

The African Union Series

# Peace, Justice, and Reconciliation in Africa

Opportunities and Challenges  
in the Fight Against Impunity

**REPORT OF THE AU PANEL OF THE WISE**

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POLICY FRAMEWORK



## List of Abbreviations

ANC	African National Congress
ATJF	African Union Policy Framework on Transitional Justice in Africa
AU	African Union
AUPD	African Union Panel on Darfur
CAR	Central African Republic
CAVR	Commission for Reception, Truth and Reconciliation in Timor-Leste
CIPEV	Commission of Inquiry on Post-Election Violence
CNDP	<i>Congrès national pour la défense du peuple</i>
COH	Cessation of Hostilities
CPA	Comprehensive Peace Agreement
CSA	Comprehensive Security Arrangements
CSC	Comprehensive Solution to the Conflict
DDR	Disarmament, Demobilization, and Reintegration
DOP	Declaration of Principles
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
FARDC	<i>Forces armées de la République démocratique du Congo</i>
FCPA	Final Comprehensive Peace Agreement
FNI	<i>Front national intégrationniste</i>
FPLC	<i>Forces patriotiques pour la libération du Congo</i>
FRPI	<i>Force de résistance patriotique en Ituri</i>

GPA	Global Political Agreement
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
LRA	Lord's Resistance Army
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
NRC	National Reconciliation Commission
OAU	Organization for African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PC	Permanent Ceasefire
PCRD	Postconflict Reconstruction and Development
REC	Regional Economic Community
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front
TRC	Truth and Reconciliation Commission
UN	United Nations
UPC	<i>Union des patriotes congolais</i>

## About this Report

Amid renewed debate about justice and peace on the African continent, the African Union's Panel of the Wise chose the issue of non-impunity and its relationship with peace, justice, reconciliation, and healing as its thematic focus for the year 2009.

To this end, the International Peace Institute (IPI) and the African Union (AU) commissioned a paper on this topic from two experts: Dr. Comfort Ero, then Director of the South Africa Office of the International Center for Transitional Justice, and Dr. Gilbert Khadiagala, Professor of International Relations at the University of the Witwatersrand in Johannesburg, South Africa. IPI and the AU then convened an expert workshop in Monrovia, Liberia, in May 2009 to consider the consultants' report, make recommendations for improving it, and propose recommendations for the AU Panel of the Wise.

This report is the outcome of this research, analysis, and deliberation. Originally entitled "Non-Impunity, Truth, Peace, Justice, and Reconciliation in Africa: Opportunities and Constraints," it was adopted by the Panel of the Wise at its tenth meeting in May 2011 in Addis Ababa, Ethiopia.

The report proposes a draft Policy Framework on Transitional Justice for adoption by the relevant organs of the AU and recommends an advocacy role for the Panel of the Wise in promoting and reinforcing guiding principles on the rule of law and transitional justice across the African continent. Indeed, since the report was first drafted in 2009, the AU has started a process for developing a clear and more coherent understanding of the contemporary application of transitional justice in Africa.

It is hoped that the publication of this Panel of the Wise report will broaden regional and international access to this research and its accompanying recommendations, and contribute to efforts by African and international actors to address the issue of non-impunity and its relationship with peace, justice, reconciliation, and healing.



## Executive Summary

Justice and reconciliation are antidotes to impunity, the condition where powerful individuals and institutions act as they desire without fear of reprisals, reproach, retribution, or recrimination. Impunity inheres where there is a deficit of democratic structures of accountability, fairness, and impartiality. Egregious crimes against humanity are in part the result of perceptions of impunity, hence the momentous global efforts against impunity and its manifestations. Justice, peace, good governance, and reconciliation, on the other hand, thrive where sturdy and stable democratic values and impulses prevail, and where there is a culture of constitutionalism to constrain arbitrariness and abuse of power. Africa has contributed significantly to global ideas and norms that have informed international practices to end impunity and promote justice and reconciliation. Africa has also witnessed efforts to incorporate these norms and ideals into national, regional, and continental structures, but there is a need for more efforts to domesticate, monitor, and implement them.

The African Union's (AU) Panel of the Wise commissioned this report to highlight the importance of the fight against impunity and enhance justice and reconciliation—all part of reversing the deleterious effects of conflict and intolerance in Africa. Ending impunity and promoting justice and reconciliation in Africa reflect the core objectives that underpinned the formation of the Organization of African Unity (now the AU) and its embodiment of international human rights institutions and conventions in its constitutive instruments. The opportunities for deepening these objectives have accrued from the spread of democratic values, promotion of the culture of constitutionalism, and the conclusion of most of the civil conflicts that have afflicted African countries since the early 1990s. Equally vital, the new norms of international justice encapsulated in the principle of a responsibility to protect and institutions such as the International Criminal Court (ICC) have refocused attention on ways to manage and

end impunity. Yet these principles and instruments have also occasioned dissent in Africa stemming from the perception of threats to sovereignty, the intrusiveness of international legality on weak states, and the fear of the selective application and implementation of these principles. This is all despite the fact that Africa represents a majority of signatory states to the Rome Statute of the ICC and three of the four cases before the ICC were referred to it by three African states. The contention over contemporary implementation of international justice initiatives in Africa therefore must not be construed as blanket opposition to justice but rather as recognition that imposing justice while ignoring legitimate African concerns may be detrimental to justice. At the same time, however, constraints on ending impunity and forging justice and reconciliation persist where African states have been unable to create meaningful national political frameworks that build the rule of law, restrain the abuse of power, and produce socioeconomic development policies that reduce profound social inequities and contribute to sustainable peace.

## RECOMMENDATIONS

The recommendations in this report are based on two assumptions. First, impunity is a manifestation of the absence of institutions that promote pluralism, participation, impartiality, accountability, and fairness. As Africa has progressed in building democratic institutions, more countries have paid attention to stopping the prevalence of impunity and enshrining values that underscore justice and reconciliation. Creating spaces for social and political contestation has provided the basis for vibrant discourse on how to end the spates of impunity that have characterized most African countries. While sometimes reconciliation trumps justice in deeply divided societies, stable peace ultimately hinges on finding a judicious balance between the two objectives. Even where deeply divided countries have made short-term pragmatic concessions that privilege reconciliation and peace

at the expense of justice, the purpose has ultimately been to strengthen institutions that diminish the persistence of impunity. In countries emerging from civil conflicts, wide-ranging and open discussions have been held across communities about the vital nature of institutions that enable consensus building and collective problem solving, and that confront the scourge of impunity. Reconciliation and justice have benefitted as a result.

Second, since Africa is a critical author of and participant in the emerging international human rights regime, it is important for African countries to deepen their commitments to these instruments. This remains true despite the instruments' current flaws, especially their slow and slanted implementation. In the international search for mechanisms to reverse the patterns and practices of impunity, Africa as a whole benefits from adherence to these norms. In addition, since the AU Constitutive Act of 2000 expressly condemns and rejects impunity and pledges to take practical measures against it, discordant voices that cast aspersions on the legitimacy of international judicial institutions only serve to weaken these institutions. By the same token, Africa's collective voice on the credibility of international norms and institutions helps to strengthen the case for national, regional, and continental indigenous instruments that meet the broader objectives of mitigating impunity and serve the ends of justice and reconciliation. Africa has legitimate concerns and reservations about the modalities of implementing some provisions of the international criminal justice system today, but improving these mechanisms requires adherence to the core principles that undergird international law. In the increasingly fragmented and divisive atmosphere that characterizes the current debates on impunity, striking an appropriate balance between the demands of international law and those of national sovereignty will be one of the hallmarks of African statesmanship.

With these assumptions in mind, this report offers two broad recommendations: (1) the Panel of the Wise should play an

advocacy role in promoting core guiding principles and (2) it should contribute to the development of an AU continental framework on transitional justice, based on African initiatives in this area. These recommendations draw from several sources: analysis conducted by the authors; deliberations reached during the May 2009 Experts' Workshop in Monrovia, Liberia; and perspectives from a July 2010 joint meeting involving the AU, the Finland-based Crisis Management Initiative, and the International Center for Transitional Justice.

### 1. The AU Panel of the Wise should adopt an advocacy role to promote and reinforce guiding principles

As a major institution in Africa's leadership structures, the Panel of the Wise is well placed to promote wider acceptance of common values and systems that enshrine rule of law, respect for human rights, and the gradual domestication of these norms. Such advocacy for the implementation of international and AU agreements played a large role in the Monrovia workshop's recommendations. The experts envisioned the panel using its influence to help enforce these agreements and monitor the progress of transitional justice mechanisms. In essence, the AU needs to revisit its core guiding principles and underscore its commitments to those principles by urging member states to ratify and implement instruments such as the *African Charter on Human and Peoples' Rights*, its protocol on the rights of women in Africa, and the new African Court on Human and Peoples' Rights. Working with civil society organizations, particularly legal institutions, the AU should guarantee that transitional justice issues are at the center of the new continental legal architecture, with special attention focused on the right to truth, justice, and reparation.



## 2. The AU should develop a Transitional Justice Policy Framework and strengthen instruments for justice and reconciliation on the continent

Looking beyond international agreements, the report recommends that the Panel of the Wise, alongside other prominent Africans and institutions, begin to draw lessons from the various experiences across Africa in the articulation of a set of common concepts and principles that would guide consensus on continental and subregional instruments. These efforts could culminate in an AU continental-wide strategic policy framework on transitional justice that balances the imperatives of peace and justice in conflict and postconflict contexts, and is based on Africa's rich and diverse experiences. Popularizing credible indigenous justice institutions to deal with impunity and enhance reconciliation in a way that is consistent with acceptable international standards may be one way of sidestepping the polarizing debates about the legitimacy of international justice instruments. The development of a transitional justice policy framework for the AU would provide the continental body with an occasion to respond judiciously and expeditiously to the difficult dilemmas of balancing the immediate need to secure peace with the longer-term importance of establishing the rule of law and preventing future conflicts. More vital, it would send an unambiguous message to opponents of justice that the pursuit of justice is an inevitable and necessary element of achieving reconciliation and stability in Africa.

One experience the Panel of the Wise could draw from is outlined in the October 2009 report of the AU Panel on Darfur (commonly known as the Mbeki Panel after its chair, former South African president Thabo Mbeki), which offers the contours of a policy framework. Entitled "Darfur: The Quest for Peace, Justice and Reconciliation," the report outlines the challenge of finding an effective and comprehensive approach to the issues of accountability and impunity on the one hand, and to peace,

healing, and reconciliation on the other. It also elaborates a set of overarching recommendations appropriate for transitional justice in Africa as a whole. The recommendations in the Mbeki Panel report were adopted by the AU Peace and Security Council in its 207<sup>th</sup> meeting at the level of the heads of state and government on October 29, 2009, in Abuja, Nigeria.

The present report includes a proposed AU Transitional Justice Policy Framework (see Annex) for use by the Panel of the Wise as part of its advocacy. In addition to drawing on the Mbeki Panel report, this framework complements existing AU policy guidelines, such as the Framework for Post-Conflict Reconstruction and Development.

## Introduction

Sound national and international laws are considered universal instruments for managing impunity and promoting justice and reconciliation. Nationally, states have attempted to develop constitutional structures with provisions for respecting human rights and dignity, and that acknowledge political and economic inclusiveness as the first lines of defense against abuses of power. Internationally, the United Nations Charter, the Geneva Conventions, and multiple instruments on human rights serve to underwrite the international human rights order. Since the end of the Second World War, the universality of rights-based strictures against impunity proceeded from the assumption that national actors with sovereign responsibilities would be the principal defenders of these rights, with international actors only playing secondary and supplementary roles.

In postcolonial Africa, most states built on these universal norms and enshrined them in domestic legislation and practices as they attempted to reconcile the imperatives of national independence with adherence to international law. But Africa also witnessed the prevalence of undemocratic and dictatorial regimes that were characterized by gross violations of human rights, extrajudicial executions, and violent change of power. Undemocratic regimes wavered on the domestication of rights-based conventions, barely building institutions that would respect international consensus on impunity and justice. Most of these regimes institutionalized impunity, borrowing from the previous colonial regimes where repression, dispossession, and oppression were standard practices. During the era of the Cold War, the invocation of sovereignty and blanket support by various external actors strengthened dictatorial regimes that were oblivious to the rule of law. For the most part, these regimes successfully manipulated ethnic diversity and economic underdevelopment to maintain power. Generalized impunity by governments in turn fostered the conditions for state weakness and the civil wars that engulfed Africa in the 1990s.

The pressure to democratize in the post–Cold War context of the 1990s generated momentous change in African governance structures, which had implications for strategies to manage impunity and foster justice and national unity. The majority of countries made tentative steps to build participatory institutions by expanding the space for multiple actors to coalesce around national concerns and by effecting peaceful changes in leadership. In these instances, questions of impunity, justice, and reconciliation were for the most part addressed through national conventions and other internal constitutional processes that sought to legitimize the new political order. However, this was much more difficult for countries engulfed in civil strife before or after the onset of the democratization process. As both causes and consequences of impunity, African civil wars saddled local and international actors with the challenges of achieving peace, justice, and reconciliation on the basis of weak and dysfunctional institutions, and in the absence of national consensus on how to find enduring solutions to these conflicts.

Civil wars added a new layer of complexity to the existing culture of impunity. They created new opportunities for the wanton plunder of national resources, recruitment of child soldiers, mass rape, and sexual violence, as well as reprisals against defenseless populations by rebel groups. In addition to such widespread violations of human rights, the fragmentation of state power during civil wars produced multiple actors, particularly rebel armies and militias, who destroyed the socioeconomic fabric of the continent and compromised the search for justice and reconciliation. Civil wars unleashed cycles of violent confrontation and revenge that legitimized armed mobilization as a means to redress grievances. By decimating the previous communal and ethnic bonds that held societies together, the conflicts of the 1990s laid the foundations for crimes against humanity perpetrated by diverse actors with assorted grievances.

The devastating effects of civil wars on African institutions in the mid-1990s meant that regional and international actors assumed disproportionate roles in national reconstruction and invariably in momentous decisions about impunity, reconciliation, and justice. In the absence of functional states and coherent leaderships with elaborate programs for national reconstruction, the international community has become a critical player in shaping parameters to end these wars and build postconflict institutions, including justice and reconciliation systems. The search for durable solutions to civil conflict has also occasioned widespread discussion about whether there is a trade-off between justice and reconciliation during national reconstruction.

As this report shows, national, regional, and international actors striving to help parties end wars have agonized over whether crimes committed during conflict ought to be de-emphasized to expedite political reconciliation or whether justice and reconciliation need to be pursued together to preempt the consolidation of impunity. Underlying these concerns are the various state interests at play, which often impact these issues. Weighing the benefits of peace against the costs of impunity is at the core of the transitional justice debates and institutions, as this report demonstrates. In addition, the report argues that the recent global impetus to reinvigorate the instruments that undergird the *Universal Declaration of Human Rights* has furnished new momentum in the fight against impunity and promotion of justice and reconciliation. New global institutions such as the International Criminal Court have emerged to lend voice and teeth to efforts to end the culture of impunity and force national actors to be more responsive to international norms and structures. The report concludes that the new international norms are a double-edged sword: creating vistas for underwriting international human rights while also potentially redefining the principles and practices of national sovereignty.

## The Search for Justice, Peace, and Reconciliation

Questions of responding to legacies of past and current injustices by repressive governments and individuals are at the center of contemporary policy and academic debates. In the 1990s, in the wake of increased civil conflict characterized by systematic and massive violations of human rights and international humanitarian law, consensus evolved about stopping atrocities and bringing those responsible for such acts to justice. Since the Nuremberg and Tokyo trials after the end of the Second World War, there have been relentless attempts to achieve justice for human rights violations. In recent years, ending conflicts through negotiation has raised difficult questions of whether peace and justice are competing goals, or whether peace precedes justice. This dilemma implies, of course, that peace and justice are incompatible and cannot be pursued at the same time. Human rights perpetrators often enter negotiations and demand immunity as a guarantee before they sign agreements. In most instances, perpetrators see accountability as an obstacle to peace and hold their societies hostage by threatening to continue violence if there is no guarantee of immunity. Proponents of human rights, however, recognize that reconciliation is critical to the attainment of lasting peace, political stability, and a just society governed by the rule of law.

Human rights practitioners face the challenge of finding a way to confront past human rights violations, punish those who committed heinous crimes, and seek redress for victims without undermining the peace process or recreating conditions for instability. The question of whether peace should take precedence over justice where human rights violations and war crimes have taken place constitutes the core of the debates in the growing field of “transitional justice,” which includes the complex ethical, legal, and political choices that various actors confront to end conflict, restore peace, and prevent the recurrence of conflict. Africa’s

multiple conflicts have underscored the dilemma between peace and justice, and have challenged local and international actors to craft solutions that sometimes compromise these values. In recent years, the ability of mediators and other interveners in conflicts to grant immunity has been curtailed by the evolving international legal obligations and the international justice architecture, including the *Rome Statute of the International Criminal Court* (ICC), which prohibits amnesty for crimes against humanity, war crimes, and genocide. Despite these international norms, African states confront difficult choices in the task of balancing the imperatives of justice and reconciliation with the political realities of managing impunity.

