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#### ABSTRACT

From Sierra Leone to South Africa, calls for prosecutions, truth seeking, reparations and institutional reform are increasingly common as countries seek to address human rights abuses. While transitional justice measures are thought to contribute towards ending impunity and advancing reconciliation, the effectiveness of such interventions are thought to depend largely on the capacity of state institutions at the administrative, judicial, and political and security level. In African countries, despite the realities of institutional deficiencies, poor governance, and poverty, transitional justice measures continue to be laden with high expectations. The paper looks at obstacles that have been encountered in a number of countries in Africa , in the hope of cultivating modest expectations.

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#### KEYWORDS

Transitional Justice – Truth Commissions – Reconciliation – Institutional Reform



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# OVERPROMISED, UNDERDELIVERED: TRANSITIONAL JUSTICE IN SUB-SAHARAN AFRICA<sup>1</sup>

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## Introduction

Calls for prosecutions, truth-seeking, reparations, and institutional reform are increasingly common in countries seeking to confront past human rights abuses. These approaches, it is argued, are necessary to combat impunity and advance reconciliation.<sup>2</sup> Currently, at least 12 sub-Saharan African countries are in some stage of implementing transitional justice measures, yet there has been no comparative analysis of the overwhelming limitations facing these efforts.<sup>3</sup> For those tasked with designing such strategies in the future, such an analysis would be valuable in helping to set realistic expectations.

Using a comparative lens, this paper explores the challenges encountered during efforts to pursue justice in a number of sub-Saharan African countries in transition.<sup>4</sup> For example, in many cases domestic prosecutions are neither systematic nor timely, partly because of the poor judicial capacity. Truth-seeking and reparations measures, often implemented in contexts of political compromise and limited resources, can appear to lack good faith. In the near-absence of trials and reparations, many victims are left without redress, particularly as efforts to vet human rights abusers continue to be slow and uneven, and perpetrators remain in positions of power.

The paper draws primarily from the experiences of the Democratic Republic of the Congo (DRC), Ghana, Rwanda, Sierra Leone, South Africa and Uganda. The selection of cases is deliberate, motivated by the fact that the countries under examination employ an explicit discourse of combating

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impunity and fostering reconciliation, and define themselves (or are defined) as being in transition.<sup>5</sup> Similarly deliberate is the choice to restrict the cases to sub-Saharan Africa, partly because of a unique combination of factors characteristic of these states.<sup>6</sup> While the precise sources of challenges to transitional justice in Africa should be empirically examined, the weakness of the African state offers a possible preliminary explanation: measures may not have their intended outcomes (such as combating impunity or advancing reconciliation) if the assumptions underlying the implementation of such measures (such as a coherent, legitimate state, an independent civil society, and citizens with political agency) do not hold.

In addition, many of the conflicts that preceded the transition are not neatly contained within borders. One of the impacts of porous borders is that national measures for combating impunity are often incomplete. Further, poverty and/or unequal distribution of income and resources have often been cited as contributing factors to, as well as consequences of, conflict and dictatorship. Transitional justice measures can seek to clarify, and have an impact on, these root causes of violence and abuse. Further, the economic dimensions of conflict and repression can have consequences for the demand for reparations and the possibilities of reconciliation. Finally, these countries have been in transition from the 1990s to the present, an era when the human rights field has been more interventionist,<sup>7</sup> which means that countries are generally under more pressure to implement measures that (appear to) address impunity.

This paper presents a background and genealogy of transitional justice, then turns to the many obstacles confronted by attempts to implement transitional justice in the form of prosecutions, truth-seeking, reparations, and institutional reform. Subsequently, the paper explores how the sequence of, and demand for, transitional justice measures is affected by definitions of “victim” and “perpetrator”, the use of amnesties, the nature of demobilization, disarmament, and reintegration (DDR) programs, and the understanding of reconciliation.

It concludes that the unmet expectations of transitional justice efforts are partly due to a default resort to an institutionally demanding understanding of transitional justice that is not congruent with the quality and capacity of state institutions in times of transition. Transitional justice measures in Africa continue to be laden with high expectations, notwithstanding the mitigating realities of institutional deficiencies, poor leadership, poverty, and the chasm between the government and the people.<sup>8</sup> In order to be more effective, the gap between expectations and reality must be narrowed by cultivating modest expectations about what justice-seeking measures can deliver; assessing realistically the institutional conditions necessary for their successful implementation; and investing in meaningful institutional reform (and

sometimes institution building). Otherwise, alternative, complementary, nonstate avenues for advancing reconciliation—including localized, informal initiatives with little demand on state institutions, or regional initiatives through the African Union—should be pursued.

### **Background and genealogy<sup>9</sup> of transitional justice**

Transitional justice has been defined as “a field of activity and inquiry focused on how societies address legacies of past human rights abuses”<sup>10</sup> in an effort to combat impunity and advance reconciliation during a period of definitive change in the political landscape. Regime change can come by negotiation with an outgoing regime, where the new government sacrifices more ambitious goals on matters of combating impunity in the interest of peace, stability, and reconciliation. However, new regimes are increasingly making decisions to address the past, and often use measures including prosecutions, truth-seeking mechanisms, institutional reform, and reparations programs.

Prosecutions are considered the mainstay of justice. By their punitive nature, prosecutions can help restore the primacy of the rule of law and make it clear that its breach carries consequences. The punishment of criminals is one way to provide “effective remedies” to victims, and primarily that obligation falls on domestic courts. In cases where the domestic judiciary is unwilling or unable to prosecute, internationalized judicial processes can constitute an alternative resort.<sup>11</sup> However, in contexts of widespread human rights abuses, prosecutions can be insufficient in achieving accountability, partly because they approach human rights abuses on an adversarial, case-by-case basis, and can be costly and lengthy. At best, trials paint an incomplete picture of the past and offer equally incomplete justice.<sup>12</sup> In addition, emphasizing perpetrators and crimes can leave victims unacknowledged on the margins. To remedy some of these shortcomings, prosecutions can be complemented by other, more victim-centric measures.

Truth-seeking mechanisms can operate alongside trials by providing an opportunity for society to gain a broader understanding of past atrocities. With a long history in Latin America and made popular in Africa by the South Africa Truth and Reconciliation Commission (TRC), truth commissions can give victims an opportunity to talk about their experiences, and allow perpetrators to acknowledge responsibility. Truth-seeking efforts can acknowledge that victims have a right to know the truth about the abuses they suffered, and that the government has a duty to facilitate a process for establishing a historical record. Government-sanctioned truth commissions have become fairly common mechanisms for establishing a socially acceptable version of history, validating the experiences of many victims.<sup>13</sup> There can

also exist unofficial, civil society–run commissions or projects with similar goals, which can act as “replacements, complements, or precursors” to official commissions.<sup>14</sup>

Truth-seeking mechanisms may develop a widely recognized definition of “victim”, which may facilitate other mechanisms, such as reparations programs. As mentioned above, the state has a duty to remember the victimization of its citizens. Such remembrance can constitute symbolic reparations. But broader reparations programs—restitution, compensation, and rehabilitation—are, under international law, a state obligation to victims as a “materialization of recognition of responsibility”.<sup>15</sup>

Both trials and truth-seeking mechanisms can shed light onto the institutional deficiencies that led to the abuses, thereby tasking the new administration with matters of vetting as well as broader issues of institutional reform. As part of larger institutional-reform measures, vetting should involve using individual, case-by-case merits rather than collectively dismissing people by virtue of their association or politics. In other situations, compromised institutions can be significantly altered or even abolished, and new bodies set up as a way to prevent recurrence.

