

# AFRICAN JOURNAL ON CONFLICT RESOLUTION

**Volume 14, Number 1, 2014**



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narratives of war and peace in North and South Kivu**

**Mozambique's peace decades since the end of the conflict:  
Inclusive or managed democracy?**

**Nigeria united in grief; divided in response:  
Religious terrorism, Boko Haram,  
and the dynamics of state response**

**Popular dispute resolution mechanisms in Ethiopia:  
Trends, opportunities, challenges and prospects**

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Forms of restorative justice?**

**Relevance of the law of international organisations in resolving  
international disputes: A review of the AU/ICC impasse**



# African Journal on Conflict Resolution

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Lay-out by Immins Naudé.

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# Foreword

*Jannie Malan*

In the long foreword to our previous regular issue (Vol 13, No 2), I wrote about the way in which a breakthrough to mutual understanding can change the atmosphere of talks and lead to a problem-solved outcome. Here, in a very short foreword, I wish to preface the articles in this issue with an emphatic reminder that understanding can be the beginning of a chain reaction of change.

Three of these articles highlight the bad news about the tragedies and tenacities of fighting. Three focus on the good news about ways of resolving the fighting, and the first three also contain recommendations in this regard. As one reads about lethal conflict between government and rebel forces in neighbouring countries and ethnic groups, or between culturally, politically and/or economically antagonistic population sectors, you can become overwhelmed with pessimism, and even feel tempted to consider a *laissez faire* conclusion.

One can also read the same material, however, while bearing in mind that the possibility of *change* should never be ignored. In fact, it can be said with good reason that '[a]ll conflict is about change' (Anstey 2006:3). After all, whenever an aggrieved party gets to the point of initiating a conflict, it is always (or almost always?) driven by its craving for having an unwanted status quo changed. The slogans and demands of such a party usually articulate clearly what the pivotal change is towards which they are struggling or fighting.

At the same time, however, a confronted party may be equally passionate about preserving the status quo and thwarting any substantial change. In such a case, refuge to cosmetic change cannot serve any useful purpose. But *understanding*



## **Jannie Malan**

can open and pave a way to effective change – either in the direction of the confronting party's objective, or in a creative, new direction.

What I therefore wish to share with our readers is a suggestion which I have found most useful when examining a case study and also when negotiating or mediating: Keep asking the understanding-oriented question *why?* I can assure you that this apparently trivial question might become a crucial key even where inter-cultural or inter-ideological mindset clashes seem to be irrevocably dead-locked.

### **Source**

Anstey, Mark 2006. *Managing change, negotiating conflict*. Cape Town, Juta.

# Accounting for violence in Eastern Congo: Young people's narratives of war and peace in North and South Kivu

*Denise Bentrovato\**

## **Abstract**

In the last two decades, wars and mass violence have marked much of the life of ordinary people in the Democratic Republic of the Congo. In its eastern provinces of North and South Kivu, an entire generation has grown up knowing little else than conflict and deprivation. This article intends to give a voice to young Congolese in this troubled region in the heart of Africa. The article is based on the results of a survey that was conducted at the end of 2009 among nearly one thousand students. It examines the way young people in the Kivu make sense of the prevalence of violence in their home-provinces and the solutions they envision for a peaceful future. In its analysis, the article exposes a predominant role of 'the Rwandese' in Congolese narratives of war and peace. Influenced by fresh memories of war, various respondents exhibited Manichean views and deep-seated feelings of resentment towards those who were deemed responsible for the Congo's recent suffering. This article argues that, unless such understandings and sentiments are acknowledged and addressed, the risk of further escalation of conflict will continue to loom on the horizon. Educational

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\* Dr Denise Bentrovato is a post-doctoral researcher focusing on African issues at the Georg Eckert Institute for International Textbook Research in Brunswick, Germany. She has specialised in the history and politics of the Great Lakes Region.

and cultural programmes targeting the youth and their views of ‘the other’ are here proposed as a promising peacebuilding measure that should complement existing efforts to promote stability in the region.

## **Introduction**

During the last two decades, the Democratic Republic of the Congo (DRC) has been the scene of unremitting armed conflict and unspeakable violence. While the country has been slowly emerging from war and destruction, its eastern provinces of North and South Kivu continue to be plagued by widespread insecurity. Reports documenting the abuses suffered by communities in the Kivus abound (OHCHR 2010; UNJHRO 2013). So do academic studies which attempt to explain the causes and dynamics of protracted conflict in the region (Chrétien and Banégas 2008; Clark et al. 2002; Lemarchand 2009; Prunier 2008, 2009; Reyntjens 2009; Scherrer 2001; Stearns 2011; Turner 2007). In these accounts, the voices of young people have been largely absent. Although the suffering endured by Congolese children and youth has been widely acknowledged, their experiences and views have not been sufficiently taken into account. This neglect represents an obstacle to adequately understanding and effectively addressing the ordeals of those who constitute the greater number of victims and perpetrators of the recent violence and on whom all hopes for the future are laid.

The present article intends to give a voice to young people in this part of the world. It does so by presenting the results of a survey that was conducted in eastern Congo from September to December 2009 as part of the author’s doctoral research on the politics of history, identity and education in the Great Lakes Region of Africa (Bentrovato 2013). The primary aim of the survey was to explore young people’s historical representations against a backdrop of contested memories and bitter controversies surrounding ‘the historical truth’. Through a standardised questionnaire presenting a series of open-ended questions, respondents were invited to recount and evaluate the history of their nation and its trajectory until the present day, based on their knowledge and experience. They were also prompted to reflect on the history of the surrounding region and

to thereby share their views and opinions on neighbouring countries and their inhabitants.<sup>1</sup>

Survey participants included 999 boys and girls who were drawn from sixteen public and private secondary schools. Schools were sampled in the two provincial capitals Goma and Bukavu, in the towns of Rutshuru and Kiwanja in Rutshuru Territory, and in the villages of Sake and Kirotshe in Masisi Territory. Born between 1989 and 1996, most respondents were aged between 13 and 20 at the time of the survey. Among them were young people from various ‘tribes’, including Hunde, Nande, Nyanga, Hutu, Tutsi, Shi and Rega, and from various religious communities, i.e. Catholic, Protestant, and Islamic. While greatly diverse, much of the surveyed population shared a common experience of violence and displacement. The majority reported having been displaced at least once in their lifetime due to wars, rebellions, banditry or natural disasters.

The accounts to which this article provides an insight aim to shed light on how young people in North and South Kivu understand and articulate the experience of violence that deeply affected their communities and their own lives. It includes their personal testimonies of the dramatic events and the lessons they have learnt for the present and the future. The investigation was conducted with the conviction that narratives constitute useful analytical tools for grasping perceptions and feelings held by both individuals and collectivities, including their preoccupations and aspirations. As beliefs and perceptions tend to inform attitudes and behaviours, an inquiry into the way the past and present are understood and framed in societies emerging from violent conflict has the

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1 The questionnaire, which was composed of twenty-five queries, was distributed in schools in eastern DR Congo, Rwanda and Burundi to a total of 2500 pupils. This article focuses on Congolese responses to the above-mentioned core questions of the cross-country doctoral study on which it draws. It reports and discusses some of the most meaningful and representative responses to the most relevant guiding questions with regard to the topic of the article. Other questions, the results of which are beyond the scope of this article and will be published elsewhere, aimed to assess the level of young people’s knowledge and interest in the subject of history, to identify the main sources of their historical knowledge, and to invite suggestions on how to improve the teaching of history based on their personal experience.

potential to reveal, explain and perhaps even anticipate the causes and risks of a relapse into war and the possibilities of sustainable peace and reconciliation.

Before examining young people's representations of the recent violence and their visions for the future, the article will sketch the historical context in which their stories were collected. In light of the prominent place of Rwanda in discourses on violence and peace, particular attention is paid to delineate the recent history of bilateral relations and its portrayal by Congolese students living in the perpetual war-zone close to the Congo-Rwanda border.

### **The historical context**

The DRC has known a largely violent recent history. Victim of a notoriously ruthless and exploitative colonial rule, this vast and mineral-rich country in Central Africa has experienced no less turbulent times since independence in 1960. The history of independent Congo has been punctuated by military coups and political assassinations, dictatorship and misrule, wars and rebellions, and mass violence and systematic spoliation. Over the last two decades, unprecedented levels of violence and insecurity have plagued North and South Kivu in particular. On the hills along the Congo-Rwanda border, civilians have suffered immensely as a result of persistent military activities.

Unfriendly relations between the Congo and Rwanda have been regarded as an important driver of this region's enduring and bloody conflict (Reyntjens 2009; Ndaywel è Nziem 2009; Nzongola-Ntalaja 2002). Their relationship reached breaking point in the wake of the 1994 genocide in Rwanda. Here, an estimated 800 000 Tutsi and 'moderate Hutu' were brutally massacred in a frenzy steered by Hutu extremists then in power. As Tutsi rebels seized control of the country, numerous *génocidaires* fled into eastern Congo. Based on the argument that the Congo was supporting state terrorists, Rwanda intervened in the affairs of its larger neighbour on several occasions. In 1996, a Rwanda-sponsored rebellion headed by Laurent Kabila conquered power after violently dismantling Hutu refugee camps in the Kivu. Accused of heading a puppet regime, the new Congolese president soon dissociated himself from the former allies. Against a backdrop of escalating tensions, Rwandan troops re-intervened in eastern Congo in 1998. This action

ushered in 'Africa's World War' – 'the deadliest war in the world since World War II and the deadliest in Africa ever recorded' (Coghlan et al. 2004:iii). Rwanda justified its involvement on security and humanitarian grounds. State officials accused the Congolese government of allowing militant Hutu refugees to operate on its territory undisturbed. Also, they denounced massacres, including genocide, against Congolese Tutsi. During the war, anti-Rwanda and especially anti-Tutsi sentiments intensified. Tutsi in the Congo increasingly became the target of demonisation and xenophobic attacks. They were accused of being collaborators and foreign agents in disguise bent on colonising the rich territory (Reyntjens 2009).

The war ended in 2003 under the presidency of Joseph Kabila, son of the murdered Laurent Kabila. Despite the official peace, insecurity continued unabatedly in the Kivus. Among the main spoilers of the peace were undisciplined army soldiers, local Mayi-Mayi militias, the Rwandan Hutu rebellion *Forces démocratiques de libération du Rwanda* (FDLR), and renegade army officers, spearheaded by Laurent Nkunda (Stearns 2008). In 2004, this Tutsi officer from North Kivu managed to briefly capture Bukavu with the alleged support of Rwanda. Two years later, he founded the *Congrès national pour la défense du peuple* (CNDP), a rebel movement which claimed to want to protect the Tutsi from genocide. Tensions escalated in late 2008, when the CNDP succeeded in reinforcing its military positions in North Kivu. Its military advancement was accompanied by countless abuses, most notably in Kiwanja. Again, while Rwanda was blamed for backing the CNDP, the Congolese State reportedly relied on the FDLR and Mayi-Mayi groups to counter the CNDP threat.

In January 2009, the two states restored diplomatic ties. Presidents Paul Kagame and Joseph Kabila hailed a 'new era' of strengthened bilateral relations following more than a decade of hostilities (Usher 2009). As a sign of rapprochement, the Rwandan authorities arrested Nkunda as he fled across the border. On its part, the Congolese government committed itself to neutralising the FDLR. After three years of relative calm, the renewed friendship faltered in the wake of accusations against Rwanda's alleged military support of the 'M23', a new Tutsi-led rebellion which captured Goma in late 2012, raising fears of yet another regional war (ICG 2012). In November 2013, the rebellion was defeated, with many of its members

retreating to Rwanda and Uganda, where they have been reportedly seeking to regroup (UNSC 2014a). In the meantime, Rwandan Hutu militias continue to destabilise the region, supposedly with the support of Congolese forces.

Twenty years after the 1994 genocide, relations between Rwanda and DR Congo remain tense. In January 2014, tensions surfaced in a verbal clash between the two countries' representatives at a UN Security Council session, bringing to light the continued acrimony and mistrust between the two neighbours (UN 2014b).

### **When life turns into one's own 'worst nightmare': Kivu's violent history seen through young people's eyes**

The Congo's turbulent recent history deeply marked the country's young generation. Their accounts exposed predominantly negative perceptions of the country's past and a resulting sense of pessimism, frustration and resignation towards the present and the future. The Congo was commonly represented as a tragic victim of a 'bad' and 'sad' history of endless pain and distress. Considered by many to have 'plunged into the abyss a long time ago', notably since the arrival of the white colonisers, the country was deemed to have experienced its 'worst nightmare' in the course of the last two decades. This was depicted as a time of greatest suffering by those who were also first-hand witnesses and victims of this history in the making.

In presenting the history of their home-provinces, respondents widely suggested that war had been its dominant feature and a constant variable throughout time – at least since the day they were born. Peace, on the other hand, was believed by some to have never existed in the region. On account of its exceptional volatility, the Kivu was occasionally recognised as occupying a unique place in the country's history. As one student explained,

It is in this part of the Congo that all wars and rebellions originated. It is here that wars and troubles have historically reigned up until today.

Congolese pupils illustrated at length the violence to which their communities had been subjected in recent years. They recurrently referred to the 'horrible' and 'grave' human rights abuses and the 'unjustifiable crimes' that had taken place in a climate of unremitting insecurity and impunity. These included killings, sexual

violence, abduction and forced conscription, forced labour and enslavement, and pillage and destruction of property. Students often drew attention to the brutal nature of the abuses and to the low value attributed to human life in the Kivu. Innocent people, including their loved ones, were said to have been slaughtered 'like animals' and to have been 'dying like flies'. Vivid imagery associated with the element of blood was used to depict the extreme violence that had plagued the Kivu. One respondent portrayed his province as a 'red' region, where 'blood is flooding in the streets'.

Insecurity was reported to have caused massive death, displacement, and disease, as well as a general disruption of every-day life activities and a consequent aggravation of socio-economic hardship. The lack of security was seen as a primary cause of the region's chronic condition of poverty, unemployment, famine and malnutrition. According to one respondent, 'parents suffer because we can no longer harvest due to the FDLR who roam from field to field and our military who steal our crops secretly'. Students recounted the direct impact war had had on their life. They highlighted, for instance, how their education had been regularly disrupted due to forced displacement and the impossibility of paying school fees as a result of their parents' assets being pillaged or destroyed. According to one pupil's testimony, '[i]n North Kivu, we always have war, and our studies therefore cannot evolve'.

Young people's accounts revealed widespread recognition of the shared victimhood of all civilians living in the war-torn areas of eastern Congo. As one girl pointed out, 'everybody has been affected by the war, including women, children, and the elderly'. Another pupil underscored people's miserable existential condition by affirming that 'the Congolese man suffers'. Confronted with ongoing suffering, young Congolese lamented a lack of efforts to ensure truth and justice for the committed abuses. They expressed little hope of ever achieving accountability and redress for the violent death of their family and friends.<sup>2</sup>

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2 Rwanda was believed by some to be able to 'help us become civilised and organised'. Echoing the appreciations often uttered by young Congolese, one respondent pointed out that, 'in neighbouring countries such as Rwanda, there is good work ethic, respect of laws and punishment for everybody who infringes on them, [and] less corruption. They are small countries, but they are well-organised, and they respect and value their wealth'.



## **‘Who is behind all this suffering?’: ‘The Rwandan threat’ and the externally imposed misery**

The question of responsibility for the general state of despair in the Kivu was frequently raised by young Congolese. Overall, they appeared to have little doubt about the identity of those to blame for the region’s perpetual suffering.

Fingers were occasionally pointed at local actors. Accusations were levelled against the Congo’s selfish, corrupt, and incompetent leaders. One student, for instance, blamed the insecurity caused by army soldiers on a government that had failed to take charge of the needs of the ‘courageous’ military. Their unlawful activities were justified by suggesting that soldiers had been obliged to steal from the population in order to cater for their welfare. Others traced the problem of child-soldiers and juvenile delinquency to the government’s neglect of the needs of young people in the Kivu. They referred in particular to the State’s inability to guarantee adequate education and employment opportunities to the youth of eastern Congo. According to these respondents, such a deplorable situation had forced many desperate and frustrated youngsters to abandon their homes and to live on the street, exposing themselves to the risk of recruitment into militias and criminal gangs. More rarely, accounts denounced an unpatriotic population that had been insufficiently supportive of the government’s efforts to counter the country’s various security threats.

The threats to which pupils commonly alluded were perceived to have primarily come from abroad. According to the dominant narrative recounted by young Congolese, at the core of the recurrent violence in the Kivu were its enviable natural resources, which had turned the region into a much-coveted booty for rapacious foreign stakeholders. Rather than a blessing, the exceptional wealth with which the country had been endowed was thus widely viewed as a curse that had brought misery and poverty instead of progress and development. Among the threatening outside forces were ‘the whites’ or ‘the Westerners’, especially ‘the Americans’. They were at times unequivocally accused of being ‘the main cause of our misery’ and the ‘real winners’ of ‘our’ wars. For the most part, their guilt, according to students’ accounts, consisted in having repeatedly hidden behind the various armed groups that had ravaged the country, financing and arming them with the aim of gaining

access to the Congo's wealth. In particular, Western countries were criticised for having backed the criminal activities of the main spoilers of the peace in the Kivu: the Rwandese. Occasionally depicted as mere puppets of neo-colonial powers, regional actors, spearheaded by Rwanda and its people, were typically situated at the top of the list of wrongdoers in the Congo. 'It was them', many argued, who were responsible for bringing war and extreme violence to the DRC. According to a student in Bukavu,

In South Kivu, people used to live together peacefully in the past. The situation however changed with the war that was brought by our neighbour Rwanda.

The centrality of Rwanda in the understanding of the recent violence expressed by young Congolese clearly emerged in their analyses of the origins of the Congo's 'worst-ever nightmare'. Two events were identified as marking the region's dramatic rise in insecurity. The first was the 1994 genocide. The students pointed to the devastating effects of the massive influx of militant Rwandan Hutu refugees following the 'Tutsi' take-over of Rwanda. The second was the First Congo War of 1996–1997. The respondents referred to Laurent Kabila's initial alliance with the Rwandese during his 'liberation war' against Mobutu's dictatorship and to the subsequent 'invasion' by Rwanda following Kabila's unfulfilled promise to relinquish parts of eastern Congo to his former allies.

The Rwandese were often collectively blamed for the extreme suffering that the Kivu had experienced in the last two decades. They were demonised by reproducing negative stereotypes that have long circulated in the region. In accordance with old clichés associated with the Tutsi in particular, Congolese respondents widely depicted Rwandans as bellicose, ruthless, domineering, parasitic, deceitful and cunning people. History was believed to have shown that Rwandans are a people of criminals, killers, rapists, and *génocidaires*. According to one student, they were in fact 'the biggest murderers of the whole region'. Accounts reported how Rwandans had first exposed their 'bad heart' and 'satanic spirit' in 1994, when 'they massacred their own parents and siblings'. These 'evil' people were said to have subsequently turned their malevolence towards the western neighbour, thus demonstrating their unrestrained thirst for power and their strong 'spirit of conquest, expansion and domination'. Referring to the Rwandese as 'aggressors', 'invaders', and 'tyrants',

various respondents observed that Rwanda, together with its Ugandan and Burundian collaborators, had proven to be 'our great enemies' as they turned the Congo into a battlefield and into 'a cake to be shared'. Congolese students frequently explained their country's misery through its misfortune of bordering envious, greedy, and hostile nations which had persistently sought to destabilise their once powerful neighbour with the aim of 'colonising' and annexing its rich eastern regions. In the words of one respondent in Rutshuru,

Our province of North Kivu has known several wars because we live next to countries that want to expand, especially Rwanda. These foreigners tirelessly try to occupy us and to drive us away, we the owners.

Another respondent similarly lamented that 'these impostors breathe with our oxygen, evolving and enriching themselves thanks to the Congo's wealth at our expense'. In the students' views, foreign predatory practices, coupled with the government's inability to control and exploit Kivu's resources, had caused a country as potentially rich as the Congo, 'which does not lack anything', to become one of the poorest countries in the world.

Congolese respondents abundantly described the adverse role played by Rwandans in the Congo and the 'horrible' crimes and abuses they had reportedly committed there. Embracing a widely accepted Manichean representation of Congo-Rwanda relations, one pupil affirmed that 'Rwandans don't like us; they hate us and abuse us'. A Hunde student in Sake vividly recounted,

In the province of North Kivu, for example in Walikale, people suffer a lot because of Rwanda, which is hidden there. I know and have seen with my own eyes the war of the Rwandan rebels: they have killed us, and raped our mothers and our sisters; they have stolen our minerals, and taken our fields and our animals by force; they have burned our houses and built houses for themselves. The Rwandan invaders treat the Congolese like their dogs and behave as if this was their territory.

Brute force was believed to have been commonly used by the 'barbaric' Rwandese to achieve their malicious aims. Revealing deep mistrust towards their Rwandan neighbours, young Congolese also warned of their innate hypocrisy

and dishonesty, and of their tendency to conceal their true nature with the purpose of advancing their vested interests. Two respondents observed,

The Rwandese are complicated people; you never know what their position is. That is why I am afraid of them.

The Rwandese are cunning people and their aims are well-hidden. But I can see that the Rwandese have been engaging in a hidden conflict with the Congo. Like in the story of 'the Crow and the Fox', the Rwandese pretend to love us, but in reality they have other ideas in their mind: they only think about the wealth of our country.

In relation to the supposed untrustworthy nature of the Rwandese, Congolese students reproduced the stereotype of the beautiful but mischievous Rwandan girls, who had the 'habit' of entertaining secretive relationships with their 'brothers' whilst pretending to be loyal to their Congolese partners. Besides references to concealed emotions and hidden objectives, another recurrent theme, related to the accusation of Rwandans' duplicity, was an almost paranoiac denunciation of a Rwandan 'habit' of lying about their real identity and of 'infiltrating' the DRC by pretending to be Congolese. Exposing such fraudulent practices, a Nande student in Goma stated,

The DRC had welcomed the refugees from Rwanda and up until today they continue to infiltrate our province saying they are Congolese. They like to invade our country under false name. But I know that it's Rwanda that is the main actor of everything that has been taking place here in the Congo.

### **'The Hutu FDLR' and 'the Tutsi CNDP': Living at the mercy of two 'Rwandan' evils**

Whereas Rwandans were often indistinctly blamed for the Congo's misery, in numerous cases students were more precise in pinpointing the ethnic and political affiliation of the assailants. On the one hand, fingers were pointed at the Hutu FDLR. These Rwandan rebels were widely reported to have been wreaking havoc in the region since fleeing Rwanda in 1994. One respondent from Walikale recounted,

## Denise Bentrovato

Here in North Kivu we suffer a lot: the Rwandan Hutu FDLR rebels threaten us, killing and raping people, and stealing their goods.

The cross-border military pursuit of these insurgents by the Rwandan national army was mentioned as an additional cause of suffering. According to a Hunde respondent in Kiwanja,

Today, we are bothered by Rwanda, which says it is looking for the FDLR while they are in fact mistreating the Congolese.

On the other hand, countless accusations were levelled against the 'Nilotic' Tutsi. In the words of a Hutu respondent in Sake,

The Tutsi always trouble us here ... there are some Nilotics who bring wars to North Kivu. They are the ones who planted hatred between Hunde and Hutu. Thank God today we are united.

No clear distinction was generally made between Rwandan and Congolese Tutsi. The 'Tutsi enemy' was typically associated both with the Rwandan government and its army, and with 'their' CNDP rebellion. Reported to have 'come from Rwanda' and to have been led by 'a Tutsi of Rwandan origins', Nkunda's rebel movement was commonly denounced for collaborating with the Rwandan government with the aim of taking over the Kivu and the entire country. A Nande respondent in Kiwanja maintained that,

It's the Rwandans who threaten us through their CNDP rebels, killing the population, stealing and smuggling the rich resources of the Congo into Rwanda, looking for fertile lands for their cows, wanting to dominate us and to annex the Congo to Rwanda and wanting to be Congolese by force, but without results.

Another student further challenged the 'so-called' 'Congolese' identity of these 'Tutsi from Rwanda'. This respondent reiterated a belief in the connivance between Rwanda and the CNDP as well as in a practice of Rwandan 'infiltration under false name'. He declared,

I lived with so-called Congolese Tutsi who came from Rwanda in 1994. They are the ones who form militias such as Nkunda's CNDP, who forced us to work for them.

Congolese students provided numerous first-hand testimonies of 'Nkunda's War'. In South Kivu, respondents spoke of '*la guerre de Mutembusi et de Nkunda*' of 2004 and of the brief seizure of Bukavu by these 'two Rwandan rebels'. In North Kivu, accounts referred to the wars that had been fought between 2006 and 2009 in the respondents' home-towns of Kiwanja, Sake, and Rutshuru. The CNDP was accused of brutally and indiscriminately killing and wounding innocent civilians, including babies and the elderly; of raping women and girls of all ages; of kidnapping and enslaving civilians, including young boys, forcing them to transport weapons and ammunition; of displacing many, both internally and externally; of pillaging and destroying goods and properties; and of causing hunger and disease. Students in Kiwanja offered their personal testimony of how, a year prior to the survey, their town had been the victim of a 'terrible' massacre or a 'genocide', during which, as recounted by one respondent, 'the FARDC [national army] soldiers were fleeing faster than the population'. In reaction to the suffering caused by Nkunda's men, Congolese pupils referred to the fresh capture and imprisonment of 'this criminal' with joy and relief. Feelings of satisfaction were nevertheless mitigated by suspicions surrounding the circumstances of Nkunda's arrest and subsequent custody in Rwanda. Echoing expressions of frustration at a lack of clarity and accountability for heinous crimes committed in the country, questions were raised about the veracity of reports on Nkunda's imprisonment as well as about the reasons why this villain had continued to 'hide' in Rwanda instead of being handed over to the Congo to face justice.

A contrasting view was presented by one of the very few Tutsi respondents who participated in the survey. Rather than depicting the CNDP as a tormentor of the Congo, this pupil's account exalted the movement as a defender of the Congolese population from the threat posed by the Rwandan FDLR and as a guarantor of peace and security in the Kivu. Here, Nkunda was portrayed as the founder and leader of a righteous movement, as a man who had been committed to peace and whose legacy needed to be preserved in the wake of his disappearance from the Congolese scene. In the words of this respondent,

Since the day I was born, I have heard of the FDLR, who came from Rwanda after having exterminated the Tutsi people of Rwanda and who fled to Congo, causing insecurity in North Kivu. As the FDLR was killing and displacing

many, the CNDP came to defend the Congolese people from the Rwandan people's FDLR. During the time that the CNDP was here, we have had a period of agricultural activities. Now that its founder Nkunda is no longer there, each of us is responsible for promoting the ideas that he left us in order to live well with our neighbours and with foreigners.

### **Bringers of an elusive peace: the State, God, and the UN**

Young Congolese elaborated extensively on those they considered to be responsible for starting the war and for committing odious crimes against civilians. Conversely, little attention was paid to the efforts made by various parties to resolve the country's political crises. Among those who were seen as having worked towards bringing peace to the Kivu was incumbent President Joseph Kabila. He was portrayed as a peacemaker who had promoted both internal dialogue and a bilateral rapprochement with Rwanda. The figure of God was also recurrent. Religious arguments were frequently used to explain both the hardship experienced and the relief brought by peace efforts. While the war was depicted by a student as 'a test of God', its (elusive) end was presented as the result of 'divine grace' and of 'the almighty God' acting through the hand of the president. More rarely, young Congolese recognised the contribution made by the international community to the management and resolution of the conflict. They were particularly thankful to the UN, and more specifically to its peacekeeping force, for its role in supporting peace through demobilisation activities.

Whilst extolled by some for their positive involvement in the Kivu, both the Congolese government and the international community were occasionally criticised for 'doing nothing' and for 'having turned a blind eye to the violence'. The most critical accounts accused government officials of having allowed foreigners to have free rein in eastern Congo and to practise what was referred to as 'neo-colonialism' or 'indirect' and 'clandestine colonialism'. Deep concerns were expressed about the risk that the Kivu might one day be sold by corrupt politicians. In the view of young Congolese, their leaders had proven not only unable to seriously confront and counter negative foreign forces, but also willing to give in to their provocations. In the words of one student in Goma,

Here in the Congo I can see that soon our province could be sold if we don't pay attention, because our authorities are very corruptible and our neighbours are ready to buy our country.

The national army as well, whose soldiers were variously depicted as brave men or as coward defectors, was generally represented as having failed in its task to protect the population and defend the nation. In a few cases, the military response against the perceived Rwandan menace was said not to have been sufficiently supported by a civilian population which was otherwise usually depicted as a passive and defenceless victim of its 'evil tormentors'. Only a handful of accounts stressed the courage of Congolese patriots who had stayed behind to help the national army defend the country against the aggressors. Among them was the testimony of a Hunde student from Masisi Territory. Highlighting the support to the army's resistance given by his entourage, he proudly stated, 'as for us, we have fought side by side with the government's soldiers'.

As for God, his actions were never questioned or challenged. In not a single case did students express a loss of faith in God or a belief of having been abandoned by their 'Father' and 'Saviour'. Congolese respondents demonstrated a strong reliance on God by summoning his help in the country's recovery from anguish and despair. Placing the country in God's hands, one student invoked his protection by stating,

God help us against the Rwandans, who want to take our land; God help us to survive and to live in peace again.

### **Addressing relations with the (former) enemies for the sake of peace: Young people's hopes and fears**

Addressing relations with the Rwandan neighbours and (former) enemies emerged as a major concern as well as a topic of considerable dissension among young Congolese. Disagreements among the respondents were recorded in relation to their assessment of the nature of current and prospective relations, and their visions and recommendations on how to best prevent further conflict and destabilisation in the region.



## Young people's assessment of current and prospective bilateral relations

Overall, Congolese students seemed to agree that bilateral relations had been conflicted in the past. Looking ahead, they were found, however, to substantially diverge in their assessment of the current situation and in their expectations for the future.

Among the most positive narratives were accounts that expressed hope about the Congo's improved relations with its Rwandan 'neighbours', also defined as 'friends' and 'brothers'. In these accounts, the emphasis was placed on reporting the two countries' extensive cooperation in such fields as diplomacy, security, humanitarian assistance, economy and commerce, and energy. They mentioned the re-opening of each other's embassies; the military alliance against the FDLR during the joint operation *Umoja Wetu*; the assistance provided to each other's refugees, for instance during the 2002 volcanic eruption in Goma; the promotion of commercial exchanges in the framework of the Economic Community of the Great Lakes Countries (CEPGL), as well as a deal on joint power generation. This promising evolution was said to have been confirmed at the 2009 Goma meeting during which the countries' presidents had expressed their commitment to strengthen bilateral ties. While generally positive, these accounts revealed a varying level of confidence in the reported process of rapprochement. Several students showed their trust in the successful resolution of past conflicts. According to one of them,

Our neighbours have always been our friends, despite a few occasions of conflict, which have now been resolved.

Others instead disclosed a degree of uncertainty about the chances of seeing this much-welcomed process succeed. As explained by one respondent,

Today we are in a phase of resolution of the profound regional conflicts and wars of aggression that had developed with our neighbours since 1996. Lately we have started to improve our relations with them, hoping that this time they have put their hands on their hearts and will respect the commitments to cease their bad habits of invading us.

In contrast to narratives that emphasised the recent reconciliation between the Congo and Rwanda, a divergent view described bilateral relations as continuing to be dire. In the words of one student, 'Rwandans and Congolese don't like each other; they fight like cats and dogs'. In these more negative accounts, official acts of cooperation and solidarity were either utterly overlooked or strongly played down. In the latter cases, young Congolese highlighted the mere political nature of the rapprochement and the failure of this process to take root among the people. Opinions seemed again to differ with regard to the prospects and expectations of a possible resolution of hostilities. The more hopeful predictions for Congo-Rwanda relations augured a termination of the ongoing conflict:

According to history and from what I see today, relations between us and especially Rwanda are not good. Disagreements exist between us, but I know that they will end one day.

Gloomier analyses instead projected a continuation of hostilities and even a looming scenario of apocalyptic inter-state war. One student declared that,

I think we will always have problems between us. In fact, according to me, one day a terrible fight will break out between the DRC and Rwanda. In the Kivu especially, everyone who is Congolese will eventually end up being either a soldier or a Mayi-Mayi to fight against Rwanda.

### **The way forward to long-lasting peace: Young people's visions and recommendations for the future**

In their narratives of war and peace, young Congolese commonly expressed their vision and recommendations for the way forward in Congo-Rwanda relations. The majority of respondents seemed to hope for strengthened regional dialogue, unity, and cooperation for the sake of long-term peace and prosperity. In the words of two students:

We must reconcile with each other, because eternal conflicts will not build anything. The past is the past. Let's now prepare for the future.

We must unite because unity is strength, and we must love each other because in this world neighbours must be best friends.

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In these statements, responsibility for an improvement of relations appears to be felt as having to be equally shared between Rwandans and Congolese. In other narratives, the obligation to amend the relationship between the two countries and peoples was instead primarily placed on Rwandans. Based on the understanding that Rwandans had been the principal source of Congolese suffering in recent years, their behavioural and attitudinal change towards the neighbours was often presented as holding the key to regional peace. One respondent declared:

Rwandans have to understand that it's time for them to make peace and to be polite towards their neighbours. In fact, if the Rwandese were to cease their provocations and aggressions, we could finally unite in a common fight against poverty and under-development.

Against the backdrop of 'provocations' that were believed to be hindering peace and reconciliation, several specific suggestions were advanced on ways in which Rwandans could restore relations. In particular, Rwandans were urged:

- to cease their militant activities in the DRC and, especially, to stop supporting rebels such as the CNDP;
- to extradite Nkunda, 'the aggressor of the Congo', so that he could face justice at the International Criminal Court (ICC);
- to renounce their expansionist aims and to acknowledge that 'our country belongs to us';
- to accept and be frank about their Rwandan identity, and to stop calling themselves Congolese; and, finally,
- to favour the repatriation of the FDLR.

Whereas the abandonment of 'bad' practices by Rwanda was generally placed at the centre of a possible resolution of hostilities, the main responsibility conferred on the Congolese themselves was a preparedness to forgive their neighbours for the committed wrongdoing. As affirmed by one student,

We are obliged to live in peace with our neighbours, and we have to forgive them for all the pain they have caused us.

Occasionally, the Congolese were encouraged to leave the past behind and to reconcile with their 'hangmen' based on religious arguments. One respondent maintained that the Congo's neighbours, regardless of their misdeeds, 'deserve

to be loved because they are also God's children'. A different argument in favour of forgiveness towards the Rwandese was raised by another student. Showing his faith in humanity, this young Congolese pleaded the former enemies to be given a second chance to prove themselves good neighbours. In his words, 'human beings can change: the enemies of yesterday can become the friends of tomorrow'. In a few of the responses, Congolese pupils demonstrated their personal willingness to reconcile with the neighbours. Among them was a young respondent who asserted her intention to follow the example set by President Kabila. She declared,

I think I will visit Rwanda one day. As our president met and signed an agreement with Rwanda's president, me too I am going to have a relationship with the people of Rwanda.

A certain readiness to surmount past hostilities was likewise expressed by a student who, while still evidently resentful towards Rwandans, appeared to be willing to open a dialogue that could repair damaged relations. In his words,

I find it difficult with those people, but if debates were organised, perhaps the situation could be remedied and I could change my mind towards them.

Such reconciliatory views and attitudes were not shared by all respondents. Holding on to a memory of the 'criminal' involvement of Rwandans in the Congo's affairs, a noticeable number of young Congolese revealed deep feelings of mistrust, fear, resentment, and revenge, as well as hostile dispositions towards their eastern neighbours. In a rather confrontational tone, one student seemed to solicit a robust collective reaction to the perceived imposed suffering. He provocatively stated:

This war is caused by some Rwandans who invade us all the time to take over eastern Congo, making us suffer a lot. If one day they were to succeed, we will be killed by the Rwandans. So, the question is: what are we going to do about it?

Overtly antagonistic visions of the best way forward were not uncommon. Rather than encouraging and welcoming increased and improved relations with Rwandans, these respondents abhorred and warned against any rapprochement with 'those people'. This position was founded on the belief that a 'soft' approach would only grant Rwandans the opportunity to cunningly advance their predatory aims whilst disguising them as attempts at reconciliation. Their recommendation

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to the Congolese authorities was to definitively break all relations with Rwandans on account of their being both unnecessary and deleterious. These youngsters suggested the expulsion of all Rwandans after establishing who is and who is not Congolese as well as the closure of all borders in order to protect the country from foreign intruders and insurgents and from further exploitation. Three statements are particularly striking for their unequivocal expression of xenophobic fears and ideals of (ethno-)national purity:

At the moment we do not know who is Rwandan and who is not. There is a total confusion with the wars they impose on us. Let the Rwandese stay Rwandese and the Congolese be Congolese.

