democratic Movement party leader Raila Odinga, and their allies, over the contested presidential election result led to mass atrocities, including the killing of at least 1,133 persons, the internal displacement of an estimated 350,000 others, and instances of sexual and gender-based violence, targeted especially against women.[1] This heightened the need for external interventions with a view to contriving peace. In response, the African Union (AU)-mandated mediation led by Kofi Annan culminated in the signing of the National Accord in February 2008. This Accord which was essentially a power-sharing agreement between the two conflicting parties emphasised the need to initiate conflict transformation interventions with a view to resolving historical injustices that attract conflict.[2]

The establishment of the Truth, Justice and Reconciliation Commission (TJRC) in 2009, on the one hand, and the authorisation of investigations on the Kenyan situation in the International Criminal Court (ICC) in 2010, on the other hand, presented a complementary mechanism to pursue transitional justice in the country.[3] This article examines the transitional justice interventions initiated in post-National Accord Kenya. This is with a view to framing the historical injustices in the country: in particular, the atrocities and human rights violations that were perpetrated by the state, and its security operatives, against individuals and ethnic communities and that have transcended generations, starting in the period during colonialism, at independence in 1963, in the wake of multiparty democracy politics in 1991, and after the signing of the National Accord in February 2008. Besides framing the historical injustices, the paper contextualises transitional justice by explicating its instrumental and constitutive arguments. This is with a view to presenting the experiences and perceptions of victims and interveners in five key areas: first, historical injustices; second, the state's response to the historical injustices; third, the nexus between peace and justice; fourth, the outcomes and impacts of the TJRC and ICC judicial interventions; and, fifth, the alternative indigenous judicial interventions in conflict transformation in Kenya.

[1] CIPEV (2008: 305, 348–51, 396).
[2] Kenya National Assembly (2008a: Article 9).
[3] Kenya National Assembly (2008b); ICC (2010).

The study engages document review and fieldwork. Secondary data was reviewed: first, to explicate the historical injustices and, second, to present conceptual arguments on transitional justice. Studies by Lynch, Slye, and Wambua have, for instance explored the constitutive and instrumental role played by the TJRC and ICC interventions in pursuing transitional justice in Kenya.[4] Based on such secondary data analyses, this study, in fieldwork carried out in 2018–19, integrates qualitative data extracted from twenty-five focus group discussions (FGDs) with victims and interveners of conflict transformation interventions carried out within ten counties in Kenya: Nairobi, Nakuru, Laikipia, Kisumu, Nandi, Uasin Gishu, Bomet, Trans Nzoia, Elgeyo Marakwet, and Mombasa. Two FGDs—one representing victims and one representing interveners—were carried out in each of the ten counties. This is in addition to five FGDs—two in Uasin Gishu County and three in Nairobi County—that were carried out within different demographics in these two counties as a pilot study to establish the reliability of the data collection tools. These counties were selected because they have repeatedly experienced land- and ethnic-based electoral conflicts which have occasioned the concentration of conflict transformation interventions therein. Besides identifying the clusters, the discussants in these counties were selected through purposive sampling based on their experiences: first, as victims of historical injustices especially relating to electoral conflict, and, second, as interveners of conflict transformation programmes. The study in its design hence adopted a constructivist philosophical approach with a view to understanding the meanings, experiences, and perceptions that victims and interveners attach to historical injustices and the transitional justice interventions initiated after the 2007 conflict, and their outcomes and impact on conflict transformation in the country.

While this section introduces the study and methodology deployed, the second section explores the historical injustices experienced in Kenya during the colonial period, at independence in 1963, in the wake of the multiparty democracy politics in 1991, and after the National Accord in 2008. The third section presents the contending instrumental and constitutive arguments, and a conceptual review of transitional justice interventions in conflict transformation. The fourth section broadly presents the study findings while the fifth section concludes.

Framing historical injustices in Kenya

The discourse on historical injustices in Kenya may be traced back to the colonial period. The British invasion of the protectorate in 1885 anchored the historical

[4] Lynch (2018: 95–123); Slye (2018: 49–83); Wambua (2019: 57).

injustices that have transcended generations to present-day Kenya. Studies examining the colonial state, for instance that by Ogot and Ochieng, posit that the imperial powers committed mass atrocities on the indigenous communities with a view to dominating the protectorate.[5] British settlers, working in collaboration with local proxies, displaced communities from their native lands and annexed huge tracts in the productive White Highlands in the Rift Valley, central, and coastal regions. The communities who resisted the invasion during the Mau Mau rebellion, and with the declaration of a state of emergency in 1952, suffered atrocities including mass killings of an estimated 11,000 natives and internal displacement of others as executed by the British army.[6] In a study of the atrocities committed during Mau Mau, Anderson estimates that at least 25,000 deaths were associated with the uprising.[7]

At independence in 1963, President Jomo Kenyatta's administration (1963–78) did not resolve the historical injustices suffered by the indigenous communities during the colonial period. As argued by Mazrui and Khamisi, the indigenous communities who had been displaced by the British settlers suffered localised colonisation by local administrators.[8] The redistribution and occupation of the White Highlands by local proxies, resulted in the indigenous–foreigner discourse that permeates arguments on the distribution of land resources in the country, especially in the Rift Valley, central, and coastal regions. In situations when communities protested against systemic inequalities, they suffered state-led repression, such as in the case of the human rights violations against ethnic Somalis in concentration camps during the Shifta War (1963–7).

President Daniel Moi's administration (1978–2002) advanced further historical injustices. In an analysis, Ndegwa contends that state operatives expropriated public land, and oversaw further displacement of communities from their indigenous lands, especially in the productive regions in the Rift Valley, central, and coastal regions.[9] In a review of historical injustices during the Moi administration, TJRC avers that state operatives executed mass atrocities, especially during the Bulla Karatasi (1980) and Malka Mari (1981) massacres.[10] While the state had perpetuated such atrocities during the secessionist Shifta War in 1963–7, the Bulla Karatasi and Malka Mari massacres entrenched a series of collective punishment atrocities against minority and indigenous communities in the northern frontier districts in the guise of security and

[5] Ogot & Ochieng (1995: 48–79); see also Khamisi (2018: 22–38).
[6] BBC News (2011).
[7] Anderson (2005); see also Elkins (2005).
[8] Mazrui (1994); Khamisi (2018: 22–38).
[9] Ndegwa (1997: 599–616); see also Khamisi (2018: 22–38); Mazrui (1994); Wamwere (2008: xi).
[10] TJRC (2013: 180–374).

disarmament operations.[11] In response to the failed 1982 military coup, the state declared emergency statutes and committed atrocities against dissidents, including detention without trial, sexual violence, and torture. The Wagalla (1983) and the Lotiriri (1984) massacres also depicted human rights violations during the Moi regime.[12] In response to these injustices, Press and Wambua underscore that civil-society-led non-violent resistance against the state culminated in the repealing of Section 2A of the Constitution, thereby paving the way for the return of multiparty politics in 1991.[13] The return of multiparty democracy was also a result of democratisation across the world at the end of the Cold War.

The return of multiparty politics in 1991, however, occasioned an electoral conflict cycle in Kenya due to ethno-political antagonisms. The state-orchestrated conflict perpetuated by security agencies in the Miteitei farm in the border of Nandi and Kisumu districts in 1991, as argued in Ogot and Ochieng, led to ethnic conflict that heightened the indigenous–foreigner standpoints based on the existing narratives around landownership in the Rift Valley.[14] As argued by Ndegwa, this conflict led to the killing of an estimated 1500 people and the displacement of an estimated 300,000 others.[15] The 1997 elections occasioned further conflict in the Rift Valley and the coastal region, and heightened ethno-political differences in the country. The 1997 Likoni massacre, in particular, advanced the indigenous–foreigner discourse that is anchored within historical discourses around land distribution in the coastal region. In a report, Human Rights Watch (HRW) records that this massacre led to the displacement of an estimated 100,000 non-locals and the killing of 104 others.[16]

President Mwai Kibaki's administration (2002–13) renewed the quest for transitional justice with the appointment of the Task Force led by Makau Mutua on the Establishment of a Truth, Justice and Reconciliation. The outbreak of electoral conflict in 2007 following the disputed presidential election result, however, heightened ethnic antagonisms in the country. As recorded in the Commission of Inquiry into Post-Election Violence (CIPEV) report, this conflict led to the deaths of 1,133 people and the internal displacement of 350,000 others.[17] In a further review of the elections, the CIPEV and the Kenya National Commission on Human Rights (KNCHR) reports underscore that this conflict was characterised by the indigenous–foreigner discourse that is premised on existing historical injustices, especially on the

[11] Ibid. (Vol. 1, xii; Vol. 2A, 193–220, 367–74).
[12] Ibid. (Vol. 2A, 180–374); Sheikh (2007: 45–52, 150–8).
[13] Press (2015: 205–32); Wambua (2017: 13); see also Ogot & Ochieng (1995: 198–9); Press (2006: 37–62).
[14] Ogot & Ochieng (1995); see also Barkan (1993: 93); Throup & Hornsby (1998).
[15] Ndegwa (1997: 85–99); see also Kenya National Assembly (1992); Oyugi (1997); TJRC (2013).
[16] HRW (2002: 2–3, 24); see also Akiwumi Commission (1999: 233–78).
[17] CIPEV (2008: 305, 351).

distribution of land resources.[18] The political stalemate that ensued between President Kibaki and Raila Odinga over the disputed election result heightened calls for external intervention. This conflict was resolved owing to the mediation led by Kofi Annan that culminated in the signing of the National Accord in February 2008.

During the mediation, the need to address historical injustices was emphasised as critical in attaining conflict transformation. The enactment of the TJRC Act in 2008 and the launch of the Commission in March 2009 marked a coordinated approach towards addressing the historical injustices that have constrained conflict transformation. While the TJRC, on the one hand, provided a mechanism that would address historical injustices with a view to serving retributive and restorative justice to perpetrators and victims, respectively, the ICC process initiated in March 2010, on the other hand, would help prosecute the perpetrators of the 2007 conflict while serving restorative justice to the victims through the Court's Trust Fund for Victims (TFV). The TFV, which was established by the Assembly of State Parties in 2004, intended at implementing reparations as would be ordered by the Court, would hence promote restorative justice for victims. As argued by ICC's Office of the Prosecutor (OTP), the state, however, failed to cooperate with the Court, in supplying evidence, in particular communication logs and financial transactions of the alleged perpetrators.[19]

While these two judicial interventions may have, in part, contributed to the peaceful elections in 2013 perhaps due to the deterrence occasioned by the ICC trials and TJRC investigations, besides the conflict transformation interventions implemented across the country by state and non-state actors,[20] the killing of thirty-seven people after the 8 August 2017 elections following the nullification of the presidential election result, and the killing of twenty-five others in Nairobi, Kisumu, Busia, and Migori during the 26 October fresh presidential elections as reported by KNCHR revitalised the discourse on the need to address historical injustices.[21] A review of arguments on the instrumental and constitutive value of transitional justice as postulated by scholars, and practitioners, hereinafter explicates on the TJRC and ICC interventions in Kenya.

[18] Ibid. (39, 41); KNCHR (2008: 52); see also HRW (2008).
[19] ICC (2014); see also ICC (2016).
[20] Wambua (2020: 4–7).
[21] KNCHR (2017: 16; 2018: 19).

Instrumental and constitutive arguments on transitional justice

The discourse on transitional justice in conflict transformation attracts two main contending arguments: the instrumental value of transitional justice on the one hand, and the constitutive value of transitional justice on the other. The key argument raised in studies in regard to the gap under review in this article is, first, on the *instrumental value of transitional justice*: how should transitional justice interventions be sequentially implemented in order to enhance conflict transformation without risking re-entry into conflict? Studies such as those by Murithi, and Murithi and Ngari argue that initiating transitional justice immediately after peace agreements may constrain conflict transformation as retribution may renew antagonisms amongst conflicting parties, leading to further conflict.[22] Since transitional justice interventions are anchored on prior injustices, as argued by Teitel, how, then, should judicial mechanisms such as the TJRC and ICC be enforced without constraining conflict transformation?[23] Debates on truth commissions attract further concerns on their agency as either judicial or quasi-judicial mechanisms. In the case of Kenya, the integration of the justice variable in its establishment, and the recommendations for prosecutions as postulated in the TJRC Act, and the TJRC report, firmly anchors the TJRC as a quasi-judicial mechanism.[24]

A second argument is raised on the *constitutive value of transitional justice*: that is, what are the outcomes and impact of transitional justice on peace and conflict transformation? Musila argues that transitional justice as an institutional process seeks to confront the past with a view to moving from repressive regimes to more open and democratic societies.[25] Mutua underscores that transitional justice is applied in states recovering from despotic rule and imbalances with a view to stabilising the state through inclusive reforms and change.[26] Adopting liberal arguments on adherence to human rights enshrined within international norms, Nzau espouses the victim–perpetrator argument on restorative versus retributive justice by advancing the quest for reparations for victims and the punishment of perpetrators of mass atrocity crimes. This attracts further contestations on how to serve justice to perpetrators and attain reconciliation with victims without attracting renewed conflict that would constrain conflict transformation interventions.[27]

[22] Murithi (2010: 1–19); Murithi & Ngari (2011: 10); see also Murithi (2015: 73–97).
[23] Teitel (2000: 11–26).
[24] Kenya National Assembly (2008b).
[25] Musila (2009: 28–9).
[26] Mutua (2015: 1–9).
[27] Nzau (2016: 52–7).

In respect to these two contending arguments, truth commissions assume both instrumental and constitutive agencies in transitional justice interventions due to their agency in addressing past legacies of injustices with a view to attaining peace. Truth commissions are, however, faulted as mechanisms initiated to evade justice due to their calls for reconciliation between perpetrators and victims, and amnesty for perpetrators. In a similar view, Kimathi and Kariuki assert that balancing prosecutions with amnesty may constrain peace agreements, and suppress accountability and reconciliation.[28] Internationalised criminal tribunals, which pursue the culpability of perpetrators, also emphasise the instrumental and constitutive agencies in transitional justice interventions. The ICC, in this case, pursues accountability for perpetrators of mass atrocity crimes through retribution while sequentially advancing reparations and restitution for victims. In prosecuting perpetrators, the ICC enhances accountability and may deter future commission of atrocities. Studies such as that by Nmaju posit that, although the Court may serve retributive justice, it may not enhance conflict transformation due to possible renewed antagonisms between victim- and perpetrator-communities.[29] Paternoster, in an analysis of deterrence theory, also raises caution on criminal deterrence by denoting that there is a marginal deterrence effect on retribution due to a disconnect between criminal systems and their effectiveness.[30] The arguments raised on the instrumental and constitutive agency of transitional justice in the foregoing review inform the analysis of the TJRC and ICC interventions in conflict transformation in Kenya. A presentation of findings on victims' and interveners' experiences and perceptions on, first, the centrality of unresolved historical injustices as a key variable in explaining conflict; second, the state's response to the historical injustices; third, the nexus between peace and justice; and, fourth, the outcomes and impacts of the TJRC and ICC judicial interventions hereinafter demonstrates the instrumental and constitutive role of transitional justice in conflict transformation in post-National Accord Kenya.

Findings on victims' and interveners' experiences and perceptions

Based on the foregoing secondary data analysis on historical injustices and transitional justice interventions in Kenya, this study, in fieldwork carried out in 2018–19, integrated qualitative data extracted from twenty-five FGDs with victims of historical injustices, and interveners of conflict transformation programmes. These FGDs were

[28] Kimathi (2010: 8–11); Kariuki (2015: 9–10).
[29] Nmaju (2009: 78–95).
[30] Paternoster (2010: 765–6).

carried out within ten counties in the country: Nairobi, Nakuru, Laikipia, Kisumu, Nandi, Uasin Gishu, Bomet, Trans Nzoia, Elgeyo Marakwet, and Mombasa. The interveners engaged in the FGDs included: state agencies, peacebuilding inter-governmental/non-governmental organisations, business and private sector, faith-based organisations, academia, research and training, activism and advocacy, media and communication, financing agencies, and judicial interventions. This was with a view to understanding the experiences and perceptions of victims and interveners on the impact and outcomes of the two transitional justice interventions in Kenya's conflict transformation agenda.

The discussants were selected through non-random purposive sampling based, first, on their experiences as victims of historical injustices associated with land distribution and electoral conflicts and, second, on their interactions as interveners—that is, local implementers of peace programmes. While the victims were on the one hand identified based on their experiences as victims of historical injustices, especially the atrocities committed during the 1992, 1997, and 2007 conflicts, the interveners were on the other hand selected based on their experiences and interactions with victims of historical injustices in the course of their conflict transformation interventions.

At the outset, the research deployed in primary data collection found nine key variables that would explain electoral conflicts and conflict transformation in Kenya. These variables, informed by a review of secondary data on factors that occasion electoral conflicts in Kenya, were: (i) historical injustices, (ii) structural, economic, and political issues, (iii) institutional inadequacies, (iv) legal and constitutional issues, (v) ethnic-identity-based factors, (vi) gender-based factors, (vii) cultural factors, (viii) ideological considerations, and (ix) demographic factors, in that order. Using the views generated in the twenty-five FGD sessions, the analysis identified the frequency with which any or all the above nine variables were identified by discussants per session as constraints to conflict transformation. In the study findings, and as illustrated in Figure 1, the victims and interveners in these selected counties identified other key variables which have a higher frequency than historical injustices as their key factors that constrain conflict transformation in the country.

As shown in Figure 1, there is consensus amongst discussants across the sessions in the selected counties that, while historical injustices—with a frequency of 15—inform discourses on conflict transformation, other variables including institutional weaknesses—with a frequency of 25—take precedence in explaining electoral conflicts in Kenya. In all the cluster counties selected, discussants argued that institutions charged with electoral processes, for instance the electoral commission, carry out elections that are characterised by irregularities that lead to political antagonisms amongst political party or coalition leaders, and their patronage. This argument is alluded to in the Independent Review Commission (the Kriegler Commission) report which noted

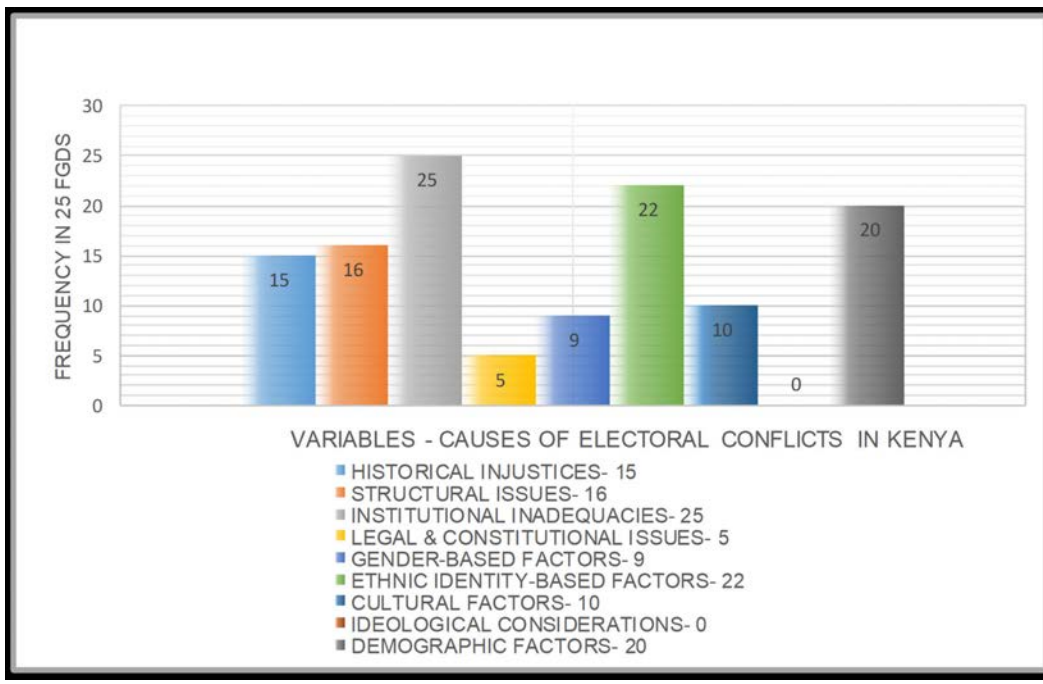

Figure 1. Victims' experiences and perceptions on causes of electoral conflicts in Kenya. *Source:* Muema Wambua.

the irregularities and illegalities in the tallying of the presidential results that eventually led to the 2007 conflict.[31] Such irregularities and illegalities were also cited by the Supreme Court of Kenya in the nullification of the 2017 presidential election.[32] Besides institutional weaknesses, discussants argued that ethnic-identity differences—with a frequency of 22—premised on the indigenous–foreigner discourse are pronounced during campaigns. A discussant in Kiambaa, Eldoret, argued that:

> *Politicians are the ones who incite violence. I would like to see the politicians who incite others being sanctioned, or denied chance to vie, so that it can be a lesson to others. Because they are the one who cause harm to others, if it were not for the politicians, there would be no violence, these kids* [who were burnt in Kiambaa KAG church] *could not have been killed. Because I have lived for 52 years here in Uasin Gishu, I have schooled with these Kikuyus, I would attend school at far distances and would eat at their* [Kikuyu] *homes during lunch time because our home was far, there was no problem, but when bad politics came in there were divisions. There is nothing we couldn't do with them* [Kikuyus].

[31] Independent Review Commission (2008: x, 115–38).
[32] Supreme Court of Kenya (2017).