These measures of transitional justice can be intimately linked. For example, evidence gathered from truth-seeking processes can be used to support prosecutions and determine beneficiaries for reparations programs. For maximum impact, some observers have recommended implementing transitional justice measures in an integrated package rather than as unrelated efforts. Failure to do so can minimize the credibility of the measures: it has been suggested that reparation programs executed without a detailed exploration of causes and effects of human rights abuses can be unsatisfactory, just as reparations awarded without any attempt at judicial accountability can be seen as tainted.<sup>16</sup>

Over the years, transitional justice initiatives have exhibited different priorities.<sup>17</sup> In what is called “Phase I” of transitional justice—the post–World War II period and the Nuremberg trials—the focus of transitional justice was international criminalization and subsequent criminal prosecutions.<sup>18</sup> Various instruments, such as the Genocide Convention, were put into place, setting a precedent that individuals could no longer justify human rights abuse in the name of institutional culture or response to orders. In this phase, the perpetrator was at the center of the quest for justice.<sup>19</sup>

During the Cold War, the pursuit of transitional justice largely stagnated.<sup>20</sup> This lasted until “Phase II”, which encompasses the transitions that took place following the decline of the Soviet Union. In the various political upheavals in the Southern Cone countries, the opening of the Stasi Records in Germany, and the lustration in Czechoslovakia, local and

politicized conceptualizations of justice associated with state building were implemented. Justice moved beyond prosecutions and included little-explored mechanisms, such as truth commissions, reparations, vetting, and other restorative justice measures, making transitional justice more “communitarian” and a “dialogue” between perpetrators and victims.<sup>21</sup> In this period, the truth commission experiment in Argentina soon gained wide use in Latin America and later was made popular by South Africa.

The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 marked the beginning of yet another political landscape, “Phase III”, where increased frequency of conflict moved the application of transitional justice and the call for combating impunity from the exception to the norm. The year 1994 saw the creation of the International Criminal Tribunal for Rwanda (ICTR), and soon afterward the Rome Statute for the International Criminal Court (ICC) was promulgated. The ripple effects from these three mechanisms have been felt across the world, particularly in a number of peace agreements that have referred to international trials and tribunals. The Arusha Accord for Burundi, the Linas-Marcoussis agreement for Côte d’Ivoire, the agreement between the government of Sierra Leone and the UN for the Special Court, and the Inter-Congolese Dialogue (ICD) for DRC all requested creation of international or hybrid prosecutorial mechanisms.<sup>22</sup> In this phase, there is constant reference to humanitarian and human rights law, as well as an “entrenchment of the Nuremberg Model”, particularly by the creation of the ICC as a permanent court to prosecute genocide, war crimes, and crimes against humanity.<sup>23</sup>

## Transitional justice developments in Africa

### *Challenges*

Unlike countries such as Chile and Argentina, in which transitional justice measures were administered following relatively clear instances of regime change, most of the cases under examination in Africa implement these measures following negotiated transitions, without a clear break with the past and/or with ongoing conflicts.<sup>24</sup> The Lomé Accord of 1999 for Sierra Leone was the third peace agreement aimed at ending the conflict and establishing democracy. Similarly, the Ghana National Reconciliation Commission (NRC) was the latest in a succession of accountability measures implemented by various governments starting from the coup that overthrew Kwame Nkrumah in 1966. The DRC and Uganda currently have different degrees of ongoing conflict while they are in the process of implementing various transitional justice measures.

A number of important questions arise: what constitutes a “transition”

in Africa? Is the transition marked simply by the political choice to use of the rhetoric of justice and reconciliation, even in a context of minimum breach from the past, perhaps in order to “create the democratic possibility to re-imagine the specific paths and goals of democratization”?<sup>25</sup> Can a country have a succession of transitions and apply transitional justice measures each time?<sup>26</sup> Are these measures appropriate even in contexts of weakly institutionalized states without a history of Western-style democratic tradition?<sup>27</sup> Or is it possible that new governments adopt the now-common language of transitional justice to compete for resources on an international stage? Without offering answers to these questions, this discussion points to the possibility that the “moment of transition” may be clearer in academic analysis than in reality. This can increase the difficulty of assessing when a country is “ripe” for transitional justice. If measures are used under inappropriate conditions, there can be an (undesirable) increased likelihood of recurrence, which would devalue the measures.<sup>28</sup>

Notwithstanding this lack of clarity about *when* to implement transitional justice (and whether the state possesses adequate institutions for such implementation), states have an obligation duty to combat impunity and “provide victims with effective remedies”.<sup>29</sup> The countries examined in this paper have undertaken a variety of transitional justice measures seemingly to fulfill this obligation, yet impunity remains widespread as their implementation meets many obstacles. While the challenges discussed below may not be exclusive to African states, they can appear more pronounced, partly because of the coincidence of weak states, unclear transitions, and a frequent resort to transitional justice measures.<sup>30</sup>

## Prosecutions

Making perpetrators accountable is central to the fight against impunity. In addition to acting as a potential deterrent for future abuses, prosecutions can repair victims, reaffirm the rule of law, and contribute toward reconciliation.<sup>31</sup> In theory, prosecutions in domestic courts should take on the main responsibility for dealing with perpetrators, while other transitional justice measures, such as reparations, truth commissions, and institutional reform, are designed to complement such trials. In cases of widespread human rights abuse, it is even more important—despite the judiciary being at its weakest—to demonstrate that impunity is not tolerable. To this end, prosecuting those most responsible, and cases that illustrate patterns of abuse, can be important to show the gravity of human rights abuses as well as their systematic perpetration.<sup>32</sup>

Unlike cases like Greece, where there were systematic prosecutions following a transition, few trials for human rights abuses have been held in

Africa, and even then with many difficulties, notably in Ethiopia and Chad.<sup>33</sup> Frequently, poor legal capacity can be a major impediment to domestic prosecutions. In the DRC, the history of the judiciary in the entire post-colonial phase has been marked by a lack of independence, integrity, and infrastructure. This is compounded by the fact that Congolese law does not proscribe genocide, war crimes, and crimes against humanity: these violations are addressed only in military courts, where their definitions do not conform to international standards.<sup>34</sup> Even with the recently implemented criminal justice program in Bunia, Human Rights Watch has described a situation where perpetrators of grave human rights abuses are prosecuted for minor crimes, in a contexts characterized by “inadequacy of existing criminal law [and] the lack of police resources required for investigation”.<sup>35</sup>

Post-genocide Rwanda found many legal professionals dead or in exile, as well as a vacuum in the judicial structures. The court’s incapacity to carry out prosecutions was (and continues to be) further compounded by the sheer number of perpetrators. In 2000, Rwanda is said to have had more than 125,000 persons in detention—a number that would be overwhelming to any judiciary, even in the developed world. Many of these individuals may have served *de facto* jail terms without ever being convicted, an issue that raises great concern about the state of justice. In an effort to speed the court processes regarding to the tens of thousands of detainees who are awaiting trial, traditional *Gacaca* courts have been set up to hear cases from various categories of perpetrators, and apportion punishment appropriately.<sup>36</sup> However, many standards of international justice consider the system to be flawed and ill equipped to address international crimes of genocide.<sup>37</sup>

In Sierra Leone, the post-war domestic judiciary was very weak and partisan. According to one report, following the civil war the judiciary had “collapsed and institutions for the administration of justice, both civil and criminal, [were] barely functional... administration of justice outside Freetown [was] almost non-existent”.<sup>38</sup> The establishment of the Special Court for Sierra Leone was partly a response to this disintegration of the domestic judicial system.