Everybody has to return to his own country; we don't want this agreement that opens the borders because they will then come to our country to exploit and to steal our land for their cows. I say No!

I think that if we could have the Tutsi return to Egypt, and the Hutu FDLR to Rwanda, we would finally have peace. In the end, the Tutsi in Rwanda should recognise that the Hutu are *originaires* and that the country belongs to them.

Concerns were specifically raised about the thousands of Congolese Tutsi refugees still living in Rwanda. Their prospective return to the DRC was seen both as a potential source of renewed conflict and as a new opportunity for Rwandans to shrewdly infiltrate the Kivu to pursue their agenda. As stated by one student,

I think that we could still have conflicts, because they say that they are Congolese while everywhere we can have infiltrators coming from Rwanda. We should put an end to this.

Several respondents showed a personal refusal to reconcile with those against whom they appeared to still hold deep rancour. Such sentiments were strongly conveyed by three students in particular. One expressed her intention to abstain from any contact with her neighbours; the other two communicated their desire to avenge the suffering caused by the enemies:

Personally, I don't want to have anything to do with the Rwandese. I have a bad memory of them and I really don't like them. In fact, nobody in my family likes them, and every time we see these foreigners we feel bad because of the war they bring us.

I wish the Rwandese our same suffering. Once there will be war in their country, we will not help them and we will support their enemies. I want them killed.

Nkunda's war in North Kivu has killed many people. That is why, if there is a way to revolt against the Rwandans, and if they tell people to go there, I think I will also go.

Two other students, respectively from North and South Kivu, similarly articulated a readiness to take up arms to defend the homeland from a threat of Rwandan domination and occupation. They declared:

The Rwandese are my enemies because they want to take my Congo, and I will fight them if I need to. Rwanda has no reason to try and take North Kivu because this is a province of the DRC, our country; this is the land that our ancestors left us.

I am Congolese and I am proud of it. I will remain Congolese and I will defend my beloved homeland from its enemies until I die.

These statements reflected young people's widespread feelings of patriotic love and pride, of ancestral attachment to Congolese land, as well as of reverence towards the readiness to fight and die for what was recurrently referred to as 'my beloved and beautiful country' and 'my dear homeland'. Heroism, according to young Congolese, was mainly determined by martyrdom in defending the nation against foreign menaces. One student explained, '[i]n our country we have two national heroes: Lumumba and Mzee Kabila; they are our heroes because they died for our country'. Once again, religious arguments were not lacking in students' narratives on the way forward. Rather than encouraging forgiveness, religion was this time summoned in a context of retribution. Young Congolese raised the concept of divine ordeal, whereby Rwanda, described by a student as 'a damned nation', would eventually have to account for its wrongdoing before God. In the words of one respondent,

As a child, I don't have a bad heart towards this country. I know that God will make Rwanda pay for what it did to us.

## **Breaking the cycle of violence: Addressing young people's negative views of the 'other'**

The findings summarised in this article lead to the conclusion that the memory of the recent violence experienced in the Kivu, and of the adverse role allegedly played by Rwandans in the region, is deeply ingrained in the minds of the Congo's young generation and continues to feed negative stereotyping and prejudice against the eastern neighbours. This memory appears to have influenced young people's level of confidence in the resolution of historical conflicts between the two countries, with predictions for the future ranging from a peaceful end of all hostilities to the gloomier projection of an all-out war. Tired of suffering, the majority of respondents seemed to hope for reconciliation on condition that Rwanda abandon its longstanding 'criminal' practices in the Congo. Feelings of mistrust and resentment were however found to be also widespread, leading some to warn against any rapprochement with 'the enemies' and to articulate their willingness to fight against 'the Rwandan threat'.

The many resolute expressions of mistrust, hostility and vengefulness that emerged in the survey expose the considerable challenges of changing perceptions and repairing relations in this conflict-ridden region. While the existence of antagonistic and uncompromising views among the Congo's young generation raises concerns for the future, the survey also indicated a possible way out of a cycle of revenge and conflict escalation. A review of students' testimonies demonstrated how the painful experience of war almost invariably led to the conclusion that Rwandans are 'bad neighbours'. Conversely, direct experiences in settings that transcended this clearly traumatic event, for instance in the everyday life with Rwandan schoolmates, neighbours and visitors, proved to be more diverse and to elicit different sentiments, i.e. negative or positive. As reported *in extenso* in Table 1, in telling their experience with Rwandans in settings beyond war, some students recounted stories of abuse and hostility that confirmed and reinforced negative perceptions of Rwandans. Others instead told stories of friendship and kindness, which explicitly challenged and debunked 'common knowledge' on the wickedness of the Rwandese. Generally, the more reconciliatory opinions and attitudes appeared to be shaped by a direct positive experience with 'the other', which had prompted a reconsideration of common negative stances that had been nurtured by a haunting memory of war and by hear-say.

**Table 1. Experiences by young Congolese with their Rwandan neighbours**

<b>Negative experiences and confirmation of prejudices</b>	<b>Positive experiences and debunking of prejudices</b>
<b>DURING THE WAR IN THE DRC</b>	
<p><i>The only experience that I have with the Rwandese is their war against us. My personal experience with Rwanda is that when the Rwandese come to the DRC we experience theft, violence and killings. Personally, I had a childhood friend, and the Rwandese cut his head and raped his sister to death. Since then, and to this day, I hate Rwanda.</i></p>	
<b>IN EVERYDAY LIFE IN THE DRC</b>	
<p><i>I have never been to Rwanda, but I see these foreigners in our country, and seeing what they did and do here, I don't like them.</i></p>	<p><i>I have never been to Rwanda, but I have studied with some Rwandans in my school here, and we are good friends. By spending time with them I discovered their good heart in comparison with what people here think of them.</i></p>
<b>DURING DISPLACEMENT TO RWANDA IN THE WAKE OF THE 2002 VOLCANIC ERUPTION</b>	
<p><i>At the time of the volcanic eruption that displaced us, they didn't take good care of us. They must have forgotten how we welcomed them during their genocides.</i></p>	<p><i>I have good memories of the Rwandese, who are believed to be mean people and brutal killers. At the time of the volcanic eruption, they proved to have a good heart in welcoming and taking good care of us. My family and I, for instance, were displaced to Gisenyi, where we were received by people whom we didn't even know. They welcomed us in their homes for a few days, giving us a place to stay and food. Hereby I want to thank them again.</i></p>
<b>DURING VISITS TO RWANDA</b>	
<p><i>If a Congolese goes to Rwanda today, he will be mistreated and will risk his life. For example, one day I was in Gisenyi, and I was robbed of everything I had because I am Congolese. Instead they come here, walking with their revolvers on the street, and doing what they want in our country.</i></p>	<p><i>Rwanda is a country which the Congolese suspect of being inhabited by very mean people, whereas when I arrived there I was very well received by our friends the Rwandese.</i></p>



The contrast that emerges from the respondents' testimonies validates the importance of investing in opportunities that can favour positive and constructive contact. In its reflection on possible avenues to promote peace in Central Africa, this article argues that greater investment should be made in initiatives which are aimed at building bridges between young people in the region and at providing opportunities for them to connect and to positively engage with each other, for instance in the framework of cross-border sporting, cultural and social activities, as part of a larger array of measures aimed at reconciling nations among which tensions have long been rife. Through initiatives that facilitate positive encounters and interactions in a safe environment and that promote dialogue and collective action, chances can be created to surmount division and tension and to bolster young people's commitment to non-violent conflict resolution and sustainable peace. Ideally, such encounters would encourage the development and strengthening of a sense of belonging to a larger community, thereby raising the stakes for averting renewed armed conflict in the region. The positive impact of such initiatives, which have been extensively experimented with in conflict-ridden societies elsewhere in the world, such as Northern Ireland, Cyprus, Bosnia, and Israel (McKeown and Cairns 2012; Abu-Nimer 2004; Hodson and Hewstone 2012), was confirmed by two Congolese respondents who recounted,

Despite our past misunderstandings, my relations with our Rwandan neighbours are perfect today because we have the chance to organise sports events, which have brought us together, reinforcing our relations.

Today I love our neighbours and I don't keep grudges against them. By meeting them, I've realised that what happened was caused by a few crooked individuals and that their actions don't have to result in cutting relations that were acquired long time ago.

Rather than being *ad hoc*, such opportunities, which have thus far been greatly neglected in peacebuilding work in the region, should preferably become a component of much-needed structural educational programmes that are geared towards the deconstruction of prejudice, negative stereotypes and of images of the enemy, and towards the appreciation of the experiences, views and feelings of 'the others'. These should constitute an integral part of endeavours aimed

at forming the next generation of leaders and at promoting understanding, solidarity and cooperation in this protractedly unstable part of the world. In the future, structural interventions in this field can encompass a coordinated process of curriculum and textbook revision that would better respond to the need to promote young people's critical appreciation of the region's history and current affairs, and expose them to the stories of 'the other' across the border. In light of the particular challenges involved in dealing with the shared violent past, efforts should eventually be made to ensure that schools in the region teach about mutual experiences of past and present suffering while at the same time encouraging young people across the border to work towards a shared future. Schools should sensitise pupils to the reality that the history and destiny of Rwanda and DR Congo are deeply interconnected, and that any way out of conflict and misery is necessarily a path that ought to be taken together. Joint investigative commissions can be formed to support regional educational programmes and to guarantee accuracy and inclusiveness of views in didactic materials. Regional organisations would be well-positioned to play a decisive role in favouring such cross-border activities as part of efforts to promote cultural integration and cooperation for the sake of regional understanding and cohesion. Inevitably, the success of these types of initiatives greatly relies on a genuine willingness on the part of national governments to loosen their typical and sometimes paralysing grip on public narratives about the nation's past, present, and future.

### **Conclusion**

This article has aimed to give a voice to the experiences and views of young people living in the Congo's volatile provinces of North and South Kivu. Their narratives of war and peace conveyed a widespread sense of national victimhood at the hands of external forces, most notably 'the Rwandese'. In what appeared to be told as a story of Rwandan wickedness in the Congo, the emphasis was placed on describing the abuses endured by a defenceless Congolese population. Influenced by fresh and vivid memories of war, numerous students displayed deep-seated mistrust, resentment and vengefulness towards those who were deemed responsible for the Congo's recent suffering. In light of the reported findings, this

article ultimately warns against the risk of further conflict escalation by laying bare a situation which could provide fertile ground for violent mobilisation. In a context in which structural drivers of youth involvement in violence seem to abound, including general frustration and disillusionment due to deprivation and prolonged exposure to armed conflict, one should be particularly wary of discourses which attempt to offer explanations and solutions to people's past and present ordeals by drawing on traumatic memories to single out a collective identity group. It is the conviction of the author that, as long as young people's antagonistic understandings and sentiments are not systematically addressed, for instance through educational and cultural programmes, the cycle of violence and revenge will likely continue. This article concludes with a plea to capitalise upon the potential positive impact of initiatives promoting young people's constructive encounters with 'the other'. Such initiatives should be further developed as a promising peacebuilding measure that could effectively contribute to breaking the cycle of violence in this chronically unstable region of the world.

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# Mozambique's peace decades since the end of the conflict: Inclusive or managed democracy?

*Madalitso Zililo Phiri and Antonio Macheve Jr\**

## **Abstract**

The article analyses Mozambique's post-conflict democratisation and argues that Mozambique has become a 'managed democracy' in the new period. Mozambique is viewed by the donor community and multilateral institutions, such as the World Bank and the International Monetary Fund, as a success story of post-war reconstruction and used as a model to be emulated. The article traces the trajectory of democratisation under the auspices of a liberal peace theoretical framework which was agreed upon in the General Peace Agreement ending the conflict in 1992. Secondary quantitative data were made available from leading International Organisations such as the World Bank and the Mo Ibrahim Governance Index. The article found that, despite Mozambique's commitments to build an inclusive democracy, corruption unmarks Mozambique's success story. The authors conclude that democratic consolidation has been accompanied by extractive political and economic institutions leading to a disgruntled citizenry. The country's peace agreement

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\* Madalitso Z. Phiri is a Ph.D. candidate in International Politics, in the National Research Foundation (NRF)/Department of Science and Technology (DST) Chair in Applied Social Policy housed at the Archie Mafeje Research Institute (AMRI) at the University of South Africa (UNISA), Pretoria, South Africa; and Fellow, Next Generation of Social Science Research (2014–15), Social Science Research Council (SSRC) (New York, USA).

Antonio Macheve Jr. is a Mandela Rhodes Scholar from Maputo, Mozambique, and M.Phil. candidate in Development Studies at the University of Cape Town, Cape Town, South Africa.

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remains fragile, and faces the reality that political stability has not been accompanied by social justice, equity and deepening democratisation.

## Introduction

Since the signing of the General Peace Agreement (GPA) in 1992, which ended conflict<sup>1</sup> and tumult, Mozambique has gone through convoluted political trajectories casting doubt on whether democracy has been salvaged. This article asks the question whether democratic reforms in Mozambique's post-conflict period, since the end of the civil war in 1992, have led to an inclusive democracy. The article suggests that Mozambique has become a 'managed democracy'<sup>2</sup> cognizant of the manipulation of political, economic and social institutions by Mozambique's governing elite. Scholars like Hanlon (2008) and Pitcher (2002) have argued that Mozambique has struggled to salvage nascent democratic institutions that promote inclusive political and economic institutions as envisaged by international stakeholders since the signing of the GPA. The negotiations that led to the end of the conflict in the post-Cold War period, under the auspices of a liberal agenda, coincided with the Third Democratic Wave (Bratton and Van de Walle 1997; Huntington 1991). According to Huntington (1991:15), a wave of democratisation refers to 'a group of transitions from nondemocratic to democratic regimes that occur

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1 A ceasefire was agreed upon in 1992, which led to the holding of the 1994 democratic and peaceful elections and to FRELIMO's victory. However, RENAMO has subsequently violated the terms of the GPA. In the 1999 presidential and parliamentary elections, disputes arose between FRELIMO and RENAMO. The ruling party was accused of manipulating votes and lacking transparency, leading RENAMO to complain about the ballot counting rules. Although electoral reforms emphasised transparency and allowed the participation of electoral observers, RENAMO felt that the reforms had been manipulated to suit the continued dominance of FRELIMO. This was preceded by RENAMO's boycott of the local elections in 1998. The antagonism resurfaced during the general election and culminated in RENAMO's renouncing and violation of the GPA. Since mid-2013 RENAMO resorted to sporadic violent attacks and threats to capture key infrastructure projects. Violent clashes were initially limited to a small geographical area in Sofala. According to some media reports there have now been clashes in the provinces of Nampula and Inhambane, and armed members of RENAMO have more recently been seen in Tete (AllAfrica.com 2012, 2013).

2 For an expanded view of what a managed democracy entails, see Nikolai Petrov 2005, and the next section below.

within a specified period of time and that significantly outnumber transitions in the opposite direction during that period'.

Mozambique's transition towards democracy occurred in parallel with regional and global trends towards a quest for a 'New African Democracy' across the continent to define the socio-political reality of most Africans. At the regional level, the end of protracted regional conflicts in South Africa and Namibia instilled hope that democracy was a viable option in post-conflict settlements. While the international community marvelled at these transitions, fault lines and limitations in peacekeeping became evident in Rwanda and Somalia: enmity and mass atrocities, genocide and ethnic cleansing of millions of people (Zartman 1995; Dallaire 2004; Melvern 2000; Desforges 1999). In addition, the horrors of Srebrenica in the Balkans further highlighted institutional limitations in post Second World War 'peace' decades (Zartman 1995; Huntington 1991). Mozambique's democratic transition was agreed upon in a century that most commentators have labelled as the bloodiest. Undoubtedly, the agreement of peace by conflicting parties sought to restore a belief in democratic institutions and the relevance of the United Nations (UN).

The signing of the GPA between FRELIMO (*Frente de Libertação de Moçambique*, or Front for the Liberation of Mozambique) and RENAMO (*Resistência Nacional Moçambicana*, or Mozambican National Resistance) in 1992, heralded a new era in Mozambican politics, from pariah under Scientific Socialism to 'successful' peace agreement as observed by international policy makers (Phiri 2012). Similarly, scholars and practitioners labelled Mozambique a 'beacon of hope' and a 'model' that can be emulated in post-conflict societies across the world for building constitutional democracies after a peace agreement (Collier et al. 2005; Paris 2004), and to show evidence of upholding human rights, gender equality, free market economics, rule of law, fair political process – bringing succour to the poor and excluded. These suggestions have been made after experimentation with political and economic reforms under the auspices of international institutions such as the International Monetary Fund (IMF) and the World Bank (Collier et al. 2005; Paris 2004; Phiri 2012). The results of these reforms are also noted by several unilateral and multilateral agencies and organisations (World Bank 2014; UNICEF 2010). This article critically



discusses the challenges, and contestations of inclusive democratic governance in post-conflict Mozambique.

The article adopts different conceptual frameworks to Mozambique's democratic transition, cognizant that one framework is not adequate to explain the characterisation of Mozambique as a 'managed democracy'. The article firstly discusses democratic peace as expounded by the father of Peace Studies, Johan Galtung, to contextualise the quest for peace when conflict raged in Mozambique. The article alternates emphasis between the conceptualisation of a 'New Democracy in Africa' as articulated by the Pan-Africanist Archie Mafeje, locating Mozambique's quest for inclusive democracy within continental debates; and Acemoglu and Robinson's take on inclusive political institutions or lack thereof as a *sine qua non* to intrinsic freedom that promotes inclusive democracy. It also provides a brief discussion of a managed democracy. What emerges is the narrative of a country that has risen from the ravages of civil war to attain respectable economic growth and governance levels. The article argues that Mozambique still has a fragile peace agreement and a questionable democracy which has to cope with the rise of public discontent and outrage over election results and issues pertaining to the improvement of the socio-economic condition of ordinary Mozambicans. Factors, such as FRELIMO's dominance over state affairs, its little openness to dialogue with the opposition, and the non-existent distinction between the ruling party and state apparatus, debilitate the salvaging of democratic institutions and the development of an inclusive democracy.

### **Democratic Peace and New African Democracy: Conceptual frameworks**

With the end of the Cold War, military threats that polarised the world, predicating a cataclysmic end, had diminished. The narrow view of security of the Cold War was replaced by a number of proposals for an extended security concept. Security no longer encompassed only territorial contestation and a Machiavellian notion of the survival of states in the international order, but all threats to humanity. Democratic governance and human security gained momentum, becoming relevant in a number of fields, including: terrorism,

systemic violations of human rights, organised crime, violence against women, epidemics, food supplies, natural disasters and environmental disasters (Akerlund 2001:34).

Johan Galtung made a seminal contribution in the field by maintaining an emphasis on human security and further differentiating direct and structural violence. He suggests that the ideas of citizenship, equality, freedom, and justice are more directed against structural violence, at the expense of or in addition to being directed against direct violence (Galtung 1986:4). Mozambique's conflict bequeathed a legacy of blight, neglect and poverty as a result of direct and structural violence by the perpetrators. Any conceptual framework that seeks to explain Mozambique's governance challenges needs to be cognizant of a commitment to building democratic institutions in the post-conflict era in an African context, with the absence of violence. As Galtung (1986:7) suggests:

Liberal theory with its political expression as democracy and its economic expression as capitalism claims peace as an automatic consequence once that theory has been implemented in all societies in the world, with the human rights approach as one special case. Correspondingly, Marxist theory with its political expression in democratic centralism and economic expression in socialism has the same claim, as does also anarchist theory with its emphasis on the withering away of the state, today.

For this newly emerged post-conflict state, paying attention to the realities of poverty, inequality and social exclusion could not be divorced from building new institutions to salvage an inclusive democracy. The conundrum is: Why, under the auspices of a liberal peace agreement in Mozambique, was the expected outcome of a liberal democracy not attained? In this context, Archie Mafeje, the renowned South African Pan-Africanist, argued that while liberal democracy upholds the principle of equality of all citizens before the law, it does not address the question of social equity (Mafeje 2002:11). The ideals best expressed to suit the African condition, social reality and psyche should be rooted in the democratic contestations seeking to address the human conditions of most citizens in Mozambique. In this paper, therefore, Mafeje's emphasis compensates where Galtung views only a peace agreement accompanied by

a liberal democracy. As Mafeje (2002:11) further argues, liberal democracy is severely handicapped because the theory of laissez-faire on which it is founded obliges it to accept such phenomena as poverty and social inequality among citizens and nations as a natural outcome of the right of the individual to choose.

Mafeje's lenses of a 'New African Democracy' could potentially shape a progressive debate and dialogue on the quest of inclusive democracy in Mozambique. Mafeje had the following principles in mind in his articulation of a 'New African Democracy': firstly, the sovereignty of the people should be recognised as both a basic necessity and a fundamental right. Secondly, social justice, not simply formal rights, should constitute the foundation of the new democracy. Thirdly, the livelihood of citizens should not be contingent on ownership of property but on equitable access to productive resources (Mafeje 2002:12).

In retrospect, Mafeje's concept of a 'sovereign democracy' could be misconstrued to tolerate implicit and explicit human rights abuses that pseudo-democracies and authoritarian governments across the continent have championed. 'Managed democracy' can better be understood in light of the evolution of a 'sovereign democracy' in contemporary global politics and more specifically Russian politics.<sup>3</sup> Sovereign democracy can be the negative brand name for managed and centralised political development, and can be considered to be the highest (and last?) stage of a managed democracy (Petrov 2005:181). In the African context for example, while post-genocide Rwanda has witnessed the building of stable institutions, civil liberties are curtailed, and opposition

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3 Since his ascension as Russia's president in 2000, Vladimir Putin has rotated roles as President and Prime Minister. He previously served as President from 2000 to 2008 and as Prime Minister of Russia from 1999 to 2000 and again from 2008 to 2012. During that last term as Prime Minister, he was also the Chairman of the United Russia political party. Under his covert and overt leadership he has influenced the Kremlin to promulgate political reforms and other moves, thereby increasing management by nondemocratic means, while trying at the same time to deflect critics with his slogan of 'sovereign democracy'. These changes include electoral reform, a tightening of control over political parties and civil society, the appointment of governors instead of their direct election, and also a number of youth, media, and public relations projects.

politics deem suspicious, challenging the narrative of an inclusive democracy. In a similar vein, while voters have chosen preferred candidates in Zimbabwean elections since 2000, media abuse and a clientelistic government have justified the use of force and curtailed press freedoms in the name of 'sovereign democracy'. This approach does not move away from the wave of post-independence authoritarian regimes that championed the toothless Organisation of African Unity (OAU), which sought to safeguard the 'sovereignty of nations' over the human rights discourse across the African continent (Cooper 2002; Phiri 2014).

Managed democracies however, contradict the principles of both a liberal and a social democracy (Wolin 2008). They feature a strong presidency with weak institutions, state control of the media, control over elections in order to prevent elites from delegitimising their decisions, visible short-term effectiveness and long-term inefficiency (Petrov 2005:182). In this light inclusive democracy as presented in a linear liberal or social democratic framework should not be understood as a universal value, which feeds into the Western narrative of bravado and triumphalism after the end of the Cold War (Fukuyama 1992). Mafeje's theoretical framework helps to imagine pluraliversalism, which is reflected in decoloniality. In decoloniality, African democracies are given the chance to give meaning to their future political trajectories without being burdened by the West's conceptualisation of what an inclusive democracy should be – cognizant of the paralysis and/or opportunities that exist in the modern or postmodern narrative of building institutions. Further, in striving for social justice, Mafeje proposes the development of strong democratic institutions to safeguard pluralism and democratic citizenship when these are distortedly conceptualised and truncated in emerging African democracies, including Mozambique. Mafeje's ideas, though located in a different theoretical tradition, are not much different from what Daron Acemoglu and James Robinson's (2012) seminal work concludes – that political and economic institutions are a *sine qua non* for progress towards pluralistic societies.

Acemoglu and Robinson (2012:81) argue that 'extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power'. Following Robert Michels' (1962) thesis on '*the iron law of oligarchy*', Acemoglu and Robinson build on this argument by

further stating that ‘economic institutions are often structured by the elite to extract resources from the rest of society. Crucial to point out, these extractive economic institutions naturally accompany extractive political institutions’ (Acemoglu and Robinson 2012:81). Mafeje’s ideas converge with Acemoglu and Robinson as they stress the importance of democratic centralism to foster inclusive democratic polities. Though from different theoretical traditions, these theorists agree that the monopoly of power and force by the state and state institutions debilitate the intrinsic values of freedom that work toward inclusive governance and democratic polities. In this light, these conceptual frameworks cannot be divorced from each other and the paper will analyse Mozambique’s democratic trajectory.

### **Mozambique’s quest for inclusive democracy from the conflict to the post-conflict phase**

Mozambique emerged from a protracted liberation war (1964–74) that was fought to oust Portuguese colonialism, and was immediately plunged into a civil war in 1977. The first attacks by RENAMO were reported soon after independence in 1977, the year when FRELIMO transitioned from a liberation movement to a Marxist-Leninist party (Manning 2002). Under Samora Machel’s leadership, Mozambique implemented scientific socialism to modernise the society, but the war debilitated socio-economic progress (Hanlon and Smart 1990; Vines 1994, 1991). Politically, FRELIMO maintained a monopoly of power and force in state and society, as Giovanni Carbone (2003:4) importantly highlights:

The Leninist notion of a vanguard single party, with restricted membership and party primacy over the state, implied a decision to do away with opposition political organizations and thus the latter’s repression.

The war, coupled with economic collapse internally, led to the demise of the Socialist project, particularly in the second half of the 1980s. What was even more pressing than restoring socialism was the need for peace, as repeatedly stressed by Samora Machel (Arndt 1999:6; Abrahamsson and Nilsson 1995). The conflict led to the destruction of infrastructure and fundamental pillars of development such as schools, hospitals and farmland, which opened the

doors to food insecurity, widespread disease, illiteracy and hunger (Hanlon 1990). Poverty also deepened during the armed conflict years. Under dire circumstances, Mozambique sought support from international financial institutions (IFIs), which marked a gradual abandonment of FRELIMO's initial Marxist-Leninist ideology. Between 1984 and 1990 the FRELIMO government was in talks with RENAMO to end the conflict, and also embarked on constitutional reforms working towards Mozambique's democratisation (Macuane 2009). The year 2012 marked the 20<sup>th</sup> anniversary of the GPA that was signed between FRELIMO led by Joaquim Chissano and RENAMO leader Afonso Dhlakama. The same year held a great deal of importance for FRELIMO and the future of Mozambican politics as it signalled the 50<sup>th</sup> anniversary of the country's sole liberation movement and the occurrence of its 10<sup>th</sup> Congress. RENAMO and the Democratic Movement of Mozambique (locally known as *Movimento Democrático de Moçambique* or MDM),<sup>4</sup> an important emerging political party that has gained momentum in the Mozambican political scene since its inception in March of 2009, are the only significant challengers of FRELIMO's electoral dominance and are therefore in a position to strengthen nascent democratic institutions.

Various explanations are given on how Mozambique was able to move from a bitter conflict to democratisation. Some scholars and practitioners point to the international context and the role played by United Nations Operations in Mozambique (ONUMOZ). This position credits the United Nations (UN) with having played a central role because it was willing to contribute a large number of peacekeeping troops and financial resources to manage demobilisation and elections in Mozambique. The UN operation in Mozambique cost \$700 million and involved 6 239 troops. Barbara Walter (1999), in particular, writes that the presence of a large UN force presented a credible commitment that the provisions of the peace accord would be held. Yet focusing solely on the United Nations ignores the complexities that made the GPA a fragile agreement. As Walter (1999:150) points out: 'The political guarantees gave RENAMO confidence that it would challenge the government, the military

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4 The MDM is a RENAMO breakaway party that emerged in 2009. It currently has 8 seats in parliament and leads four municipalities.

guarantee made RENAMO feel safe, and the territorial guarantees of a dual administration prevented RENAMO's obsolescence'. Dennis Jett, former United States ambassador to Mozambique during the implementation period, reflects that a more complete operation would entail that the UN remains behind to build political institutions.<sup>5</sup>

Other scholars and practitioners suggest that weak internal and external resources and support for Mozambique's conflict at the time helped to bring the war to an end and cause a political settlement to ensue (Zartman 1995; Msabaha 1995; Paris 2004). On the other hand, David Hume (1994:144) argues that '[t]he international factors affecting the conflict became favourable to a settlement, and President Mugabe, once FRELIMO's comrade-in-arms, eventually became the senior statesman supporting the peace process'. Yet this view also widens a chasm which prevents understanding the transition. Dorina Bekoe (2008:26) argues differently, trying to bridge the gap and offering a new perspective on the Mozambican political settlement. She notes that both positions miss the essence of the implementation period in Mozambique by not drawing out the mechanisms by which the parties continued to negotiate with each other in the absence or weakness of institutions.

If a peaceful political settlement was a quintessential position that both parties were aspiring towards, this merits close examination with particular reference to post-conflict democratisation. Indeed, how did RENAMO, a guerrilla movement best known both inside and outside of Mozambique as an organisation 'without a political program',<sup>6</sup> sustained by external support and an army of captives, complete its transformations into a political party in time for the country's first multiparty elections and agree to a negotiated settlement? While Hume (1994:144) marvels at the fact that the conflicting parties 'throughout the peace process, emphasised that their goal was reconciliation among Mozambicans as peace could not be built on the basis of a victory of

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5 In a telephone interview (26 September 2001) with Dorina A. Bekoe (referred to in Bekoe 2008).

6 Roland Paris (2004) notes that RENAMO aimed to undermine the FRELIMO government, but beyond that goal, it lacked a political programme and received little encouragement from the population within Mozambique.

one party over the other', this position is contested. Hume (1994:144) notes that 'RENAMO showed dissatisfaction on a number of critical points'. The nature of dissatisfaction is articulated by Brazão Mazula, who notes that despite the desire of peace from both FRELIMO and RENAMO, it was marked by mistrust that was

... [e]normous and reciprocal, but it came very strongly from RENAMO which did not want to fall into the trap of integration ... the strategy through which FRELIMO had wanted for years to assimilate RENAMO [offering amnesty to those subduing to the government] not giving it any political worth (Mazula 1996:30).

Dhlakama, the RENAMO leader, pushed to create a government of national unity highlighting how losers would be treated in the new system. Bekoe (2008:28) further suggests that it was one thing for the GPA to state that Mozambique would use a system of proportional representation or permit RENAMO to hold on to some of its territory, however, this did not mean that RENAMO would be able both to influence policy and prevent adverse policies. Bekoe disagrees with the position that asserts that democratisation was simply influenced by international factors and internal weak structures. She suggests that this position 'takes the provisions of the GPA for granted and does not assess the degree of mutual political and military vulnerability that characterized the implementation period' (Bekoe 2008:28).

The peace agreement provided a platform where democratic contestations could be forged. The strength of the GPA, as Bekoe (2008:29) suggests, 'lies in the political reform that recognizes RENAMO as a legitimate political party and the adoption of electoral and administrative rules that allow it to exist as an effective political party'. However, as Chris Alden (2006:156) has argued, this has resulted in democratic elections being tied to a structure that favours the ruling party in power and, as has become clearer with each election, allowed FRELIMO to conduct domestic and foreign policy without any reference to opposition concerns. As Carbone (2005:428) highlighted, although 'a formal separation of state and party structures was introduced in 1990–91', the state



apparatus remains largely controlled by FRELIMO. Carbone (2005:429) succinctly substantiates this notion by asserting that

the majority of state personnel still belong to FRELIMO and thus, while state and party structures are now parallel rather than overlapping, the separation is largely an artificial one: to become real, it will have to wait until a different party takes power.

The Peace Agreement in Mozambique opened a new opportunity for democratic governance to be enhanced. During the Cold War period, Western governments supported authoritarian regimes that repressed people in order to promote geo-strategic interests (Klein 2007; Zartman 1995; Msabaha 1995; Huntington 1991). Hanlon and Smart (2008:96) have argued that 'FRELIMO is almost unique in its post-independence ability to stay totally organizationally united and yet remain so diverse on key issues'. This is a move that can be traced to the succession of leadership within FRELIMO party structures. After Mondlane's death, Samora Machel legitimately ascended to power. In 1986, when Samora Machel died, Joaquim Chissano came to power in a move that ensured that party structures were open to the fluidity and mobility of leadership within FRELIMO. According to Hanlon and Smart (2008:96), corruption and nepotism are deeply entrenched in party structures. They suggest the following:

During elections, party workers are always shocked at the way corruption antagonizes voters and traditional FRELIMO supporters. Honest members and leaders stayed within the party and opted for internal reform, which led to Chissano being ousted as party leader and presidential candidate .... Yet Chissano remains in the party, on the Political Commission, and powerful. The other side of the coin is that some of Chissano's notoriously corrupt allies also remain in the party, in some cases with well-paid sinecures, and with the justice system manipulated to ensure that they are never prosecuted.

This does not, however, mean that democratic practice has been entrenched. Party members called for reform in the 2004 election, which led to Joaquim Chissano being replaced as party leader and presidential candidate. This was manifested in debates in which the old guard has been highly critical

of FRELIMO as a corrupt political party. As previously pointed out, in Mozambique, however, there was distrust mixed with uncertainty about the political future being agreed upon. Whereas the philosophy that underpinned the peace deal was conciliatory, Brazão Mazula (1996:32) argues that the 'GPA sought to avoid the re-establishment of authoritarian regimes which tend to forget history and distort its analysis'.

### **Initial prospect of inclusive democracy turned into a myth**

The theoretical contexts in this paper have revolved around Democratic Peace and the quest for a 'New Democracy in Africa' committed to social justice and equality as articulated by Mafeje. These frameworks push us further to imagine an inclusive democracy which exists to serve the interests of citizens. In the Mozambican case, both Cabaço and Mazula suggest that the Assembly of the Republic is the only possible forum for sharing power with the opposition. However with FRELIMO holding two-thirds of the seats in parliament, RENAMO and MDM remain too politically weak to influence the legislature. FRELIMO's political supremacy at the Assembly of the Republic accentuates its grip on policy processes and guarantees that the ruling party continues to have substantial discretionary power over state affairs. To the detriment of the opposition, all top public officials are from the ruling party. In fact, in order to get promotions in the public service or rise up to influential positions in government, one must be politically affiliated with FRELIMO and show loyalty towards the party (Macuane 2012a). Therefore, at all levels of the state apparatus, decision making must be in alignment with the political agenda of FRELIMO (Macuane 2012a). In the same vein, Manning (2002) notes that Mozambique's governance structures are dominated by ruling oligarchs.

Constitutional advancements have also allowed for the emergence of civil society organisations, which remain substantially deficient due to dominant party control and lack of funds (Forquilha and Orre 2011). Although civil society organisations participate in formal consultation processes, their limited technical capacity to operate as a solid network and relevant actors in policy-making processes further weaken their role as contributors to political inclusiveness (Macuane 2012b). According to *Instituto Nacional de Estatística de Moçambique*

(National Institute of Statistics of Mozambique 2004/2005:61), 71.2% of funds received by civil society were sourced from foreign donors. Similarly to the state, civil society organisations in Mozambique depend tremendously on foreign assistance for their daily operations, creating a great deal of susceptibility towards their donors' agendas. In addition, much of the leadership in Mozambican associations and non-governmental organisations either comes from the public sector or is directly linked to FRELIMO (AfriMAP 2009). This shows that civil society continues to face serious challenges in promoting real participation of the citizenry in the formulation of public policies that will ultimately affect the masses.

The results produced by MDM at the polls during the 2013 municipal elections are worthy of mention. As of early 2014, the MDM is leading four municipalities, including three of the most populated and most important cities in the country, namely Beira, Quelimane and Nampula. The MDM candidate for the capital city Maputo obtained 42% of the vote next to FRELIMO's 58%. These are significant changes reinforcing the idea that the MDM is gaining momentum as an opposition party and causing some shifts in power dynamics, particularly at the local level. MDM announced that Daviz Simango, the mayor of Beira, will, once more, be the candidate for the October presidential elections. MDM's victories in the municipal elections boosted the party's credibility as a strong opposition and will be potentially translated into more votes for the presidential elections. In spite of these important changes, FRELIMO continues to be the dominant political force on the national stage.