### PEACE VERSUS JUSTICE?

Discussions of transitional justice in Africa often focus on how to attain peace and ensure accountability during negotiations, raising the controversial question of whether peace and justice are competitive or complementary goals. Two incorrect assumptions underlie these discussions. First is the narrow view that assumes that peace processes are solely about ending violent conflicts. Second is the tendency to perceive justice in terms of retributive justice—that is, prosecution or criminal accountability. These extreme positions ignore the intimate links between peace and justice. A more accurate conception treats peace and justice as fundamental to ending violence and preventing its recurrence. Most mediators recognize that building a durable peace involves addressing the underlying causes and sources of violent conflict. Along with concerns about competition for power, marginalization, and identity, most conflicts are outcomes of the flagrant injustices and human rights abuses committed by elites and state institutions. Although there are examples of indictments and prosecutions helping secure peace by removing spoilers from the peace process, such as in the former Yugoslavia, often both peace and justice cannot be achieved at the same time. In most instances, there is a need to stop the fighting, seek a ceasefire,

and encourage perpetrators to negotiate. But with advances in international legal obligations and an increasingly sophisticated international justice architecture, mediators can no longer ignore questions of justice. In the quest for justice, the UN has established a binding rule prohibiting its officials from granting amnesties for crimes against humanity, war crimes, and genocide. It was for this reason that the UN envoy to Sierra Leone, at the time of the 1999 Lomé Peace Accord, appended the UN's refusal to accept the amnesty clause to the accord that the government and rebels signed. This gesture paved the way for a policy that has influenced subsequent mediation by national, regional, and international actors.

Overcoming the tensions between peace and justice entails sequencing justice activities, as demonstrated in Argentina in the 1980s. Although it was not facing ongoing armed conflict, Argentina confronted the dangers of a transition from military dictatorship to democracy. Successive democratic governments from 1983 took gradual steps in building peace and justice that involved a mixture of punishment of and amnesty for military officers implicated in human rights abuses during the period of military rule. The Argentinean experience reveals that while political realities complicated the search for accountability, multiple truth-seeking initiatives continually exposed perpetrators, and a vigilant array of victims' groups and civil society organizations kept the demand for justice alive. In addition, Argentina's victims' groups used international and regional instruments at critical moments to pressure their government to act. In the end, receptive governments and a conducive political climate made the pursuit of justice possible. Similarly, Argentina's neighbors—Uruguay and Chile—set justice aside temporarily when their militaries, including previous dictators, threatened reprisals against civilian governments that tried to pursue accountability. But these actions did not lessen public demands for justice, and as the case of General Augusto Pinochet in Chile illustrates, justice finally prevailed. These Latin American



experiences demonstrate that peace and justice are compatible and that a variety of accountability mechanisms can be pursued over time in the search for sustainable peace. In a seminal report to the UN Security Council in August 2004, the then Secretary-General Kofi Annan articulated the importance of sequencing and strategic planning when he asserted that “justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile postconflict settings requires strategic planning, careful integration and sensible sequencing of activities.”<sup>1</sup> In response to these considerations, the field of transitional justice has developed a range of judicial and non-judicial processes to meet the complex challenges facing many countries in varying types of transitions.

## TRANSITIONAL JUSTICE: AN INTEGRATED APPROACH

The concept of transitional justice is problematic since there is often no clarity regarding the nature or length of the transition. This problem stems in part from the fact that a number of countries with transitional justice mechanisms are usually in situations of ongoing armed conflict. In addition, transitional justice is no longer limited to moments of transition from authoritarianism to democracy or war to peace. Although transitional justice can be pursued in various contexts, the underlying objective is to find formulas that strengthen stability and diminish opportunities for impunity. Transitional justice has several overlapping goals: to establish the truth about the past; end impunity for past (and sometimes continuing) human rights violations; achieve compensation for the victims of those violations; build a culture of the rule of law; lay the foundation for long-term reconciliation and political transformation; and prevent the recurrence of such abuses in the future. These goals correspond to numerous obligations on states contained in domestic constitutions, international human rights law, international humanitarian law, international criminal law, and international refugee law, as well as the *Charter*

*of the United Nations, the African Charter on Human and Peoples' Rights, and other regional instruments. These instruments together form the core norms and standards of transitional justice, including the duty to prosecute, the right to the truth, and the right to remedy and reparations.*

Based on more than twenty years of experience, transitional justice practitioners have begun to emphasize the following lessons that have been learned:

- No single mechanism is capable of sufficiently addressing huge justice demands: transitional justice mechanisms are most effective when implemented as part of a holistic strategy.
- In some situations, not all transitional justice mechanisms can be pursued at the same time. For this reason, careful sequencing, planning, and timing is imperative. The design of transitional justice mechanisms must carefully balance the demands for justice with the realities of what can be achieved in the short, medium, and long term.
- Since transitional justice often occurs within a larger context of peacebuilding, trade-offs are often required. Aside from addressing the immediate concern of maintaining peace and restoring security, which frequently entails disarming and disbanding armed groups, new governments must address deep societal cleavages and rebuild public institutions, not least by restoring democracy, service delivery, and economic development. The magnitude and extent of the crimes may make investigation, prosecution, and reparations very difficult where there is a need to rebuild the judicial system. In addition, states may lack the resources needed to implement human rights policies. The implementation of transitional justice mechanisms, therefore, calls for difficult and unavoidable trade-offs.
- There is no model transitional justice approach or package that can easily be transferred from one situation to another.

Lessons can be gleaned from various country experiences, but each situation requires that the parties to the conflict, civil society, and victims' groups negotiate the parameters for their situation.

- It is important for a country's transitional justice policy to be locally owned and based on extensive public consultations with all interested actors.
- The design and processes pursued must be gender sensitive and pay due attention to the particular harms that women suffer, as they are disproportionately affected in conflicts.
- The independence of those carrying out transitional justice processes must be assured. A critical aspect of the process is to rebuild public trust in the rule of law and institutions.

The UN Secretary-General's 2010 guidance note on the United Nations' approach to transitional justice recognizes the daunting challenge of assisting societies devastated by conflicts or emerging from repressive rule to re-establish the rule of law and come to terms with large scale human rights violations.<sup>2</sup> Citing UN experiences and the importance of transitional justice in UN work, the note stipulates that the UN approach to transitional justice shall follow its guiding principles and framework. Nonetheless, the note also calls for taking into account the political and country contexts and ensuring the centrality of victims in the design and implementation of mechanisms. It emphasizes that, whatever combination of judicial and non-judicial processes and mechanisms, they should always conform to international legal standards and obligations. Furthermore, it states that UN transitional justice activities should be strengthened by “adopt[ing] an approach that strives to take into account the root causes of conflict or repressive rule, and addresses the related violations of all rights; tak[ing] human rights and transitional justice considerations into account during peace processes; [and] coordinat[ing] disarmament, demobilization, and reintegration

(DDR) initiatives with transitional justice activities in a positively reinforcing manner.<sup>23</sup>

## The Elements of Transitional Justice

The range of transitional justice methods includes individual prosecutions; truth seeking; reparations (including work on memory, memorials, and memorialization); and institutional reform (including vetting and dismissal of staff). In addition, local, community-based, traditional, and indigenous types of justice form a significant and growing area in this field.

### Criminal Prosecutions

The advancement of international law has entailed unrelenting pressure from concerned citizens and human rights groups to ensure that individuals responsible for grave human rights violations face the possibility of prosecution and punishment. Prosecution has often been part of efforts to close the impunity gap, restore the rule of law, and build a culture of human rights. The evolution of international justice has led to the creation of a complex set of strategies to deal with massive human rights violations in political environments where actors are either not prepared to confront them or are resistant to punishment.

Perpetrators' preferred response is amnesty, or immunity from prosecution. As noted already, international law is clear about the category of crimes for which there can be no amnesty. In addition, there may be domestic legal constraints, such as constitutional provisions, that may make it difficult to secure amnesty. This is certainly true for those countries that have domesticated a plethora of international and human rights treaties, including the more than 100 countries that are now party to the ICC's Rome Statute. Regardless of what national provisions are adopted, international law precludes amnesty for the most serious international crimes, defined as crimes against humanity, war crimes, and genocide. The UN has added to this list by issuing guidelines that prevent its representatives from supporting gross violations

of human rights, including individual acts of torture, extrajudicial execution, slavery, enforced disappearance, systematic racial discrimination, or deliberate and systematic deprivation of essential food, healthcare, or shelter, even when these crimes do not rise to the level of crimes in the above category.

The conditional amnesty offered by South Africa's Truth and Reconciliation Commission—the truth for amnesty formula—is often cited to illustrate how transitional justice accommodates a degree of pragmatism to secure peace. The negotiated settlement between the African National Congress (ANC) and the white nationalist government to secure a peaceful transition from apartheid rule was premised on this precondition. Amnesty can also be granted under international law as specified in Protocol II of the Geneva Conventions, which grants possible amnesty to persons who have participated in armed conflict or who have been deprived of their liberty for reasons related to armed conflict, whether they are interned or detained.<sup>4</sup> Recent developments in international law distinguish war crimes and crimes against humanity from the “political crimes” addressed in Protocol II. But while international law recognizes such provisions, it may not be appropriate to grant immunity wholesale, hence the need to consider the context and circumstances in which these political crimes took place.

In most postconflict contexts, there is also the dilemma of securing accountability without impeding the disarmament, demobilization, and reintegration (DDR) of ex-combatants. The danger comes when blanket amnesties are awarded as carrots to persuade fighters to disarm. Although such measures may be seen as attractive options, they undoubtedly cause resentment among victims' groups and are a violation of international law. The UN attempts to offer a practical option when it suggests that “carefully crafted amnesties can help in the return and reintegration [of former fighters] and should be encouraged.”<sup>5</sup> Because no national or international court will ever have the capacity to prosecute

all persons responsible for widespread human rights violations, practitioners have to look for creative ways to address this issue within the limitations of the international law on amnesty. In grappling with a large caseload of perpetrators, Rwanda (discussed in pages 32–35 below) and Timor-Leste established mechanisms whereby lower-level perpetrators confessed their involvement in crimes and reached an agreement with victims on compensation as a condition for avoiding criminal liability. In Timor-Leste, for example, serious crimes such as rape and murder were referred to the Special Panels for Serious Crimes.

Domestic and international criminal prosecutions have occurred where amnesty is not permissible or is strongly repudiated. Trial under domestic jurisdictions is preferable if it is a viable option. In April 2009, a domestic court observing international practices and standards convicted former Peruvian president Alberto Fujimori for kidnapping, murder, and other human rights crimes. The general pattern, however, is that domestic criminal prosecutions are not a viable option because domestic criminal justice settings are not designed to deal with serious crimes committed in war or armed internal conflicts. Part of the difficulty of prosecuting torture, crimes against humanity, and genocide is that such crimes are rarely defined in domestic law, although the domestication of the ICC provisions by states parties to the Rome Statute was supposed to address this problem. More importantly, in many societies affected by political upheaval or conflict, the justice system is often among the first public institutions to crumble. In the aftermath of conflict, the justice system is an immediate priority for rebuilding state institutions.

International courts, including international ad hoc tribunals, hybrid courts, and the ICC, have therefore become important justice instruments for states that are unable or unwilling to fulfill their obligation to address legacies of massive human rights violations. Regional courts such as the European Court of Human Rights and the Inter-American Court of Human

Rights have contributed to significant changes at domestic and international levels with regard to accountability for past crimes. Since the 1990s, a series of ad hoc international tribunals and hybrid courts, as well as the ICC, have initiated prosecutions in many conflict-ridden states. Courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY) have aimed to prosecute those most responsible for massive violations of rights. They have ended impunity for high-ranking state officials but also expended massive resources to secure relatively few convictions.

Hybrid courts that combine domestic and international law aim to build the capacity of the local judiciary while securing accountability. They allow an international institution to work within local law, use local experts, and operate on the scene of human rights violations. Although the assumption is that such courts cost less than international tribunals and have a lasting impact on domestic judicial systems, hybrid courts have faced objections similar to those leveled at the ad hoc international tribunals. The Special Court for Sierra Leone, for example, has met with charges of inefficiency, poor investigative procedures, and lack of engagement. There are also serious doubts about how much it has contributed to enhancing the capacity of the Sierra Leonean judicial system.

The establishment of the ICC has had a dramatic impact on international law. When the Rome Statute came into effect on July 1, 2002, the ICC became the first permanent independent international criminal tribunal with jurisdiction over individuals for genocide, war crimes, and crimes against humanity. The ICC's jurisdiction is non-retroactive, and it can only prosecute violations occurring after its establishment or after the date of ratification by states that joined since 2002. It is a court of last resort; the complementarity provision gives states primacy in initiating prosecutions. The Rome Statute allows the court to intervene when a country is unwilling or unable to investigate or

prosecute. There are three ways a situation can be referred to the ICC:

- A state party to the Rome Statute may refer its own situation to the ICC, as Uganda, the Democratic Republic of the Congo (DRC), and the Central African Republic (CAR) have done.
- The UN Security Council may refer a case to the ICC, as it did in the case of Darfur, Sudan (the legality of the referral has been challenged as Sudan is not party to the ICC's Rome Statute).
- The Office of the Prosecutor may open a case, as it did in Kenya, although the prosecutor is required to obtain authorization from the court's Pre-Trial Chamber before commencing investigations and must be able to show that he or she has sufficient grounds to pursue such investigations.

The UN Security Council has the power to suspend any case for a renewable twelve-month period,<sup>6</sup> and the prosecutor may lift an indictment if he or she judges that such an action is not inimical to the "interest of justice." Again, the prosecutor must seek prior authorization from the court's Pre-Trial Chamber. The advent of the ICC has raised the bar for what international justice can deliver. It remains a contentious instrument, particularly on the African continent, where it has sharpened the debate around peace and justice (see pages 47–60).

International criminal tribunals have contributed to efforts to deliver justice and have broken new ground. They do, however, suffer from several shortcomings. Critics often note that they suffer from a lack of local ownership and usually contribute little to building the capacity of the domestic judiciary. These criminal tribunals have also been criticized because they target a small number of perpetrators who have committed the most heinous of crimes. But these mechanisms are being used more frequently because the international community is only willing to devote limited resources to this justice endeavor.



## Truth Commissions

Truth commissions are justice mechanisms that address the root causes of conflict and offer recommendations for dealing with impunity. The first recognizable truth commission was established in Uganda in 1974 by President Idi Amin to investigate enforced disappearances under his own government. Since then, truth commissions have become a means to investigate past human rights violations, uncover the repressive machinery of authoritarian regimes, and identify systemic socioeconomic injustices. Since 1991, about twenty-five truth commissions have been established—more than twice as many as in the preceding two decades. These commissions have approached truth seeking in various ways that are frequently influenced by their institutional design. Those endowed with subpoena power and a large staff are typically more able to access information, while those empowered to name perpetrators are more likely to secure at least a symbolic measure of accountability. If they have the power to grant amnesty, they risk devolving into institutions that actually support impunity. South Africa's Truth and Reconciliation Commission offered a conditional amnesty in exchange for full disclosure of crimes, but the power to grant amnesty has historically been rare among truth commission.

Truth commissions have their limitations. They require sustained funding and political support to be effective, and there is a real danger that they are increasingly seen as a panacea, inserted into peace agreements in order to provide options for leaders seeking to avoid criminal accountability. Overall, truth commissions can have a powerful effect when used appropriately and effectively. When conducted in consultation with local actors, they have the potential to contribute to stability, building a just society, and laying the foundations for deepening the rule of law. At their best, truth commissions can produce influential investigative accounts of human rights violations while providing victims with at least symbolic reparations and accountability. They can support wider

peacebuilding efforts (e.g., in Sierra Leone), strengthen human rights standards, and propose recommendations that address critical issues of institutional reform (e.g., in South Africa). Their findings may not lead to criminal accountability, but if they name perpetrators, human rights activists can campaign to prevent these perpetrators from taking up future positions in government. Thus, when properly executed, truth commissions can be one among a host of mechanisms for restoring the rule of law.

### **Reparations, Memory, and Memorials**

Reparations focus on victims and form a critical transitional justice mechanism for repairing relations between national actors and victims. The UN Office of the High Commissioner for Human Rights (OHCHR) accords reparations a special place among transitional justice measures, even as it recognizes the necessary interconnectedness of those measures. The right to reparation is well established in international law; it is found in several multilateral treaties and is now accepted as part of customary international law.<sup>7</sup> The United Nations General Assembly, in a resolution outlining principles on the right to remedy and reparation, named five components of the right to reparation:

- **restitution** (returning the victim to his or her situation before the crime was committed);
- **compensation** (payment for economically measurable damage);
- **rehabilitation** (more general medical or social assistance);
- **satisfaction** (a broad group of measures that includes access to justice and truth seeking); and
- **guarantees of non-repetition.**<sup>8</sup>

Just as they are most useful when paired with other truth and accountability mechanisms, reparations are a step toward truth

and justice for victims: they recognize victims as persons unfairly harmed and entitled to compensation. The recognition of victimhood is an important symbolic component of any reparations program. In this sense, truth commissions and prosecutions are also agents of symbolic reparations.