In a number of states where the necessary technical capacity and political will do not exist, there is a constant call for international trials, even when there is clear indication that the possibility to set up such tribunals—according to the then Assistant Secretary General for Legal Affairs at the UN—does not exist.<sup>39</sup> In the DRC, the ICD resolved to request the UN Security Council for the formation of an International Criminal Court for the DRC to examine the atrocities that have taken place in the conflict that has engulfed the country.<sup>40</sup>

In Rwanda and Sierra Leone, the reach of internationalized tribunals has also been limited because of technical and political constraints of a different nature. For example, the ICTR, while being a commendable

prosecutorial platform committed to prosecute as many masterminds of the genocide as possible, has indicted only 80 people, convicted 20, and acquitted 3. Given a limited time mandate, the Tribunal has recently reached an agreement with the government of Rwanda to repatriate some convicts back for trials, amid much controversy. The situation of limited reach of international prosecutions is also true of Sierra Leone's hybrid-tribunal experiment, which aims at convicting those "most responsible" for the conflict and human rights abuses, and has indicted 13 people. Other issues plague these two efforts, such as the difficulty of ensuring these courts have a significant impact on the domestic judicial system.<sup>41</sup>

Meanwhile, the governments of Central African Republic, the DRC, and Uganda, and the Security Council with regard to Sudan, have made referrals to the ICC, but the Court can examine only crimes committed after July 1, 2002, the date the Rome Statute entered into force, potentially leaving many grievances unaddressed and disappointing victims.<sup>42</sup> Additionally, the ICC's investigations can be affected by such factors as the court's own limited capacity, security of the country, and the possibility of state cooperation. Also limiting ICC jurisdiction is the American Servicemembers' Protection Act of 2002, which prohibits military assistance to member states of the ICC unless such states sign bilateral agreements ("Article 98" agreements) with the United States, removing ICC jurisdiction from U.S. personnel present in their countries.

In addition to the technical and legal limits discussed above, cultural factors have also been cited as a reason that some post-conflict states shy away from prosecutions. In some cases, expressed preferences for locally owned accountability mechanisms do not include prosecutions by formal courts.<sup>43</sup> In Uganda, for example, Acholi leaders do not support the timing of the ICC referral, fearing that pursuit of prosecutions could remove the incentives from the LRA rebels to disarm.<sup>44</sup> Instead, they want to use traditional measures to bring reconciliation to the region ravaged by the LRA. A recently completed population survey of Northern Uganda, however, indicates that victims do not see justice and peace as mutually exclusive. While they want the war to end, they do not want the LRA perpetrators to get away with impunity.<sup>45</sup>

### **Truth-seeking measures**

Truth-seeking mechanisms attempt to fulfill victims' right to truth and give the community as complete a version of history as possible. Prosecuting all perpetrators is not possible because of the many challenges identified above, institutions such as truth commissions are often established to help patch this "impunity gap".<sup>46</sup> Beyond acknowledging victims, truth commissions can help identify perpetrators, establish an accurate account of history, and

recommend reparations, institutional reform, and prosecutions. They also often give the victim a platform to confront perpetrators and sometimes offer perpetrators an opportunity to come forward and provide their account of events, acknowledge their atrocities, and, in rare cases, apologize.

The ability of truth commissions to meet their goals (one of which is often reconciliation) is vested as much in the process of truth-seeking as in the final report. For this reason, commissions must be seen to be moral, just, representative, consultative, credible, and open to public scrutiny. This pertains to all aspects of the commission's work and at all stages, including drafting legislation, choosing commissioners and staff, and handing over the final report.<sup>47</sup>

The first challenge in many post-conflict situations is that truth-seeking processes are increasingly designed during a negotiation for peace, marginalizing the voice of victims and civil society organizations, and possibly reducing ownership and credibility.<sup>48</sup> In the DRC the truth commission was proposed by members of the ICD as part of the peace negotiations.<sup>49</sup> The proposed institution, with all its far-reaching aspirations, was born out of an elite (and perhaps morally questionable) consultation in which victims did not participate broadly, with potential consequences of disconnecting parts of the country from the embryonic process.<sup>50</sup>

The second challenge pertains to the selection of commissioners, who ideally should be widely respected persons of unparalleled morals chosen through an open process.<sup>51</sup> In many cases, however, the process is compromised. For the DRC, the ICD resolution stated that the commissioners should be "Congolese of great moral and intellectual probity and possessing the necessary skills to carry out the mandate of the commission", selected "by consensus from the ranks of the components according to the criteria established by the Dialogue: moral probity, credibility [...]".<sup>52</sup> Despite these provisions, the commissioners were nominated by their political parties with no regard for the ICD criteria or the consensus described in the truth commission resolution.<sup>53</sup> In Sierra Leone, the national commissioners of the truth commission were seen as sympathizers of the ruling Sierra Leone People's Party (SLPP). This view was further reinforced when, contrary to the recommendation of the truth commission that the president of the republic "unreservedly apologize to the people for all actions and inactions of all governments since 1961",<sup>54</sup> Chairman Bishop Joseph Humper supported the president's refusal to apologize. Further, at one point, the Bishop thanked the Civil Defence Force (CDF) militia, known for widespread abuses of human rights, for its work in defending the country.<sup>55</sup> All these political inclinations may have led to observers viewing the Commission as partial.

It is a common expectation that a truth commission will contribute toward restoring the dignity of victims. This may not be always the case:

depending on how they are structured, truth-seeking processes can be traumatizing or even revictimizing. The Ghana NRC's judicialized hearings caused considerable discussion: victims gave testimony under oath, which was followed by commissioners' questions, and subsequently cross-examination by the alleged perpetrators (if present). Following such a cross-examination (either by the alleged perpetrator or his or her lawyer), the alleged perpetrator received a platform to tell his or her side of the story. While the process played an important role in the attempt to reach an objective truth, some observers have commented that giving powerful perpetrators a platform to cross-examine victims and possibly dispute their stories may not have contributed to the process of dignifying the victim.<sup>56</sup> Similarly, the Oputa Panel of Nigeria also allowed alleged perpetrators to cross-examine victims.

