# Foreword

*Jannie Malan*

In this issue, the first two articles are about remembering, the next two about rethinking, and the last one about reconstructing. In different ways, all these articles are about redoing important things – and it is so that in some or other way, redoing can often be very necessary. I have found it interesting to note that the prefix 're-' can function in nine semantic fields, and that in one or more of the senses of *again, back* and *in a different way* it can be prefixed to almost any English verb or verbal derivative (Sykes 1982:860). In different, but interrelated and integrated ways, these three meanings can indeed be found in the articles of this issue.

The Mandela Centenary article is of special topical value in this year, but can be very relevant in every other year as well. It takes us back to our justifiably famous Madiba's long life and the socio-political contexts of his time – on the one hand, the contemptible situation of contra-existential apartheid, and on the other hand the expedient emergence of a co-existential and ethical humanism. The article reminds us that such ethics had to prioritise justice and had to accommodate a spear-named strategy of confronting the relentless structural violence of apartheid with a daunting, though disciplined, forcefulness. It shows us a remarkable model of overcoming ethno-national 'superiority' and propagating democracy and inclusivity. It encourages us to be followers of such a 'humble, honest and human' leader, who was inspired by a politics of living together.

Jannie Malan

The article highlighting the need for memorialisation to consolidate transitional justice in the Democratic Republic of the Congo takes us back to a devastated situation after decades of conflict, where survivors cried 'Never again!' and summoned co-survivors and perpetrators to commit themselves to such a vision. In this article the never-again-atrocities call does not only recur as a refrain, but is also elaborated to include the conflict-preventing injunction never to hate the perpetrators. We can read how fieldwork informants emphasised the dual significance of memorials and memorial days: to remember and honour victims, and to prevent survivors from harbouring ongoing hatred of perpetrators. The informants further emphasised the value of apology, especially when offered by the State.

In the article on the causes, situation and solutions of the recent years of conflict in South Sudan, the keyword is 'rethink'. Here the 're-' prefix functions in the sense of 'in a different way'. The article was prompted by the fact that when peace 'agreements' keep failing, the self-evident inference is that the real causes of the recurring conflict have not been addressed and that new approaches to the underlying problems and their possible solutions have to be urgently adopted. In this article ethnic animosity is identified as the root cause of the violent conflict, and the author's rethinking has led him to creative recommendations for counteracting such enmity and promoting amity.

The next article is also about South Sudan and also about different ways of thinking. It discusses a case where parties with conflicting thought patterns were trying to put together a peace agreement. It seems as if the general aim of the parties was to work towards transitional justice, but as if they (and/or the facilitators?) did not care to venture into a debate about prioritising retributive or restorative justice. What the Agreement contained, were sections on the 'agreed transitional justice mechanisms' (ARCSS 2015:40 [section 1.5]), in the following order: Commission for Truth, Reconciliation and Healing, Hybrid Court for South Sudan, and Compensation and Reparation Authority. The article focuses on overcoming the challenges and operationalising the envisaged Court as a

justice-delivering mechanism. But the implication is that the justice to be delivered is not only justice for the sake of justice, but also, and especially, justice for the sake of peace. The different ways of thinking should therefore reach further than the field of anti-impunity; it should transcend into the related and integrated fields of reparation and reconciliation.

The last article is about post-conflict recovery and reconstruction in Kenya, and community resilience. It discusses the different models the State used in implementing its recovery and reconstruction programme, and the various successes and shortcomings. But it focuses on findings about the remarkable resilience that may be revealed by internally displaced people – findings which show how social support can be regained and social capital recreated.

And the reviewed book is about rethinking the situation of religion between violence on one side and peacebuilding on the other. It frankly discusses religion's deplorable links with violence and its commendable potential for contributing towards justice, peace and reconciliation. The book shows how, in this dual context, rethinking can be transformative and lead to far-reaching effects.

From the editorial desk, I therefore trust that the contents of this issue will inspire our readers to remember and rethink, and possibly to turn best practices and research into even better practices and research.

## Sources

ARCSS (Agreement on the Resolution of the Conflict in the Republic of South Sudan) 2015. Addis Ababa, Intergovernmental Authority on Development.

Sykes, J.B. ed. 1982. *The Concise Oxford Dictionary of current English.* Seventh edition. Oxford, Clarendon Press.

# Celebrating the centenary of Nelson Mandela's birth and his nationalist humanist vision

*Sabelo J. Ndlovu-Gatsheni and Busani Ngcaweni\**

## Abstract

Nelson Rolihlahla Mandela, charismatic and iconic, is a product of his time and can only be understood within the context of the social movements that he belonged to and led. Thus, this article locates Mandela within the local and global context in which he emerged while at the same time making sense of his instrumental interventions and nationalist humanist vision of life, peace and justice. This article situates Mandela's political life within the broader context of the third humanist revolution, which was a response to the inimical processes of racism, enslavement and colonisation. In its centenary celebration of Mandela, the article re-articulates how he embodied alternative politics founded on the will to live as opposed to the will to power; the paradigm of peace as opposed to the paradigm of war; political justice as opposed to criminal justice; as well as pluriversality as opposed to tragic notions of racial separate development known as apartheid. What is fleshed out is a 'Mandela phenomenon' as founded on strong progressive politics albeit predicated on the unstable idea of the potential of advocates and victims of apartheid undergoing a radical metamorphosis amenable to the birth of a new pluriversal society.

---

\*     Sabelo J. Ndlovu-Gatsheni is Professor and Acting Executive Director of the Change Management Unit (CMU) in the Principal and Vice-Chancellor's Office at the University of South Africa. Busani Ngcaweni is the Head of Policy and Research Services in the Presidency (RSA) and Non-Resident Research Fellow at the University of Johannesburg.

Sabelo J. Ndlovu-Gatsheni and Busani Ngcaweni

## Introduction

In his keynote address at the Centenary of Nelson Mandela's birth in 2018, former United States President Barack Obama strove to situate Mandela within the global epochs and contexts in which he was born, persecuted, practised politics and led South Africa. This was done in the interest of understanding how Mandela attained such an iconic status in global politics. In his acclaimed *Black Prophetic Fire* (2014), the leading Black American philosopher Cornel West also underscored the link between charismatic leaders and social movements:

> But I want to point out that any conception of the charismatic leader severed from social movements is false. I consider leaders and movements to be inseparable. There is no Frederick Douglas without the Abolitionist movement. There is no W.E.B. Du Bois without the Pan-Africanist, international workers', and Black freedom movements. There is no Martin Luther King Jr. without the anti-imperialist, workers', and civil rights movements. There is no Ella Baker without the anti-US-apartheid and Puerto Rican independence movements. There is no Malcolm X without the Black Nationalist and human rights movements. And there is no Ida B. Wells without the anti-US-terrorist and Black women's movements (West 2014:2).

Mandela is no exception; hence this article situates him within the third humanist revolution without ignoring the local African and South African contexts. We revisit the life of struggle and the legacy of Mandela mainly because this year (2018) marks one hundred years since Nelson Rolihlahla Mandela was born in Qunu, South Africa. Mandela was an embodiment of the politics of life, which privileges co-existence of human beings irrespective of their race. Mandela sought to lead both perpetrators and victims of apartheid colonialism as 'survivors' into a new political formation known as the 'rainbow nation' of equal and consenting citizens.

He became an active leader in the epic struggle for liberation, and endured 27 years of imprisonment, 18 of which were spent at the notorious Robben Island. It was the violence and brutality of apartheid colonialism that forced Mandela and others in the African National Congress (ANC) and the South African Communist Party (SACP) to embrace violence as a tool of liberation. Mandela was so committed to opposing the injustice of apartheid, with its logic of racism and colonialism and its paradigm of war, that he was prepared to die for the cause of democracy and human rights long before these values were globally accepted as part of the post-Cold War international normative order.

This set him apart as a leader who was fully committed to a decolonial ethical humanism that underpins the will to live. Even after enduring years of incarceration, Mandela avoided bitterness and preached a gospel of racial harmony, reconciliation and democracy. This character of Mandela emerges poignantly even within a context of a highly dynamic and ideologically eclectic environment of anti-colonial politics of the twentieth century. Mandela's leadership role during the transition from apartheid to democracy inaugurated a paradigm shift towards political reform and social transformation. When he became the first black president of a democratic South Africa in May 1994, Mandela practically and symbolically made important overtures to the erstwhile white racists, aimed at including them in a new, inclusive, non-racial, democratic, and *pluriversal* society – a world in which many worlds fit (see Ndlovu-Gatsheni 2016:43; Mignolo 2011).

This article celebrates Mandela's centenary by analysing the 'Mandela phenomenon' as an encapsulation of humility, integrity, generosity of spirit, wisdom and servant leadership. This interpretation identifies Mandela as an advocate of decolonial humanism informed by what Dussel (2008: xvi) terms 'obediential power' to lead and command 'by obeying'. While in prison Mandela linked his personal freedom with that of the oppressed people of South Africa and, until his death in 2013, he consistently expressed how obedient he was to the ANC.

## Mandela as a visionary leader in a humanist revolution of decolonisation

Mandela's life of struggle and resulting legacy form part of what the philosopher and decolonial theorist Nelson Maldonado-Torres (2008a:115) termed 'a third humanist revolution that has existed alongside the Renaissance and the Enlightenment, always pointing to their constitutive exclusions and aiming to provide a more consistent narrative of the affirmation of the value of the entire human species'.

In decolonial theory, the first humanist revolution was during the Renaissance where a 'shift from a God-centred worldview to a Man-centred conception of selves, others, and world' was initiated (Maldonado-Torres 2008a:106). The second was the Enlightenment humanism, which Immanuel Kant (1996:58) celebrated as mankind's emergence and liberation from 'self-incurred immaturity' which resulted in the creation of modern institutions. Of these modern institutions, nation-states became key examples (see also Maldonado-Torres 2008a:109).

The third humanist revolution is driven by thinkers, activists and intellectuals from the Global South who have experienced the 'dark side' of modernity, which included enslavement and colonisation, and is therefore inevitably predicated on decolonising and *deimperialising* the world. Its horizon is the regaining of the ontological density by black people and a new post-racial *pluriversality* (Ndlovu-Gatsheni 2016:42–44). By ontological density we mean black people reclaiming their *being* after centuries of dehumanising colonialism and apartheid.

The 'Mandela phenomenon' is cast as a direct challenge to the paradigm of war that Friedrich Nietzsche in his *The Will to Power* (1968) articulated, insisting that war was the natural state of things and that human beings were destined to rarely want peace and, if they did so, it was only for brief periods of time.

Broadly speaking, Mandela's life of struggle, and his legacy, challenge the paradigm of war and its ability to turn those who were involved in the

liberation struggle against such monstrosities as imperialism, colonialism, apartheid, neo-colonialism, and coloniality to end up becoming monsters themselves. We deploy a critical decolonial ethics of liberation to propose a new understanding of the meaning of the Mandela phenomenon, and suggest that he stood for a paradigm of peace. In this account, his life of struggle became an embodiment of *pluriversal* humanism – which is opposed to the racial hatred that emerged at the dawn of a Euro-North American-centric modernity.

The apartheid regime that came to power in South Africa in 1948 was a typical manifestation of this other side of modernity. It survived the early decolonisation processes of the 1960s and it continued to defy the global anti-apartheid onslaught until 1994. Apartheid existed as a constitutive element of the paradigm of war and coloniality (Maldonado-Torres 2007; Ndlovu-Gatsheni 2013a; Ndlovu-Gatsheni 2013b).

Mandela's political struggles as encapsulated in his autobiography and as demonstrated in his actual leadership of the ANC during the Convention for a Democratic South Africa (CODESA) as well as his presidency collectively signify a consistent push for the decolonial turn that Maldonado-Torres (2008b:8) articulated as including 'the definitive entry of enslaved and colonised subjectivities into the realm of thought at previously unknown institutional levels'.

## Mandela and the politics of life

The will to live was at the centre of Mandela's preparedness to walk through the shadow of death towards freedom. The will to live is the nerve centre of the paradigm that Mandela's life of struggle and legacy embodied. Mandela was opposed to the paradigm of war even though the intransigency and brutality of the apartheid regime forced him to embrace violence and war as a protection for those who were victims of the apartheid system (Ngcaweni 2018).

The rise of Euro-North American-centric modernity enabled the birth of a modern subjectivity mediated by race as an organising principle.

A unique modernist consciousness that manifested itself in terms of a radical ontological unevenness between Euro-North Americans and non-Europeans emerged. A world system that Ramon Grosfoguel (2007, 2011) characterised as racially hierarchised, patriarchal, sexist, hetero-normative, Euro-North American-centric, Christian-centric, capitalist, imperial, colonial and modern was also born.

At the centre of this Euro-North American-centric world was what Maldonado-Torres (2007:245) described as the imperial Manichean Misanthropic Scepticism that was naturalised through the use of natural science to produce scientific racism. Constitutively, the paradigm of war is fed by racism and is inextricably tied to 'a peculiar death ethic that renders massacre and different forms of genocide as natural' (Maldonado-Torres 2008a:xi).

Mandela was not the first leader emerging from the Global South to embrace and articulate critical decolonial ethics of liberation as the foundation of a new politics of life as opposed to an imperial politics of death. Such previous decolonial humanists like Mahatma Gandhi, Aime Cesaire, William E.B. Du Bois, C.L.R. James, Albert Luthuli, Thomas Sankara, Kenneth Kaunda, and many others, were opposed to the paradigm of war (Cesaire 1955; James 1963; Du Bois 1965; Fanon 1968; Falola 2001; Rabaka 2010). Decolonisation and *deimperialisation* were considered to be essential pre-requisites for a planetary paradigm of peace to prevail. It had to be followed by the return of humanism as a foundation of socialist society where there was no exploitation of human beings by others.

Tanzania's Julius Nyerere, like Senghor, understood humanism in terms of African socialism, which he tried to implement in the form of *Ujamaa villages* (Nyerere 1968). Mandela understood humanism as *ubuntu* as a foundation for a rainbow nation (Mandela 1994).

The paradigm of peace is therefore inextricably linked with decoloniality. It is made possible by the decolonial turn. Du Bois in 1903 announced the decolonial turn as a rebellion against what he termed the 'colour line' that was constitutive of the core problems of the twentieth century.

By the problem of the 'colour line', Du Bois was speaking of increasing racism and forms of resistance and opposition that it was provoking. Broadly, the decolonial turn embodies a critical decolonial ethics of liberation:

> It posits the primacy of ethics as an antidote to problems with Western conceptions of freedom, autonomy and equality, as well as the necessity of politics to forge a world where ethical relations become the norm rather than the exception. The de-colonial turn highlights the epistemic relevance of the enslaved and colonized search for humanity (Maldonado-Torres 2008b:7).

Ngũgĩ wa Thiong'o (1993) expressed the decolonial turn in terms of 'moving the centre' (from Eurocentrism-*Europhonism* to a plurality of cultures) towards 're-membering Africa' – addressing Africa's fragmentation and restoring African cultural identity. It therefore becomes clear that the decolonial turn is rooted in struggles against racism, the slave trade, imperialism, colonialism and apartheid. But as noted by Maldonado-Torres (2008b:7), the decolonial turn 'began to take a definitive form after the end of the Second World War and the beginning of the wars for liberation of many colonised countries soon after'.

Critical decolonial ethics of liberation differ from post-colonial approaches that became dominant in the 1990s in a number of ways. Genealogically, decoloniality and critical decolonial ethics of liberation are traceable to the anti-slave trade, anti-imperialist, anti-colonial and anti-apartheid thinkers originating from the Global South, whereas post-colonialism is traceable to thinkers from the Global North such as Michel Foucault, Jacques Derrida, and Antonio Gramsci among many others who were not necessarily post-colonial theorists. Decoloniality grapples with what Grosfoguel (2007) terms *heterarchies* of power, knowledge and being that sustained an asymmetrical modern global system.

In terms of horizon, decoloniality seeks to attain a decolonised and *deimperialised* world in which a new *pluriversal* humanity is possible. Post-colonialism is part of a 'critique of modernity within modernity', which is genealogically building on Marxism, post-structuralism, and post-modernism (Wallerstein 1997). These critical interventions do not

directly address what decolonial theorists termed coloniality as the dark side of Euro-North American-centric modernity. The coloniality of being that took the form of hierarchisation of human races and the questioning of the very humanity of black people is one of the major departure points of decolonial approaches.

Mandela's life of struggle, and his legacy, is an embodiment of a consistent and active search for peace and harmony. In his autobiography, Mandela stated that:

> I always know that deep down in every human heart, there was mercy and generosity. No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught love, for love comes more naturally to the human heart than its opposite. Even the grimmest times in prison, when my comrades and I were pushed to our limits, I would see a glimmer of humanity in one of the guards, perhaps just for a second, but it was enough to assure me and keep me going. Man's goodness is a flame that can be hidden but never extinguished (Mandela 1994:609).

Mandela, typical of the decolonial ethics of liberation, interpreted the anti-colonial/anti-apartheid struggle as a humanistic movement for restoration of human life. This is how he put it:

> This then is what the ANC is fighting for. Their struggle is a truly national one. It is a struggle of the African people, inspired by their own suffering and their own experience. *It is a struggle for the right to live* (my emphasis) (Mandela 1994:352).

This paradigm of peace marks a radical humanistic-oriented departure from the paradigm of war. It is premised on a radically humanistic phenomenology of liberation aimed at rescuing those reduced by racism to the category of the 'wretched of the earth' through recovery of their lost ontological density and epistemic virtues of intellectual integrity and freedom. Thus, what one gleans from Mandela's *Long Walk to Freedom* is that, in the face of apartheid's official and institutionalised racism as well as brutality and intolerance of dissent, he emerged as the advocate of decolonisation, a fighter for freedom, and the face of a new non-racial

inclusive humanism. It would seem that Mandela was ahead of his time. This is evident from his clear articulation of the discourse of democracy and human rights long before it became a major global normative issue. For many political actors and leaders, the discourse of democracy and human rights became a major issue at the end of the Cold War. But Mandela had already vowed to die for democracy and free society as long before as the 1960s.

Interestingly, Mandela also credited his Xhosa traditional society's mode of governance, which he described as 'democracy in its purest form' where everyone irrespective of societal rank was allowed space to 'voice their opinions and were equal in their value as citizens' (Mandela 1994:20). At the same time, Mandela described himself as 'being something of an Anglophile' and confessed that 'While I abhorred the notion of British imperialism, I never rejected the trappings of British style and manners' (Mandela 1994:48). Should we therefore not understand Mandela as a liberal-nationalist-decolonial humanist? Does Mandela fit into the line of Mahatma Gandhi and Martin Luther King's type who strongly believed in non-violent civil disobedience?

The answer is both yes and no. Mandela was instrumental in the formation of *uMkhonto we Sizwe* (Spear of the Nation) and became its commander-in-chief. This was the armed wing of the African National Congress (ANC). The fighting forces had to adhere to a strict ethical conduct of only engaging in destabilisation and not in killing people. Even when Mandela was being tried for treason, he continued to tower above the apartheid system's provocations, brutality and violence, and was able to invite the architects of apartheid to return to humanity in a moving speech delivered during the course of the Rivonia Trials (1963–1964):

> During my lifetime, I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony with equal opportunities. It is an ideal which I hope to live for and to see realised. But if needs be, it is an ideal for which I am prepared to die (Mandela 1994:352).

His liberation struggle was also aimed at the liberation of both the oppressed and the oppressors from the cul-de-sac of racialism in the truly Freireian resolution of the oppressor–oppressed contradiction created by colonialism and coloniality (Freire 1970). On this, Mandela wrote:

> It was during those long and lonely years that my hunger for the freedom of my people became a hunger for the freedom of all people, white and black. I knew as well as I know anything that the oppressor must be liberated just as surely as the oppressed. A man who takes away another man's freedom is a prisoner of hatred; he is locked behind the bars of prejudice and narrow-mindedness. I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me. The oppressed and the oppressor alike are robbed of their humanity (Mandela 1994:611).

This set him apart from other African nationalist liberators like President Robert Gabriel Mugabe of Zimbabwe who ended up frustrated by the policy of reconciliation and finally reproduced the colonial paradigm of war of conquest predicated on race.

## Mandela's practising of the politics of coexistential life

Various lives of Mandela are indeed discernible within which his political formation and making emerged and crystallised. Danny Schechter's *Madiba A to Z: The Many Faces of Nelson Mandela* (2013) dramatises the various lives of Mandela. The historian Paul Tiyambe Zeleza (2013:10) posited that the political formation of Mandela and the meaning of his politics as well as legacy 'cannot be fully understood through the psychologizing and symbolic discourses preferred in the popular media and hagiographies'. Zeleza emphasised that Mandela was a political actor within the broader drama of African nationalism and decolonial struggles and concluded that:

> Mandela embodied all the key phases, dynamics and ideologies of African nationalism from the period of elite nationalism before the Second World War when the nationalists made reformist demands on the colonial regimes, to the era of militant mass nationalism after the war when they demanded independence, to the phase of armed liberation (Zeleza 2013:10).

Zeleza (2003) distilled five important humanistic objectives of African nationalism that are visible in Mandela's life of struggle. These are: anti-colonial decolonisation, nation-building, development, democracy, and pan-African integration and unity. In another publication he added that:

> Reconciliation was such a powerful motif in the political discourses of transition to independence among some African leaders of the imperatives of nation building, the second goal of African nationalism. It was also a rhetorical response to the irrational and self-serving fears of imperial racism that since Africans were supposedly eternal wards of whites and incapable of ruling themselves, independence would unleash the atavistic violence of 'inter-tribal warfare' from which colonialism had saved the benighted continent, and in the post-settler colonies, the retributive cataclysm of white massacres (Zeleza 2013:12).

Mandela was, however, not the only African humanist who decried both racism and reverse racism. Mahmood Mamdani in his *Define and Rule* (2013c:112) documents how Julius Nyerere of Tanzania introduced an alternative model of statecraft that sought to dismantle both tribalism and racism in the same manner that Mandela sought to dismantle apartheid colonialism. Like Mandela, Nyerere in 1962 sought to create an inclusive citizenship. Nyerere even stated publicly that:

> If we are going to base citizenship on colour we will commit a crime. Discrimination against human beings because of their colour is exactly what we have been fighting against […] They are preaching discrimination as a religion to us. And they stand like Hitlers and begin to glorify the race. We glorify human beings, not colour (quoted in Mamdani 2013c:112–113).

However what emerges poignantly about Mandela's life of struggle are various challenges cascading from exigencies of navigating complex but fading African and strong racial colonial realities. The first issue facing Mandela during his political formative years was how to rise above his parochial cultural identity. Mandela was born into a Xhosa family in Eastern Cape. Therefore, Xhosa custom, ritual and taboo shaped his early life in a profound way. Inevitably his mentality was shaped in Eastern Cape

where he was born and grew up. Mandela's formative political consciousness was influenced by what was happening at the 'Great Place' (royal place) of Chief Jongintaba Dalindyebo, the acting regent of the Thembu people. This is clearly articulated by him in his autobiography: 'My later notions of leadership were profoundly influenced by observing the regent and his court. I watched and learned from the tribal meetings that were regularly held at the Great Place' (Mandela 1994:19).

Chief Jongintaba had become Mandela's guardian after he lost his father. Mandela therefore grew up as part of a royal family, knowing that he was a Thembu first, and a Xhosa second. He did not know that he was a South African. It was only when he went to school that he felt a change: 'I began to sense my identity as an African, not just a Thembu, or even Xhosa. But this was still a nascent feeling' (Mandela 1994:36).

Mandela admits that he had to learn through travel and exposure that he was a South African who was experiencing racial discrimination and domination. Mandela also mentioned in his autobiography that some prisoners criticised him of always keeping the company of Xhosa speaking prisoners. He had to grow from this ethnic parochialism.

The second issue Mandela had to deal with was that of his political consciousness. Mahmood Mamdani once argued that 'without the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and no notion of rights' (1991:236). Mandela's explanation of his political formation and consciousness seems to confirm Mamdani's argument. Mandela stated that:

> I cannot pinpoint a moment when I became politicised, when I knew that I would spend my life in the liberation struggle. To be African in South Africa means that one is politicised from the moment of one's birth, whether one acknowledges it or not. An African child is born in an Africans Only hospital, taken home in an Africans Only bus, lives in an African Only area and attends Africans Only schools, if he attends school at all (Mandela 1994:89).

However, Mandela admits that when he left the University of Fort Hare, he was advanced socially but not politically. He only developed politically when he reached Johannesburg, 'a city of dreams, a place where one could transform oneself from a poor peasant into a wealthy sophisticate, a city of danger and opportunity' (Mandela 1994:56).

What is worth noting is that Mandela's early political consciousness was deeply nationalistic. He rejected communism. He also rejected involvement of Indians and whites in African politics. As he puts it: 'At the time, I was firmly opposed to allowing communists or whites to join the league' (Mandela 1994:94). He elaborated that during the heyday of the ANC Youth League:

> I was sympathetic to the ultra-revolutionary stream of African nationalism. I was angry at the white man, not at racism. While I was not prepared to hurl the white man into the sea, I would have been perfectly happy if he climbed aboard his steamship and left the continent on his own volition (Mandela 1994:106).

The third issue confronting Mandela was to decide what was entailed in being a freedom fighter. Besides his activism and leadership within the ANC Youth League, by 1952 Mandela had become part of the ANC leadership when he was appointed First Deputy President to Chief Albert Luthuli. It was also a time for Mandela to reflect and revise some of his political convictions. He began to study works of Marxism and Leninism which resulted in him changing his opposition to communism without changing his nationalist bona fides.

His frontline leadership included the drawing up of the M-Plan, which would ensure the continued existence and operation of the ANC in the event it was banned. Part of the M-Plan included political lectures on 'The World We Live In', 'How We are Governed' and 'The Need for Change' (Mandela 1994:135). Mandela also took the initiative to critique the strategy of non-violence. His idea was that 'non-violence was not a moral principle but a strategy; there was no moral goodness in using an ineffective weapon' (Mandela 1994:147). Mandela strongly believed that

'To overthrow oppression has been sanctioned by humanity and is the highest aspiration of every free man' (Mandela 1994:151). It was the experience of how the apartheid government responded to the Defiance Campaign that prompted Mandela to see no alternative to armed and violent resistance. His conclusion:

> A freedom fighter learns the hard way that it is the oppressor who defines the nature of the struggle, and the oppressed is often left no recourse but to use methods that mirror those of the oppressor. At a certain point, one can only fight fire with fire (Mandela 1994:155).

Mandela was therefore not a typical Gandhi character, though his struggle had deep elements of Gandhism. The intransigence and violence of apartheid could not be dealt with using only Gandhian tools, which can be seen in Mandela's role in the establishment of *uMkhonto we Sizwe* as a military wing of the ANC in the post-Sharpeville period.

The fourth issue to deal with was the meaning of being a symbol of resistance. The long imprisonment of Mandela inadvertently contributed in a big way to the making of a global icon. Mandela became a microcosm of the anti-colonial and anti-racist struggle as a whole. In prison, he continued to play a leading role as the spokesperson for all the prisoners. Mandela spent 18 years on Robben Island and he used that time to develop an even deeper understanding of the problems facing South Africa and the possible resolutions.

He entered prison as a radical nationalist and emerged from it as a radical humanist – a voice of reason and moderation. By the time of his release at the age of 71, Mandela had assumed a mythical stature within anti-colonial and anti-racist political formations. He became a 'living' martyr of the liberation struggle. On the impact of imprisonment on one's character, he wrote that 'Perhaps it requires such depths of oppression to create such heights of character' (Mandela 1994:609).

In justifying his individual initiative to initiate negotiations with the apartheid regime, Mandela stated that 'There are times when a leader must move out ahead of the flock, go off in a new direction, confident that he

is leading his people the right way' (Mandela 1994:510–511). Opening up negotiations with the apartheid regime was very risky. Mandela risked being misunderstood by the ANC both inside and outside South Africa. The bigger risk was well captured by Schechter (2013:28): 'He was one man up against an adversary with a whole bureaucracy behind it'. But by standing on a high moral and humanistic pedestal, Mandela managed to gradually gain the confidence of his adversaries and support of the progressive world.

In initiating the negotiations, Mandela was in the process transforming his political identity from terrorist and prisoner to negotiator and facilitator of 'talks' between the ANC and the apartheid regime. Through his initiative, Mandela managed to pull off one of the most challenging, significant and unexpected transitions from apartheid colonialism and authoritarianism to democracy. It is important to analyse and evaluate how the negotiations that produced the transition to democracy in South Africa were informed by a new logic of justice that was superior to the post-1945 Nuremberg template.

## Mandela and the transition to democracy

The paradigm of war gave birth to the Nuremberg trials as a template of justice. The paradigm of peace produces political justice. As argued by Mamdani (2013a; 2013b), the Nuremberg paradigm is predicated on the logic that violence should be 'criminalized without exception, its perpetrators identified and tried in a court of law'. The Convention for a Democratic South Africa (CODESA) paradigm of justice became predicated on a particular understanding of mass violence as political rather than criminal, which suggested a re-making of political society through political reform as a lasting solution (Mamdani 2013a; 2013b).

It would seem Mandela, working together with other stalwarts of the struggle like Joe Slovo, was fully committed to trying something new in the domain of transitional justice. In fact, the situation of a political stalemate needed political innovation and creativity to unblock. Mamdani (2013a:6) captured this situation as follows: 'neither revolution (for liberation movements) nor military victory (for the apartheid regime) was on the

cards.' Mandela led the ANC into CODESA fully aware that it was another 'theatre of struggle, subject to advances and reverses as any other struggle' (Mandela 1994:577).

History was not on the side of the apartheid regime. Apartheid had far outlived its life as a form of colonialism. If it survived the decolonial winds of change of the 1960s and 1970s, it could not survive the post-Cold War 'Third Wave' of democracy and human rights. One can even say the post-Cold War dispensation was more favourable to Mandela's initiatives. But the ANC had also lost its major ally in the form of the collapse of the Soviet Union (Ramphela 2008:45).

These points are reinforced by Frank B. Wilderson (2010) who has argued that it took major tectonic shifts in the global paradigmatic arrangement of white power such as the fall of the Soviet Union, which was the major backer of the ANC, the return of 40 000 black bourgeoisie exiles from Western capitals and a crumbling global economy, 'for there to be synergistic meeting of Mandela's moral fibre and the aspirations of white economic power' (Wilderson 2010:8). Indeed, imperatives and interests of white capitalists who were experiencing the biting effects of sanctions and popular unrest at home played an important role in influencing the negotiators.

But it is clear that what Mandela wanted and demanded from the apartheid regime was the dismantlement of apartheid and commitment to a non-racial, democratic and free society. He sought to achieve this through the following strategy: 'To make peace with an enemy, one must work with that enemy, and that enemy becomes your partner' (Mandela 1994:598).