There has been an international trend in recent years toward a role for truth commissions in reparation policies: truth-seeking bodies in South Africa, Haiti, Guatemala, Sierra Leone, Peru, and, more recently, Liberia, all made recommendations on reparations, with varying effects. Other states have created dedicated institutions for reparations (Morocco, Brazil, and Malawi), and still others have depended on a patchwork of legislation and institutions (Argentina). One state—Morocco—also gave its truth commission the power to grant reparations directly (see pages 39–40).

The implementation of reparation regimes raises fundamental institutional, practical, and political questions. Whatever institution is chosen, reparation regimes must balance demands for completeness (every victim receives reparation) and depth (victims receive an adequate level of reparation) with recognition that in postconflict societies reparation policies compete with other peacebuilding priorities. One way to balance these objectives is to institute what the OHCHR has called a “complex” reparations regime, one that combines several forms of reparation, including pensions, symbolic reparations, and rehabilitation measures (such as medical services). Governments must also set levels of compensation, keeping in mind the implied hierarchy of crimes that accompanies such a classification. In any case, reparations are most likely to be effective when they are part of a package of measures that recognize past violations. For example, it is important that reparation initiatives are properly married with DDR programs: it is likely to inflame tensions if perpetrators receive disproportionately more than victims.

Memorialization efforts are symbolic acts of reparation. They seek to preserve public memory of victims, usually through a yearly day of commemoration or through museums and monuments. The idea is to keep the memory of past abuses alive to prevent recurrence of similar violence.

### **Institutional Reforms**

A comprehensive transitional justice approach both identifies individual perpetrators and looks closely at structural deficiencies in institutions that allow for human rights abuses. Institutional reform refers to a broad range of initiatives that aim to re-establish the rule of law, a functioning state bureaucracy, and democratic norms in post-authoritarian or postconflict countries. Common reforms encompass both non-criminal forms of accountability (vetting and lustration programs) and the re-establishment of the rule of law (judicial and constitutional reform). Both types of activity serve the same purpose, or are at least mutually reinforcing: vetting civil service officials reinforces the rule of law, and judicial reforms may facilitate accountability for officials complicit in corruption or human rights violations.

Vetting and lustration programs provide one direct way to purge public administrations of officials responsible for crimes or those associated with a past regime. The most comprehensive examples of lustration programs emerged from the former communist countries of Central and Eastern Europe, where large public administrations kept good records. In the former East Germany, tens of thousands of public employees were fired for involvement in the communist government, and in Czechoslovakia, newspapers published the names of more than 100,000 people suspected of collaborating with the previous regime.

While these initiatives may be effective in establishing an institutional blank slate for new regimes, they also carry risks. Vetting or lustration programs must be handled in a judicious manner to ensure that the weeding out of public officials on a large scale does

not penalize innocent civil servants along with those responsible for serious crimes. Other institutional reforms—including police and land reforms—may involve a much larger set of activities, including training programs, oversight bodies, and dedicated commissions of inquiry.

### **Local or Community-Based Justice**

Drawing on traditional structures, local initiatives may avoid some of the pitfalls of international institutions imposed from above, particularly the lack of ownership and consultation. They shift attention from state-level to community-level processes of accountability. One such example is the Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR). Timor-Leste had to grapple with a huge caseload of perpetrators, many of whom committed less serious crimes, in the absence of a judicial system. The CAVR offered a process “from below” that sought reconciliation without losing sight of justice. It complemented the Special Panels for Serious Crimes (often referred to as a hybrid tribunal because of the mix of national and international staff) by referring cases of serious crimes to that body. In Rwanda, the government implemented the *Gacaca* court system to address the problem of trying more than 120,000 people accused of genocide (see pages 34–35).

Local justice initiatives offer rich possibilities and by their nature are closer to victims’ groups. But in most instances they work well when they are part of a holistic strategy to seek and publicize the truth, restore broken relations, and pursue justice for serious crimes. They are also increasingly being offered as solutions in peace agreements, such as in Uganda (discussed in pages 48–50).

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The international, regional, and national human rights instruments enumerated above represent more than sixty years of experience and advocacy in the struggle against impunity. While

there is an array of options available to address accountability, every society has to find its own formula that adheres to international standards and best practices. The important lesson is that no mechanism can work in isolation. Material reparations are most effective when paired with the symbolic reparations offered by victims' hearings before a truth commission. In turn, truth commissions can be a critical first step in the search for justice by ensuring that rigorous documentary evidence is preserved for future prosecutions. Similarly, prosecutions are unlikely to end impunity if they are not accompanied by serious institutional reform efforts. For all parties involved in the search for justice and reconciliation, the challenge is to find responses that address the root causes of conflict and prevent its recurrence.

## Africa's Experiences in Transitional Justice

Since the early 1990s, Africa has served as a vast testing ground for new policies to address impunity, seek truth and justice, and enable reconciliation in fractured societies. Although the results of these accountability efforts have been mixed and uneven, African experiences have contributed to advancing a plethora of domestic and international transitional justice initiatives. Africa's response to justice mirrors the upheavals of Latin America, which also suffered from false starts and political manipulation before building innovative and dynamic accountability mechanisms. Approaches have ranged from judicial mechanisms, such as international tribunals, hybrid courts, and domestic trials, to non-judicial mechanisms like truth commissions, reparations, and traditional or community-based processes. Various African countries have experimented with truth commissions with mixed success. For instance, Uganda had two separate truth commissions in the 1970s and 1980s to investigate the past; the first commission's report was released in 1975, but the later commission's report was never made public. Similarly, the reports of truth commissions in Zimbabwe (1985) and Nigeria (1999) were never officially released (because the governments perceived them to be too critical). In Ghana, a truth commission was used relatively successfully in a non-conflict setting almost a decade after the transition to constitutional rule and democratic consolidation. Finally, Rwanda and Mozambique undertook traditional community-based processes to foster reconciliation.

In other cases, external actors have weighed in to reinforce accountability measures that started at a domestic level. For example, eight years after the work of the commission to inquire into the crimes and misappropriations of former Chadian president Hissène Habré and his accomplices, indictment proceedings began against the exiled former leader who has lived in Senegal since his overthrow in 1990. Following international pressure from human rights groups and notably Belgium, which

sought his extradition to face prosecution for torture and crimes against humanity under its universal jurisdiction law, in July 2006 the AU requested that Senegal prosecute Habré.<sup>9</sup> Senegal's constitution was subsequently amended, the required legislation adopted, and judicial appointments made, but the court appeared unlikely to commence work before securing sufficient funds—estimated at \$36 million.<sup>10</sup> Contributing to this delay was the lack of clear policy guidelines for the AU on transitional justice in Africa, which would set benchmarks for progress and compliance and identify sources of funding to implement similar cases. Such a framework would garner international support, demonstrate commitment, and consolidate existing AU aspirations to combat impunity, promote justice, and foster peace and reconciliation as enshrined in Article 4 of the 2000 *Constitutive Act of the African Union*, which calls for peaceful resolution of conflicts, respect for the sanctity of human life, and the condemnation and rejection of impunity.

It is important to note that the AU has a number of policy documents that seek to address impunity that are instructive for current efforts to evolve ways of combating impunity and promoting peace and justice in Africa. In addition to the Constitutive Act, the following are worth noting:

- Articles 6 and 14 of the *Protocol Relating to Establishment of the Peace and Security Council of the African Union* on peacemaking and peacebuilding with respect to restoration of the rule of law and establishment of conditions for rebuilding society after conflict.
- Articles 31, 32, and 33 of the AU's Policy Framework for Post-Conflict Reconstruction and Development (PCRD) address human rights, justice, and reconciliation, and explicitly recognize the need to protect human rights in any PCRD efforts. Article 33 outlines a number of activities to this end:



- provide for the development of context-based mechanisms to deal with past and ongoing grievances;
  - mobilize society to ensure the legitimacy and relevance of the model adopted;
  - address the tension between impunity and reconciliation;
  - encourage and facilitate peacebuilding and reconciliation activities from the national to the grassroots levels;
  - allow for opportunities to invoke traditional mechanisms of reconciliation and/or justice, to the extent that they are aligned to with the *African Charter on Human and Peoples' Rights*; and
  - establish efficient justice sectors and provide for the use of AU structures and other international instruments to reinforce human rights, justice, and reconciliation.
- Articles 16, 28, and 39 of the *African Charter on Democracy, Elections and Governance* enjoins African countries to consolidate democracy through exchange of experiences; strong partnerships; and dialogue between governments, civil society, and the private sector. It promotes a culture of respect, compromise, consensus, and tolerance to mitigate conflict, promote political stability and security, and harness the creative energies of the African people.
  - The Mbeki Panel report on Darfur outlines generic recommendations on integrated justice and reconciliation responses, and highlights the utility of comprehensive national processes and principles for the establishment of hybrid courts in parallel with truth-telling and reconciliation process.

## SEMINAL CASES

In societies emerging from armed conflict or authoritarian rule, a key objective is to manage the demand for retribution.

Reconciliation and forgiveness—which can also be understood as attempts to maintain the status quo—are often hard to consider, particularly where hatreds run deep. In such situations, domestic criminal justice mechanisms are unable to provide justice and heal the wounds of war. Furthermore, states and international tribunals are unable to prosecute the huge number of perpetrators who need to be held accountable.

In such situations, complex and strategic sets of processes are required to respond to victims' demands for redress, including accountability. Four African cases—South Africa, Rwanda, Sierra Leone, and Morocco—provide compelling insights into how domestic mechanisms were deployed to pursue justice. At the other end of the spectrum, some countries opted to forget and avoid truth-seeking efforts by granting a blanket amnesty. In this respect, the case of Mozambique is instructive: after years of civil war, the country adopted no official accountability mechanism, but local efforts were initiated to reconcile divided communities. In other instances, even after many years have passed and states have evolved democratic practices, victims still demand redress for various historical grievances. Ghana provides such an insightful case: after the successful consolidation of democratic rule, Ghana embarked on a truth-seeking exercise to address crimes committed under military rule.

### South Africa

South Africa's transition remains *sui generis* in the annals of transitions from repressive to democratic regimes. It provides not only a vivid example of the public role that a truth commission can play in reconciliation, but also offers a cautionary tale about the usefulness of amnesty powers. During the transition from apartheid in 1995, the South African government passed the *Promotion of National Unity and Reconciliation Act*, which provided for the creation of a truth and reconciliation commission tasked with establishing an authoritative narrative of human rights violations committed between 1960 and 1994.<sup>11</sup> The

price for peace and democracy was amnesty, a compromise to balance the political realities with the desire to uncover crimes committed and hold to account those who ordered these crimes. By offering amnesty in exchange for full disclosure, the South African Truth and Reconciliation Commission (TRC) hoped to provide an incentive for perpetrators to come forward of their own accord. The commission released its final report in 1998, which not only found that the prior government had committed the majority of human rights abuses, but also found the African National Congress (ANC) and other liberation movements guilty of gross human rights violations.

The South African TRC process sought to lay the foundation for a strong democracy. It was an important vehicle for achieving national reconciliation and accountability, setting the standard in Africa. The commission also recommended institutional reforms to ensure that such crimes were never repeated, and the process reinforced critical norms of public participation and local ownership.

Nonetheless, the commission was criticized for failing to address the socioeconomic effects of apartheid and failing to hold individual and institutional beneficiaries of apartheid accountable. It was also widely criticized for raising expectations about its ability to foster individual reconciliation, when at best it was set up to contribute to national and political reconciliation. Lacking in South Africa were comprehensive reparations and redress, which continue to elude many victims of apartheid government policies. In addition, the threat of prosecution for those who did not testify—the crucial incentive for perpetrators to seek amnesty—proved to be limited in terms of effectiveness. Indeed, there have been few prosecutions of those who did not receive amnesty. In 2005 and 2007, the ANC government instituted two policies: a set of amendments to the National Prosecuting Authority’s policy and the Pardons Reference Group, respectively. Both policies paved the way for a second chance at amnesty

for perpetrators of apartheid crimes. In both cases, a coalition of local and international civil society groups, working in concert with victims' groups, sought to reverse these policies. In doing so, they secured a legal victory that ruled that the state should be compelled to fulfill its constitutional obligation to investigate cases from the apartheid era, including compliance with the TRC principle of victims' participation in the granting of pardons.

## Mozambique

Critics of transitional justice often cite Mozambique to support the argument that formal accountability mechanisms for reconciliation and stability after conflict are insignificant or unnecessary. After years of war, Mozambican parties signed a peace agreement in 1992 that provided amnesty to all combatants for crimes committed between 1979 and 1992. However, informal mechanisms to deal with issues of reconciliation have flourished in Mozambique. Civil society organizations have engaged in peacebuilding activities that have reintegrated former combatants and trained rural communities in dispute resolution and various methods of reconciliation and healing.

## Rwanda

Rwanda provides a far-reaching example of experiments in justice and reconciliation. It also reveals how the combination of international, national, and traditional criminal prosecutions can both facilitate and limit justice and reconciliation.

### **International Criminal Tribunal for Rwanda**

The United Nations created the International Criminal Tribunal for Rwanda (ICTR) in November 1994 to prosecute the masterminds of the genocide and other serious violations of international humanitarian law. The ICTR has been plagued by charges of inefficiency. Since its inception and with 800 staff, the ICTR has indicted ninety-two persons and managed to arrest

seventy-eight of them. By May 2009, forty-four cases had been completed and twenty-four were ongoing.<sup>12</sup>

The tribunal was scheduled to conclude trials of first instance by 2008 and complete its work by 2010. However, periodic reassessments of the workload led to the postponement of the date of the closure, probably until the end of 2010 for the first-instance trials and 2012 for the appeals.<sup>13</sup> A critical component of the completion strategy of the ICTR includes referral of cases to Rwanda for prosecution. Initially, the tribunal denied motions filed by the prosecutor to that effect, because of issues linked to possible difficulties upholding the fairness of trials for the defense. Since then, however, Rwanda has been adapting its legal framework to meet the exigencies of the ICTR.<sup>14</sup>

Despite its limitations, the establishment of the tribunal (along with the ICTY, the tribunal for the former Yugoslavia) was a defining moment that altered international justice and the international response to mass violence in postconflict societies. The tribunal's jurisprudence has contributed to the development of international criminal law by setting various legal precedents.

### **Domestic Trials**

When it came to power in 1994, the Rwandan Patriotic Front (RPF) government announced that it would not extend amnesty to the perpetrators of the genocide. Consequently, the government arrested and detained suspects of the genocide and other serious violations of international human rights and humanitarian law. In 1996, the Rwandan National Assembly adopted the Organic Law creating four categories of crime and associated punishments, ranging from particularly cruel behavior (Category I) to simple property offences (Category IV). These were later reduced to three categories. This law was created because, although the country was party to the 1948 Genocide Convention, its penal code was never extended to genocide.

The first genocide trials began by the end of that year, however, they severely exposed the weaknesses of the country's judicial system that had been decimated by war and the genocide. In addition, the sheer numbers of those arrested overburdened the nascent justice system. Several criticisms were made about the domestic trial process, in particular that it lacked fairness. Criticisms about the quality of the trials and the capacity of the judicial system to deliver justice effectively placed the government at loggerheads with the international community, with the former accusing donors of pursuing an expensive tribunal in the form of the ICTR while failing to invest in the domestic judicial system. These criticisms, in part, led the government to search for alternative means to deal with genocide suspects. It was also clear that prosecution alone would not address the full extent of the genocide nor promote reconciliation.

### *Gacaca* Tribunals

As the alternative judicial process, the *gacaca* had two primary objectives: to alleviate prison overcrowding and to address a range of problems at the community level, such as rebuilding group relationships and reconstructing Rwandan society. The *gacaca* was a dispute-resolution mechanism used in precolonial Rwanda to adjudicate communal disputes often linked to property issues, personal injury, or inheritance problems. During the proceedings, respected community figures served as “judges” who involved the entire community in the process. Sanctions usually took the form of compensation and not imprisonment, allowing the accused to appreciate the gravity of the damage caused before his or her reintegration into the community. The main aims of the proceedings were restitution and reconciliation. In October 2000, the Transitional National Assembly of Rwanda adopted the *Gacaca* Law (modified in June 2001), which established *gacaca* jurisdictions to adjudicate genocide suspects. Elections for approximately 255,000 *gacaca* judges took place

in October 2001, with an estimated 90 percent of the electorate casting their votes, the majority in favor of the system.