Another challenge facing truth commissions—and transitional justice measures in general—is that of high ambition, which can lead to disappointing victims' expectations. Truth commissions often articulate lofty goals beyond their means and sometimes even beyond political feasibility. Increasingly, truth commissions are seeking many different objectives. Contrast the mandate of the Chilean truth commission, which sought only to resolve disappearances and killings, with the mandate of the DRC truth commission to decide the “fate of the victims of the said crimes, for hearing them, and taking all the necessary measures to compensate them and completely restore their dignity”.<sup>57</sup>

Related to this is the fact that at the issuance of a final report, the truth commission ceases to exist, often leaving no means by which the aspirations enshrined in the recommendations can be made widely known, much less followed up by the government. In both Ghana and Sierra Leone, the final, multivolume reports were not immediately made public, which raised concern. If the population does not see the report and is not fully informed, it is difficult for them to hold the government accountable with regard to the recommendations.<sup>58</sup> The very form of the report as a written document can be inaccessible in victim communities with high illiteracy rates.<sup>59</sup> Even where the report is made public, such as South Africa, very few members of the general public read it.<sup>60</sup>

### Reparations programs<sup>61</sup>

Under international law, there exists an obligation for states to give “prompt reparation” to victims of violations of international human rights proportional to the harm suffered.<sup>62</sup> Reparations serve at least three aims: to recognize victims as citizens who are owed specific rights, communicating a message that a violation of such rights deserves action from the state; to contribute to establishment of civic trust among citizens and between citizens and state institutions; and to build social solidarity where the society empathizes with the victims.<sup>63</sup>

It is important to point out that reparations can never restore victims fully to the *status quo ante*, and can be only a part of a package of transitional justice measures that may include institutional reforms, prosecutions, and truth-seeking. In the absence of such an integrated approach, observers have remarked that reparations are likely to be seen as an attempt at buying acquiescence (if not accompanied by prosecutions) or as inadequate gestures of little long-term consequence (if not coupled with institutional reform).<sup>64</sup>

Reparations often run up against shortage of resources, and international donors cannot be counted on for payments.<sup>65</sup> In South Africa, the Committee for Reparations and Rehabilitation (CRR) assessed interim payments for victims with “urgent medical, emotional, educational and material/or symbolic needs”, as well as final reparations. Many challenges were associated with interim reparations. For example, they were paid out very late, almost two years after the CRR’s recommendations were sent to the government. They were also negligible in amount, disempowering to victims, and a frequent source of friction and tension in the community, especially between those who received them and those who did not.<sup>66</sup> After a long wait, final reparations were eventually allocated in amounts significantly lower than the CRR recommended, with the government making a one-time payment of approximately \$5,000 rather than a series of payments over six years.<sup>67</sup>

The Sierra Leone TRC recommended reparations for amputees, the wounded, women who suffered sexual abuse, children, and war widows because these victims suffered multiple violations and were deemed in “urgent need of a particular type of assistance to address their current needs, even if this only serves to put them on an equal footing with a larger category of victims”.<sup>68</sup> To the universe of potential beneficiaries (not predetermined), the Commission recommended that reparations be delivered in “packages” containing medical and psychological care, education, and skills-training programs. Given that the quality of public services in Sierra Leone is extremely poor, the benefits to victims were held hostage to the existing institutions’ capacity to deliver.<sup>69</sup> More important, the truth commission recommended creating a Special Fund for War Victims, which would take care of amputees, children, and women affected by the war and be established within three months of the publication of the Final Report. As of this writing, the recommended timeline has passed and the fund has not been established.

When designed without consideration of other transitional justice measures—especially those aimed at perpetrators—reparations’ contribution to reconciliation can be eroded. In countries emerging from conflict, reparations can serve to fill the justice gap created from nonprosecution of perpetrators. Yet because prosecution efforts are seen as essential to maintaining peace and stability, they are often prioritized; while reparations,

if ever implemented at all, come years later. In Sierra Leone, observers have reported that the post-war near-exclusive focus on perpetrator and ex-combatant rehabilitation (in the obvious interest of peace) alienated victims, who raised the issue many times during truth commission hearings.<sup>70</sup> This neglect of victims is especially notable in the context of general amnesty, where the right to seek judicial redress is unavailable.

Another challenge to reparations programs is that they are often designed at the last minute. The Sierra Leone TRC did not consider reparations until very late in its work, under a resource and time crunch. As a result, consultation was limited to government departments and Freetown-based NGOs. Similarly, in South Africa, “Reparations seem to have been promoted in principle by most actors as a just and necessary part of the transition, but discussion of the details of reparations was always delayed until later in the process”.<sup>71</sup>

Finally, the ICC envisions a Trust Fund for Victims that will benefit victims and their families.<sup>72</sup> Unfortunately, this Fund will be encumbered by many challenges. Some have observed that the Fund does not translate well as a reparations program, given that it separates reparations and responsibility. Further, the Fund may not necessarily be in a position to attract more funds from international sources than cash-strapped national reparations programs, and given the few numbers of victims whose cases will come before the ICC, the proposed individualization of assessments of reparative benefits can appear to introduce discrimination among victims.<sup>73</sup> Many raised concerns point to the likelihood that the Fund (and by association, the ICC) will raise expectations that it cannot meet.<sup>74</sup>

## Vetting

Under the larger rubric of institutional reform, vetting is increasingly implemented to address human rights abuses. Defined as a “formal process for the identification and removal of individuals responsible for abuses from public office”,<sup>75</sup> vetting is becoming an integral part of the process of restoring trust in organs of the state, in an attempt to ensure that the structures that facilitated human rights abuses in the past no longer exist.

Personnel reform should be carried out in a manner that is perceived as just, while respecting the rights of individuals and refraining from drastic depletion of essential institutional capacity.<sup>76</sup> Ideally, the reform process should involve assessment of the institutional capacity of institutions such as the judiciary and the security organs; assessment of existing staff capacity and qualifications; designation of standards of desired personnel composition of each particular sector; and ongoing public consultation about the entire process. The complex nature of vetting has presented many challenges to the transitional justice landscape.<sup>77</sup>

Vetting can be hindered by the state's inability to carry out the purely technical and procedural task of accessing employee records to evaluate their integrity and competence. According to one report, virtually no infrastructure for public administration exists in the DRC, and in the absence of such basics as personnel files, the difficulty of assessing employee integrity is immense, sometimes impossible. In Sierra Leone, the prewar period was characterized by "institutional collapse, through the weakening of the army, the police, the judiciary and the civil service".<sup>78</sup> In such a context, accessing credible personnel records can be difficult, which may be one of the reasons why the TRC resolved not to carry out any vetting based on past records for fear that it could easily be "abused for political ends and used for purposes of settling scores and pursuing vendettas". Instead, the Commission made forward-looking recommendations on governance.<sup>79</sup>

A related issue is one of political will to bring about necessary personnel change in institutions. Stemming from the often negotiated and incomplete nature of the transition, a new government can find itself unable or unwilling to carry out vetting for human rights abuse. Settlements were structured to remove perpetrators from the battlefield. The pragmatic nature of this compromise increased the perception of entrenched impunity, putting to serious question the government's commitment to reform. In the DRC, where many government officials are implicated in human rights abuses, some observers note that the parliament would not be willing to pass a suicidal vetting law.