Building on Mamdani's argument (2013a) on how South Africa's transition to democracy was predicated on a paradigmatic shift from the post-Second World War Nuremberg form of justice founded on criminal justice, one arrives at a favourable evaluation of CODESA. It was not merely a time of betrayal of decolonial liberation struggle through compromises; CODESA embodied another form of justice, a reality well captured by Mamdani, who wrote that:

> Whereas Nuremburg shaped a notion of justice as *criminal* justice, CODESA calls on us to think of justice as primarily *political*. Whereas Nuremberg has become the basis of a notion of *victim's justice* – as a complement to victor's justice than a contrast to it – CODESA provides the basis for an alternative notion of justice, which I call *survivor's justice* (Mamdani 2013a:2).

Mamdani went on to elaborate on the differences between criminal justice and political justice in this way:

> CODESA prioritized political justice over criminal justice. The difference is that criminal justice targets individuals whereas political justice affects entire groups. Whereas the object of criminal justice is punishment, that of political justice is political reform. The difference in consequence is equally dramatic (Mamdani 2013a:7).

Indeed, the decolonial anti-apartheid struggle was not meant to punish the ideologues of apartheid but to destroy the edifice of apartheid itself. On the ashes of juridical apartheid, the ANC and Mandela envisaged a new post-racial and *pluriversal* political community founded on new humanism and inclusive citizenship. The ghost of apartheid had to be laid to rest. The Truth and Reconciliation Commission (TRC) was the chosen mechanism for 'laying ghosts of the dark past to rest with neither retributive justice nor promotion of a culture of impunity' (Ramphela 2008:46). Mamdani (2013a:13) credited the TRC for transcending the Nuremberg trap 'by displacing the logic of crime and punishment with that of crime and confession'.

Netshitenzhe (2012) explained the logic of the negotiations and the settlement from the perspective of the ANC thus: 'At the risk of over-simplification, it can be argued that a critical element of that settlement, from the point of view of the ANC, was the logic of capturing a bridgehead: to codify basic rights and use these as the basis for more thoroughgoing transformation of South African society' (Netshitenzhe 2012:16).

Perhaps a strong confidence in the morality of decolonial humanism made the ANC and Mandela naïve, even to the extent of expecting those who benefitted economically from apartheid to be immediately reborn into

new compassionate human beings who would acknowledge the historical grievances of those who were abused and dispossessed by apartheid, and voluntarily commit themselves to play an active role in the equal sharing of resources.

But Netshitenzhe reinforced the notion that decolonial humanism induced Mandela and the ANC to imagine a more inclusive post-apartheid South Africa. For him:

> The articulation of the ANC mission by some of its more visionary leaders suggests an approach that, in time, should transcend the detail of statistical bean counting and emphasis on race and explicitly incorporate *the desire to contribute to the evolution of human civilization. At the foundation of this should be democracy with a social content*, excellence in the acquisition of knowledge and the utilization of science and *a profound humanism* (my emphasis) (Netshitenzhe 2012:27).

Mandela is a child of this ANC decolonial humanism. But concretely speaking, the year 1994 marked not only the end of administrative apartheid, but more importantly the beginning of a difficult process of nation-building, which was always tempered with a delicate balancing between allaying white fears and attending to black expectations and demands. This reality became a major test of Mandela's politics of life.

## The Mandela presidency and the practice of politics of life

At a practical level Mandela's politics of life found expression in refusing to diminish one's dignity through diminishing the dignity of others. Thus he avoided the humiliating of adversaries as he sought to create a new South Africa. When he became the first black president of South Africa in 1994, Mandela implemented a decolonial humanist vision of a post-racial *pluriversal* society. At the core of this vision was a departure from racism towards a deeper appreciation of the importance of difference.

In this vision, difference is not interpreted in terms of superior and inferior races. It is interpreted in terms of *pluriversality*. Maldonado-Torres (2008a:126) argued that the appreciation of human difference is informed

by a humanistic 'interest in restoring authentic and critical sociality beyond the colour-line'. This point is also articulated by Lewis R. Gordon (1995:154) who posited that 'the road out of misanthropy is a road that leads to the appreciation of the importance of difference'. Apartheid was a worse form of misanthropy founded on 'bad faith'. It had to be transcended by all means, including symbolic ways.

This is why Mandela's presidency was a terrain of the symbolic, which he used effectively to further welcome and entice the erstwhile racists into a new South Africa. Nation-building through use of symbolic gestures and other means, including sporting events, dominated Mandela's presidency. These involved him visiting the 94-year-old widow of Hendrik Verwoerd, who was identified as the ideologue of apartheid and its architect. Mandela also agreed to the erection of a statue in remembrance of Verwoerd. He visited Percy Yutar, who played the role of prosecutor during the Rivonia Trial in which Mandela was sentenced to life imprisonment. He even visited ex-apartheid President P.W. Botha. While he was criticised in some quarters of bending too much to placate whites, his idea was to ensure that indeed the erstwhile 'settlers'/'citizens' and the erstwhile 'natives'/'subjects' were afforded enough room to be re-born politically into consenting citizens living in a new political society where racism was not tolerated (Mamdani 2001:63–70).

## Conclusion and recommendations

This article attempts to understand the Mandela phenomenon as founded on strong principles opposed to the persistent paradigm of war and its founding charter of the will to power. Mandela is analysed as an embodiment of the politics of life that emerged within a modern world that was bereft of humanness, goodness, love, peace, humility, forgiveness, trust and optimism. It was a world dominated by the paradigms of war and racism.

Mandela provided an antidote to the paradigm of war. He introduced the paradigm of peace, reconciliation and racial harmony. He was

moved politically by profound humanism. He signified what Thandika Mkandawire (2013:3) has termed a 'sane relationship to power', a rare commitment to democracy and rule of law to the extent that 'In a sense … normalized the idea of democracy in Africa' (Mkandawire 2013:3).

Wilderson (2010:11–13) accused Mandela of being a sell-out who squandered the revolutionary potential of the ANC and ignored the Freedom Charter as he compromised with white and global capital. In the year marking one hundred years since Mandela's birth, 2018, we have seen this Mandela was a sell-out narrative being repeated in public discourse.

The rebuttal is that the balance of forces did not allow Mandela enough room to manoeuvre because he was dealing with an *undefeated* enemy. Mandela had to inevitably pursue a middle of the road strategy in the hope that in future white privileges and hegemony would be diluted through structural reforms that would bring about prosperity for the black majority. He made compromises fully cognisant of the need to balance the outcomes of negotiations for a win-win situation. He wanted to re-member the oppressed without necessarily dis-membering the oppressor (Ngcaweni 2018).

His vision of a post-racial *pluriversal* world remains powerful in a modern world that is trapped in a paradigm of war and the narrow Nuremberg paradigm of justice that is replicated by the International Criminal Court (ICC). Paul Maylam (2009:31) is correct to argue that Mandela 'stands out among world leaders of the last century as a person not obsessed with power, not entangled in the politics of manipulation and spin, not enticed into conspicuous consumption, but forever humble, honest and human'.

The challenge for leadership today, in South Africa and beyond, is to recall the teachings of Mandela and seek practical ways of developing a social order that brings economic freedom to the poor and the marginalised, an order that negotiates conflict and finds viable solutions, an arrangement that restores the dignity of the people, and societies that live in peace and justice. Further, the best tribute to Mandela would be responding to his call for the world's people to show unity, service and sacrifice, for not so often does the death of one mortal mobilise the international community to join hands in the advancement of an all-inclusive civilisation (Ngcaweni 2018).

# Sources

Cesaire, Aime 1955. *Discourse on colonialism*. Translated by Joan Pinkham. New York, Monthly Review Press.

Du Bois, W.E.B. 1965. *The world and Africa: An inquiry into the part which Africa has played in world history*. New York, International Publisher.

Dussel, Enrique 2008. *Twenty theses on politics*. Translated by George Ciccariello-Maher. Durham and London, Duke University Press.

Falola, Toyin 2001. *Nationalism and African intellectuals*. Rochester, University of Rochester Press.

Fanon, Frantz 1968. *The wretched of the earth*. New York, Grove Press.

Freire, Paul 1970. *The pedagogy of the oppressed*. New York and London, Continuum.

Gordon, Lewis R. 1995. *Bad faith and antiblack racism*. Atlantic Highlands, NJ, Humanities Press.

Grosfoguel, Ramon 2007. The epistemic decolonial turn: Beyond political-economy paradigms. *Cultural Studies*, 21 (2–3), pp. 211–223.

Grosfoguel, Ramon 2011. Decolonizing post-colonial studies and the paradigms of political-economy: Transmodernity, decolonial thinking, and global coloniality. *Modernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World*, 1 (1), pp. 1–39.

James, C.L.R. 1963. *The black jacobins: Toussaint L'Ouverture and the San Domingo revolution*. Second edition, revised. New York, Vintage Books.

Kant, Immanuel 1996. An answer to the question: What is enlightenment? In: Schmidt, J. ed. *What is enlightenment? Eighteenth-century answers and twentieth-century questions*. Berkeley and Los Angeles, University of California Press.

Maldonado-Torres, Nelson 2007. On the Coloniality of Being: Contributions to the development of a concept. *Cultural Studies,* 21 (2–3), pp. 240–270.

Maldonado-Torres, Nelson 2008a. Lewis Gordon: Philosopher of the human. *CLR James Journal*, 14 (1), pp. 103–137.

Maldonado-Torres, Nelson 2008b. *Against war: View from the underside of modernity*. Durham, NC, Duke University Press.

Mamdani, Mahmood 1991. Social movements and constitutionalism in the African context. In: Shivji, I.G. ed. *State and constitutionalism: An African debate on democracy*. Harare, SAPES Books. pp. 236–237.

Mamdani, Mahmood 2001. When does a settler become a native? Citizenship and identity in a settler society. *Pretext: Literary and Cultural Studies*, 10 (1), pp. 63–89.

Mamdani, Mahmood 2013a, Beyond Nuremberg: The historical significance of the post-apartheid transition in South Africa. Unpublished 2013 annual inaugural lecture delivered at Mapungubwe Institute for Strategic Reflection, University of Witwatersrand, 18 March.

Mamdani, Mahmood 2013b. The logic of Nuremberg. In: Wilmers, Mary-Kay ed. *London Review of Books*, 7 November. Bloomsbury, Nicolas Spice. pp. 33–34.

Mamdani, Mahmood 2013c. *Define and rule: Native as political identity*. Johannesburg, Wits University Press.

Mandela, Nelson 1994. *Long walk to freedom: The autobiography of Nelson Mandela*. London, Little Brown.

Maylam, Paul 2009. Archetypal hero or living saint? The veneration of Nelson Mandela. *Historia*, 54 (2), pp. 21–36.

Mendieta, Eduardo 2008. Foreword: The liberation of politics: alterity, solidarity, liberation. In: Dussel, E. ed. *Twenty theses on politics*. Translated by George Ciccariello-Maher. Durham and London, Duke University Press. pp. vii–xiii.

Mignolo, Walter D. 2011. *The darker side of western modernity: Global futures, Decolonial options*. Durham, NC, and London, Duke University Press.

Mkandawire, Thandika 2013. For my generation, the death of Mandela marks the end of Africa's liberation. Available from: <http://blogs.lse.ac.uk/africaatlse/2013/12/06/for-my-generation-the-death-of-mandela-marks-the-end-of-africas-liberation-struggle-thandika-mkandawire/> [Accessed 9 December 2013].

Ndlovu-Gatsheni, Sabelo J. 2013a. *Empire, global coloniality and African subjectivity*. New York and Oxford, Berghahn Books.

Ndlovu-Gatsheni, Sabelo J. 2013b *Coloniality of power in postcolonial Africa: Myths of decolonization*. Dakar, CODESRIA Book Series, 2013.

Ndlovu-Gatsheni, Sabelo. J. 2016. *The decolonial Mandela: Peace, justice and the politics of life*. Oxford and New York, Berghahn Books.

Nietzsche, Friedrich 1968. *The will to power*. New York, Penguin Classics.

Netshitenzhe, Joel 2012. Second keynote address: A continuing search for identity: Carrying the burden of history. In: Lissoni, A., J. Soske, N. Erlank, N. Nieftagodien and O. Badsha. eds. *One hundred years of the ANC: Debating liberation histories today*. Johannesburg, Wits University Press. pp. 13–27.

Ngcaweni, Busani 2018. *Righting writings on 'righteous' Mandela*. The daily maverick. Available from: <https://www.dailymaverick.co.za/opinionista/2018-07-18-righting-writings-on-righteous-mandela/> [Accessed 14 October 2018].

Nyerere, Julius K. 1968. *Freedom and socialism*. New York, Oxford University Press.

Rabaka, Reiland 2010. *African critical theory: Reconstructing the black radical tradition, from W.E.B. Du Bois and C.L.R. James to Frantz Fanon and Amilcar Cabral*. Lenham and Boulder, Lexington Books.

Ramphela, Mamphela 2008. *Laying ghosts to rest: Dilemmas of the transformation in South Africa*. Cape Town, Tafelberg.

Schechter, Danny 2013. *Madiba A to Z: The many faces of Nelson Mandela*. Johannesburg, Jacana Media.

wa Thiong'o, Ngũgĩ 1993. *Moving the centre: The struggle for cultural freedoms*. Oxford, James Currey.

Wallerstein, I. 1997. Eurocentrism and its avatars: The dilemmas of social science. *New Left Review*, 226, pp. 93–107.

West, Cornel 2014. *Black prophetic fire*. In dialogue with and edited by Christa Buschendorf. Boston, Beacon Press.

Wilderson, Frederick B. 2010. Obama and Mandela: The parallels and the differences. Unpublished paper presented at the Concerned Citizens of Laguna Woods Village, 2 February.

Zeleza, Paul T. 2003. *Rethinking Africa's globalization: Volume 1: The intellectual challenges*. Trenton, Africa World Press.

Zeleza, Paul T. 2013. Mandela's long walk with African history. *CODESRIA Bulletin*, 2013 (3&4), pp. 10–13.

# Memorialisation as an often neglected aspect in the consolidation of transitional justice: Case study of the Democratic Republic of the Congo

*Shirambere Philippe Tunamsifu**

> Without a proper engagement with the past and the institutionalization of remembrance, societies are condemned to repeat, re-enact, and relive the horror. Forgetting is not a good strategy for societies transiting to a minimally decent condition (Bhargava 2000:54).

## Abstract

For more than five decades after the Independence Day (1960–2018), the Democratic Republic of the Congo (DRC) has continued to witness large-scale violations of human rights and serious violations of international humanitarian law. Trying to deal with past abuses, the country twice experienced a process of transitional justice, in 1992 and in 2004, as the result of the *Conférence Nationale Souveraine* and the Inter-Congolese Dialogue, respectively. Both of these processes failed to achieve the desired result, and neither adopted any memorialisation process that honours the

---

\* Dr S.P. Tunamsifu is an Associate Professor of Law and Deputy Dean in charge of research in the Faculty of Law at the Université Libre des Pays des Grands Lacs (ULPGL/DR Congo). He holds the degrees of LL.D. (UNISA), M.A. (University for Peace) and LL.B. (Licence) (ULPGL). At present he is also a Research fellow in the Institute for Dispute Resolution in Africa (IDRA) at the University of South Africa (UNISA).

memory of victims. In October 2013, however, delegates to the *Concertation Nationale* recommended the government to build monuments in memory of victims of the different armed conflicts. Unfortunately, five years later the government has not yet done anything to implement that recommendation. Based on the interrogation of stakeholders, this paper offers strategies on how to honour the memory of victims of the various armed conflicts in the DRC – in order to consolidate the degree of transitional justice that had been attained.

To collect data, 32 key informants were interviewed and two focus group discussions were held in areas affected by armed conflicts. Findings included the recommendation that the State should apologise publicly for its failure to protect the civilian population. Thereafter, a commemorative day should be adopted to bring together victims and alleged perpetrators, and official monuments and memorials should be built in the most affected areas. Uncostly monuments, and aptly named schools, hospitals and public markets in memory of abuses should be built as symbolic collective reparation.

**Keywords:** commemoration of memories, *concertation nationale*, DRC, guarantee of non-repetition, healing process, symbolic reparation, tourism attraction, transitional justice

## 1. Introduction

### 1.1 Justification and rationality of the paper

The initial research project was entitled 'Ways of restoring the dignity of victims of various armed conflicts in the DRC'. When the researcher started the fieldwork, a general report on *Concertation Nationale* was presented to President Joseph Kabila for consideration and implementation. Then, after the fieldwork, the researcher came to realise that among the recommendations suggested by delegates, the *building of monuments in memory of victims of armed conflicts in the DRC* was an important one. Given that in the opinions of almost all participants in the study there was a focus on memorialisation as a way of restoring victims' dignity,

the researcher decided to entitle this paper: 'Memorialisation as an often neglected aspect in the consolidation of transitional justice: Case study of the Democratic Republic of the Congo'.

What makes this paper relevant is the fact that the government has not done anything in accordance with what the delegates to the *Concertation Nationale* recommended back in October 2013. This paper offers strategies on what can be done to honour the memories of victims and prevent further violence in the DRC. In this regard, Tunamsifu (2016:78) states that 'institutional reforms aiming at preventing a recurrence of violations should be developed through a process of broad public consultations that include the participation of victims and other sectors of civil society' (2016:78).

The paper contains various recommendations that may guide the government to implement the resolution adopted during the *Concertation Nationale.*

## 1.2 Scope of the paper

The DRC together with its historical precursors has been an arena of conflict since colonisation. During the almost five decades (1960–2018) following Independence Day, the country has continued to witness large-scale violations of human rights and serious violations of international humanitarian law.

In dealing with widespread past violations, States transitioning from such horror are often in need of transitional justice, but they tend to neglect the restoration of dignity for the victims. Thus, in the last decade, according to Teitel, transitional justice has focused primarily on maintaining peace and stability (Verbeeck 2012:207; Teitel 2002:898). Borello notes that:

> The term 'transitional justice' refers to the combination of policies that countries transitioning from authoritarian rule or conflict to democracy decide to implement in order to address past human rights violations. Transitional justice seeks to restore the dignity of victims and to establish trust among citizens and between citizens and the state (Borello 2004:13).

Therefore, it can be deduced that transitioning societies often decide how to bring to account those who bear the greatest responsibility and how to

compensate victims. Nevertheless, such societies usually pay less attention to memorialisation as a process after transitional justice to honour the memory of victims of past atrocities and thereby heal the wounds of survivors and pave the way towards reconciliation.

In 1991 and in 2002, the DRC convened two important events that adopted mechanisms of transitional justice. Thus the country, then the Republic of Zaïre under the military dictatorship of Mobutu, organised, in Kinshasa, the first inclusive political negotiation called the *Conférence Nationale Souveraine*. In 2002, during the series of internationalised armed conflicts backed by neighbouring countries after the Lusaka peace agreement in 1999, the Inter-Congolese Dialogue was held in Sun City (near Pretoria, South Africa). Of all the resolutions adopted[1] to deal with Mobutu's rule and the crimes committed during different armed conflicts, however, none acknowledged the memorialisation initiative as a significant mechanism following the satisfactory implementation of transitional justice.

After the contested presidential elections of 2011, President Joseph Kabila convened, in his December 2012 State of the Nation speech, a *Concertation Nationale* – which would start in September 2013 with the participation of some willing political parties and civil society organisations. The purpose of the *Concertation Nationale* was to bring together all the socio-political strata of the nation in order to reflect, exchange and debate, freely and without constraint, all the ways and means of consolidating national cohesion, to put an end to the cycles of violence in the eastern part of the country, to ward off any attempt to destabilise the State institutions, and to accelerate the development of the country in peace and harmony (République Démocratique du Congo 2013:4).[2] At the end of the

---

1   See Annexure 1 for a list of the Resolutions adopted by the Inter-Congolese Dialogue.

2   The original version in French is: 'Les concertations nationales avaient pour objet la réunion de toutes les couches sociopolitiques de la nation afin de réfléchir, d'échanger et de débattre, en toute liberté et sans contrainte, de tous les voies et moyens susceptibles de consolider la cohésion nationale, de mettre fin aux cycles de violence à l'est du pays, de conjurer toute tentative de déstabilisation des institutions et d'accélérer le développement du pays dans la paix et la concorde'.

*Concertation Nationale* in October 2013, concerned by the vicious circle of internationalised armed conflicts that the country has been going through since 1996, parties agreed that victims should be honoured. Thus, they resolved that monuments should be built in memory of victims of various internationalised armed conflicts.

Indeed, such a memorialisation process intends to preserve memories of victims of past violations as part of a healing process, as symbolic reparation and as a mechanism of preventing further atrocities. It can satisfy the need for honouring individuals who suffered, disappeared, or were killed during widespread past violence. Accordingly, memorialisation can take a variety of forms, but serves as an umbrella concept encompassing a range of processes to restore contested memory, and to remember the wrongdoings of the previous regimes. Museums and commemorative libraries, monuments, walls of names of victims, and virtual memorials on the internet are major forms of memorial initiatives (Barsalou and Baxter 2007:4–5). Thus, when the tribunals and truth commissions have finished their work, the memorialisation can follow at the national level in order to help the public to understand better the aspects of conflict that were previously hidden or not revealed during the truth-telling process. The educational programmes based on memorials and museums help the young generation to understand the history of conflict that their parents and grandparents went through (Barsalou and Baxter 2007:9–10). After dealing with the past, the awareness process through education can create an attitude among the young generation to regret what happened in the past and to say 'Never again!'

> The transitional justice paradigm relies on the conviction that by dealing with the past on a national level, a better future is secured, because insights are provided on the 'wrongfulness' of the past atrocities. Therefore, the process is both backward-looking, as it contains an exploration of the past, and forward-looking, as it aims to securing a better future. It is often believed that processes of transitional justice contribute to societal repair and therefore peace (Impunity Watch 2013).

Thus, the objectives of this research are to analyse the context of serious violations of armed conflicts and interrogate stakeholders in the quest of memorialisation that intend to preserve the memory, heal the wounds of victims and prevent further violations. Since the memorialisation initiative was adopted, but not yet implemented, the research intends to reveal the opinions of selected participants on memorialisation in the DRC as a neglected post-transitional justice mechanism.

The present research explores some available literature on memorialisation and uses a qualitative approach that takes into account the points of view of key informants selected by employing the purposive sample method. In qualitative research, according to Natasha Mack and others, only a sample of a population is selected for any given study. Thus, there was purposive selection of sample group participants according to preselected criteria relevant to a particular research question (Mack et al. 2005:5). In this study, the choice of the sample was based on a number of criteria which include the following:

Firstly. the participant would be a representative of the 'Coordination of Civil Society Organisations' in the North and South Kivu provinces, the Ituri district[3] and Kisangani. Secondly, the participant would be a representative of an association of victims of armed conflicts or of an association taking care of victims or advocating victims' cases in the courts of law in the DRC. Thirdly, the participant would be a victim or survivor staying in one of the areas mostly affected by different armed conflicts such as North Kivu province (Goma); South Kivu province (Bukavu, Walungu and Uvira); Ituri (Bunia) and Oriental Province (Kisangani).

---

3   The field research was conducted when the DRC had 11 provinces. Currently, the country has 26 provinces in which Ituri (former a district in Province Oriental) has become one of the five provinces into which the Oriental province has been divided.

## 2. Context of serious violations in the DRC and mechanisms of transitional justice adopted to deal with them

This section presents a brief overview of the context in which untold crimes have been committed since the colonial period in the DRC.

Since the period of colonisation, the DRC has witnessed difficult periods during which its name was changed several times.[4] Emizet François Kisangani observes that 'the DRC has undergone many changes in terms of players and goals, change and continuity have coexisted, and both forces have simultaneously exerted their influence on the political landscape of Congo' (Kisangani 2012:11).

Located in Central Africa precisely at the heart of the African continent, the DRC is the second largest country in Africa by area, after Algeria. It is bordered by nine countries – in the west by the Republic of Congo, in the north by the Republic of Central Africa and South Sudan, in the east by Uganda, Rwanda, Burundi and Tanzania, and in the south by Zambia and Angola.

The DRC was colonised in two phases – by King Leopold II and by the State of Belgium.[5] Both colonial administrations were brutal and various

---

4   As his personal fiefdom, King Leopold II named what is now known as the DRC, Congo Free State (CFS) on 1 July 1885. After 75 years of horror, he was forced to hand over the colony to the State of Belgium which renamed it Congo Belge on 15 November 1908. After 52 years, on 30 June 1960, the country was granted independence and was renamed the Republic of Congo, but in August 1964 it became the DRC in accordance with the Luluabourg Constitution. During the reign of President Mobutu, it was renamed Republic of Zaïre on 27 October 1971, and when President Laurent Désiré Kabila came to power in May 1997, he changed the name back to the DRC, which is the country's current name.

5   The first phase of the country's colonisation occurred as a result of the Berlin Conference that ceded the Congo to King Leopold II from 1885 to 1908. His reign was characterised by widespread murder and unspeakable atrocities against the colonised people. After 75 years of horror, which led to a huge international scandal, Leopold's rule in the Congo had become such an embarrassment that the Belgian parliament was obliged to annex Congo in 1908 (see Turner 2013:1; Savage 2006:3). The second phase of the colonisation began on 15 November 1908. The Belgian State renamed the colony Congo Belge and dominated it for 52 years (from 1908 to 30 June 1960, the country's Independence Day).

violations of human rights were committed by colonisers. The list of known and documented massacres is endless, and the number of victims of slavery, forced labour, torture and mutilation is estimated at 10 million (Hochschild 2007:288–293). In the aftermath of the colonial era, the post-colonial government did not deal with the human rights violations of the colonial era; neither did the 1960s roundtable conference, held in Belgium, provide any mechanisms to deal with perpetrators or to honour victims.

Due to the poor preparation, the First Republic (1960–1965) faced various internal crises in which innumerable crimes were committed, including the assassination of the first Prime Minister, Patrice Lumumba, on 17 January 1961. It was during that series of chaos that General Joseph Mobutu, then Chief Commander of the army, took political control of the country and declared himself president in a *coup d'état* on 24 November 1965. Belgium was continually being accused of the assassination of Lumumba, and forty years thereafter, the Belgian parliament admitted that 'Belgium bears a moral responsibility for the killing of Lumumba'.[6]

Under the Mobutu presidency, 1965–1997, the country experienced a military and dictatorial regime in which various crimes were committed. In 1971, Mobutu renamed the country Republic of Zaïre (Tunamsifu 2011:168; Mpongola 2010:181; Electoral Institute for Sustainable Democracy in Africa 2005:3). With one-party rule, he initiated a cult of a personality with absolute concentration of power and accumulated colossal personal fortunes (Borello 2004:vii). His regime was characterised by widespread corruption, violent suppression of dissent, including a massacre of students at the University of Lubumbashi in 1990.

In the quest for democratic governance, following domestic and inter-national pressure, President Mobutu convened a Sovereign National

---

[6]  In December 2001 a Belgian parliamentary commission of inquiry that was tasked to investigate the matter concluded that Belgium bears a moral responsibility for the killing of Lumumba. There was no documentary evidence that any member of the Belgian government gave orders to physically eliminate Lumumba. However, it did find that King Baudouin knew of plans by Lumumba's opponents to assassinate him and that some Belgian officers had witnessed the killing (Villafaña 2012:28–29).

Conference (CNS, *Conférence Nationale Souveraine*) in 1992 in order to discuss all the state's issues and thereby establish a new political and constitutional order. Following various revelations against Mobutu and his relatives about crimes committed, mismanagement, and violations of human rights, Mobutu decided to terminate the operations of the CNS. Four years later (1996), the country entered into various armed conflicts backed by Burundi, Rwanda, and Uganda.

A number of studies have shown that actors in all the conflicts were directly and indirectly responsible for millions of deaths (Nest, Grignon and Kisangani 2006:12; Office of the High Commissioner for Human Rights 2010:§998–999; Binder, De Geoffroy and Sokpoh 2010:22). On 17 December 2002, a Global and Inclusive Agreement on Transition in the DRC was signed and delegates opted to deal with the past through transitional justice mechanisms as the Truth and Reconciliation Commission, and requested the establishment of an international criminal tribunal for the DRC.

From the above, it can be deduced that none of the transitional justice mechanisms adopted by warring parties referred to memorialisation. Thus the purpose of this study is to demonstrate that beyond mechanisms adopted by warring parties to deal with past abuses, it is important for societies in political transition to take into account the points of view of survivors directly or through organisations taking care of victims. This study relied on literature and empirical fieldwork as its sources of information.

## 3. Holistic approaches to memorialisation and results from fieldwork

With the aim to commemorate or enhance the understanding of a conflictive past, memorialisation initiatives include entities and activities such as public memorials (museums and monuments), various documentation activities (oral history collections and archives), works of art, and public performances.

> Memorialisation efforts can create many opportunities for survivors and societies, including: the recognition of survivors; becoming a location for mourning and healing; contributing to truth telling; representing a form of justice or reparation; contributing towards the construction of national identity and social reconstruction; creating a space for public education, dialogue and engaging second generations; providing a basis for dialogue and reconciliation between groups in conflict; serving as a basis for non-recurrence, and preventing impunity (Impunity Watch 2015:17).

It should be clear, therefore, that initiatives aiming at preserving the memory of the violations are not limited to costly museums and memorials serving as symbolic reparation, but include low-cost initiatives such as a Remembrance Day, which can effectively send out the message that past atrocities must never be repeated.

Memorialisation in such a comprehensive sense was the participants' recommendation to the *Concertation Nationale*. As a top-down memorial-isation approach, this study is the result of interviews and focus group discussions in areas affected by various armed conflicts. As a bottom-up initiative, participants were asked the key question: 'What do you think could be done to restore the dignity of victims in the DRC?' This inclusive and consultative approach is in the same vein as the important saying of Mahatma Gandhi: '*Whatever you do* for *me* but *without me*, *you do against me*' (Miller, Latham and Cahill 2016:6). The results from the fieldwork indicate that the victims' dignity can be restored through memorialisation as part of symbolic community reparation; through the adoption of a commemorative day in memory of victims; and through museums and monuments that can attract tourists. Thus, this section is designed around four subsections analysing memorialisation as part of reparation, as part of healing and remembrance, as guarantee of non-recurrence, and as a tool of attracting tourists.

## 3.1 Memorialisation as part of reparation

Building museums, monuments or other memorials is part of the symbolic reparations which focus on citizens and victims. According to Gavin

Stamp, the idea behind it is that every single missing man or woman should receive a permanent memorial (Stamp 2006:101), but the initiative is also a potential tool of communication from one generation to another. Reparation can be granted individually or collectively, but in both cases reparation has strengths and weaknesses.