> *When there were ceremonies, it was as if I was at home, I would sleep in their house, but when there was violence in 2007, we could not live together*.[33]

Reiterating the aforementioned argument that ethnic-identity differences constrain conflict transformation in Kenya, a former provincial administrator in Mukima, Laikipia, noted that political divisions between the predominant Kikuyu and Kalenjin ethnicities that were entrenched at independence over land redistribution in the region permeate political processes, leading to ethnic tensions that eventually occasion conflict, especially during elections.[34]

Discussants further identified demographic considerations—with a frequency of 20—in specific youth employment, as triggers of electoral conflicts. Emphasising youth unemployment, a member of the District Peace Committee (DPC) in Kamukunji, Nairobi, for instance, argued that interventions for peace do not address the underlying issue of youth unemployment.[35] As a result, the youth remain vulnerable as they are easily incited by the politicians to perpetuate electoral conflict.[36] Besides demographic considerations—with a frequency of 20—structural factors including economic and political marginalisation of some ethnicities, and regions, in the distribution of national resources—with a frequency of 16—were emphasised. Highlighting the marginalisation suffered by their community in Sabaot, Trans Nzoia, in the access and distribution of resources, a member of the DPC, noted that:

> *There is still marginalisation in leadership and in the distribution of resources that leads to ethnic antagonisms. The Sabaot are the indigenous community in this region. There is discrimination of the Sabaot people that has continued to cause violence. The artificial borders created at independence led to the discrimination of some communities, especially on the distribution of the land resource. … The unresolved land question since independence attracts relapse. … Other communities have received land schemes but not the Sabaot*.[37]

The discussants also identified, in particular, the relegation of women in peace interventions based on gender constructions—with a frequency of 9—and cultural factors—with a frequency of 10—as constraints to conflict transformation. In all

[33] Discussants, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.
[34] Discussant, FGD CODE 008 with Peace Implementers in Mukima, Laikipia West, Laikipia County, 18 January 2019.
[35] The District Peace Committees were restructured into County Peace Committees following the advent of devolution, as enshrined in the Constitution of Kenya, 2010.
[36] Discussant, FGD CODE 003 with local peace implementers and members of the local and District Peace Committee, Eastleigh, Nairobi, Nairobi County, 20 December 2018.
[37] Discussant, FGD CODE 019 with members of District Peace Committee in Kitale, Trans Nzoia County, 29 January 2019.

discussions held across the clusters, discussants negated ideological differences—with a zero frequency—as a cause of conflict in Kenya. This discussion hereinafter confines itself to analysis of the variable of historical injustices in relation to transitional justice, which is the subject under consideration as defined at the outset in this article.

Experiences and perceptions on historical injustices

The variable of historical injustices, as elsewhere underscored by Mwagiru and the CIPEV, was identified by discussants as a major variable that informs conflict and the conflict transformation agenda in Kenya.[38] In essence, therefore, addressing these injustices through transitional justice interventions was viewed by victims as a pre-requisite for peace. In an assessment, discussants draw their explanations of historical injustices based on their experiences in the wake of multiparty democracy politics in the country in 1991. As a result of the ethnic-identity and land-based conflict atrocities experienced in these regions, especially during the 1992, 1997, and 2007 elections, transitional justice is hence fundamentally understood, or at least explained, by victims and interveners from three contending perspectives; first, on the premise of landownership during colonial times and in the independence era during the Jomo Kenyatta regime; second, the rights to regain land lost as a result of subsequent internal displacement of supposed foreigner-inhabitants and evictions by the government during the Daniel Moi regime, especially in the wake of multiparty politics in Kenya; and, third, on the resettlement and compensation of supposed 'foreigners' during the Mwai Kibaki and Uhuru Kenyatta regimes. I have, in a typology, hence conceptualised these injustices as *first-tier*, *second-tier*, and *third-tier historical injustices*. The three-tier injustices are interlinked by *first intermediate injustices* and *second intermediate injustices*.

First-tier historical injustices, as conceptualised in this study, anchor transitional justice discourses specifically on land injustices committed during the colonial period and the associated atrocities suffered by victims. The expropriation of land in the Rift Valley, central, and coastal regions and the subsequent displacement of communities attracted the indigenous–foreigner narrative in Kenya's politics. Based on this narrative, some communities, especially the Kikuyu, are perceived to have benefitted from the colonial annexation. At independence, communities, previously displaced, suffered further injustices when their 'former' tracts were allocated to proxies and allies in the

[38] Mwagiru (2008: 11–13); CIPEV (2008: 23); see also TJRC (2013); Office of the African Union Panel of Eminent African Personalities (2014: 55).

Kenyatta regime, leading to the first intermediate injustices. Citing these first-tier injustices, a regional coordinator with PeaceNet argued that: '*historical injustices were carried out by senior chiefs like* [names withheld for ethical considerations—security of the discussant] *who distributed land without consulting the local communities. The Catholic Church owns hundreds of acres from Mathari to Mweiga yet there are so many local people without land in the region.* [Prominent Kenyan—name withheld for ethical considerations—security of the discussant] *has a ranch of 46,000 acres in Laikipia.*'[39] Such narratives about how indigenous communities' lands were distributed during the transition from colonialism explain the first-tier and first intermediate injustices.[40]

Second-tier historical injustices, as conceptualised in this study, were pronounced in the wake of multiparty democratic politics in 1991. Indigenous communities that were displaced during the first-tier injustices bought land, settled in other regions, and re-established their livelihoods. The re-introduction of multiparty politics, however, attracted ethnic politics in these regions and accentuated the indigenous–foreigner discourse that inflamed land-based conflicts, especially in the 1992 and 1997 elections. While these conflicts were reportedly instigated by state security agencies, as well as non-state actors (for instance, militia groups facilitated by the opposition), they evolved into ethnic conflicts that led to the second displacement of the perceived 'foreigner' communities from their legally acquired land. The atrocities committed during the 1992 and 1997 elections in the Rift Valley, central, and coastal regions hence inflicted second-tier injustices on communities that had experienced first-tier injustices and first intermediate injustices. These communities which suffered second-tier injustices subsequently suffered second intermediate injustices after they were, for the second time, displaced from their land during the 2007 conflict.

In the third-tier historical injustices, as conceptualised in this study, some victims who suffered first-tier injustices and second-tier injustices as well as first and second intermediate injustices were excluded from the resettlement and compensation programmes implemented by the coalition government following the signing of the National Accord in 2008. While many victims received compensation in cash and others were resettled in government-acquired lands, as explained by Nzau, some victims still seek compensation.[41] These particular victims argue that they were marginalised by the state agencies in the compensation programmes and are yet to find closure with reference to atrocities suffered during the 2007 conflict. In a discussion

[39] Discussant, FGD CODE 009 with members of the District Peace Committee in Karandi, Laikipia West, Laikipia County, 21 December 2018. Argument reiterated in TJRC (2013: Volume 2B (Pre-Interference), 295–6).

[40] See also Wamwere (2008: 25).

[41] Nzau (2016: 22–60).

with victims of the Kenya Assemblies of God (KAG)—Kiambaa church arson in Kiambaa, Eldoret, a discussant pleads that:

> *I ask from the government; we have never been compensated, we the people of Kiambaa. We have seen many people come and collect information, but they don't give us anything. The victims of Kiambaa have not been compensated. … Government interventions have helped, there are so many people for peacebuilding, counselling. Since we lost a lot of property, we will never recover it. All property I acquired as a young person was lost, nothing will be restored.*[42]

This argument on restitution is averred by another victim who noted that she has not completely healed and has never been compensated by the state.[43] In another case, a victim argued that they are not willing to go back to their legally acquired land, and are not able to rebuild their livelihoods afresh because of the cycle of displacement they have suffered out of first-tier and second-tier injustices.[44] While this three-tier historical injustices typology conceptualised in this analysis is generalized, thereby creating an impression of homogenisation of victimhood, it is essential to note that not all victims in all the selected clusters underwent the sequenced episodes of victimisation. It is also important to note that, while some individual victims may have not suffered the sequenced episodes of injustice, the pattern of historical injustices in the country, especially on land-based distribution, were largely meted out to particular ethnicities across the three tiers and hence the tendency of the analysis to concentrate upon the homogenisation of victimhood across the selected cluster counties. This three-tier historical injustices typology, intermittently fused by first intermediate injustices and second intermediate injustices, is illustrated in Figure 2.

These historical injustices entrenched during the colonial and early post-colonial eras as first-tier injustices, especially on the distribution of land resources, hence transcended generations at independence through the multiparty democratic politics era as second-tier injustices into the post-National Accord era as third-tier injustices. Based on victims' experiences, the unresolved injustices, especially the distribution of land resources, have attracted ethnic antagonisms that are oftentimes depicted amongst communities during elections. Despite the state's interventions towards transitional justice, the failure to effectively address these injustices during the first intermediate and second intermediate transitions has constrained conflict transformation.

[42] Discussant, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.
[43] Ibid.
[44] Discussant, FGD CODE 014 with victims and beneficiaries of Catholic Justice and Peace Commission/Rural Women Peace Link peace interventions in Burnt Forest, Uasin Gishu County, 23 January 2019.

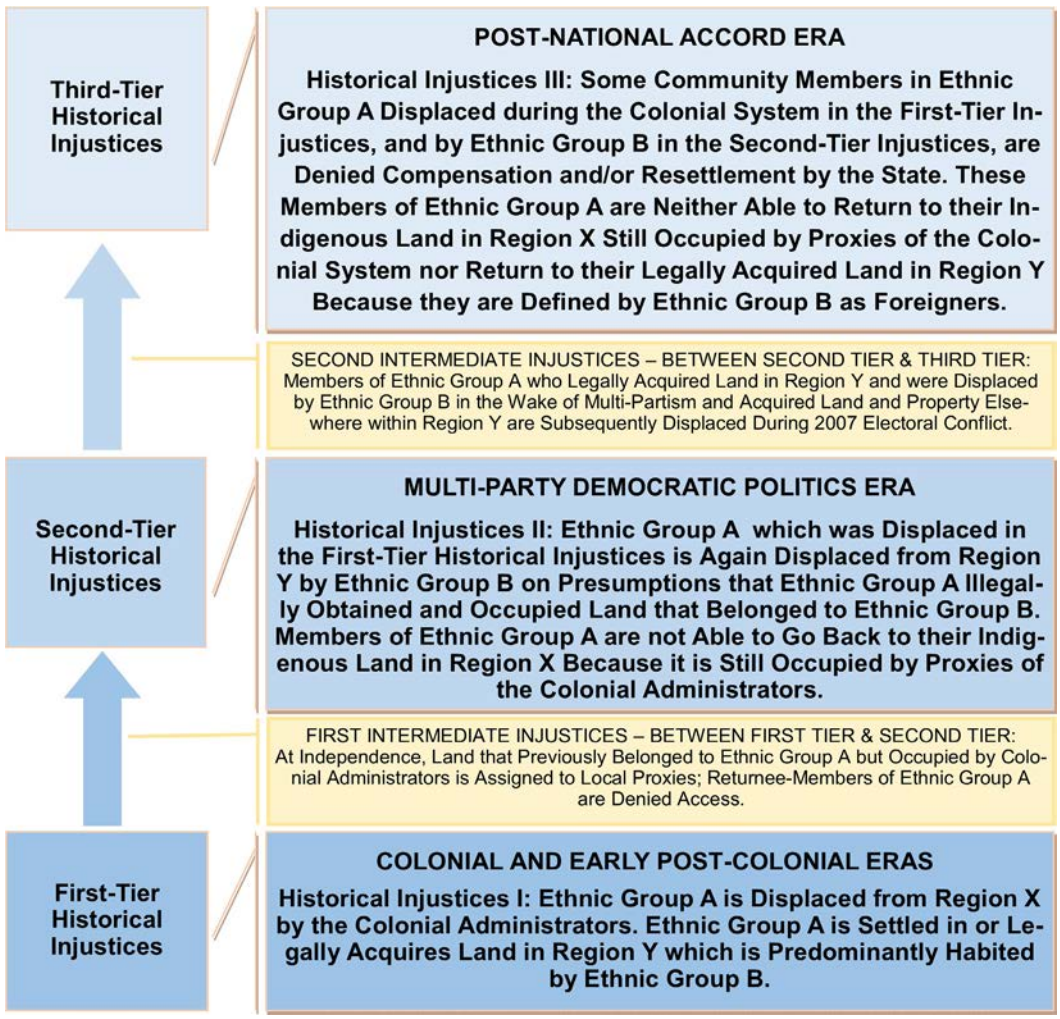

Figure 2. Three-tier typology of historical injustices on land issues in Kenya: victims' experiences and perceptions. *Source:* Muema Wambua.

Experiences and perceptions on state response to historical injustices

In a further discussion on the outcomes and impacts of the interventions initiated by the state in response to these three-tier historical injustices illustrated in Figure 2, discussants argue that the state implemented programmes that sought to address the existing indigenous–foreigner discourse, especially in the Rift Valley, central, and coastal regions. In most FGD sessions, interveners underscored that the government through the National Steering Committee on Peacebuilding and Conflict Management

(NSC) streamlined interventions for peace, and further strengthened the infrastructure for peace through district (county) peace committees, and local peace committees.

There is also consensus among intervener discussants that the government, in collaboration with non-state actors, implemented resettlement and compensation programmes that benefitted the majority of internally displacement persons (IDPs) who were victims of the 2007 electoral conflict. Victim discussants, however, identified disparities in the compensation by claiming that some IDPs were awarded ten thousand shillings, while others received forty thousand. There were some IDPs who received four hundred thousand while others received land as compensation from the government. Concerns were also raised by victim discussants regarding conflict profiteers/entrepreneurs who were not victims but benefitted from the compensation programmes as they were allocated prime land and also received cash payouts from the government. Nevertheless, the resettlement of IDPs, for instance on Waitiki land, was pointed out by interveners in Likoni, Mombasa, to have considerably addressed the land question in the coastal region. Victims and interveners, however, criticised institutions like the judiciary and the National Cohesion and Integration Commission for failing to prosecute leaders who perpetuate ethnic- and land-based incitements during elections.

While the majority of discussants explained the three-tier historical injustices from the premise of land- and ethnic-related conflicts, and their associated atrocities, some discussants especially in Kisumu highlighted economic marginalisation as a form of historical injustice that has expressly denied inhabitants equal access to development opportunities. Power distribution at the national level has since independence relegated some regions, and hence socio-economic development programmes have not been equitably distributed across the country, especially in opposition zones. Some discussants in Kisumu further talked about extrajudicial killings reportedly perpetuated by security agencies in the region during elections as a form of historical injustice. Discussants in Mukima and Karandi in Laikipia also described the extrajudicial killings allegedly committed by security agencies in the region over the proliferation of the Mungiki—an outlawed ethnic militia group with roots in central Kenya. Similar narratives about extrajudicial killings allegedly committed by security agencies and militia groups, as also reported by TJRC, were articulated by discussants in Saboti, Trans Nzoia, amongst victims of the Sabaot Land Defense Forces (SLDF)—an outlawed militia that agitated for land rights for the minority Sabaot ethnic community—in areas like Saboti and Mount Elgon.[45] A victim discussant in Saboti, Trans Nzoia, argued that victims of the extrajudicial killings and IDPs need to be compensated in order to find healing and closure. In reiteration on the need for reparations, this discussant in Saboti narrated that:

[45] TJRC (2013: Volume 1, 14, 71, 153).

> *I am from Western. We were displaced and fled to Trans Nzoia. My husband was killed and then my second born child was shot and was incapacitated to the present day. We lost everything. Up to date, I have never found residence. I live in a school. I do not have a farm, I do not have anything. … It was because of the land issues. … My husband did not want to join the perpetrators* [SLDF] *because he was born-again. … They* [SLDF] *accused him of working* [spying] *for the government. They came in the night and shot my husband and the child.*[46]

Some discussants advanced the narrative about historical injustices by explaining forced disappearances and extrajudicial killings allegedly executed by security forces to counter high crime rates in Kibera and Dandora in Nairobi. Other discussants defined historical injustices by citing atrocities allegedly committed by state agencies in their quest to counter violent extremism in Eastleigh and Majengo in Nairobi, and elsewhere in the Likoni neighbourhood in Mombasa.

Perceptions on the nexus between justice and peace variables in judicial interventions

To advance the discourse on transitional justice, discussants weighed-in on the interplay between justice and peace in the case of Kenya's conflict transformation agenda. Two key contending arguments were raised. On the one hand, victims and interveners underscored that pursuing justice, specifically in addressing unresolved historical injustices on land distribution would renew the indigenous–foreigner discourse that would elicit further ethnic antagonisms. On the other hand, victims and interveners underscored that, unless such historical injustices are resolved, the country will remain trapped in a conflict cycle due to the transcending indigenous–foreigner discourse that permeates during elections. Reiterating on the need to address historical injustices, a Youth Initiatives Kenya officer in a discussion in Dandora, Nairobi, noted that:

> *If we don't resolve the past, we will never have justice, and there will be revenge. We cannot solve peace* [conflict] *without addressing the past injustices. We do not have peace. This is illusion. This is calm before the storm. We have not addressed historical injustices. The government has never reached out to victims. The leaders are guilty, they have never apologised.*[47]

[46] Discussant, FGD CODE 018 with victims and beneficiaries of Free Pentecostal Fellowship of Kenya peace interventions in Saboti, Trans Nzoia County, 28 January 2018.
[47] Discussant, FGD CODE 005 with local implementers and beneficiaries of peacebuilding interventions in Dandora, Nairobi, Nairobi County, 21 December 2018.

The need to resolve historical injustices was averred by a member of the county peace committee in Nakuru who argued that there is the need for forgiveness on the part of the victims, with structured programmes on restitution without which there will be no reconciliation.[48] This assertion on addressing historical injustices was averred by a community service and development officer in Kisumu who argued that justice and peace must be served concurrently in order to punish perpetrators and restitute victims, however protracted the pursuit of justice would be.'[49]

Experiences and perceptions on the TJRC process

In the particular case of the TJRC intervention as a mechanism for transitional justice, there were divergent opinions from the interveners and the victims of the 2007 conflict, among other historical injustices. On the one hand, most interveners acknowledge that the TJRC process was in itself instrumental in establishing facts about historical injustices that have transcended generations, as detailed in the Commission's report findings. Interveners acknowledge that the Commission was instrumental in extracting information from victims and alleged perpetrators and hence asserted the centrality of truth-telling in uncovering the past. Interveners argue that there was significant involvement of non-state actors, especially non-governmental organisations, in providing objective information about atrocities committed on individuals and communities by state operatives. In addition, interveners argued that the TJRC created safe spaces for women to present their personal experiences about sexual- and gender-based violence they have suffered, as well as atrocities experienced by other proximate women. Interveners also asserted that the TJRC created an opportunity for minority communities to air their grievances to the state. In addition, interveners highlighted that, despite the extensive TJRC findings, the expunging of information that established culpability on the political elite by some commissioners affected the credibility of the report.

On the other hand, some victims argued that the TJRC process was elitist in that it held meetings in upmarket hotels and mostly engaged the civil society organisations, as well as the elite members of the community. While evidence given by TJRC and Slye demonstrates that the witness testimonies and hearings engaged communities at the grass-roots level in social halls, schools, and churches, some discussants argued

[48] Discussant, FGD CODE 007 with members of District Peace Committee in Nakuru, Nakuru County, 11 January 2019.
[49] Discussant, FGD CODE 010 with local peace implementers in Kisumu, Kisumu County, 21 January 2019.

that some victims who would have supplied information to the commission were sidelined.[50] In addition, some of the victims interviewed claimed that the meetings organised at the grass-roots level were biased and prearranged to suit a preferred response of the local mobilisers, perhaps with a view to isolating victims who would have otherwise exposed local perpetrators. In that respect, therefore, some victims argue that the TJRC did not sufficiently engage grass-roots communities and hence their opinions were less considered in the reporting. There were arguments by some interveners in Eldoret that the TJRC sittings were carefully crafted with witness statements extracted from some privileged members of the community with a view to protecting perpetrators of historical injustices. There was nevertheless consensus amongst interveners and victims that the failure of the National Assembly to adopt the report suppressed its implementation and hence constrained conflict transformation. In particular, discussants argued that the TJRC failed to provide reparations for victims and hence denied them closure. A member of the DPC in Kamukunji, Nairobi, further noted that the TJRC hearings and witness statements re-traumatised victims and 'opened wounds that were already healed'.[51]

While these experiences of discussants, first, to a large extent establish victimhood and, second, fault the TJRC for failing to address their plight, especially in the quest for administration of justice though reparations, victims engaged in this study established an identity that has, on the one hand, depicted one particular community—the Kikuyu—as the victims, and, on the other hand, another community—the Kalenjin—as the perpetrators. Despite evidence in reports including CIPEV (2008), KNCHR (2008), and HRW (2008) showing that other communities, for instance the Kalenjin, Luo, Luhya, and Kamba were also affected by historical injustices, the indigenous–foreigner discourse especially in the Rift Valley, central, and coastal regions has erroneously established a homogenous identity of victims. A review of the TJRC report, for instance, demonstrates the heterogeneity of victimhood in Kenya as it extensively explicates the historical injustices suffered by different ethnic communities across the country during the different epochs established in this study: that is, the colonial period, at independence in 1963, in the wake of multiparty democracy politics in 1991, and the post-National Accord era. Emphasising the heterogeneity of victims, Jacoby's theory of victimhood underscores that the construction of grievance-based identity blurs the victim–perpetrator dichotomy and may hence lead to victimhood as a collective identity.[52] In what may be defined as secondary victimhood, Laxminarayan

[50] TJRC (2013: 96–115); Slye (2018: 193–6).
[51] FGD CODE 003 with local peace implementers and members of the local and District Peace Committee, Eastleigh, Nairobi, Nairobi County, 20 December 2018.
[52] Jacoby (2014: 511–12)

argues that victims may develop a perception of victimisation in situations when their grievances are not addressed by state agencies.[53] Such a misconstrued collective victimhood identity may be deduced from the perceptions of victim discussants from a particular community—Kikuyu—as noted in this study, especially in regard to the historical injustices anchored on the indigenous–foreigner discourse in the distribution of land resources in the Rift Valley, central, and coastal regions of the country.