The security sector, often most implicated in human rights abuse, can offer particular reform challenges. In Sierra Leone, the post-independence years were marked by misuse of security forces to quell political opposition "in the name of national security".<sup>80</sup> The security sector and the army were significantly implicated in the war, and according to the Final Report, the army was responsible for the third most institutional violations of human rights. The CDF forces, formed in part because of distrust between the population and the army, were responsible for another large portion of human rights abuses. The Final Report recommends that the government "strengthen and restructure" the security sector, although, such strengthening will call for a level of resources that can allow institutionalization, professionalization, and paying salaries regularly.

### *Other issues affecting transitional justice*

A number of issues arise that can have a direct impact across all the transitional justice measures discussed above. These include the definitions of "victim" and "perpetrator," the use of amnesties, the design of DDR programs, and the meaning of reconciliation.

## Definitions

The types of crimes to which transitional justice strategies are intended to respond to define the parameters of who is classified as “victim” and “perpetrator.” In South Africa, “The task of defining ‘victim’ and ‘perpetrator’...was the single most important decision that determined the scope and depth of the Commission’s work”.<sup>81</sup> The narrow definition of violence the truth commission adopted excluded structural violence, in turn ensuring that a broader group of beneficiaries of apartheid—the white population—was not held accountable.<sup>82</sup> A “victim” was defined as the individual (and immediate family thereof) on whom “gross violations of human rights”<sup>83</sup> were perpetrated, which may have resulted in “physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights”.<sup>84</sup> Underlying the perpetration had to be a political motive. By using this definition, the TRC ignored the political motive of the apartheid system, effectively acknowledging “only those violations suffered by political activists or state agents,” which excluded entire victimized communities.<sup>85</sup> Other categories of people who are not normally designated as victims include the internally displaced population, which in the Great Lakes region numbers more than 10 million.<sup>86</sup>

Perpetrators can have different degrees of responsibility in orchestrating, perpetrating, or supporting human rights abuses.<sup>87</sup> There are a number of situations where the definition of “perpetrator” is not entirely straightforward, leading to categories of individuals with a “morally and legally ambiguous status.” For example, there are cases where wrongdoers or individuals who have benefited from others’ crimes later resist and fight against the repressive regime; those who formerly resisted and fought the regime eventually collaborate with the regime; victims, under duress, collaborate and facilitate the work of perpetrators; etc.<sup>88</sup> For these and other reasons, a number of countries have devised new approaches for treating perpetrators who embrace this ambiguity.

Ambiguity can also apply to victims. Many child soldiers involved in human rights abuses in Africa were abducted and forced to commit atrocities.<sup>89</sup> In Sierra Leone, UNICEF worked closely with the UN Mission in Sierra Leone (UNAMSIL) to design recommendations on how the Special Court should deal with children who committed crimes.<sup>90</sup> In Uganda, where the abducted children from the Acholi community fill the ranks of the LRA, the ICC affirms, “Many of the members of the LRA are themselves victims”.<sup>91</sup> In Sierra Leone and DRC where there has been extensive use of child soldiers, or in other situations where female ex-combatants have been raped or general combatants are chronically ill or disabled, many perpetrators are also victims.<sup>92</sup>

Defined broadly, perpetrators and beneficiaries of human rights abuses can include institutions, states, and nonstate actors, even extending outside

national boundaries. In the DRC, many companies have been implicated as fueling conflicts and the abuse of human rights, but there exists no clear way to address their infractions.<sup>93</sup> Sierra Leone has corporations similarly involved in the exploitation of resources that continue with their work with almost complete impunity, even though the Final Report finds that the diamond industry fueled the war. Broadening the definition of “perpetrator” can have implications for both the demand for institutional reform and the awarding of reparations. For example, the state may not be as willing to pay reparations when abuses can be directly attributed to other parties. In South Africa, the victim-support group Khulumani sued a number of corporations for their roles in facilitating apartheid.<sup>94</sup> In Rwanda, the government has attributed some responsibility for the genocide to the French.<sup>95</sup>

A (political) issue arises, when defining “perpetrator,” as to whether agents opposing a repressive regime should be treated as equal perpetrators as agents of the regime. In South Africa, where a number of observers found no moral equivalence between the atrocities committed by the apartheid regime and those carried out by the African National Congress (ANC) liberation fighters, the truth commission’s treatment of the two sides led to dissatisfaction. In Sierra Leone, Chief Sam Hinga Norman was indicted by the Special Court for acting as the “principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF,” even though the CDF was established to defend the population against the RUF rebels.<sup>96</sup> Many Sierra Leoneans saw Norman as a hero and were disillusioned by the indictment on war crime charges. In Rwanda, some observers have noted the government’s lack of acknowledgement of the crimes committed by the Rwandese Patriotic Front (RPF) against the *Interahamwe* and defeated Hutu forces.<sup>97</sup> This silence, they note, creates a crack in the government rhetoric of justice and national reconciliation.

The definition of “victim” can also be politicized. In Ghana, pre-NRC redress measures were carried out to selective, partisan, and incomprehensive rehabilitation for victims. The identity of the victims seemed to change with every administration, with each selectively rehabilitating victims who were political allies. In an attempt to do things differently, the NRC sought to unify the groups by adopting a nonpartisan approach to rehabilitation and consulting broadly with civil society in an attempt to fulfill its mandate of creating an “accurate historical record,” drawing on the experiences of both alleged victims and perpetrators.<sup>98</sup>

## Amnesties

Widespread use of amnesty denies victims a right to redress, which can increase the urgency, or sequence, of other measures of transitional justice. Equally common is nonprosecution, even without formal promises of

amnesty. Justifications are varied: trials can provoke violent reactions in cases where the military is still strong; necessary evidence can be scant or unavailable; the new state's capacity to investigate and prosecute may be weak because of loyalty to the outgoing regime; and the costs of prosecutions may be high.<sup>99</sup>

There is a growing trend, consistent with international law and norms, of excluding genocide, war crimes, and crimes against humanity from amnesties. A similar exception is observed in Sierra Leone, where the Lomé Accord extends "absolute and free pardon" to all armed factions, and even extends the guarantees of immunity to "former combatants, exiles and other persons, currently outside the country" for any crimes perpetrated in the war, promising to "ensure that no official or judicial action" will be taken against them.<sup>100</sup> The Special Representative of the Secretary-General added a reservation that the UN would not respect an amnesty given for crimes against humanity and war crimes, opening a way for the Special Court's mandate to prosecute those who "bear the greatest responsibility for serious violations of international humanitarian law".<sup>101</sup>