### **Managed democracy and absence of social justice?**

Party domination over state affairs has always been the Achilles' heel of Mozambican democratisation. According to theorists on party domination, the tendency of such systems is to allow the ruling party to spread its wings to the extent that opposition parties get weaker from election to election; thereby creating a certain degree of arrogance from the party, and oftentimes reducing voter turnout (Rønning 2010:8). In Mozambique, since the first elections in 1994, voter turnout has been decreasing significantly. It went from 87% in 1994, to 67% in 1999 and 40% in 2004 (AfriMAP 2009). This may be partly attributed

to a few factors such as the distance from certain rural settlements to electoral posts, and also the general elections coinciding with floods which impeded many rural communities from participating. There is, nonetheless, dissatisfaction from the citizenry over the fact that power, and therefore control over policy as well as economic and political institutions, lies in the hands of a few. According to a report on democracy and political participation in Mozambique by AfriMAP, a programme of the Open Society Initiative for Southern Africa (OSISA), (2009), calling Mozambique a stable democratic government is a grave misjudgement so long as power continues to be increasingly exercised by one dominant party.

In what concerns access to the media and other channels of social communication in the public domain, opposition parties face significant restrictions and there is still some censorship over debates about Mozambique's political life (AfriMAP2009). Mozambique's civil society does not yet play an important role in discussions between the government and the donor community due to its lack of substantial funding and coordinating capacity to address such issues. Lack of access to the press and a conveniently dormant civil society reinforce the ruling party's dominance, hamper Mozambique's democratisation and disable important processes aimed at achieving social justice and equality as highlighted by Mafeje's 'New Democracy in Africa'.

Democratic Peace since the GPA is another questionable issue that deserves particular attention. In the post-GPA period, Mozambique was often portrayed as an exceptional African story where political violence did not occur and where the overall population did not demonstrate any hostility towards its government. There have been a series of incidents that counter this narrative of peaceful post-conflict democratisation. In 2000, RENAMO supporters who protested against FRELIMO and the 1999 election results died of asphyxiation in a state police cell in the Cabo Delgado district of Montepuez (AfriMAP 2009). The FRELIMO government was not held accountable for these atrocious acts. In 2005, citizens were killed, injured and houses destroyed during a protest on the outcome of the 2005 municipal elections in Mocimboa da Praia (AfriMAP 2009). In September of 2010, Maputo and Matola city were home to massive protests due to increases in food and transportation costs. Protestors were shot and beaten by state police. A year later, a large group of marginalised

ex-combatants protested before the Council of Ministers for pension reviews and social justice. No substantial attention was given to their plight. In January of 2012, populations resettled by the government and the coal mining giant Vale, a novel player in Mozambique's resource battle, blocked the railway that connected the coal mining plant to the Beira port as a protest for the dire conditions in which they were left. The protestors were brutally battered and removed by state forces.

In 2012, Dhlakama relocated to 'Saturjira', RENAMO's former wartime headquarters in Gorongosa, and threatened to return to violence, claiming that the government was 'robbing' Mozambique's resources (AllAfrica.com 2012). The Mozambican armed forces surrounded the headquarters, which led to accusations by RENAMO that FRELIMO leaders were planning to assassinate Dhlakama. This resulted in a wave of retaliatory attacks between the Mozambique armed forces and RENAMO armed forces, and a bold statement by the RENAMO leader openly declaring the end of the 1992 Peace Accord. There have been several rounds of talks between the FRELIMO-led government and RENAMO, which have not been successful in halting the politico-military tension in the country as the violence was not on the agenda of the discussions (Green and Otto 2014).

Retrospectively, the FRELIMO government used the platform to discuss issues revolving around RENAMO's concerns over electoral reform and its desire to be represented in electoral bodies such as the National Electoral Commission (Green and Otto 2014). These talks did not deter RENAMO's tactic of political isolation in the 2013 municipal elections and all other government processes as a protest against FRELIMO's monopoly over Mozambique politics and the management of natural resources (Green and Otto 2014). The response of the government to the aforementioned crises accentuates the notion of a 'managed democracy', and further distances Mozambique's democratisation from the inclusive democracy that it has come to embody ever since the GPA. In a 'managed democracy' there is a huge dissonance between the theoretical underpinnings of a democratic society on paper; and the rhetoric of social change that is supposed to safeguard citizens' rights and promote social justice, pluralism and equality as articulated by Mafeje, Galtung, and Acemoglu and Robinson.

## **Extractive political and economic institutions: Corruption, nepotism and residual forces in a pseudo-democracy**

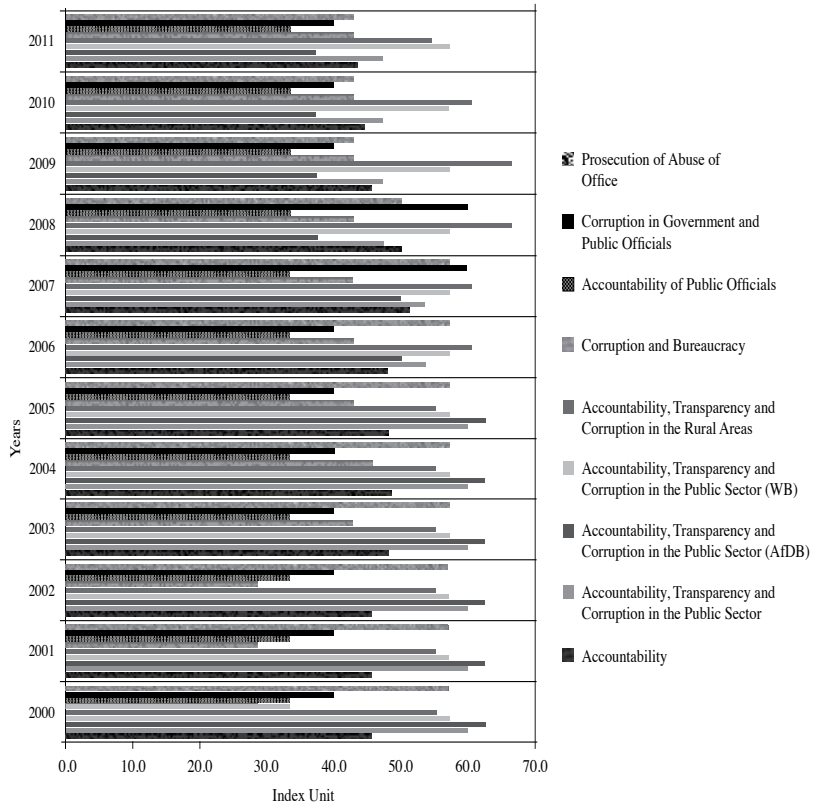
The legal successions between presidents have certainly reinforced democratic practice in Mozambique. Nevertheless, FRELIMO has been highly criticised as a corrupt political party; which further culminated in the assassination of journalist Carlos Cardoso in 2001. Cardoso had been a fierce critique of Chissano's privatisation policies, and exposed murky dealings with FRELIMO's ruling elite and the private banking sector (Hanlon and Mosse 2010; Hanlon 2001). According to Hanlon (2008), corruption and nepotism are deeply entrenched in party structures. In spite of having experienced the first decade of 'successful' peace and pluralistic politics, this relatively unruffled surface of Mozambican politics masks serious weaknesses. In light of this, Manning (2002:13) asserts:

For FRELIMO, over the years a weakened emphasis on ideology has facilitated the spread of corruption within the party and has hurt the party's image in the eyes of the Mozambican citizens. With the creep of corruption the party has lost one of the things that made it distinctive in the eyes of the Mozambican citizens, whether party supporters or not.

Figure 1 below, illustrates that corruption in Mozambique has been on the increase when aggregated sectorally. Although the figure positively shows that accountability and transparency in the public sector may have been improving between 2000 and 2011 as the value stood slightly over 60, there are questionable results. This is unmasked by the fluctuation of values between 25 and 43 in the 'Corruption and bureaucracy' label between 2000 and 2011. No change is noticed in the sector 'Corruption in the rural areas' culminating in an 'Accountability' value that has averaged a meagre 41 between 2000 and 2011. Corruption has been the result of governance malaise, challenging the narrative of Mozambique as a successful democratiser. Mozambique's overall governance score was 53 on the IIAG (Mo Ibrahim Foundation 2012) and ranked 21<sup>st</sup> which put it in the upper quintile of performance. When clustered with Southern African countries, which according to the IIAG (Mo Ibrahim Foundation 2012) are the least corrupt, then Mozambique's corruption is well camouflaged. In the IIAG

2013 (Mo Ibrahim Foundation 2013) overall governance performance stands at number 20 and slightly worse off than neighbouring countries Malawi (16<sup>th</sup>), Tanzania (17<sup>th</sup>) and Zambia (12<sup>th</sup>). The only regional neighbour that is worse off is the ‘inverted totalitarianism’ Swaziland, ranked 26<sup>th</sup>. South Africa is ranked the highest at number 5. What the overall score does is to conceal its sectoral performance in terms of accountability and transparency as shown in the table below.

Figure 1: Mozambique’s corruption indexes 2000–2011



Source: Mo Ibrahim Foundation 2012.

The anatomy of corruption in Mozambique can be traced to extractive political and economic institutions that emerged in the colonial era and the transition

from authoritarian rule to democratic rule (Hanlon 2001). Democratic governments have a mandate to serve their constituencies. Corruption, however, undermines the promotion of democratic citizenship and inclusivity, thereby reducing accountability and transparency in the political constituency. The poor and marginalised in society trust public institutions, such as health and financial institutions, to serve their interests. When trust is undermined, democratic participation is curtailed, thereby instilling fear in citizens to participate. Corrupt governments become sources of insecurity to their citizens and hurt the development of nascent democratic institutions. Political elites can therefore buy justice, as judicial institutions become accountable to the interests of the dominant elite. Mozambique's governance trajectory as a result of political and economic reforms has become aid-dependent and has paved avenues where corruption has become endemic. Aid-dependency has meant that Mozambican officials are accountable to donors, more than to their constituencies (Phiri 2012). It can be argued then that aid has an endemic character of undermining the very same constituencies and political and economic institutions it purports to build.

There are deficiencies when governments become predatory and fail to reduce corruption. Social change and progress take place in societies that uphold the rule of law, allowing space for the nascent development of inclusive political and economic institutions that, over time, do not exclude the citizenry (Mafeje 2002; Acemoglu and Robinson 2012). In Mozambique, corruption is a complex problem. This can be attributed to a parasitic relationship that involves donors, the government, and the people. At the height of neo-liberal reforms, FRELIMO's relinquishment of its socialist experiment accompanied by its accession into the aid-for-development domain has not only fostered opportunity for corruption, but also resulted in western policy dominance, which intensified the role of the ruling elites in Mozambique (Phiri 2012). In addition, acknowledging the simple premise that aid is typically released from one government to another government or from an international institution to a government, the ruling elite from the recipient country has a fictitious control over the 'contribution'. The donor has a considerable degree of political manoeuvre over the country's policy, and the people ultimately suffer the consequences.



Paolo di Renzio and Joseph Hanlon echo this sentiment as they assert that the government and the donor community arrived at a *modus vivendi* where state policy was guided by IFIs and donors with little to no sensibility towards national development. This has led to what di Renzio and Hanlon (2007:5) have termed ‘pathological equilibrium as large-scale corruption is unchecked’. Plank (1993:413) poignantly pointed out that this pumping of funds into Mozambique, accompanied by a proliferation of a fairly new private sector primarily led by political elites, opened the doors for public officials and ex-combatants who were not content with their earnings to collect ‘rents’. Whereas effective policies to reduce social ills are supposed to be carried out by the state, the parasitic relationship becomes more apparent as public and social institutions are incapacitated to make social change possible. Corruption thus unmasks Mozambique’s success story.

According to Hanlon (2009:1), ‘elite capitalism’, which he referred to as economic activities of certain Mozambican leaders, including current president Guebuza, has been discernible since the first decade of the 21<sup>st</sup> century. It certainly has a destructive effect on democratisation given its dependence on lack of transparency and lack of accountability for the citizenry. This system of elite capitalism is set to maintain its beneficiaries in the most privileged positions and ensure the eternal multiplication of trans-generational gains. As a result, inequalities are reproduced; the voices of the vast disadvantaged majority get put on mute as they hold little to no political or economic power, which hurts attempts to build an inclusive democracy. Hanlon (2009:7) substantiates the political and economic immortality of ruling elites when he reports:

Guebuza’s children and relatives have interests in various companies, often in participation with other children of the elite, and are involved in telecommunications, mining, construction, tourism, environmental issues, petrol stations, and a new grain terminal; several consultancy companies have also been established. Armando Guebuza is also a shareholder of some of them, particularly through the family company Focus 21.

Given this background, it is unsurprising that Guebuza has sought re-election in FRELIMO structures – mimicking Vladimir Putin’s return to the Russian

presidency and further confirming the characterisation of Mozambique as a 'managed democracy'. According to *Africa Confidential* (2012:10), 'the expected pattern in FRELIMO is that changing the leadership involves a realignment of power inside the party and a redistribution of the resulting benefits of patronage'. The Guebuza plan would leave many of those benefits where they are, in the hands of his family and associates, shutting out other FRELIMO members (*Africa Confidential* 2012:10). President Guebuza's manipulation of political and economic institutions has cemented rebellion and battle for leadership succession as well as public discontent into his election. This further confirms what Acemoglu and Robinson (2012:430) have argued:

... the ability of those who dominate extractive institutions to benefit greatly at the expense of the rest of society implies that political power under extractive institutions is highly coveted, making many groups and individuals fight to obtain it. As a consequence there will be powerful forces pushing societies under extractive institutions toward political instability.

FRELIMO has maintained an iron grip on the succession battles within party structures, ensuring that the ruling politburo retains control of political and economic institutions and capital, policy initiatives and its own inside 'dialogue'. Hanlon and Cunguara (2010) suggest that FRELIMO and the ruling oligarchs have strategically positioned themselves to benefit from the drivers of growth like Foreign Direct Investment (FDI), mega projects resulting from the natural resources boom and the mythology of donors promoting the 'success story'. FRELIMO thereby runs a bifurcated state that maintains a parasitic relationship that feeds corruption, nepotism, clientelism and abuse of public funds. Hanlon further argues that 'governance' is presently seen as opening Mozambique to transnational corporations, while closing off domestic capital investment which has been important in all successful national developments, such as the Asian Tigers (Hanlon and Mosse 2010).

## Conclusion

Post-conflict peace in Mozambique paved a way for democratisation, allowing the new government to champion political pluralism and a move toward building an inclusive society and social justice. International stakeholders played a crucial

role in bringing peace, under the auspices of a liberal peace agenda. As a result of a negotiated democratic transition FRELIMO won the elections in 1994 and has subsequently continued to win, though with questionable results. The political space has been filled with the rhetoric of contestation, as RENAMO has attempted to position itself as a robust opposition. The new democratic movement, MDM, has asserted itself as a strong political contestant to FRELIMO, particularly at the local level. Also, the high level of dependency of civil society organisations on external financial and leadership assistance undermines efforts aimed at promoting political inclusiveness through the participation of the citizenry in policy processes. In the past decade, Mozambique's political economy has depended on FDI and donors who in different ways have weakened the state apparatus. Internationally, this paints the picture of an increasingly democratic emerging economy opening its doors to business that multiply capital and eventually foster economic growth as prescribed by the policy dictates of Western governments, donors, and multilateral institutions.

Looking at Mozambique from the West, the idea of the 'success story' conveniently lives. In reality, the Mozambican democratic picture has a question mark as the dominant party and a considerable part of its members have distanced themselves from political, economic and strategic dialogue with other parties and the public, given the almost invisible line between FRELIMO and state apparatus. Elite capitalism and party dominance over state affairs caricature Mozambique as a 'managed democracy'. To the detriment of ordinary citizens, the Mozambican post-conflict democratic government has maintained or reproduced extractive political and economic institutions that debilitate the development of an inclusive society and social justice. Political plurality has not been guarded in this new democracy. The analysis so far highlights that Mozambique has become a 'managed democracy'. Mozambique's peace agreement remains fragile, and the question is raised whether post-conflict democratisation has been inclusive for the poor and marginalised.

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# Nigeria united in grief; divided in response: Religious terrorism, Boko Haram, and the dynamics of state response

*Daniel E. Agbiboa and Benjamin Maiangwa\**

## **Abstract**

This article critically examines the current developments regarding the religious terrorism of Boko Haram, an extremist Islamist group, which operates largely in the north-east states of Nigeria. Boko Haram's avowed aim is to wrest control from the Nigerian government and to impose a strict form of Sharia law across a country of about 170 million people. Since 2009, when Boko Haram first launched its Islamic insurgency, over 5 000 Nigerians have lost their lives in

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\* Daniel E. Agbiboa is a doctoral scholar in the Department of International Development, Queen Elizabeth House, University of Oxford, UK. He holds an M.Phil. in Development Studies from the University of Cambridge, UK, an M.A. in International Relations from the University of KwaZulu-Natal, South Africa, and an Advanced Certificate in Social Research from the Australian National University, Australia. His interests and expertise lie in the areas of corruption, security and development in West and East Africa. He has published widely in the fields of transnational terrorism, corruption, and organised crime. Benjamin Maiangwa holds an M.A. Degree in Conflict Transformation and a B.A. Honours in Political Science from the University of KwaZulu-Natal, South Africa. He also has a B.A. degree in Philosophy from St Joseph's Theological Institute, Cedara, South Africa. He is currently a graduate student at the Institute for the Advanced Study of Sustainability at the United Nations University, Tokyo, Japan. His research and writing have focused on ethno-religious and jihadist terrorism in Africa, ECOWAS (Economic Community of West African States) security architecture, and resource conflict in Nigeria.



bombings and shootings carried out by the group. In addition to a brief discussion of the emergence, demands, ideology and external links of Boko Haram, the article focuses analytic attention on how the Nigerian state has responded to the menacing threat of the group. This is followed by a critical engagement with the current debate in Nigeria regarding what can be said for and against negotiating with Boko Haram members, and for or against fighting them. In conclusion, the article offers some fresh and multifaceted recommendations on how to effectively address the Boko Haram impasse.

## **Introduction**

Since July 2009, more than 5 000 people have been killed in bombings and gun attacks by Boko Haram, an extremist Islamist group from north-eastern Nigeria whose avowed aim is to overthrow the secular government in Nigeria and impose an Islamic state governed on the basis of Sharia law (Agbiboa 2013a). These violent attacks, which show evidence of increasing coordination and sophistication, adds a further complication to the festering security challenges in Nigeria by exacerbating existing ethno-religious tensions and inter-communal violence in northern Nigeria (Maiangwa et al. 2012). As the crisis escalates, the Nigerian state has intensified its efforts to rein in the threat of the group.

This paper critically examines the current developments regarding the ongoing violent campaign of Boko Haram in northern Nigeria, including in this instance, the reasons behind the group's rebellion and the ways in which the Nigerian state has responded to the crisis since it erupted in 2009. Furthermore, the paper critically engages with the ongoing debate in Nigeria regarding what can be said for and against negotiating with Boko Haram members, and for or against fighting them.

The rest of the paper is structured into six parts. The first provides a brief review of existing literature on religious terrorism in order to glean an understanding of the Islamic insurgency of Boko Haram. The second part provides a brief background to northern Nigeria and militant Islam, with particular attention to the Maitatsine uprisings. The third part explores the terrorism of Boko Haram, focusing specifically on the group's emergence, ideology, demands, and external

links. The fourth part attempts to understand why Boko Haram rebels. The fifth part critically examines how the Nigerian state has responded to the threat of Boko Haram, as well as how these responses have divided Nigerians over the Boko Haram issue. Finally, the conclusion offers some recommendations on how to effectively address the current impasse.

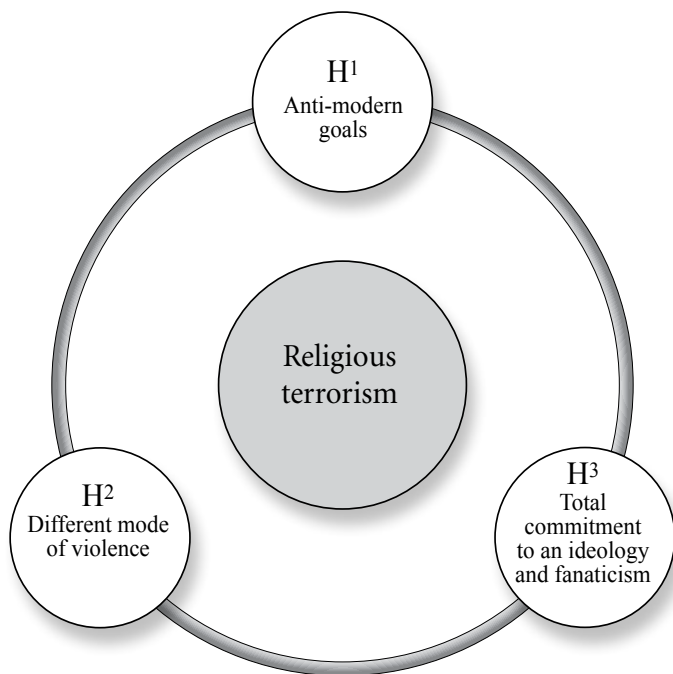
### **Religious terrorism: What does the literature say?**

Although terrorism has always formed part of social existence (Rapoport 1984), it became 'significant' for the first time in the 1960s when it 'increased in frequency' (Sandler et al. 1983:36) and assumed 'novel dimensions' as a transnational phenomenon (Mickolus 1980: 2), creating in the process what Jenkins (1975:1) describes as a 'new mode of conflict'. Specifically, the link between religion and terrorism has a long genealogy in Western scholarship (Hasenclever and Rittberger 2000). The idea of a nexus between religion and terrorism dates back to David C. Rapoport's (1984:658–677) seminal paper in *The American Political Science Review* – entitled 'Fear and Trembling: Terrorism in Three Religious Traditions' – which analyses the use of terror in three religious traditions: Hinduism, Islam, and Judaism. As the pioneering comparative study of religious terror groups, Rapoport's paper provides 'detailed analyses of the different doctrines and methods of the three well-known groups: the Thugs, Assassins, and Zealots-Sicarii' (Rapoport 1984:658). Despite a primitive technology, Rapoport argues that these groups 'each developed much more durable and destructive organizations than has any modern secular group' (Rapoport 1984:658). Rapoport's influential paper inspired many similar works, primarily in the field of terrorism studies, which sought to explain 'why violence and religion have re-emerged so dramatically at this moment in history and why they have so frequently been found in combination' (Juergensmeyer 2003:121). In this particular literature, religious terrorism has been raised above a simple label to a set of descriptive characteristics and substantive claims which appear to delineate it as a specific 'type' of political violence, fundamentally different to previous or other forms of terrorism. As argued by Hoffman, this new type of terrorism produces 'radically different value systems, mechanisms of legitimation and justification, concepts of morality and worldview' (Hoffman 2006:88), and

‘represents a very different and possibly far more lethal threat than that posed by more familiar, traditional terrorist adversaries’ (Hoffman 2006:272).

The claim about the specific nature of religious terrorism rests on a number of arguments, three of which are discussed here (see Figure 1).

**Figure 1: Three hypotheses (H) of religious terrorism**



Source: Agbibo2014b:5

First, it is argued that religious terrorists have anti-modern goals of returning society to an idealised version of the past and are therefore necessarily anti-democratic and anti-progressive. Audrey Cronin (2003:38), for example, argues that ‘the forces of history seem to be driving international terrorism back to a much earlier time, with echoes of the behaviour of ‘sacred’ terrorists ... clearly apparent in a terrorist organisation such as Al-Qaeda’. For his part, Juergensmeyer (2003:230) contends that religious terrorists work to ‘an anti-modern political agenda’. In his words:

They have come to hate secular governments with an almost transcendent passion ... dreamed of revolutionary changes that would establish a godly social order in the rubble of what the citizens of most secular societies have regarded as modern, egalitarian democracies .... The logic of this kind of militant religiosity has therefore been difficult for many people to comprehend. Yet its challenge has been profound, for it has contained a fundamental critique of the world's post-Enlightenment secular culture and politics (Juergensmeyer 2003:232).

It is further argued that religious terrorists have objectives that are absolutist, inflexible, unrealistic, devoid of political pragmatism and hostile to negotiation (Gunning and Jackson 2011). As Matthew Morgan (2004:30–31) notes: 'Today's terrorists don't want a seat at the table, they want to destroy the table and everyone sitting at it'. Byman (2003:147) says of Al-Qaeda: 'Because of the scope of its grievances, its broader agenda of rectifying humiliation, and a poisoned worldview that glorifies jihad as a solution, appeasing Al-Qaeda is difficult in theory and impossible in practice'.

A second important argument suggests that religious terrorists employ a different kind of violence to secular terrorists. For example, it is argued that for the 'religious terrorist, violence is ... a sacramental act or divine duty executed in direct response to some theological demand' (Hoffman 2006:88), as opposed to a tactical means to a political end. Furthermore, it is suggested that because religious terrorists have transcendental aims, are engaged in a cosmic war and lack an earthly constituency, they are not constrained in their pedagogy of violence and take an apocalyptic view of violent confrontation: 'What makes religious violence particularly savage and relentless is that its perpetrators have placed such religious images of divine struggle – cosmic war – in the service of worldly political battles' (Juergensmeyer 2003:149–150). For this reason, acts of religious terror serve not only as tactics in a political struggle, but also as evocations of a much larger spiritual confrontation. Thus, religious terrorists aim for maximum casualties and are willing to use weapons of mass destruction (Gunning and Jackson 2011). As Magnus Ranstorp (1996:54) puts it, they are 'relatively unconstrained in the lethality and the indiscriminate nature of violence used' because they lack 'any moral constraints in the use of violence'.

Similarly, Jessica Stern (2003:xxii) argues that '[r]eligious terrorist groups are more violent than their secular counterparts and are probably more likely to use weapons of mass destruction'.

Thirdly, it is argued that religious terrorists have the capacity to evoke total commitment and fanaticism from their members; they are characterised by the suspension of doubt and an end-justifies-the-means view of the world – in contrast to the supposedly more measured attitudes of secular groups (Gunning and Jackson 2011). Juergensmeyer (2003:220) argues that 'these disturbing displays have been accompanied by strong claims of moral justification and an enduring absolutism, characterised by the intensity of the religious activists' commitment'. Moreover, it is suggested that in some cases the certainties of the religious viewpoint and the promises of the next world are primary motivating factors in driving insecure, alienated and marginalised youths to join religious terrorist groups as a means of psychological empowerment. As Juergensmeyer (2003:187) argues, '[t]he idea of cosmic war is compelling to religious activists because it ennobles and exalts those who consider themselves a part of it ... it provides escape from humiliation and impossible predicaments .... They become involved in terrorism ... to provide themselves with a sense of power'. It is further argued that such impressionable, alienated and disempowered young people are vulnerable to forms of brainwashing and undue influence by recruiters, extremist preachers or radical materials on the internet (Hoffman 2006:197–228, 288–290; Agbiboa 2013b). Romero (2007:445), for example, argues that Islamist terrorist connections can provide 'social backing, meaning to life (to compensate for the spiritual emptiness felt), and a social or collective identity mainly based on the pride of forming part of the jihad as the only way of reaching the power and glory of Islam'.

It is important to note that the seismic rise of radical Islamist terrorism starting in the 1980s and 1990s has significantly contributed to the frequency and lethality of attacks perpetrated by religious terrorist groups (Rapoport 1998; Juergensmeyer 1997; Agbiboa 2013a). Available empirical data show that over the period 1968 to 2005, Islamist groups (especially groups affiliated with Al-Qaeda in the Islamic Maghreb) were responsible for 93.6 percent of all terrorist attacks and 86.9 percent of all casualties inflicted by religiously-oriented terrorist

groups (Terrorism Knowledge Base, cited in Piazza, 2009:66). Piazza (2009:66) explains the higher frequency and intensity of terrorist activity among Islamists in the light of the (mis)interpretation of certain doctrines and practices within Islam, including the concept of 'lesser jihad,' the practice of militant struggle to defend Islam from its perceived enemies, or the Muslim reverence for 'Itishhad' (the practice of martyrdom).

Piazza also shows how Al-Qaeda type groups fit a typology defined as 'universal/abstract' while other Islamist terrorist groups are more properly categorised as 'strategic' (Piazza 2009:65). For Piazza, 'the primary difference between universal/abstract groups and strategic groups is that the former are distinguished by highly ambitious, abstract, complex, and nebulous goals that are driven primarily by ideology ... in contrast, strategic groups have much limited and discrete goals: the liberation of specific territory, the creation of an independent homeland for a specific ethnic group, or the overthrow of a specific government' (Piazza 2009:65). According to this perspective, extremist Islamist groups like Al-Shabaab, Al-Qaeda, Boko Haram and Ansaru, among others, fall into the universal/abstract category on account of their global jihadist appeal, their absolutist and inflexible objectives, and their rigid ideological stance against outposts of the West and perceived enemies of Islam.

Before examining the religious terrorism of Boko Haram in northern Nigeria, it is expedient to provide a brief analysis of historical antecedents in northern Nigeria that may shed some light on the ongoing religious terrorism of Boko Haram.

### **Northern Nigeria and the Maitatsine uprisings**

Following independence, the first major experience of organised religious militancy in northern Nigeria came with the Maitatsine uprisings, which some scholars have connected to the jihad of Usman Dan Fodio in the 19<sup>th</sup> century. Usman Dan Fodio's jihad established the powerful Sokoto Caliphate (1804–1903) under the supreme law of Sharia (Hickey 1984; Adesoji 2011; Maiangwa 2014). The Maitatsine movement was formed by an Islamic preacher called Muhammadu Marwa (nicknamed 'Maitatsine'— that is, 'the one who curses').

Marwa migrated from Cameroon to northern Nigeria in 1945 (Pham 2012:2). Maitatsine polemics against Islamic authorities in Kano state were condemned by the British colonial authorities, who found him an extremist preacher. In Kano, Marwa became an Islamic zealot preoccupied with the purification of Islam. He believed that Islam had come under the corrupting influence of modernisation (Westernisation) (Danjibo 2009:6; Falola 1998:146).

Marwa attracted the urban poor in the northern city of Kano with his message that 'denounced the affluent elites as infidels, opposed Western influence, and refused to recognize secular authorities' (HRW 2012:22). Some of the poor and marginalised population of northern Nigeria – the *talakawa* ('commoners')– were attracted to Maitatsine because 'he condemned the hypocrisy and ostentation of the *nouveau riche* and promised redemption and salvation to God's righteous people' (Hickey 1984:253). The Maitatsine uprisings led to eleven days of violent clashes with state security forces in Kano in December 1980. A tribunal of inquiry established by the federal government in 1981 found that 4 177 people were killed in the violence, excluding members of the police force who lost their lives trying to rein in the excesses of the sect. Nevertheless, state security forces were implicated in extrajudicial killings and arbitrary torture of Maitatsine members in their custody (HRW 2012; Agbibo 2013a). Although the Nigerian military crushed the uprisings and killed its leader, the following five years (1981–85) witnessed the deaths of hundreds of people in reprisal attacks between remnants of the radical movement in the north and state security forces. Commenting on the issue, Falola (1998:138) regarded the Maitatsine uprisings in Kano and neighbouring areas of northern Nigeria in the 1980s as the first public religious violence in post-colonial Nigeria. Perhaps, it is also the first religious violence in Nigeria that, in all practical terms, demonstrates how religious ideology could link extremist groups from two different countries since, as mentioned earlier, Marwa (the Maitatsine leader) was a Cameroonian national.

The Maitatsine uprisings technically ended in the 1980s. However, spates of violent religious activism saturated northern Nigeria from the 1990s onward. The emergence of Boko Haram, since its first violent uprising in 2009, represents

yet another violent form and phase of religious radicalism in northern Nigeria (Forest 2012). But who and what is Boko Haram?

### **The religious terrorism of Boko Haram**

Boko Haram (a nomenclature which means ‘western education is sinful’) officially calls itself *Jama’atu Ahlus-Sunnah Lidda’Awati Wal Jihad*, which translates as ‘People Committed to the Prophet’s Teachings for Propagation and Jihad’ (American Foreign Policy Council 2013:1). It is widely claimed that the group has been in existence since 2002. However, Boko Haram became the cynosure of public eyes in 2009, when it propagated the sectarian violence that primarily engulfed Bauchi and Maiduguri, killing over 1 000 people, including its initial leader Mohammed Yusuf. Yusuf was reportedly killed by the Nigerian police while in custody (Paris Model United Nations 2012:4). Besides ushering in another ‘phase of security forces ruthlessness in Nigeria’ (Bamidele 2012:35), the death of Yusuf in police custody and the failure of the Nigerian government to prosecute those security personnel that were responsible for the extrajudicial killing of the Boko Haram leader, have been cited as one of the major reasons behind the ultra-radical turn of Boko Haram (Maiangwa and Uzodike 2012:3). At the end of the July 2009 uprising, the remaining members of the group reportedly fled to neighbouring countries, ‘where they attracted the attention of global jihadist movements based around the Sahel’ (Walker 2012:4). The UN Security Council reports that Boko Haram members received training in a Tuareg rebel camp in Mali during the group’s hibernation (Thurston 2011).

In mid-2010, Boko Haram resurfaced in Maiduguri and started an unprecedented campaign of assassinations and suicide bombings, which, combined with its ideological appeal, have continued to smoulder. Some observers claim that the ‘speed at which the group developed the capability to produce large and effective improvised explosive devices and enlist suicide bombers to deliver them suggests outside help’ (Walker 2012:2). The group has so far waged audacious attacks on an array of public places including police stations, prisons, schools, places of worship, media houses, and the United Nations Headquarters in Abuja (Agbibo 2013c; Forest 2012). The attack on the Nigerian police headquarters in Abuja by Boko Haram is believed to be the first suicide attack in Nigeria



(Maiangwa et al. 2012:48). For the rest of 2010, 'the group attacked many police and state officials in Borno and Bauchi states, and extended its reign of terror to anyone – particularly Islamic clerics and traditional rulers – perceived to be in cahoots with the secular Nigerian government' (Maiangwa 2013:96). Some other prominent attacks waged by the sect in 2011 and 2012 include the Madalla Christmas Day 2011 bombing that killed over 45 people, and the 20 January 2012 coordinated attacks on three government establishments in Kano state, where over 185 people were reported dead (Maiangwa 2013:96).

As the name suggests, Boko Haram is strongly opposed to what it sees as a Western-based incursion that threatens traditional values, beliefs, and customs among Muslim communities in northern Nigeria. The group's first leader, Mohammed Yusuf, told the BBC in 2009: 'Western-style education is mixed with issues that run contrary to our beliefs in Islam' (BBC News 2009). Elsewhere, the charismatic leader noted: 'Our land was an Islamic state before the colonial masters turned it to a *kafir* (infidel) land. The current system is contrary to true Islamic beliefs' (Daily Trust 27 July 2009). It also appears that Boko Haram leaders have been linking their jihad in Nigeria with the global jihad being fought by foreign terrorist organisations like Al-Shabaab in Somalia and Al-Qaeda in the Islamic Maghreb (AQIM). On 24 November 2011, a spokesman for Boko Haram, Abul Qaqa, stated: 'It is true that we have links with Al-Qaeda. They assist us and we assist them' (Chothia 2011). On one occasion, Boko Haram claimed that some of its members have been sent to Somalia to learn the acts of suicide bombing and destabilisation (Thurston 2011). A spokesperson of the group is reported to have stated that 'very soon, we will wage jihad .... We want to make it known that our jihadists have arrived in Nigeria from Somalia where they received real training on warfare from our brethren who made that country ungovernable .... This time round, our attacks will be fiercer and wider than they have been' (cited in Maiangwa et al. 2012:48). Zenn (2013) claims that the suicide bomber that attacked the UN headquarters on 26 August 2011 in Abuja was a Cameroonian man called Mamman Nur, who reportedly travelled to Somalia to receive explosives training from Al-Shabaab before returning to Nigeria to execute the attack.

The foregoing suggests that Boko Haram may be joining forces with other jihadist groups in Africa for a variety of reasons: for training, for refuge, for financial support, and most importantly, for the fact that most of these jihadist groups are united by their strong religious ideology – a key feature of Piazza’s universal/abstract groups. The last factor (spiritual ideology) played out during the 2012 Malian crisis when Boko Haram’s splinter group, Ansaru, which means ‘Vanguards for the Protection of Muslims in Black Africa’ (Vanguard 2 February 2012), killed two Mali-bound Nigerian troops in Kogi on 19 January 2013. The group justified this attack as ‘retaliation for the French-led intervention in Mali and “Western atrocities” in Afghanistan’ (Zenn 2014:26). In February 2013, Ansaru<sup>1</sup> also kidnapped seven foreign workers in north-eastern Nigeria and executed them, blaming the deaths on a joint Nigerian-British military operation intended to free the hostages (CNN 9 March 2013). The Nigerian media has also attributed to the splinter group the murder of four Chinese nationals, three Indians, and a Ghanaian in Borno, as well as the kidnapping, in May 2011, of two Europeans in an Italian construction company in Kebbi state who were killed in a botched rescue attempt in 2012 (Council on Foreign Relations 2012).