The Rwandan government has justified the *gacaca* process as a way to facilitate truth telling about the genocide, promote reconciliation, eradicate impunity, accelerate the trial of genocide suspects, and demonstrate Rwanda's ability to address its own problems. With an estimated 12,000 community-based courts and 1,545 courts to hear appeals, the *gacaca* process sought to alleviate the pressure on the formal domestic judicial system. It focused on crimes that led to serious assaults against a person and property-related offences. Nonetheless, the system has been criticized for failing to meet international standards for fair trials. Critics have charged that the *gacaca* system provides inadequate guarantees for impartiality, defense, and equality before the law. The *gacaca* process has also had uneven results in facilitating justice and reconciliation in some communities, while increasing tensions in others.<sup>15</sup>

Despite these criticisms, it is important to note that the *gacaca* idea was a compromise that recognized the inability of the country's judicial system to deal with trials after mass atrocities. The *gacaca* tribunals should, therefore, be seen as a locally appropriate and pragmatic mechanism to address impunity and contribute to reconciliation. The *gacaca* experience illustrates the possibilities of using a nuanced approach to combine customary African values with international criminal law and human rights practices to overcome intractable conflict.

### Sierra Leone

Along with Rwanda, Sierra Leone's experience provides novel insights into the problems of combining several mechanisms to address accountability and reconciliation. In Sierra Leone, a truth commission has coexisted with a hybrid domestic and international court. Following a period of protracted civil war, the government in Sierra Leone and the Revolutionary United Front

(RUF) rebel group signed the Lomé Peace Accord in July 1999. The agreement granted a controversial blanket amnesty to all the rebels, to the consternation of the international community. The amnesty provision was based on the assumption that the RUF would not sign the agreement if there were prospects of legal action. As previously mentioned, the special representative of the UN Secretary-General inserted a disclaimer in the agreement noting that in the UN's understanding, such an amnesty could not extend to genocide, crimes against humanity, war crimes, and other serious violations of international law. Alongside this blanket amnesty was a provision for the creation of a Truth and Reconciliation Commission for Sierra Leone. The dual presence of an amnesty clause and a truth commission led warring parties to envision the truth-telling process as an alternative to justice and accountability.

With the failure of the RUF to fully implement the agreement, civil society and donors demanded accountability of those responsible for renewed tension. In June 2000, President Tejan Kabbah wrote a letter to the UN Secretary-General requesting the assistance of the UN in bringing RUF fighters to justice, pleading that the country did not have the resources or a capable judicial system to ensure due process. In response, the Security Council passed Resolution 1315 establishing the Special Court for Sierra Leone. By agreeing to the creation of the court, the government effectively repudiated the amnesty. The establishment of the special court changed the dynamics of Sierra Leone's peace process, which had already mandated a truth commission. Delays in getting the truth commission started meant that it had to operate simultaneously with the special court, causing confusion among the victims. The court's mandate did not mention how it would cooperate with the existing Truth and Reconciliation Commission. Both should have played complementary roles, with the court trying and convicting only the masterminds of the conflict, and the Truth and Reconciliation Commission providing a more complete record of the conflict. As a result, the



creation of the Special Court for Sierra Leone essentially relegated the Truth and Reconciliation Commission to second-class status, with donors increasingly diverting funds to the court. Moreover, the two institutions clashed over access to detainees.

### **The Truth and Reconciliation Commission**

Despite these problems, the mandate of Sierra Leone's Truth and Reconciliation Commission and its implementation set several precedents and contained groundbreaking achievements. The mandate of the commission called upon it to give "special attention to the subject of sexual abuses and to the experiences of children within the armed conflict."<sup>16</sup> The commission's report went on to reveal the use of children and women as combatants, laborers, and sex slaves. In addition, the commission mainstreamed gender issues in its work. The body also pioneered critical work on the role of external forces, including transnational corporations and governments, in the nefarious "blood diamond" industry, although some critics charge that it did not properly investigate the role of these corporations in fueling the conflict.

Sierra Leone's Truth and Reconciliation Commission organized reconciliation ceremonies with the participation of traditional and religious leaders and with the consent of victims and alleged perpetrators. Further, the commission initiated a nationwide project before the end of its mandate that allowed all chiefdoms in the country to organize reconciliation activities according to the needs of their communities. The commission approved its final report in March 2004, but it was not made public or delivered locally until July 2005. The report is credited with documenting human rights violations and creating an authoritative historical record. The government has made substantial progress in implementing recommendations to date, particularly with the establishment of a reparations program in early 2009. The Truth and Reconciliation Commission for Sierra Leone is generally seen

to have left a positive legacy and created an advocacy tool for transformation in Sierra Leone.

### **The Special Court for Sierra Leone**

The Special Court for Sierra Leone was created to “prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”<sup>17</sup> As the first international tribunal to sit in the country where war crimes occurred, the Special Court for Sierra Leone was expected to make justice more locally relevant. The court’s first indictments and arrests targeted top commanders of all fighting groups, but its major success has been in the indictment of former Liberian president Charles Taylor for his alleged role in facilitating and fuelling the Sierra Leone conflict by supporting the RUF rebels. Although indicted when he was still serving as head of state in 2003, Taylor was not arrested until later, after he had sought refuge in Nigeria. His trial began in The Hague in 2008.<sup>18</sup>

The Special Court for Sierra Leone has made final judgments in three out of the four cases before it, contributing to the development of international criminal law. The court rendered the first sentence in history for the crime of the recruitment and use of child soldiers in hostilities, secured the first conviction for “forced marriage” as a crime against humanity, and the first conviction for “attacking peacekeepers” as a war crime. The court is widely recognized for contributing to democratic consolidation in Sierra Leone and to peacebuilding in West Africa, as well as helping to address the culture of impunity by holding top perpetrators accountable. There have been questions about the tangible benefits of the court’s pursuit of justice, and it has also been criticized for prosecuting only a small number of perpetrators while mid- and lower-level officials who perpetrated abuses have not faced justice. Additionally, the court has been criticized for not paying sufficient attention to building capacity

of the national judiciary. Finally, the court lost an opportunity to shape national jurisprudence by failing to bring any charges under Sierra Leonean law. Nonetheless, the example the court has set may contribute to substantive legal reform in Sierra Leone, particularly with respect to witness protection and indigent defense.

## Morocco

Morocco's transitional justice experience yields important lessons about the integration and interdependence of various mechanisms. The ascension to the throne in 1999 by King Mohammed VI led to gradual political liberalization, including a landmark decision to establish a truth and reconciliation commission. The Moroccan Equity and Reconciliation Commission was the world's first truth commission with the power to grant reparations directly. It was established by royal decree on January 7, 2004, to investigate instances of enforced disappearance and arbitrary detention between 1956 and 1999, issue reparations to victims, provide recommendations on other measures for victims, and establish a good historical record of abuses. The commission began its operations in the aftermath of the work of the Independent Arbitration Panel (1999), which had awarded reparations to 3,681 people but faced criticism for arbitrariness and lack of transparency in its operations. The commission therefore used high-profile public hearings to give victims a voice, pairing material reparations with symbolic reparations in the form of public recognition of victims' suffering. The combination of truth-seeking and reparation powers proved useful.

The Moroccan process, however, suffered from some limitations, among them the government's unwillingness to put in place a complementary process to secure prosecutions of past human rights abuses. The commission did not have subpoena or search-and-seizure powers, nor did it name perpetrators. Morocco's truth-seeking process is the product of a carefully crafted political compromise between the monarchy and some

civil society actors to secure political liberalization. For most of its supporters, the truth commission was about the pursuit of democratization and other institutional reforms. Nonetheless, the Moroccan truth commission was groundbreaking in its gender-sensitive work on reparations, despite the fact that only one of the seventeen commissioners was a woman. The gender sensitive reparations included payments for victims' wives and daughters equal to those of victims' male relatives. This measure challenged the existing Moroccan inheritance law. Also, in calculating the reparations, the commission took into account the additional harm that women suffered because of their status in the patriarchal society. Both of these measures served to advance women's positions under Moroccan law.

## Ghana

Ghana's transitional justice process stands out among Africa's cases for establishing a truth-seeking process years after its transition to democratic rule. The desire to address the historical wrongs under military rule remained strong ten years after the end of that rule. Although the 1992 constitution had a provision that absolved military personnel from judicial inquiry and prosecution, President John Kufuor established the National Reconciliation Commission (NRC) in 2002 to investigate human rights violations during the period of military rule and encourage national reconciliation. The commission's mandate covered human rights violations—including illegal detention, torture, killings, and disappearances under military governments—between 1966 and 1992. The commission achieved notable successes: its public hearings garnered massive attention from the media, and victims turned out in large numbers to make statements and testify. Reflecting this attention, victims had a generally positive view of the commission's work, which publicized the magnitude of the historic violations. Although fraught with problems, the reparations process recommended by the commission was at least implemented in some form; by June

2008, the government had paid more than \$1 million to victims of human rights violations.

## Liberia

In the aftermath of a devastating conflict, the Comprehensive Peace Agreement (CPA) signed in Accra in August 2003 called for the creation of a truth and reconciliation commission for Liberia. During the negotiations, Liberia's three warring factions agreed to a truth commission as a compromise to appease some civil society groups at the peace talks who were demanding a war crimes tribunal. The CPA did not provide a general amnesty for warring factions and left the issue of accountability open. It did, however, provide for the reform of the security forces in Liberia. Both the army and the police were disbanded, and extensive vetting of new recruits followed. The Liberian Truth and Reconciliation Commission was formally inaugurated in February 2006, but it confronted serious fiscal, administrative, logistical, management, and human resources difficulties during its first year of operation.

By 2008, the commission had undergone significant restructuring. It submitted its final report to the national legislature in December 2009 (it had initially submitted an "unedited" final report in June 2009). The commission elaborated a number of recommendations, the most salient being for prosecution and lustration. It called for the establishment of an extraordinary tribunal to prosecute 124 individuals and a domestic criminal court to prosecute 58 individuals for gross violations of human rights, violations of international humanitarian law, and egregious domestic crimes. However, it recommended a reprieve for 38 individuals who had cooperated with the commission but had nonetheless admitted to committing heinous crimes. The commission's report recommended that 49 individuals be lustrated and banned from public office for thirty years.<sup>19</sup> In addition, the report called for the government to create a reparations trust fund to "provide reparations for all of those individuals

and communities victimized by the years of instability and war,” as well as the establishment of traditional truth-seeking and reconciliation processes through a “palava hut” system.

The recommendations for prosecution and lustration met with controversy both inside and outside of Liberia. While the standard of proof used to generate the lists is mentioned in the report, the commission did not detail the steps it went through to reach its conclusions. Furthermore, a number of the people listed for prosecution and lustration are not mentioned in the body of the report. As a result, it is unclear what evidence many of the commission’s recommendations are based on.

## EMERGING PROCESSES ON THE CONTINENT

This section briefly discusses some of the key recent developments to address impunity, justice, and reconciliation in Africa. It highlights the emerging processes in Burundi, Togo, Kenya, and Zimbabwe.

### Burundi

The August 2000 Arusha Peace and Reconciliation Agreement for Burundi and the so-called Kalomoh report conducted by experts sent by the UN provide the basis for dealing with issues of reconciliation and justice for mass atrocities of the past in Burundi. The Kalomoh report assessed the feasibility of the mechanisms proposed in the agreement. The report recommended the creation of a truth and reconciliation commission in accordance with the agreement and, instead of the special tribunal provided for in the agreement, a special chamber within Burundi’s court system staffed by national and international members and personnel. The Security Council approved the Kalomoh report in Resolution 1606 (2005). Since then, the UN and the government have been engaged in protracted negotiations regarding the operational framework for the proposed mechanisms.

Although there is a consensus on the hybrid composition of the truth and reconciliation commission and the special chamber, two rounds of negotiations failed to secure an agreement between the government and the UN on the operational framework. The points of contention relate to the relationship between the truth and reconciliation commission and the special chamber, the independence of the chamber's prosecutor, and the power of the truth and reconciliation commission to grant amnesty. In November 2007 the government of Burundi and the UN agreed on the creation of a tripartite (UN, government, and civil society) steering committee to lead national consultations on transitional justice mechanisms. The six-member committee was tasked with collecting Burundians' perceptions of the twin transitional justice mechanisms to be created. While this process is vital in a context where the mechanisms proposed were designed without sufficient input from the public and civil society, it created conflict between the government and the UN over the outcome. The UN wanted to embark on consultations with the aim of collecting public views on the modalities of both mechanisms, whereas the government considered consultations as an opportunity to marshal popular support for the exclusive creation of a truth and reconciliation commission, and rejection of the mechanism for setting criminal accountability. All sides in the conflict had previously agreed on some form of de facto amnesty to avoid prosecution. Although the Arusha agreement prohibited amnesty for serious international crimes, subsequent peace agreements provided "provisional immunity," to rebel groups to facilitate their return to the country and participation in the political process. A number of constraints have inhibited efforts to address issues of impunity and reconciliation. In August 2010, the six-member committee produced the results of the consultation, but the report has yet to be released to the public.<sup>20</sup>

## Togo

Togo went through a constitutional crisis following the death of President Gnassingbé Eyadéma in February 2005. Presidential elections were organized for April 2005, which Mr. Faure Gnassingbé eventually won with 60 percent of the ballot. But with violence gripping the country, the Economic Community of West African States (ECOWAS) mediated a settlement in August 2006 that paved the way for the Global Political Agreement (GPA) signed by Togo's political parties, leading to a government of national unity. The GPA also provided for the creation of a truth commission intended to establish the truth about past and post-electoral violence, promote forgiveness, and facilitate national reconciliation. After consultations, a presidential decree in February 2009 established a truth, justice, and reconciliation commission ("Commission Vérité, Justice et Réconciliation") to be chaired by a religious authority. The consultations produced a bill, which was criticized by local and international civil society organizations because it provided an unreliable process for nominating commissioners, lacked a witness protection program, and failed to provide a guarantee that the commission's work would be made public.<sup>21</sup>

## Kenya

In Kenya, the violence and political unrest that threatened the country's stability following its contested presidential elections in late December 2007 led to a round of negotiations beginning in January 2008. The talks, led by former UN Secretary-General Kofi Annan in his capacity as chairman of the AU Panel of Eminent African Personalities, resulted in a power-sharing deal between the two parties and a set of institutions to address impunity, including the Commission of Inquiry on Post-Election Violence (CIPEV); the Truth, Justice, and Reconciliation Commission; and the Independent Review Committee charged with investigating all aspects of the 2007 elections. Subsequently, Parliament



passed legislation establishing a truth, justice, and reconciliation commission on October 23, 2008.

Judge Philip Waki, who headed the CIPEV report on the post-election violence, released in October 2008, began a discussion around prosecutions in Kenya. By asking Kofi Annan to forward a secret list of suspected perpetrators to the International Criminal Court (ICC) if a special tribunal was not established before meeting several deadlines, Waki took a bold step. Following the failure of Parliament to find constitutional measures that would have laid the groundwork for a domestic tribunal, the government agreed to cooperate with the ICC in prosecuting major figures involved in the electoral violence in August 2009. During a visit to Kenya by the ICC Prosecutor Luis Moreno-Ocampo in November 2009, the government reiterated its commitment to both the ICC process and the establishment of a local tribunal that would prosecute low-level officials implicated in the violence, although progress on the latter remains uncertain.

In March 2010, the prosecutor handed over a list of twenty senior political and business leaders to judges at the ICC, noting that these individuals “bear the gravest responsibility for organising, enticing and financing attacks against the civilian population on account of perceived ethnic or political affiliation pursuant of a state or organisational policy.”<sup>22</sup> The court’s judges granted the prosecutor’s request to launch an investigation into crimes against humanity in Kenya.<sup>23</sup>

## Zimbabwe

Following protracted mediation by the Southern African Development Community, a shaky political agreement was signed between Zimbabwe’s three political protagonists in September 2008, which began to restore some stability. A power-sharing transitional government was formed in February 2009. The September 2008 power-sharing agreement made mention of a mechanism to “advise on measures of national healing, cohesion

and unity in respect of victims of pre- and post-independence political conflicts.” The unity government also created a ministry for national healing to deal with issues of forgiveness and accountability.<sup>24</sup>

## The International Criminal Court and Africa

The International Criminal Court (ICC) has emerged as a key part of the international justice mechanisms for combating impunity in Africa. To date, more than 30 of the 111 states parties to the ICC are African states, more than from any other continent. Of these African states, five countries—Burkina Faso, Kenya, Senegal, South Africa, and Uganda—have domestic implementing legislation that incorporate the provisions of the court’s Rome Statute into domestic law. The continent is also home to all five situations before the ICC—the Central African Republic, Democratic Republic of the Congo, Sudan, Uganda, and Kenya—yielding twelve indictments against alleged war criminals and the detention of four suspects in The Hague.<sup>25</sup> These cases have provoked both positive and negative reactions in Africa. After the initial embrace by some of African leaders, the relations between the ICC and African states have become increasingly strained by concerns that it has pursued a selective approach to justice by primarily targeting Africans while ignoring other international crimes perpetrated by powerful nations or their allies. These have opened the court to allegations of neocolonialism; in fact, the court’s main detractors in Africa see it as a tool of Western hypocrisy and double standards. Other critics charge that the court’s retributive justice devalues traditional methods of dispute resolution that emphasize restorative justice.