A number of cases have amnesties conditioned, in principle, on a number of factors, chief among them truth-telling. However, given past experience, it is unclear the extent of prosecutions that can result from cases of denied amnesty, given the weakness of the state. In South Africa, leaders of the transition popularized the "truth for amnesty" exchange with a promise that those denied amnesty for political crimes would be prosecuted afterward. With the apartheid government controlling the security forces, such a compromise resulted from necessity. However, many assert that there has been a *de facto* blanket amnesty in South Africa as the first conviction for a person denied amnesty was issued in February 2004,<sup>102</sup> and, according to some observers, the particular case was chosen because of ease of prosecution rather than because it would serve to illustrate any patterns of abuse. There continue to be speculations of further "reopening" of the amnesty process; in other words, hearing more cases that were not brought forth by the deadline of the Amnesty Committee of the TRC to determine whether to grant amnesty. Some observers fear that this move will further entrench impunity, as it seems to be prioritizing *not* prosecuting those whose amnesties were denied, but rather extending even further amnesty to those who may have not received it the first time. Despite the disappointed expectations associated with the South African model of a truth-for-amnesty process, the DRC's peace agreement provides for a similar process where the truth commission is given the power "propose to the competent authority to accept or refuse any individual or collective amnesty application for acts of war, political crimes and crimes of opinion".<sup>103</sup>

Uganda's President Museveni issued an amnesty to the LRA with the Amnesty Act of 2000, contingent on soldiers affiliated with the LRA coming forth and disavowing combat.<sup>104</sup> The amnesty, defended by leaders of the communities most affected by the conflict and other actors, is seen as a "vital tool for both conflict resolution and longer-term reconciliation".<sup>105</sup> It applies to "any Ugandan" who may have been a combatant, promising that if such people come forth they "shall not be prosecuted or subjected to any form of punishment for...any crime committed".<sup>106</sup> Further, traditional leaders from the area most affected by the conflict have been mounting an international campaign in support of full amnesty, asking for the use of traditional cleansing ceremonies to reintegrate all levels of the LRA. However, the lack of redress occasioned by the amnesty has prompted increasing discussions about other transitional justice measures, including truth, trials, and reparations.<sup>107</sup> Overall, the constant application of amnesty can be seen to entrench impunity.

### **Demobilization, disarmament, and reintegration programs**

DDR programs are central to the security of any post-conflict situation, as they can affect the security where other transitional justice measures are to take place, as well as the willingness of victims and witnesses to collaborate with any such processes. Security, in turn, can increase or decrease the government's willingness to take risks by establishing measures for accountability. At least 7 of the 12 sub-Saharan African transitions have emerged out of violent conflict, with large numbers of combatants. During the transition, former combatants should be rehabilitated and presented with adequate incentives to join civilian life. DDR programs are considered central to stable transitions because they can reduce security fears by centralizing the use of arms in the state.<sup>108</sup> DDR programs should be implemented as holistic measures with local ownership and investment, executed with a special attention to the needs of children, women, victims, and noncombatant civilians.<sup>109</sup> They should also give as much priority to reintegration and rehabilitation as to disarmament and demobilization, the former of which is arguably crucial in developing civic trust.

Ineffective, incomplete, or badly designed DDR programs have an obvious result of increasing the insecurity of the environment in which transitional justice mechanisms are implemented, in turn affecting such factors as the political capacity of a new regime to consider prosecutions; the motivation of witnesses to come forth to testify either before truth commissions or courts; and the boldness and reach of vetting and institutional reform programs. In both Sierra Leone and Liberia, former combatants who have been re-recruited into the conflicts ongoing in Côte d'Ivoire and Guinea,

combatants have cited incomplete and/or disappointing DDR programs as part of the reason for their re-armament.<sup>110</sup>

In assessing DDR options for the Great Lakes region, the World Bank has cited the regional nature of the conflict involving Rwanda, Uganda, and the DRC as particularly challenging, as it has led to a “security dilemma” in which no government is willing to reduce its defense (both regular and irregular), thereby posing a challenge to comprehensive disarmament initiatives.<sup>111</sup> Further, some armed groups are based in foreign countries, adding the need for repatriation to an already complicated process. According to the head of disarmament for the UN Mission in the DRC (MONUC), the former Rwandese armed groups now known as FDLR (*Forces Democratique de la Liberation de Rwanda*) continue to frustrate the disarmament efforts, partly because of their uncertainty regarding to the fate awaiting them in Rwanda (where some officers, for example, could be prosecuted for their roles in the 1994 genocide).<sup>112</sup>

DDR programs can seem incompatible or in tension with transitional justice goals; the programs divide societies into combatants and noncombatants, and often face the moral dilemma of appearing to reward perpetrators.<sup>113</sup> In Sierra Leone, most of the DDR work was complete—and benefits apportioned to ex-combatants—before any measures to address victims were put in place. While ex-combatants were not fully satisfied with the program—there were complaints that combatants who shared weapons were not able to receive benefits—the stronger complaint was from victims who perceived that wrongdoers received more both during and after the conflict.<sup>114</sup> Currently, years after the ex-combatants received their “rewards,” victims’ reparations benefits are nowhere near being determined. It would not be unreasonable for victims to expect reparations of comparable value to DDR benefits, the (likely) nondelivery of which could increase social fractures.<sup>115</sup>

Social reintegration of combatants into the community can be a crucial step toward reconciliation. However, DDR programs can work against social reintegration, especially if designed as a process of buying back of weapons with a focus on demobilization and disarmament, at the expense of reintegration of combatants into the community.

## Reconciliation

Most transitional justice efforts in Africa describe themselves as centrally pursuing reconciliation—a multidimensional, contested notion. As such, the definition of “reconciliation” will affect the design of the transitional justice measures and ultimately form one of the bases upon which the success

of these efforts will be judged. Various understood, reconciliation is considered by some to be a prerequisite as well as an outcome of democracy, development, and respect for the rule of law. Others associate the term with such notions as healing, forgetting, forgiveness, co-existence, and apology. This contested notion is described as fundamentally involving establishment of trust:

*Reconciliation, minimally, is the condition under which citizens can trust each other as citizens again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so in the basis of those norms and values, and sufficiently secure about their fellow citizens' commitment to abide by these basic norms [and] values.<sup>116</sup>*

Reconciliation, then, can be seen as more than a sum total of the impact produced by the implementation of transitional justice measures.<sup>117</sup>

Strong moral leadership has been variously cited as playing a key role in the South African transition process, which is thought to have set in motion a process of national reconciliation. Yet many (African) countries do not have uncompromised and trust-inspiring leaders like Archbishop Desmond Tutu and President Nelson Mandela to give moral leadership to their transitions, a fact that can affect the credibility of any initiatives they support.<sup>118</sup> In the DRC, the appointment of former warlords to serve as generals in the army brought "serious questions about the Congolese government's commitment to justice and human rights," and would detract in obvious ways from the establishment of trust between state institutions and the population.<sup>119</sup> In Sierra Leone, Chief Hinga Norman, responsible for establishing and organizing the CDF, served in the government until his indictment for war crimes charges.<sup>120</sup>

Elsewhere, reconciliation is understood as integrally linked to economic development. In cases where inequitable distribution of resources and abject poverty constitute some of the root causes of war, continuing economic marginalization can make sustaining the transition difficult to accomplish. In reference to Rwanda, former World Bank president James Wolfensohn recommended that there "must" be an economic component to the reconciliation process in Rwanda<sup>121</sup> to put flesh on the rhetorical bones. However, Africa has had no cases in which the reconciliation project been integrally linked with social and economic development. Some experts have maintained that redistribution of wealth was beyond the scope of the South Africa TRC.