According to Johnnie Carson, the assistant secretary of state in the Bureau of African Affairs, ‘Boko Haram is composed of at least two organisations, a larger organisation focused primarily on discrediting the Nigerian government, and a smaller more dangerous group that is increasingly sophisticated and increasingly lethal’ (IRIN 16 July 2012). In a recent report on insurgency of Boko Haram in Nigeria, the International Crisis Group (ICG 2014:38) claims that the group could even be composed of six factions. And that it is this fractious nature of the group that has made the possibility of a *modus vivendi* with Boko Haram difficult.

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1 Ansaru emerged as a splinter sect of Boko Haram given its displeasure with the latter’s style of operations, and killings of innocent civilians, which it described as inhuman to the Muslim community. Hence, it vowed to restore dignity and sanity to ‘the lost dignity of Muslims in black Africa’ and to bring back the dignity of Islam in Nigeria and the Sokoto Caliphate, founded by Usman Dan Fodio in the late eighteenth century (Vanguard 2 February 2012).

Where does Boko Haram derive its funding from? In the past, the Nigerian authorities have been criticised for being unable to trace much of the funding that the group receives. However, in February 2012, recently arrested Boko Haram officials revealed that while the organisation initially relied on donations from members, its links with Al-Qaeda opened it up to more funding from groups in Saudi Arabia and the United Kingdom (Agbiboa 2013d). Furthermore, the arrested officials divulged that other sources of funding included the Al Muntada Trust Fund and the Islamic World Society. A spokesman of Boko Haram also alleged that Kano State Governor Ibrahim Shekarau and Bauchi State Governor Isa Yuguda had placed them on a monthly salary (Agbiboa 2013d). Quite aside, Boko Haram is reportedly robbing local banks and demanding money from local traders in the north-east of Nigeria in order to finance its activities. On 10 December 2011, Mohammed Abdullahi, Central Bank of Nigeria spokesman, claimed that ‘at least 30 bank attacks attributed to Boko Haram were reported in 2011’ (Onu and Muhammed 2011). Beyond bank robberies and individual financiers, there have also been rumours of Boko Haram’s involvement in trafficking illicit weapons and kidnapping expatriates and tourists for ransom (Agbiboa 2013a). On 13 November 2013, Boko Haram kidnapped a French priest, Georges Vandenbeusch, in Nguetchewe parish of Moyo-Moskota in Cameroon. However, the priest was freed on 31 December, reportedly ‘after Boko Haram received payment of a ransom and the release of one of its prominent leaders imprisoned in Maroua, Cameroon’ (ICG 2014:18). Also, many in the south believe Boko Haram is being sponsored by powerful northern politicians whose aim is to pressure the Jonathan administration into abandoning any plans Jonathan may harbour of extending his term in office beyond 2015 (IRIN 16 July 2012). Ishiekwene, however, argues that ‘it’s nonsense to suggest that these politicians, whoever they are, would kill their kith and kin – and abduct their daughters on a mass scale – to prevent Jonathan from returning to power’ (Foreign Policy 6 May 2014).

## **Why Boko Haram rebels**

The extent of relative poverty and inequality in the north has led several analysts and organisations to argue that socio-economic deprivation is the main factor behind

Boko Haram's campaign of violence in northern Nigeria (OECD 2013; Mustapha 2012; Kukah 2012; Agbiboa and Maiangwa 2013; HRW 2012). Kwaja (2011:1), for example, argues that 'religious dimensions of the conflict have been misconstrued as the primary driver of violence when, in fact, disenfranchisement and inequality are the root causes' (see also Mustapha 2012; Kukah 2012). Explanations such as these are often informed by the human needs theory of social conflicts which holds that all human beings have basic needs which they seek to fulfil, and that failure to meet these needs could lead to the outbreak of violent conflict (Rosati et al. 1990). However, the link between socio-economic deprivation and the outbreak of conflict has been criticised as simplistic (Agbiboa 2013a). This is largely because it fails to explain why some poor people or places do not participate in violence, and because it offers very little in the way of clear recommendation for policy-makers (Agbiboa 2013a). In their work entitled 'What causes terrorism?' Krieger and Meierrieks (2011) examine a host of possible influences on terrorism, including, inter alia, global order, contagion, modernisation, institutional order and identity conflict. Following a detailed review of the relevant empirical literature on what causes terrorism, they concluded that 'there is only limited evidence to support the hypothesis that economic deprivation causes terrorism ... poor economic conditions matter less to terrorism once it is controlled for institutional and political factors' (Krieger and Meierrieks 2011:3). Instead, they argue that 'terrorism is closely linked to political instability, sharp divides within the populace, country size and further demographic, institutional and international factors' (Krieger and Meierrieks 2011:3).

However, although militant Islam is the religious ideology that drives groups like Boko Haram, the relative deprivation theory cannot be simply wished away in the Boko Haram narrative. To begin with, northern Nigeria, especially the north-east, presents an ample example of impoverishment as demonstrated by widespread poverty, unemployment, infrastructural decay, and environmental stress. All these factors, while not directly the cause of the Boko Haram terrorism, nonetheless goad foot soldiers and foster a permissive environment for Boko Haram's operations. Despite Nigeria's economic growth in recent times, poverty and income inequality are high in the country. The International Crisis Group (2014:3) reports that 112.5 million Nigerians (70 percent of the population) are classified as 'poor and

absolutely poor'. The north-east, Boko Haram's operational centre, 'has the worst poverty rate of the six official zones' (ICG 2014:3; see also Tables 1 and 2). This is compounded by the issue of illiteracy and climate change. Education in the north is poorly funded and even so, secular schools are scarce in the north-east of the country. And because many children are sent to Quranic schools where they often beg for alms on the streets; in the context of widespread poverty and social decay, this practice is open to abuse by groups like Boko Haram (ICG 2014:4).

**Table 1. Human development index (HDI) by zone**

	<b>South South</b>	<b>South East</b>	<b>South West</b>	<b>North Central</b>	<b>North East</b>	<b>North West</b>
HDI [Nigerian National HDI: 0.513]	0.573	0.471	0.523	0.490	0.332	0.420

Source: UNDP (2009:10), cited in Agbiboa (2013a:77).

**Table 2. Trends in poverty rates by zone for two relative poverty lines**

<b>Zone</b>	<b>Core Poor</b>		<b>Moderately Poor</b>	
	1996	2004	1996	2004
*South South	23.4	17.0	34.8	18.1
*South East	18.2	7.8	35.3	19.0
*South West	27.5	18.9	33.4	24.2
*North Central	28.0	29.8	36.7	37.2
*North East	34.4	27.9	35.7	44.3
*North West	37.3	26.8	39.9	44.4

Source: Nigeria, National Bureau of Statistics (2010), cited in Agbiboa (2013a:77)

\*South South: Bayelsa, Rivers, Akwa-Ibom, Cross River, Edo and Delta

\*South East: Abia, Anambra, Ebonyi, Enugu, Adamawa and Imo

\*South West: Ekiti, Lagos, Ogun, Ondo, Osun and Oyo

\*North Central: Benue, Kogi, Kwara, Nasarawa, Niger, Plateau and Abuja

\*North East: Adamawa, Bauchi, Borno, Gombe, Taraba and Yobe

\*North West: Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto and Zamfara

What matters in the context of relative deprivation is how individuals feel about their position in the society. For instance, Moghaddam (2006:22) argues that ‘a Muslim might feel deprived because of the position of Muslims vis-à-vis other groups’. What is important to note here is that the feeling of deprivation in this sense is not merely restricted to the absence of material goods. It could be egoistical, fraternal and historical. According to Moghaddam (2006:47), feelings of relative deprivation in the Islamic world can be considered ‘in the historical context of the Near and Middle East’. This leads us to another noticeable characteristic of the Boko Haram phenomenon: its religiosity, which has largely been woven into its fabric by historical processes of religious politicisation in Nigeria’ (Maingangwa 2014:58). In addition, the Iranian revolution of 1979 adds another dimension to militant Islam in Nigeria. The Iranian revolution encouraged some millenarian Islamic movements in Nigeria to fully assert themselves and demand good governance and a corruption-free society through Sharia law. It is interesting to note that the Maitatsine movement became rife in northern Nigeria during this period. This is in addition to the rise of other forms of Islamic revivalism and activism in northern Nigeria in the 1970s and the 1980s. In particular, the *Jama’at Izalat al-Bida wa Iqamat al-Sunnah* (Society for the Eradication of Evil Innovations and the Reestablishment of the Sunna), better known as the Izala Movement, has contributed to a ‘general religious revival and a much greater public and political role for Islam’ (ICG 2014:8) in northern Nigeria. Thus, it could be argued then, that Boko Haram’s call for social, political, and economic justice through the Sharia ‘reflects another form of violent religious activism which draws its authority from the lineage of the Islamic jihad of Dan Fodio and the establishment of the Sokoto Caliphate’ (Lewis 2002:4, cited in Maingangwa 2014:64), as well as from the revivalist call for the institutionalisation of theocratic states by certain members of the globalised Islamic community in protest to what they regard as an imperialist world order. Given the foregoing, militant Islamism and relative deprivation are crucial factors to consider in understanding why an extremist Islamic group like Boko Haram rebels. However, we also argue that the ultra-violent turn of Boko Haram since it started employing sophisticated weapons and carrying out devastating attacks in 2010, owes largely to the manner in which the crisis has

been (mis-)managed by the Nigerian state. Thus, factors like the extrajudicial killing of Boko Haram initial leader Muhammed Yusuf, and the arbitrary arrest, torture and bloodletting of its members by state security forces have coalesced to incubate and sustain the group's violent attacks. In addition, Boko Haram's own suspicion of the authorities' intent to resolve the crisis also fuels the insurgency of the group (ICG 2014:36).

Given the foregoing, it is not surprising that Boko Haram remained adamant that it will not negotiate with the Nigerian state. Instead, the group has intensified its attacks on the Nigerian security officials and public establishments. Since the resumption of Boko Haram attacks in 2010, the group has raided over 60 police facilities in at least 10 northern and central states, and Abuja, and killed at least 211 police officers. Between January and September 2012, 119 police officers lost their lives in suspected Boko Haram attacks – more than in all of 2010 and 2011 combined (Agbiboa 2013a). Boko Haram attacks have also increasingly targeted schools in northern Nigeria. In March 2013, approximately 85 secondary schools were closed and over 120 000 pupils were sent home by the Borno state government following attacks on schools by Boko Haram. On 14 April 2014 more than 200 female pupils were abducted when Boko Haram gunmen stormed a boarding school in Chibok, Borno state (Agbiboa 2014c).

### **The 'flip-flop' response of the Nigerian state**

Two major approaches may be identified through which the Nigerian government has attempted to halt what the Human Rights Watch (2012) regards as the 'spiralling violence' of Boko Haram in northern Nigeria. These may be described as the carrot and stick approaches.

The carrot approach involves political negotiation with all stakeholders in the Boko Haram conflict. In this regard, the Nigerian state, under the late President Umaru Musa Yar'Adua, established a committee of inquiry led by Ambassador Usman Galtimari to 'identify the grievances of the sect and make possible recommendations on how to improve security in the north-east region' (Onuoha 2012). At the state level, the carrot approach has involved overtures and rapprochements to Boko Haram insurgents. For example,

former governor of Borno State Ali Modu Sheriff allegedly paid the sum of N100 million to mollify the anger of the group when their leader was killed in 2009. The current governor, Kashim Shettima, called on Boko Haram to come forward for dialogue on 16 July 2011 (Aghedo and Osumah 2012:866). Since August 2011, the government has undertaken ‘back-channel’ talks with Boko Haram according to recommendations made by a panel charged with the task of bringing the group to the negotiating table and providing the option of an amnesty for those who are willing to reject violence and embrace peace talks. On 16 September 2011, former president Olusegun Obasanjo (1999–2007) held talks with some Boko Haram members in their birthplace and stronghold, the north-eastern city of Maiduguri, where they tabled demands for a ceasefire which included an end to arrests and killings of their members, payments of compensation to families of sect members killed by security personnel, and prosecution of policemen responsible for the killing of the group’s initial leader (Agbiboa 2013b). These demands were submitted to President Jonathan who promised to look into them. In 2012, Datti Ahmad, president of the National Supreme Council on Sharia, who is believed to have the respect of Boko Haram’s founder, Mohammed Yusuf, attempted to reach out to the group. Unfortunately, contact was broken by Boko Haram, who accused the Nigerian government of acting in bad faith, after the media gained access to the deliberations. Boko Haram responded to fresh reports of another initiative in early June 2012 by advising the prospective interlocutor, Islamic scholar Dahiru Usman Bauchi, to ‘steer clear’ (IRIN 16 July 2012). In August 2012, 58 percent of Nigerians supported dialogue with Boko Haram, according to a survey by the CLEEN Foundation (originally known as the Centre for Law Enforcement Education) and the Alliance for Credible Elections. In the predominantly Muslim north, where Boko Haram has been most active, there is an almost universal demand for dialogue, while in the south the prevailing attitude is that there can be no negotiation with ‘terrorists’ until they end the insurgency that has killed thousands of innocent people. But with the continued attacks on churches in the north, tolerance is fast evaporating across the mainly Christian south, even though a considerable number of Boko Haram’s victims have been fellow Muslims (IRIN 16 July 2012).



In the most recent attempt to negotiate with key leaders of Boko Haram, the Nigerian President Goodluck Jonathan established a 26-member amnesty 'Committee on Dialogue and Peaceful Resolution of Security Challenges in the North' (henceforth, the Committee). The Committee, headed by Nigerian Special Duties Minister Kabiru Tanimu, was given a three-month mandate to try to convince Boko Haram to lay down its arms in exchange for a state pardon and social integration (Thurston 2013). According to a released presidential statement, the Committee 'has been given the task of identifying and constructively engaging key leaders of Boko Haram, and developing a workable framework for amnesty and disarmament of members of the group' (Thurston 2013). The Committee was made up of former and current government officials, religious authorities and human rights activists. However, Boko Haram's supreme leader, Abubakar Shekau, has responded to the amnesty entreaties of the Nigerian government by saying that his group has not committed any wrong, and that an amnesty would not be applicable to them. Shekau argued instead that it was the Nigerian government committing atrocities against Muslims. In his words: 'Surprisingly, the Nigerian government is talking about granting us amnesty. What wrong have we done? On the contrary, it is we that should grant you [a] pardon'. In a video released on 13 May 2013, Shekau vowed not to stop his group's violent campaigns to establish an Islamic state in Nigeria under a strict form of Sharia law (Agbibo 2013a). True to his threat, less than a week after Boko Haram rejected Nigeria's amnesty offer, the jihadist group claimed responsibility for two back-to-back violent attacks in northern Nigeria. In the first attack, Boko Haram members disguised in Nigerian military uniforms, in buses and machine gun-mouthed trucks, laid siege to the town of Bama, in Borno State, killing 55, mostly police and security forces, and freeing over 100 prison inmates. Days later, Boko Haram members killed 53 people and burnt down 13 villages in Nigeria's Benue state (Agbibo 2013c).

In the wake of the recent violent attacks of Boko Haram, the Nigerian President Goodluck Jonathan declared a state of emergency in an attempt to restore order and reclaim control of the territories taken over by the sect in three northern states – Borno, Adamawa and Yobe – where Boko Haram has been most active (BBC News 2013a). This is not the first time the president has done this.

## Religious terrorism, Boko Haram, and the dynamics of state response

In December 2011, following spates of Boko Haram attacks, President Jonathan declared a state of emergency in 15 local government areas of six northern states. In a pre-recorded address to the Nigerian public on 14 May 2013, President Goodluck Jonathan openly declared that '[w]hat we are facing is not just militancy or criminality, but a rebellion and insurgency by terrorist groups which pose a very serious threat to national unity and territorial integrity' (BBC News 2013a). Jonathan further stated that 'it would appear that there is a systematic effort by insurgents and terrorists to destabilize the Nigerian state and test our collective resolve' (BBC News 2013a). The president's speech clearly underscored the seriousness and unprecedented nature of the Boko Haram crisis, at one point describing how Boko Haram fighters had taken control of state buildings and 'had taken women and children as hostage' (Agbibo 2013a:66). According to Jonathan, 'these actions amount to a declaration of war and a deliberate attempt to undermine the authority of the Nigerian state and threaten (its) territorial integrity. As a responsible government, we will not tolerate this' (Fox News 14 May 2013). Jonathan vowed to 'take all necessary action ... to put an end to the impunity of insurgents and terrorists', including the arrest and detention of suspects, the taking over of Boko Haram hideouts, the lockdown of suspected Boko Haram enclaves, the conducting of raids, and the arrest of anyone possessing illegal weapons (IRIN 22 May 2013).

Thus, in 2012, President Goodluck Jonathan amended the Nigerian Terrorism Prevention Act of 2011 and tasked the office of the National Security Adviser to conduct anti-terrorism operations (ICG 2014:30). Since this amendment was made, Boko Haram and its well-known splinter sect, Ansaru, have both been declared as terrorist organisations by the Nigerian government. The International Crisis Group (2014:30) reports that the Nigerian state is now prosecuting several Boko Haram suspects; although it is not exactly clear how the security forces acquired the evidence to arrest these suspected members of Boko Haram considering the well-documented problem of intelligence police data gathering and 'its poor and inconsistent application' (ICG 2014:33).

Whatever the practical merits of the modest attempts by the Nigerian government to negotiate with Boko Haram and strengthen its anti-terrorism laws, there is ample evidence that lends credence to the overwhelming

investment in the stick approach by the Nigerian state, involving the use of state security forces to 'mount aggressive pursuit and crackdown of [Boko Haram] members' (Onuoha 2012). To this end and intent, the Nigerian government established a special Joint Military Task Force (JTF), known as 'Operation Restore Order' to crush the Boko Haram group. The JTF are supplemented by the Civilian JTF (CJTF) and a small contingent of Chadian and Nigerian forces who were members of a 'Joint Multinational Task Force (JMTF) initially created to combat smuggling' (ICG 2014:34). The establishment of these forces have to some extent destabilised the operational capabilities of Boko Haram 'to conduct coordinated bombings like the ones it carried out in major urban cities in 2011 and 2012' (ICG 2014:35). However, the effort is yet to blunt the sect's attacks. This is despite the unprecedented defence and security vote of US\$6 billion for 2012, collaboration with Western security forces, and the closure of Nigeria's borders with its northern neighbours (Al Jazeera 2013b). In the biggest campaign to date against Boko Haram, the Nigerian president ordered some 8 000 soldiers to the troubled northern region in a direct military offensive against Boko Haram fighters (BBC News 2013b). In less than three days into the military operation, the JTF recorded its first achievement, announcing that it had rescued nine women and children held hostage by Boko Haram during a recent crackdown on one of the group's major hideouts (Sahara Reporters 2013). A curfew was imposed on Maiduguri as the JTF used air strikes to target Boko Haram strongholds. The Nigerian government also imposed a blockade on the group's traditional base of Maiduguri in Borno State in order to re-establish Nigeria's 'territorial integrity' (Al Jazeera 2013a).

However, far too often, members of the JTF and the State Security Services (SSS) have been accused of killing innocent people in the name of countering terrorism in northern Nigeria. In Borno State, for example, JTF members have allegedly resorted to extra-legal killings, dragnet arrests and intimidation of the hapless Borno residents (Agbibo 2013a). As noted by Hussein (2012:9), 'far from conducting intelligence-driven operations, the JTF simply cordoned off areas and carried out house-to-house searches, at times shooting young men in these homes'. In Maiduguri, 'The security agents increasingly see members of

the society as siding with the group' (Hussein 2012:9). Drawing on its interviews with residents at Maiduguri, Human Rights Watch reports that: 'during raids into communities soldiers have set fire to houses, shops, and cars, randomly arrested men from the neighbourhood, and in some cases executed them in front of their shops or houses' (HRW 2012:60). Furthermore, 'government security agencies routinely hold suspects *incommunicado* without charge or trial in secret detention facilities and have subjected detainees to torture or other physical abuse' (HRW 2012:58).

In a recent crossfire between members of the JTF and Boko Haram in Baga, a village on Lake Chad near Nigeria's border with Cameroon, up to 187 people were killed and 77 others injured. But Baga residents have accused the JTF, not Boko Haram, of firing indiscriminately at civilians and setting fire to much of the historically fishing town (Atlanta Blackstar 23 April 2013). The Nigerian authorities have rarely brought any security forces to justice for these alleged large-scale crimes against civilians (HRW 2012). Although the Nigerian police have denied the allegations of brutality against civilians, it must be noted that Nigeria's armed forces have an unenviable history of terrorising 'ordinary' Nigerians. As Alemika (1988:161) argues, the legacy of the Nigerian armed forces is that of 'arbitrariness, ruthlessness, brutality, vandalism, incivility, low accountability to the public and corruption'. The same verdict may be passed on the Nigerian state itself, as the late Professor Ake (1992:16) notes: 'More often than not, the post-colonial state in Nigeria presented itself as an apparatus of violence, and while its base in social forces remained extremely narrow, it relied unduly on coercion for compliance, rather than authority'.

Relentless attacks by Boko Haram, excessive use of force by the JTF and inter-communal violence in northern Nigeria are currently creating a deadly cocktail that puts populations at heightened risk of crimes against humanity in Nigeria. As fighting intensifies between the JTF and Boko Haram, the indiscriminate use of force by both sides is contributing to a rising number of civilian deaths. Caught between what Mustapha (2012) describes as 'Boko Haram and Government Haram', civilians continue to face potential mass atrocity crimes. This is especially critical when we bear in mind that the JTF have been accused of targeting civilians and committing human rights violations. Already, the

United Nations High Commissioner for Refugees (UNHCR) has announced that over 6 200 refugees have arrived in Niger from northern Nigeria fearing retaliatory attacks and general insecurity as a result of an intensified state offensive against Boko Haram (Agbiboa 2014a).

In the latest development, the JTF are enlisting untrained youths armed with machetes and sticks for their fight against Boko Haram. This pattern is increasingly evident across northern states, but especially in Maiduguri where the youth vigilante group – who call themselves the Civilian JTF – and the state JTF are tracking down Boko Haram members and preventing suspected members of the group from returning to the state capital from where they were forced out in a military crackdown in May 2013. The battle between Boko Haram and the Civilian JTF, comprised of some 500 youths, has had a chequered history with many youths needlessly killed. While the efforts of the Civilian JTF have been commended by the state political leadership, there are growing concerns that the Civilian JTF is a ‘brewing disaster’ which could transform into a new militia if their activities were not placed under strict regulation by the state (Olugbode 2013).

The growing frustration of the Nigerian government with the deteriorating security situation in northern Nigeria has become increasingly evident in its ‘flip-flop’ approach from dialogue about granting amnesty to Boko Haram members to the deployment of military troops and the proclamation of war against Boko Haram in less than a month (see Council on Foreign Relations 2012). The latter, coupled with President Jonathan’s declaration of a state of emergency in troubled parts of northern Nigeria, has added a further complication to the already Herculean task of the amnesty Committee and made it almost impossible to win the trust of senior Boko Haram leaders (Council on Foreign Relations 2012). The adoption of such contradictory strategies by the Nigerian state has stalled any prospect of a negotiated dialogue with Boko Haram. As one leading rights activist in the north, Shehu Sani, who has participated in past negotiations with Boko Haram, recently noted: ‘You can’t talk of peace on one hand and be deploying troops on the other’ (cited in IRIN 22 May 2013).

The questions currently facing the amnesty Committee are serious: How will the new Committee identify credible interlocutors? Can anyone speak for Boko Haram, particularly if it proves increasingly fragmented and prone to the emergence of splinter groups like Ansaru? If Boko Haram has already rejected amnesty, what conditions would induce a *volte-face*? Does Boko Haram have grievances and demands that an amnesty programme could feasibly address, as in the case of the oil conflict and struggle for survival in the Niger Delta? (Thurston 2013).<sup>2</sup> Will the current state of emergency and efforts towards amnesty prove mutually reinforcing, constituting a ‘carrot and stick’ approach to Boko Haram, or does the state of emergency signal that the Nigerian government lacks a clear strategy (Thurston 2013)? The task of the amnesty Committee is also complicated by the fact that, as President Jonathan once argued: ‘Some [supporters and members of Boko Haram] are in the executive arm of government, some of them are in the parliamentary/legislative arm of government, while some of them are even in the judiciary. Some are also in the armed forces, the police and other security agencies’ (Agbiboa 2013a). However, Ishiekwene argues that ‘whether the country has been brought to its knees by the enemies within, or whether corruption and poor leadership have enfeebled the government’s response, it is frighteningly clear that this is now a war for the country’s very life’ (Foreign Policy 6 May 2014).

Appreciably, the carrot and stick approaches of the Nigerian government has polarised the Nigerian public into two groups: those who support the use of coercion on the one hand and supporters of conciliation on the other (Aghedo and Osumah 2012). Advocates of a coercive approach to tackling terrorism argue that force rather than dialogue is more effective in dealing with terrorist organisations. However, many others are overwhelmed by the threat of a possible civil war in a country of about 170 million people – Africa’s largest. These people contend that a coercive strategy would be ineffective in resolving

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2 While the amnesty deal in the Niger Delta allowed the state to buy off militant leaders to ensure maximum oil production, such a strategy might be impracticable with Boko Haram terrorists because of their narratives of grievance, which, as Aghedo and Osumah (2012:854) argue, are largely religiously driven and therefore less pecuniary than those of the Niger Delta militants, whose grievances were for a more equitable share of oil rents sourced from their homelands (see Thurston 2013).

the crisis because of ‘the relative incapacity of the state security apparatus’ and the fact that ‘Boko Haram rebels operate from among the people and target both government and ordinary citizens’ (Aghedo and Osumah 2012:854). These people suggest non-killing measures, including political dialogue and amnesty packages. Also, the carrot and stick approaches of the Nigerian government have generated mixed reactions from informed observers. Some argue that the Nigerian government was forced into taking a military action against Boko Haram. According to Mahmud, a famous constitutional lawyer in Nigeria, ‘[n]o government anywhere will allow a group to usurp part of its territorial sovereignty. The declaration of a state of emergency was necessitated by the constitutional obligation to restore a portion of Nigeria’s territory taken over by an armed group which involves the suspension of constitutional provisions relating to civic rights’ (IRIN 22 May 2013).

Other observers, however, worry that the stick response of the Nigerian government will force Boko Haram to shift their bases, with grave consequences for Nigeria and neighbouring countries. As Nigerian political scientist Kyari argues, ‘Boko Haram cannot face Nigerian troops in conventional war; the troop deployment to northern Borno means they will move out to other towns and cities with less military presence and launch guerrilla war, which is deadlier’ (IRIN 22 May 2013).

While the current military crackdowns on Boko Haram has the potential to significantly degrade the group’s operational capability to mount large-scale and coordinated violent attacks, it must be considered that relying exclusively on such an approach may increasingly force ultra-radical elements within the group to network with global jihadist groups like Al-Qaeda in the Islamic Maghreb and the Somali-based Al-Shabaab as a form of survival strategy. In the event of this happening, the group’s operational base could expand beyond northern Nigeria and their target selection could change fundamentally to include attacks on Western interests. Although the establishment of the amnesty Committee reflects President Goodluck Jonathan’s acknowledgment that purely military means cannot resolve the current impasse, it is also consistent with policymaking tendencies toward the extremist group that are ‘reactive, ad hoc, and cyclical’ (Thurston 2013).

## Conclusion and recommendations

The current Boko Haram crisis poses the fiercest challenge to Nigeria's unity since the end of the three-year Civil War in 1970. The International Crisis Group (2014:40) notes that the Boko Haram crisis has fractured Nigerians along religious lines and thus 'reversed some of the country's hard-won gains in building national unity and stability'. In addition, the generalised sense of insecurity and ubiquitous bomb scares has dealt a major blow to political and socio-economic activities in northern Nigeria. With the 2015 elections approaching, Boko Haram has remained unrelenting and as a result, local communities are growing increasingly apprehensive due to the frequent bombings, shootings, and arbitrary killings on the part of state security forces. Unfortunately, military crackdowns have failed to curb spiralling violence in northern Nigeria or to rein in Boko Haram's violent attacks; on the contrary, it might have even strengthened Boko Haram's resolve against the Nigerian state, while alienating the local community. In a recent video footage, Boko Haram's leader, Abubakar Shekau, claimed that the ongoing military offensive against his group by the Nigerian forces is failing. In the video, Shekau called on his fellow brethren from Iraq, Pakistan, Afghanistan, and Syria to join what he called Boko Haram's jihad. He assured them that 'we are strong, hale and hearty since they [the Nigerian forces] launched this assault on us following the state of emergency declaration' (Al Jazeera 2013a). Shekau's words cast serious doubts on the one-sided victory claims by the Nigerian security forces that the Boko Haram rebellion has been crushed (Agbibo 2013a).

A significant aspect of the current campaign of violence in northern Nigeria is the rigidity of the Nigerian forces in dealing with Boko Haram. Admittedly, resolving the current crisis is not an easy task, but resorting to the unidirectional tactics of military crackdowns can only further complicate matters by militarising the polity and escalating violence. We argue that efforts must be made to understand which strategic choices would sustainably attend both to the underlying factors that make Nigeria vulnerable to terrorist threat and to the sustained grievances of Boko Haram. In other words, the failure of military force to reduce spiralling violence in northern Nigeria calls for a strategic rethink that must be open



to all the components that are conducive to violence. To this end, we make specific recommendations to the Nigerian state, the neighbouring states in the region (ECOWAS member states), the Nigerian people and religious leaders of the different convictions, but especially of Islam, and to the Boko Haram group itself.

### **To the Nigerian state**

If Nigeria is to effectively respond to the current Boko Haram crisis, the following policy recommendations should be seriously considered by the Nigerian political leadership:

(1) The Nigerian government should work towards winning the confidence of Boko Haram by implementing some of the demands the group members presented to the government, including the release and the payment of compensation to the families of those killed in the security crackdowns by the JTF. This will demonstrate to the Boko Haram members that the government is sincere about its willingness to hold dialogue with them. In addition, as the 2015 election approaches, the northern governors and other public officials must strive to guard against any form of electoral violence or religious intolerance during this period. Already, there are widespread allegations from southern Nigeria that Boko Haram is the handiwork of northern leaders. If the 2015 elections turn violent in northern Nigeria as in 2011, the integrity and reputation of northern leaders will be severely tainted.

(2) The Nigerian government must develop an effective counterterrorism policy that goes beyond a security-only killing approach in order to embed counterterrorism in an overarching national security strategy that appreciates the broader context in which Islamic radicalisation occurs. What Nigeria has lacked so far is a viable concept of strategic counterterrorism that will guide her actions, help undermine the recruitment of terrorists, and change the environment they inhabit into an increasingly non-violent and permissive one. The declaration, on 18 March 2014, by the National Security Adviser of the adoption of 'soft approaches' to counter Boko Haram is a progressive step in this direction (ICG 2014:42). The Nigerian state must demonstrate the willingness and consistency to implement these soft approaches in tackling the Boko Haram

crisis. This will entail, at least, the institutionalisation of counter-radicalisation programmes and civic education in schools, communities and religious houses; the provision of entrepreneurial opportunities for the countless jobless youth in northern Nigeria, and the entire country; and the establishment of counselling centres and social support services for extremists and detained terrorists or suspected terrorists.

(3) There is a need for an intelligence-led strategy to better confront Boko Haram's localised terrorist activities and its global aspirations. Added to this, there is a necessity for greater international cooperation in terms of identifying and intercepting Boko Haram's growing external funding, weapon sources, and training which is crucial to the group's operational capabilities. In this context, the Nigerian Police Force can benefit greatly from the work of the International Criminal Police Organisation (INTERPOL) who have more sophisticated intelligence gathering equipment and experts on transnational crime in West Africa. Thus, the Nigerian state should organise an effective means of cooperating with INTERPOL in order to benefit from its operations, training, and equipment.

(4) Since Boko Haram is infusing religion into a long-churning brew of grievances about corruption, injustice and unfair distribution of wealth and power, a long-term strategy that will undercut the jihadist appeal in northern Nigeria must address the sources of socio-economic inequalities and human insecurity in the region – the poorest geopolitical zone in Nigeria in terms of socio-economic indices. In collaboration with the state and local governments, the federal government should undertake a grassroots socio-economic empowerment programme that is aimed at generating employment opportunities and promoting human security. In this regard, it is important to recall the words of Azar, that 'conflict resolution can only occur and last if satisfactory amelioration of underdevelopment occurs as well ...' (cited in Ramsbotham et al. 2008:86). Similarly, Schroder (2003:1) argues that '... to address the root causes of terrorism and insecurity ... we must ensure social and material but also cultural security'. In line with Azar and Schroder, we argue that non-killing policies that overcome economic and social insecurity or political instability are most likely to be effective in reducing the incentives for religious terrorism in northern Nigeria.

Some prominent Nigerians, including the former Central Bank Governor, Sanusi Lamido Sanusi, have pushed for the establishment of a federal ministry of northern development similar to the one established in the Niger Delta region (ICG 2014:42). Even if this ministry does not see the light of day, it is incumbent upon the Nigerian state to channel resources and demonstrate the will toward developing the largely dormant agricultural and other economic industries in northern Nigeria.

(5) The use of military force as a counterterrorism strategy is frequently unwise because it is inevitably indiscriminate and often results in the alienation of exactly those individuals in northern Nigeria who we do not want radicalised. Moreover, military action against terrorist targets often causes the deaths of innocent civilians, no matter how much care is taken (Agbiboa 2013b). A military strategy does not only provide terrorists with critical experience in tactics, but forces them to create new networks of support as a form of survival strategy. A non-killing strategy that perseveres in political dialogue is likely to win the trust of the Boko Haram leadership which is crucial to bringing them to the negotiating table (Agbiboa and Maiangwa 2013).

### **To neighbouring states and ECOWAS**

Bearing in mind that the threat of Boko Haram is expanding into neighbouring countries, with recent attacks and kidnapping of foreigners by Boko Haram in Cameroon, we argue that regional efforts and collaboration in counterterrorism is essential in combating not just the terrorism of Boko Haram, but other terrorist franchises holding sway in West Africa and the entire Sahel Sahara axis. As it stands, the Nigerian state is currently struggling to combat the terrorism of Boko Haram, and its appreciable weakness in this capacity has also affected its contribution to the regional counterterrorism efforts under the auspices of ECOWAS. Along these lines, Nigeria will need the help of its neighbours, especially those with whom it shares contiguous borders, such as Niger, Chad, and Cameroon. Together, these countries can develop efficient intelligence-sharing capability and provide well-trained security forces to police their porous borders against the influx of weapons, terrorist elements and drugs. In the long-run, ECOWAS will have to revitalise its Stand-by Force for this purpose.

But it can only do so with the support and commitment of its member states and, of course, the African Union and the United Nations. In addition to this regional effort, the International Crisis Group (2014:46) argues that Nigeria should urgently implement its policy of sending senior ambassadors and defence attachés to deliberate on security matters with other countries within the West African region. If successful, this can lead to strong bilateral security arrangements between Nigeria and her immediate neighbours who are also affected by the Boko Haram crisis.

### **To the Nigerian people and religious leaders of the different convictions**

There is an urgent need for religious leaders and followers of the different religious convictions in Nigeria to join together to publicly denounce all forms of religious intolerance and sectarian violence and encourage, especially through sermons, the need for religious harmony and tolerance of other faiths. In particular, dialogue between Christians and Muslims is vital because it will help clear the clouds of misunderstanding and create a better ambience of mutual enrichment. In addition, dialogue about action, communion and socio-political life should be promoted at all levels of society. These could include joint social projects, joint health projects and joint economic ventures that will facilitate community development and peaceful coexistence. All religious communities must understand that there is no alternative to inter-faith dialogue, as there can never be a universal religion or an exclusive society for adherents of a particular religion. The Nigerian state can encourage interfaith dialogue by establishing interfaith dialogue centres in various parts of the country, beginning from the north. The state governors can support this initiative by appointing renowned religious leaders from both the Christian and Islamic faiths to lead interfaith dialogue and programmes of mutual understanding in these centres (Maiangwa 2013). Islamic religious leaders in northern Nigeria should also find a way of dismantling the textual universe of *Salafist* Islam on which the Boko Haram ideology hinges (Ulph 2013:72). Also, Christian and Muslim religious education should be tailored in such a way as to eschew the exclusive teaching of dogmatic Christian and Islamic doctrines and to foster mutual respect, tolerance and amity. It cannot be expected that the gains of such engagement will come any

time soon because it will require ‘massive investments in educational resources’ (Ulph 2013:72). However, if the process is delayed or not executed, there may be no end in sight to Islamic radicalism in northern Nigeria.