Reparation is principally an individual right. The right to reparation is a fundamental right recognised for victims and their family members. This right is well guaranteed by international and regional instruments of human rights. For example, Article 8 of the Universal Declaration of Human Rights (1948) stipulates that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. However, in the DRC, where due to a vicious cycle of internationalised armed conflicts since 1996 millions of victims have been (and still are) harmed, a programme of individual reparations is very difficult to implement. That is why in the context of the DRC prioritising community reparation seems to be a suitable measure, especially in light of all the destruction of basic infrastructure after the vicious cycle of conflicts. The principle of collective reparation is highly controversial, however, because of the perception that the rebuilding of infrastructure may be regarded as a development programme. Measures of reparative nature that include building schools to guarantee the right to education or building hospitals to guarantee the right to health generally reflect the economic and social rights of all citizens. In this regard, the researcher agrees with the Report Mapping of the Office of the United Nations High Commissioner for Human Rights in the DRC, which acknowledges that '[i]n a context in which the vast majority of the country does not have basic infrastructures, sometimes precisely because of it having been destroyed during the conflicts, prioritising certain development projects for the benefit of the victims' communities could be seen as a kind of reparation' (Office of the High Commissioner for Human Rights 2010:§1103).

Individual reparations are often not substantial enough to make a meaningful change in victims' circumstances. One danger is that collective reparations

programmes, which benefit an entire community, may be seen as a way for governments to carry out their existing development responsibilities to build schools and medical clinics, for example – and call this sufficient reparation. On the other hand, such development-oriented projects are often what people demand most when asked about reparations. As far as possible, states should seek to provide both individual and collective reparations, the former to address victims' immediate needs and the latter in service of longer-term, structural reforms. Finally, while reparations are at times seen as restoring victims to their pre-violation state, the emphasis should be placed on the restoration of dignity and active citizenship rather than on the quantum for compensation (Roht-Arriaza 2012:4–6).

During the fieldwork, key informants #19, #20, and #22 of Bunia,[7] and #28 of Kisangani[8] estimated that there would be millions of direct and indirect victims as result of various armed conflicts. Thus, there would not be available funds for individual reparation. To this end, key informants recommended the symbolic community reparation in terms of building monuments, schools, hospitals and public markets in memory of abuses. Survivors will be satisfied with this kind of community reparation. However, key informant #23 of Bunia,[9] noted that those buildings in memory of past abuses or built as collective memory should be named as follows 'monuments of reconciliation'; 'memorial of reconciliation', and 'school for peace'.

Participants in the focus group #FG2 in Kisangani[10] estimated that since many residential houses of the survivors were destroyed completely by the bombing during the hostilities between the Rwandan and Ugandan armies in the town of Kisangani, building houses for them should be considered.

---

7   Interview held in Bunia with key informants #19 and #20 on 21 January, and #22 on 22 January 2014.

8   Interview held in Kisangani with key informant #28 on 31 January 2014.

9   Interview held in Bunia with key informant #23 on 22 January 2014.

10  Second Focus group discussion (#FG2), held in Kisangani on 30 January 2014.

After two decades, Congolese people are still experiencing atrocities from State and non-State actors. It is estimated that between six and ten million people have been killed and unnumbered houses destroyed as consequences of conflicts. So, it is impossible for every single victim to receive reparation. That is why community reparation seems realistic.

## 3.2 Memorialisation as part of the healing process

Memorialisation efforts seek to preserve public memory of victims, usually through a yearly day of commemoration or through museums and monuments (African Union Panel of the Wise 2013:26). Paul Williams uses the term memorial as an umbrella term for anything that serves in remembrance of a person or event (Williams 2007:7). In the design of the memorial, according to Maya Lin, a fundamental goal should be to be honest about death, since we must accept the loss in order to begin to overcome it. It is true that people cannot forget their loved ones, and the pain of the loss will always be there, and will always hurt, but people must acknowledge the death in order to move on (Lin 2000:n.p.). In this regard, Nabudere and Velthuizen (2013:6) clarify' that:

> [M]emory and mutual supportive action belong together; one is a condition for the other. Memory creates the space in which social action can unfold, while forgetting is synonymous with inability to act, or in the Egyptian language, with 'sloth/inertia'. Without the past there is no action. Without memory there can be no conscience, no responsibility, and no past.

On his part, Paul Williams distinguishes between the terms memorial museum and memorial site. A memorial museum is a specific kind of museum dedicated to commemorating a historic event that caused mass suffering of some kind, while a memorial site is used to indicate a physical location that serves a commemorative function, but is not necessarily dominated by a built structure (Williams 2007:8).

During the fieldwork, key informants #09 of Bukavu,[11] #16 of Uvira[12] and #19 of Bunia said that there is a need to commemorate the unspeakable crimes committed against the Congolese population. Thus, a commemorative day should be declared so that victims may not be forgotten. The key informants #19 and #20 of Bunia stressed that 'the crimes were due to the incapability (weaknesses and inactions) of the State (DRC) to protect its people. In this regard, the State must recognise that it has failed to protect the civilian population, apologise publicly, and dedicate a day in memory of the victims of the various armed conflicts in the DRC. In addition, it should take responsibility for building an official memorial for the victims.

According to key informant #16 of Uvira, a commemorative day should be adopted by the parliament, and the president of the Republic should sign a decree for remembering the victims of past atrocities. Or, as foreign actors from neighbouring countries have had hands in those atrocities, the government and civil society organisations could advocate that the African Union adopt a day to commemorate victims of armed conflicts in Africa. Such a commemorative day would communicate the necessity of bringing together survivors and perpetrators or their descendants, and of propagating a forward-looking orientation.

To avoid forgetting past crimes and honour the memory of victims, key informants #09 and #14 of Bukavu, and #11, #15 and #16 of Uvira, as well as participants in the focus group #FG2 of Kisangani, suggested to build monuments for the benefit of both victims and perpetrators. Key informant #16 of Uvira emphasised that monuments can be very meaningful for all parties involved. On one hand, when perpetrators see those monuments, they could say *we should never commit such acts again.* On the other hand, when survivors see the monuments, they could say *we should never hate perpetrators.*

---

11   Interview held in Bukavu with key informant #09 on 20 December 2013.

12   Interview held in Uvira with key informant #16 on 03 January 2014.

Participants in the focus group #FG2 of Kisangani suggested that memorials should be built in the most affected areas, and that those honouring victims should have the actual names of victims engraved on their walls. Key informant #14 of Bukavu made the point that there is a 'duty to preserve memory' of past events. This participant also complained, however, that the government has done nothing about the massacres perpetrated in Kaniola – no judicial investigation against the alleged perpetrators has been undertaken, and no support has been provided to the Roman Catholic Church when it was building the memorial site in memory of the more than 6 000 people killed. This lack of political will of the current regime does not console the survivors who are bearing their grief in silence.

Key informant #15 of Uvira noted the importance of providing a cemetery where the victims' bodies and the remains of others could be buried in dignity. Such a cemetery could become a place of worship and reconciliation where survivors or their descendants may experience a link between themselves and those who have been killed during the different armed conflicts. Cemeteries themselves provide information for those who were not informed. This should happen to keep alive the memories of victims, in spite of the unwillingness of the current regime.

Visible and permanent monuments can regularly inform passers-by and help people not to repeat the crimes committed in the past. That is why key informant #14 of Bukavu argued that building memorials and monuments in memory of the victims is a kind of healing process to the survivors.

Regarding what the country went through, it is important to preserve the memories of the victims of these atrocities, and it can be done with uncostly monuments such as broken weapons and a dove of peace. Unfortunately, however, nothing has yet been built in most of the areas affected by the various armed conflicts.

## 3.3 Memorialisation as guarantee of non-recurrence of atrocities, and future conflict prevention

Memorial museums can help to educate future generations about past abuses, and help them to avoid their recurrence by saying, 'Never again'. Thus, memorialisation initiatives, as recognised by Impunity Watch, are important as they offer insight into the root causes of violence, which can offer lessons that would hopefully guarantee non-recurrence (Impunity Watch 2015:17). In this regard, the African Union Panel of the Wise (2013:26) also realises that the idea of memorialisation is to keep the memory of past abuses alive to prevent recurrence of similar violence. In the foreword to his study, Ralph Sprenkels explains that memorialisation initiatives contribute to enhancing societal trust, respect and cohesion, and provide a widely applicable tool that helps to create societal foundations for transformative change in favour of human rights, which is essential for the democratisation process at large (Impunity Watch 2015:iv).

In terms of the interview and focus group guide, key informants #16 of Uvira and #19 of Bunia, as well as participants in the focus groups #FG1[13] of Bunia and #FG2 of Kisangani stressed the importance of memory as a guarantee of non-repetition of past abuses and the prevention of armed conflicts in the future. Key informant #16 of Uvira shared the opinion that meaningful monuments can promote insightful understanding by survivors and perpetrators as a guarantee of non-repetition of past abuses.

Participants in the focus group discussion #FG1 in Bunia suggested that memorials and monuments should be built in areas ravaged by the various armed conflicts. By doing so, participants in the focus group discussion #FG2 in Kisangani argued that such an initiative would propagate the 'never again' message and prevent future generations from repeating what happened in the past. In the same vein, key informant #19 of Bunia argued that building memorials and monuments in affected communities would prevent history from repeating itself. When, however, state authorities

---

13    First Focus group discussion (#FG1) held in Bunia on 20 January 2014.

fail to undertake measures or initiatives that prevent further atrocities it would mean that victims may have to endure a repetition of gross human rights violations.

## 3.4 Memorialisation and tourism

Memorial museums can also bring about the further advantage of drawing foreigners' attention to historical sites. Paul Williams agrees that they form key sites that can capitalise on the growth of 'cultural tourism'. He adds that they may even have a double significance:

> They are advantageous for visitors not only in the way they conveniently condense historical narratives within a single authentic site, but also in the way they impart moral rectitude to those who visit (Williams 2007:190).

Participants in the focus group discussion #FG2 in Kisangani noted that the construction of memorials would attract tourism, and access fees or donations from visitors will help in the gathering of more evidence about past abuses.

## 4. Conclusion, and recommendations of fieldwork participants

The DRC, in more than five decades after its Independence Day (1960–2018), has continued to witness large-scale violations of human rights and serious violations of international humanitarian law. In dealing with past abuses, the country convened two important inclusive political negotiations in 1991 and in 2002 during which transitional justice mechanisms were adopted. Both were unsatisfactory experiences however, and in both cases a memorialisation process which could have facilitated an atmosphere of reconciliation and coexistence was unfortunately neglected.

It was only in 2013 that stakeholders at the *Concertation Nationale* for the very first time adopted a decision to build monuments in memory of the victims of armed conflicts in all areas where atrocities were committed.

Since, five years later, there are not yet any official monuments built to honour victims of the different armed conflicts, or any measures to

implement such a recommendation, this study collected data from 32 key informants and two focus group discussions in areas affected in order to explore the point of view of the affected population. The researcher selected key informants from the 'Coordination of Civil Society Organisations', from victims of armed conflict associations or of associations taking care of victims, and also from victims or survivors staying in areas mostly affected by different armed conflicts such as North Kivu province (Goma); South Kivu province (Bukavu, Walungu and Uvira); Ituri (Bunia) and Province Oriental (Kisangani).

In the light of the research findings, this study as a bottom-up initiative offers the following recommendations on a memorialisation process as a consolidating aspect of transitional justice in the DRC. The recommendations of the participants are grouped according to the four aspects of memorialisation discussed above: commemoration of memories, symbolic reparation, guarantee of non-repetition, and tourism attraction.

## 4.1 Commemoration of memories of past abuses:

- The State must apologise publicly that is has failed to protect civilian population;
- Adoption of a commemorative day to remember the victims of past atrocities in the DRC;
- The building of official monuments and memorials in memory of all victims of various armed conflicts in the most affected areas in the DRC;
- Advocate for an African Day to commemorate Congolese victims killed by African countries ;
- Involve all parties (victims and alleged perpetrators) in the building of monuments.

## 4.2 Memorialisation as symbolic reparation:

- Monuments, schools, hospitals, public market in memory of past abuses should be built as symbolic community or collective reparation;
- Collective memories should be named as follows 'monuments of reconciliation'; 'memorial of reconciliation', and 'school for peace'.
- The building of houses for the survivors of hostilities between the Rwandan and Ugandan armies in the town of Kisangani where both armies destroyed completely residential houses of civil population.

## 4.3 Guarantee of non-repetition and the prevention of future conflict:

- Monuments should be built by all parties because when alleged perpetrators would see them they will say *never again we would commit such acts*, and when survivors would see those monuments, they will say *never we would hate perpetrators*.
- Building memorials and monuments in affected communities would prevent the history from repeating itself.

## 4.4 Tourism:

- Memorials attract tourism, and access fees or donations from visitors will help harvest testimony in light of past abuses.

The above recommendations from key participants represent the voice of survivors and victims of different internationalised armed conflicts since 1996. The researcher is of the opinion that the government may be guided by these recommendations in order to implement what was decided during the *Concertation Nationale* and therefore honour the memories of victims of various armed conflicts in the DRC.

The DRC has lost opportunities to deal with past abuses and therefore to prevent further violence. As a bottom-up initiative, this research recommends the government, with the support of all development partners, to implement all transitional justice mechanisms adopted. The subsequent resumption of armed conflicts is the result of failing to address the past.

# Sources

African Union Panel of the Wise 2013. *Peace, justice, and reconciliation in Africa: Opportunities and challenges in the fight against impunity*. The African Union Series. New York, International Peace Institute.

Barsalou, Judy and Victoria Baxter 2007. *The urge to remember: The role of memorials in social reconstruction and transitional justice*. United States Institute of Peace Stabilization and Reconstruction Series No. 5 January 2007. Available from: <http://www.usip.org/sites/default/files/srs5.pdf> [Accessed 14 October 2016].

Bhargava, Rajeev 2000. Restoring decency to barbaric societies. In: Rotberg, Robert I. and Bennis Thompson eds. *Truth v. justice: The morality of truth commissions*. Princeton, NJ, Princeton University Press.

Binder Adrea, Veronique De Geoffroy and Bonaventure Sokpoh 2010. *Democratic Republic of Congo*. Berlin, Global Public Policy Institute.

Borello, Federico 2004. *A first few steps: The long road to a just peace in the Democratic Republic of the Congo*. New York, International Centre for Transitional Justice.

Electoral Institute for Sustainable Democracy in Africa (EISA) 2006. *Observer Mission: The 2005 Constitutional Referendum in the DRC 18–19 December 2005*. Johannesburg, EISA.

Hochschild, Adam 2007. Les fantômes du roi Léopold : la terreur coloniale dans l'État du Congo, 1884–1908 (The phantoms of King Leopold: The colonial terror in the State of the Congo, 1884–1908). Paris, Editions Tallandier.

Impunity Watch 2013. The long road to justice: Guiding principles of memorialisation. Available from: <https://www.hivos.org/long-road-justice-guiding-principles-memorialisation> [Accessed 1 February 2017].

Impunity Watch 2015. Asia Exchange Report: 'Memory for change' Memorialisation as a tool for transitional Justice. Available from: <http://www.impunitywatch.org/docs/Exchange Report.pdf> [Accessed 20 August 2015].

Kisangani, Emizet François 2012. *Civil war in the Democratic Republic of Congo 1960–2010*. London, Lynne Rienner.

Lin, Maya 2000. Making the memorial. The New York Review of Books. Available from: <http://dcrit.sva.edu/wp-content/uploads/2011/06/Making-the-Memorial.pdf> [Accessed 29 August 2013].

Mack, Natasha, Cynthia Woodsong, M. Kathleen Macqueen, Greg Guest and Emily Namey 2005. *Qualitative research methods: A data collector's field guide*. Triangle Park, NC, Family Health International.

Miller, Rex, Bill Latham and Brian Cahill 2017. *Humanizing the education machine: How to create schools that turn disengaged kids into inspired learners*. Hoboken, NJ, Wiley.

Mpongola, Diku D. 2010. Dealing with the past in the DRC: The path followed? *Politorbis*, 50 (Special issue on 'Dealing with the past'). Berlin, Federal Department of Foreign Affairs. pp. 181–184.

Nabudere, Dani Wadada and Andreas Velthuizen 2013. *Restorative justice in Africa: From trans-dimensional knowledge to a culture of harmony*. Pretoria, Africa Institute of South Africa.

Nest, Michael, Francois Grignon and Emizet François Kisangani 2006. *The Democratic Republic of Congo: Economic dimensions of war and peace*. Boulder, CO, Lynne Rienner.

Office of the High Commissioner for Human Rights (OHCHR) 2010. Report of the Mapping Exercise Documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003. Available from: <http://www.genocidewatch.org/images/DRC10_06_xx_Report_Draft_Democratic_Republic_of_the_Congo_1993–2003.pdf> [Accessed 18 June 2014].

République Démocratique du Congo 2013. *Les Concertations Nationales : Rapport Général des Travaux* (The National Consultations: General Report of the Proceedings [Works]). Kinshasa, Palais du Peuple.

Roht-Arriaza, Naomi 2012. *African Union Transitional Justice Policy Framework in Practice: Implementing accountability measures*. Talks compiled by Brankovic, Jasmina. Cape Town, Centre for the Study of Violence and Reconciliation.

Savage, Tyrone 2006. *In quest of a sustainable justice: Transitional justice and human security in the Democratic Republic of the Congo*. Pretoria, Institute for Security Studies.

Stamp, Gavin 2006. *The memorial to the missing of the Somme*. London, Profile Books.

Teitel, Ruti G. 2002. Transitional justice in a new era. *Fordham International Law Journal,* 26 (4), pp. 893–906.

Tunamsifu, Shirambere P. 2011. Culture of Peace I: Conflict Resolution, Peace and Law. Master curriculum development designed in the field of Peace and Conflict Studies. San José, University for Peace.

Tunamsifu, Shirambere P. 2016. A Comparative Study of Transitional Justice in the Republic of South Africa and the Democratic Republic of the Congo. Unpublished LL.D. Thesis. Pretoria, University of South Africa.

Turner, Thomas 2013. *Congo*. Cambridge, Polity Press.

Verbeeck, Georgi 2012. The South African model of transitional justice: Revenge or reconciliation? In: Nelen, Hans and Jacques Claessen eds. *Beyond the death penalty: Reflections on punishment*. Cambridge, Intersentia. pp. 203–218.

Villafaña, Franc R. 2012. *Cold war in the Congo: The confrontation of Cuban military forces, 1960–1967*. New Brunswick, NJ, Transaction Publishers.

Williams, Paul 2007. *Memorial museums: The global rush to commemorate atrocities*. Oxford, Berg Publishers.

## Annexure 1

1.  Resolution No: DIC/CPJ/01. Relating to the endorsement of the Global and Inclusive Agreement.

2.  Resolution No: DIC/CPJ/02. Relating to the adoption of the Transitional Constitution.

3.  Resolution No: DIC/CPJ/03. Relating to the enshrinement of democratic principles.

4.  Resolution No: DIC/CPJ/04. Relating to the effective and complete liberalisation of political life and association.

5.  Resolution No: DIC/CPJ/05. Relating to the free movement of people and goods throughout the national territory of the DRC as well as the restoration of transport links.

6.  Resolution No: DIC/CPJ/06. Relating to the abolition of special courts and the reform of military justice.

7.  Resolution No: DIC/CPJ/07. Relating to the reinstatement and rehabilitation of magistrates dismissed or forced into early retirement.

8.  Resolution No: DIC/CPJ/08. Relating to the rehabilitation of workers arbitrarily dismissed.

9.  Resolution No: DIC/CPJ/09. Relating to the Independent Electoral Commission.

10. Resolution No: DIC/CPJ/10. Relating to the support of the international community.

11. Resolution No: DIC/CDS/01. Relating to mechanisms for the consolidation of peace.

12. Resolution No: DIC/CDS/02. Relating to the disarmament of armed groups and the withdrawal of foreign forces.

13. Resolution No: DIC/CDS/03. Relating to the identification of nationals who shall constitute the Army; demobilisation and reintegration of child soldiers and vulnerable persons; recruitment with a view to integrating military and paramilitary groups into the National Army and Police.

14. Resolution No: DIC/CDS/04. Relating to the formation of the new restructured and integrated army.

15. Resolution No: DIC/DSC/05. Relating to sanctions against parties acting in bad faith.

16. Resolution No: DIC/CEF/01. Relating to the costs of the two wars, 1996 and 1998.

17. Resolution No: DIC/CEF/02. Resolution on the restitution of property taken and/or confiscated from individuals and of plundered state property.

18. Resolution No: ICD/CEF/03. Relating to disputes over the reconstruction of the environment destroyed by war.

19. Resolution No: ICD/CEF/04. Resolution calling for scrutiny to determine the validity of economic and financial agreements signed during the war.

20. Resolution No: ICD/CEF/05. Relating to emergency economic and social programme.

21. Resolution No: ICD/CHSC/01. Relating to the Emergency Programme in different social sectors.

22. Resolution No: ICD/CHSC/02. Relating to the Emergency Humanitarian Programme for the DRC.

23. Resolution No: ICD/CHSC/03. Relating to the Emergency Programme for the environment in the DRC.

24. Resolution No: ICD/CHSC/04. Relating to the reconstruction of Kisangani and all the other towns destroyed by the war.

25. Resolution No: ICD/CHSC/05. Relating to the reconstruction of the town of Goma.

26. Resolution No: ICD/CHSC/06. Relating to culture and inter-ethnic coexistence in the DRC.

27. Resolution No: ICD/CHSC/07. Relating to the ethics and the fight against corruption.

28. Resolution No: ICD/CHSC/08. Relating to the National Monitoring Body for Human Rights.

29. Resolution No: ICD/CHSC/09. Relating to the media sector.

30. Resolution No: ICD/CPR/01. Relating to the restitution of property taken and/or confiscated from individuals and property stolen from the state.

31. Resolution No: ICD/CPR/02. Relating to the protection of minorities.

32. Resolution No: ICD/CPR/03. Relating to the problem of nationality with regard to national reconciliation.

33. Resolution No: ICD/CPR/04. Relating to the institution of a Truth and Reconciliation Commission.

34. Resolution No: ICD/CPR/05. Relating to the establishment of an International Criminal Court.

35. Resolution No: ICD/CPR/06. Relating to the peace and security in the DRC and in the Great Lakes region.

36. Resolution No: ICD/CPR/07. Relating to the organisation of an international conference on peace, security and development in the Great Lakes region and Central Africa.

## Interviewees

1. Key informant #01DRC interviewed in Goma on 16 December 2013. Staff of Hôpital Heal Africa de Goma.

2. Key informant #02DRC interviewed in Goma on 17 December 2013. Victim found at Hôpital Heal Africa de Goma.

3. Key informant #03DRC interviewed in Goma on 17 December 2013. Victim found at Hôpital Heal Africa de Goma.

4. Key informant #04DRC interviewed in Goma on 17 December 2013. Staff of Association du Barreau Américain à Goma.

5. Key informant #05DRC interviewed in Goma on 17 December 2013. Staff of Association du Barreau Américain à Goma.

6. Key informant #06DRC interviewed in Goma on 18 December 2013. Member of the Coordination Provinciale de la société civile du Nord Kivu à Goma.

7. Key informant #07DRC interviewed in Goma on 18 December 2013. Victim found at Hôpital Heal Africa de Goma.

8. Key informant #08DRC interviewed in Bukavu on 20 December 2013. Person at Hôpital Général de Panzi à Bukavu.

9. Key informant #09DRC interviewed in Bukavu on 20 December 2013. Member of the Coordination Provinciale de la société civile du Sud-Kivu.

10. Key informant #10DRC interviewed in Uvira on 21 December 2013. Staff of Genre actif pour un devenir meilleur de la femme (GAD) à Uvira.

11. Key informant #11DRC interviewed in Uvira on 22 December 2013. Staff of the entity Village de Makobola à Uvira.

12. Key informant #12DRC interviewed in Kaniola on 23 December 2013. Staff of the Paroisse Reine de tous les Saints de Kaniola à Bukavu.

13. Key informant #13DRC interviewed in Kaniola on 23 December 2013. Staff of the Bureau d'écoute Justice et Paix at the Paroisse Reine de tous les Saints de Kaniola à Bukavu.

14. Key informant #14DRC interviewed in Burhale on 23 December 2013. Staff of the Paroisse Saint Jean Apôtre de Burhale à Bukavu.

15. Key informant #15DRC interviewed in Uvira on 02 January 2014. Staff of the Cité d'Uvira in Uvira.

16. Key informant #16DRC interviewed in Uvira on 03 January 2014. Staff of the Cadre de Concertation inter-ethnique de Uvira.

17. Key informant #17DRC interviewed in Bunia on 20 January 2014. Staff of Caritas Bunia.

18. Key informant #18DRC interviewed in Bunia on 21 January 2014. Staff of Association des Mamans Anti Bwaki de Bunia and former Commissioner of the Commission Vérité et Réconciliation in the DRC.

19. Key informant #19DRC interviewed in Bunia on 21 January 2014. Staff of École de la Paix des Missionnaires d'Afrique in Bunia.

20. Key informant #20DRC interviewed in Bunia on 21 January 2014. Staff of Coopération Internationale in Bunia.

21. Key informant #21DRC interviewed in Bunia on 22 January 2014. Staff of the Centre de recherche de l'Institut Supérieur Pédagogique de Bunia.

22. Key informant #22DRC interviewed in Bunia on 22 January 2014. Staff of Justice Plus in Bunia.

23. Key informant #23DRC interviewed in Bunia on 22 January 2014. Representative of the Hima community of Bunia.

24. Key informant #24DRC interviewed in Bunia on 23 January 2014. Member of the Coordination de la Société civile de Bunia.

25. Key informant #25DRC interviewed in Bunia on 24 January 2014. Person representing Lendu community of Bunia.

26. Key informant #26DRC interviewed in Kisangani on 29 January 2014. Staff of Congo en Images in Kisangani.

27. Key informant #27DRC interviewed in Kisangani on 30 January 2014. Staff of Actions et Réalisations pour le Développement de Kisangani.

28. Key informant #28DRC interviewed in Kisangani on 31 January 2014. Member of the Coordination Provinciale de la société civile de Kisangani.

29. Key informant #29DRC interviewed in Kisangani on 30 January 2014. Staff of the Commission Justice et Paix de la Province Orientale.

30. Key informant #30DRC interviewed in Kisangani on 01 February 2014. Staff of Union pour le développement de la Province Orientale.

31. Key informant #31DRC interviewed in Kinshasa on 18 February 2014. Staff of the Bureau de la représentation de la CPI à Kinshasa.

32. Key informant #32DRC interviewed in Kinshasa on 21 February 2014. Staff of Coalition pour la CPI à Kinshasa.

# South Sudan conflict from 2013 to 2018: Rethinking the causes, situation and solutions

*Israel Nyaburi Nyadera\**

## Abstract

With the South Sudanese conflict in its fifth year in 2018, this paper seeks to not only examine the status of the civil war that has engulfed the youngest nation on earth but to also discuss the evolving narratives of its causes and provide policy recommendation to actors involved in the peace process. Having examined the continuously failing peace treaties between the warring parties, it is evident that the agreements have failed to unearth and provide solutions to the crisis and a new approach to examining the causes and solutions to the problem is therefore necessary. This paper argues that ethnic animosities and rivalry are a key underlying cause that has transformed political rivalry into a deadly ethnic dispute through vicious mobilisation and rhetoric. Therefore, it recommends a comprehensive peace approach that will address the political aspects of the conflict and propose restructuring South Sudan's administrative, economic and social spheres in order to curb further manipulation of the ethnic differences.

**Keywords:** South Sudan, civil war, transitional authority, conflict resolution, ethnicity

---

\*   Mr Israel Nyaburi Nyadera is a graduate of the University of Nairobi Department of Political Science and History. He holds a Masters in International Relations from Middle East Technical University and a Masters in Political Science from Ankara Yildirim Beyazit University. He is currently a Ph.D. researcher in the same department and has been a visiting researcher to the University of Milan.

## Introduction

South Sudan became the youngest nation in the world after splitting from the larger Sudan to become the Republic of South Sudan in 2011. However, their independence, like that of other countries in the world, came with a huge human cost following decades of intense conflict between the Arab North and the non-Arab South. The intensity of the conflict was so destructive that it caught the attention of the international community, who embarked on a series of mediation and negotiation processes between the North and the South. Following several protocols and agreements signed by representatives of the North and the South between 2002 and 2004 (Jok 2015:1–5), these processes culminated in the signing of the Comprehensive Peace Agreement (CPA) on 9 January 2005. However, as the separation process was taking place, several key issues that were responsible for mistrust among groups in the non-Arab South were not addressed. The main focus was on the conflict between the North and the South and not the 'frozen' and 'cold' relations among the different ethnicities in the South. The referendum was overwhelmingly in favour of separation, with 99% of the votes cast approving the decision. For the North, however, this marked a major downgrade of their country's land mass as one-third of the land and about three-quarters of its oil reserves went to the new Republic of South Sudan (Ottaway and El-Sadany 2012:3).

The objective of this paper is to revisit the status of and events surrounding the South Sudan conflict from a historical and contemporary perspective and assess the consequences after five years of continued fighting. It also seeks to emphasise the role of ethnic animosity as the main underlying cause of the transformation from political rivalry to violent conflict and the way in which other causes are attached to the ethnicity factor. Recommendations will then be provided to address the political, economic and ethnic differences in the country. The paper recommends an exit strategy that will ensure the gaps that allowed previous peace agreements to collapse are sealed by involving local, regional and international actors. It proposes a transitional authority that will help deconstruct the myth

that ethnicity is the basis of survival and instead suggests the establishment of a government that will regain public trust and confidence through better management and distribution of resources, restructuring and retraining the country's security forces – ensuring territorial integrity and a state monopoly on the use of force. All of these may be achieved through the adoption of an elaborate constitutional reform.

The data used in this paper was obtained through rigorous thematic analysis of existing literature on the South Sudan conflict. The author used the data to identify the present status of the conflict, and examine the narratives on the causes of the conflict and on the various peace agreements. This way, it becomes apparent that ethnicity was not given the attention it deserves, as the focus was on ending the violence through political power sharing rather than addressing the ethnic and economic grievances. Based on the findings, an elaborate peace approach has been recommended: one that will dilute the short and long term impacts of ethnicity and allow the young nation to benefit from the fruits of its independence.

## Status of the conflict

The government of South Sudan is experiencing a struggle over legitimacy and monopoly on the use of force. Weber's definition of the state is largely based on the state's ability to have a monopoly of force. This argument is supported by several realist theorists like Waltz (1998:28–34), some of them pointing out that although such control will enable the state to have authority over other actors, this authority should not be abused (Thomson and Krasner 1989; Krasner 1999). The moment a state loses control of the monopoly over the use of force, be it through a union, revolution, collapse or conquest, then the state is dead (Adams 2000:2–5). In the case of South Sudan, the situation has remained alarming as legitimacy and monopoly over the use of force is not solely in the hands of the current government since the opposition has significant support, legitimacy and a strong army of fighters which has taken control of several parts of the country.