Experiences and perceptions on the ICC process

In the case of the ICC intervention and its outcomes and impact on transitional justice, discussants argued that the process initially appeared as an alternative to Kenya's weak judicial mechanisms. Since the judiciary failed to prosecute perpetrators of the 1992 and 1997 conflicts, the ICC hence appeared to be a mechanism that would perhaps punish perpetrators of the 2007 conflict. The failed attempts to establish a special tribunal as recommended by the CIPEV, and the authorisation of the ICC situation in Kenya, provided a recourse to victims that retributive justice would eventually be served to perpetrators without state interference. In a study of victim participants in the ICC, the Human Rights Center (2015) notes that victim participation in the Court was constrained by extensive state security apparatus. While the OTP coordinated its outreach activities with a field office, their initial interactions were with well-established non-governmental organisations based in Nairobi, far away from the epicentre of the violence. The participants in this study also cited that they favoured the ICC processes due to its immediate criminal indictment and the need to deter future electoral violence. In an interview with 204 respondent victims who had submitted witness statements to the Court's Victim Participation and Reparation Section (VPRS), the Human Rights Center (2015) notes that the Court offered the victims a platform where they would share their experiences and those of their proximate family members and friends.[54] The victims' interactions with the VPRS, or their legal representatives, gave them the voice they needed to air their grievances and articulate their demands. The victim participants also noted that the domestic courts as well as regional courts were biased, unlike the ICC which was perceived as neutral or apolitical, at least.[55] Due to its perceived neutrality, the Court was hence viewed to be the only effective approach to find justice for victims and deter the future commission of mass atrocities in Kenya. Some respondents, however, depicted

[53] Laxminarayan (2012: ii)
[54] Human Rights Center (2015: 51).
[55] Ibid. (53).

the Court as not impartial, based on narratives of witness coaching and witness bribery that watered down the credibility of the investigations. In addition, instances of witness intimidation, as well as disappearances, affected victims who withdrew their evidence, thereby weakening the evidentiary weight of the cases. In a further study on perceptions towards the ICC in Kenya, Dancy *et al.* demonstrate victims' biases against domestic courts on claims that such courts would insulate perpetrators of mass atrocities. A key observation made by Dancy *et al.* is that such perceptions are based on group allegiances to ethnic identities and in-group formation, and not to the Court's perceived bias against African states. The study further showed that the victims had less trust in the government and domestic institutions; hence their support for agencies like the ICC.[56]

Despite the withdrawal of the *The Prosecutor v. Uhuru Muigai Kenyatta* case in March 2015 and the vacation of charges in the *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* in April 2016, discussants underscored that the ICC served as deterrence to future commission of atrocities. The naming of alleged perpetrators and the pretrials in The Hague showed the centrality of international law in prosecuting atrocities in situations where domestic mechanisms fail to serve justice. A discussant in Eastleigh, Nairobi, observed that '*the ICC contributed immensely on the peace we have today. The ICC acted like deterrence. If the president can be taken up by the ICC, then any other politician can be taken* [arrested], *jailed or convicted.*'[57]

As a result of the investigations, there were contending arguments amongst discussants on the outcomes and impacts of the ICC intervention on conflict transformation. On the one hand, some discussants noted that the investigations led to integration between the perceived antagonist communities, especially the Kikuyu and Kalenjin, who have suffered the three-tier historical injustices, especially in the Rift Valley, central, and coastal regions. Due to the ICC pretrials, the two political leaders—Uhuru Kenyatta and William Ruto, who were alleged to have perpetrated the mass atrocities committed during the 2007 conflict—engaged their communities in dialogues that fostered reconciliation, especially towards the 2013 elections. On the other hand, some victims argued that ICC investigations renewed antagonisms between the alleged perpetrators and their patronage, and against the opposition leaders who had been incorporated into the coalition government following claims that the leaders supplied the Court with evidence incriminating the perpetrators. A Youth Initiatives Kenya officer in Dandora, Nairobi, noted that '*the ICC process split the communities. Coalitions were built around ethnic communities whose leaders*

[56] Dancy *et al.* (2019: 1444–53).

[57] FGD CODE 003 with local peace implementers and members of the local and District Peace Committee, Eastleigh, Nairobi, Nairobi County, 20 December 2018.

were tried [indicted].'[58] Discussants, however, assert that the withdrawal and vacation of the two cases ended the quest for justice, especially for victims who suffered atrocities during the 2007 conflict.

In addition, discussants argued that the ICC led to further atrocities: for instance, the killing of key witness Meshack Yebei.[59] Some discussants raised concerns that the prosecution of the alleged perpetrators, especially within the two communities that have suffered atrocities in the Rift Valley and central regions, would lead to renewed antagonisms. A discussant argued that; '*ICC did not help, there were rumours that once* [name of prominent Kenyan withheld for ethical considerations—safety of the researcher] *is jailed, all these witnesses who were well-known had to leave the area of Kimuri* [in Eldoret]. *The Kalenjins would say once* [name of prominent Kenyan withheld for ethical considerations—safety of the researcher] *is jailed, the Kikuyus would be evicted.*'[60]

There are further narratives from discussants that the ICC process was infiltrated by civil society organisations that supplied evidence, and at worse coached witnesses, who eventually withdrew from adducing evidence at the Court, thereby weakening the evidentiary weight of the cases. A discussant asserted that the ICC process was elitist since it neither identified perpetrators at the grass roots nor adequately engaged the victims at the grass-roots level in evidence gathering.[61] In addition, some discussants noted that the politicisation of the ICC process eventually halted their quest for retributive justice and denied victims closure, thereby derailing integration and reconciliation. Regarding healing and closure, a discussant in Kiambaa, Eldoret, narrated that:

> *I was among those who were in the church* [KAG Church—Kiambaa]. *I was there even when it was burning. I always thank God because I don't know how I escaped from the church, because we had others who did not survive. I escaped through there* [pointing at an imaginary fence] *where there was barbed wire fence and a house. I was there even when that house was torched. I am not sure whether it was ignited using petrol. I saw them igniting the fire. After which I went to the road where I met three young men who attacked me on the head. My neighbour's daughter took me to the referral* [Moi Teaching and Referral Hospital]*, I was treated at the Cathedral. … We were bereaved, we will*

[58] Discussant, FGD CODE 005 with local implementers and beneficiaries of peacebuilding interventions in Dandora, Nairobi, Nairobi County, 21 December 2018. Argument averred by Discussant, FGD CODE 016 with local peace implementers working with the Catholic Justice and Peace Commission in Bomet, Bomet County, 24 January 2019.

[59] Discussant, FGD CODE 011 with victims and beneficiaries of Interventions in Kisumu, Kisumu County, 21 January, 2019; see also ICC (2015).

[60] Discussants, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.

[61] Discussant, FGD CODE 002 with victims and beneficiaries of peace interventions in Kibera, Nairobi, Nairobi County, 19 December 2018.

never heal. We were never compensated by the government. It is very painful. I sought counselling, but will never forget. My child died, her wife suffered, and the child that was born was affected at birth.[62]

Perceptions on 'alternative' indigenous judicial interventions

Due to the perceived failure of the TJRC and ICC, and domestic judicial mechanisms, specifically the recommended Special Tribunal for Kenya and the International Crimes Division of the High Court, some discussants argued for indigenous dispute resolution mechanisms as 'alternative' interventions for pursuing justice. The failure of the government to implement the TJRC report, and the subsequent withdrawal and vacation of the two cases in the ICC failed in serving restorative and retributive justice to victims and perpetrators, respectively. Some victims still bear trauma associated with the conflict and hence find ICC guilty of a miscarriage of justice, and further accuse the government of protecting the Adversely Mentioned Persons in the TJRC report. Some victim discussants argued that they have never found closure since they interact with perpetrators at the grass roots who were never prosecuted. These discussants hence argue that indigenous dispute resolution mechanisms are well structured to rebuild relations between victims and perpetrators, and their communities, since they are implemented based on social–cultural norms that are commonly accepted by the conflicting communities. A discussant averred that '*it is important to have local mechanisms which promote peace. It is better to have local solutions. The local people know the local challenges and they still have the solutions.*'[63] In reiteration, a discussant argued that indigenous dispute resolution and methods of reconciliation can attract justice and peace within conflicting communities since they are sanctioned by elders who are revered.[64]

The quest for alternative indigenous judicial interventions in a multi-ethnic country like Kenya where the configuration of the electoral conflict coincided with ethnic affiliation, however, attracts further discourses on the applicability of indigenous judicial interventions. Due to the perceptions of ethnic victimhood, especially of the Kikuyu community, efforts to engage the council of elders to deploy indigenous judicial interventions to address victims and perpetrators of the electoral conflict

[62] Discussants, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.
[63] Discussant, FGD CODE 012 with victims and beneficiaries of peace in interventions, Kapsabet, Nandi County, January 22 2019.
[64] Discussant, FGD CODE 016 with local peace implementers working with the Catholic Justice and Peace Commission in Bomet, Bomet County, 24 January 2019.

have failed. Although the *Athuuri* and *Muiyot* elders representing the Kikuyu and Kalenjin communities, respectively, advanced traditional reconciliation between the two communities especially after the 2007 conflict, discussions on reparations and retribution failed when the *Athuuri* elders invoked the collective ethnic victimhood of their community and asserted that they can only engage in such a mechanism if and when the *Muiyot* acknowledge guilt on behalf of their community—the Kalenjin. For example, narratives were raised by a discussant that elders from the Kalenjin community rejected the reconstruction and memorialisation of the victims of 1 January 2008 Kenya Assemblies of God Kiambaa church arson, arguing that such a practice anchors claims that the atrocities were committed by members of their community against the Kikuyu.[65] Elsewhere in Saboti, discussants claimed that the *Kokwet* Sabaot council of elders would discourage the punishment of perpetrators, would discourage victims from providing evidence in courts, and would sanction victims to forgive perpetrators, unconditionally.[66] While these indigenous interventions may have succeeded in their implementation in the case of the *gacaca* courts in Rwanda and the *mato oput* among the Acholi in northern Uganda, they may fail in multi-ethnic communities due to engrained ethnic victimhood identity discourses. In addition, indigenous judicial interventions may be avenues to subvert the rule of law, and may be deployed to protect perpetrators who may have committed atrocities. Besides, the composition of these councils of elders in Kenya is male-dominated due to existing patriarchal and gendered constructions, and may hence relegate the women's agency which is a critical constituency in judicial interventions.

Conclusion

The foregoing analysis of historical injustices in Kenya underscores an argument that there exist individual victimhood and collective victimhood in the country that is premised on perceptions and experiences of victims, spanning from the colonial period through independence era in 1963 and the wake of multiparty democracy politics in 1991 into post-National Accord Kenya. The failure of the state, and of non-state actors, to effectively address the three-tier historical injustices as conceptualised in this article has impacted on the conflict transformation agenda in the country. Conflict transformation in Kenya has also been hampered by other variables including:

[65] Discussant, FGD CODE 024 with victims of the Kenya Assembly of God Kiambaa Church arson in Kiambaa, Eldoret, Uasin Gishu County, 15 October 2019.
[66] Discussant, FGD CODE 018 with victims and beneficiaries of Free Pentecostal Fellowship of Kenya peace interventions in Saboti, Trans Nzoia County, 28 January 2018.

economic and political factors, institutional inadequacies, legal and constitutional issues, ethnic identity differences, gender-based constructions and cultural factors, as well as demographic considerations.

Despite the impetus towards addressing historical injustices in the period after the signing of the National Accord in February 2008, the failure of the state to establish the special tribunal for Kenya as recommended in the CIPEV report, as well as the delayed actualisation of the International Crimes Division of the High Court, has affected transitional justice in the country. While the internationalised intervention of the ICC presented a complementary approach towards pursuing transitional justice, the withdrawal and vacation of the two cases derailed the quest for retribution for perpetrators of historical injustices, and reparations for victims. In addition, the failure to establish the implementation framework and the reparations committee as defined in the TJRC Act, as well as the failure of the National Assembly to debate and adopt the TJRC report with a view to implementing its findings constrained the quest for addressing the historical injustices.

In order to attain effective conflict transformation in Kenya, it is therefore essential for the state to address existing grievances of victims who bear the experiences of historical injustices as conceptualised in the three-tier typology. While the individual discussants engaged in this study may not have experienced the first-, second-, and third-tiers in their entirety, as well as the first intermediary and second intermediary historical injustices, their individual experiences and perceptions establish a sense of collective victimhood identity largely anchored on the indigenous–foreigner discourse. It is in responding to such claims of victimhood through transitional justice that individuals and communities would reconcile with their perceived perpetrator communities.

While the narratives presented by discussants in the ten selected counties about historical injustices may not be used to expressly generalise on the outcomes and impact of transitional justice interventions in post-National Accord Kenya, they nevertheless present empirical and objective perspectives on the contending experiences and perceptions of victims and interveners that would perhaps inform further interventions for transitional justice in the country. By implication, these experiences and perceptions inform the need for the state to perhaps revisit the resettlement and compensation programmes with a view to addressing the concerns of victims who are yet to find healing and closure in regard to the three-tier historical injustices as conceptualised in this study.

Acknowledgements

The fieldwork in this article was carried out as part of my PhD dissertation research. I am grateful to the Social Sciences Research Council, New York, for the Award of the Next Generation Social Sciences in Africa Doctoral Dissertation Research Fellowship 2019/2020.

References

Akiwumi Commission (1999), *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya (Akiwumi Report)* (Nairobi, Government Printer).

Anderson, D. (2005), *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (New York, W.W. Norton).

Barkan, J. (1993), 'Kenya: Lessons from a Flawed Election', *Journal of Democracy*, 4: 85–99. https://doi.org/10.1353/jod.1993.0045

BBC News (2011), 'Mau Mau Uprising: Bloody History of Kenya Conflict', 7 April. https://www.bbc.com/news/uk-12997138

CIPEV (Commission of Inquiry into Post-Election Violence) (2008), *Report of the Commission of Inquiry into Post-Election Violence* (Nairobi, Commission of Inquiry into Post-Election Violence).

Dancy, G., Dutton, Y.M., Alleblas, T. & Aloyo, E. (2019), 'What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya', *Journal of Conflict Resolution*, 64(7–8): 1443–69. https://doi.org/10.1177/0022002719893740

Elkins, C. (2005), *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York, Henry Holt and Company).

HRW (Human Rights Watch) (2002), *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya* (New York, Human Rights Watch).

HRW (Human Rights Watch) (2008), *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (New York, Human Rights Watch).

Human Rights Center (2015), *The Victims' Court? A Study of 622 Victim Participants in the International Criminal Court* (Berkley, CA, University of California).

ICC (International Criminal Court) (2010), 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya'. https://www.legal-tools.org/doc/f0caaf/pdf/

ICC (International Criminal Court) (2014), 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case'. https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014

ICC (International Criminal Court) (2015), 'Statement of the Office of the Prosecutor Regarding the Reported Abduction and Murder of Mr. Meshak Yebei'. https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-09-01-2015

ICC (International Criminal Court) (2016), 'ICC Trial Chamber V (B) Refers Non-cooperation of the Kenyan Government to the Assembly of State Parties to the Rome Statute'. https://www.icc-cpi.int/legalAidConsultations?name=pr1239

Independent Review Commission (2008), *Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2008* (Nairobi, Independent Review Commission).

Jacoby, T.A. (2014), 'A Theory of Victimhood: Politics, Conflict and the Construction of Victim-based Identity', *Millennium: Journal of International Studies*, 43(2): 511–30. https://doi.org/10.1177/0305829814550258

Kariuki, N. (2015), *Transitional Justice in Kenya: How Far Should We Go in Defining the Past?* (Nairobi, Global Partnership for the Prevention of Armed Conflict/NPI-Africa).

Kenya National Assembly (1992), *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya* (Nairobi, Kenya National Assembly).

Kenya National Assembly (2008a), *National Accord and Reconciliation Act* (Nairobi, National Council of Law Reporting).

Kenya National Assembly (2008b), *Truth, Justice and Reconciliation Commission Act* (Nairobi, National Council of Law Reporting).

Khamisi, J. (2018), *Kenya: Looters and Grabbers: 54 Years of Corruption and Plunder by the Elite, 1963–2017* (Zionsville, IN, Jodey Book Publishers).

Kimathi, L. (2010), 'Whose Truth, Justice, and Reconciliation? Enhancing the Legitimacy of the Truth, Justice and Reconciliation Commission among Affected Communities in Kenya' (Occasional Paper Series 1(6); Nairobi, International Peace Support Training Centre).

KNCHR (Kenya National Commission on Human Rights) (2008), *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (Nairobi, KNCHR).

KNCHR (Kenya National Commission on Human Rights) (2017), *Mirage at Dusk: A Human Rights Account of the 2017 General Election* (Nairobi, Kenya National Commission on Human Rights).

KNCHR (Kenya National Commission on Human Rights) (2018), *Still a Mirage: A Human Rights Account of the Fresh Presidential Poll for the Period September and November 2017* (Nairobi, Kenya National Commission on Human Rights).

Laxminarayan, M.S. (2012), *The Heterogeneity of Crime Victims: Variations in Procedural and Outcome Preferences* (Nijmegen, Wolf Legal Publishers).

Lynch, G. (2018), *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108575164

Mazrui, A. (1994), 'The Majimbo Debate: Majimbo: Political, Economic and Military', Keynote Address at a Conference on Democracy in a Multi-Ethnic Society: The Kenya Situation, Nairobi, 29 June–3 July.

Murithi, T. (2010), 'Sequencing the Administration of Justice to Enable the Pursuit of Peace: Can the ICC Play a Role in Complementing Restorative Justice?', *IJR Policy Brief*, 1. https://media.africa-portal.org/documents/Sequencing_the_Administration_of_Justice_IJR_Policy_Brief_June_2010.pdf

Murithi, T. (2015), 'Ensuring Peace and Reconciliation While Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan', *Africa Development*, 40(2): 73–97.

Murithi, T. & Ngari, A. (2011), *The ICC and Community Level Reconciliation: In-country Perspectives* (Wynberg, Institute of Justice and Reconciliation).

Musila, G. (2009), 'The Accountability Process in Kenya: Context, Themes and Mechanisms', *Judiciary Watch Report*, 8: 28–9.

Mutua, M. (2015), 'What is the Future of Transitional Justice?', *International Journal of Transitional Justice*, 9: 1–9. https://doi.org/10.1093/ijtj/iju032

Mwagiru, M. (2008), *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya* (Nairobi, Institute for Diplomacy and International Studies).

Ndegwa, S. (1997), 'Citizenship and Ethnicity: An Examination of the Transition Moments in Kenyan Politics', *The American Political Science Review*, 91(3): 599–616. https://doi.org/10.2307/2952077

Nmaju, M. (2009), 'Violence in Kenya: Any Role for the ICC in the Quest for Accountability?', *African Journal of Legal Studies*, 3(1): 78–95. https://doi.org/10.1163/221097312X13397499736949

Nzau, M. (2016), *Transitional Justice and After: Kenya's Experience with IDP Resettlement and Peacebuilding since the 2007/2008 Post-election Violence* (Nairobi, CUEA Press).

Office of the African Union Panel of Eminent African Personalities (2014), *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (Addis Ababa, African Union Commission).

Ogot, B.A. & Ochieng, W.R. (1995), *Decolonization and Independence in Kenya 1940–93* (Nairobi, East African Educational Publishers).

Oyugi, W. (1997), 'Ethnicity in the Electoral Process: The 1992 General Elections in Kenya', *Africa Journal of Political Science*, 2(1): 4–69.

Paternoster, R. (2010), 'How Much Do We Really Know about Criminal Deterrence', *Journal of Criminal Law & Criminology*, 100(3): 765–824.

Press, R. (2006), *Peaceful Resistance: Advancing Human Rights and Democratic Reforms* (Burlington, IN, Ashgate).

Press, R. (2015), *Ripples of Hope: How Ordinary People Resist Repression without Violence* (Amsterdam, Amsterdam University Press). https://doi.org/10.26530/OAPEN_611225

Sheikh, S.A. (2007), *Blood on the Runway: The Wagalla Massacre of 1984* (Nairobi, Northern Publishing House).

Slye, R. (2018), *The Kenyan TJRC: An Outsider's View from Inside* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108380010

Supreme Court of Kenya (2017), 'Election Petition of 2017—Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others', *Kenya Law.* http://kenyalaw.org/caselaw/cases/view/140478/

Teitel, R.G. (2000), *Transitional Justice* (New York, Oxford University Press).

Throup, D. & Hornsby, C. (1998), *Multiparty Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections* (Oxford, James Currey).

TJRC (Truth, Justice and Reconciliation Commission) (2013), *Report of the Truth, Justice and Reconciliation Commission* (Nairobi, Truth, Justice and Reconciliation Commission).

Wambua, M. (2017), 'The Ethnification of Electoral Conflicts in Kenya: Options for Positive Peace', *African Journal on Conflict Resolution*, 17(2): 9–40.

Wambua, M. (2019), 'Transitional Justice and Peacebuilding: The ICC and TJRC Processes in Kenya', *African Conflict and Peacebuilding Review*, 2(1): 54–71. https://doi.org/10.2979/africonfpeacrevi.9.1.03

Wambua, M. (2020). 'Reflections on the Conflict Transformation Agenda in Post-National Accord Kenya', *UBALF Policy Briefs*, 1(1): 1–15.

Wamwere, K. (2008), *Towards Genocide in Kenya: The Curse of Negative Ethnicity* (Nairobi, Mvule Africa Publishers).

To cite the article: Muema Wambua (2021), 'Historical injustices and transitional justice interventions in Kenya: victims' and interveners' experiences and perceptions', *Journal of the British Academy*, 9(s2): 75–102.
DOI https://doi.org/10.5871/jba/009s2.075

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk

The British Academy

Journal of the British Academy, **9(s2)**, 103–125
DOI https://doi.org/10.5871/jba/009s2.103
Posted 25 May 2021

'New wine, old wineskins': a comparative study of interfaith engagement and transitional justice in Kenya and South Africa

Martin Munyao

Abstract: Transitional justice (TJ) is an approach that has been used by states to bring hope and renaissance in addressing past injustices. Unfortunately, transitional justice mechanisms have been ambiguous and often yield underwhelming results. While various components that constitute human societies have been incorporated in Africa's journey towards resolving historical injustices, religion has been casually utilised, if not altogether ignored. An interfaith approach to addressing a violent past has not been exploited, yet religion played a significant role in South Africa's (SA) post-apartheid era and Kenya's second liberation from KANU's single-party rule. This article will highlight the insufficiencies and gains made by past TJ mechanisms in Kenya and SA. The article will also discuss the place of interfaith engagement in confronting structural violence. Lastly, improving on SA's TJ model, it will suggest an interfaith agenda for TJ that mitigates the horrors of historical injustices for reconciliation, peace, and stability in Kenya.

Keywords: Transitional justice, violence, (multi)interfaith, injustices, religion.

Note on the author: Martin is a PhD holder in Missiology from Concordia Theological Seminary (2017). He teaches theology of peacebuilding at Daystar University, Nairobi—Kenya. He has published journal articles such as 'Migration, Interfaith Engagement, and Mission among Somali Refugees in Kenya: Assessing the Cape Town Commitment from a Global South Perspective One Decade On', *Religions*, 12: 129 https://doi.org/10.3390/rel12020129; and 'Creating Contemporary Wells in a City Hosting Refugees: A Case Study', *Fuller Magazine*, 19: 54–5.
mluther2001@gmail.com

Introduction

Legal processes are important in transitional justice (TJ), but they need to be supplemented with various accountability structures for checking and balancing the (mis)use of power in revisiting and recovering the past. This calls for the inclusion of religious stakeholders who play a crucial role in society. Since TJ is an important instrument for reclaiming societies which are experiencing political and societal imbalance dysfunction,[1] the morality of the process ought to be duly represented by the religious leadership in the country. Past TJ initiatives have sidelined if not ignored the contribution of religion in peacebuilding. While TJ may be a one-time project, peacebuilding is not. Rather, peacebuilding is a lifetime activity that needs the presence of religious leaders to sustain peaceful communities. Transitional justice refers to the different programmes a country puts in place to deal with past crimes against humanity, impunity, etc. in a truthful and just way. Therefore, various faith leaders are critical to the TJ processes from the start to the end to champion and promote truth-bearing and justice for the victims.