These criticisms have coincided with growing disillusion about the workings of the court among the court’s key allies in Africa’s civil society and victims’ groups. Although strongly supportive of the ICC—they were part of the global campaign to strengthen international justice—these actors have been frustrated by the court’s direction, prosecutorial policies and strategies, excessive procedural delays, and insufficient evidence for charges, as well as the inadequate participation of victims. The procedural and policy issues raised by victims’ groups and their supporters

in civil society do raise concerns and require further analysis beyond the scope of this report.

This report is concerned with the criticisms leveled against the court by several African states, criticisms that culminated in the decision by the African Union (AU) not to cooperate with the ICC with regard to Sudan's indicted president, Omar al-Bashir. The international justice architecture is thus perceived to be at loggerheads with Africa in a manner that may potentially threaten the pursuit of peace and justice.

## Uganda

Following almost two decades of fighting between the Lord's Resistance Army (LRA) and government forces in a conflict characterized by horrific suffering and human rights violations, Ugandan President Yoweri Museveni referred the situation to the ICC in December 2003, the first time a head of state had referred a conflict to the court. But the invitation coincided with the government's new effort to engage the rebels in formal peace talks. The timing of the invitation—extended as the talks were facing difficulties—seemed to complicate the peace process. The ICC's investigations proved controversial and brought to the fore tensions between the pursuit of peace and demands for justice. There were concerns raised about the court's impartiality. More importantly, some critics asserted that the ICC's intervention undermined the indigenous justice initiatives that had been used previously to integrate former rebels into society.

The talks were halted temporarily in October 2005 after the ICC prosecutor issued indictments against five LRA leaders, including Joseph Kony. But they resumed in Juba under Southern Sudanese leadership in early 2006. During the talks, the LRA demanded the withdrawal of the ICC arrest warrants as a precondition to signing a peace agreement. The Ugandan government promised a blanket amnesty and claimed that it could request that the ICC lift the warrant. Although the Juba talks culminated in the

Cessation of Hostilities Agreement in August 2006, Kony did not sign the agreement. By 2008, the protracted peace process came to an end without a final peace agreement after the LRA leader, despite adopting all five agenda items (including item III, the Agreement on Accountability and Reconciliation), repeatedly failed to sign the final peace agreement citing the ICC indictment and warrants. Overall, the agreement paved the way for the gradual return to stability in northern Uganda, even though the LRA rebels continued to cause mayhem in Southern Sudan, eastern DRC, and the Central African Republic. Despite criticisms of the court's intervention, the indictment had a constructive effect by propelling both parties to explore an extensive array of national accountability and reconciliation options that could serve as alternatives to the ICC.

The Agreement on Accountability and Reconciliation contained specific commitments to establish a special war crimes division within Uganda's High Court, promote truth telling, and use traditional justice mechanisms such as *mato oput*, *kayo cuk*, *ailuc*, and *tonu ki coka*, which focus on cleansing and reintegration rituals to bring about reconciliation. The LRA insisted that the government should also accept responsibility for crimes through these mechanisms, including truth commissions and compensation. In addition to the traditional structures, parties agreed that other national approaches to accountability and reconciliation should be pursued, particularly the Amnesty Law of 2000, the Uganda Human Rights Commission, and the Ugandan constitution. The parties signed an annex to the agreement in February 2008, specifying the transitional justice structures to be adopted in Uganda, particularly the establishment of a special division of the High Court, which would commence criminal investigations against LRA leaders while calling upon the UN to defer all investigations and prosecutions against the LRA leadership. These provisions gave primacy to traditional methods.<sup>26</sup> A special war crimes division was established and three judges appointed to staff the court, all with previous experience in other war

crimes tribunals. At the same time, Uganda domesticated the Rome Statute, giving the war crimes division powers to try the cases that are before the ICC.

In light of the annex, the ICC's Pre-Trial Chamber II re-examined the admissibility of the Kony et al case under Article 19(1) of the Rome Statute, beginning in October 2008. In March 2009, the chamber ruled that the international court did continue to have jurisdiction over the proceedings. It considered the Ugandan government's explanation of how the peace agreement and the annex were to be implemented "ambiguous...as to where and by whom the alleged perpetrators of atrocities should be tried." Additionally, the chamber noted that the peace agreement remained unsigned, and that any attempts at implementing the agreement had been "preliminary and partial."<sup>27</sup>

As the defense appealed the ruling,<sup>28</sup> the government appointed the Justice, Law and Order Sector's Technical Committee on Transitional Justice to seek mechanisms to harmonize and implement the various transitional justice components agreed in the annex, including those establishing a special tribunal, truth-telling forum, and the use of traditional justice mechanisms. In addition, a subcommittee on truth telling adopted a proposed national reconciliation bill largely drafted by civil society actors.

## The Democratic Republic of the Congo

The holding of national elections in 2006 was a significant turning point in the tumultuous history of the Democratic Republic of the Congo (DRC), but the country has struggled to bring closure to an era of protracted civil conflict marked by vast human rights violations. Since President Joseph Kabila won the elections, several transitional justice initiatives have been undertaken but have not successfully established accountability for past crimes. At the heart of the debate is the role of the ICC. President Kabila referred the situation to the ICC in 2004. Since then, the ICC has issued four arrest warrants for suspected Congolese war

criminals, mainly in the Ituri district of the DRC, and three have been arrested and transferred to The Hague:<sup>29</sup>

- **Thomas Lubanga Dyilo**, alleged leader of the *Union des patriotes congolais* (UPC) and commander-in-chief of its military wing, the *Forces patriotiques pour la libération du Congo* (FPLC). The prosecutor accused Lubanga of conscripting and enlisting child soldiers from September 2002 to August 2003. Lubanga was transferred to ICC custody in 2006. His was the first case before the ICC. In 2008, the court stopped proceedings against Lubanga, citing the prosecutor's failure to turn over potentially exculpatory materials to the defense. The matter was resolved, but the trial continued to pose challenges to the ICC.<sup>30</sup>
- **Germain Katanga**, alleged commander of the *Force de résistance patriotique en Ituri* (FRPI). The ICC charged Katanga with multiple counts of war crimes and crimes against humanity. Katanga has been in ICC custody since 2007. In June 2009, the court's Trial Chamber III dismissed the argument by Katanga's defense that his case was inadmissible because of failure to respect the principle of complementarity. The judge explained that the DRC referred the case to the court under the complementarity provision.
- **Mathieu Ngudjolo Chui**, alleged former leader of the *Front national intégrationniste* (FNI) and a colonel in the DRC's national army (FARDC). The ICC charged Ngudjolo with multiple counts of war crimes and crimes against humanity in Ituri. Ngudjolo was transferred to ICC custody in February 2008. The ICC has joined Ngudjolo's case with that of Germain Katanga. Their trial was marred by postponement and procedural delays.<sup>31</sup>
- **Bosco Ntaganda**, alleged former deputy chief of the general staff of the FPLC and alleged current chief of staff of the *Congrès national pour la défense du peuple* (CNDP). The ICC

unsealed an arrest warrant for Ntaganda on charges focusing on the recruitment of child soldiers. Ntaganda remains at large. He was appointed as military commander of the joint military operations in eastern DRC, and in February 2009 a circular was issued to the Office of the Military Prosecutor ordering that no prosecution or investigation should be pursued against any CNDP member and that all current investigations against the group be suspended.<sup>32</sup>

As in Uganda, some have questioned the one-sided nature of the ICC's indictments in the DRC. In addition, it remains to be seen how the court's prosecutions interact with various national accountability processes that are also unfolding. At the national level, several trials for serious international crimes have been brought before the military justice system, resulting in convictions and orders to pay damages to the victims. However, most of those convicted have escaped from jail, and no victim has received payment. In these instances, the military courts invoked and applied the Rome Statute—notably referring to the jurisdiction of the ICC—in the absence of proper integration of the latter within the Congolese legal framework. While the military courts claimed primacy over the international treaty ratified by the Congolese government, they have limited knowledge of international criminal law. In all instances in which the Rome Statute was applied, international organizations (e.g., *Avocats sans frontières*) and the United Nations Mission in Congo (MONUC) substantially assisted the proceedings. That said, implementing elements of the Rome Statute within the Congolese legal system may ensure that Congolese magistrates are trained in international criminal law and could enable civilian courts to be seized on the subject matter of the ICC, which falls under the exclusive jurisdiction of military courts.

Alongside this, mention should be made of the work of the Congolese Truth and Reconciliation Commission (TRC), which envisioned a truth-for-amnesty process akin to that of South



Africa's process. Its mandate called for commissioners from all four factions to the December 2002 power-sharing agreement, including former armed belligerents. However, the TRC's mandate was too vast, appropriate rules were not adopted, and no investigations of human rights violations took place. In May 2009, the Congolese Parliament passed an amnesty law for limited use in connection with acts of war and insurrection committed by Congolese in North and South Kivu between June 2003 and May 2009. The law is the outcome of various efforts to bring an end to fighting in this region of the DRC. It does not offer amnesty to those accused of war crimes.

### The Central African Republic

The Central African Republic (CAR) referred the situation of crimes in CAR territory to the ICC in July 2005, but formal investigations did not begin until May 2007. These investigations concerned the atrocities committed by government and rebel forces from October 2002 to March 2003 that precipitated the coup against then President Ange-Félix Patassé. Jean-Pierre Bemba Gombo, a former vice president and rebel leader in the DRC, allegedly assisted Patassé and allegedly committed war crimes and crimes against humanity. In a major move in May 2008, Bemba was arrested in Belgium on an ICC arrest warrant charging him with war crimes, including rape, torture, and murder, as well as crimes against humanity committed in the CAR. Arrested on a visit to Belgium, Bemba was later transferred to The Hague. The CAR government used the provisions contained in Article 16 of the Rome Statute, which allows the UN Security Council to suspend the action of the court, and asked the Security Council to suspend the ICC's investigations of crimes that may have been committed by its troops in the CAR. In a letter to the UN Secretary-General, the government also insisted that the ICC's intervention was not necessary because the country's justice system was capable of pursuing national prosecutions for international crimes and that

the process of national reconciliation was underway. In October 2008, the government promulgated an amnesty law that excluded international crimes as defined by the ICC but granted extensive amnesty for some serious crimes. In addition, the recommendations from a national dialogue forum held in December 2008 called for the establishment of a truth and reconciliation commission. Although the ICC's involvement may have triggered the start of domestic processes to address impunity, there have been concerns that the invocation of truth commissions and reparation measures to compensate victims serve to avoid confronting criminal accountability.

The case of the CAR may, however, pave the way for groundbreaking move by the ICC. The prosecution of Bemba for crimes committed by his Congolese militia forces in the CAR marked the ICC's first formal recognition of the regional nature of African conflicts.<sup>33</sup> Bemba's arrest for human rights crimes committed in a neighboring country raises some challenging issues about how transitional justice mechanisms can address the complex regional conflicts in Central Africa and the Great Lakes region, where several leaders have been implicated in atrocities committed by their armies. Since Africa's conflicts are rarely confined within national boundaries, the case of the CAR is instructive in sending an important message about the need to ensure that accountability efforts include the culpability of neighboring states in conflicts. In addition to the indictment of Charles Taylor by the Special Court for Sierra Leone, Bemba's indictment provides another legal innovation in the fight against impunity.<sup>34</sup>

## Sudan

Unlike previous ICC interventions in Africa, the situation in Darfur was referred to the ICC by the UN Security Council under Resolution 1593 of March 2005. The basis of that referral was the findings of the January 2005 UN International Commission of Inquiry into Darfur, which concluded that the crimes committed by the government and its militia, the

Janjaweed, did amount to “violations of international human rights and humanitarian law” and that some of the crimes “very likely to amount to war crimes” and “crimes against humanity.”<sup>35</sup> In May 2007, the ICC issued arrest warrants for Ahmad Haroun and Ali Mohammed Ali Abd-al-Rahman (Ali Kushayb), individuals who were engaged in the Darfur conflict in key positions. Although the government has failed to arrest Haroun, it arrested Kushayb—the *janjaweed* militia leader—in 2009 on charges of war crimes and promised to prosecute him domestically.<sup>36</sup>

The Sudanese government’s limited cooperation with the ICC ended in early 2007, as Khartoum challenged the jurisdiction of the ICC on the grounds of sovereignty. The Sudanese government argued that its domestic judiciary was capable of handling prosecutions of crimes committed in Darfur. To counter the ICC, the government came up with efforts to address impunity in Sudan, including commissions of inquiry, courts, and special prosecutors. For example on June 6, 2005, the government announced the creation of a Special Criminal Court on Events in Darfur. Similarly, the government appointed a prosecutor general for Darfur in August of 2008, who committed himself to re-examining previously blocked cases. Critics have questioned the credibility of these national initiatives, arguing that the judiciary has limited independence and the numerous immunity provisions have impeded the prosecution of members of security agencies for serious crimes.<sup>37</sup>

Most of the controversy in the Darfur case has centered on the indictment of Sudan’s President Omar al-Bashir. In June 2008 the ICC prosecutor applied for an arrest warrant for the president, and in March 2009 the Pre-Trial Chamber of the ICC issued an arrest warrant for him. The prosecutor initially charged Bashir with war crimes, crimes against humanity, and genocide in Darfur. The court upheld the first two charges, but rejected the charge of genocide. In July 2010, however, the ICC’s Pre-Trial

Chamber issued a second arrest warrant for President Bashir for the crime of genocide. The chamber argued that there were reasonable grounds to believe that he is responsible for three counts of genocide committed against the Fur, Masalit, and Zaghawa ethnic groups, including killing, causing serious bodily harm, and deliberately inflicting conditions of life calculated to bring about the physical destruction, in whole or in part, of a particular group.

Several critics have challenged the decision of the ICC. They highlight the conflicting goals of pursuing peace and justice, raise questions about whether justice should be pursued at all costs, and articulate concerns that the arrest warrant poses risks for the fragile peace and security in Sudan. While the ICC prosecutor's mandate is to pursue justice for serious international crimes, the prosecutor is also supposed to consider the interests of victims when bringing a prosecution. Critics therefore argue that the prosecutor could have delayed the arrest warrant until a later date, or simply not have issued one, as he has done in other situations rather than further exacerbate the heightened state of insecurity and uncertainty in Darfur.

After the prosecutor requested an arrest warrant for Bashir, the AU Peace and Security Council issued a communiqué reiterating its commitment to “combating impunity,” stating its concern with the “double standard” and “misuse of indictments against African leaders,” and expressing its conviction that the arrest warrant “could seriously undermine the ongoing efforts at facilitating the early resolution of the conflict in Darfur and the promotion of a long-lasting peace.”<sup>38</sup> The communiqué requested that the UN Security Council invoke Article 16 of the Rome Statute that grants the Security Council the power to suspend an indictment for up to one year. The AU Peace and Security Council argued that such a move was necessary because under “the current circumstances, a prosecution may not be in the interest of victims and justice,” or peace.<sup>39</sup> Following issuance of the arrest warrant, the Peace and

Security Council released another communiqué regretting the decision, urging Sudan to exercise restraint, appealing once again to the UN Security Council to defer the prosecution, and urging it to give the situation the serious attention it deserved.<sup>40</sup>

The prospects of arresting and transferring President Bashir to The Hague are remote. With no enforcement powers of its own, the ICC is dependent on states parties to the Rome Statute to arrest him if he steps on their territory. Two states parties—Chad and Kenya—have already received President Bashir without taking action.

Nonetheless, the indictment has drawn attention to debates about the importance of peace and justice working in tandem. When the UN Security Council referred the Darfur case to the ICC in 2005, it recognized that lasting peace requires justice and that any comprehensive solution in Darfur must entail justice. The indictment also propelled the AU to craft responses to the abuse of human rights. For instance, after the application request for Bashir's arrest by the ICC prosecutor in July 2008, the AU created a High-Level Panel on Darfur (AUPD) chaired by former South African president Thabo Mbeki. The establishment of the panel underscored the AU's determination to map out alternative approaches and responses to the ICC on Sudan. In the July 2008 AU Peace and Security Council communiqué establishing the AUPD, the AU called on the UN Security Council to defer the ICC's proceedings for twelve months under Article 16 of the Rome Statute. The Peace and Security Council urged the AUPD to examine the situation in Sudan and submit recommendations to the council on effective and comprehensive means to address issues of accountability and combat impunity on the one hand, and promote reconciliation and healing, on the other. It also called upon "the Sudanese parties to ensure that issues of impunity, accountability, and reconciliation and healing are appropriately addressed during the negotiations aimed at reaching a comprehensive peace agreement." Recognizing the

ICC's principle of complementarity, it also urged the Sudanese government "to take immediate and concrete steps to investigate human rights violations in Darfur and bring to justice their perpetrators and to keep the AU fully and continuously informed of progress made in this respect."<sup>41</sup>

The formation of the AUPD underscored Africa's determination to seek a balance between justice and peace. In attempting to straddle the polarization occasioned by the ICC process, the formation also sought to forge a position that recognized the need to address concerns about human rights violations in Darfur and Sudanese complaints about the overreaching arm of international justice. In the midst of the AUPD's deliberations and hearings, the AU heads of state and government reached a decision in July 2009 urging member states not to cooperate with the ICC, "pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Bashir."<sup>42</sup> The decision, which came after the July 2009 AU Summit in Sirte, Libya, created further tensions between Africa and the ICC.