A key difficulty that confronts efforts toward the establishment of

civic trust is the blurred distinction between the political project of reconciliation and localized, culture-specific, interpersonal reconciliation. In South Africa, part of the difficulty of assessing the TRC's contribution to reconciliation stems from the lack of clarity about the meaning of the term.<sup>122</sup> Restoring interpersonal relationships and bringing healing (individual reconciliation) can be a distinctly different undertaking from a political project of establishing state institutions with a respect for rule of law and human rights that ensures co-existence (national reconciliation).<sup>123</sup> Stemming from the fact that neither the interim constitution nor the National Unity and Reconciliation Act provided a "clear definition" of reconciliation, the term was imbued with different meanings at different times. While Archbishop Tutu and others raised public expectations of the TRC's ability to deliver interpersonal reconciliation, the Commission's Act was a tool framed to deliver impersonal, political reconciliation.<sup>124</sup> In Sierra Leone, large sections of some communities did not come before the truth commission—despite being disproportionately affected by the war—because culturally, they did not believe that talking about the conflict before the nationally directed project could lead to (interpersonal) healing and reconciliation.<sup>125</sup> Here, many victims appeared more concerned with social reintegration of ex-combatants than with a public accounting of atrocities as a way of reconciliation, as propounded by the truth commission.<sup>126</sup>

While many scholars would say that transitional justice measures are necessary in the pursuit of reconciliation, some countries consider themselves reconciled in a manner that questions these assumptions. In rural Angola and Mozambique, war was regarded as a contamination, and those involved in its atrocities were ritually and *nonverbally* cleansed of their crimes before being embraced in the community. These rituals were on a distinctly local, rather than national, level, and through them former perpetrators were treated as reconciled with their communities.<sup>127</sup> In Namibia, the government declared the country reconciled following the apartheid years, choosing a distinctly different route than the truth commission of neighboring South Africa.<sup>128</sup>

Does that mean these countries will revisit their past at some point in the future, because of the lack of justice-seeking measures in their reconciliation processes? Given the oft-illegitimate nature of the state, should informal or memory- or culture-based reconciliation initiatives be seen as an end in themselves, or as contributing to the establishment of enabling conditions for more ambitious, national justice goals? Would separating the notions of justice and reconciliation allow justice to be pursued to the fullest degree possible (which sometimes may mean not at all, and with no

clear detriment) without drawing into the conversations the contested notion of reconciliation? While the answers to these questions are unclear, it is possible to make a case for a broader imagination when addressing impunity and reconciliation in Africa, outside the implicit assumptions about the nature of the state and the agency of the citizens.

### *Searching for explanations*

There is a growing trend for post-conflict and -dictatorship African states to engage in the rhetoric of, and establish mechanisms aimed toward, combating impunity and advancing reconciliation.

Evidently, many of the established initiatives are riddled with problems and have often fallen very short of their stated objectives. Around the world, but especially in Africa, prosecutions for human rights abuse are neither prompt nor widespread, partly because of limited technical, legal, and political capacity. With very few exceptions, trials have been foregone in transitions, and amnesties (including *de facto* amnesties) are widespread. Internationalized prosecutions, including referrals to the ICC, are increasingly called upon in an effort to remedy the shortcomings of domestic trials, but even their reach is inherently limited.

In part to patch the impunity gap created by limited prosecutions, states are increasingly supporting truth-seeking and reparations measures that, in the contexts of limited resources and political compromises, can be seen as lacking in good faith, and often promise more than they can deliver, disappointing victims. In fact, conditions for the successful implementation of a truth-telling mechanism may not exist in many of the countries under exploration.<sup>129</sup> Similarly, institutional-reform efforts through vetting human rights abusers have also been slow and uneven, despite the fact that such reform is thought to provide one of the necessary guarantees for nonrecurrence of human rights abuses.

Why does impunity continue to be widespread in Africa, despite the frequency with which transitional justice measures are implemented? Why have transitional justice strategies faced many difficulties and often fallen short of meeting their stated objectives?<sup>130</sup> Is there anything particular about the African context that makes the measures possibly inappropriate? Is there a minimum amount of democratic tradition and institutional strength necessary for transitional justice measures to be successful (perhaps conditions similar to those in Eastern Europe and Latin America, from where the measures originated)? A possible preliminary explanation is that the difficulties encountered by justice measures in Africa stem in part from the weakness of state institutions.<sup>131</sup>

## The nature of state institutions

Transitional justice is typically understood within the legal framework of state responsibilities, with an underlying assumption of a model of an institutionalized state with its organs “unconstrained by the dynamics of social pressures” in a society composed of citizens whose relations are mediated by the law rather than other means, such as kinship.<sup>132</sup> Transitional justice measures, then, primarily seek to establish or restore trust between the state and citizens who conform to certain parameters. However, despite all appearances, the African state is often “vacuous and ineffectual”, a deliberately and instrumentally informalized entity in which an entrenchment of the rule of law may not often correspond with the logic of politics.<sup>133</sup> In other words, efforts toward formalizing the state and establishing conditions where citizens can be “sufficiently committed to the norms and values that motivate their ruling institutions”—as transitional justice measures seek to do—can run counter to the practices of a state in which the rulers benefit from an informal equilibrium.<sup>134</sup> In states with weak institutions, one of the unintended consequences of some measures of transitional justice is that they can provide “a veneer of legitimacy for governments that actually shun democratization and the rule of law”, enabling leaders to “pay lip service to human rights principles” without substantive change in the business of politics.<sup>135</sup>

With this in the background as a possible reading of the condition of the African state, it is possible to see why implementing transitional justice measures, with origin in very particular institutional contexts, could lead to uncertain outcomes and even fall drastically short of expectations. In this reading, poor institutionalization is fundamental to the underperformance of transitional justice measures. In conditions with few legitimate rules and institutions, prosecutions and vetting programs can clash with the patronage logic of the informal state, along which much of politics is ordered. The act of putting in place a public, truth-seeking process may not necessarily be seen as a good-faith effort in critical self-examination but rather an embrace of the currency of accountability and human rights—much like the inconsequential ratification of various international human rights instruments—which can reduce development assistance conditionality. And while there are calls for a revisit to the models of National Conferences, which facilitated a number of African transitions in the early 1990s by fostering national dialogue about past failings and future directions of the state (including power-sharing recommendations), it is worth underlining that their outcomes were also equally mixed.<sup>136</sup>

While identifying the possible origins of difficulties facing transitional

justice does not provide obvious solutions, it points to the opportunity for post-conflict interventions to focus on building the capacity of the state and its institutions in order for it to be able to deliver justice and human rights—an intervention described as “paradoxical”, given that elsewhere, human rights interventions were intended to curb, rather than strengthen, the reach of state institutions.<sup>137</sup> Put simply, there exists a minimum degree of state institutionalization above which state policies, including transitional justice measures, can be most effective.<sup>138</sup> Transitional justice measures cannot be implemented in “an institutional desert”.<sup>139</sup> Critics talk about this institutional minimum as existing beyond the achievement of most countries in transition, a manifestation of the paradox that justice institutions are likely to be most successful in highly functioning states and where the “demonstration effect” of justice measures is least needed.<sup>140</sup> If institution building were taken to be an important entry point, then sequencing, length of time, as well as resources given for implementation of transitional justice measures (especially now that they are increasingly appearing in peace negotiations) would reflect the long-term and complex reality.