Yet there might be a reason why religion has been sidelined in peacebuilding processes in the past. Even though the current trend is now moving to recognise the role of religion in peacebuilding, that has not been the case in past decades. Historically, international conflict theorists have held that 'organised religion is primarily if not essentially, an instigator of violence'.[2] While there may be pockets of religiously instigated violence, religion generally embodies peace, and peacebuilding among communities is its main agenda. Consequently, international conflict resolution theorists have tended to exclude religion as a force for peacebuilding.[3] Conversely, if organised religion is an instigator of violence, then the same force can be used for peacebuilding. It means that peacebuilding initiatives have to include religion and religious conversations. At the same time, the postcolonial mindset in Africa is laced with the Western and colonial perception that there needs to be a separation between the fields of religion and politics.

> The formal separation between the fields of religion and politics has been the hallmark of Western democracies for centuries and has been introduced to other parts of the world, notably those which were colonized by Europe, and, more generally, countries that have undergone the influence of Europe and North America.[4]

[1] Mutua (2015: 2).
[2] Tan (2011: 443).
[3] Tan (2011: 444).
[4] Haar (2004: 6).

Current research[5] on decoloniality has emphasised various aspects of human life in Africa but not so much religion. Decolonising the African mind as far as religion and peacebuilding are concerned is critical as it goes back to colonial history to reconnect with the past. If TJ is going to incorporate religion, then it must debunk two existing myths. The two myths have been raised by Haar (2004). One is that 'religion by its very nature is an obstacle to peace',[6] a myth for which there is evidence in the world today. Second is that 'when religion becomes a significant factor in a particular conflict it is being used contrary to its essential nature, which is often deemed to be intrinsically good'.[7] According to Haar, these two positions stand in contradiction with one another. The two positions which seem to be incompatible are both subjectively biased depending on who is interpreting them. The thought that religion is a negative force, and that it is intrinsically good are opposing views from biased quarters. These opposing positions reveal the wide gap and discrepancy between theory and practice in peacebuilding work. Positively interpreted, if religion is a cause of conflicts, then it leads to the conclusion that it can be used as a resource for peacebuilding, especially as a component of TJ.

The false dichotomy between the fields of religion and politics marginalised religion, denying it the opportunity to offer moral accountability and course direction to public life. Contrary to the intention of the said dichotomy, religion is a resource for peacebuilding.

> If religion played a part in fueling the conflict, then when resolving the conflict, religion must be at least taken into account, for without this consideration, peacekeepers, diplomats, and mediators not only fail to deal with the fundamentals of the conflict but also miss potential peacebuilding resources in the religious traditions themselves.[8]

African societies are very religious. In fact, in most non-Western and post-colonial societies, such as Africa, religion is resuming its central place in public life, including politics. The role of religion was not entirely lost, it was just not a point of reference in peacebuilding processes. For the most part, political engagements such as campaign rallies, fundraisers, and community mobilisations invoke the name of God. The promise of good governance and leadership by the political elite is attached to one's allegiance to religious groups. Similarly, the invocation of God is also common with communities that have suffered historical injustices and need reparations. The prevalence of religious talk not only shakes the political status quo but also reawakens

[5] Öhlmann *et al.* (2020).
[6] Haar (2004: 7).
[7] Haar (2004: 7).
[8] Tan (2011: 444).

aspects of the society that have long been repressed by oppressive political regimes. 'Religion is one such power now increasingly seen as challenging the basis of the secular state.'[9] For example, in South Africa (SA), Christianity in particular played a significant role in the Truth and Reconciliation Commission (TRC) that facilitated reconciliation and peacebuilding in post-apartheid SA.

In Kenya, religion has for the most part either praised or criticised both sides of the political divide. In some eras, it has been accused of being in cahoots with the political powers, while other times it has fought the incumbent regime as an opposing power. But, as for participation in TJ processes, religion in Kenya has rather been distant. Religious participation in TJ processes in the past has been denominational and perhaps in partnership with civil society groups. There has been little interfaith engagement in TJ initiatives. For example, the mainstream Christian church operated separately from the Muslim faith during the late President Moi's regime compared to today's regime. There was not much collaboration between Christians and Muslims in addressing governance under Moi's regime. In Kenya's history, rarely have interfaith initiatives been engaged to participate in revisiting and resolving historical injustices. This paper contends that interfaith engagement is highly needed in mounting and fostering TJ processes.

Defining transitional justice

Attempts to define 'transitional justice' in Africa have yielded different results depending on which region or country is under study due to several reasons. One is that the emergence of TJ as a field of policy, practice, and scholarship is a relatively recent phenomenon.[10] As a policy issue, TJ tends to focus on theories that promise stability and the sustainability of peace in the post-conflict period. As a matter of practice, others have focused on larger goals, such as truth, justice, and peace for areas with recurring conflict. Two, conflict can either be intra-state or inter-state; hence the choice and complexity of the TJ mechanism vary. Therefore, a proper definition of TJ that cuts across various periods of historical injustices in the continent, the scope of interest, and geographical settings is elusive. Wambua conceptualises TJ as 'the restorative and retributive judicial and nonjudicial measures initiated within a state to address historical injustices to contrive peace'.[11] That definition captures the reparative element of TJ processes. It also brings about the legal or non-legal pathways of

[9] Haar (2004*:* 6).
[10] Backer & Kulkarni (2016).
[11] Wambua (2019: 55).

achieving TJ. For Kenya, there has been an over-preoccupation with the legal component in achieving TJ, which ends up missing out on the main objective of TJ. This is difficult because some of Africa's past and present regimes were characterised by despotic leadership with little or no regard for legal accountability.

Unfortunately, transitional justice mechanisms in Africa, such as special court tribunals in Kenya, the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, and the International Criminal Court (ICC) in The Hague, that try African leaders have focused more on legal accountability of individuals and less on the transformation of structures of power. Such traditional mechanisms focus on trials, vetting, and restitution that does not address the underlying community issues. For Kenya, the state has delegated the role of questioning structures of power to commissions that are appointed by the same state that has abused power. Such an approach renders the 'independent' commissions powerless to confront oppressive structures of power and past regimes. In the recent past, TJ has included 'non-judicial instruments such as apologies, truth commissions, healing circles, or forms of remembrance and commemoration'.[12] This is the direction in which most African societies have moved in the last two decades or so; forming truth commissions to lead in TJ. The most compelling definition for TJ is that of Moscati, who understands TJ as 'a set of practices, mechanisms, and concerns that arise following a period of conflict, civil strife, or repression, and that is aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[13] This definition goes a step further to suggest that TJ processes include mitigation of 'potential sources of future conflicts and violations'.[14] This endeavour on TJ processes anticipates either a recurrence of violence in a certain area or even a fresh eruption of violence.

Transitional justice comprises a broad set of responses to violence committed during periods of conflict, repressive rule, or occupation.[15] This definition expands on various forms of violence and atrocities committed against the people. Violence does not have to be necessarily bloody. It can be political, economic, and even spiritual. The bottom line is that TJ seeks to deal with violence occasioned by transition or transfer of power. As the word 'transition' suggests, 'transit' indicates a change of guard, in between eras, or better still the sunset of one era as well as the dawn of another. When a democratically elected government is installed, there is an opportunity to deal with past atrocities. For Kenya, this means revisiting past gross human rights violations after each successive political regime since independence in 1963.

[12] Gal-Or & Schwelling (2015: 8).
[13] Moscati (2015, 8).
[14] Moscati (2015: 8).
[15] Palmer *et al.* (2015: 173).

Religion has played a vital role in witnessing peaceful transitions and religious leaders are even called upon to pray for the new leadership. Mutua opines that 'transitions to functional post-despotic societies are difficult and challenging. The old order and their entrenched elites reside in the sinews of society and are nearly impossible to uproot'.[16] In the meantime, the populace is hungrily longing for justice and peace.

Setting the historical context of TJ in Kenya and South Africa

Conflict and post-conflict Kenya and South Africa have four things in common. One is that in both Kenya and South Africa, conflict and violence have roots in colonialism. When colonial powers were in operation, they fragmented African communities along tribal and racial lines for purposes of assimilation, and easy administration and control. Apartheid, as it is known, 'is an Afrikaans word for separation, it denotes 'apart-hood' or 'apartness'.[17] This was a term used to validate racial separation in SA from the arrival of the Dutch, until the 20th century. Thus, Kenya and SA share a colonial heritage. Secondly, the nature of violence and historical injustices that TJ seeks to resolve are both physical and structural. Physical in the sense that the violence meted on both Kenyans and South Africans largely involved physical, social, and economic violence. For these structural injustices to continue unchecked, they had to be systemic and state-sanctioned. Thirdly, both countries have adopted commissions as TJ mechanisms. Truth, Justice and Reconciliation Commissions (TJRC) and Truth and Reconciliation Commission (TRC) for Kenya and South Africa, respectively, were appointed to carry out the task of TJ. Lastly, in both countries, religion plays a significant role in social and public life, and hence is an important component worth incorporating in various truth, justice, and reconciliation commissions.

While in the SA Truth and Reconciliation Commission religion was involved from beginning to the end of the TJ process, the religious voice in Kenya started as lone voices of advocacy for human rights. These lone voices over time gained momentum and developed into a great force under the banner of various religious institutions. Such an example in Kenya was the *Ufungamano* initiative which 'emerged with a great promise, epitomizing a countermovement of multi-ethnic, religious, generational, and class power politics that generated widespread support'.[18] This initiative was largely driven by an interfaith movement housed under various national council organs such as the National Council of Churches of Kenya (NCCK) and the Supreme Council of

[16] Mutua (2015: 2).
[17] Shore (2009: 36).
[18] Mati (2012: 65).

Kenya Muslims (SUPKEM). Though successful in challenging the state's handling of human and constitutional rights in Kenya, the interfaith-led *Ufungamano* initiative remained vulnerable to a coerced merger with the state-led constitutional reform process in 2001 which deflated its potency.[19] The initiative finally succumbed to 'multiple ethnic, inter-class, and religious cleavages'.[20] The same interreligious diversity that led the initiative was party to the death of the first-ever interfaith-led shot at TJ in Kenya.

Institutionalisation of transitional justice in the Republic of South Africa

In South Africa, the infamous racial contract was necessitated by European expansion in that they conquered lands, exploited resources, and dominated the people they found.[21] While racial segregation denied blacks access to the economic gains in the country, land grabbing, on the other hand, dislocated people from their social and economic base. To cement the social contract, the idea was segregation. The racial contract linked space to race and race to personhood and as a result the white raced space of polity is in a sense the geographical locus of the polity proper.[22] That is why in apartheid South Africa, there were places designated WHITES ONLY and those for others. Not only was apartheid a system of racial discrimination, it was also an imposed separation of blacks and whites in the areas of government, the labour market, and residency.[23] Throughout much of the 20th century, controversial legislation on landownership was passed to ensure that the majority of land would remain in the hands of white farmers.[24] In the post-apartheid regime, these injustices needed to be resolved. The Truth and Reconciliation Commission (TRC) which had a religious representation was established to revisit these injustices against humanity.

In 1995, President Nelson Mandela appointed seventeen commissioners to the TRC.[25] The commission comprised mainly religious leaders with a heavy representation of Christian leaders from a cross-section of the country. Approximately one-third of the commissioners were faith-based coming from faith communities. Archbishop Desmond Tutu was appointed the Chairman of the commission. On the commission was a religious actor by the name of Ms Yasmin Sooka, a Hindu human rights lawyer

[19] Mati (2012: 65).
[20] Mati (2012: 65).
[21] Mhlauli *et al.* (2015: 211).
[22] Mhlauli *et al.* (2015: 216).
[23] Mhlauli *et al.* (2015: 216).
[24] Piotrowski (2019: 58).
[25] Shore (2009: 61).

and South African leader of the multi-faith World Conference on Religion and Peace.[26] The other members of the commission had legal and health backgrounds. But overall, most commissioners came from faith communities which influenced their view of human rights.

Non-governmental organisations (NGOs) and church organisations that were represented through their leaders in the commission participated by giving office space to the TRC to conduct its work. The TRC conducted interviews and took testimonials from 21,000 victims and witnesses.[27] The media covered, televised, and published most of the public hearings with the *Truth Commission Special* report becoming the most-watched programme on the television.

To deal with institutional injustices that participated in the apartheid period, the commission held hearings focused on such institutions. These included the religious, legal, and business communities, labour, health sector, media, prison, and armed forces.[28] Much effort was laid on fact-finding on how these institutions and the people running them facilitated apartheid policies in SA. However, the commission was also criticised for not using the strong powers at its disposal to indict perpetrators of violence against black South Africans. Instead, it promoted the mission of reconciliation above truth-finding.[29] This is why Christianity's overbearing presence in the commission was later accused of being too soft and lenient on the perpetrators rather than truth-finding for justice to the victims.

As an achievement, the commission is remembered for using its powers and religious language and processes to give amnesty to politically motivated crimes between 1960 and April 1994.[30] Most of the applications were declined as they did not bear political motivation in the way they were committed. In total, about 1,167 people were given amnesty. Amnesty was also granted to thirty-seven ANC leaders who made a joint application. But largely that was a controversial move by the commission to invoke the law as well as religious values of forgiveness. It made all the difference to have the religious leaders dominate the TRC as they tapped into the religious doctrines of social justice that were initially violated if not altogether ignored. The truth and reconciliation of the country across the racial divide was the commission's greatest motivation. Trials of some of the perpetrators of violence were also executed, which saw the imprisonment of pro-apartheid leaders.

A dimension that was, however, missed in the TRC is that of justice. This does not mean that retributive justice was not achieved; there were judicial consequences for

[26] Shore (2009: 61).
[27] Hayner (2011: 28).
[28] Hayner (2011: 28)
[29] Hayner (2011: 28).
[30] Hayner (2011: 29).

the perpetrators of crimes against humanity during apartheid. The justice dimension that did not gain a lot of traction is that of distributive justice. Remember that apartheid lasted for decades and thus instituted socio-economic inequalities that have impacted black South Africans to the present. Most farmland is still owned by white settlers while blacks occupy most of the urban informal settlements.

Historical injustices in Kenya and South Africa

The history of socio-political and economic injustices in both Kenya and South Africa dates back to the colonial era. In both countries, land and race were at the centre of the injustices meted out to people. In Kenya, the institutionalisation of the colonial government in the 1940s and 1950s led to forceful land grabbing that pushed the natives off their land, and subsequent human rights violations. After independence in 1963, the first Kenyan government was formed on the foundations of institutional and systemic injustices. Forceful land grabbing was extended from the colonial regime to the first African-led government. 'Similarly, the distribution of political resources, especially in the personalization of power during the Kenyatta administration, established genuine resource distribution grievances that entrenched political divisions in the country.'[31] The constitution that was inherited from the colonial powers further entrenched the ethnicisation of political power and marginalisation of communities that were not represented in the political system. The increased marginalisation ended up becoming the main cause of ethnic violence in some sections of the country, as communities fought for limited resources such as land. The government's response to tribal clashes exacerbated the situation further. State-sanctioned military operations against communities led to gruesome mass murders that the country has yet to come to terms with. For example, the Shifta war (1964–7)[32] led to mass killings of innocent people, gender-based violence, and the torture of thousands of people as national security agencies responded to the insecurities. During President Jomo Kenyatta's regime, institutions such as the police, media, and parliament were compromised and weakened under the immense authoritarian rule.

In Kenya, voices of dissent against the first and second presidential regimes were met with sporadic political assassinations and torture.[33] The impunity that led to abuse of power by security authorities tried to squash any budding civil society groups. Religious leadership in the country seized the moment to lead a protest against

[31] Wambua (2017: 12).
[32] Wambua (2019: 57).
[33] Karanja (2006); Tarus & Gathongo (2016).

violations of human rights. Clergymen such as Henry Okullu, Manasses Kuria, and David Gitari became relentless crusaders for fundamental human rights and freedoms which, in their view, arise from God-given human dignity.[34] For these religious leaders, freedom of expression and human rights were fundamental to human dignity. At the time, mainstream religion was not yet recognised as having any authority over the civil affairs of the country. Nonetheless, the religious leaders persisted in agitating for constitutional review that would pave way for the institutionalisation of TJ mechanisms in place. The moral obligation for human rights protection rightfully rested with the religious leadership. For example, Okullu strongly believed that a multiparty system of government has a greater chance of promoting democracy as it provides alternative governance.[35] It is important to note that, at the time, Christianity, for example, still had the face of the missionary church which had tolerated the colonial government. The said religious leaders at the time were pushing for a constitutional review that would allow for mainstreaming and institutionalisation of TJ so that historical injustices would be revisited.

Religion and social change in Kenya

After the first president of Kenya died in 1978, his Vice President, Daniel Toroitich arap Moi took over the presidency. 'President Moi's administration (1978–2002) heightened the unfettered accumulation of state resources.'[36] Due to ethnic strife at the leadership level on succession politics, Moi strengthened his camp against tribal affiliations that were opposed to his presidency. Moi's leadership enhanced the ethnic and religious marginalisation of communities as he employed a divide-and-rule leadership style.[37] This led to an attempted and failed coup d'état in 1982 which forced Moi to transform the country into a one-party state.[38] Former President Moi's regime was from that time on marked by a series of state-sanctioned crimes[39] against humanity, murders, and repression of masses who did not subscribe to his politics. A task force put together by KANU confirmed what the National Christian Council of Kenya (NCCK) had affirmed: that the state was involved in ethnic cleansing and tribal clashes in the Rift Valley and Coastal provinces.

[34] Karanja (2006: 594).
[35] Karanja (2006: 594).
[36] Wambua (2017:12).
[37] Wambua (2017: 12).
[38] Wambua (2019: 58).
[39] Detainment without trial of his political critics (Willy Mutunga, Katama Mukangi, Raila Odinga, Kenneth Matiba, etc.), the Wagalla massacre, Molo clashes, and Likoni clashes.

As an individual, the late President Moi presented a religious bearing that caused a large section of the church leadership to develop a softness for him and his leadership. However, opposition from sections of the church maintained their criticism against Moi's rule. Individual efforts from some notable religious leaders such as bishops and pastoral leaders like Bishop Manasses Kuria, the late Bishop Alexander Muge, the Reverend Timothy Njoya, and Father John Kaiser, amongst others, acted on their agency without involving the institutional church. Through sermon preaching and publishing editorial comments in the media, they became lone voices of dissent against President Moi. Some of them lost their lives while others were beaten and tortured in the infamous Nyayo House torture chambers.[40] By the time Kenya held the first multiparty elections in 1992, Moi's government had presided over years of massive corruption, bad governance, and human rights violations.[41] Each election cycle since 1992 was marked by pre- and post-election violence, loss of lives, destruction of property, and forced displacement of people. Each time these forms of violence are meted out to people, religious leaders come out to condemn the acts of violence in the strongest terms. The interfaith group dubbed the *Ufungamano* initiative led the campaign demanding reparations in the case of unresolved historical injustices.

The 2007/8 post-election violence and institutionalisation of transitional justice in Kenya

The botched election of 2007 and consequent post-election violence of 2008 was the turnaround for TJ in Kenya. First, this was a very polarising election whose campaign involved the balkanisation of Kenyans along ethnic lines. As mentioned earlier, this was the first time in Kenya's history that a TJRC specifically addressed historical injustices in Kenya. This was seen by political analysts and various stakeholders as a strategy by the political class to avoid taking political responsibility for the crimes against human rights because of their irresponsible conduct during and after the election.[42] Before that, there had been numerous accounts of the government's unwillingness to compensate victims of police brutality and state-sanctioned violence.[43] Several commissions were set up consecutively. One of the ground-shaking commissions was the Commission of Inquiry into Post-Election Violence (CIPEV) led by the retired Justice Philip Waki. Waki viciously zeroed in on the key masterminds of what

[40] These were torture cells at the basement of Nyayo House in Nairobi where the government detained and tortured Moi's political dissidents without trial.
[41] Wambua (2017: 13).
[42] Ghoshal (2011: 4).
[43] Ghoshal (2011: 4).

seemed like attempts at ethnic cleansing or genocidal operations against some members of one community by the other. This commission produced a list of six named individuals who must have participated in the murder and destruction of property of thousands of people.

The famous Waki report suggested the names of people who were very senior in the government. The parliament's indecision on which TJ mechanism to adopt was a clear sign that 'There was a lack of political will to address post-election violence which was further demonstrated by the government's failure to adequately compensate the victims.'[44] The parliament could not decide whether to try the perpetrators locally or at the International Criminal Court (ICC) in The Hague. Hence the ICC became the last resort. The indictment of the leaders of these atrocities would have meant a restoration of peace in Kenya's hotspot areas. But, as is expected in most TJ processes in Africa, political leaders leveraged their powerful influence to compromise state organs. The move to the ICC could have involved religious leaders who would have provided the needed moral compass by the country on what should happen to the indicted perpetrators. Not only was the government unwilling to indict suspects who were of significant political influence, but it also was not ready to compensate the internally displaced peoples (IDPs).

In the quest for post-election justice in Kenya, the ICC was considered the TJ mechanism in March 2010. This was an effort to pursue retributive and restorative justice for victims and perpetrators of the 2007 post-election violence.[45] Consequently, the ICC sent the ICC prosecutor Mr Luis Moreno Ocampo to carry out his independent investigations in Kenya to indict the perpetrators. This he did by interviewing various stakeholders including victims of the post-election violence.

The threats to transitional justice in Kenya

One of the threats to TJ in any political system is the demands and interests of powerful people, including politicians in the past as well as the present regime. Since TJ promises to bring justice to both victims and perpetrators, those in power might attempt to obstruct justice. It took decades of debate as to whether or not Kenya should have a truth commission. Finally, after President Moi retired in 2002, and a new government was set up under President Mwai Kibaki, a task force was set up to decide on instituting a truth commission for Kenya.[46] After public hearings were

[44] Ghoshal (2011: 4).
[45] Wambua (2019: 62).
[46] Hayner (2011: 73).

conducted across the country, a Truth, Justice and Reconciliation Committee was set up with a mandate to go back to 1963 during independence and up to the present day.[47] The mandate involved economic crimes amongst other forms of human rights violations.