The AUPD submitted its report in October 2009, which recommended balancing the need for justice, peace, and reconciliation in Darfur through the establishment of a hybrid court constituted by Sudanese and non-Sudanese judges and legal experts to deal with the most serious crimes. In addition, it recommended the introduction of legislation to remove all immunities of state actors suspected to have committed crimes in Darfur and the establishment of a truth, justice, and reconciliation commission to promote truth telling and suitable acts of reconciliation, and to grant pardons where appropriate. In endorsing the recommendations of the AUPD at its meeting in Abuja in October 2009, the Peace and Security Council reaffirmed the AU's commitment to combating impunity, condemned human rights violations in Darfur, and reiterated its call for the deferral of the ICC's indictment against President Bashir in the interest of peace, justice, and

reconciliation. Ultimately, as the AUPD's chair, Thabo Mbeki, observed: "Whatever the ICC might have done does not absolve Sudan from acting on crimes that might have been committed. So it is still the responsibility of the Sudanese state to act on those matters."<sup>43</sup> The panel's report is now an official AU policy toward Sudan. At the same time, the panel was renamed the AU High-level Implementation Panel with a mandate to facilitate the implementation of its recommendations.

At a 2009 meeting on the role of the ICC in Africa, African states parties to the Rome Statute proposed a number of measures that, if properly implemented, would consolidate efforts since the 2000 Constitutive Act to end impunity on the continent. These measures included continued "commitment of AU Member States to combating impunity...in conformity with the Constitutive Act of the African Union,"<sup>44</sup> as well as the following recommendations:

- Concurrence with the AU Assembly that the AU Commission "examine the implications of the [African] Court [on Human and Peoples' Rights], being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes."
- The initiation of "programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and security of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies."<sup>45</sup>

Both proposals need to be properly examined as they provoke an important conversation on complementarity. The ICC's Rome Statute is premised on the understanding that the court is a court of last resort and will only step in when national authorities are unable or unwilling genuinely to investigate and prosecute

mass atrocities—the principle of complementarity.<sup>46</sup> The onus is therefore on national criminal jurisdictions to initiate investigations and prosecutions. The AU's above proposal to cooperate with its member states to put in place programs aimed at enhancing the capacity of domestic judicial systems to deal with international crimes is in line with the Rome Statute. The AU's proposal therefore offers some possibilities for realizing the principle of complementarity and lends further weight to efforts to strengthen domestic measures for accountability in Africa.

At the July 2010 AU Summit of Heads of States and Governments in Kampala, the AU reiterated its refusal to cooperate with the ICC on Sudan and made further calls for termination of outstanding indictments. The AU summit recognized the need for ICC members to balance AU obligations with obligations under the court's Rome Statute. Echoing its previous requests to the UN Security Council to suspend the ICC indictments against President Bashir, the AU expressed its displeasure with the ICC chief prosecutor's approach and rejected the ICC's request to establish a liaison office at the AU. In addition, in defending Kenya's decision not to arrest President Bashir, the AU Commission urged its members to vote against any UN resolution condemning Kenya and disclosed the steps it had taken to restrict the work of the ICC in Africa.<sup>47</sup>



## Conclusion and Recommendations

Ending impunity has become a collective international enterprise to promote justice, reduce human suffering, and foster amity within and across societies. Yet, as this report has shown, international instruments to deal with impunity have evolved alongside the gradual diminution of sovereign rights of states, raising profound questions about the locus of action and responsibility that have blurred the traditional division of labor between national and the international actors. Thus, the consensus on fighting impunity has, in part, been stymied by the competing claims about the boundaries between national and international legality, morality, and rights. Despite these tensions, there is a growing realization that solid institutions that undergird justice and reconciliation within the broader framework of democracy and the rule of law are the weapons for fighting impunity across nations. International instruments against impunity have become blunt because of the escalation of atrocities and in circumstances where civil wars have ravaged the institutions of justice and reconciliation.

Afflicted for a long time with wars and violence, Africa has made strident attempts to remedy the culture of impunity at the national, regional, and continental levels. As one of the cornerstones of the AU's principles of democracy, human rights, and the rule of law, the battle against impunity has been enshrined in the organization's charter and the AU Constitutive Act to give moral and political weight to Africa's collective efforts. For the most part, the AU's human rights crusade—reflected in the struggle against impunity—and the quest for justice and reconciliation seek to legitimize various national efforts that have grappled with building democracies, the rule of law, and functional judicial systems with a semblance of impartiality. Equally vital, the AU has embraced declarations against impunity to propagate this norm of justice and reconciliation within its

multiple institutions and subregional bodies, such as the Regional Economic Communities (RECs).

African experiences of managing impunity via justice and reconciliation reveal the importance of institutional innovations that give prominence to participation, impartiality, and the search for truth and healing. National transitional justice institutions, such as truth and reconciliation commissions, have worked where there is a decisive departure from institutions and practices that underwrite impunity and criminalize organized dissent. Impunity that stems from the absence of the rule of law often impedes reconciliation in the long run precisely by reproducing the conditions that breed violence and injustice.

The challenge in Africa has been to create stable institutions that balance reconciliation with justice in the context of broadening political, social, and economic freedoms. African attempts to deal with justice and reconciliation have reinforced significant principles and norms, in particular the importance of public participation, public hearings, and the restoration of civic trust; the right to the truth and reparations for victims; and the centrality of institutional reforms. Furthermore, these experiences have established some important precedents for the international justice regime. These include the recognition of rape as an instrument of war punishable under international law, the recruitment and use of child soldiers as a criminal offence, “forced marriages” as a crime against humanity, and attacks against peacekeepers as a war crime. If Latin American experiences in the 1980s provided the groundwork for the field of transitional justice, Africa’s vast experiences have considerably advanced the field into the twenty-first century.

For Africa, questions of impunity, justice, and reconciliation have been increasingly mediated by international actors and institutions, some of which are not perceived to be fair, impartial, and just. The emergence of the ICC as the epitome of international legality on impunity has occasioned deep debates about the

prosecution of crimes and atrocities by individuals, irrespective of status and standing. More than thirty African states are signatories to the Rome Statute that created the ICC and some have made efforts to establish enabling legislation to implement its provisions. Although the concerns of some African states about the selective application of international justice will not diminish, there is widespread consensus, especially among the citizens of the continent, on the core underpinnings in the fight against impunity. The results of the ICC’s judicial intervention—both positive and negative—are reverberating across Africa. The impact of the ICC, under its complementarity clause, has propelled some innovative domestic judicial and non-judicial approaches to dealing with impunity. In the same vein, it is apparent that international justice is at a crossroads in Africa.

To overcome this polarizing debate about international justice in Africa, this report concludes with two sets of recommendations that seek to resolve these tensions; entrench African values in international accountability mechanisms; and harmonize the global search for peace, justice, and reconciliation. The first recommendation relates to the advocacy of the Panel of the Wise and the second to African initiatives for strengthening instruments of justice and reconciliation.

### Recommendation 1: The AU Panel of the Wise should adopt an advocacy role to promote and reinforce guiding principles

As a major institution in Africa’s leadership structures, the Panel of the Wise plays a critical role in promoting wider acceptance of common values and rules that enshrine rule of law, respect for human rights, and the dissemination and domestication of these norms. As such, the panel should

- dedicate itself to the ratification and implementation of AU and international agreements that could help strengthen justice in Africa, including the *African Charter on Human*

*and Peoples' Rights*, its protocol on the rights of women in Africa, and the new African Court on Human and Peoples' Rights;

- ensure mediators and peacemakers throughout Africa are aware of relevant norms and institutions as they set up transitional justice mechanisms;
- advocate for full implementation of existing transitional justice mechanisms in Africa, most of which have yet to have their intended effect;
- monitor transitional justice initiatives across Africa, including tracking the implementation of recommendations from truth commissions and ensuring decisions by courts and tribunals are enforced;
- work with civil society organizations and legal institutions to guarantee that transitional justice issues are at the center of the new continental legal architecture, with the right to truth, justice, and reparation being indispensable.

The panel will also have a strategic role in mediating between African interests and the concerns of the international community. This role will become significant as more cases of impunity and gross violations of human rights are brought before the ICC.

In this context, the panel may wish to

- work with the Regional Economic Communities (RECs) to sensitize them to the need to provide support to their member states' efforts in combating all forms of impunity;
- be involved in the selection mechanism regarding the participation of NGOs and civil society at large in the process of transitional justice;
- establish mechanisms of consultation with victims' groups

- recommend measures to enhance postconflict reconstruction and development activities to better the lives of victims;
- recommend measures for strengthening the capacity of national judicial systems to complement the activities of both traditional and international processes;
- assist in the articulation of early-warning mechanisms at the continental level and among RECs. Such early-warning mechanisms would identify vulnerabilities in weak states and bring these vulnerabilities to the attention of the AU and relevant authorities in such member states.

### Recommendation 2: The AU should develop a Transitional Justice Policy Framework and strengthen instruments for justice and reconciliation on the continent

The AU Constitutive Act pledges to fight impunity, but there is a need to draw lessons from the various experiences across Africa in the articulation of a set of common concepts and principles that would guide consensus on continental and subregional instruments. Part of these initiatives would entail exploration of measures to develop and deepen the AU's capacity for assessing the goals and limitations of various accountability measures to respond to impunity. These efforts could culminate in a continental strategic policy framework on transitional justice that balances the imperatives of peace and justice in conflict and postconflict contexts. Such a policy would provide the AU with the occasion to respond appropriately to the difficult dilemmas of balancing the immediate need to secure peace with the longer-term importance of establishing the rule of law and preventing future conflicts. More vital still, it would send an unambiguous message to opponents of justice that the pursuit of justice is an inevitable and necessary element for achieving reconciliation and stability in Africa. Since Africa has been at forefront of innovative experiments around accountability and reconciliation,

documentation of these practices is critical to the accumulation of knowledge about these experiences.

The Panel of the Wise could draw on the October 2009 Report of the African Union Panel on Darfur (commonly known as the Mbeki Panel after its Chair, former South Africa President Thabo Mbeki). The report and its recommendations offer the contours of a policy framework. Entitled “Darfur: The Quest for Peace, Justice and Reconciliation,” the report focuses on Darfur and outlines the challenges of effective and comprehensive approaches to issues of accountability and combating impunity on the one hand, and peace, healing, and reconciliation on the other. More importantly, it also elaborates a set of overarching recommendations appropriate for transitional justice in Africa as a whole. The recommendations in the Mbeki Panel report were adopted by the AU Peace and Security Council in its 207<sup>th</sup> Meeting at the level of the heads of state and government on October 29, 2009, in Abuja, Nigeria. To add details to this recommendation the annex to this report provides a detailed proposals for an AU Transitional Justice Policy Framework for use by the Panel of the Wise as part of its advocacy. In addition to drawing on the Mbeki Panel report, the framework draws from existing AU policy guidelines, such as the Framework for Post-Conflict Reconstruction and Development.

## Endnotes

1. United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, August 23, 2004, p. 1
2. United Nations, “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice,” March 2010.
3. *Ibid.*, p. 2.
4. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), June 8, 1977, Article 6 (5).
5. United Nations Secretary-General, *The Rule of Law*, p. 11, para. 32.
6. UN General Assembly, *Rome Statute of the International Criminal Court*, July 17, 1998, Article 16.
7. Office of the United Nations High Commissioner for Human Rights (OHCHR), “Rule of Law Tools for Post-Conflict States: Reparations Programs,” New York and Geneva: United Nations, 2008, pp. 5–6.
8. UN General Assembly Resolution 60/147 (December 16, 2005), UN Doc. A/RES/60/147.
9. An international arrest warrant was issued by a Belgian judge in September 2005.
10. In July 2012 the International Court of Justice ordered Senegal to either prosecute Habré “without further delay” or extradite him. Shortly thereafter, the AU and Senegal agreed to establish a special court to try Habré in the Senegalese justice system with African judges appointed by the AU. The court was scheduled to be operational by the end of 2012.
11. *Promotion of National Unity and Reconciliation Act*, South Africa, July 19, 1995.

12. In late 2012, seventy-two cases had been completed, of which seventeen were pending appeal. One case was ongoing.
13. As this report was going to press, the first instance trials were due to be completed at the end of 2012 and the appeals in 2014.
14. Eight cases were subsequently transferred to Rwanda for trial.
15. See Philip Clark, "The Rules (and Politics) of Engagement: The *Gacaca* Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda," in *After Genocide: Transitional Justice, Post Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, edited by Philip Clark and Zachary Kaufman (New York: Columbia University Press, 2009).
16. *The Truth and Reconciliation Commission Act 2000*, February 10, 2000, Part III, 6 (2b).
17. *Agreement Between The United Nations and The Government of Sierra Leone on the Establishment of a Special Court For Sierra Leone*, January 16, 2002.
18. In April 2012, Charles Taylor was found guilty of crimes against humanity and war crimes, including murder, rape, slavery, and the use of child soldiers. He was then sentenced to fifty years in prison.
19. The Republic of Liberia Truth and Reconciliation Commission, "Final Report," available at <http://trcofliberia.org/reports/final-report> .
20. As this report went to press, a truth and reconciliation commission had not yet been established in Burundi.
21. The Truth, Justice and Reconciliation Commission of Togo submitted its final report to the Togolese government in April 2012.
22. International Criminal Court, "ICC Prosecutor to Judges: Kenya Crimes Resulted From a Policy by Identifiable Leaders," press release, March 3, 2010, ICC Doc. ICC-OTP-20100303-PR501.
23. International Criminal Court, "ICC Judges Grant the Prosecutor's Request to Launch an Investigation on Crimes Against Humanity with Regard to the Situation in Kenya," press release, March 31,



2010, ICC Doc. ICC-CPI-20100331-PR512. At press time, the opening of the trial of four suspects was scheduled for 2013.

24. As of 2012, the Organ for National Healing, Reconciliation and Integration had proposed the establishment of an independent “National Peace and Reconciliation Council.”
25. As of 2012, all eight situations before the ICC were on the African continent, with the addition of Libya, Côte d’Ivoire, and Mali. Preliminary investigations were also underway in Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea, and Nigeria.
26. *Agreement on the Implementation and Monitoring Mechanism*, Juba, Sudan, February 29, 2008.
27. Decision of the ICC’s Pre-Trial Chamber II cited in Women’s Initiative for Gender Justice, “Legal Eye on the ICC,” May 2009, available at [www.iccwomen.org/news/docs/LegalEye\\_May09/index.html](http://www.iccwomen.org/news/docs/LegalEye_May09/index.html).
28. Their appeal was ultimately dismissed. As this report was being published, Kony remained at large.
29. As of 2012, one had been convicted and the verdicts were pending from the trials of two others. An arrest warrant had also been issued for a Rwandan citizen, Sylvestre Mudacumura, the alleged supreme commander of the *Forces démocratiques pour la libération du Rwanda* who is allegedly criminally responsible for committing nine counts of war crimes in the context of the conflict in the Kivus.
30. Ultimately, Lubanga became the first person convicted by the ICC in 2012. He was found guilty of conscripting and enlisting children under fifteen years old and using them to participate in hostilities.
31. The trial of Germain Katanga and Mathieu Ngudjolo Chui commenced in November 2009 and closing statements were made in May 2012. At press time, the verdict was pending.
32. A second arrest warrant for Ntaganda was issued by Pre-Trial Chamber II in July 2012.
33. On March 4, 2009, judges at the Pre-Trial Chamber adjourned the confirmation of charges hearing against Bemba and requested

the prosecutor to consider amending the charges to show that he had commander responsibility for the crimes committed. See International Criminal Court, “The Judges Ask the Prosecutor to Submit an Amended Document Containing the Charges,” press release, March 5, 2009, ICC Doc. ICC-CPI-20090305-PR395.

34. Bemba’s trial commenced in November 2010. In 2012, the last of forty prosecution witnesses was presented and the defense called its first witnesses.
35. International Commission of Inquiry on Darfur, “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” Geneva, January 25, 2005.
36. Haroun remained at large as this publication went to press, and it appeared that Kushayb had neither been tried domestically nor handed over to the ICC.
37. For example, *The Criminal Act* (1991) creates a defense of “performance of duty or exercise of right,” and the *People’s Armed Forces Act* amended in 2005 enshrines immunity for members of the armed forces disallowing any proceedings for an act that may constitute a crime while executing his duties except upon approval of the “General Commander.” The latter law also protects the *janjaweed*.
38. African Union Peace and Security Council, “Communiqué of the 142<sup>nd</sup> Meeting,” July 21, 2008, AU Doc. PSC/MIN/Comm.(CXLII), paras. 2, 3, 7, and 9.
39. *Ibid.*, para. 11 (i).
40. African Union Peace and Security Council, “Communiqué of the 175<sup>th</sup> Meeting,” March 5, 2009, AU Doc. PSC/PR/C Comm. (CLXXV), paras. 1–3, 5, and 6.
41. African Union Peace and Security Council, “Communiqué of the 142<sup>nd</sup> Meeting,” para. 11 (i–vi), pp. 2–3.
42. African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, AU Doc. Assembly/AU/13(XIII), July 3, 2009.
43. “AU panel submits report on Darfur but kept confidential,” *Sudan Tribune*, October 9, 2009.