Weeks into the fighting that began in 2013, the United Nations (UN) estimated that thousands had been killed, and around 120 000 others internally displaced – of whom around 63 000 were seeking shelter at the UN Peacekeeping Base (UNOCHA 2013). The UN Security Council was called into action rapidly with the unanimous adoption of Resolution 2132 that required an increase of the number of troops serving under the United Nations Mission in South Sudan (UNMISS) to 12 500 soldiers and immediate cessation of hostilities (UNSC 2013). To show the seriousness of the South Sudanese case, Secretary-General Ban Ki-Moon authorised the transfer of troops from other conflict regions such as the African Union-United Nations Hybrid Operation in Darfur (UNAMID), the United Nations Operation in Côte d'Ivoire (UNOCI), the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) and the United Nations Mission in Liberia (UNMIL). Such a drastic response can be explained by the fact that although it is not very clear how many people had been killed in the first three months, aid agencies put the figure at over 50 000 people, which is higher than those who had been killed in Syria at the time – and that while the population of South Sudan is only about half of that of Syria (Martell 2016.)

The conflict continued with heavy casualties witnessed until 2015, when a temporary peace treaty was signed (Blackings 2016:7). Cessation of hostilities did not last long as both sides accused each other of violating the terms of the peace treaty. Episodic violence kept erupting as the country remained unstable. Even the Southern parts that were relatively peaceful and known for their high crop yields came under attack. This affected food production in the country and diminished supply quantities. The government lost monopoly over coercive power and was unable to administer justice, provide basic services to the citizens and guarantee their security. Domestic sovereignty and more particularly the legitimacy of the political elites were highly disputed as the country was staring into a possible genocide (African Union 2014:106, 276).

In 2017, four years into the war, the number of displaced persons had increased to over 2.3 million people, and renewed fighting was taking place

in the Equatorials, Western Bahr al Ghazal and the Greater Upper Nile, causing the death of thousands more (UNHCR 2018). The government was accused of illegal detentions, restriction of media freedom and suppression of critics. The number of people seeking shelter at UN peacekeepers' bases had also increased to 230 000 from 63 000. The situation was made even worse with the outbreak of a severe famine, especially in the former Unity state, which lasted for more than six months. The unchecked violence has seen war crimes and crimes against humanity committed, according to the African Union Commission of Inquiry. In 2018, reports by the Mercy Corps indicate that 1 out of 3 people in South Sudan is a refugee, 1.9 million people are internally displaced while more than 2.1 million have fled out of the country. This shows an increase in the number of internally and externally displaced persons from 2 million to 4 million (Mercy Corps 2018). Already, approximately $20 billion has been spent by the UN on its peacekeeping missions in South Sudan since 2014 – with little results in terms of achieving sustainable peace (Rolandsen 2015:355–356).

Targeted attacks on civilians, gender-based violence including rape, burning of homes and livestock, murder and kidnapping continue to be widespread. Aid convoys continue to be attacked and relief food looted by different warring groups. According to the United Nations International Children's Emergency Fund (UNICEF), almost 50% of all children eligible to be enrolled are out of school. The violence continues to affect not just school-going children, but also farmers and other workers who have abandoned their duties to find other means of surviving. The situation in South Sudan is among the worst in the world. Understandably so because the region became independent after three decades of fierce fighting with the North. Before the dust of the independence celebrations even settled, the civil war erupted, and as a result there was no adequate time to establish institutions and response mechanisms that could have at least reduced the effects of the war. This has seen South Sudan ranked the highest on the world index of fragile states that can collapse anytime. Inadequate funding has been a big challenge, too, in facing the conflict. For example, the budget needed to respond to the crisis in 2017 was $1.64 billion, which was expected to help 7.6 million beneficiaries. However, only 73% of the total budget was

financed. In 2018 the targeted budget by the UN is $1.8 billion to help the internally displaced and $1.7 billion to assist those who have fled out of the country (Reuters 2017b). Given the failure to meet the full budget in the previous years, aid agencies may need to look to the private sector among other options, for sufficient funding. Lack of funds is further worsened by the excess spending and extravagant lifestyle of the political class (Waal 2014:362–364).

**Graph showing the number of conflict incidences from 2011 to 2018**
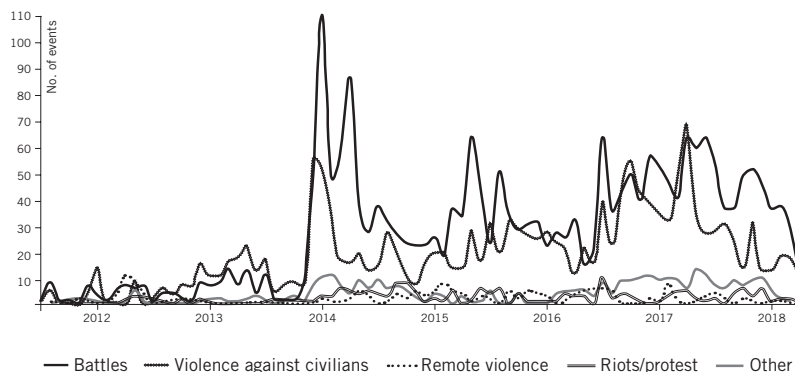


Source: Armed Conflict Location and Event Data Project (ACLEDP) 2018.

The International Monetary Fund (IMF) is warning that the prolonged war threatens a complete collapse of the South Sudanese economy if the large economic imbalances and exhausted economic buffers are not addressed (Sudan Tribune 2016). The economic situation in the country suffered a serious blow from the global oil price decline since 98% of the government revenue comes from oil exports. The South Sudanese Pound also lost around 90% of its value following the 2015 liberalisation of exchange rates that saw the country lose ground against other global currencies (Sudan Tribune 2017). In 2016 inflation surpassed the 550% increase rate leaving the government with over $1.1 billion deficit in the 2016–2017 financial year (IMF 2017). Wages were significantly reduced while the prices of even the most basic products skyrocketed – inflicting more suffering on the people. For example, the price of sorghum had increased by 400%. (FEWSN 2016).

## Recent developments

The civil war has remained persistent since the collapse of the 2015 peace agreement that was mediated by the Intergovernmental Authority on Development (IGAD) (Knopf 2016:12). During this time, several efforts have been made to attract the leaders back to the negotiating table, but all of them were in vain. In early May 2018, peace talks resumed in Addis Ababa, but by the end of the month the meetings ended without any formal agreements. Both parties rejected the proposal presented by IGAD on the sharing of government positions, the governance system of the country, and, most importantly, the security arrangements.

On 25 June 2018, following intense pressure, President Salva Kiir and Riek Machar met in Khartoum for the first time in two years (The Star 2018). The meeting was concluded with the signing of a new peace agreement that called for a countrywide *cease-fire* as well as the sharing of government positions. The cease-fire was just hours later violated in the Northern part of the country with both parties accusing the other of the violation. The almost immediate violation of the agreement leaves analysts sceptical on whether this particular one will hold longer, given that previous agreements have not been honoured. Factors that threaten the new agreement are the creation of positions for four vice-presidents, and efforts to extend the presidential term again by three years – given that elections were supposed to be conducted in 2015 but were not. The resumption of oil exploration is another contentious point of the agreement about which the opposition are still expressing concerns. Apart from the cease-fire, the agreement package provides for a 120-day pre-transition period and a 36-month transition period that will be followed by a general election and the withdrawal of troops from urban areas, villages, schools, camps, and churches. Noteworthy, other groups have also found their way into the negotiations and will also have a share of the executive and parliamentary slots shared by the two main protagonists. Their presence when an agreement was signed in Kampala, Uganda on the 8th of July 2018 has earned them a slot among the proposed four positions of the vice-presidency.

While this peace agreement is a welcome move, it does not adequately deal with the reasons which had caused the collapse of previous agreements. We will later examine why these forms of power-sharing deals may not be sufficient to end the ongoing civil war.

## Narratives on the causes of the conflict

The devastating consequences of the South Sudan conflict have prompted several scholars to come up with narratives as to the circumstances that have led to the conflict (Ballentine and Nitzschke 2005, Doyle and Sambanis 2000, O'Brien 2009). Some of these narratives touch on natural resources (especially oil), others on the access and availability of arms, or the role of Sudan in the conflict. While these narratives may have merit, they fail to examine some of the most critical underlying causes of the conflict. This is what necessitates the rethinking of the ways in which the conflict has been presented academically. Below are some of the arguments and their gaps.

The narrative of oil fuelling the civil war in South Sudan has been highly favoured by various scholars who argue that the warring parties are keen on controlling oil and other natural resources (Ballentine and Nitzschke 2005:6–7; Sachs and Warner 2001:827–838). Fearon and Laitin (2003:75–90) and De Soysa (2002:409) adopted different data sets, but also concluded that there is a causal relationship between oil resources and civil wars. Indeed, in the case of South Sudan, oil is the most important source of government revenue, and oil-producing states such as Unity, Jonglei, and Upper Nile have seen the worst of the civil war with some of the most intense combat operations reportedly happening in these areas. An investigative initiative conducted by Sentry, a US-based think-tank, gave a report alleging that oil revenues are used to finance and sustain the ongoing civil war and to enrich a small group of people in South Sudan (Bariyo 2014). This report was dismissed by the government spokesperson, Ateny Wek Ateny Sefa-Nyarko, who during an interview with Reuters insisted that oil revenues are being used to pay civil servants, stating: 'The oil money did not even buy a knife. It is being used for paying the salaries of the civil servants' (Reuters 2014). There are also scholars, such as Sefa-Nyarko (2016:194),

Johnson (2014:167) and others, who contend that the civil war of South Sudan cannot be explained using the perspective that the natural resource curse is its primary cause.

There has already been much argument on the question of why and how income from natural resources, and not income from other sources – such as agriculture, would cause conflict. Often, however, the proponents of civil wars being caused by natural resources fall short of providing a convincing argument. The media tend to use expressions such as the war has been 'fuelled' by the existence of natural resources but fail to explain how it happened. The literature concerned still needs to address three important aspects, the first of which is the possibility of spurious logic in regard to the place of endogeneity. That is, the potential that the correlation can actually be the opposite in the sense that natural resource dependency can be a *product* of civil war. Natural resources are in most cases location-specific, so even in times of war they remain constant while mobile sectors such as industries can flee. South Sudan has been at war for more than half a century and it is only the oil sector that has been sustaining not simply the war but the economy. Secondly, the natural resource narrative needs to present, in a clear way, which conflicts are affected by which resources and how such resources affect the duration of a conflict. In this regard the claims of Collier, Hoeffler and Söderbom (2004:263) on the one hand, and of Doyle and Sambanis (2000:798) and Stedman and others (2002:12–18), on the other hand, can be compared. Thirdly, the argument that natural resources provide rebels with an opportunity to extort money from miners (Ross 2002:9–10) needs to explain why stricter mining security measures have not been put in place and why a group of rebels who is able to generate revenue by controlling natural resources would opt to engage in violence – unless there were an already existing problem.

The second narrative concerns the ease of access to arms enjoyed by the warring parties. This narrative has some merit and cannot be dismissed in its entirety. After successfully carrying out an armed resistance against the Arab North, the new nation was so overwhelmed by celebrations of their achievement that they failed to recognise the importance of complete

disarmament of the civilians at the very early stages of independence. These arms have no doubt played a crucial role in the continuation and escalation of the civil war, since not only the state security agencies had access to arms, but civilians were able to keep the arms they used to fight for independence and thus challenge the state's monopoly on the use of force (O'Brien 2009:11). The critical role that access to arms has played in the civil war has been recognised by state and non-state actors who have continued to call on the UN and the Security Council to impose an arms embargo on South Sudan. The impact of such a move on the country has not been discussed in this forum, but it is important to note that the United States in February 2018 recognised the impact access to arms has on the current state of South Sudan, and imposed an arms embargo on South Sudan – a move that prevents American citizens and companies from providing defence services to South Sudan (Reuters 2018). This narrative, however, does not explain what motivates a South Sudanese citizen to point a gun and kill a fellow countryman/woman. It also does not explain why the gun is being pointed at very specific members of certain tribes and not the other.

The third narrative is about the role of Sudan in the civil war. Proponents of this narrative are keen on referring to past efforts by Khartoum to destabilise the southern region and even provide support to South Sudanese to carry out attacks in the region. A case in point is the support of the South Sudan Defence Forces (SSDF) by Khartoum between 1983 and 2005 (Young 2006:17). This alliance saw the SSDF, headed by among others Riek Machar, supporting garrisons of the Sudanese Armed Forces and protecting oil fields in the Northern part of South Sudan on behalf of the Khartoum government. In exchange the SSDF received technical and military assistance from the Arab North, including arms believed to have been instrumental in the 1991 Bor Massacre (Canadian Department of Justice 2014). Sudan and South Sudan have also been caught up in a dispute over the oil-rich Abyei region which both parties insist belongs to their side of the border (Born and Ravivn 2017:178). Some may argue that this dispute proves an 'intention' by Sudan to support the instability

of South Sudan, but the counter-argument is that Sudan stands to benefit more from a peaceful South than from a South under civil war. One of the ways Sudan can benefit from the peace is that there will be good relations between the two countries, which in turn can lessen Juba's support of rebel groups in Darfur and enable the three-year oil agreement between the two countries to proceed without any interference. Last but not least, Sudan's involvement in the peace process can help rebuild the souring relations with international actors such as the European Union and the United States (Adam 2018).

In order to understand the South Sudan civil war, however, we need to look at more than just these three narratives. There are other relevant factors such as past events, ethnic identity and the role of individuals.

## Manifestation of ethnicity in the South Sudan Conflict

At independence, South Sudan faced challenges similar to those faced by many other newly-independent countries of Africa. Competition for political power and differing ideologies among local leaders create a scenario where communities regroup within their ethnic cocoons in order to advance their cause (Cheeseman 2015:8–13). Such restructuring of communities have historical bases but are triggered by contemporary interests. Below we look at the nature in which ethnic rivalry manifests itself in the Sudan conflict.

## Divisions within the SPLM

The Sudan People's Liberation Movement was established in 1983 under the charismatic guidance of the late John Garang. Guided by the aim of realising a New Sudan, the SPLM led a rebellion against Khartoum in a bid to realise a more secularised state (Warner 2016:6–13). The SPLM drew its initial members from the South, but as the liberation quest gained momentum it incorporated some members from the North under the banner of liberating marginalised groups in the North (Barltrop 2010:3–5). Ethnically, the SPLM was from its inception a diverse organisation, but within that diversity, the Nuer and the Dinka were the majority by virtue

of the sizes of their populations. They occupied polar positions within the organisation's hierarchy – something that is still visible today (Kiranda et al. 2016:33).

As the liberation quest was on its course, the SPLM grappled with various challenges, ranging from organisational, internal and leadership to financial and ideological challenges (Janssen 2017:13). Finding solutions to these challenges became an uphill task for the SPLM leadership since these challenges were ethnicised – mainly as attempts by the dominant ethnic groups to find solutions that favoured their side. Thus, in the absence of a functioning united leadership, cracks emerged within the SPLM and signs of forthcoming splits began showing right from its inception. Along similar lines, Mamdani argues that cracks within SPLM provided a fertile ground for the continued conflict as the antagonised parties were confronted by two main issues: one was the equal ethnic representation of ethnic groups in the struggle for power, and two, the path in which the power would follow (Mamdani 2014). These divisions paved the way towards the subsequent rivalries that rocked SPLM from within.

The first split that occurred at the nascent stages of the liberation struggle (1984–1985) was more ideological and was anchored on the determination of the path the liberation struggle was to take. On one side, Akuot Atem Mayem and Gai Tut Yang were calling for an independent South Sudan, and on the other John Garang, William Nyuon Banyi, and Kerubino Kuanyin Bol led the side that advocated for what they termed a New Sudan which would be a more democratic, secular and pluralistic country. Both sides received support from diverse ethnic groups but there were undertones that the quest for an independent South Sudan was an idea of the Nuer while calls for a New Sudan resonated well with the Dinka (Kiranda et al. 2016). Although the claims and insinuations were muted, they triggered an unending slugfest between the two dominant ethnic groups and dimmed the possibilities of a peaceful South Sudan.

The second split, which served as a litmus test on the leadership of the SPLM, occurred in 1991 after Riek Machar joined forces with Lam Akol,

a senior commander in the Sudan People's Liberation Army (SPLA), to trigger a change of SPLM leadership. The two, together with others, called for the replacement of John Garang as the leader of the SPLM (Sørbø 2014:1). They accused Garang of establishing close ties with the Ethiopian government, which they regarded as a move that would stymie internal reforms within the SPLM (Johnson 2014). This attempt did not come to fruition, and Riek Machar led a splinter group in the formation of Sudan People's Liberation Movement/Army-Nasir which continued to support the independence of the South from the North even though it received military and financial support from the government in Khartoum. Noteworthy, the confrontation between Riek Machar and John Garang has been viewed through an ethnic lens that pitted the Nuers against the Dinkas in a duel that has transformed South Sudan into a crucible of war.

The night of 15 December 2013 witnessed the 3rd split, which originated from the SPLM. Just after two years of independence the young nation was yet again embroiled in a conflict, and that has continued to date. Forces loyal to the president and those loyal to the vice-president were engaged in confrontations following weeks of intense succession politics within the SPLM Political Bureau (Johnson 2014:168). This time around it was President Salva Kiir accusing Machar of plotting a coup against his government just as the party was preparing its May 2013 SPLM National Convention which was supposed to discuss, among other issues, the party's flag bearer in the 2015 presidential elections, the term limits of the chairperson of the SPLM, the Constitution and a code of conduct (Janssen 2017:12). An order to disarm members of certain communities within the presidential guard led to a mutiny that triggered revenge attacks of Dinka in Akobo and of Nuer at Bor (Johnson 2014:170). Although the alleged coup plotters were arrested, Riek Machar managed to escape from the country. But troops loyal to him continued with the conflict.

Ethnicity has remained an important variable in South Sudan's politics. The tyranny of numbers enjoyed by dominant ethnic groups has become an important instrument of ascending to power. Ethnic mobilisations based on historical rivalries and attachments explain the composition of the warring

parties in South Sudan. Strong ethnic loyalty combined with a political system that allows winners to dominate government positions and get a larger share of the national cake causes political stakes to be heightened to the extent of violence. It is also important to note that other factors like availability of arms amongst civilians, competition for available resources and the role of Sudan – underscored features in contemporary discourses – have aided the continuation of the conflict, but have not explained why it must always be a Dinka aiming a cannon at the Nuer and vice versa as it occurred in the Bor Massacre and other subsequent confrontations.

## The Bor Massacre and its implications on the conflict

In 1991, two years after the fall of the Berlin wall, when the world was beginning to experience an aura of democratic peace after decades of intense rivalry between world powers, a massacre with devastating consequences occurred in Bor, the capital of Jonglei state (Wild, Jok and Ronak 2018:2–11). Located on the east of River Bahl al Jabal (White Nile), Bor was predominantly inhabited by pastoralist Nuers with pockets of Dinka communities. Years before the massacre, there had been a series of inter-ethnic cattle raiding episodes between the Nuers and the Dinkas in a bid to increase their herds. These raids were initially conducted by means of spears and well-orchestrated ambushes, but later, with an increase in the number of guns, firearms became the common tools of the trade. Regardless of the raiding methods, it is important to note that cattle are historical symbols of social status, and their products which are of high nutritional value are important sources of livelihood among South Sudanese communities (Glowacki and Wrangham 2015:349–350).

Prior to the massacre, there was a proliferation of arms among the civilians who had formed well-organised groups. While the Dinkas had the Titweng (a local militia), the Nuers had the 'White Army' that was originally formed to protect the cattle but upon gaining widespread success in their raids became an important asset in the political sphere (Young 2016). This came against the backdrop of visible rifts in the SPLM leadership that provided the avenue for Riek Machar to incorporate the Nuer white army members

into SPLM-Nasir, and with the support of the Khartoum government in the North, SPLM-Nasir orchestrated one of the deadliest massacres in the history of South Sudan. According to Wild, Jok and Ronak (2018), Riek Machar who was then entangled in ideological differences with John Garang, mobilised over 20 000 members of the SPLM-Nasir to carry out an attack against the Dinkas in Bor in what came to be known as the Bor Massacre. It saw the death of over 2 000 people of Dinka origin and the destruction of properties as well as other atrocities (Wild, Jok and Ronak 2018). Even though Riek Machar offered an apology to the Dinkas in 2011 when he was the vice-president, it is without doubt that the massacre left an indelible footprint of loss on the lives of the Dinkas, and it has become a political tool that has been used against Riek Machar in his quest to ascend to the highest office in the land (Chol 2011:3).

It could be easy to argue that a focus on the historical rivalry between the dominant ethnic groups is simplistic and superficial and that this would reduce the ongoing feud solely into an ethnic conflict, as it is had already been labelled by segments of the international media. However, efforts to sustain an ethnic conflict narrative have been quickly countered by the argument that the South Sudan government was a representation of diverse ethnic groups and that even after the December 2013 crisis which saw a number of people arrested on the allegations of an attempted coup, the president did not spare those from his tribe (Pinaud 2014:192). Indeed, the ousted and the current vice-president belong to the Nuer and the president is from the Dinka, but the presence of people of diverse ethnic origins in the government cannot be construed to mean a representation of ethnic interests, since African societies have the propensity to bestow ethnic responsibilities on particular individuals whose voices not only become the voice of the ethnic groups but also symbols of ethnic unity. Therefore, any kind of humiliation that targets these ethnic kingpins becomes an outright humiliation to the ethnic groups they represent, who then, on behalf of their leaders, may endeavour to seek revenge.

## Previous peace efforts

The first effort towards peace was spearheaded by IGAD with the support of Norway, the United Kingdom, and the United States in the course of 2014 (Taulbee, Kelleher and Grosvenor 2014:78) The committee had set an ambitious target of 5 March 2015 as the final deadline for achieving a peace deal in the Sudan conflict. However, the deadline passed without the target being realised. That same month sanctions were imposed on a number of individuals by the Security Council for their role in the conflict. Interestingly the two main protagonists, Kiir and Machar, were not included in the list of six individuals that were sanctioned. More pressure from regional and international players demanding an end to the senseless killing led to a new draft in June 2015 that was followed by the threat of further sanctions by the Security Council if the parties involved did not sign the agreement by 17 August 2015 (Foreign Policy 2015).

Two months after signing of the peace treaty the first obstacle emerged with the unilateral decision of President Kiir to establish 18 additional states above the then existing 10 states. This act was condemned, but a positive gesture from the President was made in December 2015 with the sharing of cabinet positions. By January 2016, the deadline for forming the Transitional Government of National Unity (TGNU) had been missed, indicating the slow progress in the implementation of the peace accord.

Finally, Riek Machar was appointed as the 1st Vice-President in February 2016 although he was still in exile at the time. Further security agreements such as the demilitarisation of the capital city, Juba, were also made. Late July 2016, an attack by alleged government forces on a UN-protected civilian camp threatened to shatter the peace process (Blanchard 2016:2). In the following weeks, pockets of fighting across the country were witnessed, and the UN Human Rights Commission published a report on 11 March 2016 asserting incidences of war crime that include sexual violence. The shaky agreement continued to hold, and Machar was able to return to Juba in April 2016 to take up the position of 1st Vice-President (Baker 2016:20–27). However, fighting broke out between government forces and

those of Riek Machar, forcing him to flee the city once again, and marking the final collapse of the Transitional Government of National Unity.

De Vries and Schomerus (2017:333–340) explain that the collapse of the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) signed by the South Sudanese government, the international community and members of the opposition was a result of a lack of political goodwill by the government and the opposition, both of whom had more interest in the amount of power they would retain than in implementing the agreement (De Vries and Schomerus 2017:335). Indeed, the excessive attention given to the government and the opposition in the ongoing civil war has overshadowed genuine grievances that ordinary citizens of the country are facing and that can motivate them to take up arms and fight. This is further worsened by the perception that rebels are illegitimate groups challenging the sovereignty of the country and the opposition's far-fetched claim that they represent genuine grievances of the citizens. De Vries and Schomerus do emphasise that unless there is a more comprehensive approach to peace in South Sudan, sharing of government slots may not offer a permanent solution.

The latest efforts to bring an end to the brutal conflict in South Sudan culminated with the signing of a peace agreement on 12 September 2018 in Addis Ababa. This marked the 12th time President Kiir and his fiercest rival Riek Machar have entered into a peace agreement since the conflict began. The unique feature of this new agreement is the involvement of two new actors, namely the presidents Bashir of Sudan and Museveni of Uganda. This is interesting in the sense that the former had been previously seen as a cause of the conflict, but under the new agreement he is seen as part of the solution. This new agreement, however, still failed to tackle the underlying cause of the conflict, which is ethnicity, as it facilitated sharing of government positions among the Nuer and Dinkas, so that the two dominant tribes were given the lion's share at the expense of the smaller tribes. Already the conflicting parties have violated the cease-fire agreement with the most recent case taking place on 24 September 2018 when opposition and government forces clashed in Koch County in

the Northern part of the Country. This appears to be a continued sign of dissatisfaction with the terms of the agreement – something that had earlier delayed the signing of the peace accord.

## Findings

This paper has noted a number of issues that have either delayed peace or facilitated continued conflict. Of these, the following are the most important.

There seems to be an attitude of treating South Sudan not as an independent country, but as an amalgamation of ethnic groups with the dominant groups having their way. This is evident from the manner in which the peace agreements have been handled, so that there can only be a cease-fire when the dominant tribes are satisfied with the positions its members have been awarded.

Despite several peace agreements being signed, there are still weak support systems. The institutional bodies established to ensure smooth implementation of the peace agreements have often fallen short of their mandate due to operational and institutional challenges that hinder them from operating efficiently. Some of these institutions are: the Joint Monitoring and Evaluation Commission (JMEC), UNMISS, IGAD, the Ceasefire and Transitional Security Arrangement Monitoring Mechanism (CTSAMM) and the Regional Protection Force (RPF). There have been concerns over, inter alia, insufficient funding of these institutions, lack of leverage, insufficient command and control structures, and parallelisms.

Constant violation of cease-fire agreements is also a consistent observation in the South Sudan conflict. The key pillar of the peace agreements signed has been the Cessation of Hostilities Agreement (CoHA), yet in all the cases either one party has or both parties have violated this important clause. In some cases, the government even tried to prevent the reaching of cease-fire agreements. They refused to commit to a clause submitted during the second round of peace talks in September 2018 suggesting how those who violate peace would be punished, and they impeded the smooth operation

of relief agencies by prolonging relief workers' work permit processes (Reuters 2017a).

There is an absence of a serious commitment to end the conflict. Despite the devastating consequences of the South Sudan conflict, political leaders have failed to show goodwill to end the crisis (Keitany 2016:50). The main antagonists in the conflict bear political and moral responsibility to ensure that the life and dignity of the people of South Sudan are defended. On this however, they have failed. This extends to the regional and international actors involved in the peace process. The August 2018 peace agreement supported by IGAD has seen some of the countries lacking neutrality. Uganda and Sudan are said to be aligned with the interests of the government and opposition, respectively, while Ethiopia and Kenya are involved in diplomatic and economic rivalry which may play out in the peace process.

Complex military-politics relations in South Sudan are also visible and cause a hindrance to peace. There have been strong affiliations between soldiers and political elites, specifically from their ethnic groups, to whom they seem to pay more allegiance than to the state. This complex relationship is not new and began long ago, during and after the struggle for independence (Rolandsen and Kindersley 2017:9–12). The ever visible military influence in state affairs has been further supported by the laxity of previous peace agreements to accommodate non-state actors in the transition period, and to train ethnic militias adopted into the national army for their new role. More importantly, both government and opposition military forces hold extreme positions – the latter calling for the removal of the president and the opposing the inclusion of opposition political leaders in the government.
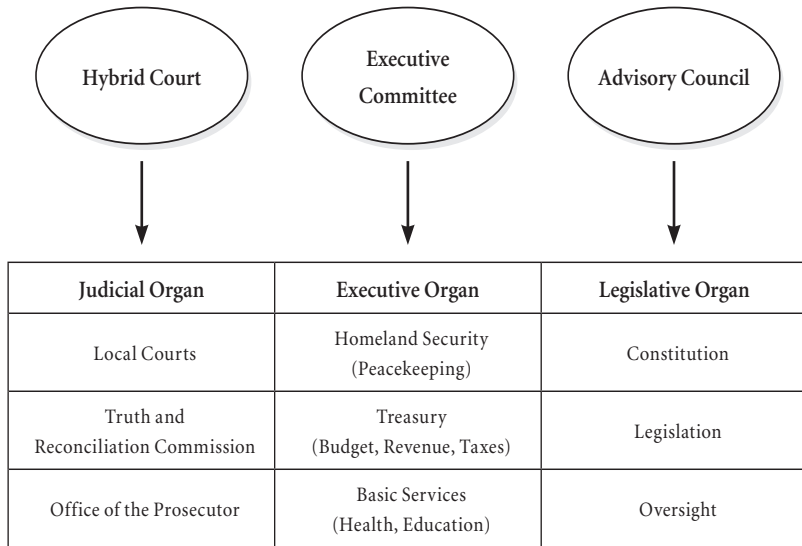
## Recommended approach to peace

The findings of this paper indicate that sustainable peace in South Sudan cannot be realised until key factors are addressed. These include an inadequate sense of nationalism due to the presence of ethnic identities stronger than national identity; a lack of strong institutions to ensure full

implementation of peace agreements; a lack of neutral security forces that do not take sides in the conflict; and a lack of political will to achieve peace. The recommendations below attempt to fill these gaps in the following ways:

1.  Providing President Salva Kiir, Riek Machar and other key figures involved in the current conflict a negotiated exit from the political sphere of South Sudan. This is because they hold the highest responsibility for the on-going conflict since they are at the top of the command chain and have failed to ensure that their troops adhere to the International Law of Armed Conflict. Their exit will have to be negotiated, with due consideration to procedure and timing. This will help overcome fears of a possible repeat of the crisis as happened in Iraq, Libya and Yemen. Parties to be involved in this process should include IGAD, the East African Community, the African Union, the United Nations General Assembly, and the Security Council.