Unfortunately, setting up the TJRC was faced with challenges from its formation. The TJRC chairman, Ambassador Bethuel Kiplagat had worked with the former president Daniel arap Moi, who was at the centre of a controversy regarding some of the worst human rights violations and economic crimes. The chairman, Ambassador Kiplagat himself was accused of having participated in the planning of the Wagalla massacre[48] of 1984.[49] The commission largely failed to investigate the 2007/8 post-election violence, claiming that CIPEV had already dealt with and concluded on the matter.[50] In the end, the commission failed to deliver TJ to Kenyans.

Following the post-election violence of 2007/8, a Truth, Justice, and Reconciliation Commission (TJRC) was inaugurated to inquire into the country's historical injustices and violations of human rights.[51] This was occasioned by an election stalemate in the 2007/8 general elections where the Party of National Unity (PNU) led by former President Mwai Kibaki and former Prime Minister Raila Odinga's Orange Democratic Movement (ODM) were deadlocked following a rigged election.[52] This stalemate led to an eruption of countrywide violence that led to the killing of hundreds of people and the forceful displacement of thousands. There were massive and gross violations of human rights and crimes against humanity. Interestingly, it was not until then that a truth commission was deemed necessary to revisit past atrocities on Kenyan citizens. The task of the commission was to look into the historical injustices perpetrated by Kenya's political activity. The Kofi-Annan-led African Union Panel of Eminent African Personalities (AUPEAP) presided over peace negotiations and the consequent signing of the National Accord paved the way for temporal peace and partial stability of the country. To prevent a recurrence of similar violence during successive elections, a truth commission, the Truth, Justice, and Reconciliation Commission, was formed and instituted in 2009 as a TJ mechanism in Kenya's historical and unresolved atrocities.

[47] Hayner (2011: 73).
[48] On February 1984, following a clan-related conflict in Wajir, the Kenya Army conducted a military operation that led to the indiscriminate massacre of thousands of people. This has been considered as a systematic targetting of a civilian population that was orchestrated by government security agencies.
[49] Wambua (2019: 60).
[50] Wambua (2019: 60).
[51] Wambua (2019: 59).
[52] Wambua (2019: 55).

The place of interfaith engagement in confronting structural violence

One of the reasons there are historical injustices in the world today is because of past violence. As has been mentioned earlier in this article, violence does not have to be physical to be destructive to human life; it could also be structural. Structural violence is the kind of violence arising from repressive and oppressive national political, economic, and social structures in which the system generates suffering, torture, marginalisation, and abject poverty to communities. In this article, it has already been argued that the religious leadership has the moral obligation to lead the country towards a peaceable society by confronting repressive structures. It does this by both unearthing and dealing with historical injustices as well as ensuring that structures that allow for gross violations of human rights are done away with. But the approach is that of an interfaith engagement, whereby various religious groups come together for the common good. It is evident from the past section that various religious groups have collectively and individually been engaging with rogue political leaders and governments. This has had an impact on the history of TJ in Kenya, making it unsustainable, and hence referenced as old wineskins. For the wineskin to hold new wine without spilling, the wineskin must be new (Matthew 9: 14–17). The wineskin is the TJ mechanism while wine is the interfaith engagement in sustainable peacebuilding across the country. The new wine which is interpreted as the contribution of the interfaith organisations to TJ processes must work within new interfaith structures without any undue influence by the state.

Religion should not divide the people in a country. Rather than dividing people, 'religion can be the force empowering people from around the world to work together and build cultures of peace, justice, and healing'.[53] How can various religious groups harness a united force for justice and peace? The answer to that question is based on the fact that all religious traditions promote values of peace, harmony, love, and selflessness.[54] Each religious tradition has its way of transmitting values of justice and peace from one generation to another. These beautiful values are packaged in the various religious liturgies in the form of songs, myths, stories, dirges, public calls to prayers, sermons, etc. This understanding is important for justice and peace by which communities aim to gain stability in the country. This involves audacity on the religious leaders' part to push the government to revisit past atrocities against humanity.

It is correct to say that every faith tradition advocates healing, forgiveness, and reconciliation. Every religion has its set of religious rituals which are a resource for healing. However, more than healing, religious rituals practised in a safe space can be

[53] Abu-Nimer *et al.* (2004: 107).
[54] Abu-Nimer *et al.* (2004: 107).

a force for good in revisiting the past atrocities committed by states. It is proven that 'Religious rituals for reconciliation are powerful acts that often invoke strong emotions and can easily mobilize crowds into unexpected gestures of reconciliation and forgiveness.'[55] The diversity of religious traditions and their rituals provide a rich resource for revisiting the historical past and dealing with it. It also provides an opportunity to deliver a fair representation of all communities in the country. When community representation is backed up by various religious groups, it prevents the political leader from offering blanket forgiveness on behalf of her/his community during a national prayer day.[56] It is hard for victim communities to accept and move on based on leader-driven blanket forgiveness which does not show a promise of taking responsibility for the atrocities committed. This discredits forgiveness and reparation initiatives. Religious leaders present should have been able to see and confront impunity, corruption, and crimes against humanity in a truthful and just way. Faith traditions should show the resolve to challenge and remove structures that have perpetrated systemic injustices against the people. For Kenya, this has been a long journey for the interfaith groups facilitated by external groups to arrive at a common goal.

Both the TJRC and ICC sidelined religion and its role in offering a voice for the oppressed in TJ matters in Kenya. Upon the naming of the perpetrators of the 2007/8 post-election violence by the ICC prosecutor, Luis Ocampo, a section of the church leadership rose to pray for the perpetrators that justice would be found for them.[57] This was a premature move long before the suspects who were charged with committing crimes against humanity were even arraigned in court. In addition, the state made calls for prayer rallies across the country as the clergy were used to intercede for the infamous Ocampo Six, in the weeks leading to their appearance at The Hague where they were indicted by the ICC[58] Besides the Christian church, some African traditional religious leaders were also involved in praying for the suspected perpetrators who were answerable to charges against humanity in The Hague. The Meru traditional religious group, the *Njuri Ncheke* prayed for Mr Francis Muthaura, one of their tribal kingpins and former secretary to the cabinet who was among the Ocampo Six. Sections of Muslim leaders too held prayers for one of their adherents, the former police chief Mr Mohammed Hussein Ali who had been accused of abetting crimes against humanity. These are just a few examples of how religion has been misused to obstruct TJ. Religion is, however, the mainstay of justice. Religion cannot be separated from

[55] Abu-Nimer *et al.* (2004: 183).
[56] On 31 May 2018, President Uhuru Kenyatta and the opposition leader Raila Odinga as representatives of their communities offered forgiveness to each other at the Safari Park Hotel during a National Prayer Day for past insults which might have triggered violence during the 2017 disputed elections.
[57] Kimutai (2011).
[58] Maruko (2011).

the conversation around justice issues as it speaks to the moral obligation of each person who seeks community peace for the common good.

Both Kenya and South Africa have had religious groups working together to pursue social justice. The approach of religious engagement has been two-pronged. On the one hand, religious groups have focused on peacebuilding initiatives that address existing cases of violent conflicts. On the other hand, various religious groups have worked only with their communities. The challenge with this approach is that the country as a whole does not see the graveness of past atrocities committed against fellow citizens; hence there is a lack of synergy in agitating for TJ. However, human rights groups see these atrocities and fight for the TJ mechanism to be put in place for justice, healing, and reconciliation of communities. For the success of TJ in Kenya, religious leaders from all religious traditions ought to unite and work alongside civil society groups.

From the recent past to the present, various religious groups have been engaged in social action in peacebuilding projects. This has involved working with communities across the religious divide to stop violence and develop peace amongst warring communities. Civil society groups such as the Coast Interfaith Council of Clerics (CICC), the Center for Human Rights and Policy Studies, the Life and Peace Institute, Search for Common Ground, the Africa Voices Foundation, and Muslims for Human Rights (MUHURI) are good examples. Their agenda is to work for the common good of justice in communities that are ravaged by violence and conflict. These efforts, while small, activate the government's responsibility in laying down a strong foundation for TJ in the country. This is because one of the reasons communities are up in arms against each other is because of diminishing resources such as land. There is no better comparison to make than that of Kenya and the success story of post-apartheid South Africa.

Interfaith engagement and transitional justice in Kenya and South Africa

Having established that religion is the mainstay of justice, a case is made that TJ in Kenya has so far appeared as 'new wine served in an old wineskin'. New wine is refreshing, and so is the promise of justice to the oppressed masses. A TJ mechanism that is devoid of the contribution of religious leadership is subject to interference by powerful political influence. But worse is a TJ mechanism that is devoid of an interfaith component, not just religious. All voices in the religious front need to be heard as they represent a cross-section of communities in the country. In SA, religion played a key role in the post-apartheid period. This section is going to study what gains were

made, and what it could have done better had it incorporated a multifaith aspect into this effort. This section will also discuss what Kenya's TJ mechanism can borrow from SA's TJ processes.

In her book *Religion and Conflict Resolution* Shore premises in the underlying argument that 'the Christian influence in the TRC helped shape the post-conflict reconstruction stage of South Africa's transition through an emphasis on truth-telling and reconciliation'.[59] This is even though TRC did not incorporate the justice aspect at first. This does not mean, however, that the commission did not address justice issues resulting from racism and apartheid. Therefore, the religious presence shaped and directed talks around post-conflict reconstruction. This is essentially the goal of TJ. The work of TJ is incomplete if it does not end in healing and community reconciliation. It is also important to note that the religious presence also had its limitations. Shore observes that Christianity's presence in the talks undermined aspects of the TRC and South Africa's ongoing social and political transition.[60] This could have been due to the relationship between Christianity and the colonial enterprise that subtly perpetuated apartheid. But more significantly, Christianity prescribed a formula that consisted of three vital components of the TJ process: truth-telling, healing, and reconciliation.[61] Not all of the Christian churches were in favour of the apartheid policy.

Similarly, in Kenya, not all the church was in favour of colonialism. African Independent Churches (AICs) were born out resistance against the imperialists' continued presence in Kenya's post-independence religious, socio-economic, and political recovery.[62] Just as some sections of the Christian church challenged British imperialism in Kenya, so did some churches in SA challenge the apartheid policy based on the premise that all men are created equal. A prime example of Christian involvement in the struggle was a sentiment from an African National Congress (ANC) congressman, Albert Luthuli, who believed that his political role in agitating for justice was inspired by his religious faith.[63] He felt that his compulsion to be in the struggle for justice was his Christian duty. The same was true of several Christian leaders in post-independence Kenya who felt that their primary call was to be in politics to help fellow countrymen restore human dignity that had been lost during colonialism and struggle for independence. Likewise, the religious leaders' involvement in fighting for TJ during the successive regimes of Jomo Kenyatta, Daniel arap Moi, and Mwai Kibaki has been in response to the call for the restoration of human dignity lost in past atrocities.

[59] Shore (2009: 3).
[60] Shore (2009: 3).
[61] Shore (2009: 49).
[62] Mwaura (2014: 250).
[63] Shore, (2009: 50).

Truth commissions in both Kenya and South Africa

The South African TRC was in many ways an unconventional modern political mechanism.[64] In the constitution of the commission, there were numerous calls for religion to be included in the process. Christianity was vouched for and incorporated in the process which influenced how the commission values truth-telling as a key component of the TJ process. By incorporating religion as an important component in the TJ process, the TRC was flagged as a model prototype that could be adapted by other African states. One of the major limitations is that choosing Christianity in essence sidelined other religions that were assuredly present in SA. Christianity was factored in as the 'authorized and legitimate method of truth-telling'.[65] This was in utter disregard of the principles of international conflict resolution theory that discourages the inclusion of a single religion on matters of peacebuilding.

Would the inclusion of other religions represented in SA have hindered truth-telling? To respond to that question, a look at other religions is recommended to determine their values. This article will not attempt to go in that direction. It is, however, important to underscore that most religions hold common cardinal values, like truth and justice for all of humanity. Therefore, Islam, Hinduism, Buddhism, and African Traditional Religions hold truth-telling as a sacred virtue that needs to be upheld by all human beings.

Religion and transitional justice in Kenya and the Republic of South Africa

In Kenya, most if not all political leaders subscribe to and are committed to a religious tradition and therefore might hold to their religious values, including truth-telling. In Kenya, and largely in Africa, religion is still relevant in informing political functions and decisions. Including religion in political processes might be considered to be undermining the liberal views of a country. However, SA still went ahead and made the religious dimension important to the entire process. In terms of religious representation in the political space, Kenya has a great opportunity to practise religious tolerance with secular entities. Civil society groups such as CICC and MUHURI, as discussed earlier, have promoted tolerance in their engagement. Religion plays an important role in civil society to promote truth-telling during inquiry commissions. Truth commissions are avenues used for fact-finding as well as telling stories of past

[64] Shore (2009: 9).
[65] Shore (2009: 9).

human rights violations.[66] The fact-finding is by way of spending time with the victims, listening to them with empathy to know what happened.

> Truth commissions in most countries are usually concerned with similar goals.
>
> To discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to counter impunity and advance individual accountability; to outline institutional responsibility and recommend reforms, and to promote reconciliation and reduce conflict over the past.[67]

The goal of fact-finding does not mean that the victims discover new truths. No! rather, they testify before a hearing of what they already know. It can be predicted that when victims are subjected to a truth commission that is representative of their religious subscription, then they will unreservedly pour out their hearts with the hope that healing as promised in their respective faith tradition is guaranteed. Therefore, truth commissions are not about finding out new truths, but therapeutic mechanisms that offer the victims the chance to speak their hearts out. During testimonials before truth commissions, the truth that is long-held but is hard to talk about is made known. For example, 'Anti-apartheid activists in South Africa insist that it was impossible not to know that torture and killing were commonplace under apartheid, but that some South Africans chose to ignore the truth.'[68] This has been the case for Kenya's long-held stories of immense torture and suffering under past regimes and their dictators. For example, victims of the infamous Nyayo House torture chambers where suspects of political dissent against former president Moi were detained have never had a platform for truth-telling. During the twenty-four years of President Moi's reign, people could not speak about the torture chamber and therefore chose to ignore the truth. Only after President Moi's retirement did victims start to speak up in isolated interviews with human rights groups.

A truth commission that is representative of the interfaith leadership can provide a safe environment for truth-telling. In religious conflict resolution, the common understanding in a multifaith context is that truth is supreme and sacred across all religions. Therefore, the object and subject of truth itself deserve attention and protection because it is a noble thing. This is to recommend a multifaith-laced truth commission as a TJ mechanism because of the advantages it has for witness and victim protection over state machinery. One of several objectives of the truth commission is, as Hayner calls it, 'sanctioned fact-finding'.[69] This means 'to establish an accurate record of a country's past, clarify uncertain events, and lift the lid of silence

[66] Shore (2009: 28).
[67] Hayner (2011: 20).
[68] Hayner (2011: 20).
[69] Hayner (2011: 20).

and denial from a contentious and painful period of history'.[70] Lifting the lid of silence is therapeutic in itself to the victims and family members of the victims of oppression. Stopping the denial of past atrocities also has a national healing aspect. For a conflict of a religious nature,[71] a truth commission with the interfaith leadership incorporated in it creates an environment of vulnerability. This vulnerability in an open and safe space is required for truth and fact-finding. If facts are not achieved, then truth will not suffice in the interviews, without which the regaining of peace and stability is difficult for a country. The 'Official acknowledgment can be powerful precisely because official denial can be so pervasive.'[72] Most if not all religious traditions have rituals that can deal with the skeletons of the past and provide the chance to regain a fresh start in reconciliation.

Even though religious leaders in Kenya have been successful in calling rogue governments and regimes to account, they have not followed up with a clamour for retributive and distributive justice. Instead, the commissions that had been set up focused on the perpetrators who were already well protected by the prevailing powers. On the contrary, the pain suffered by victims at the grass-roots level was not redressed. Thousands of internally displaced people (IDPs) had been returned to their homes, but the scars and horrors of violence against them remained fresh in their minds. The country has since failed to reconcile the communities at the centre of post-election violence. Therefore, from that time on, successive election cycles have been marked with a lot of tension, sparks of violence, and election malpractices that deny Kenyans their democratic right to free and fair elections.

Without reconciliation, there is no lasting peace. Kenyans are always on edge, before, during, and after a general election. Consequently, the country is set to an election mode from one election to another, with talks about the next election from the moment a president is sworn into office. This trend has not helped establish peace and deliver TJ. The country is usually preoccupied with succession politics, such that the people do not have a chance to remember and talk about their pain and loss. Only the religious leadership can address this as it bears the moral capacity to trace back injustices and recompense for those afflicted by it.

[70] Hayner (2011: 20).
[71] Some forms of conflict in Africa are caused by religion. For example, when political leaders of a certain religion incite their communities to attack another community of a different religious affiliation.
[72] Hayner (2011: 21).

Conclusion

Transitional justice is essential for the peace and stability of any country. Religious leaders and groups have in the past participated in pushing for the institutionalisation of transitional justice in both Kenya and the Republic of South Africa. However, interfaith bodies as religious institutions have remained in the margins of conversations about TJ. Instead, it has been suspected to be a party to or cause of conflict in the past. While this could be true, experts believe that religion has been at the forefront of peacebuilding initiatives. This acknowledgment gives the religious leadership in Kenya more ground and basis to offer leadership in peacebuilding. This is because religious groups are influencers of societies. Religion-led peacebuilding efforts cannot be achieved by various religious leaders and groups working in isolation from each other. An interfaith synergy is thus required to deal with TJ as religious leaders have a massive influence in the country across the political divide.

Numerous TJ mechanisms have failed to yield good results due to the nature of their constitution and agenda. Truth commissions have been set up that do not meet the religious representation required to drive change through TJ. Thus, truth commissions are constituted in old wineskins. The Truth and Reconciliation Commission in the Republic of South Africa that helped reconcile a divided post-apartheid country is a success story.

Conversely in Kenya, religious institutions have in the past pushed for space and inclusion in the TJ processes. While religion has been incorporated in truth commissions, they stand alone as individual entities that have little capacity to influence values of truth-finding, healing, and reconciliation in Kenya. Perhaps a mainstreaming of interfaith institutions in TJ processes will enable Kenya to develop and put new TJ mechanisms in place. An interfaith composition of the truth commission can be leveraged to yield healing and reconciliation for sustainable peace in Kenya as it did with the Republic of South Africa.

References

Abu-Nimer, Mohammed, Hartford, Barbara, Liebler, Claudia, Mcllwaine, Susanna & Sampson, Cynthia (eds) (2004), *Interfaith Peacebuilding Guide* (San Francisco, CA, United Religions Initiative).

Backer, David & Kulkarni, Anupma (2016), 'Humanizing Transitional Justice: Reflections on the Role of Survey Research in Studying Violent Conflict and Its Aftermath', *Transitional Justice Review*, 1(4): article 6. https://doi.org/10.5206/tjr.2016.1.4.6

Gal-Or, Noemi & Schwelling, Birgit (2015), 'Global Cooperation in Transitional Justice: Challenges, Possibilities, and Limits' (Global Dialogues 6; Duisburg, Germany, Centre for Global Cooperation Research).

Ghoshal, Neela (2011), *'Turning Pebbles': Evading Accountability for Post-election Violence in Kenya* (New York, Human Rights Watch).

Haar, Gerrie ter (2004), *Religion: Source of Conflict or Resource for Peace?* (London, Brill).

Hayner, Priscilla B. (2011), *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edn (New York, Routledge).

Karanja, John (2006), 'The Biblical, Prophetic Ministries of Henry Okullu and David Gitari', *Historical Society of the Episcopal Church*, 75(4): 580–604.

Kimutai, Vitalis (2011, 29 March), 'Group Plans Prayers for "Ocampo Six"', *The Standard*, Politics section. https://www.standardmedia.co.ke/busia/article/2000032120/group-plans-prayers-for-ocampo-six#

Maruko, Tom (2011, 1 April), 'Uhuru and Ruto Strengthen Ties', *Daily Nation*. https://www.nation.co.ke/kenya/news/politics/uhuru-and-ruto-strengthen-ties--762782

Mati, Jacob M. (2012, March), 'Social Movements and Social–Political Change in Africa: The Ufungamano Initiative and Kenyan Constitutional Reform Struggles', *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 23(1): 63–84.

Mhlauli, Mavis B., Salani, End & Mokotedi, Rosinah (2015), 'Understanding Apartheid in South Africa Through the Racial Contract', *International Journal of Asian Social Science*, 5(4): 203–19. https://doi.org/10.18488/journal.1/2015.5.4/1.4.203.209

Moscati, Maria Federica (2015, May), 'The Role of Transitional Justice and Access to Justice in Conflict Resolution and Democratic Advancement' (London, Democratic Progress Institute). https://www.democraticprogress.org/wp-content/uploads/2015/06/MOSCATI_TRANSITIONAL-JUSTICE-Proof.pdf

Mutua, Makau (2015), 'What Is the Future of Transitional Justice?', *International Journal of Transitional Justice*, 9(1): 1–9. https://doi.org/10.1093/ijtj/iju032

Mwaura, Philomena Njeri (2014), 'African Instituted Churches as Expressions of African Christianity', in *Endless Quest: The Vocation of an African Christian Theologian* (Nairobi, Kenya, Acton Publishers), 247–72.

Öhlmann, Philipp, Gräb, Wilhelm & Frost, Marie-Luise (2020), 'Introduction: African Initiated Christianity and Sustainable Development', in *African Initiated Christianity and the Decolonisation of Development* (Abingdon, Routledge), 1–30.

Palmer, Nicola, Jones, Briony & Viebach, Julia (2015), 'Introduction: Ways of Knowing Atrocity: A Methodological Enquiry into the Formulation, Implementation, and Assessment of Transitional Justice', *Canadian Journal of Law and Society / Revue Canadienne Droit et Société*, 30(2): 173–82. https://doi.org/10.1017/cls.2015.19

Piotrowski, Adeline (2019), 'Colonialism, Apartheid, and Democracy: South Africa's Historical Implications on the Land Reform Debate', *Journal of Interdisciplinary Undergraduate Research*, 11(4): 53–71.

Shore, Megan (2009), *Religion and Conflict Resolution: Christianity and South Africa's Truth and Reconciliation Commission* (Aldershot, Ashgate).

Tan, Matthew John Paul (2011), 'Religion and Conflict Resolution: Christianity and South Africa's Truth and Reconciliation Commission', *Global Change, Peace & Security*, 23(3): 443–4. https://doi.org/10.1080/14781158.2011.605665

Tarus, David & Gathongo, Julius (2016), 'Conquering Africa's Second Devil: Ecclesiastical Role in Combating Ethnic Bigotry', *Online Journal of African Affairs*, 5: 8–15.