44. Article 4(h) of the AU Constitutive Act signed in Lomé, Togo, on July 11, 2000, gives the union the “right to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”
45. African Union, *Decision on the Meeting*, paras. 4–6.
46. UN General Assembly, *Rome Statute*, Article 17(a).
47. “Kenya: Al-Bashir’s Visit to the Country Was in Order, Says AU,” *Daily Nation*, August 31, 2010.

## Annex

### AFRICAN UNION DRAFT TRANSITIONAL JUSTICE POLICY FRAMEWORK

#### Introduction

1. This African Union (AU) policy framework on Transitional Justice in Africa (ATJF) is intended to serve as a guide that can be adapted and applied to individual countries or sub-regions emerging from conflicts and repressive rule to assist them in their pursuit of accountability, sustainable peace, justice and reconciliation.
2. The need for the ATJF has become increasingly apparent as Africa demonstrates greater capacity for its affairs and seeks to complement international efforts to combat impunity and promote accountability, achieve peace, and foster reconciliation and social healing. With the formation of the AU, Africa has begun putting in place a regional and continental framework that includes mechanisms, instruments and institutions that have as their aim the resolution of conflicts, ensuring accountability, promotion of peacebuilding, justice, reconciliation and development. Pursuant to these objectives, the AU appointed prominent African leaders to consult on comprehensive solutions to conflicts in Darfur.
3. A combination of local, regional, and international factors create numerous obstacles to the attainment of sustainable peace, accountability, reparations, healing, and post-conflict reconciliation. The narrow pursuit of particular forms of justice has served to aggravate and prolong the misery of victims and frustrate creative solutions required to end violent hostilities and return to the rule of law.

4. The AUPD Report highlighted the need to address the objectives of peace, reconciliation and justice as interconnected, mutually dependent and equally desirable. They must be pursued in a manner consistent with the need to achieve democratic and socio-economic and cultural transformation. The Report emphasizes that local ownership and inclusive participation of affected communities in the design and implementation of appropriate mechanisms is vital for success.
5. Therefore, the objective of the ATJF on peace, reconciliation, and justice is to improve the timeliness, effectiveness, and coordination of the efforts of societies emerging from conflicts and oppressive rule; and to lay the foundations for accountability, social justice, sustainable peace, healing, and reconciliation. This objective is in line with Article 4 (o) of the Constitutive Act of the AU, which calls for peaceful resolution of conflicts, respect of the sanctity of human life, and the condemnation and rejection of impunity.
6. This ATJF policy framework is conceived as a practical and actionable tool to a) consolidate peace, reconciliation, and justice in Africa and prevent impunity; b) help end repressive rule and conflicts and nurture sustainable peace with development, social justice, human and peoples' rights, democratic rule and good governance; c) draw lessons from various experiences across Africa in articulating a set of common concepts and principles to constitute a reference point for developing and strengthening peace agreements and transitional justice institutions and initiatives in Africa; d) develop AU benchmarks for assessing compliance with the need to combat impunity. The framework also consolidates Africa's contribution to the emerging field of transitional justice and international law by broadening understanding and approaches to impunity and justice. The policy declares that transitional justice broadly defined is at the core of

human and peoples' rights in Africa.

7. For the purposes of this policy framework, transitional justice is defined to include a range of processes and mechanisms associated with a society's attempt to mitigate ongoing conflicts and to address a legacy of large scale past abuses, in order to ensure accountability, promote justice and achieve peace and reconciliation. The essence of transitional justice under this framework is the balancing of the immediate need to secure peace with longer term imperatives to establish the rule of law and prevent future conflicts. It includes short, medium and long term local, regional, and international programs that address the peace, reconciliation, and justice needs of the affected populations, prevent escalation of conflicts, prevent further victimization, avoid relapse into violence, combat impunity, foster social justice and democratic participation, and strengthen progress towards the consolidation of peace.

### AU Mandate in Combating Impunity and Promoting Peace, Justice, and Reconciliation

8. Africa has for the past fifty years been grappling with the challenges of implementing creative mechanisms to promote peace, reconciliation, and justice. Individual countries struggled with a legacy of colonial abuses and violations perpetuated with impunity. The formation of the Organization of African Unity (OAU, now AU) was the epitome of this struggle and the embodiment of Africa's aspiration for accountability, eradication of impunity, attainment of sustainable peace, democracy, good governance, and development.
9. Articles 6 and 14 of the *Protocol Relating to Establishment of the Peace and Security Council* of the AU mandates peacemaking and peacebuilding with respect to restoration of the rule of law and the establishment of conditions for

post-conflict rebuilding of society. This should inevitably include a comprehensive framework on addressing the issue of justice and accountability.

10. Article 31, 32, and 33 of AU Policy Framework on Post Conflict Reconstruction and Development (PCRD) under its Human Rights, Justice and Reconciliation chapter explicitly recognizes the need to protect human rights. It obliges the AU to develop mechanisms to deal with past and ongoing grievances; provide space for a context-based approach to PCRD; facilitate mobilization of society to ensure the legitimacy and relevance of the PCRD model adopted; address the tension between choices of impunity and reconciliation; encourage and facilitate peacebuilding and reconciliation activities from the national to the grassroots levels; allow for opportunities to invoke traditional mechanisms of reconciliation and/or justice, to the extent that they are consistent with the African Charter on Human and Peoples' Rights (ACHPR); establish efficient and independent justice sectors and provide for the use of AU structures and other international instruments to reinforce human rights, justice and reconciliation.
11. Furthermore, article 16, 28, and 39 of the African Charter, *Protocol on Democracy, Elections and Governance*, provides for consolidation of democracy through exchange of experiences, strong partnership and dialogue between governments, civil society and private sector and promotion of a culture of respect, compromise, consensus, and tolerance to mitigate conflict, promotion of political stability and security, and the need to harness the creative energies of the African people.
12. The appointment of the AUPD with a mandate to consult and make recommendations on effective and comprehensive approaches to the issues of accountability and combating impunity, on the one hand, and peace, healing and reconciliation, on the other, in Darfur fulfilled the above obliga-

tions. The AUPD Report, while responding specifically to the situation in Darfur, made generic recommendations on integrated justice and reconciliation responses for Africa as a whole: the utility of comprehensive national processes and principles for the establishment of hybrid courts in parallel with a truth seeking and reconciliation process. On October 29, 2009, the AU Peace and Security Council adopted this report.

13. The AUPD Report espouses a number of key transitional justice principles relevant to the African context including the following: a) The urgency to pursue peace through inclusive negotiations, rather than force/military struggles. This should include acknowledgement of past and ongoing suffering by victims and attention to regional and international dimensions. It emphasized the need to investigate serious crimes and put in place measures to prevent the commission of future crimes, as well as preserve evidence for later proceedings and adopt measures of witness protection to encourage victims of sexual crimes to come forward. b) The suspension of hostilities and protection of civilians to provide enabling conditions for participation in dialogue and the search for meaningful peace and justice; including a permanent ceasefire, demobilization and comprehensive security arrangements. c) Broader understanding of justice to encompass processes of achieving healing, equality, reconciliation, obtaining compensation and restitution, and establishing the rule of law. This should constitute part of a comprehensive transitional justice process required to deal with the past and secure sustainable justice going forward.
14. The AUPD emphasized that criminal justice will be significant, though not a sufficient pillar in every justice and reconciliation framework. There needs to be legislative and institutional reforms in post-conflict transitional societies to provide for an effective accountability system. Alongside



the formal system of national and hybrid courts, African traditional justice mechanisms should be developed and applied to deal with appropriate crimes and perpetrators at the community level.

## Rationale for a Framework on Transitional Justice in Africa

15. The appointment of the AUPD was an important milestone for African leaders as it points to African solutions to Africa's challenges. An AU policy framework on transitional justice in Africa is premised on the following:

- a) *A programmatic and normative imperative:* As the embodiment of Africa's determination for peace, justice, and reconciliation, the AU is obliged to engender programs that make possible the realization of the African transitional justice vision and aspirations. Furthermore, given that achieving peace, reconciliation, and justice in the aftermath of mass atrocities is a complex matter which requires extraordinary measures, it elaborates in a holistic manner the entire continuum of measures required to demonstrate the commitment to peace, justice, and reconciliation, and lays down minimum standards and benchmarks for combating impunity and evaluating compliance. As a framework it sketches a model that is adaptable to specific country situations, and because of its appeal to an African sense of justice, needs, and aspirations, it will empower and encourage affected countries to take the lead in designing appropriate transitional justice mechanisms.
- b) *A determination to enhance global accountability and imbue African values:* International norms and standards of accountability for international crimes are evolving rapidly but without the essential African input and voices. While Africans also share aspirations for these

global accountability norms, some contexts in Africa make their implementation impossible. In such circumstances sequencing is necessary. Some traditional practices and customary norms in Africa like Ubuntu in South Africa, Gacaca in Rwanda, and Mato Oput in Uganda have proven to be useful to complement the need for criminal prosecutions for certain categories of crimes. Institutionalizing these norms and integrating generic African practices to international norms would further enhance international commitment to end impunity and promote peace, justice, and reconciliation.

- c) *Provide a platform for International Engagement and Partnership with Africans in Enhancing Global Accountability:* Ending impunity and promoting peace, justice and reconciliation in Africa are indistinguishable from the core objectives that underpin the formation of the AU and its embodiment of international human rights norms in its constitutive instruments. The opportunities for deepening these objectives have accrued from the spread of democratic values, promotion of the culture of constitutionalism, and the conclusion of many civil wars that afflicted many African countries after attaining independence. Equally vital, the new norms of international justice encapsulated in the principle of the Responsibility to Protect (R2P) and institutions such as the International Criminal Court (ICC) have refocused attention on ways to manage impunity. Yet these principles and instruments have also occasioned dissent in Africa stemming from perception of threats to sovereignty, the perceived intrusiveness of international legality on weak states, and the fear of the selective application and implementation of these principles. That Africans deserve and aspire to a fair and equitable global justice system is evident from the fact that African states represent a majority of signatory states to the Rome

Statute of the ICC. Three of the five cases before the ICC were referred to it by African states. The contention over contemporary implementation of international justice initiatives in Africa, therefore, must not be construed as blanket opposition to justice but rather a recognition that imposing justice while ignoring legitimate Africa's concerns may be detrimental to justice. This ATJ Framework demonstrates the AU's recognition that transitional justice imperatives are at the center of the new continental obligation to combat impunity and achieve sustainable peace and reconciliation.

- d) *Addressing Knowledge gaps on Transitional Justice in African Context:* This framework recognizes the urgent need to document and further clarify in a coherent manner the practical and philosophical underpinnings of the various African traditional justice mechanisms practiced in different countries. This policy framework invites African countries to facilitate the creation of training institutes and centers for documentation, learning and dissemination of local accountability and justice mechanisms within the broader transitional justice spectrum envisaged under this policy framework. Transitional justice studies should constitute part of academic syllabi in Africa and be taught at all levels of education.

### Principles Underpinning the ATJ Framework

16. **Entrench African Values in Transitional Justice:** The ATJ Framework should catalyze the development and embodiment of African values into the transitional justice discourse. The framework recognizes that international justice takes place within a political, socio-economic, and ideological context and the effective implementation of international justice requires supportive diplomatic, strategic, and political settings. The AU, scholars and other actors will use the ATJ

framework as a medium to appreciate, initiate, and support transitional justice initiatives in Africa. The AU and member states should provide support and solidarity to countries emerging from conflict to implement effective accountability measures meeting national and international standards.

17. **Promote Local Ownership and Inclusive Participation in Transitional Justice Processes:** The ATJ framework is premised on promoting accountability mechanisms that resonate with people's sense of justice. The framework prioritizes local ownership and participation as the sine qua non to justice. Rebuilding state authorities after conflict requires harnessing local capacities and transitional governments must devise means for mitigating suffering to affected populations. This framework recognizes that for countries that are emerging out of civil conflicts, reconciliation, and justice have benefitted from wide-ranging and open discussions across communities about the vital nature of institutions of consensus-building and collective problem-solving that confront the scourge of impunity. The framework mandates broad national consultation and consensus on demands for accountability and reconciliation.
18. **Sequencing Peace and Justice:** This framework declares that peace, justice, and reconciliation are interconnected, mutually interdependent, and equally desirable. However, it is also equally self-evident that in an on-going conflict the most urgent desire of the affected population is to cease hostilities, restore peace and security. Nevertheless, when stability is restored and victims protected, there is need for concerted action to strengthen institutions, including creating new ones to deliver justice and hold certain categories of perpetrators accountable to consolidate the pursuit of sustainable peace;
19. **Broadening the Understanding of Justice:** The ATJ framework is aimed at addressing impunity that is entrenched when powerful individuals and institutions act as they

desire without being held to account or answer for their actions. This framework recognizes that accountability is broader than punishment, and while the fear of reprisals, reproach, retribution, and recrimination may satisfy the ends of justice, restorative measures such as compensation, truth-telling, public apology, reparations, vetting and institutional reforms are equally important ingredients of justice. While punitive or restorative justice can be adopted to address the different nature and level of crimes, the ultimate objectives of a stable and sturdy peace ultimately hinges on finding a judicious balance between the two objectives. This framework stipulates that even where a country makes short-term pragmatic concessions that promotes reconciliation and peace at the expense of punitive justice, it must strengthen judicial institutions and punish certain perpetrators to diminish the persistence of impunity.

20. **Complementarity with the ICC:** The AU believes and reaffirms its commitment to fighting impunity. While recognizing that the ICC has an important role to play, it is critical that the necessary adjustments and amendments be made to the ICC Status, in line with the recommendations of the ministerial preparatory meeting on the Rome Statute, held in Addis Ababa on November 6, 2009, as endorsed by the Assembly of the Union at its 14th Ordinary Session held in Addis Ababa in January 2010. This policy framework marks the beginning for a positive complementarity between Africa and international justice. For too long there was no overarching framework in Africa to harmonize the pursuit of justice and accountability in Africa making enforcement and implementation of international justice controversial. To contribute to development of international norms, all measures under this framework including initiatives by the AU to combat impunity, would build on the obligation of furthering international human rights and accountability under the United Nations Charter, the AU Constitutive Act,

the African Charter on Human and Peoples' Rights, and the Genocide Convention.

21. **Strengthen AU Capacity to Combat Impunity:** The ATJ policy framework constitutes a range of measures being undertaken by the AU to fulfil its obligation to combat impunity such as the African Commission and Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, the Court of Justice of the Regional Economic Communities, *Protocol on Peace and Security and Democracy and Good Governance*, and the proposal to create an extended criminal jurisdiction for the African Court on Human and Peoples', Rights to include crimes of genocide, war crimes and crimes against humanity.

### Constitutive Element of a Transitional Justice Framework

22. This framework envisages several overlapping mechanisms of accountability and reconciliation such as comprehensive peace agreements; truth telling forums and commissions; prosecutions in courts of law—formal courts, ad hoc international tribunals and hybrid courts; traditional justice mechanisms; acknowledgement, compensation, and reparations; and institutional vetting or lustrations; and limited conditional amnesty as constitutive elements of the ATJ framework.
23. To be in compliance with the spirit and standards established in this framework any initiative must be aimed at ensuring accountability, and promote peace, reconciliation, and justice. The parties including all actors in pursuit of peace, justice, and reconciliation in Africa such as states and non-state actors, international institutions, civil society and advocates, have obligations to respect and protect the dignity and rights of victims and victim communities, witnesses and interme-

diaries who are the people most directly affected by mass atrocities, whose respect a justice mechanism must earn and whose participation and support is necessary for the success of any measure of justice. This obligation includes duties of care, provision of appropriate protection and assistance, accurate, and timely information, facilitation of good faith dealings, and diligent discharge of both legal and ethical responsibilities. Provisions should be made to protect women and children affected by conflicts, place victims' protection and their participation at the center of all proceedings, implement integrated measures and address the root causes and sources for the continuation of conflicts as part and parcel to societal healing.