2.  Establishing a temporary Transitional Authority under a Security Council Resolution that will include nominees from the political, economic, professional, diaspora, religious and cultural spheres of South Sudan and the international community. This authority may adopt a three-organ structure as suggested in figure 3 below in order to cover the important dimensions of the society. First is a Hybrid Court, consisting of foreign and local judges as well as a prosecutor, acting as the judicial arm with a specific mandate to oversee the activities of a Truth and Reconciliation Commission and the local courts. Second is an Executive Committee that will oversee the day-to-day operations in the country. It will be comprised of a department of Homeland Security consisting of a strong peacekeeping force mandated to recruit, train and restructure the country's security organs: a department of Treasury that will deal with issues of financial management and acquisition; and a department of Social Services that will temporarily reform the health, education and basic infrastructure sectors. The third organ is an Advisory Council that will act as a legislative organ and

will be tasked with drafting a new constitution within a specified period, passing basic laws and approving government expenditure as well as conducting oversight.

**Structure of the Proposed Transitional Authority**

| Judicial Organ | Executive Organ | Legislative Organ |
|---|---|---|
| Local Courts | Homeland Security (Peacekeeping) | Constitution |
| Truth and Reconciliation Commission | Treasury (Budget, Revenue, Taxes) | Legislation |
| Office of the Prosecutor | Basic Services (Health, Education) | Oversight |

Hybrid Court → Judicial Organ

Executive Committee → Executive Organ

Advisory Council → Legislative Organ

Source: Author

3. Initiating the cessation of hostilities and a disarmament process in order to end the widespread supply of arms to civilians. Any party involved in violence after the declaration of cessation of hostilities should face trial under existing laws before retaliation by the other parties takes place.

4. Drafting a new constitution for the country that will require the establishment of a political and economic system that guarantees each and every South Sudanese equity and equality. The politics of winner takes all should be ruled out, while the separation of powers between the executive, judiciary, legislature and the local government must be strengthened. Division of labour among the various security forces must be emphasised so that they are divorced from politics.

## Conclusion

The recommended model of a transitional authority is not a new concept and it will not be the first time a country is put under international custody. Yossi Shain and Juan J. Linz have written extensively regarding provisional governments, and they divide them into three categories: Power-sharing provisional governments, Incumbent provisional governments, and International provisional governments. Our recommendation is a hybrid provisional government that will see more international actors and some locals involved in managing the country during the transition period. We hope for reasonable success, as witnessed in cases as the following: the Provisional Government of Spain (1868–1871), the Caretaker Government of Australia (1901), the Provisional Government of Ireland (1922), the Interim Government of India (1946–1947), the Provisional Revolutionary Government of the Republic of South Vietnam (1969–1976), the Transitional Government of the Democratic Republic of the Congo (2003–2006), the United Nations Transitional Authority in Cambodia (1992–1993), and provisional governments in several other countries .

These recommendations come against the backdrop of already failed attempts to bring peace to South Sudan through the sharing of government positions between the government and the opposition. This experience has in fact further worsened the situation, since new political players understand that in order to have a place at the negotiating table, one must first prove one's worth through use of violence and blackmail. The new recommendations recognise that the conflict in South Sudan is deeply rooted and cannot be solved overnight through a power-sharing agreement and a handshake. Such an approach may take longer but has a better chance for finding lasting solutions to the challenges in South Sudan. South Sudan's independence came about under unique circumstances that differed from those in African countries with fair social, economic and education infrastructures. As a justification for the above-recommended approach, the following were taken into consideration.

First, the recommended form of hybrid approach borrows from previously implemented strategies in post-conflict countries such as Rwanda (post-1994), South Africa (1994), Kenya (2007), Cambodia (1970–1973), and Namibia (1988–1990), and the Democratic Republic of the Congo, where the United Nations established a tutelage to prepare political leaders (2003). Some of these countries have been under international trusteeship; others have adopted either an international legal system to try perpetrators of past violence, or a truth justice and reconciliation commission. Secondly, there is the consideration that this proposal could help to address the peace vs justice dilemma that keeps resurfacing when discussing peace in South Sudan. The recommendation does offer a smooth transition after the exit of the current set of political elites. It proposes a negotiated agreement that should avoid a catastrophic outcome as was seen in Iraq during the exit of Saddam Hussein and in Libya with the violent death of Muammar Gaddafi.

The truth, justice and reconciliation process will give South Sudanese a platform to dialogue openly about their grievances and come to a consensus on what needs to be done to achieve justice in a manner that does not elicit violence. A further merit of this approach is that it should tackle deep-rooted structural weaknesses of the state by recommending a new system of government, which is compatible with the social features of the country and not just a power-sharing deal between the warlords. If a proportional system of representation is adopted, it will get rid of the 'winner takes all' mentality that affects not just South Sudan but also many African countries. The new constitution, implemented with the assistance of UN-deployed forces, should help restructure and give a new meaning and philosophy to the security organs of the country. When everything is considered, what the people of South Sudan need, is an inclusive, unbiased and honest approach to peace – an approach that is not surrounded by political and economic ambitions of the leaders, but one that uproots the grievances from the bottom.

# Sources

ACLEDP (Armed Conflict Location and Event Data Project) 2018. *South Sudan analysis*. Available from: <https://www.acleddata.com/dashboard/#728> [Accessed 9 April 2018].

Adam, Ahmed H. 2018. Why is Omar al-Bashir mediating South Sudan peace talks? *Al Jazeera*, 5 Jul 2018. Available from: <https://www.aljazeera.com/indepth/opinion/omar-al-bashir-mediating-south-sudan-peace-talks-180705134746432.html> [Accessed 15 April 2018].

Adams, Karen Ruth 2000. State survival and state death: International and technological contexts. Ph.D. dissertation, University of California, Berkeley.

African Union 2014. Final Report of the African Union Commission of Inquiry on South Sudan. Addis Ababa, 15 October 2014. Available from: <http://www.au.int/en/auciss> [Accessed 23 May 2018].

Baker, Aryn 2016. War crimes: Slaughter and starvation haunt a broken South Sudan. *Time*, 187 (20) (30 May), pp. 20–27.

Ballentine, Karen and Heiko Nitzschke 2005. *The political economy of civil war and conflict transformation*. Berghof Research Centre for Constructive Conflict Management, Berlin. Available from: <http://www. berghof-handbook.net/articles/BHDS3_BallentineNitzschke230305.Pdf> [Accessed 9 April 2018].

Bariyo, Nicholas 2014. South Sudan's debt rises as oil ebbs. *Wall Street Journal*, 5 August. Available from: <https://www.wsj.com/articles/south-sudans-debt-rises-as-oil-ebbs-1407280169> [Accessed 21 June 2018].

Barltrop, Richard 2010. Leadership, trust and legitimacy in Southern Sudan's transition after 2005. Global Event Working Paper, presented at the 'Capacity is development' Global event, New York, 2010, sponsored by the United Nations Development Programme (UNDP). Available from: <http://www.undp.org/content/dam/aplaws/publication/en/publications/capacity-development/drivers-of-change/leadership/leadership-trust-and-legitimacy-in-southern-sudan-transition-after-2005/Leadership_trust%20and%20legitimacy%20in%20Southern%20Sudan%20transition%20after%202005.pdf> [Accessed 23 May 2018].

Blackings, Mairi J. 2016. *Why peace fails: The case of South Sudan's Agreement on the Resolution of the Conflict in South Sudan*. Nairobi, Friedrich Ebert Stiftung (Foundation).

Born, Gary B. and Adam Ravivn 2017. The Abyei arbitration and the rule of law. *Harvard International Law Journal*, 58 (1), pp. 177–224.

Canadian Department of Justice 2014. Armed Conflicts Report – Sudan. Available from: <file:///V|/vll/country/armed_conflict_report/Sudan.htm> [Accessed 9 April 2018].

Cheeseman, Nic 2015. *Democracy in Africa: Successes, failures, and the struggle for political reform*. Cambridge, Cambridge University Press.

Chol, Agereb Leek 2011. 20 years apology: A political campaign for Dr. Riek Machar Teny – A case of 'Why Garang Must Go Now' is now recanted. Available from: <https://paanluelwel2011.files.wordpress.com/2011/10/dr-riek-political-apology.pdf> [Accessed 16 May 2018].

Collier, Paul, Anke Hoeffler and Måns Söderbom 2004. On the duration of civil war. *Journal of Peace Research*, 41 (3), pp. 253–273.

De Soysa, Indra 2002. Paradise is a bazaar? Greed, creed, and governance in civil war, 1989–99. *Journal of Peace Research*, 39 (4), pp. 395–416.

De Vries, Lotje and Mareike Schomerus 2017. South Sudan's civil war will not end with a peace deal. *Peace Review*, 29 (3), pp. 333–340.

Doyle, Michael W. and Nicholas Sambanis 2000. International peacebuilding: A theoretical and quantitative analysis. *American Political Science Review*, 94 (4), pp. 779–801.

Fearon, James D. and David D. Laitin 2003. Ethnicity, insurgency, and civil war. *American Political Science Review*, 97 (1), pp. 75–90.

FEWSN (Famine Early Warning Systems Network) 2016. Food security outlook update: Staple food prices increasing more rapidly than expected. 16 April 2016. Available from: <http://fews.net/east-Africa/south-Sudan/food-security-outlook-update/April-2016> [Accessed 22 August 2018].

Foreign Policy 2015. U.S. threatens South Sudan with sanctions … again. 24 February 2015. Available from: <https://foreignpolicy.com/2015/02/24/u-s-threatens-south-sudan-with-sanctions-again/> [Accessed 22 December 2017].

Glowacki, Luke and Richard Wrangham 2015. Warfare and reproductive success in a tribal population. *Proceedings of the National Academy of Sciences of the United States of America*, 112 (2), pp. 348–353.

IMF (International Monetary Fund) 2017. South Sudan: 2016 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for South Sudan. IMF Staff Country Report No. 17/73, 23 March 2017. Washington, IMF. Available from: <https://www.imf.org/en/Publications/CR/Issues/2017/03/23/South-Sudan-2016-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-44757> [Accessed 23 May 2018].

Janssen, Jordy 2017. South Sudan: Why power-sharing did not lead to political stability. Unpublished M.A. thesis, University of Leiden.

Johnson, Douglas H. 2014. The political crisis in South Sudan. *African Studies Review*, 57 (3), pp. 167–174. (doi:10.1017/asr.2014.97)

Jok, Jok Madut 2015. The paradox of peace in Sudan and South Sudan: Why political settlements failed to endure. *Inclusive Political Settlements* Papers, 15, September. Berlin, Berghof Foundation.

Keitany, Phillip 2016. The African Union Mission In South Sudan: A case Study of South Sudan. Unpublished M.A. thesis, University of Nairobi.

Kiranda Yusuf, Mathias Kamp, Michael B. Mugisha and Donnas Ojok 2016. Conflict and state formation in South Sudan: The logic of oil revenues in influencing the dynamics of elite bargains. *Journal on Perspectives of African Democracy and Development*, 1 (1), pp. 30–40.

Knopf, Katherine A. 2016. *Ending South Sudan's civil war*. Council Special Report No. 77. New York, Council on Foreign Relations, Center for Preventive Action.

Krasner, Stephen D. 1999. *Sovereignty: Organized hypocrisy*. Princeton, Princeton University Press.

Mamdani, Mahmood 2014. South Sudan: No power-sharing without political reform. *New Vision* newspaper, 18 February.

Martell, Paul 2016. South Sudan is dying, and nobody is counting. *News24 France*, 10 March. Available from: <https://www.news24.com/Africa/News/south-sudan-is-dying-and-nobody-is-counting-20160311-4> [Accessed 13 July 2018].

Mercy Corps 2018. Quick facts: What you need to know about the South Sudan crisis. February 2018. Available from: <https://www.mercycorps.org/articles/south-sudan/quick-facts-what-you-need-know-about-south-sudan-crisis> [Accessed 9 April 2018].

O'Brien, Adam 2009. *Shots in the dark: The 2008 South Sudan civilian disarmament campaign*. Geneva, Small Arms Survey.

OHCHR (Office of the High Commissioner for Human Rights) 2013. Pillay urges South Sudan leadership to curb alarming violence against civilians. 24 December. Available from: <https://reliefweb.int/report/south-sudan-republic/pillay-urges-south-sudan-leadership-curb-alarming-violence-against> [Accessed 25 April 2018].

Ottaway, Marina and Mai El-Sadany 2012. *Sudan: From conflict to conflict*. Washington, D.C., Carnegie Endowment for International Peace.

Pinaud, Clemence 2014. South Sudan: Civil war, predation and the making of a military aristocracy. *African Affairs*, 113 (451), pp. 192–211.

Reuters 2014. South Sudan oil state capital divided, says government. February 20. Available from: <https://www.reuters.com/article/us-southsudan-unrest/south-sudan-oil-state-capital-divided-says-government-idUSBREA1J0DK20140220> [Accessed 9 April 2018].

Reuters 2017a. South Sudan drops plan for $10,000 work permit fee for aid staff. 3 April. Available from: <https://www.reuters.com/article/us-southsudan-workers-permit-idUSKBN1751AI> [Accessed 12 July 2018].

Reuters 2017b. South Sudan needs $1.7 billion humanitarian aid in 2018. December 21. Available from: <https://www.reuters.com/article/us-southsudan-unrest/south-sudan-needs-1-7-billion-humanitarian-aid-in-2018-idUSKBN1E71BK> [Accessed 16 May 2018].

Reuters 2018. U.N. Security council imposes an arms embargo on South Sudan. 20 July. Available from: <https://www.reuters.com/article/us-southsudan-unrest-un/u-n-security-council-imposes-an-arms-embargo-on-south-sudan-idUSKBN1K3257> [Accessed 9 April 2018].

Rolandsen, Øystein H. 2015. Small and far between: Peacekeeping economies in South Sudan. *Journal of Intervention and Statebuilding*, 9 (3), pp. 353–371.

Rolandsen, Øystein H. and Nicki Kindersley 2017. South Sudan: A political economy analysis. Oslo, Norwegian Institute of International Affairs (NUPI).

Ross, Michael 2002. *Natural resources and civil war: An overview with some policy options*. Draft report prepared for conference on 'The Governance of Natural Resources Revenues' sponsored by the World Bank and the Agence Francaise de Developpement, Paris, December 9–10.

Sachs, Jeffrey D. and Andrew M. Warner 2001. The curse of natural resources. *European Economic Review*, 45 (4–6), pp. 827–838.

Blanchard, Lauren P. 2016. Conflict in South Sudan and the challenges ahead. *Congressional Research Service*. Available from: <https://fas.org/sgp/crs/row/R43344.pdf> [Accessed 6 April 2018]

Sefa-Nyarko, Clement 2016. Civil war in South Sudan: Is it a reflection of historical secessionist and natural resource wars in 'Greater Sudan'? *African Security*, 9 (3), pp. 188–210.

Sørbø, Gunnar M. 2014. Return to war in South Sudan. Policy Brief. Norwegian Peacebuilding Resource Centre. Available from: <www:http://noref.no/var/ezflow_site/storage/original/application/dfe9c9db13050b38a2a5c-73c072af1e.pdf> [Accessed 15 September 2018].

Stedman Stephen John, Donald S. Rothchild and Elizabeth M. Cousens 2002. *Ending civil wars: the implementation of peace agreements*. Boulder, CO, Lynne Rienner.

Sudan Tribune 2016. IMF warns of further deteriorating economy in South Sudan. 3 June. Available from: <http://www.sudantribune.com/spip.php?article59164> [Accessed 13 April 2018].

Sudan Tribune 2017. South Sudanese pound loses further value against U.S. dollar. 13 April. Available from: <http://www.sudantribune.com/spip.php?article62178> [Accessed 13 April 2018].

Taulbee, James L., Ann Kelleher and Peter Grosvenor 2014. *Norway's peace policy: Soft power in a turbulent world*. London, Palgrave Macmillan.

The Star 2018. Salva Kiir, Riek Machar sign peace agreement in Khartoum. June 27. Available from: <https://www.the-star.co.ke/news/2018/06/27/salva-kiir-riek-machar-sign-peace-agreement-in-khartoum_c1778869> [Accessed 13 April 2018].

Thomson, Janice E. and Stephen Krasner 1989. Global transactions and the consolidation of sovereignty. In: Czempiel, Ernst Otto and James N. Rosenau eds. *Global changes and theoretical challenges: Approaches to world politics for the 1990s*. Lexington, MA, Lexington Books. pp. 195–219.

UNSC (United Nations Security Council) 2013. Security Council resolution 2132, South Sudan and Sudan, S/RES/2132, 24 December 2013. New York, UNSC.

UNHCR (United Nations High Commissioner for Refugees) 2018. South Sudan Situation: UNHCR Regional Update. Available from: <https://reliefweb.int/report/south-sudan/south-sudan-situation-unhcr-regional-update-1–31-december-2017> [Accessed 13 April 2018].

UNOCHA (United Nations Office for the Coordination of Humanitarian Affairs) 2013. South Sudan crisis: Situation report, 26 December. Report Number 4.

Waal, Alex D. 2014. When kleptocracy becomes insolvent: Brute causes of the civil war in South Sudan. *African Affairs*, 113 (452), pp. 347–369.

Walt, Stephen M. 1998. International relations: One world, many theories. *Foreign Policy*, (110), pp. 29–46.

Warner, Lesley Anne 2016. The disintegration of the Military Integration Process in South Sudan (2006–2013). *Stability: International Journal of Security and Development*, 5 (1), art. 12, pp. 1–20. Available from: <http://dx.doi.or g/10.5334/sta.460> [Accessed 13 April 2018].

Wild, Hannah, Jok Madut Jok and Patel Ronak 2018. The militarization of cattle raiding in South Sudan: How a traditional practice became a tool for political violence. *Journal of International Humanitarian Action*, 2018 (3:2), pp.1–11.

Young, John 2006. *The South Sudan Defence Forces in the wake of the Juba Declaration*. Geneva, Small Arms Survey (Graduate Institute of International and Development Studies).

Young, John 2016. *Popular struggles and elite co-optation: The Nuer White Army in South Sudan's Civil War*. Geneva, Small Arms Survey (Graduate Institute of International and Development Studies).

# The proposed hybrid court for South Sudan: Moving South Sudan and the African Union to action against impunity

*Owiso Owiso\**

## Abstract

The 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan provides quite ambitiously and laudably for the creation of the Hybrid Court for South Sudan under the auspices of the African Union. The article is an extract from the author's 2016 LL.M. dissertation submitted to the University of Pretoria. It critically examines the salient features of the proposed court with the aim of testing the court's ability to effectively address historical grievances and injustices in South Sudan. In so doing, the article draws lessons from similar mechanisms in Africa and beyond. It also interrogates the role of the African Union and South Sudan in operationalising this court. It reveals strengths as well as weaknesses in the proposed design of the court as well as in the ability of the African Union and South Sudan to fulfil their obligations. Despite

---

\*    Mr Owiso Owiso has been admitted as a PhD Candidate – Public International Law (University of Luxembourg). He holds a Master of Advanced Studies – Transitional Justice, Human Rights and the Rule of Law (Geneva Academy of International Humanitarian Law and Human Rights), an LL.M – Human Rights and Democratisation in Africa (Pretoria), PGD-Law (Kenya School of Law) and an LL.B – Hon. (Nairobi). Owiso is an Advocate of the courts of Kenya.

these weaknesses, the article argues that by harnessing the strengths identified and learning from lessons from across the continent, the African Union (AU) and South Sudan can overcome the anticipated challenges and operationalise a hybrid court which will effectively deliver sustainable justice to the victims of international crimes committed during the South Sudan civil war.

**Keywords:** South Sudan, African Union, Hybrid Court, international crimes, human rights, transitional justice

## 1. Introduction

After months of simmering political tensions, violence erupted in South Sudan on 15 December 2013 when President Salva Kiir attempted to arrest his former deputy Dr Riek Machar on allegations of an attempted *coup d'état,* an allegation that has since been discounted by the African Union Commission of Inquiry on South Sudan (AUCISS). The violence spread fast, resulting in international crimes being committed by forces loyal to Kiir and breakaway forces loyal to Machar (AUCISS 2014:1125–1137). Concerted efforts led by the Intergovernmental Authority on Development (IGAD) and supported by the African Union (AU) and other stakeholders resulted in the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) on 17 August 2015 (Intergovernmental Authority on Development [IGAD] 2015).

The ARCSS provides for the establishment of the Hybrid Court for South Sudan (HCSS), as one among other transitional justice mechanisms, and envisions a major role for the AU in its establishment and operationalisation. This proposal buys into the liberal-prosecution model of transitional justice which emphasises the prosecution of the planners and organisers of international crimes. This article interrogates the capability of the HCSS to deliver sustainable transitional justice solutions to South Sudan and explores how the AU can contribute to its success. The article is primarily a qualitative desk-based research with primary data gathered from relevant instruments and policy documents and statutes and jurisprudence of

similar mechanisms. Secondary data from textbooks, journal articles, newspapers, commentaries and electronic sources are also relied on, with limited discussion interviews being used only to supplement the primary and secondary sources. Section one provides an introduction, methodology and outlay of the article. Section two lays a foundation for discussion of the current conflict by providing a historical context. Section three assesses the potential of the proposed HCSS to learn from the failures of South Sudan's past flirtations with transitional justice and deliver sustainable solutions. Section four explores the potential of the AU to contribute to the success of the HCSS.

## 2. Historical context of the South Sudan crisis

After over five decades of armed resistance by the people of Southern Sudan against marginalisation and oppression by the government of Sudan (Garang 1992; Kebbede 1997; Deng 2005; Machar 1995), the Comprehensive Peace Agreement (CPA) was signed between the Sudan Peoples' Liberation Movement/Army (SPLM/A) and the Government of the Republic of the Sudan. Consequently, Southern Sudan gained autonomy on 9 July 2005 under Dr John Garang as president of Southern Sudan region and First Vice-President of Sudan. However, Garang died in a helicopter crash on 30 July 2005 and was succeeded by his deputy Kiir with Machar as the new deputy. The pair led the South to independence as the Republic of South Sudan on 9 July 2011 following a referendum in line with the CPA. While the CPA symbolised the beginning of the South's long-overdue journey to democratic and economic prosperity (Natsios 2005:89), the new state's success depended a lot on how it addressed human rights violations committed during the conflict. Eleven years into the CPA, however, the anticipated 'peace dividends' have not materialised and a civil war rages. The South Sudan crisis is complex and multidimensional and an exhaustive discussion is beyond the scope of this article. This section, however, explores some of the factors involved in as far as they have a bearing on the discussion of transitional justice, particularly criminal accountability.

## 2.1 South-South violations of human rights during the Sudan civil war

While the Sudan civil war mainly pitted the South against Khartoum, the Southerners had unresolved internal issues. Significantly, the split in 1991 within the SPLM/A (then known only as Sudan Peoples' Liberation Army [SPLA]) was a defining moment in intra-South relations. Machar, Lam Akol and others rebelled from the SPLA at Nasir in what came to be known as the Nasir rebellion (Akol 2003). The disagreement was initially a tussle between unitary ideologues who advocated for equality for Southerners but as part of Sudan, and separatist ideologues who advocated for complete independence of the South from Sudan (Malwal 2015:157; Garang 1992). However, the antagonists soon intensified ethnic passions along the lines of Machar's Nuer ethnic group and Garang's Dinka group (The Sudd Institute 2014:2). The splinter group gruesomely killed Dinka combatants within their ranks before massacring the Dinka civilian populations in Twic East and Bor (Malwal 2015:159–160, 205; Crawford-Browne 2006:54; Johnson 2016:6). Deadly confrontations between the SPLA and the splinter group continued for the greater part of the 1990s and Machar eventually aligned with Khartoum in 1997. Even though temporary peace, at least enough to allow refocus towards the common enemy in Khartoum, was achieved after the much-hailed Dinka-Nuer West Bank Peace and Reconciliation Conference in Wunlit (AUCISS 2014:922–951; Ashworth et al. 2014:151–167), this fateful event sowed deep distrust among Southern communities as Machar's actions were considered a Nuer betrayal of the Southern cause.

Other conflicts before and after the events of 1991 equally resulted in destructive violence. These include the disagreements in the 1970s and early 1980s when the then rebel group known as Anyanya was transitioning from the First Civil War to the 1972 Addis Ababa Peace Agreement and to the beginning of the Second Civil War in 1983 (Malwal 2015), as well as later factional clashes in several areas in the South (Human Rights Watch/Africa 1994:19–21; AUCISS 2014:855–856). These too were ignored in the lead-up to the CPA with Garang championing a united Southern front and inviting Machar back to the SPLM in 2002 as it became clear

that the peace process had potential for success (Crawford-Browne 2006:54). Unease and suspicion simmered within SPLM ranks especially after Garang's death and elections in 2010 (The Sudd Institute 2014:3–4). The affected communities did not receive recompense or a genuine apology for the atrocities committed against them during these unfortunate events (Malwal 2015:160; Johnson 2016:151–152).

Some Southerners were also caught in the cross-fire between the SPLA and the Sudanese army. Garrison towns under Sudanese army occupation, such as Malakal, Juba, Wau and Yei were frequently attacked by the SPLM and casualties often included the civilian residents who the SPLM considered as either loyal to or sympathetic to Khartoum (Crawford-Browne 2006:68). When the CPA was signed, these towns and their peoples became part of the South with no mention made of redress for the atrocities committed against them. SPLM and other Southerners who actively fought against Khartoum continued to treat them with suspicion (Zahar 2011:37) and perhaps even contempt. The unaddressed events and old rivalries highlighted above created room for resentment and distrust in the new state and within the SPLM government.

## 2.2 Criminal accountability under the CPA and the question of state succession

Justice and accountability were not exactly a priority in the CPA process (Basha 2006:28). While it did not expressly provide for amnesty, the CPA was unnervingly silent on the question of accountability for abuses committed during the Sudan civil war. This, Ibrahim (2007:491–492) concludes, was a deliberate *de facto* amnesty intended to ensure continued political goodwill for the CPA. This article, however, asserts that the government of national unity comprising the SPLM and the Khartoum-based National Congress Party (NCP) which governed Sudan during the interim period from 2005 to 2011 was bound under international human rights law to provide effective remedy for human rights violations committed during the war since Sudan was a party to the International Covenant on Civil and Political Rights (ICCPR).

However, the question of state succession arises in relation to human rights treaty obligations of the new Republic of South Sudan after independence in 2011. Article 16 of the Vienna Convention on Succession of States in Respect of Treaties appears to endorse the 'clean slate' approach excusing newly-independent states from their predecessors' treaty obligations. However, this article argues for automatic state succession to human rights treaties since they codify general principles of inherent human dignity and seek to avoid a gap in protection which would expose previously protected populations to potential violations (Weeramantry 1996:645–655). The UN Human Rights Committee later adopted this position in General Comment 26 on continuity of obligations, particularly for ICCPR rights. Therefore, despite South Sudan not having formally acceded to ICCPR, it was obligated to provide effective remedy for the human rights abuses as it automatically assumed ICCPR obligations of Sudan upon its independence. Further, as a member of the UN it is bound by the Charter of the United Nations to act towards the UN's common purpose of promoting and respecting human rights. The silence of the CPA could not reasonably be interpreted as absolving the government of South Sudan of its obligations under international law.

## 2.3 South Sudan's approach to transitional justice after the Sudan civil war

The preceding sections have highlighted the fact that the new nation desperately required genuine accountability and reconciliation to provide closure and draw clear lines on impunity. However, the government of South Sudan failed to prioritise and initiate such processes. Instead, former fighters and militias were unconditionally integrated into the SPLA and the society regardless of their previous misdeeds against civilians (Zahar 2011:37).

Granted, the government launched the Presidential Committee for Community Peace, Reconciliation and Tolerance in Jonglei State in 2012 (Ashworth 2015:177) as this was the area hit hardest by inter-ethnic conflicts. This committee's recommendations are, however, yet to be implemented

(AUCISS 2014:920). Attempts by Machar's wife, Angelina Teny, to launch a healing and reconciliation initiative also failed as it was not government-driven, but rather a Machar family project widely suspected as political scheming (AUCISS 2014:914–915). Discomfort over Machar's role in the events of 1991 that left some of the deepest scars in South Sudanese society could also have been a factor. Further, the first nationwide government initiative, National Reconciliation Committee for Healing, Peace and Reconciliation, created in 2013, was also unable to fully commence operations since the war broke out shortly after its creation (AUCISS 2014:920).

## 2.4 Exclusionary governance and poor development record

The South Sudanese people expected their new government to forge a national identity through an inclusive and cohesive development agenda (Jok 2011). Marginalisation was, after all, one of the main reasons why the people of the South so resiliently fought Khartoum for years. Ironically therefore, Khartoum's exploitative style served to set a high bar for the new government with statehood igniting hopes of better governance. However, the SPLM government seems to have done the opposite. The foundations for this lie in the design of the CPA.

Apart from its signatories, the CPA was largely negotiated without reasonable involvement of other Sudanese stakeholders (Ibrahim 2007:475) thereby failing to provide sufficient guarantees and safeguards for minority inclusion. Further, the CPA handed over near-total control of the South to SPLM by giving it 70% representation in the interim Southern parliament with only 15% each left for other Southern stakeholders and the NCP. This imbalance enabled the SPLM to dominate the Southern parliament well into independence. South Sudan comprises over 60 diverse ethnic groups with the Dinka and Nuer being the majority. However, far from the facile and Afro-pessimistic conclusion of commentators like Silva (2014:78–80), ethnic diversity is not in itself the cause of South Sudan's problems. The concern rather is that power in the SPLM was not diversified among the various interest groups, but was instead concentrated around an elite

group (Jok 2011) leading to marginalisation, exclusion, unequal treatment and discontent within large sections of society (Zahar 2011:37).

This exclusion enabled corruption and mismanagement to thrive in government, leading to weak national institutions and eventually crippling provision of basic services. This was compounded by the fact that the new nation had almost non-existent structures and very few qualified civil servants to take up the responsibility of policy development and implementation. These factors heightened public frustration which only required a political trigger that came in the form of the events of 15 December 2013 and quickly spiralled into a civil war.

## 2.5 National security as a challenge to peace and transitional justice

Despite the SPLM being quite organised in its struggle against Khartoum, it was in fact a 'coalition' of armed factions and ideologues (Deng 2005) over who the SPLM leadership did not always have total control. Further, the CPA required the SPLM to transform into a professional political movement and military force despite most SPLA fighters and commanders being once-regular country-folk hardened by years of bush war and who had probably grown accustomed to operating more as rebels than as professional soldiers or civilians (Guarak 2011:555). However, the much-needed security sector reform, including disarmament, demobilisation and reintegration, was not effectively undertaken. Many ordinary civilians had also acquired undocumented firearms for civil defence which they were reluctant to surrender for a future that seemed uncertain at the time (Crawford-Browne 2006:61). South Sudan was therefore ushered into statehood with many undocumented weapons in the hands of civilians and militias and a 'military' that was more militia than national army.