### **To Boko Haram**

Boko Haram also has a significant role to play in resolving some of its grievances. In this regard, we press further the view of the International Crisis Group (2014:47) that Boko Haram should ‘formulate clear minimalist conditions for ending the violence ... the sect and its affiliates should explore with the government how to reach a rapprochement’. This will enable the Boko Haram group to continue with its tradition of helping the poor and the less privileged through acts of social work and charity, which are also notable works undertaken by some terrorist groups elsewhere like Hezbollah and Hamas (Moghaddam 2006:3). However, as already stated in the theoretical section of this paper, appeasing a religious terrorist group like Boko Haram will be a difficult endeavour, if not altogether an impossible task. This is particularly so due to what we alluded to as the poisoned worldview of universal/abstract religious terrorist groups who revel in jihad as the only solution to attaining their spiritual objectives (Byman 2003:147).

In the final analysis, if Boko Haram remains determined to Islamise Nigeria, the cycle of violence involving the group and the Nigerian state will persist with insidious consequences on the lives of ordinary civilians. In the long run, the Nigerian state may eventually win the war against the group. But as we have argued, this Pyrrhic victory will entirely depend on how the battle is fought.

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# Popular dispute resolution mechanisms in Ethiopia: Trends, opportunities, challenges and prospects

*Gebreyesus Teklu Bahta\**

## **Abstract**

This article finds that high-ranking officials within the judiciary and executive, heads of some organisations, and certain researchers have acclaimed the harmonisation and application of the Popular Dispute Resolution Mechanisms (PDRMs) in Ethiopia's justice system. To this effect, they have sponsored national and regional forums, conferences and workshops; established research institutions and centres as well as sponsored scholars who conduct research on this initiative. The positive attitude of these stakeholders towards PDRMs, the multiplicity and diversity of PDRMs, as well as the support of various institutions to such initiatives are considered to be good opportunities for the harmonisation and application of these practices in the country's justice system. On the other hand, the absence of clear laws and policies related to the legitimacy of the informal justice systems, the level of administration to which they should be accountable, their interconnection with the formal courts and other state structures, the scope of application of their jurisdiction and their financial transactions are found to be serious challenges that demand immediate attention. Some of the hitherto existing research works are found to be scattered, poorly cross-referenced and out-of-the-reach of researchers and readers; while others are shallow in their investigative depth and limited in thematic and

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\* Dr Gebreyesus Teklu Bahta is a Post-Doctoral Fellow at the Institute for Dispute Resolution in Africa, University of South Africa, Pretoria.

geographical coverage. In order to address these challenges and dilemmas, the article recommends the establishment of a new regulatory organ at macro level that has the capability and legitimacy to adapt and harmonise PDRMs in ways that can preserve the traditional African indigenous values and at the same time respect international human rights convention

## **1. Introduction**

The first half of the 20<sup>th</sup> century witnessed the highest number of casualties in human history – mostly due to interstate wars. During the second half of the 20<sup>th</sup> century, intrastate wars, coup d'états, civil wars, religious and ethnic conflicts ravaged many countries of Asia, Africa and some places in Europe. Many of these conflicts were resolved by armed struggles that took millions of lives and quintillions of dollars-worth assets. During the colonial period, Africans, some supporting the winners and others the losers of the Second World War, paid human lives for the holocaust. Apart from small conflicts between the colonial powers in some parts of Africa, which indirectly or to a lesser extent directly influenced Africans, the continent was relatively peaceful at that time. Since the cessation of the Cold War Era, however, the tide of conflict has shifted towards Africa. Western-states-sponsored coup d'états, civil wars, genocides, religious conflicts, and interstate conflicts have become routine. Andreas (2010:1) stated that Ethiopia, like the other African war-ravaged states,

... has been consumed by strife for most of the nineteenth century and more than a third of the twentieth century. The horrors engendered by violent conflict in Africa are vivid and pervasive, among these: The loss of millions of lives, and the painful displacement of countless citizens and communities; no less tragic is the loss of opportunities and capabilities to improve the lot of the living.

Ethiopia has attempted to solve conflicts of various types either through armed struggles or formal court litigation. Currently, the international and regional tendencies with regard to conflict resolution mechanisms have shifted towards alternative methods of conflict resolution. After the cessation of World War II, the alleged perpetrators of interstate conflicts, civil wars, genocides and rampant human rights violations across the world were made to face trials before

formal courts or military tribunals, but these were found to be inadequate for resolving conflicts and restoring tranquillity. Since the emergence of the Cold War, governments, human rights activists, psychologists, anthropologists, sociologists and political scientists have demonstrated a huge interest in alternative forms of dispute resolution (Harty and Modell 1991). Concerned individuals, communities and organisations started to recognise and appraise the significance of informal or non-state systems and practices of conflict resolution.

These systems have been given different names by different scholars: unofficial law (Chiba 1993), traditional institution of conflict resolution (Zelege 2010), traditional justice systems (Slade 2000), non-state laws (Assefa 2011), customary dispute resolution mechanisms (Yntiso et al. 2011), restorative justice (Macfarlane 2012), and alternative dispute resolution (Gowok 2013). For the sake of consistency and contextualisation of the concept with the Ethiopian situation, I have decided to use the term ‘popular dispute resolution mechanisms’ (PDRMs) in this article. I prefer the term ‘popular’ to others because this word is closely associated with the broad masses indicating that the practice of conflict resolution emanates from the people and serves the people.

Africans apply PDRMs although such practices have been seriously challenged since the Era of Slave Trade and Colonialism. Similarly, PDRMs have been acclaimed as popular ways of administering justice even after the introduction of authoritative written laws: such as *Fetha Nagast* (the Law of the Kings) in the 15<sup>th</sup> century and the codes of the 1950s and 1960s in Ethiopia (Yntiso et al. 2011). Regardless of their wider popular acceptance throughout the country, PDRMs have been marginalised since the 1950s and 1960s when the imperial regime was engaged in the extensive codification and overhaul of the existing laws with the aim of ‘unifying’ and ‘modernising’ the laws. In the enactments codified at that time, PDRMs related to family relations and interpretations of contracts were incorporated as long as these practices did not contradict the Codes. Most of these conciliatory practices were designed to be used under the supervision and recommendation of the formal courts that functioned under the new Codes. In this connection, the Civil Code of the Empire of Ethiopia (1960: Art. 3347 (1)) stipulates that: ‘Unless otherwise expressly provided, all rules whether written or

customary previously in force concerning matters provided for in this code shall be replaced by this code and are hereby replaced'. This has rendered most of the PDRMs illegal.

Haile Selassie I, the monarch who spearheaded the 'campaigns of modernisation' and codification of the Ethiopian laws in the 1950s and 1960s, along with his legislative team, seem to have been torn halfway between their propensity to overhaul and modernise the laws and their desire to include the rich legal and cultural heritage of the country as can be perceived from the monarch's words as stated in *Fetha Nagast* (Tzadua and Strauss 1968:v): 'No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation'. The Codes introduced at that time were, however, highly dependent on foreign experiences; less exhaustive in the content and depth of the issues they covered; less compatible with the conflict management styles of the different ethnic and religious groups; unresponsive to the communal philosophies, life styles and demands of the people; incongruent with the multiplicity and diversity of adjudicative practices and procedures of the people; and alien to the majority of legal professionals, law enforcement agencies as well as the traditional institutions (Schiller 1966; Zeleke 2010; Yntiso et al. 2011; Koang 2011). The laws were also inaccessible to the majority of the population, especially to the rural community. This was demonstrated by the distance between the litigants and the judicial officers, the transactional costs of litigation and the duration of proceedings. In the name of modernising and unifying the laws of the country, 'fantasy laws' (Schiller 1966) were imposed on the people. Being cognizant of this fact, most of the people still depend on PDRMs even after the introduction of the new laws in the 1950s and 1960s.

Currently, both government officials and researchers have accepted the international and regional tendency to synchronise and apply PDRMs in the country's justice system. They have demonstrated their commitment by hosting national and regional forums, conferences and workshops; establishing research institutions and centres as well as sponsoring scholars who conduct research on PDRMs. The practical experience of the majority of the people is in favour of this consensus. This is a very great leap forward. However, there are various factors that demand immediate attention. This article attempts to identify the

existing opportunities, prospects, trends, challenges, dilemmas and obstacles for the classification, documentation, harmonisation, legalisation and application of PDRMs in Ethiopia's justice system.

### **2. Current trends and opportunities**

PDRMs are more relevant to the African condition than the formal mechanisms. The first reason is related to the philosophical background upon which the concept of conflict resolution is based. The Westernised dispute resolution mechanism bases itself on the philosophy of individuals: the liberty of an individual, private ownership of most means of production and the obligation of individuals to indefinitely contest to be the winner. On the contrary, the African PDRM bases itself on the philosophy of communalism where the plight of an individual is achieved, protected and restored through the primacy of societal welfare, and where the view is that if the communal norms, values, traditions, practices are healthy, an individual will be healthy (Chiba 1993; Mekonnen 2010; Elechi et al. 2010).

The second reason that makes PDRMs relevant to Africa is related to the recurrence of interstate wars, civil wars, and genocides that haunt the continent and its people due to an alien epistemology imposed through Western education and political intrigues networked across the continent by foreign hegemonic powers that make profits out of conflicts. Attempts to solve the African interstate, tribal, marital, religious and personal conflicts through Westernised court proceedings or regional or international tribunals failed to meet the popular demand of the war ravaged Africa because these proceedings are alien and sometimes contrary to the norms, demands and values of the African people (Okerefoezeke 2002; Jenkins 2004; Yntiso et al. 2011).

The third reason for the preference of PDRMs above state court proceedings or international tribunals is the familiarity of the PDRMs to the African people. They have been used by various ethnic groups over millennia. The procedures and the implementation of the verdicts are akin to the norms, ideology and social psychology of the people (Elechi et al. 2010; Yntiso et al. 2011). The verdicts are often given by honoured and venerated elders. It is believed that



these elders communicate with powerful spirits that can have an influence on the disputants and even their descendants if they refuse to obey decisions or if they tell lies in a forum (Koang 2011; Woubishet 2011). This makes the PDRM a better means of investigating criminal or immoral offenses perpetrated in the absence of any evidence. It compensates for the absence of sophisticated forensic capability in the traditional communities. The proceedings are mostly carried out in a public manner. The wrongdoer, the victim and other members of the community participate in the debates. The procedures of PDRMs are more flexible as compared to those of the court proceedings (Zelege 2010; Woubishet 2011).

Having recognised the significance of PDRMs, the government of Ethiopia, various non-governmental organisations, individual researchers and institutions have attempted to lay the foundations that could promote the application of PDRMs in the country's justice system. As part of this commitment, the government has supported the establishment of the Institute for Peace and Security Studies (IPSS) at Addis Ababa University and the Ethiopian Arbitration and Conciliation Centre (EACC). Both these institutions promote the significance of PDRMs in Ethiopia.

The most important contribution of the IPSS was demonstrated through its success in organising the first Tana High-Level Forum on Security in Africa in the city of Bahir Daron on 14–15 April 2012. The participants of the Forum included various stake holders from different sections of society. The meeting demonstrated the Ethiopian government's desire to entertain informal methods of conflict resolution.

As stated in the introductory remarks of both the chairperson of the Forum, the former president of Nigeria Olusegun Obasanjo, as well as the late prime minister of Ethiopia, Ato Meles Zenawi, all representatives were invited to contribute their ideas, regardless of their gender, age, race, social or economic power, on multifaceted conflicts in Africa and the mechanisms for their resolution. The Forum was different from the formal meetings of heads of states that usually pass formal resolutions. This shift of interest from the formal to the informal ways of conflict resolution is a great leap forward for Ethiopians

who prefer PDRMs to formal ways of conflict resolution. The informality of the Forum was not only marked by the selection of participants from different social hierarchies but also by the informality of the venue. The Forum was held under a baobab tree, which has symbolic value for African traditional societies. Olusegun Obasanjo, the chairman of the Forum, clearly explained this concern in the IPSS's 'report on The Tana High-Level Forum on Security in Africa' (IPSS 2012:8):

We have chosen the Baobab tree as a symbol of the Tana High-Level Forum; indeed we are going to talk under the tree here in the hall, in the best of African traditions. The tree symbolizes the importance of dialogue as a key aspect of conflict resolution and instituting peace and security. Meeting under the tree stands for the traditional values of love and brotherhood, hospitality and communalism of Africa. It also stands for the ethical principles of justice, reciprocity, equity, integrity and honesty. The Tana Forum challenges us to become ever more steadfast in pursuing these values and virtues.

As expressed in the words above, Africans have a special spiritual bond with a tree. It is a temple where the African ancestral spirits yield power to influence and guide the living in a symphony of hospitality and communal safety; a forum where the living pay tribute to the dead and vow to respect the communal indigenous values that connect the fabric of brotherhood, mutual concern, selflessness, commitment to protect natural and manmade disasters; a court where the wrongdoer is cleansed and the victim compensated; a school where the young are taught to become future leaders; a clinic where the sick are healed from spiritual and physical illnesses. This Forum heralds the commitment of African decision-makers in general and the Ethiopian government in particular to shift from formal methods of conflict resolution that are borrowed entirely from Western epistemology to indigenous African methods of conflict resolution that favour African philosophy and cosmology. The Forum has raised awareness for the introduction and application of PDRMs in the Ethiopian justice system.

The second important non-profit making organisation that assists PDRMs in the country, the EACC, was established with the support of the government

and other stake-holders, in August 2004, with the aim of facilitating and promoting the application of PDRMs in the justice system of the country. Since its establishment, it has hosted training workshops and forums; organised and funded research on PDRMs of various ethnic groups and published the findings in order to facilitate scholarly communication about the nature and applicability of PDRM's in the country.

The Ethiopian government's desire to shift from highly formal and Westernised methods of conflict resolution to informal African methods of conflict resolution was described as follows by Prof Andreas Eshete (IPSS 2012:13), who was an advisor to the Prime Minister:

[T]o advance the cause of peace in Africa, we must look beyond the norms and practices of states and intergovernmental institutions. The existence of an ethos upholding a culture of peace among ordinary citizens is essential if intercommunal violence and the all too common unspeakable abuses of children and women in Africa's wars is to be checked. For this, too, fora such as this [the Tana High-Level Forum] engaging leaders and ordinary citizens in reflective conversation on peace are vital.

Eshete's statement indicates the growing support of the Ethiopian government for PDRMs, hence opening the opportunity for research concerning the application of traditional conflict resolution mechanisms in the country's justice system.

The awareness and commitment of the Ethiopian government is reflected in the words of Birhanu, who was the State Minister of Justice in 2011. In a keynote address delivered at the workshop held on Alternative Dispute Resolution mechanisms on 5 March 2011 in Addis Ababa, Birhanu (2011:1–2) said as follows:

Side by side with the judiciary, there are numerous alternative dispute resolution mechanisms which have become prominent in the contemporary period. In any kind of the relationship she [Ethiopia] establishes with other countries of the world, our country like other similar states has been endeavoring and is continuing to make endeavors to put in place alternative dispute resolution mechanisms.

In his subsequent speech, Birhanu advocated the importance of designing new laws related to Alternative Dispute Resolution mechanisms. He also promised to offer his unreserved assistance to such endeavours. That workshop was convened to discuss a draft law on Alternative Dispute Resolution mechanisms related to contract administration only. The draft legislation was too limited in scope and content to be considered as a document that provides the legal framework for full-scale implementation of PDRMs in the country. It can, however, be regarded as a symptom of the positive attitude of the country's top officials towards PDRMs.

### **3. Challenges, dilemmas and ways out**

As indicated in the discussion above, the heads of some African countries and the Ethiopian officials have decided to reconsider the position of PDRMs in their countries' justice systems. There is a need for careful and systematic comparison of the formal and informal approaches of conflict resolution in all aspects in order to take the merits of each and design a new justice system that serves the people. This section focuses on the challenges and dilemmas that could be encountered in an attempt to design policy matters and regulatory laws related to the application of PDRMs in Ethiopia. The challenges and dilemmas that are focused upon in this article are related to the negative attitude of some scholars and institutions towards PDRMs, the absence of policies and laws that recognise, legitimise or specify the level of administration PDRMs should be accountable to, the unclear interconnection of PDRMs with the formal courts and other state structures, and unregulated financial transactions within PDRMs. The consensus reached by stakeholders and researchers about the importance of the wider application of PDRMs in both urban and rural populations will not be a success unless the severe challenges related to these issues are solved.

#### **3.1 The negative attitude of people towards PDRMs**

From the research outputs, peace-forum discussions and workshop presentations discussed above, it can be inferred that major stakeholders have already reached consensus about the significance of applying PDRMs in Ethiopia's justice system. This does not, however, guarantee the existence of a positive attitude

of all scholars about PDRMs. The law scholars of the 1950s and 1960s did not recognise PDRMs as part of the legal system. This is clearly stated in the conclusive words of Vanderlinden (1966/67:250), one of the major players in the codification of Ethiopian law of the 1960s: ‘... the contemporary [Ethiopian] legal system ... does not exist as such.’ As one of the prominent law instructors at Addis University, it is too difficult to assume that the writer did not know the existence of at least *Fetha Nagast*, the first Ethiopian written law. He rather did not want to recognise any written or unwritten PDRMs which were not Westernised. Other scholars of that time disregarded informal laws because of the unpredictability, precariousness, irregularity, incompleteness and unintelligibility. David (1962) summarised this disregard as quoted by Yntiso et al. (2011:32):

In the early 1960’s CDRMs [Customary Dispute Resolution Mechanisms] were criticized as difficult to ascertain because of widespread variation and labelled (sic) as ‘primitive laws’ hence implying ‘inferior laws’ compared to the formal law (this was the conception prevalent during the making of the codes in Ethiopia).

The latter scholars disclose the shortcomings of PDRMs based on the critical observation of the drawbacks of PDRMs in the treatment of women, children and the despised classes. There are situations when women, for example, become objects of compensation to avoid blood feuds – leaving alone all the cases where they do not get fair treatment for themselves as disputants. Abbute (2002), as quoted in Assefa (2011:193), describes the rituals of ‘... giving away of a girl during the reconciliation process between the feuding clans’ of the Gumuz community in Ethiopia to ‘be used by the victim families in any way they wish ...’. This tradition is very common among different ethnic groups in the country (Birhan 2011). Similarly, the despised classes of different kinds are either victimised by the PDRMs’ verdicts or attacked as scapegoats (as ways out of certain alleged social evils) (Wodisha 2011). Therefore, it is difficult to disregard the view of these scholars, since their concern is not merely attitudinal. It is obvious that PDRMs mostly favour the dominant local chiefs and religious leaders who do not see women and ordinary people as equal citizens. Despite their enormous benefits, PDRMs include some embarrassing and inappropriate practices for modern African states that have signed international human rights

agreements and norms. The dilemma here is to choose between appropriating their advantages and maintaining human rights conventions. This is, of course, a demanding task awaiting stakeholders who would do regulatory work on the applicability of PDRMs.

The negative attitude towards PDRMs is not limited to the law scholars mentioned above. Israel (2011) observed that some followers of Christianity (mainly Protestants) and Islam condemn certain rituals and folk materials of the *Gada* system among the Borona Oromos as 'pagan' practices and artefacts that should be abolished. Religious fanatics hold that some of the practices and procedures of PDRMs are dominated or accompanied by practices related to 'sorcery' and 'witchcraft', which in their opinion, should be regarded as the outcomes of 'evil', 'ignorance' and 'backwardness'. This is one obvious challenge which could be extremely complicated to solve if it is wrongly handled.

Ethiopia is one of the few African countries that embraced the three major Abrahamic religions, Judaism, Christianity and Islam, at the early phases of their expansion. All these religions advocate monotheism and condemn the practising of rituals with regard to ancestral spirits, and beliefs in the influence of the spirit of the dead upon the living, and in magicians being spiritually possessed. It would, therefore, be reasonable to see the inherent contradictions of value systems even within the practices of different PDRMs themselves. For thousands of years, there existed a coalition of the conflicting values which rested on the practical wisdom of the people.

In this connection, Birhan (2011) describes a miraculous ritual conducted together by both Muslim and Christian elders in order to resolve a blood feud between the families of murderers and those of victims in the Southern Wello of the Amhara Region. In the pre-conciliation stage, Christian and Muslim elders, accompanied by many people, march to the victims' houses and villages, attired in their own respective formal dresses and bearing their own symbolic object – the former carrying a cross, a big umbrella and a picture of Saint Mary while clicking cistern cymbals; the latter a bow and an arrow in order to influence the victims' family to be ready for reconciliation. During the conciliation stage one of the victims' families cuts off the neck of an old barren black sheep.

Then, the sheep is made to stand upright on its four limbs as if it were alive facing the north. While the victim's family stands on the right of the sheep and the murderers' family on the left, they pierce the belly of the sheep with knives on each side. Next, they shake hands with each other passing their hands through the pierced belly of the sheep. Then all of them pull the entrails and drag it out. This symbolises the union and reconciliation of both parties from the bottom of their heart.

The important point is that under normal circumstances, Ethiopian Muslims and Christians neither touch nor eat an animal which is slaughtered by the other party. For the sake of conflict resolution, however, they temporarily perform the rituals together. When they enter their hands into the pierced belly of the sheep which is killed by a person whose religion is different from their own, they do not mind touching the blood. The procedure is the same whether the conflict is between followers of the two religions or of one of them. The unity of the believers of Christianity and Islam demonstrates the unchallenged harmony of the followers of both religions across millennia, at least in the Ethiopian context. This shows that having differences in belief systems by itself is not a source of conflict as long as people are committed to live together in peace.

Modern lawmakers should not be frustrated by the multiplicity and diversity of rituals and religious practices. If wrongly handled, different belief systems could be a source of conflict and a severe challenge. Some religious believers, apparently committed to religious fundamentalism, tend to denounce indigenous customs, and such practices demand immediate intervention of the stakeholders concerned before misunderstanding develops into physical confrontation. In order to avoid the negative attitudes of different institutions or individual personalities, activities that raise awareness are recommended as a solution. Governmental, non-governmental and civic organisations should raise the awareness about the importance of PDRMs. The new generation must have an appropriate understanding of PDRMs. The essence of PDRMs should be published by the media and included in other ways of socialisation. Non-governmental organisations must also convene communication forums on PDRMs.

### 3.2 Absence of a clear policy direction and legal framework

The second sensitive challenge is related to the absence of a policy direction and comprehensive laws that deal with the legalisation, institutionalisation, and synchronisation of PDRMs within the country's justice system. The references in the Constitution and the few provisions stated in the Civil Code are limited to family and contractual relations. These few, scattered, ambiguous and shallow enactments are negligible when they are seen in the context of the proliferation of the wider corpus of the PDRMs in the country. The Afar and Somali Regional States have included some rules that legitimise certain PDRMs in their own respective regions' constitutions (Yntiso et al. 2011). This is an example for other regions to follow.

Before the other regions include their own PDRMs in the same manner, a comprehensive legal policy should be developed and endorsed at a national level in order to authorise the establishment of certain institutions that could facilitate the legalisation, systematisation and synchronisation of PDRMs in the Constitution as well as in the Civil and the Penal Codes. Currently, PDRMs in the whole country function in their own distinct ways. All *Shimagles* (elders) of Tigray (Assefa 2011) and Amhara (Alemu 2011), *Qualus* and *Aba Gadas* (elders) of Oromo (Israel 2011), Earth Priests of Nuer (Koang 2011) and the Boro-Shinasa's *Iketsa* (Witch) (Wodisha 2011) have their own distinct methods of fact-finding procedures and peculiar ways of giving and enforcing their decisions.

When we think of including them in the formal justice system, it is very difficult to include some mechanisms while others are excluded. This in turn might cause ethnic or religious conflict among groups whose PDRMs are recognised and those whose PDRMs are rejected. Under such circumstances, there is a possibility for PDRMs to function as breeding grounds of conflict instead of as mechanisms of conflict resolution. If we try to include all of them in the formal law of the country, it could be an unhappy marriage of an incongruent mosaic of cultural experiences. While there are different, even at times contradictory, practices, it might prove to be difficult to consolidate all these practices. If we try to include them in the specific scenarios where such experiences prevail,



efforts should also be made to resolve intra-ethnic, intra-linguistic and intra-religious conflicts.

Another issue worth discussing is related to the controversy of legitimising spirit mediums as PDRMs. Some elders claim to use spirit possession in all their reconciliatory activities. For example, the investigation of the wrongdoers is done through the medium of supernatural powers as in the case of *Ye Shakoch Chilot* (the court of the sheiks) (Zelege 2010), the Boro-Shinasha's *Iketsa* (Witch) (Koang 2011) and the Northern Shewa's *Wofa Legese's Wuqabi* (Woubishet 2011). These rituals are considered to be very effective means of investigating criminal activities for which evidence could not be produced. However, it would be difficult to recognise and include them in the formal laws because of the following reasons. If these practices are permitted, there would be an endless number of requests for recognition from magicians who claim to have supernatural possession. According to some reports from law-making and law-enforcing state organs, many magicians who claim to possess supernatural powers are reported to have caused disastrous damage on human health, life and property. Identifying 'honest supernatural possession' from 'dishonest supernatural possession' is extremely difficult. While society accepts the legal effect of PDRMs, the Constitution as well as the Civil and Penal Codes reject PDRMs as null and void when these practices are in contradiction with the formal laws. If traditional practitioners who mediate or reconcile conflicts through the medium of spirits are accused of sorcery and witchcraft, there is no legal provision that can be quoted to their rescue as long as magic is considered to be a criminal offence in Ethiopia. Should some seemingly odd but widely accepted practices such as administering justice through a revelation of supernatural spirits be offered a license to administer justice when it is impossible to identify 'a true magician with sincere supernatural possession' from 'a fake magician with fraudulent mystic possession'? Could that be justified scientifically or logically? Such questions might put lawmakers into dilemmas or bring them into conflict with one another. It requires inquiries into international, but mainly African, practices to handle this issue.

### 3.3 Absence of clear jurisdiction regarding PDRMs

The third challenge that needs attention is the institutionalisation of PDRMs in regard to content administration and jurisdiction. Currently, traditional institutions administer almost all kinds of disputes ranging from petty offences, civil cases, such as financial, familial and contractual disputes to first-degree murder cases and blood feuds. Regarding their geographical or regional coverage, some of them serve whoever comes to their forum (Zelege 2010; Woubishet 2011) while others are limited to serve restricted societies within limited geographical locations (Koang 2011; Wodisha 2011; Israel 2011). When PDRMs are officially recognised as legal entities, their contextual and regional jurisdiction should be limited by law.

Another issue which is directly related to the legitimacy and institutionalisation of PDRMs is whether or not they should be accountable to a particular state organ: the judiciary, the legislative or the executive or any other commission or institution that could be established in the future. Currently, certain PDRMs that are practised by individuals with 'spiritual possession' are not accountable to any administrative body (Zelege 2010; Koang 2011; Wodisha 2011). The practitioners merely enjoy the trust of their customers. They serve as supreme courts that offer final decisions without chance of appeal. In other instances, state organs administer the PDRMs. In some administrative zones like Gambela, traditional conflict resolution mechanisms of the Nuer community are administered by men who were directly appointed by the government as local chiefs. According to Koang (2011:413), 'the advent of government brought in a new institution manned by chiefs and *Kebele* (the smallest administrative unit of the executive wing in Ethiopia) executives, who have continued to use customary laws to resolve conflicts'. Koang observed that the amalgamation of the laws on PDRMs within the state machinery brought about rampant corruption, people's mistrust in the PDRMs' integrity, and confusion about formal and informal norms.

Similar confusion exists among the social courts in Tigray Administrative Region. Assefa (2011:377–378) observed the dilemma of 'queasy' (pseudo) PDRMs in terms of clarity of accountability, jurisdiction and jury composition:

Currently the social courts as an institution seem to be at crossroads. In practice, there is widespread confusion as to whether to maintain them as social courts – institutions for resolving root causes of social ills in every *tabia/kebele* (hence more in line with the role of *Shimagles* [elders]) – or if they would best serve as a lowest unit within the regular court administration. The practice, contrary to law, indicates that the young and productive forces and women constitute the lion's share of the judges in the social courts, and this composition has created some problems.

What is evident is that these social courts are, practically, neither PDRMs nor the lowest wings of the judiciary. This creates problems in the administration of justice. The members of the social courts are very young. Due to this, the society could not render them the kind of respect that is given to revered elders (Assefa 2011). Some of the members of social courts lack the wisdom and ethics of elders because of their age and experience. The social courts do not exercise the power of the formal court for most cases because they are not granted that legitimacy (Assefa 2011). This indicates the confusion of the two systems.

In the Amhara Regional State, executive organs have attempted to organise elders who are entrusted with reconciling conflicts and avoiding blood feuds. Alemu (2011) argues that these elders cannot play the roles expected of them because they are not authorised by the people according to traditional norms. In this specific tradition, selecting elders for reconciliation is the exclusive right of the disputants only.

The interference of the state organs with the PDRMs demands caution. From the case studies (Assefa 2011; Alemu 2011; Koang 2011) and other contexts, it is possible to conclude that the interference of state organs in PDRMs resulted in chaos. Though there is necessity for caution, in fact there is also a lack in the attempts to legalise and regulate the activities of PDRMs at a national level at this time. But to make useful intercessions, concerned stakeholders should urgently issue laws that clearly regulate the types of cases that should be administered by PDRMs. The horizontal and vertical relationships of PDRMs with the judicial, executive and legislative organs of the state as well as non-governmental and civic organisations should be clearly stated. Of the existing state organs and

non-governmental and civic organisations, there seems to be no entity that has the capability and legitimacy to accomplish the institutionalisation of PDRMs due to the difficulty and complexity of the task. As a way out, this article recommends the establishment of a special commission for the legalisation, harmonisation, and application of PDRMs in Ethiopia.

### 3.4 The unregulated financial transactions within PDRMs

A fourth challenge that demands attention is the monetary transactions related to PDRMs. The money that is collected by practitioners of PDRMs for the running cost of the peace forums, rituals and compensations given to the victims is not regulated. Zeleke (2010) and Woubishet (2011) observed that there are some elders who fairly collect money from perpetrators of crime as a running cost for the peace rituals. On the other hand, there are some greedy elders (practitioners of PDRMs) who amass huge sums of money from clients. Koang (2011:415) observed the greed of state-appointed *Sefer Shums* (pseudo elders) of the Nuer community who collect money or other gifts under the pretext of service charges:

The applicants pay the chiefs a service charge ranging from 120 *Birr* [approximately 6.6 USD] for an ordinary case such as theft, farmland disputes or debt claim, to a cow worth 1000 *Birr* [approximately 54 USD] or more for such cases as initiating divorce.

However, some of these cases can be initiated for free and others for negligible costs in the formal courts of law. The absence of clear laws related to financial transactions of PDRMs motivated the greedy chiefs to bulge their pockets with the money collected from the poor in the form of service charges. Even after the payment of such huge money, justice is not guaranteed for some chiefs are said to be corrupt. Koang's informant summarised the exploitation as: "You claim a cow by giving another" (2011:415). This means disputants establish a case for almost the same amount of money they claim to get after they win a case. They are, therefore, forced not to claim their right.

Similarly, the *Abba Gada* elders of the Borona Oromo community are observed taking some unfair benefits under the pretext of service charges. Israel

(2011:320) reveals these corrupt practices as he quotes his informant: “They [the elders] cannot help you without it [liquor], at the same time they cannot help you with it because they get drunk after they consume it”. In the Oromo’s traditional socio-political system (*Gada*), taking liquor is prohibited. Contrary to the norm, the elders consume alcohol, which they get in the form of bribe. The corrupt practices of the *Sefer Chiefs* of the Nuer community and *Abba Geda* elders of the Borona Oromo ethnic group demonstrate the absence of rules and regulations of monetary transactions of PDRMs. It could also be regarded as a symptom of the bastardisation of culture due to the influence of Western culture and urbanisation.

The other financial matter that should be considered is the budget to be used by personalities or offices that could be established to legalise, synchronise, and harmonise PDRMs at macro level. The task is extremely huge and complicated, and will need a substantial budget. As a way out, the stakeholders who have demonstrated their commitment to do their level best should consider this concern during the regulatory tasks. On the other hand, PDRMs could be a source of funds to the government. Some of the practitioners of PDRMs collect huge sums of money during conciliatory rituals and peace forums; but, they do not pay income tax to the government. They have to contribute money to the national coffers. This new endeavour could face massive resistance since they have not been accustomed to it. This article suggests that the government has to convince them to pay income taxes. The money that could be collected in the form of tax can be used to assist individuals and institutions that work for the legalisation, synchronisation and harmonisation of PDRMs themselves.

### **3.5 Conflict between the formal and informal ways of conflict resolution**

The fifth challenge is related to the unclear and unspecified relationship between PDRMs and formal judicial organs of the state that results in conflict. Whether any one likes them or not, whether they have limitations or not, both PDRMs and formal judicial systems are existing realities currently dealing with conflict resolution practices throughout the country side by side. There should be a

smooth relationship between the formal and the informal ways of conflict resolution. If there is conflict between two systems, the whole justice system will become chaotic. Some researchers have observed a lack of interface and sometimes a contradiction over jurisdiction. In dealing with certain conflicts, there are incidents where one case is treated by both methods.

Birhan's (2011) case study, unveiled a double jeopardy in the case of two individuals who were accused of homicide. The traditional justice system, *Amare's Justice Forum in Wegdi and Borona Districts of Wello Zone* (translation mine), had already finished the case in such a way that the families of the victims and the perpetrators committed themselves to stay away from blood feud, the traditional cultural practice that motivates endless killings among conflicting groups. Through the majestic rituals accompanied by oaths, the feeling of revenge was already transformed into a normal relationship. The perpetrators were already made to compensate a lot of money, as seen locally, to the victim's family. Disregarding all these efforts, the judiciary and the executive organs decided to jail the perpetrators until sufficient evidence was sought. The elders attempted to protect their cherished custom by advising all members of the community not to cooperate with the police and the court in the prosecution of the two individuals by withholding evidence and witnesses. This delayed the prosecution of the prisoners who were already corrected by their cherished justice forum. The conflict of the two systems exposed the perpetrators to double jeopardy. It also undermined the efforts of the elders which prevented the blood feud that could have taken the lives of many other citizens. This, in turn, encouraged another conflict among the people who had already settled their case.

Assefa's (2011:190–91) observation is another typical example of the unhappy marriage of the formal judiciary and PDRMs:

One of the main challenges of legal pluralism in Ethiopia today is the determination of which body should be the highest judicial body that could give a conclusive end to claims that have been submitted to the customary and religious courts. For example, should the final decision of the highest

religious or customary court be subject to review by the ordinary courts, or for that matter by the highest ordinary court? This issue has been a battle ground between the liberal outlook and that of the supporters of more autonomy for cultural or self determination rights of ethno national or religious groups.

The issue really is a 'battle ground'. The proponents of traditional culture believe that cases that are already handled by cultural or religious courts (PDRMs) should be finalised within the context of their system and should not be obstructed by the formal courts at any level of jurisdiction. On the contrary, liberal and human rights activities believe that the decisions of PDRMs should be reviewed by the relevant courts. The divergence and conflict of the two systems can be eliminated if stakeholders and practitioners of both systems are aware of the damages that have been caused by the unhappy marriage of the two systems.

It is not conducive to social harmony to mix the two systems as was done within the *Nuer* community before thorough studies were conducted. In order to solve this problem, the society and the practitioners of the two systems should communicate and learn from one another. The formal system has to accept the PDRMs as permanent partners. Practitioners of PDRMs have to be convinced to eliminate the obvious human rights violations against women, children and the despised class. The proposed regulatory commission would facilitate the determination of these issues.

### **3.6 Limitations of the research works to date**

Regardless of the inclination of stakeholders to integrate PDRMs in the justice system of Ethiopia, there are many factors that need to be researched before the institutionalisation of PDRMs can be effected. First, the interconnection and interdependence of the formal (adjudicative state structures) and the informal (PDRM) systems are neither properly assessed nor documented. It is not well studied how the legislative, judiciary and executive organs of the state at all levels of jurisdiction understand and support the functioning of PDRMs. Reciprocally, the attitude of the practitioners and advocates of PDRMs towards the formal system is not fully investigated. It is perceived that a lot of people solve their

conflicts through PDRMs. However, the reasons for the people's preference of the informal system to the formal one are not sufficiently studied. Related case studies such as Zeleke's (2010) are very limited in scope. This creates a dilemma for the people, the practitioners of PDRMs and the authorities in different organs of the state. Second, there are not yet sufficient research findings about the conflicts between the formal and informal systems of conflict resolution. No directions are outlined regarding the mechanisms by which the formal and informal systems could be assimilated with each other. Except for limited attempts, the applicability and adaptability of the norms and practices of the PDRMs in intra- and inter-group conflicts are neither sufficiently studied nor documented. As a solution to this problem, the possibilities of the future coexistence of multiple systems of conflict resolution and the ways of resolving tensions between them need to be examined.