Wambua, Muema (2017), 'The Ethnification of Electoral Conflicts in Kenya: Options for Positive Peace', *African Journal on Conflict Resolution*, 17(2): 9–40.

Wambua, Muema, (2019), 'Transitional Justice and Peacebuilding: The ICC and TJRC Processes in Kenya', *African Conflict and Peacebuilding Review*, 9(1): 54–71. https://doi.org/10.2979/africonfpeacrevi.9.1.03

To cite the article: Martin Munyao (2021), '"New wine, old wineskins": a comparative study of interfaith engagement and transitional justice in Kenya and South Africa', *Journal of the British Academy*, 9(s2): 103–125.
DOI https://doi.org/10.5871/jba/009s2.103

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk

The British Academy

Journal of the British Academy, **9(s2)**, 127–154
DOI https://doi.org/10.5871/jba/009s2.127
Posted 25 May 2021

Liberal international criminal law and legal memory: deconstructing the production of witness memories at the International Criminal Tribunal for Rwanda

Benjamin Thorne

Abstract: International criminal tribunals and courts, such as the International Criminal Tribunal for Rwanda (ICTR), are commonly understood within legal transitional justice scholarship as the primary response to mass human rights violations, not only in addressing impunity, but also in uncovering the truth of what happened and why. This conceptually orientated article aims to deconstruct legal witnessing and memory production at the ICTR in order to critique claims in legal scholarship that international criminal institutions are able to produce a collective memory of mass rights violations. Specifically, the article proposes an original conceptual framework using insights from critical theory, Giorgio Agamben (witness) and Paul Ricœur (memory), which it is argued extends our understanding of the scope, and limitations, of liberal Western criminal institutions' (in)ability to make sense of past atrocities.

Keywords: International criminal institutions, critical theory, legal memory construction.

Note on the author: Dr Benjamin Thorne's main areas of interest are socio-legal studies, transitional justice, and critical theory. Currently a central focus is memory, transitional justice, and legal atrocity archives. More generally, Benjamin is interested in questions around visual and audio representations of crime, law and justice, and the coexistence of spaces of law and faith in the aftermath of mass violence.

Introduction

This conceptually orientated article proposes an original theoretical framework to critique liberal international criminal law and specifically the claim that international criminal courts and tribunals can aid African societies transitioning from conflict and atrocities by producing, via the testimonies of witnesses, a collective understanding of why and how the atrocities occurred. To do this it uses the case study of the International Criminal Tribunal for Rwanda (ICTR), which was created as an international response to the 1994 genocide against the Tutsi in Rwanda. The article's critique is framed by the backdrop of transitional justice's strong legalistic orientation (Zunino 2018), in both an empirical and a philosophical sense: international criminal justice is seen as superior and more 'neutral' to local understandings of justice, and international criminal courts and tribunals are perceived to be the primary way to facilitate this Western liberal notion of justice (Dixon & Tenove 2013). Transitional justice's orientation towards the primacy of international criminal justice has a fetishisation with Africa (Murithi 2008, Nkansah 2011, Nyawo 2017, Clarke 2019, Muleefu 2019). This fixation has consistently lacked understanding and engagement with societies experiencing periods of transition, which has often led to a negative rather than positive impact on those that international justice is purportedly aiming to help (Igwe 2008, Nyawo 2017, Clark 2018). Advocates of international criminal justice as the most suitable response to atrocities and/or conflict in Africa commonly claim the scope of international criminal law to contribute to societal transformation (Kendall 2015, Keydar 2019). The crux of this claim is that international criminal courts and tribunals have the ability to go beyond the essence of what courts are there to do, that is reach a legal determination of guilty or not guilty, and can also contribute to reconciliation and peace (Igwe 2008, Keydar 2019). These lofty and idealised aims of international criminal law include contributing to producing a collective understanding of the past through the testimonies of witnesses.

From this backdrop, the article proposes an original conceptual framework using insights from Giorgio Agamben ('witness') and Paul Ricœur's philosophical thinking on memory, in order to deconstruct the ways in which the ICTR constructs witness identity and memories. Agamben's (1999) understanding of witnessing is concerned with the ethical implications of positioning the survivor of mass violence as the witness, accounting for the trauma suffered by others. Agamben's concept of 'witness' focuses on the concentration camps at Auschwitz. This article takes Agamben's conceptual insights and applies them to a new context, the ICTR. Ricœur (2004) understands memory to be plural and fragmented, unable to render the temporality of historical knowledge. The arguments advanced by this article contribute towards discussions on the role of witnesses and how the past is remembered during transitional

periods, by highlighting the need for the study and practice of transitional justice to fully understand how theoretical insights can make visible the complexities, contours, and limitations of the legal construction of past experiences of African societies.

This article aims to advance three related points. The discussion begins by providing a summary survey of liberal orientated legal scholarship which claims the ability and benefits of international criminal courts and tribunals to be able to produce a collective understanding of how and why the atrocities occurred. The section argues that this scholarship is saturated with traditional legal frameworks and epistemological assumptions, and misses, or is conceptually unable to comprehend, the contingent nature of legal memory construction and the role legal institutions, and their actors (judges, legal counsel, investigators, registrar) play in the construction of witness identity and memories. Developing this argument, the second section of the article constructs an original post-structuralist conceptual framework for exploring identity and memory construction at the ICTR specifically, and international criminal courts generally. The article proposes that this conceptual framework offers an alternative understanding of who can be a witness at the ICTR and what witnesses can recall from their memories. The section concludes by arguing that this framework offers one way to consider legal witnessing and memory as a process of construction, limits, and exclusion. The final section reflects on Rwandan society's relationship with legal memory by conceptually exploring what else the legal process of memory construction does: what else happens or is produced through the discursive practices at the ICTR. Specifically, it provides an initial exploration of the potential role ICTR archival material could have in aiding post-conflict memory ecology in Rwanda.

Context and scope

Between April and July 1994 in Rwanda approximately 800,000 people were killed, mainly ethnic Tutsi and moderate Hutu. The ICTR was created (United Nations Resolution 955, 1994) following a request led by the Rwandan government (Rwandan Patriotic Front (RPF)) and a United Nations investigation that concluded the violence between April and July 1994 was genocide. The preamble in the ICTR statute states the establishment of the tribunal will bring a new era to international criminal justice and individual accountability for violations of international law, including genocide (ICTR 2007: 55). The statute also states that the tribunal will contribute towards the 'process of national reconciliation and to the restoration and maintenance of peace' (ICTR 2010: 57–9). The tribunal was comprised of three organs: the chambers, the prosecutor, and the registry. The tribunal's first judgment was delivered on 2 September 1998 (Jean Paul Akayesu). The average length of a trial (from indictment issued to judgment)

was just under 8.5 years, though the longest ICTR trial was more than double the average at 19.5 years (Elie Ndayambaje). During the tribunal's 21-year existence (1994–2015) it issued 93 indictments and delivered 62 sentences.[1] It is also perceived by many advocates of international justice as producing 'landmark' judgments, such as in the Akayesu case which determined for the first time rape as a weapon to commit genocide. Alongside this advocacy, the ICTR has also been criticised for delivering 'one-sided justice', specifically for not indicting any members of the RPF for crimes committed within the tribunal's jurisdiction (Jones 2009). A common response to this claim by the Rwandan government is that members of the RPF who committed crimes have been tried in Rwandan military courts, albeit 'closed door' proceedings with few publicly available records. Although, former ICTR prosecutor Hassan Bubacar Jallow has stated that the government had shown him details of up to 24 senior military officers who had been prosecuted by the Rwandan military courts in relation to allegations against the RPF (Jallow 2009).[2]

The ICTR was one of three transitional justice responses to the same historical event in Rwanda. This consisted of an international mechanism, the ICTR; at the national level there were the Rwandan courts; and at a local level the community *gacaca* courts. Palmer (2015) has coined the term 'concurrent justice' for multiple legal institutions responding to the same mass atrocity. In principle, these three justice mechanisms were designed to work collegially and support each other's work and operations (Palmer 2015). However, Palmer has argued that in practice, despite the legal compatibility of the courts, these three mechanisms operated in competition and with a cynical view of the workings of the other courts (Palmer 2015: 3–5).

Witness evidence was central to the functioning of all three of the courts, resulting in nearly every Rwandan adult engaging with one of these legal mechanisms, sometimes two or even in occasional instances all three (Palmer 2015: 4). At the ICTR's core were investigations carried out by prosecution and defence counsels where tens of thousands of witness statements from individuals who had survived the violence were gathered. This article's framework (Agamben and Ricœur) is used to deconstruct witness identity and memory construction at the ICTR, including the pretrial stage. To help contextualise these conceptual arguments, the article engages with data from interview transcripts of ICTR staff that relate to the selection of witnesses, including legal counsel, registrar, and investigators. The interview transcripts were taken from the University of Washington online archive. These interviews were conducted by the

[1] In 2010, the United Nations Security Council created the International Residual Mechanism for Criminal Tribunals to continue some of the core functions of the ICTR, and International Criminal Tribunal for the Former Yugoslavia, including prosecuting indictments issued by the ICTR and appeal proceedings.

[2] See Jallow's statement to the UN Security council (2009, https://undocs.org/en/S/PV.6134).

UoW Faculty of Law (2008–9) for their project 'Voices from the Rwanda Tribunal' (VFRT), and include the full transcripts, audio and video recordings of the interviews, along with all of the questions the interviewees were asked. The online archive contains 49 interviews with ICTR personnel, including judges, acting chief of investigations, legal officers, prosecution and defence counsel, investigators, and the chief of information. The University of Washington's project was created for the purpose of establishing an online archive of information with the intention that it be reused and repurposed by others, including Rwandans, researchers, artists, and educators (Nathan *et al.* 2011: 593). The interview transcripts provide very useful information about first-hand experiences of the functioning of the tribunal relating to the selection of witnesses.

This article is not arguing that the benefits of international criminal proceedings, or the role international criminal courts have in the growing milieu of transitional justice responses to periods of violence, should be rejected. What this article is sceptical of and challenges throughout the following conceptually orientated critique, is the claim of restorative justice capabilities of international criminal law. Specifically, the claimed capability that international criminal courts can, and should, go beyond their retributive duty to bring about accountability for heinous crimes, and can also contribute to aiding affected societies in Africa by producing a collective understanding of the past.

International criminal justice as the purported panacea for conflict and atrocities in Africa

This section begins with a discussion of how liberal international criminal law has become an entrenched norm for transitional justice responses to atrocity crimes in Africa. Expanding this discussion, the section then gives a summary survey of how this dominant approach has impacted the perceived ability of international criminal courts and tribunals to be able to produce a collective understanding of past horrors.

In the context of conflict and/or mass atrocities in Africa, liberal international criminal law has become a dominant sphere that shapes the priorities and processes for how transitional justice responds to atrocity crimes (Zunino 2018: 2). A core feature of this sphere is a Western understanding of the universality of legal and human rights norms. In short, legal norms are a set of 'Western' legal values that espouse the existence of a standardised framework of criminal law which functions as a universal paradigm for the international community (Teitel 2015: 56). The reverence for legal and human rights advocacy has influenced the perceived importance of international criminal law in transitional justice scholarship (McEvoy 2007). International criminal

and human rights law acts as a universal standard which can 'provide guidance on the necessary course of action', which is external to the parties involved in transition (Turner 2013: 200). However, transitional justice defined by legal and human rights norms, homogenises the way in which periods of transition are comprehended. This homogenising perceives that there is one, indisputable, understanding of justice through which past atrocities can be understood and addressed (Turner 2016). Thus, this singular understanding of justice acts to carve a paradigm of legitimacy for transitional justice legal mechanisms, which, importantly, comes at the cost of withdrawing heterogeneous meaning during periods of transition. This is reflected in Turner arguing, it is '[p]recisely because of the inevitable disagreement over the meaning of justice in transitional societies, [international criminal] law steps in to replace politics as the basis for authoritative decisions' (Turner 2013: 205). As a result of international criminal law colonising what constitutes legitimate meaning, alternative understandings of justice are marginalised from the debate (Turner 2013: 199–201). For example, the Rwandan *gacaca* courts (2002–12) have been labelled as a 'failed' process by much of legal scholarship, precisely for not falling within the legal paradigm of legitimate approaches, even though many Rwandans interpret *gacaca* in different ways (Doughty 2016, 2017, Thorne & Viebach 2019).[3] Thus, transitional justice scholarship in dealing with the past and as a legitimating source for a democratic domestic future is founded upon the 'assumption of the capacity of international criminal law to mediate social change' (Turner 2013, 198–9).

International criminal justice resonates with the dominance of legal and human rights norms as the panacea of transitional justice in Africa. One of the implications of this dominance is that the International Criminal Court (ICC) is often charged with being a neocolonial institution, partly because it has only issued indictments for atrocities in Africa. Although, Phil Clark has argued that, whilst there is validity in the neocolonial perspective of the ICC, this argument overstretches the view that African governments are completely at the 'mercy' of the ICC and that states are powerless to resist this international justice institution (Clark 2018). As Clark argues, contrary to the common perception that the ICC wields unrestricted power over situation countries in Africa, rather some African governments, such as in Uganda, have used the ICC for their own political ends precisely because the court is a weaker institution than is often acknowledged (Clark 2018: 119). This emphasises the complexities between courts' engagement with African conflicts and the political dynamics of these countries.

According to Kamari Maxine Clarke, international criminal justice is an assemblage of legal technocritical practices, embodied effects, and emotional regimes,

[3] See Clark (2010).

which she refers to as 'affective justice' (Clarke 2019: 9). This assemblage of affective justice creates possibilities and conditions for the way that international justice engages with African countries: how justice is defined, who is it for (and not for), and its geographical reach (Clarke 2019: 6). Affective justice helps us understand 'people's embodied engagements with and production of justice through particular structures of power, history and contingencies' (Clarke 2019: 5). A key part of Clarke's affective justice is the 'victim' subject, through which the workings of the international criminal court (ICC) and structures of power are embodied. It is the 'legalistic processes that make legible the subjects of the law', such as victims (Clarke 2019: 29). Here, in the context of this article we can think of legal witnesses as one of the subjects of law, whose subjectivity and voice are made possible and conditioned through the discursive practices of the ICTR and its legal actors. Understanding the conditions and possibilities of who can be a witness and what they can recall from their memories at the ICTR is the central thrust of the original conceptual framework offered in the discussions to follow.

It is this frame of advocacy for international criminal justice and legal and human rights norms that advocates often use to justify the ability of international criminal courts and tribunals to produce a collective understanding of mass atrocities in Africa. Scholarship focusing on the role of legal witnessing in international criminal courts can be split broadly into two approaches, traditional legal frameworks and legal and human right norms, although they are not necessarily mutually exclusive. Traditional legal frameworks have primarily focused on procedural processes of witness evidence, particularly on the role and legitimacy of witness proofing (Ambos 2009). Relatedly, Combs has argued that at the ICTR Rwandan witnesses were often untrustworthy and had a 'culture' of secrecy (Combs 2010). However, Combs focuses exclusively on 'culture', how Rwandan culture shapes how witnesses engaged with the ICTR. Combs fails to acknowledge the important role that legal culture and practices of the ICTR had in shaping the testimonies of witnesses (Eltringham 2019: 137). Scholars who analyse legal witnessing through the lens of legal and human rights norms argue that they contribute on an individual level by enabling witnesses to come to terms with the past (Kim 2013: 40, Klinkner & Smith 2015) and at a collective level through the compilation of witness testimonies facilitating a collective memory of mass violations (Keydar 2019). Groome argues that, on an individual level, there is a need to position individual victims of mass human rights violations at the centre of legal responses to atrocities, transitioning victims from passive sufferers of violence to active participants in processes of redress (Groome 2011). Those who claim the beneficial relation of legal approaches to understanding the past and human rights norms argue it aids individuals and 'satisfies society's interest in the truth about gross violations of human rights' (Groome 2011: 198). However, this human rights discourse on witness memories

fails to comprehend the conditional and contingent nature of memory. This is because there exists a fundamental principle within normative human rights discourse that individual victims of rights abuses have a universal right to agency in legal proceedings (Klinkner & Smith 2015: 11–12). This normative human rights discourse 'often leads to "faith-based" rather than "fact-based" prescriptions' (Thoms *et al.* 2008: 5). As such, this suggests that expectations of human rights advocacy are often too high, which exemplifies the need to conceptually examine how individuals 'become' a witness subject and the institutional conditions and possibilities of how they remember.

Conceptualising the way ICTR witnesses remember mass atrocities

This section constructs an original theoretical framework using the concepts of 'memory' (Ricœur) and 'witness' (Agamben). The article's framework uses a 'toolkit' approach to theoretical insights, in which particular conceptual components are brought together as a conceptual lens to cast new light on a given research problematic (Foucault 1972). This conceptual framework consists of five interconnected components: namely, subjectivity, the grey zone, the lacuna of law–justice (Agamben), plurality of memory, and manipulated memory (Ricœur). In what follows each conceptual component is outlined and applied to the ICTR. Each conceptual insight builds upon the others in order to create a lens through which witness identity and memories at the ICTR can be deconstructed.

The subjectivity of bearing witness

Reflecting on the achievements of the ICTR, Deputy Registrar Everard O'Donnell is a voice that champions how the tribunal has been able to tell victims' stories of horrific suffering that would not otherwise be heard. In exemplifying his conviction, O'Donnell draws upon the Mikaeli Muhimana (*ICTR-95-1B*) case and the horrific events that led to the torture and murder of Pascasie Mukaremera and her unborn baby:

> Pascasie Mukaremera who was this Tutsi farmer who was pulled out, tortured and had her baby ripped out of her stomach and we would never have known about that if it hadn't been for just one witness who was hiding in the bushes 20 meters away. Otherwise it would be an anonymous death, you know, like so many of the hundreds of thousands of deaths, just anonymous. We have recorded Pascasie Mukaremera's story for the rest of time. Wherever digital media survives, that witness will be able to speak.

O'Donnell's remarks that legal witnesses can tell the stories of horrific trauma is at the centre of this article's conceptual investigation.

According to Agamben, there are two types of witnesses at Auschwitz. The witness who was killed at Auschwitz and the witness who survived and was left to tell the story of Auschwitz to others (Agamben 1999: 16). For Agamben, these two types of witnesses are an instructive 'paradigm' for thinking through, ontologically, how experience (knowledge) is understood (Agamben 1999). That being so, interrogating the lacuna in which 'survivors bore witness to something it is impossible to bear witness to' (Agamben 1999: 13). This is why Agamben insists the central concern of his book, *Remnants of Auschwitz*, is testimony (Agamben 1999: 13).[4] According to Agamben this lacuna of the impossibility for the survivor to bear witness is clearly evident in Primo Levi's account of his own experience of surviving Auschwitz (Agamben 1999: 16–17). Specifically, Agamben uses Levi's account in *The Drowned and the Saved* as the ontological foundation for thinking through how the experience, and more specifically knowledge, of Auschwitz can be known if it is impossible for the survivor to bear witness to it (Agamben 1999). Therefore, it is necessary for the discussion that follows to briefly summarise Levi's *The Drowned and the Saved*, then to go on to unpack how Agamben uses it to develop his philosophical understanding of witnessing and how the article uses it.

A central theme of *The Drowned and the Saved* is the survivors' responsibility to speak, ensuring the atrocities of Auschwitz were not forgotten, and simultaneously coping with the guilt of having survived the camps when so many did not. On bearing witness to the memory of Auschwitz and a moral obligation to do so, Levi is clear on one thing: as a survivor of the camps Levi accepts the moral obligation to testify to what he witnessed. However, Levi is unequivocal that the true witnesses to the horrors of the Nazi concentration camps were those killed in the gas chambers (Levi 1988). Here it is worth stating at length Levi's conviction on his understanding of the true witnesses:

> I must repeat—we, the survivors, are not the true witnesses. This is an unfortunate notion, of which I have become conscious little by little, reading the memories of others and reading mine at the distance of years. We survivors are not only an exiguous

[4] *Remnants of Auschwitz* forms the third instalment of Agamben's *Homo Sacer* project, though it is this third instalment in particular that received heavy criticism for its apparent deemphases of historical singularity (Bernstein 2004, Marion 2006, Mouffe & Laclau 2007). Although such criticism overlooks the nuances of the philosophical method Agamben employs. What critics including Laclau, Marion, and Bernstein appear to be challenging most of all, albeit Marion and Bernstein from a slightly different position to Laclau, is the paradigmatic method Agamben uses to make his philosophical offerings. This criticism stemmed from Agamben's use of Auschwitz and figures and events from the camp as much as it did for the content and insights it offers (de la Durantaye 2009, 248–9). This common criticism of Agamben's paradigmatic method, such as that made by Laclau, seems to miss or avoid taking seriously the paradigmatic methodology Agamben uses to advance his philosophical argumentation.

> but also an anomalous minority: we are those who by the prevarications or abilities or good luck did not touch the bottom. Those who did so, those who saw the gorgon, have not returned to tell about it or have returned mute, but they are 'Muslims', the submerged, the complete witnesses, the ones whose the position would have a general significance. They are the rule, we are the exception … we who were favoured by fate tried, with more or less wisdom, to account not only our fate, but also that of the others, the submerged; but this was discourse on 'behalf of third parties', the story of things seen from close by, not experienced personally. (Levi 1988: 63–4)

It is this 'speaking in proxy' which Levi foregrounds that Agamben interprets in advancing his philosophical explanation of testimony. In that, for Agamben, Levi's claim that the survivor speaks in proxy for those who cannot is analogous to how experience is understood (Agamben 1999). In other words, Agamben, conceptualising his understanding of witnessing takes as its starting point Levi's account of the 'true witnesses' of Auschwitz.