24. Every peace agreement concluded under this framework must proceed under the solemn declaration that peace, justice, and reconciliation are interconnected, mutually interdependent and equally desirable. Peace shall constitute a first measure of justice in Africa. Whereas this policy framework prioritizes the pursuit of negotiated peace in Africa, the peace agreements and commitment by parties to negotiate a peaceful end to violent conflict will constitute an important, but not conclusive element of accountability under this framework. For transitional justice measures to be comprehensive and meet the benchmarks under this framework, the parties must agree to implement democratic reforms and commit to accountability and reparatory measures necessary to combat impunity.
25. While negotiating peace and justice in Africa, action should be undertaken to protect civilians and investigate the serious crimes that have been committed. Such measures should include robust arrangements to prevent a resumption of hostilities and guarantee respect and implementation of peace agreements. For a peace agreement to be comprehensive under this policy, it must meet the following benchmarks:

- a) *Suspension of Hostilities Agreement:* In a Suspension/ Cessation of Hostility (COH) agreement parties shall agree to an unconditional end to hostilities and provide immediate security for the affected populations to create an enabling environment to allow inclusive participation to determine the agenda and outcomes of a peace process. This includes unilateral measures undertaken in good faith and aimed at reducing violence; agreeing to a mediator and venue; acceptance of a neutral guarantor to monitor the truce; adoption of a consensual framework; participation by key leaders or appointment of credible delegations with full powers to negotiate and conclude binding agreements; respect humanitarian assistance; release of civilians and non-combatants; facilitate returns of refugees and internally displaced persons (IDPs).
- b) *The Framework Agreement:* Parties should adopt a comprehensive framework agreement that commits them to a process of negotiations to end the conflict. A framework agreement must contain a Declaration of Principles (DoPs) for the resolution of the conflict, the parties and all stakeholders involved, reference groups, including international guarantors, representative delegations with a full mandate; venue and expected duration. The framework must also address the agenda for negotiations including demand for finding comprehensive solutions to the conflict, justice, and reconciliation.
- c) *Permanent Ceasefire and Security Arrangements:* The parties should enter into negotiations to conclude a Permanent Ceasefire (PC), including comprehensive security arrangements (CSA). The central objective of the PC/CSA will be to permanently end all hostilities among all conflicting parties, ensuring that only mandated forces have the authority to bear arms and provide security. The process of disarmament, demobilization, and reintegra-



tion (DDR) needs to be an essential element of these arrangements. The PC/CSA comes to force once it has been incorporated into the Final Comprehensive Peace Agreement (FCPA).

- d) *Comprehensive Solutions to the Conflict*: Parties shall agree and consult affected populations on the roadmap to a comprehensive solution to the conflict (CSC). The CSC Agreement shall address the actual and perceived root causes of the conflict and reasons for its continuity and stipulate comprehensive programs and steps to be taken to address and prevent reoccurrence; including power sharing, constitutional reforms, compensation, reparations, and all measures for the pursuit of sustainable peace, justice and reconciliation.
- e) *Addressing the issue of accountability and combating impunity*: The ATJ framework understands justice broadly to encompass processes of achieving equality, repairing broken relationships, obtaining compensation and restitution, establishing the rule of law, implementing restorative measures, as well as retributions for culpable societal members. To fulfill the accountability requirements under this framework and combat impunity, parties must undertake to implement the interventions set out below to deal with these aspects of justice, reconciliation, and sustainable peacebuilding and must not privilege any one measure over the other. For avoidance of doubt, while sequencing may vary and application of different mechanisms can target different actors, ultimately all measures below must be implemented for particular groups at the first available opportunity.
  - (i) *Investigations and Prosecutions*: States shall establish, equip, and maintain an independent unit for carrying out investigations into international crimes and other violations of human rights. Investigations of mass

atrocities to support accountability and any proceedings envisaged under this framework should continue unimpeded before, during and after negotiations until such a time when accountability proceedings are concluded, supported by such evidence. The international crimes investigation unit should have a multi-disciplinary character of forensic and other experts with support from the international community. Investigations shall (a) seek to identify individuals who are alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians; (b) reflect the broad pattern of serious crimes and violations committed during the conflict; (c) give particular attention to crimes and violations against women and children committed during the conflict. Prosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed international crimes under the Rome Statute and the grave breaches of the Geneva Conventions.

- (ii) *Prosecutorial Measures*: Alongside the formal courts, states shall establish special hybrid tribunals with qualified local and international judges. A hybrid court for purposes of trying high-level crimes ideally should be constituted as a new, independent organization established by an international treaty between the AU and the responsible governments. The court should be entirely independent and protected from political interference, should guarantee fair trials and adequate witness protection, and should not be subject to any constitutional or other judicial review by the states; all prosecutorial initiatives must aim to develop the domestic legal jurisprudence and strengthening the administration of justice.

- **Hybrid Courts:** The Hybrid court shall be independent and supported by dedicated prosecution, investigation and registry functions. The Hybrid court shall hold accountable those individuals deemed most responsible for commission of international crimes and crimes under the Rome Statute or grave breaches of the Geneva Convention. The AU shall nominate individuals of integrity and competence as judges, commissioners, investigators, observers and technical staff to facilitate and report on investigations, accountability, truth telling, and reconciliation pursuant to this policy framework. Provided that priority in staffing shall be guided by the need to identify, train, and facilitate competent local experts of recognized competence in international law from within the country to establish a sustainable capacity for future administration of justice. For the proper functioning of the Hybrid Court in accordance with this policy framework, legislation may provide for the constitution of the court; the substantive law to be applied; appeals against the decisions of the court; rules of procedure; the recognition of traditional and community justice and reconciliation processes in all formal proceeding.
- **Strengthening Administration of Criminal Justice:** Criminal prosecution shall constitute an important element in combating impunity and building sustainable peace under this framework. To facilitate meaningful administration of criminal justice, states shall introduce enabling legislations and institutions to provide effective accountability for the different levels of criminal participation. Legislations shall be consistent with the constitution and laws which reflects international crimes and penal sanctions,

remove legal or de facto immunities and other legal impediments to prosecutions such as periods of limitations; guarantee fair trials, including adequate legal representation and, where necessary, legal aid for suspects and accused persons; enhanced procedural and evidential provisions to enable the effective and timely delivery of justice, as well as the participation of witnesses and victims in judicial processes; special measures, including legislations for dealing with rape and other sexual crimes at all stages of the criminal justice processes; measures to protect witnesses and victims participating in proceedings; adequate staffing and provision for capacity building in all departments and proceedings; clear procedural rules for co-ordination between the different courts and functions within the criminal justice system, as well as between institutions of accountability and reconciliation envisaged under this policy framework.

- Cooperation with Investigations and Proceedings: Rules and procedures for all accountability mechanism under this framework shall regulate the manner in which an individual may cooperate with any investigations and proceedings and, by disclosure of all relevant information relating to (a) his or her own conduct during the conflict; (b) details that may assist in establishing the fate of persons missing during the conflict; (c) the location of land mines or unexploded ordnances or other munitions; and, (d) any other relevant information. Provided that a person shall not be compelled to disclose any matter that might incriminate him or her unless immunity is specifically granted. Provisions may be made for the recognition of confessions or other forms of cooperation to be recognized for purposes

of sentencing or sanctions.

- (iii) Truth-Seeking and Independent Commissions: In order to achieve closure, both victims and perpetrators must be afforded the opportunity to reconcile their account of histories. While all mechanisms envisaged under this framework facilitate some kind of inquiry into the past and other related matters, there is need to establish a body conferred with all the necessary powers and immunities, whose functions shall include (a) to consider and analyze any relevant matters including the history of the conflict; (b) to inquire into the manifestations of the conflict; (c) to inquire into human rights violations committed during the conflict, giving particular attention to the experiences of women and children; (d) to hold hearings and sessions in public and private; (e) to make provision for witness protection, especially for children and women; (f) to make special provision for cases involving gender based violence; (g) to promote truth-telling in communities and in this respect to liaise with any traditional or other community reconciliation interlocutors; (h) to promote and encourage the preservation of the memory of the events and victims of the conflict through memorials, archives, commemorations and other forms of preservation; (i) to gather and analyze information on those who have disappeared during the conflict; (j) to make recommendations for the most appropriate modalities for implementing a regime of reparations, taking into account the principles set out in this framework; (k) to make recommendations for preventing any future outbreak of conflict; (l) to publish its findings as a public document; (m) to undertake any other functions relevant to the principles set out in this framework.

- (iv) Guidelines and Working Methods: In the fulfillment of its functions, the body shall give precedence to any investigations or formal proceedings instituted pursuant to the terms of this policy framework. Detailed guidelines and working practices shall be established to regulate the relationship between the body and any other adjudicatory body seized of a case relating to this policy framework. The body shall be independent and made up of individuals of high moral character and proven integrity and the necessary expertise for carrying out its functions. In particular, its composition shall reflect integrity, impartiality, credibility, diversity, gender balance and the national character. A truth commission should confront the past with honesty, integrity, and vigor. It must do so regardless of how painful and divisive the truth may appear to be. The objective of a truth commission cannot be realized if it is subjected to manipulation, overlooks inconvenient facts, or generates a distorted version of the truth for short term goals.
- (v) Reparations: Prompt, adequate, and effective comprehensive reparation programs are a constitutive element for achieving peace, justice, and reconciliation under this framework. Generally reparation includes material and moral measures intended to return the victim to his/her position prior to the violations. This means reparations should be proportional to the gravity of the violations and the harm suffered. Under this policy framework, the reparation must achieve a broader goal of restitution for the victim but must aim at creating a situation that would not permit such a violation to reoccur. Accordingly reparatory measures shall include a whole range of compensatory, restitutionary, rehabilitative, and/or symbolic measures—public apologies, acknowledge-

ment, memorials and memorialization, and can be individual (the benefits accrue to or are felt by the victim directly through, for example, access to mental or physical healthcare services) or collective (the benefits are targeted at the whole community that has suffered harm through, for example, reconstruction of infrastructure). Reparations might also take on a whole range of legal and institutional reforms as well as developmental programs. States shall establish the necessary arrangements for making prompt adequate reparations to victims of the conflict. All actors engaged in promotion of peace, justice and reconciliation pursuant to this policy framework must prioritize effective coordination of reparation programs to reach all category of victims. States shall develop clear procedures and programs for reparations—financial or otherwise—and set up appropriate institutions to administer them effectively. Those most responsible should bear the heaviest burden in providing reparations. The responsible institutions should use their resources to provide reparations, especially for the most vulnerable victims and the internally displaced. Civil society organizations and representatives of victims’ groups must be actively involved in designing and implementing the reparations program.

- (vi) Socio-Economic and Cultural Justice: This policy framework considers justice as a value that should not impinge on people’s daily lives—from the provision of security and the rule of law, through measures such as disarming the militia, an end to predatory policing, and the need for security agencies that act with due regard to human rights and the rule of law. While not a single accountability mechanism envisaged under this framework can deliver this, priority must focus on achieving socio-economic and cultural justice

through provision of protection and security, followed by a political settlement that can lead to an equitable distribution of wealth, elimination of corruption, implementation of development programs, nurturing the rule of law and political systems that give people a significant say over their own affairs. This includes equal treatment of all groups within the state and the elimination of inequalities and discrimination against any individual or group of persons on the ground of ethnic origin, race, religious beliefs, social or economic standing, gender, sexual orientation, disability or political opinion. Where people have human security and equal opportunity, they feel confident enough to take bold steps towards the future, seize ownership of their problems, rebuild trust, come together to collectively examine perceptions of injustice, however they are defined, seek redress, engage with government institutions from a position of strength and undo the wrongs, damages, and past mistakes. The end of hostilities should enable displaced populations, including refugees, to exercise their right to return to their original homes. Adequate measures shall be adopted by the state with support of the AU and other international actors, in consultation with affected population, to find durable solutions to displacement, as well as resolving land disputes/ conflicts, recovering lost properties, and adequate facilitation of the process of voluntary repatriation, return and resettlement including provision of restitutions, compensation, reparations, and rehabilitation of communities. The need to promote reconciliation should animate all efforts and programs envisaged under this policy framework. The process of reconciliation is enhanced when people engage with one another and citizens contribute to debates about the



future of their communities and society. Institutions and programs must be put in place to provide a forum to affected communities and stakeholders to dialogue on recovery, reconstruction and development efforts, as well as sustainable peacebuilding and reconciliation.

- f) **Amnesty:** An Amnesty is likely to complicate already complex processes. A conditional amnesty process drains resources and time and is likely to distract a truth-seeking body or commission from its central tasks. Experience illustrates that an amnesty process does not contribute significantly to the generation of truth. It should only be considered as a last resort. There must be a sound justification for the inclusion of an amnesty process and it must also be practically feasible to implement.
- g) **Traditional Justice Mechanism:** The recognition of traditional justice and reconciliation measures shall constitute an important consideration in all accountability mechanisms envisaged under this policy framework. Alongside the formal prosecutions and any other mechanisms, attempts shall be made to identify and promote the most appropriate traditional justice mechanism to deal with those perpetrators who appear to bear crimes other than the most serious violations. Particular measures and strategies, and where necessary, legislations codifying broad principles, should be adopted to ensure that traditional justice measures operate fairly and do not exclude the concerns of any group (women, children, youths, victims, perpetrators, or outsiders) wishing to participate in justice proceedings. Communal dispute settlement institutions such as family and clan courts shall be promoted at appropriate levels for appropriate cases, provided a person shall not be compelled to undergo any traditional ritual.

- h) Constitutional, Legal and Institutional Reforms: States, in consultation with AU and civil society shall assess the need and introduce national legal arrangements and reform existing laws and institutions to facilitate implementation of the full measure of accountability and reconciliation envisaged under this policy framework. Provided that all stages of the development and implementation of reform programs, the widest possible consultation shall be promoted and undertaken in order to receive the views and concerns of all stakeholders, and to ensure broad national ownership of the accountability and reconciliation processes and also be in tandem with international obligations.
- i) Vetting and Lustration: Provisional measures shall be adopted to exclude certain individuals deemed most responsible for the worst crimes from public offices and institutions to facilitate the administration of accountability and reconciliation processes stipulated under this policy framework.
- j) ICC and Referrals: The ICC is a court of last resort, which complements the national and regional judicial systems. It is also a court of limited but overriding capacity. This policy framework recognizes the important role the ICC can play in the pursuit of international justice and undertakes to call for its cooperation or refer to the attention of the ICC any individual within AU member states deemed to be in contravention under this policy framework. The adoption of this policy framework also demands the creation of an ICC-AU liaison office to facilitate positive complementarity envisaged under this policy framework. The ICC and UN Security Council shall cooperate in suspending or delaying indictments in specific situations as may be requested by the AU in pursuance of implementing complementary account-

ability measures under this framework.

26. **Benchmarks and Indicators:** Key benchmarks for measuring transitional justice development in Africa shall be progressively developed under this policy framework but a guiding tool for assessing compliance with this policy framework includes the following:
- a) Effective implementation of the AUPD recommendation in Darfur;
  - b) AU support and engagement with transitional justice processes in African countries;
  - c) Institutional and legal reforms, including creation of accountability and reconciliation mechanisms envisaged under this policy framework by African countries;
  - d) Peaceful resolution of intractable conflicts in Africa with comprehensive peace agreements that address the issue of accountability and reconciliation;
  - e) Progressive realization of economic and social justice and enhancement of democratization, human rights, and good governance;
  - f) Existence and use of functioning African traditional justice and reconciliation mechanisms;
  - g) Growing scholarship and education on African transitional justice initiatives and imperatives to the global pursuit of justice;
  - h) Establishment of African institutes, learning centers, and inclusion of transitional justice studies in educational curriculum;
  - i) Integration of transitional justice imperatives in all conflict and post conflict peacebuilding, recovery and development programs;

- j) Growing number of African transitional justice experts engaging in other contexts and advocating justice, peace, and reconciliation within the continent.
27. **Resource Mobilization:** Securing adequate and sustained funding and international support is pertinent to achieving transitional justice goals in societies emerging from conflicts under this policy framework. The AU and individual countries shall design comprehensive resource mobilization strategies and extend support to other countries implementing transitional justice initiatives where possible. The AU shall allocate funding to encourage the development of transitional justice expertise in Africa. The AU shall liaise with the ICC to facilitate the effective and efficient use of funds for victims in situations within Africa. Countries emerging from conflict should coordinate with international donors, nongovernmental organizations, civil society, and private sector to mobilize resources to facilitate local grassroots transitional justice initiatives.
28. **General Interpretation:** This Policy Framework reaffirms that peace, justice, and reconciliation require that the human rights and dignity of affected populations are respected and upheld; that grave abuses of human rights are redressed; that the prevailing culture of impunity is eradicated; and that perpetrators are held accountable through a robust, credible system of accountability, social and economic. The choice for prioritizing any of the mechanisms stipulated under this framework will be based among others on the needs of the victims, possibility of enforcements, behaviors of the parties, nature and levels of criminality, prevailing political, social and economic circumstances, and the interests of justice. The AU shall, in consultation with responsible governments, African transitional justice experts, African citizens, the international community, UN agencies and African civil society conduct broad consultation and coordinate the

effective and timely implementation of specific measures envisaged by this policy framework. Any person subject to an accountability mechanism under this framework shall be afforded a fair hearing and may be entitled to appear in person or be represented at that person's expense by a lawyer of his or her choice, provided that victims participating in any formal proceedings shall be entitled to legal representation at the expense of the state.





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