Yntiso and others (2011) have collected case studies on nineteen different types of PDRMs. In almost all of these, however, there is no detailed discussion on how women and minority groups are implicitly and explicitly excluded, humiliated and abused in the rituals and convocations. Some researchers have found that some of the rituals that make women objects of consumption or subjugation are perceived to be positive to the women practising these rituals. Yntiso and others (2011:473) have also observed the insufficiency, shallowness and disorganisation of the research work in these areas:

Since most studies are scattered, inaccessible, and inadequately cross-referenced, little is known about their coverage in terms of analytical depth, thematic focus, cultural backgrounds, and geographic locations .... The dream of every applied research is to influence policy to recognize and accommodate informal justice. In the absence of comprehensive knowledge and comparative analysis, influencing policy is tantamount to wishful thinking.

It is estimated that the number of PDRMs in Ethiopia could be more than seventy. Of this huge heritage repository, researches have thus far focused on the PDRMs of only a few ethnic groups that were easily accessible. There are ethnic groups whose PDRMs have not yet been explored. Even the studies conducted



on PDRMs of the same ethnic groups are insufficiently ‘cross referenced’ (Yntiso et al. 2011:473). Unnecessary repetitions pervade the research corpus. By their very nature, PDRMs pass from one generation to the other by word of mouth. Unless massive work is done to preserve this exquisite knowledge, it will be lost through urbanisation, Westernisation and acculturation. Generally, exhaustive research is required in order to achieve comprehensive knowledge that can influence policy matters at macro level.

#### **4. Conclusion and recommendations**

In spite of the wider popular approval of PDRMs in Ethiopia, these practices have been marginalised since the time of the codification of the Ethiopian laws in the 1950s and 1960s. Currently, the real situation of the broader use of the PDRMs among most Ethiopian people as well as the international and regional tendency to shift from formal methods to PDRMs seem to have influenced the Ethiopian situation. Top officials within the executive and the judiciary, research institutions, and certain private researchers have acclaimed and supported the harmonisation and application of PDRMs in Ethiopia’s justice system. In order to accomplish this objective, these stakeholders have hosted national and regional conferences, workshops and forums; founded research centres and institutions and funded academics who conduct research on PDRMs. The positive attitude of these stakeholders towards PDRMs, the multiplicity and diversity of the PDRMs in the country, and the assistance of various organisations to promote PDRMs are considered as positive situations and initiatives for the harmonisation and application of PDRMs in the country’s justice system. On the other hand, there are no clear laws and policies related to the legitimacy of PDRMs, the level of administration they should be accountable to, their interconnection and interdependence with the formal courts and other state structures, and the scope of application of their decisions in respect of content, jurisdiction and financial transactions. These challenges require urgent consideration.

While these challenges and ambiguities exist, it is difficult to regulate policies and ratify laws that can accommodate PDRMs in the justice system. First, the existing situation should be rigorously assessed through research. Some of the research results to date are unorganised, poorly cross-referenced and out-of-the-reach of

researchers and readers; while others are shallow in terms of investigative depth and scanty in thematic and geographical coverage. Therefore, the information acquired through research is not sufficient to influence policy directions or to stimulate the making of regulatory laws that could solve the challenges and dilemmas stated above. Generally, great effort should be exerted to assess the huge corpus of PDRMs that are practised within this multi-ethnic and multi-religious country.

This article recommends the foundation of a special commission for the harmonisation of PDRMs in Ethiopia's legal system. The proposed commission should consist of multidisciplinary specialists, representatives from all governmental, non-governmental and civic organisations, the practitioners of both formal mechanisms and PDRMs, mainly elders and judges, private intellectual researchers as well as organisations currently dealing with PDRMs. The commission should include experts from countries that have been involved in the harmonisation of their own informal justice systems. Due to the urgency and difficulty of the matter, a special mandate should be given to the proposed commission to facilitate critical and constructive debate among practitioners of PDRMs and academics; compare and contrast varieties of ideas and viewpoints of various peoples across the country and from institutions working on peace research; narrow the disparity between practice and theory in the area of conflict prevention, resolution and transformation; draft new accommodative regulatory laws of PDRMs; receive feedback from stakeholders; and monitor the passage of the new legislation.

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# Ethiopian customary dispute resolution mechanisms: Forms of restorative justice?

*Endalew Lijalem Enyew\**

## **Abstract**

The customary dispute resolution mechanisms of Ethiopia are playing an important role in resolving crimes of any kind and maintaining peace and stability in the community though they are not recognised by law and not properly organised. The customary dispute resolution mechanisms are run by elders; involve reconciliation of the conflicting parties and their respective families using different customary rituals where needed; emphasise the restitution of victims and reintegration of offenders; and aim at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by avoiding the culturally accepted practices of revenge. However, despite the fact that Ethiopia's indigenous knowledge base of customary justice practice has the enormous advantage of implementing the ideals of restorative justice, restorative justice has not yet taken root in the criminal justice system of Ethiopia. This article examines the legal, *de jure*, and factual, *de facto*, jurisdictions of Ethiopian customary dispute resolution mechanisms in resolving criminal matters, and explores whether they are compatible with the core values and principles of restorative justice. Based on the analysis of the relevant legislations, literature in restorative justice and customary dispute resolution mechanisms, and interviews, it is found that Ethiopian customary dispute resolution mechanisms

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\* Endalew Lijalem Enyew has obtained his LL.B. at Hawassa University, his LL.M. at Addis Ababa University and his M.Phil. in Peace and Conflict Transformation at the Centre for Peace Studies of the University of Tromsø, Norway. He is currently a Ph.D. candidate at the Faculty of Law of the University of Tromsø – the Arctic University of Norway.

are compatible with the values and principles of restorative justice. Hence, it is argued that the customary mechanisms of Ethiopia can be used as a basis to develop restorative justice programmes if they are properly institutionalised and sufficient legal recognition is provided for their functioning.

## **Introduction**

Parallel to the formal criminal justice system of Ethiopia, societies also have their own customary ways of dealing with crime. In many regions of the country, and especially in the remote and peripheral areas, these customary dispute resolution mechanisms are more influential and applicable than the formal criminal justice system, which is considered alien to the traditional societies (Macfarlane 2007:488). In many regions of Ethiopia, the customary norms are more strong, relevant, and accessible than imposed and top-down legal norms. Moreover, experiences in different regions of Ethiopia show that people, even after passing through the procedures and penalties in the formal criminal court, tend to use the customary dispute resolution mechanisms for reconciliation and in order to control acts of revenge.

Despite these factual roles of customary dispute resolution mechanisms, however, the procedural and substantive laws of Ethiopia, including the Constitution itself, exclude their application in criminal matters. In the Constitution of the Federal Democratic Republic of Ethiopia (1994),<sup>1</sup> customary and religious institutions are given a constitutional right to handle personal and family matters if the conflicting parties give their consent to get decision by these institutions. Hence, the Constitution limits the mandate of the customary dispute resolution institutions only to private and family disputes by specifically excluding their application to criminal matters despite the fact that they are functioning for many types of crimes on the ground.

Based on an analysis of pertinent legislations, relevant literature on restorative justice and customary dispute resolution, and interviews, this article explores the *de jure* and *de facto* mandates of the Ethiopian customary dispute resolution mechanisms in criminal matters and their compatibility with the values and

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1 Henceforth 'Constitution'.

principles of restorative justice. The first section of the article deals with the meaning, key principles, and models of restorative justice and their place in the continuum of restorative justice. The second section explores the status, mandate, and mode of operation of Ethiopian customary dispute resolution mechanisms in a general manner, followed by a discussion of their compatibility with the values and principles of modern restorative justice. The fourth section highlights the limitations associated with the Ethiopian customary dispute resolution mechanisms. Finally, section five forwards conclusions.

### **1. Restorative justice: Its meaning, key principles, and models**

#### **1.1 What is restorative justice?**

There is no consistent and universally accepted definition for restorative justice, partly due to the growing nature of the field. However, in order to avoid the danger of misusing the concept for programmes which are not restorative, scholars provide their own working definitions in their writings. Some of the commonly used working definitions of restorative justice are provided below.

Tony Marshal (1999:5) defines restorative justice as:

A process whereby all parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.

Howard Zehr (2002:40) has refined Marshal's definition as follows:

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.

The most comprehensive working definition of restorative justice has been provided by Robert Cormier (2002):

Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime – victim(s), offender and community – to identify and address their



needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm.

All of the above working definitions contain a common notion of all participating persons having a stake in a particular crime in order to address the harm, to restore the parties into their previous relationships and reintegrate the offender into the community, and to reduce future harm by preventing possible future crimes, all of which are manifestations of restorative justice values and principles.

## 1.2 The key principles of restorative justice

Restorative justice views criminal conflict as a violation of a relationship among victims, offenders and community (Zehr 1985:8); and the ‘property’ of those involved (Christie 1977:7). Christie argues that the conflict should be restored to their ‘legitimate owners’ who should be involved in determining the harm and repairing it. In line with such a fundamental premise, restorative justice is guided by some key principles or values which are discussed below.

The first principle of restorative justice emphasises the making of *amends* or *repairs* to the harms that resulted from the crime by imposing obligations on the offender and the communities (Zehr 2002:33). It focuses on the offender’s responsibility to understand the consequences of his/her wrongful act and to assume commitments to make *amends* for it. Making amends may take the form of concrete *restitution* in which the offender returns the property of the victim, or makes financial payments, or performs community services so as to recompense the primary victim and the community at large (Van Ness and Strong 2010:87).<sup>2</sup> It may also be *symbolic*, which involves the offender acknowledging his/her wrongful acts and making an apology, showing sincere remorse (Schmid

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2 The term ‘communities’ in restorative justice discourse includes both ‘micro-communities’, also called ‘communities of care’ which are comprised of family members, friends, and others with whom the victim and the offender have meaningful personal relationships regardless of geographical location; and ‘macro-communities’ or ‘communities of place’ which consist of persons defined by geography or membership instead of emotional connections or personal relationships with the victim or the offender. These may include neighbours and residential communities (see McCold 2010:156).

2002:96). In this connection, restorative justice also imposes obligations on communities to extend support and encouragement to the offender so as to enable him/her to carry out his/her obligations to make amends (Zehr 2002:28).

Second, restorative justice *involves the legitimate stake-holders* to the crime in the process. Howard Zehr calls this principle an ‘*engagement*’, in which case ‘the parties affected by the crime, offenders, their respective family members, and members of the community, are given significant roles in the justice process’ (Zehr 2002:22). Van Ness and Strong, on the other hand, use the terms ‘*inclusion*’ and ‘*encounter*’ as separate principles of restorative justice instead of the general term, ‘*engagement*’, used by Zehr. Inclusion refers to the opportunity for direct and full involvement of stake-holders, namely victims, offenders, and community members, in the process and in the determination of the final outcome (Van Ness and Strong 2010:119). Encounter, on the other hand, means that victims are given a chance to physically meet the offender in a safe environment to discuss the crime, the harms and the appropriate responses to it (Van Ness and Strong 2010: 49, 65).<sup>3</sup>

The engagement of stake-holders in the process is a manifestation of their *empowerment*. Restorative justice processes aim to empower the victims by providing a forum in which to vent their feelings, to confront the offender in order to ask questions about the crime, and to receive answers directly from the offender. It also gives them a chance to suggest ways of resolving the crime and addressing the harm as McCold (2010:168) plausibly states that ‘what brings the most healing and the best way for individuals affected by a crime to reliably meet their needs is the very act of participating in the process and in deciding what will happen’. Similarly, restorative justice may empower the offender by giving him/her the chance to be involved in the process, in the discussion with the victim, and other members of the community; and in the determination of his own punishment. According

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3 The principle of encounter does not, however, deny the possibility for indirect mediation, also called ‘shuttle diplomacy’, where, in the case of some offences, the victim and offender do not meet face to face, but where instead information is passed by the mediator between them (see Bradt and Bouverne-De Bie 2009:183, and Van Ness and Strong 2010:66).

to the punishment as ‘communication’ perspective, punishment should be a two-way communication, not a one-way directive aimed at a passive offender (Duff 1992:151). Hence, restorative justice processes aim to empower the offender instead of making him/her a passive receiver of the unilateral decision imposed by the court. Moreover, restorative justice practice empowers the communities as it enables them to identify and address the root cause of the crime so as to prevent the commission of further crimes (Zehr 2002:28). Therefore, the principle of engagement, in addition to giving victims and offenders a bigger role in the process, recognises the community’s role in the justice making process.

Third, restorative justice encourages the *voluntary participation of the parties* concerned. This principle of restorative justice requires the participation of parties in restorative justice processes to be based on their own freewill, and without any external coercion (Luna 2003:291). The voluntary participation of the victim and/or the offender also includes their freedom to withdraw such consent at any time during the process (UN Economic and Social Council 2002: Art. 7). This freedom given to the parties to freely decide whether to participate in the process or to withdraw temporarily or altogether is an important feature of restorative justice.

The fourth principle of restorative justice is that it envisions a *collaborative sanctioning process* in dealing with the crime (Schmid 2002:96). Unlike the ‘battle model’ or adversarial process of criminal justice system in which processes are guided by strict legal procedures and formalities, and outcomes are merely decided by a judge, restorative justice emphasises processes that are flexible, collaborative and inclusive; and outcomes that are mutually agreed upon rather than externally imposed (Zehr 2002: 24). This collaborative process may help the parties to discover the whole truth about the wrongdoing, as well as the causes, the harms and the consequences to their future relationships (Van Ness 2002:134–135). Restorative justice, in a collaborative interaction, gives a chance for the parties to vent their feelings, present their version of the story, and through the help of their community, to arrive at an agreement about the harm the crime has caused, the offender’s responsibility, and what should be done to restore justice (Zehr 2005:191).

The fifth principle of restorative justice aims to *restore and reintegrate the parties* into the community by focusing on and addressing harms and needs of the stake-holders of the crime (Zehr 2005:128). Since restorative justice views crime as a harm done to parties and the larger communities rather than to the state, it tries to identify and address their injuries and needs positively (Zehr 2005:128). It addresses the physical harm and material loss the primary victims may have sustained. Similarly, restorative justice also focuses on the injuries of offenders which either could be *contributing injuries*, those that ‘existed prior to the crime and provoked the wrongdoing’ such as prior victimisation (Van Ness and Strong 2010:45); or *resulting injuries* which are ‘caused by the crime itself or its aftermath’ (Van Ness and Strong 2010:45). The resulting injuries may be caused by the criminal justice system’s response, for it stigmatises and separates the offender from his/her social ties. Hence, restorative justice, through family care and community support, aims at healing the injuries of offenders thereby facilitating their reintegration into the community. In other words, restorative justice processes make it possible for reintegrative shaming to happen (Braithwaite 1989:55).<sup>4</sup>

Reintegrative shaming involves the community’s disapproval of the wrongdoing, and their accompanying acts to ‘reintegrate the offender back into the community of law abiding citizens through words or gestures of forgiveness, or ceremonies to decertify the offender as deviant’ (Braithwaite 1989:55). It is shaming with respect so that the shaming relates to the offender’s wrongful act and not to his/her real personality (Luna 2003:231).

In order to make the shaming process reintegrative, it must be conducted by those people whose disapproval has the greatest impact and whom the offender respects, such as his/her family, elders or close supporters, because shaming by the people who care for the offender and whom the offender

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4 John Braithwaite argues that one of the most powerful ways to disapprove a wrong is shaming, which is comprised of either stigmatising shaming or reintegrative shaming. According to Braithwaite, stigmatising shaming is a characteristic feature of a retributive justice system which considers the offender as permanently deviant, thereby making reintegration into the society difficult; whereas reintegrative shaming is a process which makes the offender feel responsible, commit to undo his/her wrong, and be reintegrated into the community by censuring the wrong and receiving support.

respects is more curative. It communicates the message that the offender is forgiven and is still accepted by his/her communities, and that they are on his/her side to provide him/her support to start life afresh (Braithwaite 1989:87). Moreover, cultural rituals of apology and forgiveness are important instruments for ending stigmatisation and play a great role to make the shaming process reintegrative (Braithwaite 1989:87). The rituals may help the offender to internalise the shaming positively, and may thereby facilitate his/her reintegration into the law-abiding community. Hence, restorative justice is ultimately concerned about the *restoration of victims and reintegration of offenders* into the community, and about maintaining the well-being of the community by addressing their respective harms and needs.

The above guiding principles of restorative justice accentuate the fact that restorative justice emphasises the importance of the roles of crime victims, the offender and community members through their active participation in the justice process – roles which make offenders directly accountable to the victim and the communities they have harmed, restore the material losses of the victim, and provide opportunities for discussion and negotiation which may lead to community safety, societal harmony, and sustainable peace for all.

### **1.3 Models of restorative justice**

In line with the above values and principles, different restorative justice models, also called restorative justice programmes or processes, have been developed around the world. The UN Economic and Social Council's resolution on basic principles for the use of restorative justice programmes in criminal matters defines a restorative justice process as 'any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator' (UN Economic and Social Council 2002: paragraph 2). According to this definition, any process can be considered restorative, though levels of restorativeness might vary, as long as it falls within the 'continuum of

restorative justice' (Zehr 2002:54–58; Van Ness 2002:131).<sup>5</sup> According to the continuum of restorative justice, a particular programme is not necessarily required to possess all the values and principles of restorative justice to qualify as a restorative justice process. It is enough for those values and principles to exist partially within the two ends of the continuum so that it will be assessed to be less or more restorative on a case by case basis even though there is no uniform and fixed standard of measurement (Van Ness 2002:131).

Though they are not equally restorative, different restorative justice programmes are functioning in different countries. The well known models of restorative justice, which are considered to be the 'hallmarks of restorative justice processes', are: Victim-Offender Mediation, Family Group Conferencing, and Sentencing Circles.

### 1.3.1 Victim-Offender Mediation (VOM)

Mediation is a process by which a neutral third party, who does not have the power to impose a binding decision, brings the conflicting parties together for peaceful settlement. Unlike mediating civil cases, the mediation process of criminal conflicts is known as Victim-Offender Mediation (Umbreit 2009:216–217).

Umbreit (2009:215) provides a comprehensive definition to Victim-Offender Mediation as follows:

Victim-Offender Mediation is a process which provides interested victims of primarily property crimes the opportunity to meet the offender, in a safe and structured setting, with the goal of holding the offender directly accountable for his/her behaviour while providing important assistance and compensation to the victim.

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5 The 'continuum of restorative justice' is a concept which allows restorative justice processes or programmes to be evaluated as fully, mostly, partly, or non-restorative, based on the Restorative Justice Values and Principles Test (RJVPT). The continuum is important to avoid an improper dichotomisation according to which a practice is either restorative, embracing all values and principles, or non-restorative in which all values and principles of restorative justice are absent (see Van Ness 2002:131).

The referral of cases to Victim-Offender Mediation is usually made by the police, prosecutors, or judges in the form of diversion before or after prosecution, either before guilt is established or after formal admission of guilt has been obtained by the court in which case the mediation process serves as a condition of probation or mitigation of penalties (Umbreit 2009:217). The process creates a fertile environment for a joint victim-offender meeting, discussion about the particulars of the crime and a hearing of the parties' feelings. It enables the victim to tell the offender how the crime affected him/her, to receive answers to questions he/she may have, and to directly participate in the determination of a proper form of punishment for the offender; and the offender is also able to know the full impact of his/her action, to take direct responsibility for his/her behaviour and express remorse, and to participate in the determination of a plan for making amends (Van Ness and Strong 2010:67). The process usually culminates in the parties reaching an agreement to restore losses incurred as a form of the offender's punishment, determining how and in what modality the harm caused can be repaired, and how the agreement will be enforced (Van Ness and Strong 2010:67). In sum, VOM programmes seek to empower the participants to resolve their conflicts by their own in a fertile environment.

### **1.3.2 Family group conferencing (FGC)**

Family Group Conferencing is conceptually an extension of Victim-Offender Mediation which involves other community members such as the families of the conflicting parties, the arresting police officer as well as the legal representative of the young offender (Mousourakis [2002]:43).

The practice of FGC was first developed in New Zealand, though it was subsequently adapted in Australia and is being used in different countries in various forms. The practice developed out of the traditional family conference of the Maori people with the passing of the *Children, Young Persons and their Families Act* of 1989 (CYPFA) that recognised its use for young offenders in the form of diversion (Schmid 2002:106; Mousourakis [2002]:50).

In this process, a youth justice coordinator or facilitator arranges the conference after consulting the victim's and young offender's families following a case

referral by the police, public prosecutor or the Youth Court – before the charge, or after the charge but before admission of guilt, or after the finding of guilt, respectively (Mousourakis [2002]:51). FGC allows the young offender to explain what happened and to make admission of his/her wrong (Schmid 2002:106); it enables the victim to speak about the personal impact of the criminal act and to ask questions directly to the offender; and empowers all the participants to discuss the young person's behaviour, and to share their views and recommendations about how to solve the matter and repair the harm (Van Ness and Strong 2010:69). The decision or recommendation imposed on the offender in the form of punishment may include performing community service, making reparation to the victim, or giving care or protection to the young offender him/herself, and will be binding only if it is unanimously adopted by all participants of the conference (Mousourakis [2002]:53). The young offender is required to adhere to the decisions of FGC and his/her family assumes responsibility to support him/her to comply with the decision; and if he/she fails to do so, the youth court judge can take proper penalty depending on the nature of the crime (Mousourakis [2002]:55).

Generally, FGC attempts to *empower* the victim, the offender, and their respective families by providing an opportunity to play a role in the justice process – in spite of the fact that there may be suspicion that involved professionals are dominating the decision-making process and preventing the 'legitimate owners' of the conflict from playing a central role.

### 1.3.3 Sentencing circle (SC)

The sentencing circle model is derived from aboriginal peacemaking practices in Canada (Van Ness and Strong 2010:69). It is a type of restorative justice process, chaired by a respected member of the community, in which the victim and the offender, their families, other community members, as well as a judge, lawyer, and police come together to discuss and recommend the type of sentence an offender should undergo (Canadian Resource Centre for Victims of Crime 2011:5). It is an alternative approach in which the judge receives a sentence opinion from the community in lieu of receiving a formal sentencing submission from the public prosecutor and the offender or his/her



defence attorney (Lilles 2001:162). The very purpose is to reach a constructive outcome or punishment which better meets the needs of the victim and the community at large, and which places more emphasis on the responsibility of the offender than on a mere incarceration.

The discussion by the community, however, is not exclusively focused on a sentencing plan for the offender, as may be literally understood from its name; instead it goes beyond the current crime and includes the extent, causes and impacts of similar crimes on victims and the community at large, and the question about what should be done to prevent similar crimes in the future (Lilles 2001:163). After a thorough discussion of the matter, the judge imposes the ‘criminal punishment’ by considering the recommendation of the community members – on the condition that the case will be returned to the formal criminal court upon non-compliance of the offender with the decision (Van Ness and Strong 2010:70).

The community problem-solving dimension is the most important aspect of sentencing circles as it places more emphasis on sufficient community involvement (Zehr 2005:260). The process is used for both young and adult offenders, and since the process is long and thorough, requiring patience and commitment from all participants, it can be used for crimes of more than minor nature (Lilles 2001:163). Therefore, sentencing circles provide the victim, the families concerned and the community at large an opportunity to express themselves, address the offender, and take part in developing and implementing a plan relating to the offender’s sentence.

## **2. The Ethiopian customary dispute resolution mechanisms and their mode of operation**

### **2.1 What are customary dispute resolution mechanisms?**

The customary dispute resolution mechanisms are traditional practices used to resolve conflicts and maintain peace and stability in the community. These traditional practices are deeply rooted in different ethnic groups of Ethiopia and arise from age-old practices that have regulated the relationships of the

peoples in the community (Regassa et al. 2008:58). They are associated with the cultural norms and beliefs of the peoples, and gain their legitimacy from the community values instead of the state (Jembere 1998:39). In other words, the customary dispute resolution mechanisms of Ethiopia function on the basis of local customary practices or cultural norms. However, due to the multi-ethnic composition of the country, the customary laws of Ethiopia are different from ethnic group to ethnic group and as a result they do not have uniform application all over the country.

These customary practices of Ethiopia are mostly, though not exclusively, vibrant in rural areas where the formal legal system is unable to penetrate because of a lack of resources, infrastructure and legal personnel as well as a lack of legitimacy, for the modern law is seen as alien, imposed, and ignorant of the cultural realities on the ground. Hence, in the face of such a shortage of facilities and legitimacy, the customary dispute resolution mechanisms play a very vital role in the administration of justice.

### **2.2 Legal pluralism and the status of customary dispute resolution mechanisms in Ethiopia**

The concept of legal pluralism, referring to the existence of more than one type of law within a particular country, is opposed to the ideology of 'legal centralism' (Griffiths 1986:1–3) which believes that 'law is and should be the law of the state, uniform for all persons, exclusive of all other non-state laws, and administered by a single set of state institutions' (Griffiths 1986:1). Legal pluralism, on the other hand, recognises the existence and functioning of both the state law and customary laws within a particular country.

Woodman (1996:157) defines legal pluralism as:

... the state of affairs in which the category of social relations is within the field of operation of two or more bodies of legal norms .... It is the situation by which individuals are subject to more than one body of law.

Ethiopian customary dispute resolution mechanisms were in use to regulate every aspect of life before the introduction of modern laws in the 1960s. However, Ethiopia involved itself in legal transplantation activities through

a grand codification process in which six codes, namely the Penal Code, the Civil Code, the Maritime Code, the Criminal and Civil Procedure Codes, and the Commercial Code, were produced from 1957 to 1965. The Ethiopian legal importation, induced by ambitions to introduce modernity and change into the country, created discontinuity from the traditional beliefs and values (Fiseha et al. 2011:23). This is mainly because the codes were drafted according to European experience and the transplantation process was conducted by expatriate scholars who were ignorant of local customary and cultural practices of Ethiopia (Mulugeta 1999:22). It may be argued that legal transplantation is a common and normal practice in a law-making process. However, the transplanted laws need to be contextualised within the realities of the country after being discussed and deliberated by the national parliament. In the Ethiopia of the time, the real power of law making was in the hands of the emperor; and as long as he approved the law drafted by foreign experts, it became effective law regardless of whether it was discussed by the house of senate or deputies (the then parliament). Hence, the transplantation process was not healthy in a sense that it did not take into account the customs and traditions of peoples, and the realities on the ground.

The consequence of such an ill legal transplantation process was the exclusion of customary laws from application since they were considered as the anti-thesis of modernity and change. That was manifested by the repeal provision of the Ethiopian Civil Code that abrogates the application of customary laws. This repeal provision (Civil Code of the Empire of Ethiopia 1960: Art. 3347 (1)) reads:

Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this code and are hereby repealed.

This legal provision made all customary practices out of use, irrespective of whether they were consistent or inconsistent with the provisions of the Civil Code, by the mere fact that the Code covered and regulated the matter. The transplantation process was, thus, a drastic measure taken against customary dispute resolution mechanisms which made them lose formal legal

recognition and standing. *De facto*, however, customary dispute resolution mechanisms remained functional on the ground, as the transplanted laws were unable to penetrate into the local communities and get legitimacy.

The enactment of the Constitution revived a formal legal recognition of customary laws, however. One of the relevant constitutional recognitions is provided under Art. 34 (5) of the Constitution, which reads:

This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws with the consent of the parties to the dispute.

According to the above legal provision, customary dispute resolution mechanisms are legally authorised to regulate personal and family matters as long as the conflicting parties give their consent to that effect. In line with this legal recognition given to customary laws, the Constitution (Art. 78 (5)) also authorises the House of People Representatives and State Councils to establish and to give official recognition to religious and customary courts. These articles obviously show that the Constitution took some important steps towards recognising legal diversity or pluralism by recognising customary laws and their institutions.

However, such recognition is still limited to civil matters. The Constitution does not rectify the past mistakes and fails to extend the legal recognition to applying customary dispute resolution mechanisms in criminal matters, despite the fact that they are still being used on the ground to resolve criminal matters and serve as the main way of obtaining justice, especially in rural Ethiopia. All types of criminal cases which range from petty offences to serious crimes, such as homicide as well as inter-ethnic and inter-religion conflicts, can be and are being resolved via customary dispute resolution mechanisms in many regions of the country (Gemechu 2011:270). Peoples also resort to customary dispute resolution mechanisms for reconciliation even after a verdict, be it conviction or acquittal, is given by the formal criminal justice system in order to avoid the cultural practice of revenge by the victim or his/her relatives (Zelege 2010:74). Hence, the status of applying customary dispute resolution mechanisms to criminal matters still remains *de facto*.

Nonetheless, certain interpretative arguments may arise in this regard. Some legal scholars argue that the absence of express recognition of the application of customary laws to criminal matters in the Constitution does not necessarily mean that they are totally excluded from application (Mengiste 2012). They further claim that the Constitution would have provided express provision to exclude the application of customary laws to criminal matters had the legislature intended it as such (Mengiste 2012); and they call for a broader and holistic interpretation of the Constitution, as total exclusion of applying customary laws to criminal matters would defeat the overall objectives of the Constitution to ensure lasting peace and to maintain community safety. On the other hand, the *a contrario* interpretation of Art. 34 (5) of the Constitution may be understood as implying an explicit prohibition of the application of customary dispute resolution mechanisms in criminal matters. However, the first line of argument, which favours the broader and holistic interpretation, is important as it helps to give formal legal status to applying customary laws in criminal matters.

In short, Ethiopia exhibits plural legal systems, both multi-layered state laws and customary laws, though no formal recognition is given to the use of customary dispute resolution mechanisms in criminal matters under Ethiopian laws. Hence, necessary legal reform needs to be undertaken so as to give sufficient legal recognition and formal status to the application of customary dispute resolution mechanisms in criminal matters. This may include the amendment of the Constitution to incorporate a clear constitutional clause which recognises the application of customary dispute resolution mechanisms in criminal matters. The inclusion of a clear constitutional clause is a necessary and important measure to avoid interpretative arguments concerning the status and mandate of the customary mechanisms. Moreover, the theory of legal pluralism can be used as a basis to elevate the status of the application of customary dispute resolution mechanisms in criminal matters, for it recognises their existence and application. The validation and recognition legal pluralism gives to customary dispute resolution mechanisms are, in turn, important to develop restorative justice programmes based on such customary dispute resolution mechanisms

because they are compatible with the reintegrative, healing and other values and principles of restorative justice, as discussed below in more depth.

### 2.3 Mode of operation of the customary dispute resolution mechanisms<sup>6</sup>

The customary dispute resolution mechanisms of Ethiopia are handled by elders, *non-specialised specialists* to use the words of Nils Christie, who are well known and respected members of the community and may comprise religious leaders, wise men and other community leaders (Fiseha et al. 2011:27). However, their composition, number, and the procedure they follow may vary from ethnic group to ethnic group depending on specific local customs and practices. Unlike the judges of the formal legal system who are appointed by a state on the basis of their knowledge of state laws, elders are chosen by the conflicting parties themselves or their families on an *ad hoc* basis of their 'reputation for high sense of justice, impartiality, deep knowledge of community norms, wisdom and rich experience' (Fiseha et al. 2011:27). They work persistently to identify the root causes of the conflict so as to restore the balance and to establish sustainable peace in the community instead of punishing the offender. To that end, the customary dispute resolution mechanisms involve different stages which are discussed below.

#### 2.3.1 Setting customary dispute resolution mechanisms in motion

The customary dispute resolution processes of Ethiopia are set in motion by the offender him/herself, by his/her family or close relatives; and in some minor crimes by the victim or his/her family (Regassa et al. 2008:66).<sup>7</sup> When a crime is committed, the perpetrator, the victim, their respective families, or any third party observers run to and ask elders to help the settlement of the conflict

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6 Since it is claimed that almost all ethnic groups in Ethiopia have their own distinct customary law systems with specific variations, the author tries to present the mode of operation of customary dispute resolution mechanisms in a general manner.

7 The victim or his/her family makes a request for the beginning of the customary dispute resolution process only for minor crimes and not for serious crimes such as homicide, as it is regarded as a shame for the victim's side to take the initiative to use customary dispute resolution mechanisms instead of taking vengeance (see Gemechu 2011:261).

(Regassa et al. 2008:66). The community elders will then call the parties to some public place, or in the case of a serious crime, go to the victim's and/or his/her family's home to persuade them into resolving the matter peacefully.

In serious crimes, such as homicide, the victim's family may not initially be willing to engage in the customary dispute resolution processes and may demand vengeance against the victim or his/her relatives. In almost all of the Ethiopian societies, vengeance is a culturally accepted instrument for redressing injury, and the men of the victim's side are *duty bound* to take vengeance against the killer or one of the killer's close relatives (Zelege 2010:73). Since killing one's family member is regarded as challenging the dignity of the whole family or relatives, the victim's relatives should prove their *wondinet* (manhood), and restore their dignity by taking vengeance (Zelege 2010:73). This cultural duty to take revenge is aggravated by praising a person who kills the killer or one of the killer's family members as hero, for he/she restores the dignity of his/her family; and by belittling and insulting those who did not take avenging action as cowards (Zelege 2010:73). Consequently, the victim's family may not easily submit to the customary dispute resolution mechanisms in the first instance. However, the elders insist and pressurise them to come to the process, and mostly do not leave without getting their consent to come to the peaceful settlement (Kebede 2012). Once the victim or his/her family agrees to engage in the process of the customary dispute resolution, the actual deliberation and reconciliation stage will start.

### **2.3.2 Deliberation and reconciliation**

After obtaining the willingness of the victim or his/her family to engage in the customary dispute resolution process, the community elders sit, under the shadow of a big tree or in the church compound, in a circle with the victim, the offender,<sup>8</sup> and their respective family members to discuss the matter (Regassa et al. 2008:66). This stage constitutes the heart of the customary dispute resolution process in which the details of the conflict, such as the root causes, the manner

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8 In some serious crimes such as homicide, offenders and the victim's families do not initially meet face-to-face fearing that the latter will take vengeance. Instead the elders act as a go-between mediator, moving back and forth between the two parties until agreement is reached.

of its commission, its consequences, and how it can be settled, are discussed. The victim personally or his/her family, as the case may be, is given the first chance to explain the crime and its impact. The offender is then allowed to state whether he/she has committed the crime, the manner of its commission, and the factors which prompted the commission of a crime (Pankhurst and Assefa 2008b:11). In the presentation of their version of the case the parties are not restricted to the main issue of the case; rather they are free to narrate the long story of the dispute and provide any information which could have been excluded as irrelevant in the regular criminal court proceedings (Gemechu 2011:261). This unrestricted freedom of expression in the customary processes is essential to identify the root causes of the conflict while tracing back to the beginning of the long story. Once the offender admits<sup>9</sup> the commission of the crime, a discussion will be opened so as to censure the offender and to determine the appropriate decision to be imposed on him/her.

The decisions may vary depending on the type and gravity of the crime, and the particular customary practice. Some minor crimes and crimes committed among close relatives may merely require an apology or forgiveness without compensation which is known as '*yiqir le egziabher*', forgiveness in the name of God (Pankhurst and Assefa 2008b:15). The very purpose in such a case is to restore the parties to the position they were in before the commission of the crime and to ensure sustainable community peace.

The most common decision is, however, the payment of compensation. The amount of compensation is often negotiated and is fixed taking into account the loss suffered by the victim, the circumstances of its commission, whether intentionally or by negligence, the economic capacity of the offender, and the

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9 Admission is a requirement to proceed with the customary dispute resolution mechanisms. If the offender denies the commission of a crime in his presentation of the case, elders employ different strategies to convince and persuade him/her to tell the truth. They may try to impress him/her about the seriousness of social sanctions – such as refusal to help with burial, exclusion from local associations and from the traditional collective system of work, losing any assistance at a time of hardship; and being cursed by the elderly people – he/she is going to endure if the truth is discovered later in time (see Pankhurst and Assefa 2008b:63). Therefore, fearing such social sanctions, the offender usually does not deny the crime.



number of families he/she supports (Pankhurst and Assefa 2008b:66). The compensation may be paid in cash money or in kind, such as camels, cattle, or sheep and goats (Pankhurst and Assefa 2008b: 68). Unlike the formal criminal legal system which is guided by the principle of the *personal nature of crime*, in which only the criminal is liable for his/her crime, customary dispute resolution mechanisms may entail collective responsibility for the payment of compensation. The offender's family or his/her clan members may be required to contribute to the compensation determined by the elders (Fiseha et al. 2011:30). This collective responsibility to pay compensation manifests the communitarian character of the Ethiopian societies, and plays an important role when family or clan members have to be monitored for their compliance with the community values.