Subjectivity, similar to much of Agamben's philosophical thought, is framed within his understanding of potentiality (Agamben 1999: 177). For Agamben, potentiality is the ontological principle of the possibility that there is always the potential to do something, although whether an individual does that thing or not is never predetermined (Agamben 1995: 39–49). Potentiality is not the potential of something waiting to be actualised; rather potentiality, or 'impotentiality', is the opposite to understanding events as totalising. It is the potential for an individual to 'become', but also not to become something, the eschewing of single unity of subjects. Following Agamben, an individual subject's relation to the totality of a group, such as witnesses, is the potential to only be part of that totality, which is referred to by Agamben as a 'remnant' (Agamben 1999: 87–135). Importantly, 'remnant' is the subjectivity of the subject not becoming encapsulated within the singular identity of a collective (Agamben 2005: 54). A subject understood as a 'remnant', which is the interpretation taken by this article, is a conceptual tool to see 'how a totality conceives of itself and of its component parts' (de la Durantaye 2009: 299). In short, the subject, the individual who saw the horrors of the genocide against the Tutsi, is a kind of 'remnant'. The subject as a 'remnant' is 'neither the all, nor a part of the all, but the impossibility for the part and the all to coincide with themselves or with each other' (Agamben 2005: 55). In other words, the subject framed as a 'remnant' challenges the notion that a community completely encapsulates the singularity of its members (de la Durantaye 2009: 300). From the article's perspective, it is instead the discursive conditions and thus discursive practices that constitute who can speak as the subject witness and what they can speak about. The discussion will now apply Agamben's insights on subjectivity to the investigation stage at the ICTR in order to help illustrate how this legal institution, and its actors, construct the witness subject, which entails a process

of exclusion. Due to the word limitations of this article it is not possible to extend this discussion to some of the other pretrial legal processes at the ICTR. However, the investigation process, discussed below, is one of multiple pretrial processes, such as indictments and pretrial briefs and motions, which when viewed through the lens of subjectivity all contribute to 'filtering' who can 'become' a witness subject. The following discussion focuses on the investigators' process of selecting witnesses and investigators' lack of local knowledge.

The investigation process at the ICTR acted to restrict who can be a 'witness' through interviewing and selecting witness who had specific information that legal counsels needed to contribute to a legal judgment being reached. As former ICTR investigator David Wagala explains, investigators were only interested in witnesses who could provide relevant evidence to support the prosecutor's case. Finding the relevant witness evidence required a process of filtering out the 'irrelevant' witnesses. For example, as Wagala explicitly states:

> so first we just ask [the person] general questions to ascertain that they have knowledge of what happened, because we want very good witnesses, not just people, fancy people coming here telling stories. So, the first interview is meant to identify the good potential witnesses

A further example of the pretrial stage restricting who can 'become' a witness subject at the ICTR was the Investigation Section lacking context-specific knowledge and local expertise. The ICTR was reluctant, albeit implicitly, to allow Rwandans to be part of the Office of the Prosecutor (OTP) investigation teams, or to allow judges and legal staff to visit Rwanda. The reluctance to use local expertise was based upon the concern that individuals sympathetic to the genocide as well as the Rwandan Patriotic Front (RPF) could manipulate or destroy evidence.[5] Whilst it is understandable that the ICTR wanted to preserve the objectivity of investigations, the distancing of local expertise, particularly in the first decade of the tribunal, resulted in investigations being somewhat haphazard. For example, former ICTR Legal Officer Suzanne Chenault states there was a need for:

> greater knowledge of the anthropological dimensions of this community. And I think that we've gone in almost like bears in a china closet without understanding Rwanda extremely well [including the] ways of approaching those who have survived and those people who witness the events.

[5] Interview with ICTR Prosecutor Charles Adeogun-Phillips. Interviewed by Lisa. P. Nathan and Robert Utter for the University of Washington project 'Voices from the Rwanda Tribunal'.

The impact of lack of local knowledge on investigations and gathering witness evidence is also highlighted by former ICTR prosecutor Charles Adeogun-Phillips. In interview with Nathan and Utter, Adeogun-Phillips states,

> [We] lacked the involvement of national staff in the investigative process. We didn't have any Rwandan help. What is the essential drawback of not having a Rwandan on your investigative team? Well, we're foreigners. We're not native to the locality and there were so many diverse issues and intricacies about the whole genocide in itself that you, you are unable to understand or grasp at a very early stage if you don't have that local context. … And you can imagine what the practical effect of that is, in the sense that we may have, based many of our trials on erroneous theories and strategies, not out of negligence, but out of ignorance.

To identify what conditions constitute the witness subject amongst all the individuals who experienced the genocide against the Tutsi, is suggested here to include investigators' lack of contextual knowledge. The uncompromising stance for legal actors to be distant from the society is evident in one senior ICTR judge's response to Clark's question, *whether or not he had travelled to Rwanda?*

> I have never been to Rwanda and I have no desire to visit. Going there and seeing the effect we are having would only make my work more difficult. How can I do my job—judging these cases fairly—with pictures in my mind of what is happening over there? This task is already complicated enough. (Clark 2018: 43)

The highlighting here of the complexities and in some instances incompetence of investigations is not done in order to propose procedural reform. Rather, the focus here, through a subjectivity lens, is to argue that these procedural complexities and shortfalls in investigations are an important component in understanding the discursive conditions and restrictions of how the witness subject is constituted. Drawing upon the above illustrated example, 'becoming' a witness at the ICTR entails two different but connected influences: namely investigators selecting witnesses who can tell a particular story, and the lack of investigators' contextual knowledge of Rwanda. Investigators' lack of contextual knowledge acted to shape how they understood the events of the genocide, the historical nuances leading up to it, and the complexities of the numerous actors involved. This very limited contextual knowledge in turn shaped what evidence investigators needed, including witness testimonies. Connected to, and compounding, the previous issue of lack of local knowledge, investigators' strategy for witness selection and where to seek these witnesses was directly influenced by the narrow legal narrative prosecutors/defence counsels needed in order for the court to reach a legal determination. These two distinct but intertwined issues are two examples of how the ICTR legal actors contributed to shaping the conditions and possibilities of who can 'become' a witness. In other words, the ICTR legal procedures, including

investigations, are part of the 'filtering' process of the construction of the 'witness'. The way in which investigation teams gather evidence and respond to challenges/issues is more than just a reflection of procedural functioning of the ICTR; crucially, they are part of restricting who can 'become' a witness.

In the next move, the article introduces Agamben's idea of the 'grey zone', which is interpreted to argue that legal witnesses at the ICTR are located in a 'grey zone'.

The grey zone: law, legal witnessing, and the illusion of change

The 'grey zone', a term Agamben takes from Levi, is where the intersection, or more specifically the conflation, of law and ethical categories exists (Agamben 1999: 22). According to Agamben, philosophical understandings of ethics encompass categories such as guilt, responsibility, and judgment as judicial as well as ethical categories. Here, it is worth briefly summarising what it is Agamben takes from Levi's concept of the 'grey zone'. This is important as the article framework uses an interpretation of Agamben's understanding when suggesting that witnesses at the ICTR are located in a 'grey zone'.

Levi's term, the 'grey zone', relates to camp detainees and the blurring of distinctions between prisoner and 'executioner' at Auschwitz; some detainees 'volunteered' for 'work' roles within the camp. One such collaborative role was the *Sonderkommando* (Special Squad) who were 'entrusted with running the crematoria': disposing of the bodies from the gas chambers (Levi 1988: 32). Levi discusses an unusual event, a soccer match, that took place at Auschwitz between the 'Special Squad' and SS camp guards. It is Levi's depiction of the soccer match, which Agamben uses as an example of the 'grey zone' in framing his philosophical argument on law and ethics. Levi notes how surreal the event of the soccer match was:

> Men of the SS and the rest of the squad are present at the game; they take sides, bet, applaud, urge the players on as if, rather than at the gates of hell, the game were taking place on the village green (Levi 1988: 38).

For Agamben, the soccer match at Auschwitz may be incorrectly understood by some as an example of a 'brief pause of humanity' in the despairs of the horrors and atrocities taking place at Auschwitz (Agamben 1999: 26). However, Agamben argues that this 'game' is not a sign of hope. It is for Agamben the normalcy of the soccer match, which is the true horror of the Nazis' concentration camps. What Agamben appears to be pointing towards here in explaining his philosophical framing of the 'grey zone' is that what can appear as a break in the cycle of repression or violence is not in fact a rupture that signals change. Instead it is the illusion of change. Agamben's philosophical framing of the 'grey zone' encapsulates the fallacy of security and

distance from repression and/or violence. In short, the 'grey zone' projects an interruption to unpleasant and repressive action. This interruption to the status quo has the false appearance of bringing back normalcy as the foundations for progressive change. However, the apparent appearance of normalcy is no guarantee of breaking the status quo.

Agamben's 'grey zone' is interpreted by this article as a conceptual tool, which can be used to shed light on how legal witnessing at the ICTR has the illusion of movement from a violent past to a more peaceful future. More specifically, the article's framework interpreting Agamben's 'grey zone' suggests that dominant perspectives in the legal transitional justice scholarship purporting that transformative benefits of legal witnessing facilitated by law and human rights norms, are a 'grey zone'. That being so, these dominant perspectives perceive that law facilitated through international tribunals acts as a distinct marker between a violent past and a more peaceful future (Sikkink 2011, Klinkner & Smith 2015).

In the context of the ICTR, it is legal and human rights norms, and the witness testimonies they facilitate, that give the illusion of a linear progression to a brighter horizon. Here the illusion is the claim of advocates that law makes past atrocities understandable in the present and thus makes a society's transition to a peaceful future possible. It is suggested here that understanding legal witnessing as being located in a 'grey zone' allows this claim to be exposed as unhelpful and misguided. For example, in the Nizeyimana case the prosecutor called thirty-eight witnesses to testify in court and the defence called thirty-nine witnesses (Nizeyimana Judgment and Sentencing 2012: 450–1). Although the prosecutor's pretrial brief stated the names and summaries of what they would testify to in court for fifty witnesses, twelve less than that actually testified on the witness stand (Nizeyimana Pre-trial brief 2010). One month prior to the submission of the pretrial brief the prosecutor filed a memorandum titled 'Compliance with the scheduling order' (2010). This document stated the names of seventy-one witnesses that the prosecution would call during the trial (Prosecution Memorandum 2010: 1–9). In short, in the Nizeyimana case the number of witnesses who were to testify in court was reduced from seventy-one to thirty-eight, a reduction of thirty-three witnesses. This does not include witness statements that may have been gathered by investigators but not included in the scheduling order or pretrial brief. In short, understanding legal witnessing as being located in a 'grey zone' casts light upon the fragmented and very limiting process of who can be a 'witness' and what they can talk about at the ICTR.

Understanding legal witnessing as a 'grey zone' is crucial to challenging the claim in legal transitional justice scholarship that international criminal law is the primary response to mass atrocities, not only in addressing impunity but also in making sense of past violence (Turner 2016). In other words, international criminal law is unable to

provide a linear progression from a violent past to a more peaceful future. For example, advocates claim that international criminal law has transformative benefits that are upheld through the universality of legal and human rights norms (Sikkink 2011). This claim is linear and can be explained thus. The horrors of genocide against the Tutsi were allowed to happen because legal and human rights norms were ignored. The response to this—indeed the only response—is international criminal law. The ICTR represents the re-establishing of legal and human rights norms. Law, having been re-established through the creation of the ICTR, is able to make sense of past atrocities. Having made sense of past rights violations via witness testimonies, law has facilitated an essential component of transition, an understanding of social and political reasons for the violence occurring.

However, the claim described above is a self-filling prophecy of law. This prophecy is at the crux of the claim that international criminal law, and international criminal institutions such as the ICTR, are a suitable response for making sense of mass violence in the present. In short, this circular prophecy of law is the failure of law, law being restored, and law facilitating progress via the testimonies of witnesses. Importantly, law through the universality of legal norms has the illusion of breaking the status quo of violations of human rights and provides positive change towards a brighter future. This is the essence of the 'grey zone' of legal witnessing: an illusion of change, not actual change.

The lacuna of law and justice or legal witnessing as 'judgment'

By decoupling law from justice Agamben states that, ontologically, law is solely about 'judgment' absent of justice and truth. For the purpose of the article's conceptual framework, it is Agamben's insights on the need for distance to be drawn in law–justice understood as one and the same thing. To be clear, the article is specifically interested in Agamben's insights on the relationship, or lacuna, between law and justice, rather than directly engaging with his thinking on law.[6] Here it is also worth acknowledging that the article interprets this insight of Agamben. Specifically, the article does not follow Agamben all the way in seeking the deactivation, or removal of law, in order for justice to be reached (Agamben 1999). Although, the article does agree with Agamben that law and justice are distinct. In short, using Agamben's insights on the lacuna of law and justice is not to argue that transitional justice should seek the removal of law for justice to be possible for transitioning societies. Rather, his insights are interpreted as a conceptual tool to argue the need to unshackle the fallacy

[6] For discussion on Agamben's understanding of law see Agamben (1995); Zartaloudis (2010); Frost (2014).

of a transcendent synthesis at international tribunals (ICTR). This fallacy is the conflation of legal determination and the capacity of law to contribute to making sense of the past in deeply divided societies: the law's (in)ability to facilitate social change.

For Agamben, lacuna, or 'threshold', is a key conceptual device that he uses throughout his ontological oeuvre, including the separation of law–justice, to foreground 'the undoing of our structured and imposed forms of subjectivity' (Murray 2010: 100). Crucial to Agamben's ontological understanding of the lacuna is the relationship between law and justice, or more directly put, the need to draw distance within the notion that law and justice are one and the same thing. Law is only about 'Judgment' (Agamben 1999). For Agamben, law–justice as inseparable is a fallacy that entrenches the idea that through the applications of law, justice is unequivocally attainable. According to Agamben, there is no origin or foundation of law that it is possible to return to that would allow for the fulfilment of justice (Agamben 1995). Following Agamben, Frost has highlighted that justice understood as 'potentiality' requires the 'messianic' deactivation of the law (Frost 2014). To deactivate the law is not the destruction of law or to move beyond the law. Rather to 'deactivate' the law, or the messianic deactivation of the law, is the 'gate' that can lead to justice (Agamben 1995, Frost 2014: 219). The messianic deactivation does not mark the completion of law where justice is achieved. Rather, law is what must be '"fulfilled" in the passage to justice' (Whyte 2010: 111). As Agamben argues, 'law is not directed toward the establishment of justice. Nor is it directed toward the verification of truth. Law is solely directed toward judgment, independent of truth and justice' (Agamben 1999: 18). In short, the article interprets Agamben's understanding of the 'witness', discussed above, and the distancing of law–justice discussed here, in order to argue that legal witnessing at the ICTR should be understood as located in a lacuna between legal determination and justice–truth: 'judgment'.

This understanding challenges the common perception within legal transitional justice scholarship of a transcendent synthesis of legal determination and the capacity of international criminal law to make sense of a violent past. For example, according to Sikkink (2011), human rights trials necessarily address mass rights violations through judicial accountability. Simultaneously judicial accountability through the application of international law allows for those violations to be understood (Sikkink 2011). In other words, for scholars such as Sikkink (2011) the ICTR reaching a legal determination of guilt or innocence and related judgment is inherently tied up with being able to make sense of past violations. Legal determination and law's ability to make sense of past horrors are one and the same thing. For the article, understanding law–justice as distant from each other is an important conceptual tool to argue that the ontological distancing of law–justice produces a lacuna in which the myth

that legal and human rights norms facilitate a transcendent synthesis from legal determination to understanding a traumatic past can be exposed.

In societies such as Rwanda, affected by conflict and atrocities, there are numerous understandings of justice, including judicial, semi-legal, or hybrid like *gacaca*, and non-judicial processes including community therapy, and ritual and faith healing processes (Macdonald & Allen 2015). The importance for scholars and courts to engage with local articulations of justice are also mirrored in the words of one Rwandan genocide survivor,

> This man is in Arusha and I am only hearing that he is being tried but it is very far away and it does not help. Can you testify against someone we do not see? To speak would reduce our suffering and I hope that he will be punished but no one has come to speak to us about what he did. How can they try someone if they do not hear our stories? If he came here, maybe he could ask for forgiveness, and perhaps we could have forgiven him. Over there, it does not follow the way of justice that we expect. (Clark & Palmer 2012: 12)

In summary, Agamben states that it is not the case that law and the witness testimonies it facilitates mean justice has been achieved (Agabmen 1999). Or to put it slightly more crudely, witnesses testifying in court is not a box to be 'ticked' indicating justice has been reached. Instead, understanding legal witnesses in the lacuna of law and justice is a way to resist international criminal law's need for progress and singularity. The testimonial evidence witnesses give in court serves an important function of contributing to a legal determination being reached. However, testimony's contribution should not be understood beyond its judicial contribution. The witness located in the lacuna between law and justice then means that testimony is not about contributing towards an understanding of the past, and reaching that understanding would be an important part of a society's progress to a more peaceful future. Instead, the act of witnesses testifying in court becomes distinct from any notions of justice. The act of testimony distinct from justice is important because it resists transitional justice's legalistic impulse to assume that international criminal law is transformative.

Remembering with others

Ricœur understands memory to be both individual and collective, rejecting the polemical positing that memory is either individual or collective. Underwriting Ricœur's rejection of a binary understanding of memory is the idea that, if memory belongs purely to the individual, it does not seem possible to have a genuine sense of communal memory. Conversely, if memory is only collective, our understanding

of memory is separated from the memories of individual subjects (Ricœur 2004: 45–50).[7] For Ricœur, it is necessary to denounce the 'inwardness' position that the origins of memory can only reside within the individual. However, he also challenges the claim that memory is unequivocally 'communal'. Specifically:

> Does not the very act of 'placing oneself' in a group and of 'displacing' oneself or shifting from group to group presuppose a spontaneity capable of establishing a continuation with itself? If not, society would be without any social actors. (Ricœur 2004: 122)

For Ricœur, conceptualising 'memory' requires a middle ground, 'between the self and they' (Ricœur 2004: 132); a framing of memory that is inclusive of the 'inwardness' perspective of agency whilst also allowing for the 'collective' sharing of memories with 'others'. This middle ground proposed by Ricœur entails being in close proximity with 'others'. That is, being close to 'others' (groups) whilst at the same time maintaining a relation to the self; between the private solitary individual and public communal life (Ricœur 2004: 132). '[C]lose relations are individuals who approve of my existence and whose existence I approve of in the reciprocity and equality of esteem' (Ricœur 2004: 132). It is with 'close relations' that an individual can speak and remember, and, importantly, includes those who may not approve of an individual's actions though they do not dismiss the individual's experience. In other words, being close to 'others' is the capacity to share stories of the past with 'others' and have a collective understanding of events without individuals being reduced to the collective identity of a group, such as legal witnesses. Sharing stories 'with others', Ricœur suggests, is what forms a 'life in common' (Ricœur 2004: 131–2). Specifically, a shared understanding of a traumatic past is not located in what a given community (group) remembers about itself. Rather it is the stories of individuals which they tell each other about the origins of their shared experience of past events (Leichter 2012). It is the plural stories of individuals and heterogeneous experiences communally shared that forms a 'life in common' with 'others' (Ricœur 2004: 131–2).

Extending the argument above on the 'grey zone', the following discussion argues that the construction of legal memories at the ICTR lacks plural memories (Ricœur 2004). Specifically, engaging with Ricœur's conceptual insights on the plurality of memory, it is argued that the discursive conditions at the ICTR are commonly unable to engage with plural memories. These memories are an essential component for communities sharing stories about the past.

[7] Jeffery Olick takes a similar position that 'There is no individual memory without social experience, nor is there any collective memory without individuals participating in communal life' (Olick 2007: 34).

In the context of the claim that the ICTR can produce a collective memory of past violence, Ricœur's concept of the plurality of memory allows the article to critique this claim (Klinkner & Smith 2015, Keydar 2019). The ICTR produces a narrow and singular memory for the specific purpose of reaching a legal judgment. The discursive conditions that constitute what witnesses can talk about, as illustrated above in the context of ICTR investigations, do not include individuals sharing heterogeneous memories of shared past events with their community. Plural memories of the dynamics of genocidal violence are absent from the legal story. Witness memories that are included in statements gathered by investigators, in indictments and pretrial briefs also lack plurality; instead, they need to fit within the singular legal categories of ICTR crimes.

Importantly, what is also absent from the narrow legal memory the ICTR produces is the remembering 'with others' that is a key part of memory (Ricœur 2004). The ICTR did not facilitate a platform for individuals to externalise their memories of shared past experiences with each other. In fact, it is not the purpose of international criminal tribunals and courts to be a platform for communities exchanging personal experiences of a violent past with each other. On a related point, even the singular and narrow memory the ICTR produces is out of reach for most Rwandans, in consideration of the geographical distance of the court from Rwanda. For most Rwandans the ICTR being located hundreds of miles away in Arusha, Tanzania, has meant court proceedings where witness memories are externalised is something they have not experienced (Palmer 2015). This legal distancing from the context of the violence goes beyond just geography. It also represents the view of advocates that international criminal and human rights law should be distant from the events it is judging so as not to be 'contaminated' by what is seen and heard on the ground (Clark 2018). Despite the ICTR's rhetoric that their outreach programmes have helped make the workings of the court known to Rwandans, the reality for most Rwandans is that the ICTR remains in all senses distant (Schulz 2017, Clark 2018). This distancing is reflected in the statement of one *gacaca* judge remarking on justice in Rwanda,

> In Arusha the big fish are there. The victims travel there, but in *gacaca*, everyone is already here: survivors, perpetrators, judges, they are all here in the community. That is the difference ... . Those in Arusha haven't asked for forgiveness, yet they have committed many crimes here. They should face us, the Rwandan family, but they avoid us by being there. (Clark & Palmer 2012: 12)

This distancing of the ICTR adds to the evidence that the tribunal lacks the core component of memory, individuals telling plural experiences to their community. In short, even the narrow legal memory the ICTR produced lacks communal remembering, which is essential for the sharing of heterogeneous experience of past violence.

To help illustrate the ICTR's shortage of plural memories, the following discussion will briefly use the example of the Rwandan *gacaca* courts, which in contrast to the tribunal did facilitate plural memories (Clark 2010, Palmer 2015, Doughty 2016, Thorne & Viebach 2019). The *gacaca* courts (2002–12) were used before and during colonialism as a community-based conflict resolution mechanism and were adapted and modernised to try crimes including Genocide and Crimes Against Humanity (Clark 2010). Central to *gacaca* was its restorative element that included participation of the whole community (Clark 2010). Legal and human rights norms are central to the claim that the ICTR can produce a collective memory of violence. Interestingly, as *gacaca* did not adhere to these norms, legal and human rights groups concluded that *gacaca* was a failure (Thorne & Viebach 2019).[8] Importantly, it is precisely the localised understanding of justice at *gacaca* that allowed for communities to share diverse individual stories of violence (Doughty 2016, 2017). The decision by the Rwandan government to use this traditional justice mechanism is what facilitated community dialogue about diverse experiences of genocidal violence (Clark 2010: 320). A key part of *gacaca*'s mandate was community reconciliation through victims, witnesses, perpetrators, and members of the community being able to ask questions about the past. In part, it is precisely *gacaca* not adhering to legal and human rights norms, that are so entrenched at the ICTR, which allowed for the communal sharing of individual plural experiences of genocidal violence (Doughty 2016). In other words, the example of *gacaca* illustrates that the absence of plural memories at the ICTR is explicitly related to its discursive conditions and legal norms. In contrast, *gacaca* for many Rwandans, although not all, allowed the sharing in communities of individual experiences of genocidal violence through localised understandings of justice.