The SPLA added to its military woes by massively recruiting over 7 500 new soldiers, inevitably from a population comprising many people who had had very little access to education (AUCISS 2014:53–54). While this in itself may not have been a problem, the process was skewed to favour those from groups loyal to Kiir, and to a small extent Machar. Further, the process

of recruitment, training and deployment was opaque and allowed for most recruits to operate outside of official military channels (AUCISS 2014:53–54). A combination of these factors contributed greatly in compromising peace and security in South Sudan.

## 3. Criminal accountability under the ARCSS

As discussed in the preceding section, South Sudan failed to engage in a much-needed genuine transitional justice process for events during the Sudan civil war. This set the stage for a political conflict to very quickly spiral into a full-blown civil war from 15 December 2013 – characterised by massive violations of human rights and international humanitarian law amounting to international crimes. The ARCSS of 17 August 2015 unequivocally acknowledges the disharmony resulting from past human rights abuses and the need for accountability, and then provides for the establishment of the HCSS. This seems to adopt the recommendation of the AUCISS that accountability must be pursued as part of a wider process of societal reconciliation if sustainable peace is to be achieved in South Sudan.

While individual criminal responsibility as a transitional justice mechanism is now well-established – dating back to the post-World War I aborted attempt to prosecute Kaiser Wilhelm II of Germany and the shambolic Ottoman trials, and its successful affirmation at the International Military Tribunal at Nuremburg in 1946 – criminal prosecutions in circumstances of mass violations are, according to Schabas (2002), generally time and resource intensive such that not all perpetrators can be prosecuted. It is for this reason that the International Criminal Court (ICC), for example, concentrates on individuals considered to bear the greatest responsibility for international crimes. Further, criminal accountability cannot single-handedly ensure genuine transitional justice, but rather reconciliation and justice are both necessary as experiences from Rwanda and Sierra Leone have shown (Sooka et al. 2016). The ARCSS confronts these realities by providing for a Commission for Truth, Reconciliation and Healing (CTRH) and a Compensation and Reparations Authority (CRA) to operate

simultaneously with the court. This article, however, only focuses on the HCSS by analysing and testing it against prevailing standards of transitional justice and human rights.

## 3.1 Establishment of the HCSS

The UN defines a hybrid court as one whose jurisdiction and composition is mixed, exhibits international and national aspects and is often located within the territory of the crime (Office of the United Nations High Commissioner for Human Rights [OHCHR] 2008:1). As will be discussed below, the HCSS is indeed a hybrid court within this definition. The choice of a hybrid court as opposed to an international tribunal is ideal where national systems are either non-existent or incapable of addressing mass violations and where a purely internationalised mechanism would not earn local acceptance (Kaleck 2015:55; OHCHR 2008:3–4). South Sudan presents such a scenario; hence the proposed HCSS as a court superior to, and independent of, the South Sudan judiciary.

According to the ARCSS, the African Union Commission (AUC) is responsible for the establishment of the HCSS and in this regard, is required to sign a Memorandum of Understanding (MoU) with the government to operationalise the court. The AUC has the mandate of determining key aspects of the court such as location, funding, infrastructure, enforcement and personnel. This design gives the AU a role as prominent as, if not more prominent than, that of the government of South Sudan in relation to the HCSS. While this can potentially promote resistance and non-cooperation from domestic authorities (Bell 2000:273), it is necessary where domestic mechanisms are incapable of conducting genuine investigations and prosecutions for reasons of incapacity or susceptibility to political manipulation. The AUC has since prepared and submitted a draft statute to the transitional government of South Sudan, which statute has been approved by the Council of Ministers (CoM) and is currently awaiting parliamentary approval (Commission on Human Rights in South Sudan 2017:115).

Despite the above powers given to the AUC by the ARCSS, the ARCSS also empowers the government through the general powers of the CoM to initiate the legislation operationalising transitional justice mechanisms, including the HCSS. Parliament is then expected to enact this legislation by consensus or a two-thirds majority vote as a last resort, in an attempt to promote consensus and local ownership. The power bestowed upon the CoM in this regard is quite immense considering that the CoM was an uncomfortable compromise between warring parties (Johnson 2016:294), at least until Machar's departure in July 2016 and the outbreak of renewed violence. As such there is the likelihood of deadlock in decision making at the CoM either due to factional differences, or outright lack of good faith due to the possibility that some members of the CoM are themselves likely to be subjected to the HCSS (Tiitmamer 2016:14). Expecting political goodwill on fundamental decisions on transitional justice from these individuals may be stretching the limits of expectation.

Further to the above conflation of responsibilities, the ARCSS gives the National Constitutional Amendment Committee (NCAC) the general mandate of drafting new legislation required under the Agreement. The NCAC is an eight-member committee comprising representatives from government, Machar's breakaway SPLM/A-In Opposition, former political detainees, other political parties and IGAD. Overall, the above powers raise the potential for conflict of responsibilities between the AUC, the responsible ministry, the CoM and the NCAC thereby creating confusion as to who exactly between the AUC and the government (and within the government) is responsible for the creation of the court. The anticipated MoU between the AU and the government should either expressly oust the jurisdiction of one of the above organs over the HCSS legislation or clearly lay out how this responsibility is to be shared.

## 3.2 Jurisdiction of the HCSS

The HCSS has broad temporal jurisdiction over international crimes committed from 15 December 2013 to the end of the 30-month transition period. In hindsight, there was much wisdom in extending this jurisdiction

to beyond the signing of the Agreement, especially considering that more violations have since occurred after the formation of the transitional government when Kiir and Machar fell out once again. However, the periodic limitation of jurisdiction precludes the court from addressing widespread atrocities committed before 15 December 2013 particularly in Jonglei state where well-organised inter-communal violence was prevalent before and after independence (Johnson 2016). Some commentators, however, believe that this was a necessary political decision in order to avoid constraining the resources of the court and to also give domestic criminal courts the opportunity to complement the HCSS (Musila Interview 2016b). To cure the above temporal gap in the court's mandate and to ensure that persons not prosecuted by the HCSS face domestic processes, the government needs to occasion legislative measures necessary to empower domestic courts to try international crimes in a manner complementary to and respectful of the supremacy of the HCSS.

The court's subject matter jurisdiction encompasses genocide, war crimes, crimes against humanity, sexual crimes, gender-based crimes and other serious crimes under both international law and South Sudanese law. This expansive jurisdiction is designed to ensure that all possible serious crimes committed during this period are prosecuted. However, in relation to South Sudanese law the ARCSS (IGAD 2015: chap V, 3.1.1) simply says 'and/or applicable South Sudanese law' without elaborating the specific laws, be they substantive, procedural or evidentiary. The applicable domestic law should be clarified beforehand, preferably by the anticipated statute, in order to eliminate the possibility of applying laws that may be inconsistent with international standards (OHCHR 2008:12).

Notably, the HCSS has a wide personal jurisdiction over any individual allegedly responsible for international crimes in this context, regardless of nationality. This is necessary considering the complexity of the conflict which raises the possibility of non-nationals also having been involved. Such wide personal jurisdiction was instrumental for the Special Court for Sierra Leone (SCSL) which exercised its jurisdiction in *Prosecutor v Charles*

*Ghankay Taylor* and prosecuted and convicted Taylor in 2012 for his role in the conflict in Sierra Leone despite him being a Liberian national.

Significantly, the ARCSS also advocates for restorative justice. The court is empowered to order forfeiture of property or proceeds of crime to the state or restoration to the rightful owners. This is in addition to the court's power to order reparations. These powers are designed to ensure that beyond punitive justice, victims get some measure of tangible compensation for the crimes against them.

Related to jurisdiction is the court's mandate to leave a 'permanent legacy' in South Sudan, consistent with the position of the UN that the establishment of a hybrid court must consider what legacy it will leave in the country (United Nations 2004:46). Legacy in this context is the enduring impact the court has on improving the rule of law in the country (OHCHR 2008:4). South Sudan ranks very low on the Rule of Law – being ranked by the 2018 Freedom House Index among the worst of the worst at 2/100 (Freedom House 2018) – and as such, the HCSS is expected to set a lasting example for domestic institutions on accountability and the rule of law. However, the ARCSS is silent on who should have custody of the archival records of the HCSS. While the records are crucial for an impactful legacy and in creating a historical record, the need to protect some witnesses and victims is equally compelling (Nyagoah e-mail 2016). Custody has become a controversial issue between the UN and Rwanda over the archives of the International Criminal Tribunal for Rwanda (ICTR). The UN took custody of the archives after the ICTR wound up in 2015, but Rwanda continues to demand custody as it deems these to be crucial for its national memory of the 1994 genocide (United Nations Mechanism for International Criminal Tribunals 2015). To avoid a similar situation in future between South Sudan and the AU, the anticipated MoU and statute establishing the HCSS should clarify who has the responsibility of keeping the HCSS's archival records upon its winding up.

## 3.3 Membership and staff of the HCSS

The Agreement seeks impartiality and contextual sensitivity by providing for majority foreign judges from other African nations and minority South Sudanese judges. All prosecutors, the registrar and other staff, on the other hand, shall be foreign nationals from other African states. The ARCSS seems to have adopted a UN recommendation that hybrid courts for divided societies such as South Sudan should ideally be comprised of a majority of international judges in order to guarantee fairness, impartiality and objectivity (United Nations 2004:64). While the South Sudan judges bring deep understanding of the specific cultural and historical context, the other non-national African judges bring a general understanding of the African context and valuable experience. This composition guarantees local ownership, both by South Sudan specifically and Africa in general; ensures contextual sensitivity; and guarantees impartiality, fairness, efficiency and professionalism in accordance with established principles of international criminal justice.

However, the exclusion of South Sudan nationals from the prosecution team is worrying. A mix of majority non-nationals and minority nationals would have been ideal to further promote South Sudan ownership of the process, infuse contextual familiarity in the team while maintaining impartiality and objectivity, and promote capacity building of South Sudanese professionals (Musila Interview 2016b). The Central African Republic's proposed *Cour Pénal Spécial* is instructive in this regard as it provides for an international prosecutor deputised by a national and assisted by a team of prosecutors comprising majority non-nationals and minority nationals (Musila 2016a:23). This provision ought to be reconsidered when drafting the anticipated statute of the HCSS to allow for a South Sudanese national to deputise the non-national chief prosecutor as well as have a reasonable number of South Sudanese prosecutors, investigators and assisting staff.

A poorly worded provision of the ARCSS (IGAD 2015: chap V, 3.3.3) further purports to restrict the right of accused persons to defence counsel of their choice by providing that, '… [duty] defence counsels of the HCSS

shall be composed of personnel from African states *other than the Republic of South Sudan ...*' (emphasis added). It is a recognised international human rights principle that an accused person should not be denied the right to choose counsel of his or her choice. Purporting to preclude South Sudanese nationals from acting as duty defence counsels potentially violates this right (Nyagoah e-mail 2016). Similar concerns arose concerning the fairness of the decision of the *Chambres Africaines Extraordinaires au Sénégal* in *Ministère Public v Hissèin Habré* to appoint Senegalese lawyers for Habré, a former president of Chad, without his approval after he refused to cooperate with the court (Oyugi 2016). Best practice from the ICC, and other criminal courts/tribunals, requires the court to give the accused persons an opportunity to pick from a list of available counsels of *any* nationality where the court has to assign defence counsel, thereby ensuring the above right is upheld. The anticipated statute should clarify this position to expressly allow South Sudanese nationals to be listed as duty defence counsels.

Another concern is on the appointment of support staff for prosecutors and the defence. While the ARCSS is express on the AU being the appointing authority of judges, prosecutors, duty defence counsels and the registrar, it is silent on who should appoint the other staff and investigators. This potentially leaves room for the government to take the lead on these appointments and this could be exploited to compromise the court processes and jeopardise security of witnesses (Nyagoah e-mail 2016). The MoU and anticipated legislation should expressly make the AU responsible for these appointments.

## 3.4 The HCSS and the question of immunity

The ARCSS expressly precludes the possibility of immunity or amnesty from criminal responsibility. Non-immunity is long established in international criminal law judging by the constitutive instruments of past and current international criminal mechanisms. A recent UNDP survey also reveals significant support by South Sudanese for non-immunity as they attribute the intransigence of some of their leaders to the 2005 CPA's

*de facto* immunities (UNDP 2015:23). Notably the Agreement departs from the AU's apparent position on immunities as evidenced by the June 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which seeks to add an international criminal chamber to the proposed court, but which expressly provides personal immunity from prosecution for heads of state and government and senior government officials. It is therefore laudable that slightly over a year after the protocol's adoption, an AU-backed mechanism expressly precludes any immunities. This either indicates a change of tune by the AU on the issue of immunity or at the very least signifies hope for such change.

The ARCSS further remarkably provides that persons indicted or convicted by the court are ineligible to participate in government for a period to be determined and further that any indicted person eventually 'proven innocent' will be entitled to compensation (IGAD 2015: chap V, 5). The first part of this provision is a legitimate endeavour aimed at giving the nation a chance to move forward under trustworthy and untainted leadership. However, two issues need to be clarified in this regard. First, it should be clarified whether this lustration takes effect upon indictment or upon conviction. The presumption of innocence principle swings in favour of this lustration taking effect upon conviction. Secondly, it would be prudent to clarify whether this period of exclusion will run concurrently with or subsequent to the sentence. Ideally, this period should run subsequent to serving sentence for it to have any meaningful effect. The exclusion will also inevitably require major shake-up of government which Tiitmamer (2016) argues is potentially destabilising. However, this article asserts that the exercise is necessary to purge the government of persons responsible for heinous crimes against the people. The second part of the provision is a misnomer, which is most likely the result of inattentive drafting, since criminal courts do not pronounce on the innocence of accused persons, but rather on whether a case has been proved to the required standard of proof.

## 3.5 The legal relationship between the HCSS and the CTRH

The Agreement is rather vague on the legal relationship between the HCSS and the CTRH, a fact that potentially exposes the two mechanisms to an antagonistic relationship. Both mechanisms have concurrent jurisdiction over violations committed between 15 December 2013 and 17 August 2015. This in itself is not a problem since the CTRH is a political institution offering political solutions while the HCSS is a judicial institution offering legal solutions in accordance with international criminal law. In fact, experiences from Peru, Argentina and Timor-Leste have shown that with a well-defined framework, the two mechanisms can beneficially and complementarily work together (United Nations 2004:26).

The experience of Sierra Leone, however, shows the risks of not clarifying a framework for interaction from the onset (Murungu 2011:104–106). In 2003, the SCSL trial chamber asserted in *Prosecutor v Samuel Hinga Norman* and *Prosecutor v Augustine Gbao* that to allow persons charged before the court to testify before the Truth and Reconciliation Commission of Sierra Leone would undermine the court's autonomy and jeopardise the accused's right to presumption of innocence. The appeals chamber disagreed, holding that the existence of the two mechanisms was based on the principles of complementarity and harmonious and practical balance between criminal prosecution and the need for truth and reconciliation, and that as such the accused persons could testify before the commission as long as the procedure for taking testimony upholds the integrity of the court process. While the SCSL appeals chamber's decision is the appropriate position, this may not always be obvious, especially if the enabling instrument does not clearly spell out this relationship as is the case with the ARCSS. It is therefore important that the anticipated statute clarifies this relationship.

## 4. The African Union and transitional justice in South Sudan

The previous section discussed salient features of the HCSS and identified strengths which should be maximised and shortcomings which should be

addressed by the AU and the government as the two stakeholders with the greatest responsibilities in this regard. While the primary responsibility of forging a path to sustainable peace in South Sudan rests with its people, the AU has a legal, political and 'moral' obligation to complement the process (Sooka et al. 2016). The government of South Sudan being a negotiated power-sharing arrangement as opposed to a democratically elected government, it may be prudent to provide for some degree of external pressure and oversight in order to ensure that the government fulfils its obligations regarding the HCSS. This appreciation probably informed the prominent role bestowed by the Agreement upon the AU in relation to the HCSS. How the AU responds to these obligations could determine to a great extent the future of the HCSS. This section therefore examines how the AU, being the regional political organisation, and its various relevant organs can effectively perform this role.

## 4.2 The legal basis for the African Union's transitional justice mandate

The fundamental objectives of the AU as entrenched in the Constitutive Act of the African Union include a people-centric approach to the promotion of human rights, peace, security and stability in Africa. The AU seeks to achieve these objectives through peace-building, reconstruction and restoration of the rule of law in post-conflict states and conflict resolution mechanisms at domestic and continental levels. This is recognition of the fact that peace and security are only achievable if governance structures of individual countries and of the AU are effective, stable and responsive to the people's needs. As such, the security of individual African countries is both a domestic as well as a continental concern.

## 4.2 The African Union's continental transitional justice efforts

While the AU has in the past had little success in conflict resolution in Africa, it has recently stepped up its efforts. It adopted the Policy on Post-Conflict Reconstruction and Development in 2006, which emphasised the need for countries emerging from conflict to institute transitional justice

processes in order to address past and current grievances. While this policy affirmed the AU's resolve to address impunity, it merely stated these principles without providing much in the form of a structural roadmap for their actualisation.

Bold movement towards direct AU involvement in post-conflict processes was heralded by the 2009 report of the African Union High-Level Panel on Darfur which recommended the establishment of a hybrid court for Darfur, truth and reconciliation mechanisms, and an AU implementation and monitoring panel. While most of the recommendations of this report have not been implemented, it provided the first clear indication of the AU's practical role in transitional justice in member states.

Taking cue from the above report, the AU Panel of the Wise (PoW) attempted to codify a continental policy on transitional justice. The panel's report, entitled 'Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity', revealed that domestic approaches by individual countries have largely been haphazard. The report recommended that the AU takes a more active and direct role in transitional justice in Africa by consolidating lessons from across the continent and developing common principles and concepts to enable it to effectively balance peace and security with accountability and reconciliation (African Union Panel of the Wise 2013:65–66). The panel attached to the report a draft it called the African Union Draft Transitional Justice Policy Framework (Draft Policy).

The draft was presented to the AU's Specialised Technical Committee on Justice and Legal Affairs in November 2015, but the committee raised concerns that it was not comprehensively reflective of the input of governments (Permanent Mission of Ethiopia to the African Union and the United Nations Economic Commission for Africa 2016). The committee then engaged experts from member states to re-draft the document. This article argues that South Sudan presents an opportunity for the AU to test the Draft Policy including subsequent expert consultations on the draft in order to strengthen it for adoption as a benchmark for continental

transitional justice standards. This will afford the AU the opportunity to develop a responsive and practical policy borne out of wide consultations, experience from *ad hoc* domestic mechanisms and the AU's own experience in South Sudan.

Another complementary process was launched in 2013 by another AU organ, the African Commission on Human and Peoples' Rights (ACHPR), which by a 2013 resolution on transitional justice in Africa commissioned a study to, among others, identify the specific role the ACHPR should play in supporting transitional justice mechanisms in Africa, possibly by means of a thematic special mechanism. The report of this study is due in May 2018. Significantly, the government of South Sudan is expressly obliged by the Agreement to seek the ACHPR's assistance in implementing the transitional justice mechanisms. The ACHPR's work and experience thus far in this regard will be useful to the South Sudanese efforts while also affording the ACHPR the opportunity to develop and enrich its report with practical experience.

This article therefore argues that first the AU's expert drafters and the ACHPR should harmonise their efforts in developing a continental transitional justice policy and then coordinate and direct these harmonised efforts towards facilitating the transitional justice process in South Sudan through sharing experiences, promoting capacity building and enriching the policy drafting effort. By harmonising inter-agency cooperation with the South Sudan process, the AU will ensure proper coordination, and hence efficiency, of its interventions. Further, this will ensure effective monitoring by the AU of the South Sudan process in order to flag potential challenges and mobilise response.

## 4.3 The African Union and South Sudan before the Agreement

On 17 December 2013, two days after the civil war began, the AU expressed readiness to assist South Sudan find a peaceful solution, and soon thereafter directed the AUC Chairperson to consult the ACHPR and immediately establish a commission to investigate human rights and humanitarian law

violations in South Sudan during the war and make recommendations on accountability, reconciliation and healing. Significantly, this was the first time the AU acted so expeditiously to investigate human rights violations in a member state, and that while South Sudan was not at the time a state party to the African Charter which establishes the ACHPR.

The AUC Chairperson constituted the AUCISS comprising five eminent Africans – former Nigerian President Olusegun Obasanjo, Honourable Sophia Akuffo of Ghana, Ms Bineta Diop of Senegal, Prof Mahmood Mamdani of Uganda and Prof Pacifique Manirakiza of Burundi – in March 2014 after consulting stakeholders including the warring parties, ostensibly to promote acceptance by all parties and dispel any perceptions of bias and impartiality. Its temporal mandate was capped at the date the civil war began, 15 December 2013. The AUCISS presented its final report to the AU on 15 October 2014, but the AU only released it a year later on 27 October 2015. The report revealed widespread and systematic violations of human rights law and international humanitarian law amounting to international crimes, and recommended accountability, as well as healing and reconciliation processes. Having initiated and supported AUCISS, it is imperative that the AU follows up on its recommendations above in order to send a clear message against impunity and to affirm respect for its own processes (Sooka et al. 2016).

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), another AU organ, whose mandate is to protect and promote children's rights and welfare in Africa, undertook a fact-finding mission to South Sudan in 2014 with the permission of the government and revealed grave violations of the rights of children during the civil war. Despite South Sudan not being a state party to the African Charter on the Rights and Welfare of the Child, the ACERWC interpreted its mandate broadly to allow it to conduct the mission. The ACERWC, like the AUCISS, drew attention to the need for accountability (African Committee of Experts on the Rights and Welfare of the Child 2014:37). This contextual experience of the ACERWC coupled with its thematic expertise can collaboratively

be harnessed in order to ensure that the welfare of children prominently features in the South Sudan transitional justice process.

## 4.4 The transitional justice role of the African Union under the Agreement

The ARCSS envisions a very prominent role for the AU in operationalising the HCSS and obliges the government to work with the AU towards this end. As discussed in section three above, the ARCSS is ambiguous on who exactly should initiate the drafting of the court's enabling statute. Nonetheless, the ARCSS expressly obliges the AU to establish the HCSS through an MoU with the government, and as mentioned above, the AUC Commission has already assumed a leading role and drafted a statute and submitted it to the government of South Sudan. Experts estimate that if the AU keeps up this pace, the court should be operational within three years (Musila Interview 2016b), which period this article argues is necessary to allow for a properly thought-out court structure and operational design. However, should the government unnecessarily delay the process, the AU should bypass it and establish the HCSS by invoking its powers under article 4(h) of the Constitutive Act of the AU which mandates it to intervene in a member state in the event of international crimes.

The AU is required to appoint personnel of the court as well as determine the location of the court, its infrastructure, its funding and enforcement of its decisions. These responsibilities require the AU to mobilise the necessary financial resources preferably by developing a fundraising outreach framework for the HCSS (Nyagoah e-mail 2016). While targeting global and regional donors, the focus should be on mobilising funds from AU member states as a primary component, either through compulsory member state contributions or as a vote-head in the AU annual budget. This way, funding sustainability can be assured and the AU will maintain the HCSS' identity as an Africa-owned and Africa-led and, for the most part, Africa-resourced initiative.

In deciding the court's location, a balance should be struck between security of court personnel and witnesses and the court's accessibility to the South

Sudanese people (Nyagoah e-mail 2016). Arguably therefore, it cannot be located in South Sudan due to prevailing insecurity. This article argues that Arusha, Tanzania would be ideal with the possibility of relocation to South Sudan if and when security conditions improve. Arusha is reasonably geographically close to South Sudan and has the infrastructural advantage having inherited the facilities of the ICTR that wound up its activities in 2015. Further, Tanzania is politically stable and offers security unlike South Sudan's immediate neighbours Sudan, Central African Republic and the Democratic Republic of Congo. Tanzania is also relatively politically neutral and impartial unlike Kenya, Uganda and Ethiopia who besides hosting large South Sudanese refugee populations, have also been accused of providing a safe haven for resources plundered from South Sudan during the conflict (The Sentry 2016).

Also relevant to the success of the HCSS is the AU's consolidation of the political support of its members and other stakeholders. To avoid the pitfall of lack of political goodwill and cooperation that characterised the ICC's relationship with Sudan and Kenya leading to the hibernation of *Prosecutor v Omar Hassan Ahmad Al Bashir,* withdrawal of charges in *Prosecutor v Uhuru Muigai Kenyatta* and vacation of charges in *Prosecutor v William Samoei Ruto & Joshua arap Sang,* the AU must mobilise its members to unequivocally support the HCSS and collectively put pressure on South Sudan to cooperate with the HCSS. After securing this support, the AU should then embark on galvanising global support for the HCSS. However, the AU should not in the process shirk its responsibilities by delegating to global stakeholders. Rather, it should provide the necessary leadership in coordinating external support to achieve cohesiveness and efficiency (Sooka et al. 2016). This way the transitional justice process in South Sudan will not be dominated by donor interests, but will be Africa-driven with complementary assistance from global stakeholders.

## 5. Conclusion

This article sought to examine the capability of the proposed HCSS to deliver sustainable transitional justice solutions to South Sudan, and

ways in which the AU can effectively contribute to its success. The article determined that South Sudan became independent against the backdrop of underlying internal grievances that were not subsequently addressed. This, coupled with insecurity, bad governance and political tensions within the ruling SPLM, culminated in the current civil war. The article concludes that the HCSS presents a timely opportunity for accountability. Shortcomings have, however, been identified, which prompted recommendations made to the government and the AU in relation to the HCSS, including limited temporal jurisdiction; exclusion of South Sudanese nationals from the staff of the court; lack of clarification on who between the government of South Sudan and the AU will have custody of archival records of the HCSS; unclear legal relationship between the HCSS and the CTRH; and ambiguity on who is responsible for initiating the HCSS' enabling legislation.

The study also determined that the ARCSS bestows significant responsibilities upon the AU in relation to the HCSS which include operationalising the HCSS in consultation with the government; determining the location of the HCSS; appointing court personnel; availing the necessary infrastructure and funding; providing an enforcement mechanism for HCSS decisions; and coordinating stakeholder support. The article has made recommendations on how the AU can effectively perform these obligations. The study concludes that the AU must take the lead in relation to the HCSS in order to guarantee focus and sustainability.

Finally, the article notes that as of the time of writing, Kiir and Machar had again fallen out with the latter leaving the country and controversially being replaced by Taban Deng Gai as First Vice-President of the transitional government. In response, IGAD launched a High Level Revitalisation Forum to get the process back on track, resulting in Kiir and Machar signing yet another deal in September 2018 for the reinstatement of Machar and recommitting to the ARCSS. While these recent developments have made the situation more fragile, they have also shown the urgency in implementing the ARCSS, particularly the HCSS.

# Sources

African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 2014. Report of the ACERWC on the Advocacy Mission to assess the Situation of Children in South Sudan, August 2014. Addis Ababa, African Union.

African Union Commission of Inquiry on South Sudan (AUCISS) 2014. Final Report. Addis Ababa, 15 October 2014. Available from: <http://www.peaceau.org/uploads/auciss.final.report.pdf> [Accessed 10 September 2016].

African Union High-Level Panel on Darfur 2009. Report, October 2009. PSC/AHG/2(CCVII). Addis Ababa, African Union.

African Union Panel of the Wise 2013. Peace, justice, and reconciliation in Africa: Opportunities and challenges in the fight against impunity. Available from: <http://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf> [Accessed 10 September 2016].

Akol, Lam 2003. *SPLM/SPLA: The Nasir Declaration*. Bloomington, IN, iUniverse.

Ashworth, John 2015. The attempts of dialogue in Sudan. In: Rieker, Pernille and Henrik Thune eds. *Dialogue and conflict resolution: Potential and limits*. Farnham, Sr, Ashgate. pp. 167–188.

Ashworth, John, Haruun L. Ruun, Emmanuel LoWilla and Maura A. Ryan 2014. *The voice of the voiceless: The role of the church in the Sudanese civil wars, 1983 - 2005*. Nairobi, Paulines Publications Africa.

Basha, Sarah 2006. The Comprehensive Peace Agreement – A synopsis. In: Raftopoulos, Brian and Karin Alexander eds. *Peace in the balance: The crisis in Sudan*. Cape Town, Institute for Justice and Reconciliation. pp. 7–22.

Bell, Christine 2000. *Peace agreements and human rights*. Oxford, Oxford University Press.

Commission on Human Rights in South Sudan 2018. Report, 13 March 2018. A/HRC/37/71. Addis Ababa, African Union.

Crawford-Browne, Sarah 2006. The battle for the Sudan. In: Raftopoulos, Brian and Karin Alexander eds. *Peace in the balance: The crisis in Sudan*. Cape Town, Institute for Justice and Reconciliation. pp. 51–70.

Deng, Francis 2005. Sudan's turbulent road to nationhood. In: Larémont, Ricardo ed. *Borders, nationalism, and the African state*. Boulder, CO, Lynne Rienner. pp. 44–104.

Freedom House 2018. Freedom in the world 2018: Table of country scores. Available from: <https://freedomhouse.org/report/freedom-world-2018-table-country-scores> [Accessed 29 May 2018].

Garang, John 1992. *The call for democracy in Sudan*. London, Kegan Paul International.

Guarak, Mawut 2011. *Integration and fragmentation of the Sudan: An African renaissance*. Bloomington, IN, AuthorHouse.

Human Rights Watch/Africa 1994. *Civilian devastation: Abuses by all parties in the war in Southern Sudan*. New York/Washington/Los Angeles, Human Rights Watch.

Ibrahim, Noha 2007. Post CPA: Restructuring and enhancing the Sudanese judiciary as a means of preserving peace. *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America,* 40 (4), pp. 471–494.

Intergovernmental Authority on Development (IGAD) 2015. Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), 17 August 2015. Addis Ababa, IGAD.

Johnson, Hilde 2016. *South Sudan: The untold story from independence to civil war*. London/ New York, I.B. Tauris.

Jok, Madut 2011. Diversity, unity and nation building in South Sudan. Available from: <https:// www.usip.org/sites/default/files/Diversity,%20Unity,%20and%20Nation%20Building%20 in%20South%20Sudan%20(Jok).pdf> [Accessed 11 August 2016].

Kaleck, Wolfgang 2015. *Double standards: International criminal law and the West*. Brussels, Torkel Opsahl Academic ePublisher.

Kebbede, Girma 1997. Sudan: The North-South conflict in historical perspective. *Contributions in Black Studies,* 15, pp. 15–45.

Machar, Riek 1995. South Sudan: A history of political domination – A case of self-determination. 19 November. Available from: <http://www.africa.upenn.edu/Hornet/ sd_machar.html> [Accessed 27 March 2016].

Malwal, Bonnie 2015. *Sudan and South Sudan: From one to two*. London, Palgrave Macmillan.