In some societies like the Beni-Shangul Gumuz, compensation may take the form of a person known as *bride compensation*. A girl is given as a wife to a relative of a deceased in the form of compensation in order to end hostilities by creating a marital relationship (Besie and Demie 2008:124; Gluckman 1973:13). Though this practice is believed important to maintain sustainable peace between the two groups, it infringes upon the human rights of a woman because the marriage is conducted without her consent, and she is given as a chattel.

Generally, this stage of the customary dispute resolution process ensures the participation of the victim, the offender, their respective families and the community members in the administration of justice. It also helps the parties to come together, and ensures that the victim or his/her family is compensated for the loss they have suffered due to the crime. Once the conflict is settled and a compromise is reached, elders fix a day to conduct the final customary ceremonies or rituals.

### **2.3.3 Customary rituals**

After the compensation is decided upon and the conflict is settled, the restoration of prior relationships is symbolised through instruments of 'reintegrative' ceremonies or rituals.<sup>10</sup> These rituals vary from region to region, depending on

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<sup>10</sup> The settlement or reconciliation process and the customary rituals may take place on the same day or later. Usually, the customary rituals are conducted some days after the settlement is reached to allow time for preparation.

each particular customary practice. Dejene Gemechu (2011:265) has described one of the dramatic customary rituals of the Weliso Oromos as follows:

The killer wipes the eyes of one of the close relatives of the victim using cotton. The practice presupposes that the killer caused the latter to cry with grief and he/she is still in tears. The act, thus, connotes the wiping off tears of the aggrieved using a very smooth and delicate material.

According to Gemechu (2011:265), the act also implies that the killer regrets his/her wrong and shows sincere remorse by 'appeasing the offended'. It is also a custom in many Oromo societies that the conflicting parties 'suck one another's finger immersed in honey to symbolize the fact that their future relationships will be as sweet as honey' (Regassa et al. 2008:60). In the Amhara region, in the customary practice of *shimgilina* (elders' mediation), and also in many other ethnic groups of Ethiopia, a reconciliatory celebration or feast is arranged by the offender after the end of the dispute resolution. In this feast, the offender's side slaughters a head of cattle and the conflicting parties and their families come together and eat together, while the village community is also invited to the feast (Regassa et al. 2008:62). Their eating together from the same plate, which otherwise is considered a taboo, signals the end of enmity, and their togetherness and pledge to live peacefully in the future. In some parts of Ethiopia, such as Afar and Wello, both parties may be required to take an oath in accordance with their custom, confirming that they will not resume the conflict and refrain from acts of revenge (Zelege 2010:73). The ritual process is then mostly concluded with a blessing pronounced by the elders.

In sum, these customary rituals aim at restoring the relationship between the parties, ceremoniously reintegrating the offender into the community, and avoiding the cultural practices of revenge by the victim and his/her family. Hence, the ritual practices are mainly forward-looking and aiming at the reintegration of the offender into his/her community, and the preservation of future communal peace and harmony.

### **3. Ethiopian customary dispute resolution mechanisms: Compatible with restorative justice values and principles?**

As shown above in the discussion of models of restorative justice, most of the modern restorative justice programmes are developed based on, and shaped by customary or indigenous processes, since the 'underlying philosophy of indigenous practices that justice seeks to repair the torn community fabric following crime has resonated well with and informed the modern restorative justice ideal' (Van Ness 2005:2). Similarly, tracing its historical roots, Gavrielides (2011:3) writes that the 'roots of restorative justice practices are ancient, reaching back into the customary practices and religions of most traditional societies though the term restorative justice was coined in the 1970s'. Hence, the customary processes are used as a basis for modern restorative justice programmes because their philosophy and values are similar to the values of the modern theory of restorative justice.

The Ethiopian customary dispute resolution mechanisms have values that resonate well with the values and principles of restorative justice, namely encounter, inclusion, participation, restitution or compensation, and reintegration.

In the Ethiopian customary dispute resolution mechanisms, *encounter* between the parties which leads to a peaceful settlement of the conflict is one of the values given top priority. Except for some serious crimes where the parties do not meet face to face for fear of provocative vengeance, the conflicting parties personally meet with each other and discuss the crime, the harms caused and the appropriate responses to it. In addition, in line with the values or principles of *inclusion* and *participation* of restorative justice, the customary dispute resolution mechanisms of Ethiopia allow the presence of the victim, the offender, their respective families and other community members, and promote their active participation in the conflict resolution process. With the aim of discovering the whole truth about the wrongdoing, the customary dispute resolution mechanisms give the parties maximum freedom to explain and narrate every detail of the conflict and to vent their feelings without limiting them only to relevant issues. In addition to the families of the parties and the elders who are chosen to manage and lead the customary dispute resolution mechanisms, other community members are

## Ethiopian customary dispute resolution mechanisms

allowed to attend and take part in the process. In some customary groups, such as the Oromo, youths are required and encouraged to attend the customary dispute resolution processes so as to make them know and learn the wisdom of customary practices in order to ensure the existence and continuity of the customs from generation to generation (Mergia and Kebede 2012). This indicates how the Ethiopian customary dispute resolution mechanisms are focused on community participation. In this regard, Jembere (1998:39) has rightly stated that the legitimacy of Ethiopian customary dispute resolution mechanisms is rooted in and remains relevant due to ‘the participation and consensus of the community’.

Similarly, the customary dispute resolution mechanisms, like the modern restorative justice processes, emphasise the *restitution* or *compensation* of victims. It involves concrete material compensation such as cash or in kind payments, or symbolic compensation which involves showing sincere remorse and making apology by the offender, especially for minor crimes and crimes occurring among close relatives (Pankhurst and Assefa 2008b:15). Since the amount of compensation is subject to negotiation, the offender is also actively involved in the determination of the amount of compensation to be imposed on him/her in the form of punishment.

Moreover, the *reintegration* of the offender into his/her community through the process of reconciliation is the other main feature that Ethiopian customary dispute resolution mechanisms have in common with modern restorative justice ideals. The various types of customary rituals that follow reconciliation in customary dispute resolution mechanisms, as discussed above, aim at restoring the relationship between the parties, and reintegrating the offender back into the society. Instead of excluding and branding the offender as permanently criminal, the customary dispute resolution mechanisms use words of forgiveness or rituals to ‘decertify the offender as deviant’ and facilitate his/her reintegration into the communities (Braithwaite 1989:55). In other words, the customary dispute resolution mechanisms of Ethiopia resonate well with the ‘reintegrative shaming’ aspect of restorative justice. The involvement and participation of the respected members of the community – such as the elders and those who care most about the offender and the victim, their respective close families – play an important

role to effectively communicate 'shame' to the offender and help reintegrating him/her into the law abiding community.

Besides, unlike the one-sided theory of reintegrative shaming which focuses on the shaming of the offender, the Ethiopian customary dispute resolution mechanisms are double edged, which involves the shaming of both the offender and the victim as well as their families. As stated above, vengeance is a culturally accepted instrument for redressing injury in which the men of the victim's side are *duty bound* to take vengeance against the killer or one of the killer's close relatives in order to restore the dignity of the victim's family. However, once the conflict is resolved via the customary ways, the families of the victim will not, most of the time, resort to vengeance because the love and support of the community to the victim's families as expressed in the customary rituals make them get rid of the grudge; as well as of the fear of curse by community elders and of condemnation and isolation by the community members as if they were violators of the community values. This is mainly because failure to comply with the decision is considered as disregarding the customary values on which it was based or as a shameful act disrespecting the elders. Hence, the customary dispute resolution mechanisms of Ethiopia are capable of communicating 'shame' not only to the offender but also to the victim and his/her close relatives – thereby preventing them from taking revenge, and are consistent with the reintegrative shaming ideals of restorative justice.

Generally, the customary dispute resolution mechanisms of Ethiopia involve mediation between the conflicting parties and their respective families. It also involves restitution, reconciliation, and aims at not only settling the conflict between the parties but also at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by circumventing the culture of revenge. Further, the customary dispute resolution mechanisms use elders as mediators who are appointed by and known to the parties and/or communities, which shows the high degree of community participation in the process. Hence, the customary dispute resolution mechanisms of Ethiopia are compatible with the values and principles of restorative justice and may fall either at the fully or mostly, or at the partly restorative part of the continuum of restorative justice – in spite of the fact that their functioning is not

fully recognised by law, that they are not well organised programmes, and that they are subjected to some shortcomings, as highlighted below.

### **4. Shortcomings of the customary dispute resolution mechanisms**

Though the customary dispute resolution mechanisms are useful tools for administering justice in Ethiopia as discussed above, they are not without shortcomings. The limitations are mainly related to the non-compliance with human rights standards, and particularly to the unequal treatment of women and men. Most of the time, in most customary dispute resolution mechanisms of Ethiopia, women are not treated equally. Assefa and Pankhurst (2008:264) stated that women may not, in some customary dispute resolution mechanisms like in Beni Shangul Gumuz and Afar regions, have 'a standing to appear before elders in the customary dispute resolution processes on their own, and may require a male relative to represent them'. Similarly, customary dispute resolution institutions may also pass decisions which are against the interests of women. In some customary dispute resolution mechanisms, such as in the Afar and some parts of the Oromia regions, the amount of compensation for female victims is half of that which may be due for a male victim (Pankhurst and Assefa 2008b:10). Besides, as stated above, a girl may be provided as a wife to a relative of a deceased in the form of compensation, *bride compensation*, against her consent (Besie and Demie 2008:124). Therefore, the limitations associated with the customary dispute resolution mechanisms should be properly addressed so as to utilise those mechanisms as an asset and as a tool to implement restorative justice in the Ethiopian criminal justice system.

### **5. Conclusions and the way forward**

The currently functioning criminal laws of Ethiopia, including the Constitution, neither recognise the application of customary dispute resolution mechanisms to criminal matters nor do they give discretionary power for legal practitioners to identify certain matters that may be more appropriate for pre-charge or post-charge diversion into the customary dispute resolution mechanisms.

Despite the Ethiopian policy of ‘turning a blind eye’ to the customary dispute resolution mechanisms, they are playing an important role in resolving conflicts of any kind and maintaining peace and stability in the community. The customary dispute resolution mechanisms use elders as mediators who are appointed by and known to the parties and/or communities. They involve reconciliation of the conflicting parties and their respective families, using different customary rituals; emphasise healing and restitution and aim at not only settling the conflict between the parties but also at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by avoiding the culturally accepted practices of revenge. Hence, the customary dispute resolution mechanisms of Ethiopia, no doubt, are compatible with the values and principles of restorative justice. They may be regarded as ranging from the fully to the partly restorative parts in the continuum of restorative justice.

The presence of diverse customary dispute resolution mechanisms, which resonate well with the values and principles of restorative justice, are valuable assets and offer the greatest opportunities for the introduction and implementation of restorative justice in the Ethiopian criminal justice system. Since most of the Ethiopian communities are traditional and religious people who live up to, and have great respect for, the customary and religious rules, the implementation of restorative justice using customary dispute resolution mechanisms would be much easier. Using customary dispute resolution mechanisms to develop restorative justice programmes is also consistent with the constitutional provision of ensuring access to justice; and the recognition of the nation’s and the peoples’ right of self determination, autonomy, and control over the administration of the justice system provided under the Constitution.

Therefore, the Ethiopian customary dispute resolution mechanisms are in line with the values and principles of modern restorative justice and can be used as a basis to implement restorative justice in the Ethiopian criminal justice system if and only if certain things are done.

First, the Constitution should be amended to include express provision which recognises the customary dispute resolution mechanisms’ application to criminal matters. The inclusion of such a constitutional clause will give a strong foundation

for applying customary dispute resolution mechanisms to criminal matters and avoid interpretative arguments concerning their status, as discussed above in section 2.2. On the other hand, the absence of such a clause places a shadow on the validity of some diversions of criminal cases, based on the discretion of some legal practitioners, to customary dispute resolution mechanisms. This is because any act of officials or customary practice which contradicts the Constitution is null and void (Constitution, Art. 9). Hence, the amendment of the Constitution to include a clear constitutional clause recognising the application of customary dispute resolution mechanisms to criminal matters is necessary to avoid such doubts.

Second, the customary dispute resolution mechanisms should be properly organised or institutionalised. Organised and well established customary institutions which are capable of receiving cases diverted to it by the court or public prosecutor are essential requirements to properly implement restorative justice by facilitating diversionary processes. However, a detailed and comprehensive study should be conducted to find out how to better organise or institutionalise the customary dispute resolution mechanisms, especially in a way to adequately demarcate the state's involvement and role in such institutions so as to prevent it from politicising customary dispute resolution institutions.

Third, necessary measures should be taken to properly address the limitations associated with the customary dispute resolution mechanisms, and to re-orient and make them consistent with contemporary human rights principles. This in particular requires the provision of necessary training to elders (traditional adjudicators) to make them aware of and up to date with the constitutional principles and international human rights treaties that Ethiopia has ratified. But, yet, the training should not be delivered in a way that abuses the age-long traditional customs.

In sum, if all of the above and other necessary measures are properly taken, Ethiopia has a great potential to develop restorative justice systems which meet the needs of its peoples and reflect its cultural heritage by legally recognising and organising the customary dispute resolution mechanisms, and linking them with the formal criminal justice system.



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# Relevance of the law of international organisations in resolving international disputes: A review of the AU/ICC impasse

*Mba Chidi Nmaju\**

## **Abstract**

The paper examines the legal nature of the dispute between the International Criminal Court (ICC) and the African Union (AU), and observes that the core issue revolves around the arrest warrant issued by the Court for Al-Bashir. Therefore, it locates this to be within a legal rather than political impasse. The paper argues that the general rules of the law of international organisations may provide the key to resolving the impasse. And that accordingly, the general principles of the regime of international law point to the interpretation of the provisions of the constitutions of the two international organisations to identify the extent to which they were empowered to make the decisions that resulted in the dispute. The provisions of the Rome Statute on immunity are identified as providing the key to the resolution. Therefore the interpretation of the Statute on the immunity of certain state officials is important. The paper argues that accordingly the ICC should change its approach to the arrest of

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\* Dr Mba Chidi Nmaju, LL.B. (Ife) and Ph.D. (London), is a National Research Foundation (NRF) Free Standing Postdoctoral Fellow at the University of the Witwatersrand, Johannesburg South Africa. The financial assistance of the NRF towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the NRF.

certain officials in order to prevent facilitating the violation of the customary principles of diplomatic immunity in international law – which should have also been codified in treaties. Such an interpretation of the Rome Statute would indicate that states should exercise caution in arresting a sitting Head of State such as Sudanese President Al-Bashir until such a time that he leaves office or that Sudan waives his immunity.

## **1. Introduction**

The African Union (AU) has in recent times shown increasing opposition to the work of the International Criminal Court (ICC). This has led to tensions between the two international organisations and to questions arising from this increasing confrontation. It is clear that the international legal order has the structures to resolve disputes between states. Uncertainty remains, however, on the availability of effective structures within the system to resolve disputes between international organisations. It is important to note that international organisations were, prior to 1945, not considered subjects of international law so as to be recipients of rights and those responsibilities to undertake duties.

Generally, disputes between states are resolved in several ways in the international legal order, but it is unclear how disputes between international organisations are to be resolved. The International Court of Justice (ICJ), as one of the key mechanisms set up to resolve disputes between states, does not provide an automatic platform for resolving disputes between international organisations. It is recalled that according to its statute, only states shall be parties in a dispute before the ICJ (Statute of the ICJ 2006: Art. 34(1)).<sup>1</sup> International organisations may only appear before the ICJ if the ICJ so requests for an information from the organisation on a matter before it (Statute of the ICJ 2006: Art. 34(2)). Furthermore, the ICJ may notify the organisation or communicate to it any written submissions before it whenever the construction of the constituent instrument of that international organisation or of an international convention adopted thereunder is in question in a case before the ICJ (Statute of the ICJ

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<sup>1</sup> The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. The main object of the Statute is to organise the composition and the functioning of the ICJ.

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2006: Art. 34(3)). As such, an organisation may choose to try to resolve any dispute between it and other organisations or states through negotiations. Notwithstanding, this approach has so far failed in the current impasse between the AU and the ICC. This paper therefore proposes another approach – a wholly legal approach whereby the general principles guiding international organisations may lead to resolution. The importance of such an approach goes towards influencing policy makers in both organisations to acknowledge and act in compliance with these general principles. In this way, the essence of the principles are emphasised in their practicality and effectiveness – rather than merely considering them as theoretical notions underlying the legal fiction that birthed international organisations.

The basis of this paper is the assertion that ‘law serves two purposes: fairness and efficiency. On the one hand, it tries to achieve the goal that every human being is equitably treated. It aims at justice for all and protection of the weak. But, on the other hand, the law regulates society. It must provide rules which are workable and which lead to a well-functioning society’ (Schermers 1988:4). The question here is whether there are tools within the international legal structure to resolve this confrontation that threatens the whole regime of International Criminal Law (ICL), if not the whole international legal system. The identification of the tools, if any, applicable in international law is important to regulate differences in approach and ensure fairness within the legal order. Following that, it is queried whether these tools serve the twin purposes identified (fairness in its implementation to both weak and strong as well as regulation of the international society so that every state and international organisation must comply).

The ICC (henceforth, the Court) and the AU share common features: to the extent that both are international organisations whose goals include curbing impunity.<sup>2</sup> At the same time, there are differences between the two. It appears that the differences between them may threaten to fracture their relations. It is our argument that legal issues are at the core of the dispute despite the political issues (the arrest warrant issued by the Court for Al-Bashir). This is not unusual due to the political nature of the international system (Akanke 1998).

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<sup>2</sup> See Rome Statute of the ICC 1988: Preamble, and African Union 2000.

As such, the ICJ has held that the fact that a dispute has political overtones does not diminish the legal nature at the core of it.<sup>3</sup> This paper argues that the general rules of the law of international organisations may provide the key to resolving the impasse. And that accordingly, the general principles of the regime of international law point to the interpretation of the provisions of the constitutions of the two international organisations to identify the extent to which they were empowered to make the decisions that resulted in the dispute. The first part of the paper therefore investigates the background to the impasse to understand the extent to which the disputes relate to legal rather than political differences.

Following that, the next section reviews international legal provisions on resolving such conflicts and in so doing, it advances approaches to resolving such disputes. It reviews the legal principles that regulate international organisations (particularly in relation to both the ICC and the AU); and goes on to identify the provisions of the Rome Statute on immunity as providing the key to the resolution. Therefore the interpretation of the relevant portions of the enabling instruments of the two organisations is important. Further to that, the question of the international responsibility of states is explored after the capacity of the two organisations to undertake the actions which contributed to or exacerbated the impasse have been reviewed. In sum, this paper concludes that on the one hand, the ICC should change its approach to the arrest of certain officials to prevent facilitating the violation of the customary principles of diplomatic immunity in international law (which are also mostly codified in treaties). Such that states may exercise caution in arresting a sitting Head of State or a similarly important foreign official. The AU, on the other hand should desist from its recent shift toward attempts to resolve the conflict through non-legal means. In addition, it should neither over-politicise the issue nor encourage its state parties to violate their treaty obligations to the Rome Statute.

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<sup>3</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, General Assembly Opinion, I.C.J. Reports (1996), pp. 233–234, para. 13. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, WHO Opinion I.C.J. Reports (1996), pp. 73–74, paras. 16–17.

## **2. Brief overview of the AU/ICC impasse**

It is important to lay out the underlying factors that led to the ongoing impasse between the AU and ICC. The AU appears to have been unhappy about the increasing role of Africa as the key and perhaps only focus of the Court's judicial efforts since its inception (Du Plessis and Gevers 2011:4). The arrest warrant issued by the Court over the Sudanese President was the focal point of the AU's concerns with the approach of both the United Nations Security Council (UNSC) and the ICC to international criminal justice issues in Africa. The regional organisation had, at various times, supported efforts to deflect the influence of superpower states in such matters. For instance, it supported Senegal's decision to refuse Belgium's extradition request for Hissene Habré. The AU declared that Habré should be tried in Africa 'for the benefit of Africa.'<sup>4</sup> This section briefly examines how the AU's concerns gradually shifted into an institutional position against the Court's judicial efforts in Africa. It also locates the issues within the scope of a legal frame of reference.

The AU had been involved in some mediation to resolve the crisis in Darfur, Sudan, prior to the UNSC referral. Therefore it was concerned that involving the ICC would derail its peace efforts.<sup>5</sup> In order to preserve the peace process, the AU consequently tabled a request to the UNSC to delay referring the situation to the ICC.<sup>6</sup> It must be noted that the AU deferral request to the UNSC was based on Article 16 of the Rome Statute (1998) (henceforth, Rome Statute). This was a logical approach, considering it was the first time that the UNSC was utilising its mandate under Article 13 of the Rome Statute to trigger the Court's jurisdiction to investigate a situation within the territory of a non-party.

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<sup>4</sup> Assembly of the African Union, Seventh Ordinary Session, 1–2 July 2006, Banjul, The Gambia 'Decision on the Hissene Habré case and the African Union' DOC. ASSEMBLY/AU/3 (VII); Assembly/AU/ Dec.127(VII), para. 5(ii). Available from: <<http://www.africa-union.org//au//summit/doc/Decisions/Assembly-AU-Dec.pdf>> [Accessed 16 December 2012].

<sup>5</sup> See Akande et al. 2010:6.

<sup>6</sup> Decision of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, p. 8; Communiqué of the 207<sup>th</sup> Meeting of the Peace and Security Council at the Level of Heads of State and Government, Doc. PSC/AHG/COMM.1 (CCVII), 29 October 2009, p.5.



Nonetheless, the AU request, which was a wholly legal approach, was ignored by the UNSC (Du Plessis and Gevers 2011). The AU considered this as a slight by the UNSC.<sup>7</sup> Furthermore, the regional organisation's unsuccessful attempt to amend Article 16 of the Rome Statute was in order to curb, or at the least balance, the powers of the UNSC to refer matters to the Court. To a certain extent this seemed to complicate the growing problem, which was further compounded by the subsequent referral of Libya to the Court (in which case again the UNSC ignored the regional organisation's plea).<sup>8</sup> The AU was justifiably disappointed with the politics of the referrals (Akande et al. 2010:10–11). It felt the UNSC had referred the situations involving African states to the ICC in a selective manner (Du Plessis and Gevers 2011:3). This was not made better by the fact that the powers of deferral provided in the Rome Statute<sup>9</sup> were used in the same Resolution (1593) to protect peace keepers serving in Sudan from prosecution for any breach of international norms. What was once an uneasy relationship with the ICC had, by this time, become toxic to the extent that the AU began a non-cooperation policy towards the Court.

The amplification of the problem as a result of the above is unhelpful to the organisations involved, especially the ICC and the AU. Furthermore, it is also detrimental to the international legal order. There are clearly attendant risks to the possible escalation of the dispute. It is important to note that it is already moving to that level as the AU has since 2009 begun making anti-ICC

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<sup>7</sup> Press Release, Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Commission of the African Union, 14 July 2009.

<sup>8</sup> The UNSC referred the situation in Libya to the ICC by passing Resolution 1970, 26 February 2011.

<sup>9</sup> Rome Statute 1998: Art. 16 provides that 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

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decisions.<sup>10</sup> It has recently increased the tempo by quickly releasing a press statement in response to the ICC ruling on the failure of two African states to arrest Al-Bashir.<sup>11</sup> Furthermore, at the last AU conference in January 2013, it made unsubstantiated allegations that the ICC was focusing on Africa on the basis of racial prejudice.<sup>12</sup> The ICC President noted that one of the challenges facing the Court is the battle for its credibility in Africa (Song 2010:4). The struggle took a different turn following a change of leadership in Malawi. The new President reversed the country's earlier position by refusing to permit Al-Bashir to attend the AU summit in that country. Malawi went on to forfeit hosting the AU Heads of State summit rather than disregard its obligation to the ICC (BBC News 2012). But in doing so, it effectively violated its obligation to the AU (BBC News 2012). Such actions lead to states backing one international organisation against another. It may also lead to a complex scenario involving breaches and counter breaches of different international obligations by states. Resolving the impasse will prevent possible disputes between states (especially between those who are willing and those who are unwilling to arrest Al-Bashir). If not resolved, a weakened international legal system would result.

The above paragraphs indicate that the threat of competing obligations is one that must be taken seriously. It may unhinge the legitimacy of the system, especially one as fragile as the special regime of international criminal justice. In this instance, the relations between the ICC and African states may deteriorate.

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<sup>10</sup> See for instance: Doc Assembly/AU/13 (XIII) 2009, note 6 above; Communiqué of the 207<sup>th</sup> PSC Meeting, 29 October 2009, note 6 above; African Union Press Release No. 119/2010, 'On the Decision of The Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya' 29 August 2010. Available from: <<http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>> [Accessed 1 January 2013]. African Union Press Release No. 002/2012 'On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the Cooperation Requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan' 9 January 2012. Available from: <[www.au.int/en/sites/default/files/PR-%20ICC%20English.pdf](http://www.au.int/en/sites/default/files/PR-%20ICC%20English.pdf)> [Accessed 3 June 2012].

<sup>11</sup> AU Press Release N° 002/2012 'On the Decisions of Pre-Trial Chamber I of the ICC.

<sup>12</sup> See Davison 2013.

Moreover, the confusion on priority of legal obligations may, as in the case of Malawi, lead to states pitting one organisation against another. The fear here is that it may create a smoke screen that could be exploited by despotic leaders to confuse and/or evade justice. In essence, if African states were to doubt the credibility of the ICC it may negate the Court's positive image. It may also make it difficult for the Court to carry on its work in the continent. In addition, the confusion over the competing obligations might scupper the continent's rich history of supporting international criminal justice. This emerging field has found Africa to be a melting pot in its development. Therefore, it must be ensured that the impasse is resolved using the mechanisms set out in international law. Such mechanisms cannot be utilised without the political will of the bigger states in the UNSC who, it must be noted, have contributed to deepening this dispute.

The tension between the two international organisations does not appear to be attritional. The ICC has attempted to set up a liaison office at Addis Ababa (the same city where the AU Headquarters are) in order to maintain dialogue with the AU (Song 2010). The AU on its part has sought to maintain the continent's support of international law by ensuring that its differences with the ICC are resolved through legal structures.<sup>13</sup> The AU's efforts suggest that there may be legal structures, applicable to the impasse, within the international legal order. The regime of the Rome Statute may provide certain structures to resolve aspects of the dispute. However, the ICC, by attempting to resolve the conflict through political negotiations, may have resorted to mechanisms outside its legal instrument.<sup>14</sup> This is not entirely outside the general international legal remits. Such approaches are recognised and encouraged in the UN Charter.<sup>15</sup> Nonetheless, these efforts are clearly not enough to resolve the ongoing dispute. The question that thus arises is whether the international legal system has the appropriate structures to resolve such disputes. If there are indeed some

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<sup>13</sup> These have been through a variety of legal avenues. First, it proposed amendments to Art. 16 of the Rome Statute. Second, it requested its members to comply with the international rule on Immunity (and again under the Rome Statutes' Art. 98) and therefore desist from cooperating with the ICC.

<sup>14</sup> See Song 2010.

<sup>15</sup> See especially Chapter VIII (Arts. 52–54) of the Charter of the United Nations which provides for the pacific settlement of international disputes.

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structures then the task would relate to ascertaining the effectiveness of such a mechanism.

In all, what is at stake here is a dispute over how to address the situation in Sudan (especially the immunity of Al-Bashir). The other issue(s) such as the claim that the ICC unfairly targets African states does not appear to be a genuine complaint by the AU.<sup>16</sup> In fact, the later AU decisions criticising the ICC and urging its members not to cooperate with the Court have mainly focused on the Al-Bashir case. A more recent decision did not mention the Libya and Kenya situations unlike in previous decisions.<sup>17</sup> Kenya led the efforts to change the AU approach which sought to move away from legal efforts to political resistance (Du Plessis et al. 2013:4–5). The organisation had in criticising the ICC about the Kenya cases requested for the cases to be transferred to Kenya. There was no legal basis for this request.

The change of approach to a more political battle may not ultimately benefit the AU. In addition, it is not one likely to yield success to the regional organisation, given that it is weak in the one key area that impacts on political influence. An economically weak state or region does not usually exert any influence, as can be exemplified by the recent disregard of the organisation's views by the UNSC in the debate leading up the Libya intervention. Furthermore, a political confrontation with a legal institution cannot be expected to succeed if the dispute is to a large extent about the interpretation or application of the constitutional basis of that legal institution.

Inasmuch as the dispute cannot be said to be inherently political; it must be recognised that the AU has diverged from its earlier approach. Nonetheless, it can still be concluded that the real underlying concern of the AU relates to the immunity of Al-Bashir as a legal issue, around which the political issues revolve. As a result, this paper focuses on the legal impasse in the hope that its resolution will ultimately reduce the political tensions.

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<sup>16</sup> Four of the ICC investigations in Africa were referred by the African states themselves, two by the UNSC – to which the AU contention appears to be on questions of procedure rather than substance. The other two investigations (Kenya and Côte d'Ivoire) were initiated by the Prosecutor *suo moto*.

<sup>17</sup> AU Decision on the Pre-Trial Chamber, see note 11 above.

### **3. A review of international legal prescriptions on resolving disputes between international organisations**

This section explores the norms of international law that are relevant in resolving the impasse between the two international organisations. The treaties governing the two bodies are therefore to be applied and interpreted within the framework of international law.

A case has been made that the conflict between the two organisations is a matter of competing obligations of their state parties. It has been further argued that such competing obligations would be resolved by the provisions of the national laws of the concerned states (Du Plessis and Gevers 2011). The proposed solution was premised on the argument that a balance must be reached by states between their competing obligations to the AU and the ICC (Du Plessis and Gevers 2011). In making the above argument, Du Plessis and Gevers assert that each state may exercise its discretion in complying with the competing obligations. They went on to concede that such a requirement to balance the competing obligations may be doomed to fail as the AU decision appears to ‘drive a categorical imperative yet at the same time provides allowance for a measure of discretion’ (Du Plessis and Gevers 2011). As such, the two commands in the AU decision are not reconcilable, i.e., the prescription not to cooperate with the ICC and the one which urges those states to balance this non-cooperation with their obligations to the Rome Statute.<sup>18</sup> They further concluded that ‘how the competing obligations play out at national levels depend on the particular domestic framework of each country’ (Du Plessis and Gevers 2011), and so the states concerned should be guided by the provisions of their national laws about how to interpret the Rome Statute.

The view set out above goes against the general rule in international law that a domestic law cannot be a basis for a state to derogate from its international legal

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<sup>18</sup> See AU Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court, 15<sup>th</sup> Ordinary session of the Assembly of the Union, Kampala 27<sup>th</sup> July 2010 Doc Assembly AU/DEC296(XV), paras. 5 and 6.

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obligation.<sup>19</sup> In addition, their study does not address the issue of non-parties, because it was solely focused on competing obligations of states which are parties to both treaties. However, the matter must also concern non-ICC parties whether or not they are African states. Therefore, a better approach may be to explore the international legal structures that address this problem. An argument that requires states to rely on their national law as a guide to how they should comply with their international obligations would not absolve such states from liability for wrongful acts against another state or for failing to comply with their obligation to one of the treaties. The dispute resolution mechanisms available within the international legal order should be applied in resolving international disputes despite the increasing complexity of the system.

The extent to which the legal structures in public international law are applicable to this dispute will be examined further. The two organisations should be classified as international organisations within the remits of the definitions in international law. In addition, they are both established by multilateral treaties to which states are the only parties. The treaties are also constitutional instruments which imbue the two entities with international legal personalities, and with definite functions and objectives. As international organisations they are subject to international legal prescriptions including customary rules and conventions (Sands and Klein 2009:461). The International Court of Justice (ICJ), in a matter involving an international organisation and a state, held that the three legal obligations binding international organisations evolve from the general rules of

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<sup>19</sup> ICJ, in the *Applicability of the Obligation to Arbitrate case*, I.C.J. Reports, 1988, pp. 12, 34, confirmed 'the fundamental principle of international law that international law prevails over domestic law'. Judge Shahabudeen in his separate opinion on the *Lockerbie case, Questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 114, noted that domestic law cannot act as a defence to non-compliance with an international obligation. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, para. 11. The rule was codified in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) 1969, United Nations, Treaty Series, vol. 1155, p. 331.

international law, their constitutions and the international agreements to which they are parties.<sup>20</sup>

Disputes between the organisation and its members or between members would be resolved using the provisions of the constituent instrument. However, disputes between two international organisations may not be settled using the constituent instrument of one of them; rather it must be resolved by applying the general principles common to international organisations. That said, the general principles may point towards one of the constituent instruments for the solution to the dispute. These general principles of the law guiding international organisations may provide the avenues to resolving the current impasse. In fact, the law of international organisations would be the platform upon which other mechanisms of international law may be applied in this instance and similar cases.

### **3.1 The law of international organisations**

The dispute between the AU and the ICC is a telling indication that, with the continuing expansion of international law, there are some situations which expose the grey areas of the accepted rules. The resultant legal uncertainty is unhelpful to the international legal order. The issue raises conceptual questions, such as to what extent the rules of general international law are capable of evolving to be responsive to the specific problems posed by international organisations such as the case with which we are concerned. There are three main areas of public international law generally applicable to international organisations: the law on immunities, diplomatic relations, and treaties (Morgenstern 1986:4). This paper is concerned with all three, especially the last area. This is because the conflict between the AU and ICC can be traced to diverging interpretations of the Rome Statute, and particularly, as stated earlier, the AU's efforts to amend a key provision of the Statute with regard to the role of the UNSC (treaty law). Yet, the core of the dispute remains the immunity of a head of state and, to a lesser extent, the effect on the responsibility of states (in their diplomatic relations and for international wrongs against other states). This leads us to investigate

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<sup>20</sup> ICJ, Advisory Opinion on the Interpretation of the Agreement between the WHO and Egypt (1980) I.C.J. Reports, p. 73, paras. 89–90.

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whether there are rules guiding international organisations as a special field of international law which may assist us in proposing the way forward in the current tensions between the two organisations.

Whether the emerging field of international organisations could constitute a special regime, following the increasing influence of organisations in the international sphere, was uncertain at one time. However, subsequent increase in their role has led to further studies and convincing formulations of the law. It has now been generally agreed by scholars that there are certain common principles which govern international organisations.<sup>21</sup> International organisations have now come to 'play a significant role in international affairs generally and in the development of international law specifically' (Akande 2006:278). They perform functions in their diverse fields of operations that are crucial to the effective working of the international system. For instance, international organisations often function as a forum to: combat international or transnational problems; develop rules on common issues of concern to the generality of states; provide mechanisms to promote, monitor, and supervise state compliance with agreed rules; and finally, provide a forum for international dispute resolution (Akande 2006). Consequently, these organisations share some general principles in their operations in order to carry out these functions. Such general principles form the legal framework guiding their activities (Akande 2006). Therefore, the general principles of the field (law of international organisations) are important in our study of the current AU/ICC dispute.

On the other hand, it is arguable that the diverse nature of international organisations is an indication of the absence of general principles guiding the regime (Akande 2006:280). Each international organisation derives its basic rules from its constituent instrument. Therefore, its rules are only applicable to other international organisations by analogy. The constituent instruments of each international organisation may provide different regulations on issues of membership, competences and finances (Akande 2006). Despite this, a

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<sup>21</sup> See for instance Akande 2006:277–305; Sands and Klein 2009; Schermers 2013; Klabbers 2005.



better argument is that there is a common law of international organisations that arises from customary international law and to a lesser extent treaties which have generated principles that are generally applicable to the spectrum of international organisations (Akande 2006). As such, certain common principles have developed a framework that addresses general matters peculiar to all international organisations in areas such as legal personality, implied powers/competencies, interpretation of constituent instruments, immunities, privileges and the responsibilities of international organisations and their member states (Akande 2006). It has been strongly argued that 'these common principles apply in the absence of any contrary principle provided for in the law of the particular organisation, and as regards liability and responsibility may even apply despite contrary provisions in the internal law' (Akande 2006). In the instant study, it is apparent that the interpretation of the Rome Statute (an area governed by the common principles on the law of international organisations) remains a core aspect of the disagreement between the two bodies. A related issue (which will not be addressed in this paper) is how this affects the activities of the members of one or both of them. Therefore, the field of international organisations may provide a structure and principles which may be applied to resolve the impasse between the two organisations and which have wider implications for inter-state relations in the international order.

It remains to be seen whether the common principles of the law of international organisations can resolve the dispute. What is clear is that these common principles appear to have some rules that relate to the issues at hand. The subsequent parts of this paper will examine the extent to which it is probable that legal frameworks on international organisations can be successfully applied in resolving the dispute around the divergent interpretations of the Rome Statute concerning the arrest of Al-Bashir and his surrender to the Court. The common principles of the framework that will be investigated relate to the powers of the organisations, and how the inter-organisational problem may provide a blueprint for dispute resolution between international organisations using the common principles of the law. In essence, can the Rome statute be interpreted to say whether it has or does not have powers to require states to arrest Bashir (as a sitting Head of State)?