In short, Ricœur's insights on the plurality of memory have been used to argue that the ICTR lacks plural memories of experiences of the past. This conceptual lens challenges the claim that the ICTR is able to produce a legal collective memory of mass violence.

[8] Viebach and I (Thorne & Viebach 2019) have argued that reports produced by rights groups (Human Rights Watch and Amnesty International) have concluded *gacaca* as a failure because it did not adhere to Western standards of legal and human rights reports. Crucially, these human rights reports tell a story that leaves little room for different interpretations or meanings attached to *gacaca* and therefore it is not able to understand the positive impact *gacaca* has for many Rwandans. Instead these reports produce a very limited understanding of *gacaca*, which is rooted in the radical exclusion of context, subjectivity, sociality, and material belonging (Thorne & Viebach 2019).

Legal memory as 'manipulated memory'

Whilst the sharing of heterogeneous memories of the past with groups is for Ricœur an important component of 'memory', Ricœur does acknowledge that collective understanding of the past produced through individual experiences can potentially be problematic, particularly the institutional production of memory. Ricœur users the term 'manipulated memory' in relation to institutionalised production of memory (Ricœur 2004: 80). Specifically, the institutionalised production of memory entails strategies including the intentional omission of certain facts and the promotion of others, and a contextual narrative emphasising a causal relationship between events. For Ricœur it is within 'manipulated memory' that ideology functions, justifying power 'that the resources of manipulation provided by narrative are mobilised' (Ricœur 2004: 85). According to Ricœur, the institutional construction of the past, manipulated memory, centres around the legal demand for the public expression of memory (Ricœur 2004: 220). Crucially, manipulated memory in international legal institutions is centred around hierarchical systems of power and order that legitimise certain courses of action. For Ricœur, the production of institutional knowledge of past events is legitimised through a hierarchical relation between the agency of certain actors being enacted over actors with less or no agency (Ricœur 2004: 83). In the context of this article, the ICTR is understood as entailing a system of power that structures and legitimatises certain knowledge, memories of the past, whilst simultaneously constraining other forms of knowledge. Here, applying the lens of manipulated memory to the construction of memory at the ICTR aids our thinking about how this legal institution and its actors, such as legal counsel, play an important role in what memories of past horrors are heard at the ICTR. Legal counsels are not concerned with witnesses externalising their memories of traumatic experiences (Eltringham 2019: 135). Legal counsel focus on just a very small part of a witness's experience that the counsel needed in order to tell their legal narrative. Sometimes this tiny piece of information that was so vital to the lawyer seemed an unimportant part of the story for the witness. As one ICTR prosecution lawyer told Eltringham,

> [w]e only need ten or fifteen minutes out of their whole lifetime. We're only interested in a tiny little part. We're not interested in the before or the after. They can't understand why this miniscule incident is so important. … They want to talk about other things. Therefore, they're frustrated, they're not fulfilled because they haven't told their story (Eltringham 2019: 135).

Powerful actors within the ICTR are key to the way in which particular individuals and their experiences are used or discarded, depending on the objectives and motivation of those actors who have the power to construct memory (Ricœur 2004: 80–5).

Legal actors, such as lawyers, as powerful individuals in the process of memory production at the ICTR relate to the legal demand for trials of mass atrocities to make public what were previously personal private memories (Felman 2002, Ricœur 2004: 220). As Felman reminds us, law is incapable of telling stories of mass violence, but that is exactly what law must do (Felman 2002). International criminal law making public what were previously private individual memories is the process whereby powerful actors, such as legal counsels and judges, justify certain outcomes that shape and influence what memories become part of the publicly told collective legal story.

In summary, this section has outlined a conceptual framework in order to deconstruct witness identity and memory at the ICTR. Applying this conceptual lens to the ICTR shows that the witness who speaks in court is speaking on behalf of, or as a proxy for, the true witness. This shows that the knowledge of the past witnesses speak about is always partial. Related to this, what witnesses are is not self-evident, and a term like witness does not encapsulate the entire group. A particular value of this argument is that it redirects the focus away from assuming that what witnesses are is self-evident and instead focuses on how an individual 'becomes' a witness. Secondly, witness memories are something constructed through a process of inclusion and exclusion by institutions, such as the ICTR and its actors. Furthermore, memory production is a dispersed process entailing numerous layers and levels, and entails people sharing past experiences with each other. The arguments made in this section offer one alternative understanding of the ways in which the ICTR constructs witness identities and memory. In doing so, the arguments contribute to extending legal scholarship's understanding of legal witnessing at the ICTR. Whilst it is the case that the processes and systems of each court and tribunal will vary, it is likely that the argument advanced in this article would be apparent in all instances of international criminal tribunals and legal witnessing.

As the theme of this supplementary issue is transitional justice in Africa, this concluding section reflects on Rwandan society's relationship with legal memory. Specifically, it is proposed here that legal witnesses can potentially contribute to the post-conflict memory ecology during periods of transition, although, crucially, this requires a conceptual reorientation in how we think about legal memory. It will be proposed that, if we re-orientate our understanding of legal memory away from court proceedings and instead zoom in on the legal archive, and the material it houses, this can potentially be a way that legal witnesses can contribute to post-conflict memory ecology in Rwanda.

Fragments of legal memories

This final discussion conceptually explores the potential role ICTR archival material could have in aiding post-conflict memory ecology in Rwanda. It does this by conceptually exploring what else the legal process of memory construction does: what else happens or is produced through the institutional conditions and possibilities at the ICTR. In short, this final discussion explores one way not to be limited by international criminal law's need for singularity and progress, and therefore puts front and centre the plural and multidirectional nature of remembering atrocities.

Legal archives: plurality, self, and 'others'

The discussion explores the potential for fragments of witness memories contained in the ICTR archive material to contribute to post-genocide memory ecology in Rwanda. These fragments include witness statements and testimonies, along with other material, including forensic reports, investigators' dossiers, videos of investigation sites, diaries, letters, and photographs from pre-genocide, genocide, and post-genocide periods. Some of this material was used during trials, but not all. The unused materials were not deemed relevant to the narrow legal narrative lawyers need to tell in contributing to reaching a legal determination of guilty or not guilty. However, this does not necessarily mean these materials are unreliable or not potentially meaningful and important to Rwandan communities and individuals. It is the fragmented and non-linear space of legal archives that can contribute to the plurality of meaning in how societies make sense of and move beyond past horrors.

Here it is suggested that we consider the ICTR archival material to consist of relational fragments of memories, and how these fragments could contribute towards Rwandan's sharing plural experiences of the past. Emmanuel Levinas (2001) refers to relationality as having at its essence the irreducible relation between oneself and other people, which Levinas refers to as the 'Other' (Levinas 2001: 33–40, Frost 2014: 223). For Levinas, awareness of objects by the self, or I, leads to the awareness of the 'Other'. It is this awareness of the 'Other' that is relational (Levinas 2001: 104–18). The 'Other' exists before the self; in fact, it is the Other that constitutes the self. Importantly, as Frost argues, the Other constituting the self 'does not drive the I into any particular outcome. Nor does the relation to the Other have any meaning apart from constituting the I, the Self' (Frost 2014: 227). In short, Levinas's concept of relationality is interpreted here as a way to think about archival material existing as individual fragments but in relation to other fragments, though importantly the relation is not predetermined or presupposing the memory into a group or identity.

Relationality is being used in two interconnecting ways: fragments of experiences in the ICTR archive material are connected but not determined into a dominant narrative, and Rwandans have relational existence to plural experiences of the past. In summary, relationality is suggested here as a useful way to think about transitioning societies' relationships with legal memory that highlights the existence of fragments of the past telling multiple stories. Legal memory in the form of fragments of experiences in the archive material, including witness testimonies, exist as relational fragments. Each fragment of memory exists in relation to other fragments but, unlike the narrow legal memory the ICTR produces, these fragments have not been defined within a dominant narrative of the past.

To help illustrate how relational fragments of memories in the ICTR archive could contribute to plural memory ecology in Rwanda, an example using photographs will now be used. Specifically, it is suggested here that archival photographs could be a productive way to stimulate intergenerational transmission of memories that engages with the diverse memory ecology in Rwanda: between individuals who experienced the genocide against the Tutsi and those born during/afterwards and thus with no personal memories of the events of 1994.

The ICTR archives contain hundreds of photographs, including family photographs, photographs taken by journalists during the genocide against the Tutsi, and photographs taken by ICTR investigators. Many of the photographs are of places that the post-genocide generation would likely know and may also be part of their everyday reality: shops, football stadiums, and churches. For example, photographs taken after the genocide by ICTR investigators of places where genocidal violence occurred, such as high streets and football stadiums, could be a way of facilitating a dialogue between generations.[9] In particular, some of these images will be part of the post-genocide generation's everyday lived reality, physical spaces that they know and interact with on a regular basis. Having familiarity with the places in these photographs means it is likely that individuals born after the genocide will have a collection of stories, or fragments of memories, associated with these places. These images could be used as a starting point to facilitate a conversation between those who experienced the horrors of 1994 and those with no personal memories. In particular, as both types of individual will have stories of these places, it would allow for multiple meanings to be discussed. Photographs are not a site where meaning is given; rather they are spaces where meanings are sought and negotiated (Fairey & Orton 2019). In the Rwandan context, photographs from the ICTR archive offer an opportunity for meanings of Rwanda's past to be sought and negotiated between generations. Photographs can

[9] For an example of the importance of photographs in how some Rwandans come to terms with and manage their past trauma, see Piotr Cieplak's documentary *The Faces We Lost* (2017).

stimulate dialogue about human experiences because imagery is explicitly orientated towards embracing complexity and the plurality of lived experiences (Azoulay 2012). Photographs carry with them the potential for perspectives to be explored, reinforced, challenged, and altered, and are the beginning of a conversation (Fairey & Orton 2019: 299). Photographs as a tool for dialogue are 'enmeshed in webs of power, resistance and agency through which we assert and explore a sense of self and relation to others' (Fairey & Orton 2019: 299). Dialogue through photographs is a process of being with, and being open to, others, experiencing the world of and with other people (Fairey & Orton 2019: 301). ICTR archival photographs as a dialogue to engage with other people and their experiences speak directly to Levinas's idea of the 'Other' and Ricœur's plurality of memory. It is suggested that archival material, fragments of memory, have great potential to aid the plurality of post genocide memory ecology in Rwanda.

Acknowledgments

Firstly, I would like to thank the guest editorial team of this supplementary issue for bringing together such an interesting and important set of papers on this crucial topic. I would like to also thank Dr Matthew Evans, Dr Tom Frost, and Dr Tarik Kochi for the many readings and comments on my PhD thesis which this article is founded upon. Additionally, many thanks to Tom for the numerous conversations on Agamben and critical legal theory more broadly which has undoubtedly further developed my understanding and its application to the context of transitional justice. Also thank you for the comments and feedback from the two anonymous reviewers which helped further develop this article.

References

Agamben, G. (1995), *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA, Stanford University Press).

Agamben, G. (1999), *Remnants of Auschwitz: The Witness and the Archive* (Princeton, NJ, Zone Books).

Agamben, G. (2005), *The Time that Remains: A Commentary on the Letter to the Romans* (Stanford, CA, Stanford University Press).

Ambos, K. (2009), '"Witness Proofing" Before The ICC: Neither Legally Admissible Nor Necessary', in *The Emerging Practice of the International Criminal Court* (Leiden, Brill), 599–614. https://doi.org/10.2139/ssrn.1972144

Azoulay, A.A. (2012), *Civil Imagination: A Political Ontology of Photography* (London, Verso Books).

Bernstein, J.M. (2004), 'Bare Life, Bearing Witness: Auschwitz and the Pornography of Horror', *parallax*, 10(1): 2–16. https://doi.org/10.1080/1353464032000171046

Clark, P. (2010), *The Gacaca Courts, Post-genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge, Cambridge University Press). https://doi.org/10.1017/CBO9780511761584

Clark, P. (2018), *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108576260

Clark, P. & Palmer, N. (2012), *Testifying to Genocide: Victim and Witness Protection in Rwanda* (London, Redress Trust).

Clarke, K.M. (2019), *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham, NC, Duke University Press). https://doi.org/10.1215/9781478007388

Combs, N.A. (2010), *Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge, Cambridge University Press). https://doi.org/10.1017/CBO9780511760259

de la Durantaye, L. (2009), *Giorgio Agamben: A Critical Introduction* (Stanford, CA, Stanford University Press).

Dixon, P. & Tenove, C. (2013), 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', *International Journal of Transitional Justice*, 7(3): 393–412. https://doi.org/10.1093/ijtj/ijt015

Doughty, K.C. (2016), *Remediation in Rwanda: Grassroots Legal Forums* (Philadelphia, PA, University of Pennsylvania Press).

Doughty, K.C. (2017), *Inside Rwanda's Gacaca Courts: Seeking Justice After Genocide* (Madison, WI, University of Wisconsin Press).

Eltringham, N. (2019), *Genocide Never Sleeps* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108757195

Fairey, T. & Orton, L. (2019), 'Photography as Dialogue', *Photography and Culture*, 12(3): 299–305. https://doi.org/10.1080/17514517.2019.1669992

Felman, S. (2002), *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA, Harvard University Press).

Foucault, M. (1972), *The Archaeology of Knowledge* (New York, Pantheon).

Frost, T. (2014), 'Thinking Relationality in Agamben and Levinas', *Griffith Law Review*, 23(2): 210–31. https://doi.org/10.1080/10383441.2014.962682

Groome, D. (2011), 'The Right to Truth in the Fight against Impunity', *Berkeley Journal of International Law*, 29: 175–99.

ICTR (International Criminal Tribunal for Rwanda) (2007), *Statute: Article 31 Rules of Procedure and Evidence* (Arusha, United Nations).

ICTR (International Criminal Tribunal for Rwanda) (2010), *Statute: Article 17 Investigation and Preparation of Indictment* (Arusha, United Nations).

Igwe, C.S. (2008), 'The ICC's Favourite Customer: Africa and International Criminal Law', *The Comparative and International Law Journal of Southern Africa*, 41(2): 294–323.

Jones, N. (2009), *The Courts of Genocide: Politics and the Rule of Law in Rwanda and Arusha* (Abingdon, Routledge).

Kendall, S. (2015), 'Beyond the Restorative Turn: The Limits of Legal Humanitarianism', in C. De Vos, S. Kendall & C. Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge, Cambridge University Press), 352–76. https://doi.org/10.1017/CBO9781139924528.017

Keydar, R. (2019), 'Mass Atrocity, Mass Testimony, and the Quantitative Turn in International Law', *Law & Society Review*, 53: 554–87. https://doi.org/10.1111/lasr.12399

Klinkner, M. & Smith, E. (2015), 'The Right to Truth, Appropriate Forum and the International Criminal Court', in N. Szablewska & S.-D. Bachmann (eds) *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Cham, Springer International), 3–29. https://doi.org/10.1007/978-3-319-09390-1_1

Leichter, D.J. (2012), 'Collective Identity and Collective Memory in the Philosophy of Paul Ricœur', *Ricoeur Studies/Etudes Ricoeuriennes*, 3(1): 114–31. https://doi.org/10.5195/ERRS.2012.125

Levi, P. (1988), *The Drowned and the Saved* trans R. Rosenthal (London, Michael Joseph) (originally published 1986).

Levinas, E. (2001), *Is it Righteous to Be? Interviews with Emmanuel Levinas* ed. J. Robbins (Stanford, CA, Stanford University Press).

Macdonald, A. & Allen, T. (2015), 'Social Accountability in War Zones—Confronting Local Realities of Law and Justice', *International Journal on Minority and Group Rights*, 22(3): 279–308. https://doi.org/10.1163/15718115-02203001

Madlingozi, T. (2010), 'On Transitional Justice Entrepreneurs and the Production of Victims', *Journal of Human Rights Practice*, 2: 208–28. https://doi.org/10.1093/jhuman/huq005

Marion, E.N. (2006), 'The Nazi Genocide and the Writing of the Holocaust Aporia: Ethics and Remnants of Auschwitz', *MLN: Modern Language Notes*, 121(4): 1009–22. https://doi.org/10.1353/mln.2006.0098

McEvoy, K. (2007), 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law and Society*, 34(4): 411–40. https://doi.org/10.1111/j.1467-6478.2007.00399.x

Mouffe, C. & Laclau, S. (2007) *En torno a lo político* (Buenos Aires, Fondo de cultura económica).

Muleefu, A. (2019), *The Independence of the International Criminal Court: Between a Rock and a Hard Place* (Cambridge, Intersentia). https://doi.org/10.1017/9781780688992

Murithi, T. (2008), 'The African Union's Evolving Role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia', *African Security Studies*, 17(1): 69–82. https://doi.org/10.1080/10246029.2008.9627460

Murray, A. (2010), *Giorgio Agamben* (Abingdon, Routledge). https://doi.org/10.1080/10246029.2008.9627460

Nathan, L.P., Lake, M., Grey, N.C., Nilsen, T., Utter, R.F., Utter, E.J., Ring, M., Kahn, Z. & Friedman, B. (2011), 'Multi-lifespan Information System Design: Investigating a New Design Approach in Rwanda', in *Proceedings of the 2011 iconference*: 591–7. https://doi.org/10.1145/1940761.1940841

Nizeyimana Judgment and Sentencing (2012), *Mechanism Archives and Records Section*, ICTR-00-55C-05361, 22 June 2012 (Arusha, United Nations).

Nizeyimana Pre-trial brief (2010), 'Reply To Prosecutors Response To Urgent Pre-Trial Motion For Disclosure Under Rule 66(A) (Ii) Of The R.P.E', *Mechanism Archives and Records Section*, ICTR-00-55C-017, 14 December 2010 (Arusha, United Nations).

Nkansah, L.A. (2011), 'International Criminal Justice in Africa: Some Emerging Dynamics', *Journal of Politics and Law*, 4(2): 74–84. https://doi.org/10.5539/jpl.v4n2p74

Nyawo, J. (2017), *Selective Enforcement and International Criminal Law: The International Criminal Court and Africa* (Cambridge, Intersentia). https://doi.org/10.1017/9781780685014

Olick, J.K. (2007), 'Collective Memory and Nonpublic Opinion: A Historical Note on a Methodological Controversy about a Political Problem', *Symbolic Interaction*, 30(1): 41–55. https://doi.org/10.1525/si.2007.30.1.41

Palmer, N. (2015), *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (Oxford, Oxford University Press). https://doi.org/10.1093/acprof:oso/9780199398195.001.0001

Prosecution Memorandum (2010), 'Supplementary Submission To The Motion To Vary The Witness List', *Mechanism Archives and Records Section*, ICTR-00-55-0125, 14 September 2010 (Arusha, United Nations).

Ricœur, P. (2004), *Memory, History, Forgetting* (Chicago, IL, University of Chicago Press). https://doi.org/10.7208/chicago/9780226713465.001.0001

Sikkink, K. (2011), *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (The Norton Series in World Politics; New York, W.W. Norton).

Thoms, O., Ron, J. & Paris, R. (2008), 'The Effects of Transitional Justice Mechanisms. A Summary of Empirical Research Findings and Implications for Analysts and Practitioners' (University of Ottawa, Ottawa, Centre for International Policy Studies).

Thorne, B. & Viebach, J. (2019), 'Human Rights Reporting on the Rwandan Gacaca Courts: A Story of Stagnation and Failure', in H. Grayson & N. Hitchcott (eds) *Rwanda Since 1994: Stories of Change* (Liverpool, University of Liverpool Press). https://doi.org/10.2307/j.ctvh9vw0t.6

Teitel, R.G. (2015), *Globalizing Transitional Justice: Contemporary Essays* (Oxford, Oxford University Press). https://doi.org/10.1093/acprof:oso/9780195394948.001.0001

Turner, C. (2013), 'Deconstructing Transitional Justice', *Law Critique*, 24: 193–209. https://doi.org/10.1007/s10978-013-9119-z

Turner, C. (2016), *Violence, Law and the Impossibility of Transitional Justice* (Abingdon, Routledge). https://doi.org/10.4324/9781315695044

United Nations (1994), *Resolution 955*. https://digitallibrary.un.org/record/198038?ln=en

VFRT (Voices from the Rwanda Tribunal), Suzanne Chenault, Legal Officer and Juris-Linguist. Interview Date: 4 November 2008 Location: Arusha, Tanzania Interviewers: Lisa P. Nathan Donald J Horowitz. http://www.tribunalvoices.org/voices/transcripts/transcript_CHENAULT_Suzanne_full.pdf

VFRT (Voices from the Rwanda Tribunal), Everard O'Donnell, Deputy Registrar. Interview Date: 15 October 2008 Location: Arusha, Tanzania Interviewer: Donald J Horowitz. http://www.tribunalvoices.org/voices/transcripts/transcript_ODONNELL_Everard_full.pdf

VFRT (Voices from the Rwanda Tribunal), David Wagala, Acting Chief of Investigations. Interview Date: 16 October 2008 Location: Butare, Rwanda Interviewers: Batya Friedman John McKay. http://www.tribunalvoices.org/voices/transcripts/transcript_WAGALA_David_full.pdf

Whyte, J. (2010), 'A New Use of the Self': Giorgio Agamben on the Coming Community', *Theory & Event*, 13(1). https://doi.org/10.1353/tae.0.0115

Zartaloudis, T. (2010), *Giorgio Agamben: Power, Law and the Uses of Criticism* (Abingdon, Routledge). https://doi.org/10.4324/9780203859711

Zunino, M. (2018), *Justice Framed* (Cambridge, Cambridge University Press). https://doi.org/10.1017/9781108693127

To cite the article: Benjamin Thorne (2021), 'Liberal international criminal law and legal memory: deconstructing the production of witness memories at the International Criminal Tribunal for Rwanda', *Journal of the British Academy*, 9(s2): 127–154. DOI https://doi.org/10.5871/jba/009s2.127

Journal of the British Academy (ISSN 2052–7217) is published by
The British Academy, 10–11 Carlton House Terrace, London, SW1Y 5AH
www.thebritishacademy.ac.uk