Murungu, Chacha 2011. Prosecution and punishment of international crimes by the Special Court for Sierra Leone. In: Murungu, Chacha and Joseph Biegon eds. *Prosecuting international crimes in Africa*. Pretoria, Pretoria University Law Press. pp. 97–118.

Musila, Godfrey 2016a. The Special Criminal Court and other options of accountability in the Central African Republic: Legal and policy recommendations. *International Nuremburg Principles Academy Occasional Paper,* 2, pp. 1–46.

Musila, Godfrey 2016b. Telephone communication with author, 1 October 2016.

Natsios, Andrew 2005. Implementing the Comprehensive Peace Agreement in Sudan. *Yale Journal of International Affairs,* 1, pp. 89–98.

Nyagoah, Tut 2016. E-mail to author, 26 September 2016.

Office of the United Nations High Commissioner for Human Rights (OHCHR) 2008. *Rule of law tools for post-conflict states: Maximizing the legacy of hybrid courts*. Geneva, United Nations.

Oyugi, Phoebe 2016. The trial of Hissèin Habré: An analysis of the rights of the accused. 28 September. Available from: <http://culture-human-rights.blogspot.com/2016/09/ the-trial-of-hissene-habre-analysis-of_28.html> [Accessed 29 September 2016].

Permanent Mission of Ethiopia to the African Union and the United Nations Economic Commission for Africa 2016. Internal Report (original version in Amharic, with English translation provided, on file with author).

Schabas, William 2002. The Rwanda case: Sometimes it's impossible. In: Bassiouni, M. Cherif ed. *Post-conflict justice*. New York, Transnational Publishers. pp. 499–522.

Silva, Mario 2014. After partition: The perils of South Sudan. *University of Baltimore Journal of International Law,* 3 (1), pp. 63–90.

Sooka, Yasmin, Arnold Tsunga, David Deng and Betty K. Murungi 2006. The way forward for the African Union in South Sudan, January 2006. Available from: <http://www.afrecs.org/The_Way_Forward_for_the_AU_in_South_Sudan.pdf> [Accessed 10 September 2016].

The Sentry 2016. War crimes shouldn't pay: Stopping the looting and destruction in South Sudan. September 2016. Available from: <https://cdn.thesentry.org/wp-content/uploads/2016/09/Sentry_WCSP_Finalx.pdf> [Accessed 16 September 2016].

The Sudd Institute 2014. South Sudan's crisis: Its drivers, key players, and post-conflict prospects. 3 August 2014. Available from: <http://www.suddinstitute.org/assets/Publications/South-Sudan-Crisisfinal.pdf> [Accessed 27 March 2016].

Tiitmamer, Nhial 2016. Transitional justice for stabilising South Sudan: Lessons from global and local perspectives, 21 July 2016. Available from: <https://www.suddinstitute.org/publications/show/57944dc78f034> [Accessed 11 September 2016].

United Nations Development Programme 2015. Search for a new beginning: Perceptions of truth, justice, reconciliation and healing in South Sudan. Available from: <https://radiotamazuj.org/sites/default/files/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf> [Accessed 17 August 2016].

Weeramantry, C. 1996. Separate opinion in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia), Preliminary Objections, 11 July 1996. ICJ Reports 595. The Hague, International Court of Justice.

Zahar, Marie-Joëlle 2011. A journey of a thousand steps: The challenges of state and nation building in South Sudan. *Middle East Report,* 259, pp. 36–39.

# Community resilience and social capital in the reconstruction and recovery process for post-election violence victims in Kenya

*Julius Kinyeki\**

## Abstract

This study addresses three questions: how Internally Displaced Persons (IDPs) following the post-election violence of 2007/2008 in Kenya are recreating their community resilience capacities; how the Kenyan government and non-state interventions are influencing the victims' livelihood strategies towards their reconstruction and recovery process and how social support and social capital have accelerated their reconstruction and recovery process. The study adopted qualitative research methodology, and primary data were collected since January 2015, continuously and concurrently with data analysis. The key finding was that ownership of land is identified and perceived as a milestone in the process of post-conflict reconstruction and recovery, and as an avenue for community resilience. The study found that after the rather short-term programmes of the Kenyan government, the United Nations Development Programme (UNDP) and

\*   Dr Julius Kinyeki specialises in Governance and Development, particularly in post-conflict reconstruction and recovery. He graduated with a Ph.D. from the School of Governance at Witwatersrand University, South Africa, and a Master of Arts in Sociology from the University of Nairobi. He works for the South African High Commission in Nairobi, after he previously had a post at Laikipia University in Kenya.

Non-governmental Organisations (NGOs), the main means of livelihood for IDPs still is casual labour and other menial jobs. However, many IDPs, especially those who were not placed in camps or resettled on farms, but integrated with host communities, developed new emergent norms to support each other. The key recommendations are that government should evaluate the economic loss of every integrated IDP, and that those resettled in government procured farms should be provided with legal ownership documents. There should be an urgent re-profiling of IDPs in camps and a definite commitment to follow the United Nations' *Guiding Principles on Internal Displacement* (Office for the Coordination of Humanitarian Affairs 2004). The findings of this study bring to light new knowledge on the theory of social capital. It shows how victims of displacement develop new emergent norms, values and culture to support each other, which eventually creates a new society/community.

**Keywords:** Internally displaced persons, Kenya, post-conflict reconstruction and recovery, livelihood strategies, social capital, community resilience

## 1. Kenya's genie of tribal politics

The post-election crisis of January 2008 brought Kenya close to collapse. The abrupt proclamation of Mwai Kibaki, the retired president, as victor in a highly contentious presidential election, led to either planned or spontaneous eruptions of ethnic violence (see Kagwanja 2009:365–387). According to an investigative report on 2007/2008 post-election violence, popularly referred to as the Waki Commission 2008 report, there are several deep-rooted causes of the post-election violence, such as poverty and unemployment, but ethnic disputes relating to land and dating back to colonial times (notably between Kalenjin and Kikuyu in the Rift Valley) and the formation of political parties around Kenya's 42 ethnic groups were the immediate causes of the violence (Akiwumi Report 1999; Waki Commission 2008; Kagwanja 2009).

Towards the election date, ethnic tension was further heightened by the opposition campaign, critically shaped by the rhetoric of 'forty one against

one' (the Kikuyu) and 'Kenya against Kikuyu'. The message to the voters was to isolate one tribe (Kikuyu) against the other forty one tribes in Kenya by voting as a tribal bloc. This demonstrated that though multiparty elections in 1992, 1997 and 2002 were also conducted along ethnic lines, ethnic polarisation reached fever pitch in the 2007 elections. According to the Waki Commission (2008) and Adeagbo (2011:174–179), deep-rooted land disputes, economic and political inequality, impunity, the role of the media, and ethnic animosity played a key role in the post-election violence.

At independence, Kenya had only two parties: Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). KANU was dominated by the Kikuyu ethnic tribe and KADU by the Luo ethnic tribe. At Independence, the country still had adequate levels of economic resources, and the perception of ethnicity was not evident. Politicians conducted politics around national identity, and thus candidates were voted for regardless of ethnicity. However, from the 1990s multiparty period in Kenya, ambitious politicians discovered they could win votes by appealing for ethnic support and promising improved government services and projects in their areas. They created an ethnic solidarity, enhanced perceptions of ethnic favouritism, and to some extent caused increased post-election violence (see Kagwanja 2009; Kagwanja and Southall 2009; Kanyinga 2009; Waki Commission 2008; Akiwumi Report 1999; Kiliku Commission 1992; Kiai 2008:162–168).

Tribal identity, kinship, and clan or ethnic considerations largely determined how people voted henceforth, and especially in the 2007 general elections (Waki Commission 2008). This means ethnicity has been one of the significant variables under Kenya's multiparty democracy, since competition for state resources has made it hard for politicians to devise alternative bases for political organisation such as class (Kwatemba 2012). Hyden (2006) acknowledges this point when he argues that the influence of 'community-centred networks' in African politics has been due to the inability of class-based identity to dislodge kinship ties.

At the continental level, the re-introduction of multiparty politics in the early 1990s led to a worrying trend of increasing election-related violent conflict that threatens democracy, peace and stability. These threats are manifested through increased electoral violence with an ethnic dimension. According to Kagwanja (2009:365–387), the electoral violence in Kenya quickly metamorphosed into a deadly orgy of 'ethnic' slaughter, rape and plunder reminiscent of the 1994 Rwandan genocide, about which Wolff (2006:31) notes:

> Ethnicity acquires enormous power to mobilize people when it becomes a predominant identity and means more than just a particular ethnic origin; it comes to define people as speakers of a certain language, belonging to a particular religion, being able to pursue some careers but not others, being able to preserve and express their cultural heritage, having access to positions of power and wealth or not. In short, when ethnicity becomes politically relevant and determines the life prospects of people belonging to distinct ethnic groups, it is possible to mobilize group members to change a situation of apparently perpetual discrimination and disadvantage or in defence of a valued status quo.

In Kenya today, ethnicity has become more than just an expression of cultural identity: it gets connected to social status; it determines people's fortunes in life and becomes politicised. It makes it possible for those who feel aggrieved as a result of discrimination and those in power who want to protect their privileges, to invoke ethnicity (Kwatemba 2008; 2012). This elicits a sense of optimism due to wide participation, but increases cases of electoral violence in a country like Kenya with forty two ethnic groups. Indeed, the 2007/2008 post-election violence proved the weaknesses of many electoral institutions since independence (Khadiagala 2008:53–60; Waki Commission 2008; Abuya 2009:127–158).

With the ethnic and electoral institutional challenges during every election, Kenya's political history has become very dynamic and unpredictable. For example, the country promulgated a new constitution in 2010 and conducted peaceful 2013 elections – although the presidential results were

contested at the Supreme Court. The court upheld the results in its 30 March 2013 ruling. Though Raila Odinga and the elected opposition leaders criticised the casual way in which this ruling was made, they nevertheless accepted the outcome. The 2017 general election was peaceful, but the presidential election results were again contested at the Supreme Court. This time the court, in its 1 September 2017 ruling, annulled the results and ordered a second vote. This was conducted against the backdrop of a boycott by Raila Odinga (Daily Nation 2017d; Standard 2017).

To a large extent the opposition stronghold never participated, but only called for mass protests and economic boycotts. Indeed on 30 January 2018, Odinga took an oath at a public rally in Uhuru Park and was 'sworn in' as the people's president. But on 9 March 2018 he decided to support Kenyatta's government leaving his supporters and government leadership surprised by the move popularly referred to as 'handshake'. He termed the cross-over a Building Bridges Initiative. On 20 October 2018 he was appointed African Envoy for Infrastructure Development by the Chairman of the African Union. This adaptive transformation of Odinga has led political commentators to question if he will vie for the presidency in the 2022 general election, with this new mandate and also his advancing age (Daily Nation 2018).

## 2. The scale and impact of internal displacement

The post-election violence led to the death of 1133 people and the displacement of over 600 000 (Waki Commission 2008). At the end, there were 118 IDP camps across the country (Waki Commission 2008). According to the global survey of the Internal Displacement Monitoring Centre (2011), 40.8 million people around the world have been forced by armed conflict and generalised violence to flee their homes, and were living in displacement within the borders of their own country at the end of 2015. This is the largest number in the last ten years. In 2014, there were 38 million people displaced, 33.3 million in 2013, 28.8 million in 2012, 26.6 million in 2011, 27.5 million in 2010, 27 million in 2009 and 26 million in 2008.

In sub-Saharan Africa, there were 12 million IDPs across 22 countries, with Sudan, Democratic Republic of the Congo, South Sudan, Somalia and Nigeria being the most affected. By the end of 2015, Kenya accounted for 309 200 people living in internal displacement. These statistics, and those of previous years, show that internal displacement is a problem which is increasing each year, especially in sub-Saharan Africa.

During the violence in Kenya, IDPs lost community support structures which members of the community had helped build in their lifetime. Many self-employed community members lost business income and livelihood, while those in gainful employment lost their jobs. Social networks such as families, neighbours, friends, co-workers as well as informal social support mechanisms were destroyed. Although some of the above community social structures were reconstructed, many were not, and others were entirely abandoned as community members became resettled in new areas.

Social capital, defined as the capacity of individuals to command scarce socio-economic and political resources by virtue of belonging to a social network (Portes 1998; 2000; Nakagawa and Shaw 2004) was disrupted or destroyed. Many families remained separated, and informal support systems such as women credit systems, record keeping and micro-finance banking structures were disorganised and damaged. This has prevented social capital from playing its crucial role in the process of reconstruction and recovery. Research in social psychology has revealed that the primary source of help and social support for IDPs is their own informal social support networks (Hernandez-Plaza et al. 2006:1151–1169).

Although some of the IDPs have been resettled in new areas by the government, it has been difficult for them to recover their socio-economic livelihood, which had been previously achieved through applying the unique adaptation, absorption or transformation coping strategies of social support (Alvarez-Castillo et al. 2006:78–87). The process of reconstruction and recovery spearheaded by the Kenyan government and non-state actors is on-going, but many IDPs are yet to bounce back resiliently to their pre-conflict situation. The government's approach is costly, but merely *ad hoc* and ineffective (Daily Nation 2017c).

The hope that IDPs were to receive reparation and either restorative or retributive justice, in order to bounce back by adapting, being absorbed or transforming, was short-lived as the Kenyan parliament referred the post-election violence cases to the International Criminal Court (ICC). The ICC commenced pre-trial hearings for crimes against humanity by six Kenyans – Uhuru Kenyatta, Francis Muthaura, Hussein Ali, William Ruto, Henry Kosgey and Joshua Sang – and recommended prosecution for being most culpable for the violence. By 2016, however, all the cases had collapsed. Successful prosecution would have paved way for secondary cases with regard to compensation for the IDPs.

The ICC pre-trial hearings became complicated when in 2013 two of the suspects, Uhuru Kenyatta and William Ruto were elected president and deputy president respectively, which brought to light the question of the Kenyan government's degree of co-operation with the ICC. To date, Kenya has not established any internationally recognised justice system to try any emerging cases related to the post-election violence, and nobody has been successfully tried and convicted of such crimes (ICC 2009; 2015).

While various processes have been applied in the management of the post-election violence, such as national intelligence gathering, security mapping, early warning and response, preparedness, prevention and mitigation (Kumar 1997; Krisch and Flint 2011; Alexander 2002; Coppola 2007), the resettlement of IDPs, part of the reconstruction and recovery process, stopped in 2012 (Daily Nation 2015b; 2016b; 2015c; Standard 2015). This was the period coinciding with the end of the term of the coalition government and the ushering in of campaigns for another general election in March 2013. But during the 2017 general election campaigns, President Kenyatta allocated an amount of Kenyan Shillings (Kshs.) 358 million as compensation to Integrated IDPs in Kisii, Nyamira (Daily Nation 2017b; 2017a). Still, when it was stopped in 2012, the reconstruction and recovery process of IDPs was yet to be fully completed.

## 3. Research design and methodology

To understand how the various interventions assisted or limited community resilience of IDPs, the researcher used Interview-Guides, Focus Group Discussions, Key Informant interviews and Review of secondary data as tools to collect data.

Interviews for *camp-based IDPs* were limited to Kamara IDPs camp in Kuresoi North District, Nakuru County, and Mumoi IDPs camp in Subukia District, Nakuru County. These two camps were picked as they are the oldest and hence have a rich history of IDPs issues and also hold the largest number of IDPs. Ten respondents were picked – five from each of the two camps. The first five adult IDPs were picked from the Ministry of State for Special Programmes lists of the two camps.

Interviews for *government-resettled IDPs* were limited to five areas: Muhu Farm in Mirangini District, Nyandarua County; Ngiwa Farm in Rongai District, Nakuru County; Kabia/Asanyo Farm, in Kuresoi North District, Nakuru County; Gakonya Farm in Molo District, Nakuru County; Haji Farm in Subukia District, Nakuru County. These five out of the current eighteen farms for government-resettled IDPs (part of about 28 government-procured farms) were picked deliberately because of their large numbers and long histories.

From each farm's list, as maintained by the Ministry of State for Special Programmes, the researcher picked three respondents, taking every fifth name. In this category there were therefore fifteen respondents.

Interviews for *integrated IDPs* were conducted in Ndunduri in Mirangini District, Nyandarua County, Bahati Centre in Nakuru District, Nakuru County, and in Nakuru Township in Nakuru District, Nakuru County. These are the areas with the largest number of integrated IDPs country-wide. Nine respondents were picked in the same way as in the previous case.

To check on the validity and reliability of data from the primary respondents, key informant interviews and focused group discussions were conducted, and relevant reports and documents were reviewed. The key informants

included: the programme co-coordinator for IDPs resettlement in the Ministry of State for Special Programmes; the programme co-coordinator for IDPs affairs in the Integration and Cohesion Commission; the 2007/2008 post-election violence IDP Network Leader; the programme co-ordinator for Kenya Red Cross Society, IDPs reconstruction and recovery programme; one local chief each within the two main IDP camps; and one Member of Country Assembly representatives from each of the two main IDP camps.

Six IDPs were considered for the focus group discussion in each of the three categories of IDPs. Individuals for the focus group discussions were picked through purposive sampling based on their perceived knowledge of the themes under discussion. Three focus group discussions were conducted with, in each case, two men, two women and two youths picked from the relevant list of the Ministry of State for Special Programmes – camp-based IDPs, government-resettled IDPs and integrated IDPs. The researcher created groups that were balanced according to age and gender. The discussions were scheduled for about forty-five to sixty minutes. The researcher used personal and professional attributes to create a conducive environment for optimum input on topics under discussion.

Additionally, to cross-check for details given in other techniques, this research reviewed: school admission/enrolment registers for the two main schools concerned; programme budgets from local NGOs implementing post-election violence projects; progress reports from Kenya Red Cross Society; progress reports from the Ministry of State for Special Programmes; and progress reports from the Cohesion and Integration Commission. Such records are presumed to be as objective and unaffected by emotions as possible.

The fieldwork provided answers on livelihood capacities and on the role of land in community resilience, as well as on the roles of social support, the ICC, and the Kenyan State and other actors. The purpose was to reveal 'what works and what does not work'. Together with the fieldwork component, however, the study intended to unpack the empirical, theoretical and conceptual contributions of new knowledge to the post-conflict reconstruction and recovery discourse.

## 4. The findings

It became clear that means of livelihood and ownership of resources, especially land, played a key role in the reconstruction and recovery of the IDPs.

### 4.1 Land ownership

Legal ownership of land is identified and perceived by IDPs as a socio-economic asset to their reconstruction and recovery, making it the backbone of community resilience. Land ownership was linked throughout by respondents as the avenue for more successful recovery. Government made an effort towards the resettlement of IDPs on parcels of land, but never provided legal titles. These parcels can therefore not serve as a safety net (absorptive capacities), and the IDPs cannot actively engage in changing land policies (transformative capacities). Lack of legal ownership denies IDPs an asset and a means of long-term recovery. This was explained thus:

> We are told the land is ours, the house is ours … but we don't have the title. We are not 100% sure of tomorrow in case of violence. But at least we have something. If it was possible we would borrow money with these (land and house) as surety, but no bank or co-surety would agree an arrangement without legal documents (Male, Kabia/Asanyo farm).

IDPs have no capacity for credit systems and cannot make alternative investment options, such as selling the land or building rental structures. IDPs continue to suffer the loss of economic growth, stable means of livelihood and equitable distribution of income and assets within populations. Land, raw materials, physical capital and accessible housing create the essential resource base for a resilient community. Land is so significant that even IDPs who never owned land before the violence looked forward to owning a piece by courtesy of the *ad hoc* and ineffective resettlement process. It would help the victims to rebuild a base for their socio-economic lives by building up income and assets. Also, if the land is fertile, and there are houses, water, roads, electricity and other physical infrastructure, its market value would increase further. As a community asset it can help creating diverse kinds of socio-economic livelihood for legal owners.

After the violence, the government developed a resettlement framework such that an IDP was to be allocated 2¼ hectares of land, of which the ¼ hectare was to be used for building a house, while the 2 hectares were to be used for farming. Seeds and fertilizer for the first planting season were also provided. Such a piece of land, barely equivalent to the land individual IDPs had lost, is not adequate for profitable farming. The resettled have to depend on seasonal rain for cultivating maize and beans, but the rain is unpredictable in volumes and patterns. Season by season, the harvests continue to be poor as the IDPs have no capacity to invest in modern farming technologies or budget for fertilizer or manure. And without enough food, IDPs cannot be resilient. They explained:

> Each one of us was allocated 2¼ hectares, each house is built on a ¼ hectare while each household farms the remaining 2 hectares (Female, Ngiwa farm).

> We owned big chunks of land back at home, here we were allocated 2 hectares each … how much food can one grow in that piece? It cannot even feed the entire family. One must look for other means of sustaining the family, hence casual labour to the host community (Male, Ngiwa farm).

By the end of this study, it was not possible to establish the actual number of IDPs resettled as there was no clear data on how many IDPs have been allocated farms. After allocations, the government discontinued any socio-economic or political support. The argument has been that once resettled, victims cease being IDPs. However, the resettled continue to perceive themselves as IDPs and are identified as such by the host communities. This has hindered reconstruction and recovery as they continue to look forward for economic and social support from government and NGOs. In fact, they lament over how the government has not been visiting them in the resettlement. A key finding among camp-based IDPs is that due to the long stay in the camps, they have developed a 'beggar culture', which has continued to limit their view of opportunities. But in reality this study has found that these IDPs do not fit the definition of beggars. One of them captured their situation as follows:

> … just idle around in the camp. There is nothing to do. We just sit talk whole day, waiting if one can get some casual labour in the field … can wait for weeks or months (Male, Kamara camp).

> We have hope that one day we get paid what we lost. But for now we are at zero. I came here with nothing, having lost everything. When government gives us land and build houses for us like it has done to some other IDPs, is when we can look forward for a new beginning (Male, Kamara camp).

When they were asked about their means of livelihood and occupation, the majority gave the following kind of response:

> ... Casual labour … could be farming in the host community farms, domestic work in their houses, fetching water, washing clothes … any 'kibarua' (casual labour) available. When you have nothing you cannot choose … It is also not available all the time. For example, I have been out of any 'kibarua' for the last two weeks. If I am lucky I can be on 'kibarua' for a month, and also can be without for as long (Female, Kamara camp).

There were no adequate consultations between the IDPs and Government before resettlement. This is against the UN guiding principles on resettlement (Brookings-Bern Project on Internal Displacement 2006; Brookings Institution 2008; 2011). Government presumed that all IDPs were farmers or could be farmers even when they had previously been business people. This is manifested in the allocated farms where the idea of farming is abandoned and IDPs rent out part or all of the 2 hectares provided by the Government. They use the money for other socio-economic business ideas which they think may bring about resiliency.

An interesting finding has been the claim that weather and climate in these farms are too extreme for any profitable livelihood. As such IDPs spend a lot of time hoping for alternatives which are unlikely to come. The land allocated is in isolated locations and in harsh climatic and environmental areas. IDPs perceive direct allocation of land by government or provision of cash to buy land on their own as the only avenue towards adaptation, absorption or transformation pathways. On weather an IDP said:

Here the weather is very harsh ... in the morning it is fog ... one old man died here because of the weather (Female, Muhu farm).

## 4.2 Means of livelihood and external effort

Before the violence, IDPs' assets included animals such as cows, sheep, goats, pigs and donkeys. They cultivated foodstuff such as maize, beans and peas for family consumption and sold the surplus, and they also had small businesses in townships. The pool of assets (animals, money saved, land, foodstuff, home structures etc.) acted as safety net for emergencies. They were able to acquire credit for emergencies from friends and structured financial institutions. They lived in a family set-up (wife/husband and children) and in community (neighbours, friends, co-workers).

Now, however, they are faced with limited opportunities and options for any economic livelihoods, which are also unsustainable – especially in the case of, for instance, casual labour (Jacobsen 2002). The social support system network of IDPs operates only amongst themselves, hence is economically weak. This is an emergent norm, similar to that of Colombian IDPs who relied on each other for social support (Zora 2009:133–151; Tardy 1985:187–202). Without external livelihood assistance, IDPs remain vulnerable for a long period of time – having lost their entire social support system provided by family, friends, neighbours, co-workers, professionals, norms, culture, values, institutions and more.

Some IDPs have been able to create new social support through emergent norms, cultures and values. But these new social support systems have not helped to accelerate their reconstruction and recovery processes, especially among camp-based IDPs, as they are mostly concerned with voicing their vulnerability. They are mainly for emotional and informational purposes. They lack financial ability to support each other. For example, IDPs responded:

> My brothers and sisters are struggling like me … they have their own families. It will even be a bother to ask for help from them. Our neighbours are also IDPs. It's only government which can help us by giving us some land (Female, Mumoi IDP camp).

> … even if they (family) wanted, maybe they send airtime. They cannot afford any other help. They are as needy as I am … (Female, Mumoi IDP camp).

Julius Kinyeki

In the pyramid of social support, family, neighbours and colleagues are placed at the core (Tardy 1985). Support is either received (enacted) or perceived (expected). Various forms of social capital include bonding, bridging and linking, but for IDPs with their common vulnerability these are weak. To overcome this vulnerability they have developed a strong emergent norm, value and culture of assisting each other. They are continuously securing casual labour through referrals, they share common meals and sleep in one tent if need arises. This is regardless of ethnic affiliation or gender. They forget their ethnic affiliations, hence draw strength in their diversity. They are a close-knit community, which is a social support mechanism and a survival strategy.

Social support helps IDPs to build adaptive capacities, create alternative livelihood strategies as well as absorptive capacity, and minimise shocks and stress. Portes (1998; 2000) has noted that dependency and reliance on other people is an advantage, hence the emergent norm of referral for opportunities among social network of IDPs.

There are cases where IDPs have cordial relationships with the host community, who are receptive to and supportive of their socio-economic needs. Because camp-based IDPs and Government resettled IDPs live in secluded IDPs-only areas, they have less contact with host communities than integrated IDPs who live together with host communities. All IDPs have access to National Government leadership, but through their elected leaders, such as Members of Parliament, Members of County Assemblies and Local Administration such as Chiefs. Additionally they have formed IDP leadership structures.

In addition to IDPs' own efforts, agencies other than the State have also attempted to restore livelihood for the IDPs. The United Nations Development Programme (UNDP) implemented a livelihood project worth US$1 666 700. The aim of this project was to re-equip IDPs with lost livelihood assets, skills and micro-enterprise opportunities, as well as credit and entrepreneurial opportunities. This was done through establishing business solution centres in the major hubs, providing access

to women's development funds and youth business funds, restoring and improving access to markets, rehabilitating small-scale public works through intensive labour, and mainstreaming livelihoods recovery in the national economic agenda (UNDP 2009; 2011a; 2011b; 2011c).

The UNDP project was not able to reach out to all IDPs, however, and other non-state actors such as the Kenya Red Cross, only offered humanitarian assistance. Their projects ended after the humanitarian crisis, and civil society was left with the accountability of remaining interested in advocacy and human rights issues. During the course of this study the Government announced a new initiative to resettle IDPs through a Kshs. 10 billion fund, thereby acknowledging that at that stage the process was still incomplete.

By 2012 the Government had spent Kshs. 4 billion and NGOs 16 billion on post-conflict reconstruction and recovery of the IDPs (Daily Nation 2016a; 2017b; 2016c; Standard 2018; 2016). But eventually, apparently due to fatigue, the Government announced the closure of all IDP camps. NGOs shortly thereafter also closed down all their IDPs projects – perhaps because there was no more donor appeal. Currently NGOs are active in research, human rights and advocacy. The large amounts of money spent are not reflective of the livelihood reconstruction and recovery of the IDPs (Kanyinga 2014).

By the end of this study there were 46 IDP camps, 28 government procured farms – of which only 18 were fully operational. The government was not able to provide the accurate number of integrated IDPs. However, 170 000 integrated IDPs were each given Kshs. 10 000 as start-up capital. In the combined area of this study, covering Bahati, Ndunduri and Nakuru towns, there were 8 250 integrated IDPs (Ministry of State for Special Programmes 2010; 2011; 2012).

Government paid Kshs. 25 000 to every returning IDP to reconstruct their houses and another Kshs. 10 000 as start-up capital. In this intervention, 38 145 IDP households received payment. The target was to construct 43 792 houses but Government managed to construct only 26 589. There were 817 individual IDPs who received Kshs. 400 000 to rebuild their own

houses without government logistical support and Kshs. 10 000 as start-up capital. A total of 617 primary schools were constructed in the affected areas (Ministry of State for Special Programmes 2010; 2011; 2012).

In addition to direct Government support, there was resource and monetary support from external actors. For example, the Government of China donated 105 000 iron sheets worth Kshs. 200 million, the government of Morocco donated US$1 million and Africa Development Bank (ADB) donated Kshs. 1.5 billion for farm infrastructure. When IDPs who fled to Uganda returned in 2015, UNHCR paid each IDP US$50. This was an indication of the recognition of these IDPs.

## 4.3 Unfulfilled expectations of a judicial solution

Kenya is part of the international community and a signatory of ICC Rome Statute, and as such the post-election violence cases were referred to the ICC through a formal and a systematic process (ICC 2009; 2015). However, the previous Government and the 2013–2017 Government were very pre-occupied fighting off the ICC to the detriment of the IDPs' plight. The Government's failure to establish a local tribunal and its opting for the Hague-based ICC demonstrated its unwillingness to engage in a process towards a permanent judicial solution for the victims (Daily Nation 2009; Daily Nation 2013a; Daily Nation 2013b). However, acquittals in the Kenyatta and Ruto ICC cases, in 2014 and 2016 respectively, re-programmed the vision and mission of the IDPs reconstruction and recovery agenda by the Government (Daily Nation 2015a).

The IDPs expected justice to be administered to the perpetrators of the violence. They were to be held accountable for the IDPs' loss of their property, relatives and friends. A Post-Conflict Reconstruction and Development (PCRD) programme could have provided for this, and victims expected to achieve restorative, reparative and retributive justice, but Kenya's judicial system was unwilling and incapable (Khadiagala 2008:53–60; 2009:4–33; African Union 2006; 2009).

## 4.4 The expected role of the African Union

Although the African Union has the primary responsibility for peace and security (Murithi 2006; Nkhuhlu 2005), it failed to anticipate the magnitude of the violence in Kenya. It thus arrived on the ground late. Perhaps if Kofi Annan, the Panel of Eminent Persons' chairman, had arrived earlier, the number of deaths and the amount of destruction and displacement would have been less and the reconstruction and recovery process would have been manageable (Khadiagala 2008:53–60; 2009:4–33). Western countries, such as the US, Germany, UK, France, and Switzerland, funded the mediation process through the African Union, and hence the peace process was neither African-based nor Kenyan-based despite the Panel of Eminent Persons being African.