### **3.2 Constituent instruments as the basis of competence (Rome Statute and AU Constitutive Act)**

International organisations are founded by treaties which also are the constitutions and form the basis of their competence (Shaw 2008:889; Campbell 2005:83; Akande 2006). The constituent instruments will indicate whether the issues relating to the dispute are either provided for by, or within the competence of the organisations. Where there are clear, unambiguous provisions on the relevant issues of concern, the next step is to attempt to interpret the said provisions. On the contrary, where there are no such provisions, we will look to the provisions of the general principles of the law of international organisations to analyse the position. This approach will enhance the development of the law. Furthermore, it has been posited by Professor Shaw that ‘international organisations are grounded upon treaties that are also constituent instruments, but issues relating to the scope of powers and especially implied powers are also of crucial importance. Nevertheless a two-way process of legal development is involved’ (Shaw 2008:908–909). The constituent instruments of both the ICC and the AU have defined their authority and their status. As such, their authority can be principally evolved from the provisions of the Rome Statute and the Constitutive Act of the African Union, respectively (Shaw 2008:914).

Generally, the constituent instruments of international organisations serve two purposes, which often make them difficult to interpret (Amerasinghe 1994: 175–209).<sup>22</sup> First, they are multilateral treaties, and secondly they are the means of creating international persons. This is because the norms of treaty interpretation (guided generally by the codified rules found in the Vienna Convention on the Law of Treaties (VCLT)) may in some instances differ from the rules required to interpret agreements which are also the constitutions of international bodies. It follows that the constituent instrument defines the position of the organisation towards its members, to the component organs within it as well as to third parties (Akande 2006:261). All of this illustrates the considerable importance that may be attached to interpreting the constituent

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<sup>22</sup> See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 19.

instruments of an international organisation (Akande 2006:261). It has been asserted that ‘the special nature of the constituent instruments as forming not only multilateral agreements but also constitutional documents subject to constant practice, and thus interpretation, both of the institution itself and of member states and others in relation to it’ (Shaw 2008:914–915), means that a more flexible or purpose oriented method of interpretation must always be considered (Shaw 2008:914–915).

The constituent instruments of the ICC and the AU are therefore crucial in indicating whether they have the powers to take the decisions that have led to the ongoing impasse. To determine this, the extent to which the ICC may take actions or persuade its members to arrest Al-Bashir on the one hand; and on the other hand, the extent to which the AU has the capacity to urge its members to desist from cooperating with the ICC in relation to Al-Bashir must be investigated. The powers of both the ICC and the AU must be explored in terms of the provisions of their constituent instruments.

### **3.3 General principles relating to the powers of international organisations**

The constitution of an international organisation determines the extent of its powers either expressly or impliedly. The Permanent Court of International Justice (PCIJ), in the *Danube case*, held that ‘the European Commission is not a state but an international organisation with a special purpose, it only has the functions bestowed upon it by the definitive statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the statute does not impose restrictions upon it’.<sup>23</sup> Therefore the constituent instrument is important in determining the powers of an international organisation in three ways. First, it lays down the functions and purposes of the organisation. Secondly, it may clearly provide the extent of that organisation’s powers. Finally, it may place limits to any such power the organisation may exercise to fulfil its purposes. Ultimately, it comes down to the issue of interpreting the constitution.

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<sup>23</sup> Case Relating to the Jurisdiction of the European Commission of the Danube between Galatz and Braila. Advisory *Opinion* (1927) P.C.I.J (Ser B.) No. 14 at p. 64.

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It is generally agreed that the interpretation of an international organisation's statute should not be contrary to the spirit and letter of the instrument; but should be consistent with the purpose of the organisation as expressed therein.<sup>24</sup> While it is in general the interpretation of the constitution that is most important in determining the powers, whether expressly attributed, implied, or inherent in the organisation; it is therefore important to briefly describe these powers and their application in the instant case. It is generally agreed that the powers of an international organisation as evolving from the constitution are classified into three categories of attributed, implied and inherent powers. An understanding of the general notion of these powers will suggest the better approach to take in interpreting the provisions of the constituent instruments that are of concern to us in this paper.

### **3.3.1 Attributed powers of international organisations**

The attributed powers doctrine is the most natural explanation of the powers of the international organisation (Klabbers 2005:160). It provides that the powers should be restricted to those functions the organisation is specifically empowered to do (Klabbers 2009:56). As such, it has been criticised as being limited in that it appears to position an international organisation as a mere mouthpiece of its members rather than as a separate legal entity (Klabbers 2009:58). The doctrine precludes the organisation from acting outside the powers that are expressly provided by its constitution (Klabbers 2009). It restricts the organisation's ability to operate flexibly in order to fulfil its functions and purposes (Klabbers 2009). The other theories on the powers of the international organisation were developed to supplement the supposed weakness of this doctrine.

### **3.3.2 Implied powers of international organisations**

The theoretical underpinnings of the doctrine of implied powers were first set out by the Permanent Court of International Justice (PCIJ) in 1926. In the International Labour Organisation (ILO) case, it held that the implied powers of an international organisation can actually be considered to rest upon the consent

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<sup>24</sup> ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *Advisory Opinion* of 18 July 1950, I.C.J. Report (1950) p. 221, para. 229; Article 31(1) Vienna Convention on the Law of Treaties (VCLT) 1969, see note 19 above.

of approving member states.<sup>25</sup> This concept was further established as a general principle by the successor court to the PCIJ. In laying down the requirements for the international legal personality of an international organisation, the ICJ both confirmed the existence of the doctrine and also enhanced it (by similarly linking it to expressly provided powers and the purpose of the international organisation). The ICJ went further to refine the underlying theory of the implied powers doctrine. It held that implied powers are similar to attributed powers because both arise from the consent of members (Klabbers 2005:160–161).<sup>26</sup> The difference is that the consent for implied powers arises through implication, rather than being expressly provided as is the case with attributed powers. The ICJ in a later declaration confirmed that ‘under international law, the organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties’.<sup>27</sup>

The notion of implied powers is merely an interpretation of the statute which assumes the organisation to have those powers which, although they were not stated expressly, are necessary for the fulfilment of its functions and purposes.<sup>28</sup> The doctrine of implied powers does not presuppose that there are no limits as to what the organisation is permitted to do. The powers invested in the organisation must be restricted to its functions, which reflect the common interests entrusted to the organisation by its members.<sup>29</sup> The ICJ formulated the rule that any action taken by the organisation under the implied powers doctrine would be

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<sup>25</sup> Competence of the ILO to regulate incidentally the personal work of the employer (the ILO case) Advisory Opinion of 23 July 1926 (1926) P.C.I.J. (Ser. B) No 13.

<sup>26</sup> See also the *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949, p. 174, paras. 196–8.

<sup>27</sup> *Reparation case*, see note 26 above, p. 174, paras. 196–8

<sup>28</sup> *Effect of awards of compensation made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, p. 47; see also *Certain expenses of the United Nations* (Article 17, para. 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151a. para. 168.

<sup>29</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (WHO), Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 66, para. 25

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*ultra vires*, unless it is to fulfil one of the organisation's functions or purposes.<sup>30</sup> According to Klabbers, the doctrine 'may lead to more effective international governance, but not necessarily to greater democracy or legitimacy, and may undermine the legal position of individual citizens' (Klabbers 2009:73). It is not to be an open cheque given to an organisation to take any actions it deems necessary.

The actions of an organisation to fulfil its functions may yet still be outside its powers. There are other restrictions to the application of the implied powers doctrine. First, it would be restricted by a contrary indication in the constituent instrument. Therefore, it must operate within the framework of the statutorily expressed powers (Campbell 2005:283; Shaw 2008:916). Pointedly, in a dissenting judgment, Judge Winiarski noted that there is a need to 'maintain the balance of carefully established fields of competence'<sup>31</sup> in the international legal order. He further argued (speaking of the UN, but applicable to other international organisations) that 'the fact that an organ of the UN is seeking to achieve one of the UN's purposes does not suffice to render its action lawful'.<sup>32</sup> This view seems to have been accepted by some scholars. It has been argued that practice indicates conclusively that the exercise of powers by an organisation must be consistent with its scope of competence 'both in relation to each particular organ and to the overall balance of competence' (Campbell 2005:291–292). In essence, power should not be exercised so as to alter a balance of competence; the distribution of which is a question 'of the highest political sensibility' (Campbell 2005:291–292). This cautionary note, apparent in the UN expenses case,<sup>33</sup> is also applicable in the instant matter. The actions of an organisation may be pursuant to its functions; at the same time, it must not be contrary to any restriction in the constitution.

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<sup>30</sup> ICJ, Certain expenses case, see note 28 above, at para. 168.

<sup>31</sup> Dissenting Opinion of Judge Winiarski, Certain expenses case, see note 28 above, at para. 230.

<sup>32</sup> Dissenting Opinion of Judge Winiarski, Certain expenses case, see note 28 above, at 230.

<sup>33</sup> See note 28 above.

### 3.3.3 Inherent powers

The final doctrine relates to those powers that are inherent in the organisation as a separate legal entity. Inherent powers are similar to the implied power doctrine to the extent that they exclude such powers which are prohibited in the constitutional instruments (Campbell 2005:291–292). The notion of inherent powers is functional, however, to aid the organisation to attain its objectives. It also reduces the number of legal controls on the capacity of the organisation to carry out its functions.

### 3.3.4 Summary of the powers of international organisations: A matter of interpreting constitutional instruments

The above brief overview of the powers of international organisations highlights the importance of interpreting the constituent instruments. Generally it must be observed that since constitutional instruments are treaties, the rules of the VCLT must be considered.<sup>34</sup> Then again, as noted earlier, the instruments are also constitutional documents and as such their special characteristics must be considered.<sup>35</sup> In fact, the constitutional nature of these documents raises special problems of interpretation due to their nature, character, objects, functions and practice (Akande 2006:278).<sup>36</sup> As noted earlier, the special characteristics of the constitutional nature of this kind of treaties means that their interpretation may not follow the general rules as laid down in the VCLT.

On the matter of interpreting the instruments of an international organisation, the case has been made for special emphasis on the object and purpose interpretative approach. Generally, in the case of other treaties, the ICJ has held that this should be subsidiary to the text.<sup>37</sup> However, in another case involving international organisations, the Court noted that ‘the nature of the organisation, the objectives and the imperatives associated with the effective performance

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<sup>34</sup> Articles 31 and 32 VCLT, see note 19 above.

<sup>35</sup> ICJ, Nuclear Weapons Advisory (WHO) case, see note 29 above.

<sup>36</sup> See also *Legality of Nuclear Weapons case*, see note 22 above, para. 19; *Certain expenses case*, see note 28 above, p. 151, para. 157.

<sup>37</sup> ICJ, *Case Concerning the Territorial Dispute (Libyan Arab J'amahiriyai vs. Chad)*, Judgment of 3 February 1994, I.C.J Report 1994, p. 21, para. 41; see also Aust 2007: 235.

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of its functions are elements which may deserve special attention when interpreting the constituent instrument of the international organisation.<sup>38</sup> It has been argued that the Court will interpret the contested word or phrase to follow what is most conducive to the attainment of that organisation's objects and purposes.<sup>39</sup> In all, it remains true that where the text of a treaty is sufficiently clear, interpreting bodies do not usually look further.<sup>40</sup>

### 4. The powers of the AU

The relations between the two international organisations deteriorated when the AU publicly opposed Sudan's referral by the UNSC to the ICC. The relations further worsened with the Court's indictment of Al-Bashir.<sup>41</sup> Of concern to us, is the recent decision of the organisation that relied on Article 23 of the AU Constitutive Act (African Union 2000) and Article 98 of the Rome Statute in requiring its members not to comply with the ICC warrant for the arrest of the Sudanese President.<sup>42</sup> The question here is whether the AU has the powers to request the non-cooperation of its members with the ICC.

It appears that the regional organisation has such powers expressly attributed and implied from the Constitutive Act. Article 23 of the Constitutive Act (African Union 2000) provides that member states that fail to comply with the decision and policies of the Union may be subjected to other sanctions. Implicit from that provision is the capacity given to the organisation to make decisions and enact policies which are binding on its members. In addition, the treaty clearly grants the organisation the powers to: (1) determine its common policies, (2) monitor the implementation of its policies and decisions, and (3) ensure compliance by

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<sup>38</sup> *Nuclear Weapons Case (WHO)*, see note 29 above, at p. 75; see Akande 2006:278.

<sup>39</sup> Lauterpacht 1976:420 (cited in Akande 2006:289).

<sup>40</sup> Tetsuo Sato, *Evolving Constitutions of International Organisations: A Critical Analysis of the Interpretative Framework of the Constituent Instruments of International Organisations* (Martinus Nijhoff 1996:153).

<sup>41</sup> *In the Case of the Prosecutor V. Omar Hassan Ahmad Al Bashir ('Omar Al-Bashir')*, Pre-Trial Chamber I, 4 March 2009, Warrant of Arrest for Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-1 04-03-2009 1/8 SL PT

<sup>42</sup> AU Commission Press, see note 11 above.



member states (African Union 2000: Art. 9(1)(a)(e)). Ultimately, the AU has the powers to make decisions on behalf of its members.

The rules of the Constitutive Act deter any member from violating the obligations arising from it (African Union 2000: Art. 23(2)). However, any AU decision that is not properly reached would not be binding on members. Therefore such a decision would have no attendant sanctions. A properly constituted decision must be made by a consensus of the Assembly (of Heads of States and Governments) (African Union 2000: Art. 7(1)). Alternatively, a two-thirds majority of the member states of the organisation shall be adequate to reach an appropriate decision that is binding on all (African Union 2000: Art. 7(1)). In addition, these two-thirds shall also constitute a quorum at any meeting of the Assembly (African Union 2000: Art. 7(2)). These procedures were complied with by the AU in making the ICC decisions.

It is expected that the AU decisions would be designed to attain the objectives laid down in its Constitutive Act. Therefore, it has the powers to ensure that its member states work toward achieving these common regional objectives. In the instant situation, it can be argued that the actions of the organisation were intended to achieve such objectives as to encourage international cooperation (by preventing inter-state conflict which would arise if an AU state arrests Al-Bashir) and to promote and defend African common positions, peace, security and stability on the continent (African Union 2000: Art. 3). Therefore, the AU Assembly is empowered by Article 7 to make such decisions which in this case are binding on its members.

While the AU may have the powers to make decisions and policies that are binding on its members; it appears that the non-cooperation decision raises the issue of competing obligations for African state parties to the Rome Statute of the ICC. The question is whether the AU decision may result in the violation of another international treaty. To answer this question, the dispute at hand with the ICC must be explored. This is because while the AU may be within its powers to take decisions and make policies for its members it should not encourage treaty violation, except in situations (such as the instant case) where the issue at stake is one that may be questionable or unlawful *ab initio*. In any

case, the powers of the ICC (and the question whether it is acting *ultra vires*) must of necessity be examined to determine whether the AU or the ICC may be treading carelessly on a minefield of international responsibility (both of itself as an international organisation and of its state parties when contravening their obligations to the Rome Statute).

### 5. The powers of the ICC under the Rome Statute

This paper is concerned with the extent to which the ICC could request the arrest and surrender of Al-Bashir or any such indicted person by its member states. First, it will have to be established whether there are express provisions granting the Court such powers. Where this is so, the issue of whether such powers fall within the organisation's express purposes or functions will be moot.

It is important to note that in the case of the ICC, any of the three main organs may exercise its powers. Consequently, the organ may have to interpret the Statute to determine the power or the extent thereof. The ICC, like the other international criminal tribunals before it, is made up of the Office of the Prosecutor (OTP), the Registry, and the Chambers.<sup>43</sup> The OTP investigates the crimes that fall within the jurisdiction of the Court, indicts the suspects and presents evidence against them in Court (Rome Statute 1998: Art. 42). The Trial and Appeal Chambers are made up of judges elected by the Assembly of States for a term of nine years (Rome Statute 1998: Art. 36(9)(a)). They determine the guilt or innocence of those accused of the crimes within the jurisdiction of the Court and the consequent punishment (Rome Statute 1998: Art. 36(9)(a)). The judges also draft the Court's Rules of Procedure and Evidence. The Registry is the administrative and support arm of the Court. It schedules the hearings and the translations and undertakes all the support services of the Court (Rome Statute 1998: Art. 43). The three organs may, in carrying out their functions, interpret the powers of the Court as provided in the Rome Statute or such implied/inherent powers as the organ deems necessary to carry out the general functions of the Court. In the instant case, it is the OTP and, subsequently, the

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<sup>43</sup> Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir* (New York, Other Press, 2009), p. 40.

Chambers of the Court that have been involved in the efforts to bring Al-Bashir to justice pursuant to the UNSC referral of the situation in Sudan.

The current impasse arose as a result of the OTP's view that the Court has the powers to urge its state parties to arrest and surrender Al-Bashir, the Sudanese leader. The issue here is whether the Rome Statute provides such powers to the Court, expressly or impliedly. As has been noted earlier, the constituent instrument of an international organisation provides the initial source of determining its powers. It is only where that constituent instrument is silent that the concept of implied or inherent powers would be applied. In this instance, the Rome Statute lays out the purposes, functions and powers of the Court. It has also been established earlier that the powers should be interpreted consistently with the objects and purposes of the organisation. The purposes of the ICC as provided in its Statute must necessarily inform its powers (attributed, implied or inherent) and the limits thereto. In the instant case, our concern would be to interpret the provisions of the Rome Statute that determine the extent to which the ICC may direct its state parties to arrest and surrender Sudan's Al-Bashir.

Art. 98 lays down steps for the ICC to follow in requesting the arrest and surrender of persons enjoying immunity by another state which is not the state of nationality. The provision reads thus:

(1). The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

(2). The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

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The above provision is a clear limitation to the inherent or implied powers of the ICC to request the arrest and surrender of high state officials set out under Article 89.

The Statute expressly provides that the 'Court may transmit a request for the arrest and surrender of a person... to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'. It is worth mentioning that the part of the Statute so referred to in Article 89(1) includes Article 98 (Cooperation with respect to waiver of immunity and consent to surrender). Furthermore, it must be made clear that the applicability of Article 89 hinges on the relationship between the Court and its state parties. It is complementary to states yet operates from a different stratum. Therefore, it has power to expect cooperation from its state parties. Nonetheless, this power is not unlimited. Accordingly Article 89(1) thus provides that the cooperation is limited to the requirement that state parties should act in accordance with the provisions of Part IX (International cooperation and judicial assistance) and their national laws. Therefore Article 89 recognises that the cooperation expected from a state party must not be without consideration to the provisions on waiver of immunity and consent to surrender.

The provision provides that for the ICC to request the arrest and surrender of state officials in another state under the cooperation obligations of Article 89, it has to follow certain conditions. The essence of these conditions is that, so as to properly implement the ICC request that the requested state does not breach its obligations under international law, the Court must first obtain the waiver of immunity of the official by his state of nationality. It is only after such a waiver has been obtained that the Court may proceed with the request to the requested state to arrest and surrender such an individual. A detailed analysis of the proper interpretation of Article 98 by this writer can be found in a forthcoming paper (Nmaju forthcoming). For the purposes of the current paper, it suffices to sum up the argument that the provisions of the Rome Statute do not support the approach of the Office of the Prosecutor (OTP) in the matter of Al-Bashir's immunity.

Ultimately, the approach of the ICC, especially the OTP, to promote the arrest of the Sudanese president appears to be inconsistent with the procedure laid out in the Statute. In addition, the Pre-Trial Chamber did not address this (the relationship of Article 98 with Article 27(2), both of the Rome Statute) in its decision referring Malawi to the UN Security Council for the two states' (Malawi and Chad) supposed breach of their obligations under the Rome Statute to arrest Al-Bashir when he was within their territory.

## **6. International responsibility**

The violation of a duty imposed by international law constitutes an international wrong and has been generally considered as one of the most important and yet intricate aspects of the international legal order (Mann 1976; Matsui 2002; Brownlie 1983; Ragazzi 2010; Provost 2002). More generally accepted is the rule that every internationally wrongful act of a state entails the international responsibility of that state (United Nations 2001).<sup>44</sup> The act of a state is considered to constitute an internationally wrongful act when the conduct or omission constitutes a breach of an international obligation of that state (United Nations 2001: Art. 3), and which is attributable to it (United Nations 2001: Art. 1). Accordingly the origin of the international obligation (whether custom, treaty or other) does not affect whether the act of that state constitutes a breach of an international obligation (United Nations 2001: Art. 3).<sup>45</sup> The notion of state responsibility in international law may be divided into two related sets of norms: the first conceives rules that impose particular obligations on states (primary rules); the second is 'concerned with determining the consequences of failure to fulfill obligations established by the primary rules, and which may hence be termed "secondary" rules' (Matsui 2002:3).

Following that, it is arguable that the nature of the obligation that may be violated as a result of the ICC approach will indicate whether the action of a requested state will constitute an international wrong. It must be noted that the traditional concept of state responsibility was confined to the responsibility

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<sup>44</sup> See also Brownlie 1983, Matsui 2002 and Provost 2002.

<sup>45</sup> See also Matsui 2002:3.

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of a state for damage caused to foreigners in its territory (Matsui 2002:5). The distinction, if any, between the traditional and current notion of the law of responsibility will not be discussed in this paper. What is sufficient here is to focus on the question whether any wrong of the kind we are concerned with will be committed within the territory of the requested state as set out in Article 98 of the Rome Statute.

The core of any problem of the responsibility of the requested state, as a result of effecting an ICC arrest warrant for certain foreign state officials, will be its inconsistency with the norms of diplomatic and consular relations. These rules are customs codified in various treaties such as the Vienna Convention on Diplomatic Relations (VCDR),<sup>46</sup> the Vienna Convention on Consular Relations (VCCR)<sup>47</sup> and the United Nations Convention on Special Missions.<sup>48</sup> In essence, the rules provide that the person of certain high foreign officials – such as heads of state, ambassadors and foreign ministers – enjoy the immunity that flows from their state. These persons are considered important in the state functions such that their person, residence and office in the host state are inviolable.<sup>49</sup> The immunity that accrues to them is distinct from that of their mission (embassy) and includes their personal inviolability, immunity from criminal and civil and even administrative jurisdiction in the host state (Roberts 2009). The VCDR provision for the inviolability of the foreign state officials effectively codifies what is arguably the oldest, established and universally recognised principles of diplomatic practice (Roberts 2009:122).<sup>50</sup> This means that such foreign officials ‘shall not be liable to any form of arrest or detention’.<sup>51</sup> There is a second aspect of this principle of inviolability that places a special duty on the

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<sup>46</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, Arts 29, 31, 23 UST 3227, 500 UNTS 95 (henceforth VCDR)

<sup>47</sup> Vienna Convention on Consular Relations, 1963, Art. 24, Art 43(1), 21 UNTS 261(henceforth VCCR)

<sup>48</sup> United Nations Convention on Special Missions, 8 Dec. 1969, 1400 UNTS 231.

<sup>49</sup> VCDR; VCCR; Denza 1998; Roberts 2009.

<sup>50</sup> The provision is found in VCDR: Art. 29.

<sup>51</sup> VCDR: Art 29.

host state not to merely ensure the inviolability of the official but also to protect him/her.

The special duty of the host state to protect the foreign official is an aspect of the notion of personal inviolability that has been widely debated as to its interpretation. Nonetheless, the failure to protect the foreign official may trigger the responsibility of the host state as an omission to comply with a legal obligation. The norm on inviolability requires the host state to prevent the violation of the person of a state ambassador or head of state.<sup>52</sup> Hence it is a breach for a state, such as Malawi, to declare that it will not protect the person of a head of state on official visit. The convention requires the host state to take appropriate steps to protect the foreign diplomat or head of state. There are limits to the duty to protect as suggested by the inclusion of the word 'appropriate' in Article 29. This was highlighted in a UK case (*Aziz v. Aziz, Sultan of Brunei Intervening*).<sup>53</sup> In that case, the Court of Appeal considered the claim of the Sultan of Brunei that the UK government was under a legal obligation to protect his dignity under the personal inviolability principle by suppressing facts that were contained in a judicial document of another case. The argument was based on the need to prevent him from being identified and thus to protect his dignity. The loss of dignity claim under this principle was correctly held by the UK Court of Appeal to be beyond what is required in international law as he was a third party to the other proceedings.

The customary norms on inter-state relations as codified in VCDR provided for the personal protection of the agent of the sending state in the territory of a host state. Anything that will obstruct the foreign official in the host state is illegal. In fact, the host state as shown above is expected to take positive action to ensure the protection of the foreign official. Therefore, it is clear that the action of a requested state in arresting a foreign official who enjoys diplomatic immunity will constitute an international wrong by violating the above customary and treaty rules on diplomatic immunity.

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<sup>52</sup> VCDR; VCCR; UN Convention on Special Missions, see note 48 above.

<sup>53</sup> Judgement of Collins LJ, 11 July 2007 [2007] EWCA Civ 712.

## **7. Conclusions**

The above argumentation demonstrates that the legal impasse between the AU and the ICC can be resolved by the legal structures provided by the regime of international organisations. The international rules involving immunity (howbeit controversial) must be respected by the ICC as well as the AU outside the limitations to those rules, such as their irrelevance before international tribunals (including the ICC). As a result, what is at stake here is the procedures for bringing indicted persons such as Al-Bashir before the ICC. The argument made in this paper is that the ICC is going beyond its powers to actively urge its state parties to arrest Al-Bashir. Therefore any state acting pursuant to an ICC request to arrest Al-Bashir or similarly placed foreign official would be violating its obligations in international law, such that the injured state can successfully trigger the responsibility of the requested state for remedies. The AU, on the other hand, should maintain the efforts to resolve the dispute through legal structures rather than resorting to political manoeuvring which does not appear to have much chance of success. Nonetheless, the AU's actions (especially the later actions in relation to Kenya) appear to encourage treaty violation by its member states. It risks shooting itself in the foot by such counter-productive measures.

It is accepted that there may be no remedy adequate to rectify the injury to the sending state. The ICC should change its approach in the view that it is unlikely to result in the arrest of Al-Bashir or similarly placed high officials. The reason is that few states will be willing to take the gamble of arresting a foreign official due to the high political and legal risks that it poses. These risks will appear to the states as offering little political capital or, worse, possibly leading to an international dispute or conflict. The resultant outcome may be considered a dispute if the sending state embarks on some form of diplomatic retaliation (*quid pro quo*) or initiates action before the ICJ or other UN organs. On the other hand, it may be considered as a conflict if the sending state embarks on armed conflict against the requested state. The law must therefore be allowed to fulfil its purpose to comprehensively ensure fairness and efficiency in the international legal order.



In conclusion, we argue that these tools identified may serve the twin purposes of fairness (in its implementation to both weak and strong) and regulation of the international society such that every state and international organisation must comply. It can be said that our suggestions above, if adopted by bodies, will ensure that the differences between the ICC and AU on the issue are regulated in a way that is fair and equitable to all.

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## Book review

# *Back from the brink: The 2008 mediation process and reforms in Kenya*

Graca Machel and Benjamin Mkapa 2014

*Geneva, African Union Commission, 310 pages.*  
*ISBN 978-9966-065-73-5*

*Reviewed by Charles Nyuykonge*  
*Senior Researcher: Knowledge Production Department, ACCORD*

Although much has been written about triggers of post-electoral violence, and what needs to be done to prevent their resurgence in Kenya and Africa, insights into the architecture on which Kenya's post-2007 electoral institutions were built have not benefitted from the same amount of scholarly and policy attention. With early warning signs suggesting that growing elitism and the gap between the rich and the poor are set to widen, interest in democratic processes is also set to increase. However, this interest risks sparking some uncontrollable civil strife or popular uprisings such as has been witnessed around the world in the North Africa and Middle East region, Greece, Spain, and now Ukraine. How states or international organisations would respond to such strife is marked by the incertitude that contemporary policy makers have to grapple with. *Back from the brink* presents a real life example of how contestation in Kenya's democratisation

process uncovered years of unresolved socio-economic undercurrents and almost degenerated into a civil war. Although *Back from the brink* speaks about a retroactive solution to an anticipated crisis, it provides policy lessons for early preventive action, effective mediation and durable institution building. Being an insider's perspective, *Back from the brink* presents minute details of mediation and stands as a reference point on: the constitution of a mediation team; the principles to underpin the mediation; characteristics of a key interlocutor; and, most crucially, the time for intervening. While previous studies contemplated that the role of the Panel of Eminent African Personalities ended after the February 2008 National Accord between Raila Odinga of the Orange Democratic Movement (ODM) and Mwai Kibaki of the Party of National Unity (PNU), *Back from the brink* strengthens the assertion that mediation is a process which goes beyond peace agreements. With the perspectives that mediation is a fine art or craft, that mediating skills can be contributed by eminent persons or former statesmen, and that world leaders are acquiring the understanding that mediation is an emerging social science discipline, *Back from the brink* will be relevant to a vast constituency of readers, including peace and security students, conflict analysis and development practitioners, conflict management policymakers, and diplomats with interest in the quintessence of mediation.

Structured into thirteen reader-friendly and interconnected chapters, *Back from the brink* reflects the fact that both the panel and the negotiating teams of both Raila and Kibaki did not see the peace agreement as an end, but as a means to stability conditional to the full implementation of all the provisos of the agreement. The compilers of the chapters reflect what seems like consensus from not just the Panel's eye, but also from the negotiating team and their principals. Other mediators are therefore enticed to read between the lines to find how totally opposed factions can reach common positions about totally opposing views on a number of things. For instance, one of the critical challenges to unpacking the triggers of a crisis is often the juxtaposition of conflict theories and concrete reality – which sometimes dilutes or amplifies the cause of the conflict and misinforms the mediator or even the policy community about the resolvable immediate causes. With *Back from the brink*, the Panel's ability to get the negotiating team and their principals to agree to the immediate and

remote causes of the conflict is a successful milestone in mediation history as it immediately helps to focus the Panel's work on what can be achieved in the short, medium and long term. It is often said that the most important people to a mediation are the negotiators, and that getting a common position from them is critical to the success of the mediation. These issues are highlighted in *Back from the brink*. Chapter one suggests that from the onset, the negotiators' acceptance of the Panel was indicative that both Raila and Kibaki's factions were open to a negotiated settlement facilitated by the team. Thus suggesting that for successful mediation, perhaps the first condition is getting the parties to agree to the mediator; and then getting them to agree to the causes of their feuds whether they be historical or immediate. Consensually, both Raila and Kibaki agreed that the process was flawed because the minds of the Electoral Commission of Kenya (ECK) and those of local and international observers did not meet, which was suggestive that something had to be done. Thus, the mediation ceased to be about who won the elections but focused upon how the electoral process can be fixed to ensure that futuristically, what the ECK announces tallies with ground realities as witnessed by all observers (p. 92).

Following from the above, one of the key benefits of the 2008 Kenyan mediation process was the coordinated international support for the process. Unlike in certain mediation experiences such as Syria where competing international interests obliterated Kofi Annan and Lakhdar Brahimi's mediation efforts, support of the Kenyan process in 2008 was international – with funds being administered by the UN (p. 33); regular consultations with the diplomatic community taking place (p. 31); and reporting being done facilitating the implementation' (p. 47). It should be noted that it refers to when the peace agreement was signed and the phase that follows. As previously mentioned, mediation is a process, and even if it were to be concluded, it would only be, when according to the words of the Kenyan anthem, '... all with one accord, In common bond united, Build this nation together, And the glory of Kenya ...' (p. 39). So, following the peace agreement, the role of the Panel changed to give Raila and Kibaki a chance to roll out the agreement in a show of local ownership. From then, the Panel's role was one of facilitation. The process towards wording and concluding the agreement derived not just from the negotiating

team, but from wide inter(national) consultations, and, amongst others, from Kenya's vibrant civil society organisations whose critical contributions gave the mediation and agreement a multi-track configuration (p. 45).

*Back from the brink* provides a vivid account of the inner workings of the coalition government and demonstrates that it was not always rosy. That Raila and Kibaki knew that the coalition government was only a temporary remedy to fix undercurrents in the Kenyan political system was critical in eliminating delays in crafting preventive remedies to future electoral processes. Benefitting from the eagle-eye of the facilitation team that continued to keep watch over the implementation, Raila and Kibaki knew better than to be seen as stalling the process – with the risk of falling out with the international community that wholly supported the process.

*Back from the brink* dedicates chapters five to twelve to reform making – starting with reforming the electoral system which was the last pulse that sparked the violence. Negotiators often resorted to having independent committees which would review the pre-existent system and posit recommendations for the future. Although severely criticised for not focusing enough on the violence that ensued in the aftermath of the elections, the committees created worked with the mindset not to stall the process by blaming any of the parties. This philosophy which underpinned the work of the committees was key in advancing dialogue and giving direction to policy makers. In many cases, the dialogues were stalled by accusatory remarks issued against the other by either of the parties. For instance, while PNU claimed the elections were free and fair and devoid of irregularities, as announced by the head ECK which declared Kibaki the winner, ODM rebutted that its agents were excluded from the vote-tallying in what seemed like a systematic ploy to tamper with the electoral outcomes (p. 90). ODM challenged the PNU to a vote recount or forensic audit, and PNU responded that the election laws allowed recounts to happen 24 hours after elections. And after these back and forth arguments, an Independent Review Committee was agreed to, and set-up. The same principles applied to the Commission of Enquiry in Post-Election Violence (CIPEV); the Truth, Justice and Reconciliation Commission (TJRC), the Police Reform Implementation Committee (PRIC); and the Independent Electoral and Boundaries Commission

(IEBC). Expectedly, there were stalemates and instances where the negotiations could not move forward. It is usually in such instances that the tact of the mediator is seen and tested. In one of such, Kofi Annan interrupted the usual prayers and offered to play a song which had been composed by Hans Corell and dedicated to him when he left the United Nations on March 2004. The Song which he titled ‘Secretary-General Kofi Annan’s Prayer for Peace’ was tuned, and as it whistled symphonic lyrics into the hearts of the negotiators, Kofi Annan tuned down the music and recited sections of the Kenyan National anthem (p. 39). This tactful act reminded the negotiators that the cause which had brought them together was bigger than they themselves – it was about the Kenyan people.

Before concluding with lessons learned from *Back from the brink*, it should be stated that the book largely focuses on the actors, their thought processes, and key decisions; but not at all on the mediation team. While it is noble for the team to package a review of the Kenyan process, it would equally be opportune to understand the inner workings of the Panel, how they were constituted, and how they resolved their own differences on how they saw things. From a process point of view, *Back from the brink* speaks a lot about how mediations should be carried out but little about how the mediator and his team should conduct themselves, especially when they come together from different works of life and have different appreciations of the reality they are dealing with or different responses to divisive issues – such as how to address impunity.

With a lot of conflict-intervention challenges usually centred on the question for timing, *Back from the brink* also fails to pin-point what made the Panel’s intervention timely. Such an assessment is important in understanding what William Zartman refers to as ‘hurting stalemate’ and the ‘ripe moment’. *Back from the brink* leaves us with more questions than answers as to whether Raila and Kibaki had to cope with any hurting factors at the time when the Panel intervened. It seems as if, as Graça Machel put it, ‘the country was at stake ... it was divided and bleeding’, and it was important to bring the nation together in ‘a place where all citizens had a sense of belonging’ (p. 37). That this ‘place’ is Kenya is undoubted, but does this suggest that successful mediation must happen in the countries where the disputants are? If so, what can one infer from the fact



that the Burundi Peace process was not mediated in Burundi, but yielded to some form of stability which the country still enjoys today?

In conclusion, *Back from the brink's* chapter 13 is a must read. It lays out some solid variables on which the success of the Kenyan mediation was anchored. From the tact of the mediator and his team that enjoyed international support, through the process of early diagnosis and timely intervention, *Back from the brink* speaks to the importance of successful conflict analysis which led Ghana's former president John Kuffuor (Chair of the African Union) to appoint the Panel and entrust to them the task of ending the brutal blood-bath that Kenya was experiencing. These approaches, coupled with 'power-sharing' presented by the mediator as one of many possible solutions, indicate the patience of the mediator in leading while giving the negotiators the chance to make common choices. Finally, it should be emphasised that although mentioned passively, the African context was critical. Suffice it to say that the often-mooted 'African solutions to African problems' seems to have been vindicated by this mediation as it was led by Africans, for Africans and in Africa. *Back from the brink* therefore provides a useful resource for understanding the nuances of mediation. Such an analysis, as provided by *Back from the brink*, is useful because it foregrounds informed and context-specific conflict resolution.