The African Union relied on the traditional approach of peace negotiations, ceasefire, transitional government, demilitarisation, constitutional reforms and democratic elections. The peace negotiations, however, through the AU approach were short-term – just to end the crisis. A long-term post-conflict reconstruction and recovery agenda was recommended, but enforcement mechanisms were not established. The agenda points developed by the Kenya National Dialogue and Reconciliation body remained as such and at the mercy of political leadership to implement. Indeed, to end the crisis, the African Union did establish the Grand Coalition government of 2007–2013. This Government, for purposes of inclusivity was the largest since independence and had two centres of power, each faction answerable to either Kibaki or Odinga (Kenya National Dialogue and Reconciliation 2009).

A Special Session of the Assembly of the AU eventually, on 31 August 2009, passed action plans on the consideration and resolution of conflicts in Africa. At that stage, Kenya had just emerged from the violence, and was not among the thirteen countries in the action plans. What should have happened in Kenya, however, was to set up country offices such as in the Quick Impact Projects (QUIPS) approach as well as to provide funds to implement the reconstruction and recovery of socio-economic capacities of IDPs (Daley 2006:303–319; African Union 2009).

## 5. Recommended model for post-conflict reconstruction and recovery of IDPs

From the above findings, this study recommends an IDP post-election reconstruction and recovery approach. The approach suggests five coordinated steps:

First, it should be recognised that where democracy is mature, it is unlikely to have incidences of post-election violence in which the community experiences a crisis, people are displaced, killed and property destroyed, and the displaced seek shelter in camps, and become IDPs.

Secondly, the government department in charge of internal affairs should consult or cooperate with a lead non-state actor such as the UNDP who has experience and capacity to coordinate the humanitarian affairs of the displaced population. This lead agency should coordinate all other non-state actors in the management of various IDP camps. Humanitarian resources should be distributed to the IDPs through the various non-state agencies with roles assigned by the appointed non-state actor. The core competencies and functions of these agencies should be established before assignment. The main activities of these non-state actors should include the supply of resources and essentials such as – food, clothes, tents, transport, counselling, medicines and tracing.

Third, the Government should take the responsibility of profiling the IDPs in terms of socio-economic losses and capacities. This profiling should ultimately lead to comprehensive databases and databanks of genuine IDPs. The information on the databases can be verified against the documentation from the departments dealing with immigration, registration of persons, and issuance of identity documents. Government security agencies should also collect crucial information from IDPs regarding alleged perpetrators of the post-election violence. This information should be verified with information collected outside the camps.

The Government should be guided by the UN guiding principles for purposes of classifying IDPs in terms of returning home, re-integration

or resettlement options. Social support abilities of IDPs may be identified through interviews with IDPs to establish their primary social network, and their adaptation, absorption and transformation capacities according to an assessment of the skills, assets, information and communication, vision and mission of each IDP household.

Fourth, when a PCRD process is underway, the Government should attend to the implementation of the various legal frameworks such as the UN Guiding Principles, Kampala Convention, Great Lakes Convention and Kenya IDP Bill when IDPs are returned to their original homes, resettled elsewhere or helped to re-integrate within the communities. The most viable option would be to return IDPs to their original homes. Where this is impossible, however, the best would be to re-integrate them in the host communities.

The last step is to ensure that perpetrators of the post-election violence face the justice system. IDPs should receive compensation in the form of reparation, and should observe the administering of justice in the form of retribution or restitution. A trusted judicial system is able to hold the perpetrators of the post-election violence to account and make them pay for properties destroyed and deaths caused.

## 6. What works: Integrating IDPs as the better option

The integrated category of IDPs is able to recover from the violence and reconstruct their situation much faster than the other categories of IDPs. They are able to adapt, absorb and transform their IDP status and return to their businesses, hence becoming more resilient than camp and government-resettled IDPs. They are able to go back to the host community or relocate to other parts of the country and re-start with their new lifestyles.

The host communities are generally receptive and cordial to post-conflict victims. There are strong social support systems within this integration of IDPs with the host communities as compared with the other IDPs. These support systems have played a key role in the post-conflict reconstruction and recovery process.

Portes' (1998; 2000) definition of social capital emphasises that a person must be related to others, and it is those others, not him-/herself, who are the actual source of his or her advantage. In this regard, integrated IDPs were able to re-establish their old social network. The primary source of help and social support for IDPs is their own informal social groups. This experience is similar to that of IDP victims elsewhere – for instance, Japan (after the Kobe earthquake), Azerbaijan, South-Western highlands of Uganda, Liberia, South Sudan (due to the 2013 ethnic violence) – and that of IDP-women in Bogota, Colombia (Brookings-Bern Project on Internal Displacement 2006; Brookings Institution 2008; 2011; Zora 2009). This demonstrates that social support provides an informal boost to the community resilience of IDPs.

Integrated IDPs' adaptive, absorptive and transformative capacities are strong because they do not only have their own IDP-based social support system; they have managed to integrate with the host community and have hence secured a broad social network for recovery and reconstruction. They have established cordial relationships with the landlords, who allowed them delayed rent re-payments of loans made in difficult circumstances.

They have been able to integrate and conduct businesses with those who were not affected by the violence as well as to re-establish social networking with former business clients. The integrated nature of their resettled situation means they attend the same markets, churches and clinics as their host communities, and their children are in the same public schools. This study concludes that this is a valuable asset in their reconstruction and recovery.

In addition to the social networks of their new environments, they have a type of leadership structure comprised of a chairperson, secretary and members. This social network helps them access information and also links them to the National Government. They have bonding, linking and bridging social capital, which is positively helping them accelerate their reconstruction and recovery. This empowers them for collective decision-making.

# 7. Conclusions

The analysis on 'what works and what does not work' provides a lens for this study to offer four critical conclusions for policy makers in post-conflict reconstruction and recovery. On the basis of the findings, the following conclusions and recommendations are presented:

## 7.1 Land-based resettlement approach

Land-based post-conflict reconstruction and recovery approaches on their own are not a sustainable solution for IDP community resiliency. IDPs require a guaranteed socio-economic livelihood. Post-electoral conflict victims should be integrated back into communities and offered some socio-economic livelihood they can rely on (Brookings-Bern Project on Internal Displacement 2006; Brookings Institution 2008; 2011). To facilitate this approach, a multi-sectorial and multi-agency team should determine each individual victim's economic loss in the electoral crisis and carry out an evaluation for purposes of compensation (restitution, retribution or restoration). Governments, NGOs and other stakeholders need to initiate peace, cohesion and integration projects in the host communities. This approach ensures community resilience and a faster recovery and reconstruction process for the victims.

In situations where the Government has resettled IDPs on farms, there should be an accelerated plan to re-engage and provide them with capacity and empowerment for a sustainable livelihood. This may include providing them with tools, credit and new options of crop cultivation, poultry rearing and marketing. In the long run, they should provide them with legal documents for ownership of the houses and pieces of land allocated. Cohesion and integration agenda should be rolled out to ensure host communities do not label the resettled as IDPs.

## 7.2 Social support in reconstruction and recovery

Social support is an important aspect in IDPs' reconstruction and recovery. In absence of external support from host communities or government, IDPs

form their own support system. Where IDPs make a decision to integrate with the host communities, they are able to adapt, absorb or transform much more quickly. The pyramid of social support affords many forms of social support such as providing direction, disposition, description, content and network (Tardy 1985:187–202). The foundation of social support is the social network: comprising immediate family, close friends, neighbours, co-workers, community and professionals.

In displacement, IDPs are able to create new social support mechanisms among themselves for the purpose of livelihood. These social support structures are closely knit as they have a clear understanding of each other. They have common values, mission and vision, and eventually they even create new norms.

## 7.3 External actors' support

In this study, non-state actors are stakeholders in the post-conflict reconstruction and recovery. At the micro-level reconstruction and recovery processes, they need to actively involve communities in the design and the implementation of the projects. UNDP Kenya had a well programmed livelihood project (2009–2011). The activities within this project aimed to improve livelihood capacities and empower the IDPs (UNDP 2009; 2011c). To achieve progress, donors should consider more proposals from NGOs similar to the approach of the UNDP Kenya. The projects should run for a longer period of about five years or more to achieve effective impact.

The peace process was driven by the AU with continual instruction and advice from western countries such as the US, UK, Germany and France. Because these countries were instrumental in peace negotiations, they must also appraise, evaluate and monitor the impact of the resettlement projects and, if necessary, fund the process to ensure an accelerated search of durable solutions for the IDPs.

## 7.4 African Union mandate

The AU's PCRD should continue with its current mandate, but enforcement mechanisms should be put in place to prevent post-election violence. The AU is a key stakeholder in Africa's conflict prevention and peace promotion. Although a mechanism for peer-review is in place, there has been no tangible impact on the way in which the system has managed to prevent violence (Khadiagala 2008; 2009; African Union 2009; 2010).

In the case of Kenya, the AU belatedly anticipated the post-election violence and at any rate failed to enforce systems to prevent it. Therefore the AU should consider expert missions – emplaced about two years to general elections – to study and make recommendations to countries going to elections. This would help in timeously monitoring and evaluating electoral systems and structures in the countries concerned, and in advising and enforcing where necessary. This would avoid a merely one-day event of monitoring general elections by AU observers, as currently is the case.

## 7.5 The empirical, theoretical and conceptual contribution

This study has attempted to focus on empirical, theoretical and conceptual aspects of reconstruction and recovery processes for IDPs after a post-electoral conflict.

In the fieldwork, post-election violence victims shared details about the loss of their economic (livelihood), physical (land), natural (heritage, culture) and social (friendship, neighbours) assets during the violence. The study shows how the concept of social support and community resilience has informed the post-conflict reconstruction and recovery discourse, particularly in multi-ethnic communities. It shows that co-workers are the first call for social support during and after a crisis, and that IDPs have intentionally created IDP-based social support structures and systems to overcome their common adversity.

The general expectation that IDPs are socio-economic vagrants due to the losses suffered has been found to be merely a perception, since it is clear that the victims have been making proactive and informed choices

about alternative sources of livelihood, based on the changing conditions to which they were adapting. The study finds reliance of casual labour and other menial jobs as the primary source of livelihood among IDPs. The IDPs are determined to overcome adversity.

Adaptive aspects of social capital are internally controlled by IDPs, while Government and non-state actors control absorptive and transformative aspects. As such, IDP communities rich in the three different aspects of social capital are able to regain functionality (bounce back) faster. This study may provide a baseline for future researchers interrogating how IDP communities could share their experiences in regard to aspects of social capital with other post-conflict displaced communities located in many parts of the world.

With regard to the bouncing back of displaced communities, this study underscores the importance of such livelihood assets as land, food, security, jobs, businesses and household properties as enabling a community to transform, adapt or absorb new ways of life. Additionally, however, the capacity for more or less successful recovery is determined by the way in which the hosting community enables or constrains victims to adapt, absorb or transform during and after a crisis. On the one hand, an IDP community needs ownership of livelihood resource (land) and on the other hand, they need social support systems advancing the vision, mission, goals and objectives of becoming resilient. What this study found, is that the bigger the pool of livelihood assets and the faster the re-acquisition of lost assets or the acquisition of new assets, the further the post-conflict victims stand on the pathway back to functionality.

There is a strong argument regarding the relationship between post-election violence and ethnicity. The summary of this argument is that post-election violence breaks down the community into closed hostile ethnically determined units. This study has found, however, that IDPs develop strong emergent norms, values and culture (bonding social capital) which become dominant among themselves and are *not* determined by ethnic affiliation. By sharing common problems in displacement, IDPs disregarded ethnic

affiliations and created unique forms of bonding social capital among themselves. The process of more successful recovery is determined by in-group solidarity, mobilisation and reciprocity supports. This creates strong in-group loyalty and comradeship and out-group antagonism. There is closure and density within the displaced population which ensures active resistance to infiltration by host communities.

The important finding of this study is the possibility of IDPs mobilising new social networks based on the socio-economic and livelihood resources they have among themselves. This could eventually create a new society (community) complete with new traditions, culture, systems and structures. The opinion that the foundation of social support originates solely from victims' social network, such as family and neighbours, is apparently not accurate.

Indeed, the primary sources of social support among the displaced are the victims themselves. They share the pains of displacement, they share common characteristics, attitudes and behaviour; they develop new values and norms among themselves, based on their displaced world view. This new culture creates a new community distinct from the host community and different from the community as it might have previously existed.

The new society/community emerging from displacement develops new forms of social capital. These communities/societies have different socio-economic and political attributes and characteristics from their pre-conflict communities. Experiences in displacement shape their rules, values, norms, behaviour, attitudes and world view. I therefore submit that a new community created out of displacement is more resilient, and more connected by social support systems and structures which enable them to deal with future post-electoral conflicts.

This emergent culture has unique community capacities – adaptive, absorptive and transformative – based on previous experiences. The community develops areas of collective action independent of the host communities: such as conflict and risk reduction and management, community protection (food, money services, etc.), resource management

(water, land, etc.) and management of community goods and services (schools, health, etc.). These capacities evolve to become pervasive and even dominant in the geographic area occupied by the IDP community.

Additionally, this community/society has the capacity to influence host communities to adopt their new culture, values order, social systems, social structures and social networks. This study refers to this possibility as creating new social capital. Therefore, the longer IDPs occupy certain geographic areas, the greater the likelihood for them to influence the culture, social network, social values and interactions of the host community. The new community/society is devoid of ethnicity. Indeed, in the Kenyan context new worship systems, new agricultural practices, new market systems and micro-finance systems are taking shape in areas dominated by IDP resettlement. This concept is comparable with the structural and cultural influence an immigrant Muslim/Asian community can create whenever they settle in a new area. They develop strong loyalty, solidarity and comradeship bonds among themselves. They influence the language and economic systems of that geographic area. They are able in time to dominate existing social systems, structures and institutions.

## 7.6 Further research

The empirical, theoretical and conceptual issues, as well as the conclusions above, may provide scholars with new horizons of knowledge concerning social capital and community resilience as potent factors in the reconstruction and recovery processes of IDPs.

Based on the above conclusions, scholars need to investigate further the relationships between IDPs and refugees' reconstruction and recovery processes. Additionally, future scholars should examine case studies of IDPs in non-war situations.

# Sources

Abuya, Edwin Odhiambo 2009. Consequences of a flawed presidential election. *Journal of Legal Studies*, 29 (1), pp. 127–158.

Adeagbo, O.A. 2011. Post-election crisis in Kenya and Internally Displaced Persons: A critical appraisal. *Journal of Politics and Law*, 4 (2), pp. 174–179.

African Union 2006. Policy on Post-Conflict Reconstruction and Development (PCRD). Adopted in Banjul, The Gambia, July 2006. Conflict Management Division, Peace and Security Department, Commission of the African Union, Addis Ababa.

African Union 2009. Special Session of the Assembly of the Union on the Consideration and Resolution of Conflicts in Africa: Plan of Action. Tripoli, 31 August 2009. Addis Ababa, African Union.

African Union 2010. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Available from: <http://www.au.int/ en/sites/default/files/african_union_convention_for_the_protection_and_assistance_of_ internally_displaced_persons_in_africa_(kampala_convention).pdf> [Accessed 12 June 2015].

Akiwumi Report 1999. KHRC killing the vote: State-sponsored violence and flawed elections in Kenya. The Report of the Judicial Commission of Inquiry into Tribal Clashes in Kenya.

Alexander, David E. 2002. *Principles of emergency planning and management*. Harpenden, Hertfordshire, Terra Publishing.

Alvarez-Castillo, F., S. Okuonzi, N. Chabikuli, O. Lomorro, L. Atuyanbe and K.T. Silva 2006. Why some survive: Coping, resilience and social capital in armed conflicts. African Safety Promotion. *Journal of Injury and Violence Prevention*, 4 (2), pp. 78–87.

Brookings-Bern Project on Internal Displacement 2006. Workshop on the Implementation of Uganda's National Policy for Internally Displaced Persons. Background paper. Kampala, Uganda, 3–4 July 2006. Washington, D.C., The Bookings Institution, and Bern, University of Bern.

Brookings Institution 2008. *Protecting Internally Displaced Persons: A manual for law and policy makers*. October 2008. Washington, D.C., The Brookings Institution, and London, London School of Economics.

Brookings Institution 2011. *Resolving Internal Displacement: Prospects for local integration*. June 2011. Washington, D.C., The Brookings Institution, and London, London School of Economics.

Coppola, Damon P. 2007. *Introduction to International Disaster Management*. Oxford, Butterworth-Heinemann.

Daily Nation 2009. Kenya post-poll case set for ICC. 5 November.

Daily Nation 2013a. How lack of tribunal paved way for ICC. 8 September.

Daily Nation 2013b. How Kenya handled local tribunal process. 17 September.

Daily Nation 2015a. Uhuru ICC case terminated. 13 March.

Daily Nation 2015b. IDPs await compensation 10 years on. 27 March.

Daily Nation 2015c. IDPs lose bid to get State compensation. 10 August.

Daily Nation 2016a. Genuine integrated IDPs to be compensated. 22 May.

Daily Nation 2016b. Government use Kshs. 6bn to resettle integrated IDPs. 21 October.

Daily Nation 2016c. Government to use Kshs. 6bn to Resettle Integrated IDPs. 20 December.

Daily Nation 2017a. 15,000 IDPs in Kisii, Nyamira to be compensated. 20 March.

Daily Nation 2017b. Government to compensate integrated IDPs with shs.2.2 Billion. 25 June.

Daily Nation 2017c. 10 Years on, no solace for 2007–08 poll violence survivors. 4 August.

Daily Nation 2017d. Key Points in Supreme Court Judgment. 21 September.

Daily Nation 2018. Raila outline his new role at African Union's Special Envoy. 24 October.

Daley, Patricia 2006. Challenges to peace: Conflict resolution in the Great Lakes Region of Africa. *Third World Quarterly*, 27 (2), pp. 303–319.

Hernandez-Plaza, Sonia, Enrique Alonso-Morillejo and Carmen Pozo-Munoz 2006. *Social support interventions in migrant population*. London, Oxford University Press.

Hyden, Goran 2006. *African politics in comparative perspective*. New York, Cambridge University Press.

Internal Displacement Monitoring Centre 2011. Global Overview 2011: People internally displaced by conflict and violence. Available from: <http://www.unhcr.org/IDMC/IDMC-report.pdf> [Accessed 19 August 2015].

International Criminal Court 2009. Situation in the Republic of Kenya. Available from: <https://www.icc-cpi.int/kenya> [Accessed 19 August 2015].

International Criminal Court 2015. Situation in the Republic of Kenya. Available from: <https://www.icc-cpi.int/kenya> [Accessed 19 August 2015].

Jacobsen, Karen 2002. Livelihoods in conflict: The pursuit of livelihoods by refugees and the impact on the human security of host communities. *Journal of International Migration*, 65 (5), pp. 89–121.

Kagwanja, Peter 2009. Courting genocide: Populism, ethno-nationalism and informalism of violence in Kenya's 2008 post-election crisis. *Journal of Contemporary African Studies*, 27 (3), pp. 365–387.

Kagwanja, Peter and Roger Southall 2009. Introduction: Kenya – a democracy in retreat? *Journal of Contemporary African Studies*, 27 (3), pp. 259–277.

Kanyinga, Karuti 2009. The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya. *Journal of Contemporary African Studies*, 27 (3), pp. 325–344.

Kanyinga, Karuti 2014. Kenya democracy and political participation: A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi.

Kenya National Dialogue and Reconciliation (KNDR) 2009. Monitoring Project Agenda Item 4 Long-standing issues and solutions. Draft report on Status of Implementation, January 2009. Nairobi, South Consulting Company.

Khadiagala, Gilbert 2008. The failure of leaders and institutions: Reflections on the 2007 election malaise in Kenya. *African Renaissance*, 5 (1), pp.53–60.

Khadiagala, Gilbert 2009. Forty days and nights of peacemaking in Kenya. *Journal of African Elections*, 7 (2), pp. 4–33.

Kiai, M. 2008. The crisis in Kenya. *Journal of Democracy*, 19, pp.162–168.

Kiliku Commission 1992. *Report of the parliamentary select committee to investigate ethnic clashes in western and other parts of Kenya*. Nairobi, Parliament of Kenya.

Krisch, Scott and Colin Flint 2011. *Reconstructing conflict: Integrating war and post-war geographies*. Farnham, Ashgate.

Kumar, Krishna 1997. *Rebuilding societies after civil war: Critical roles of international assistance*, London, Lynne Rienner.

Kwatemba, Shilaho Westen 2008. Ethnicity and political pluralism in Kenya. *Journal of African Elections*, 27 (2), pp. 77–112.

Kwatemba, Shilaho Westen 2012. The role of ethnicity in Kenya's transition from single party rule to political pluralism (1992–2007). Thesis submitted to the faculty of humanities and social sciences, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the Degree of Doctor of Philosophy.

Ministry of State for Special Programmes 2010. Report on IDPs Resettlement. Nairobi, Government Printer.

Ministry of State for Special Programmes 2011. Report on IDPs Resettlement, Nairobi, Government Printer.

Ministry of State for Special Programmes 2012. Report on IDPs Resettlement, Nairobi, Government Printer.

Murithi, Tim 2006. The AU/NEPAD post-conflict reconstruction policy: An analysis. *Conflict Trends*, 2006 (1), pp.16–21.

Nakagawa, Yuko and Rajib Shaw 2004. Social capital: A missing link to disaster recovery. *International Journal of Mass Emergencies and Disasters*, 22 (1), pp. 5–34.

Nkhuhlu, Wiseman 2005. *The New Partnership for Africa's Development: The Journey so far*. Pretoria, NEPAD Secretariat.

Office for the Coordination of Humanitarian Affairs (OCHA) 2004. *Guiding Principles on Internal Displacement*. Second edition. New York, United Nations.

Portes, Alejandro 1998. Social capital: Its origins and applications in modern sociology. *Annual Review of Sociology,* 24, pp. 1–24.

Portes, Alejandro 2000. The two meanings of social capital. *Sociological Forum*, 15 (1), pp. 1–12.

Standard 2015. Kenya earmarks 1.2 billion for IDP resettlement. 2 June.

Standard 2016. Government to resettle all remaining IDPs by Monday. 4 February.

Standard 2017. Supreme Court to Rule whether Kenyans will hold Fresh Presidential Elections. 25 October.

Standard 2018. How cartels colluded to steal IDP billions. 27 August.

Tardy, Charles H. 1985. Social support measurement. *American Journal of Community Psychology*, 13 (2), pp. 187–202. UNDP (United Nations Development Programme) 2009. United Nations Development Project: Country Kenya. Livelihood Recovery Project Document.

UNDP 2011a. Community peace recovery and reconstruction: A handbook for generating leadership for sustainable peace and recovery.

UNDP 2011b. Restoring of human dignity of IDPs in Kenya: A situational report by UNDP. Kenya, OCHHR.

UNDP 2011c. The Post-Election Violence (PEV) Livelihood Recovery Project.

Waki Commission 2008. Report of the commission of inquiry into post-election violence. Nairobi, Government Printers.

Wolff, Stefan 2006. *Ethnic conflict: A global perspective*. Oxford, Oxford University Press.

Zora, Popovu I. 2009. The Role of Social Capital for Post-ethnic Conflict Reconstruction. Thesis submitted for the degree of Doctor of Philosophy, University of Bath, Department of European Studies and Modern Languages, December 2009.

# Book review

## *Violence, Religion, Peacemaking*

**Irvin-Erickson, Douglas and Peter C. Phan editors 2016**

*New York, Palgrave Macmillan, 205 pp.*
*ISBN 978-1-137-56850-2 (hard cover printed copy);*
*978-1-137-56851-9 (eBook)*

*Reviewed by Jannie Malan\**

The title of this book announces three topics, one after the other, with commas separating the three keywords. In addition to the title, the cover of the printed book also provides us with a sub-title, a contextual reference and a symbolic picture. The sub-title is: 'Contributions of Interreligious Dialogue'. The reference is to the series of which the book forms part: Interreligious Studies in Theory and Practice. Next to the name of the series, there is a logo of a circle of five overlapping circles. And the picture shows a dark sky above a moonlit cloud.

This meaningful book has developed out of a 2013 conference in New York on the theme 'Nurturing Cultures of Peace in Contexts of Global Violence' (p. 3).

---

\*    Jannie Malan is a Senior researcher at ACCORD.

The goal of this conference was 'to strengthen relationships between religious leaders, peace practitioners, and scholars, and to create a forum for a free exchange of ideas at the nexus of theory, practice, and faith' (p. ix). The three-day conference and workshops proved to be a 'transformative' event, and reading of the resulting publication may surely also lead to transformative experiences.

In a context of global violence, much, if not most, of which is to some extent religion-related, a free exchange of ideas is very relevant and required. Such dialogic, or multilogic, exercises are not uncomplicated or unchallenging, however. In the fields of violence, religion and peacemaking, we have (almost?) no provabilities or certainties, but mainly debatabilities, believabilities and expectabilities. The commas in the title of this book may therefore be regarded as indicators of open-ended relatedness, and as prompts to revisit one's opinions about the relations concerned. Each chapter separately, and the whole book as well, certainly challenge its readers to rethink their conceptions, and perhaps even convictions, and to play their constructive roles in nurturing cultures of peace.

In the Introduction, orientating questions are asked and discussed: What is religion? What is peace? What is interreligious peacemaking? Such 'What?' questions may of course be answered partly or wholly theoretically, and the discussions in the introductory pages are indeed on a theoretical wavelength. (From some religious perspectives, there may be objections to using the terms 'theory' and 'theoretical' with regard to convictions of faith, but for our present purpose we will have to ignore such debate. After all, the title of the series in which this book has been published, is 'Interreligious Studies in Theory and Practice'.)

In addition to the 'What?' questions, however, the Introduction also poses the very practical 'How?' question: How can religious leaders contribute to cultures of peace in the contemporary world? (p. 3). In my opinion, this is the core question of the book, and it identifies religious leaders as crucially important readers, and, hopefully, receptive and responsive readers. After all, most of the committed followers of religions usually do not have the opportunities and/or facilities to undertake open-minded and deeply

penetrating research into the convictions and traditions of their faith. With well-intentioned but naïve trust, they simply follow the guidance of their religious leaders. And when their leaders, albeit with good intentions, still happen to adhere to ancient but outdated persuasions and practices, the followers do the same. Even more deplorable and disastrous are the cases where a religious group has been diverted into a socio-political and/or ethno-national direction and the religious leaders compliantly adopt the slogans but fail to blow any whistles.

I have to add the obvious fact, however, that when the conference papers were written, and also when, after the conference, they were edited into the chapters of this book, the authors did not have the introductory chapter with its essential 'How?' question at their disposal. Nevertheless, there are many and valuable practical recommendations, and also between-the-lines suggestions. There are country-specific details – from, alphabetically, Afghanistan, Cambodia, Canada, Colombia, Indonesia, Kenya, Nigeria and Sudan – which should be of special interest to readers from the countries and/or religions concerned, but which may also point to lessons that can be implemented in other geographic and/or religious contexts, with modifications where needed. Among the approaches and methods described and discussed, there are, for instance, the following:

Counteracting environment-degrading resource extraction

Practising nonviolent resistance against landgrabs, structural inequality, and structural violence

Religious leaders remaining politically non-aligned

Promoting environment-restoring tree planting

Promoting not only coexistence, but also pro-existence

Recognising and rectifying misapplication of religious elements

Recognising religion as part of a solution

Repairing individual relationships

Rescuing a religion from destructive politicisation

Reviving and promoting a vision of harmony

Tourists befriending vulnerable locals

Understanding each other's religion and culture

Jannie Malan

The emphasis on *understanding* explicitly occurs in four of the chapters, and in two of these, understanding is repeatedly mentioned. In chapter 9 (Armed Peacebuilding: The Peacebuilding aspects of the Counterinsurgency in Afghanistan), for instance, the importance of understanding is discussed, firstly with regard to the education of women on their rights within Islam. An existing programme is mentioned which was founded by an *insider* who realised the need. Secondly, it is explained 'how an effective counterinsurgency policy is based on engaging the local populations and winning their support, not merely defeating the enemy with superior firepower' (p. 158). In this regard, it was an *outsider* military general who took important initiatives. He allowed himself to be guided by 'paradoxical understandings' and he promoted the development of understanding and relationship-building between the military and the religious leaders (pp. 163–165). And in chapter 10 (Religion as a Catalyst for Peacebuilding in Jos, Plateau State North Central Nigeria), it is emphatically stated that 'Christians and Muslims in Jos, Nigeria need to understand that both religions preach peace' (p. 177). This is followed by clear examples of what each group should understand about their own religion, and of how such understandings could pave the way towards forgiveness and reconciliation (pp. 177–179).

After my comments on the country-related chapters, I wish to underline the meanings and messages of the first two chapters, which make up almost a third of the book. In chapter 1 (Introduction: Interfaith Contributions to Nurturing Cultures of Peace), concepts and theories are briefly but meaningfully discussed. Chapter 2 (Peacekeeping, Peacemaking, Peacebuilding: An Interreligious Spirituality for Just Peace), the longest in the book, 'attemts to expound the teachings of various religions on peace and just peacebuiling, and to elaborate an interreligioius spirituality, that is, a way of living that promotes peacekeeping, peacemaking, and peacebuilding' (p. 22). Near the end of this chapter, it is stated 'that all world religions recommend such a spirituality of knowing the truth, doing justice, forgiveness and social reconstruction' (p. 48). I am inclined, however, to criticise this as an unreferenced sweeping statement, and also

as a partial statement. The *inner* and attitudinal nature of this spirituality is suggested by the mention of forgiveness, but the way in which such a spirituality deviates from *outward* religiosity is not emphasised. And, since it is usually the externalities found in creeds, codes and cults that cause and/or exacerbate conflict, I reckon that the making of this point, here and elsewhere, could have significantly increased the impact of the book. But I immediately have to add that in my opinion this crucial insight is missing from many books in the field of religion.

In spite of this (debatable?) shortcoming, however, *Violence, Religion, Peacemaking* does communicate and disseminate very meaningful contributions to the interreligious dialogue. It warns against the destructive role religion can play in the 'deadly mix' of 'ethnicity, nationalism, land, and religion … fueling most armed conflicts' (p. 23), and it strongly recommends ways in which religion can be 'a catalyst for peacebuilding' (p. 181) – in a particular area and globally.

Technically, this book has been produced very professionally. I have noticed 24 typing errors, but as an editor I know very well how easily minor mistakes can slip through.

I can highly recommend this book to religious leaders, polititians, peace practitioners and scholars, and to all who are interested in religion and conflict. The more we think and rethink around the nexus of theory, practice and faith, the more our moon-lit clouds might become directly sun-lit. Or evaporate.