Moreover, a conscious recognition of the centrality of institutionalization to the success of transitional justice could allow for a tempering the high expectations placed on such measures, as well as a possible legitimization of a broader exploration of initiatives outside the state-centric, often legal, search for justice and accountability. For example, in cases where the government’s good faith to foster trust can be in question, perhaps because of its own perceived contribution to the abuse of human rights (e.g., Uganda, Sudan); or because it has implemented some transitional justice measures in the past (thereby possibly creating skepticism among the population about the utility of such measures); or where the war took a largely local rather than political character (e.g., Mozambique), localized, informal processes seeking to establish trust can be more meaningful.<sup>141</sup>

### **Local approaches through culture and the arts**

Because transitional justice can contain elements of law, psychology, memory, politics, anthropology, and culture,<sup>140</sup> possible interventions can be thought of as lying on a continuum with one end consisting of the mostly institutional, legalistic measures and the other the more informal, cultural approaches to accountability. Given that this paper has pointed out the institutional weaknesses of many African states, an effective alternative might be to confront past atrocity and human rights abuse at the localized and cultural end of the spectrum, possibly through the arts and cultural activities on the level of society.

While this paper has not examined this question in any depth, many theorists and practitioners in other contexts have explored these alternative approaches. In Latin America, for example, often under the heading of “collective memory”, scholars and practitioners have sought to understand and endorse ways of dealing with the past that are not dependent on state institutions and public policy.<sup>143</sup> These include theater, photography exhibits, and films that have tried to explore the complicated questions of *why* and *how* past atrocity could have been committed, while at the same time attempting to contribute to a societal dialogue around human rights.<sup>144</sup>

Human rights memorial museums of conscience, such as the District Six Museum in South Africa or the Rwanda Genocide Museum, are also increasingly common ways of attempting to building communal dialogue about the past.<sup>145</sup> These efforts attempt to claim public space and create physical reminders, conversation starters, or provocative history lessons about what happened and why. They operate on the level of local culture, and they demand that society remember what happened. Like other transitional justice approaches, they aim as much at the future as the past.<sup>146</sup>

### Regional approaches

Even with appropriate sequencing of transitional justice measures and a legitimate, institutionalized state, the insufficiency of national mechanisms because of cross-regional implications of conflicts would still present a huge challenge. It would be difficult for the DRC to have a comprehensive truth commission when many implicated persons are across the border in Rwanda or Uganda. Similar cross-border challenges exist in the case of Sierra Leone and with regard to perpetrators of Liberian origin, the most visible of whom is Charles Taylor.

It is possible that multinational, regional mechanisms with a new source of legitimacy, such as the instruments of the African Union, may present one opportunity to address these challenges.<sup>147</sup> For example, the Constitutive Act of the African Union condemns genocide, war crimes, and crimes against humanity; the Peace and Security Council of the African Union enshrines power to recommend an intervention in a state perpetrating those crimes; the New Partnership for African Development (NEPAD) acknowledges the importance of “post-conflict reconciliation” in development; and the Conference for Security, Stability, Development and Cooperation in Africa (CSSDCA), adopted by the OAU in 2000, states the importance of combating impunity and prosecuting perpetrators.<sup>148</sup> However, it is unclear whether the African Union has the capacity to meet these tasks; many actions of member states are vastly discrepant from these declarations.<sup>149</sup>

## Ways forward

This paper raises a number of issues with profound implications on the capacity of post-conflict and -dictatorship Africa to genuinely embark on and sustain inclusive, legitimate initiatives to transform society. Despite the severity of the challenges described where transitional justice efforts have fallen short of their stated objectives, including creating an environment where citizens can learn to trust the state and addressing conditions that led to or fuelled conflict or authoritarian rule, it is still an important undertaking.<sup>150</sup> The critical perspective of the paper is not aimed at discounting the importance of implementing these measures, but rather at adding sobriety about the gap between reality and expectations and calling for a critical re-examination of assumptions underlying the implementation of now-staple transitional justice interventions.<sup>151</sup> After all, it is very likely that other African countries considering similar transitional justice initiatives will be frustrated by the lack of an enabling environment and come up against challenges very similar to those discussed in this paper.

As much as transitional justice measures are implemented in order to strengthen state institutions, their practical success depends on the prior existence of functioning state institutions. This conclusion calls for a thorough assessment of the institutional basis of countries in transition prior to embarking on transitional justice, cultivation of extremely modest expectations about what can be delivered, and an exploration of alternative and/or complementary paradigms for combating impunity and advancing reconciliation in Africa. Ultimately, Africans as must demand a prioritization of reform—or (re)construction—of state institutions, and the international community should be prepared to back up such demands with appropriate resources.

## NOTES

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1. A fuller version of this paper has been published by the International Center for Transitional Justice, <[www.ictj.org](http://www.ictj.org)>, access on August 18, 2006. This paper was written by Lydiah Bosire, Program Associate at the International Center for Transitional Justice (ICTJ). The paper was guided by discussions a Canadian International Development Agency (CIDA)–funded meeting in Bellagio in April 2004 with leaders of African NGOs from countries in transition. The meeting included Louis Bickford, Alex Boraine, E. Gyimah-Boadi, Brian Bright Kagoro, Matthew Kukah, Jennifer McHugh, Paul Nantulya, Surita Sandosham, Paul Simo, Graeme Simpson, Noel Twagiramungu, and Nansata Saliah Yakubu. Thanks to Louis Bickford, Pablo de Greiff, Roger

Duthie, Kelli Muddell, and Marieke Wierda for comments. Louis Bickford and Sarah Rutledge provided editorial assistance. The views herein are the responsibility of the author and do not necessarily reflect those of the ICTJ.

2. Transitional justice is frequently defined as comprising prosecutions, truth-seeking initiatives, reparations measures, and institutional reform. Reconciliation, an often-stated objective of transitional justice, is a contested notion that is variously understood, although at its core it is thought to constitute the establishment of civic trust, based on shared norms among citizens and between citizens and governing institutions. See P. de Greiff, "The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted", In *The Age of Apologies*, Mark Gibney and Rhoda Howard-Hassmann, eds., forthcoming. Other frequently cited objectives of transitional justice include advancing "accountability" (not just criminal accountability) and combating "impunity". While transitional justice measures are thought to contribute in different degrees to these goals (prosecutions can be thought to contribute more to justice and accountability and reparations more to reconciliation, etc.) there is a great deal of overlap to the extent that these objectives are sometimes used interchangeably.

3. These countries include Burundi, Côte d'Ivoire, the Democratic Republic of the Congo, Ghana, Kenya, Liberia, Nigeria, Rwanda, Sierra Leone, South Africa, Sudan, and Uganda. Other countries whose transitions are of interest include Angola, Chad, Ethiopia, Mozambique, and Namibia.

4. "African" is used interchangeably with "sub-Saharan Africa", and should be understood to exclude North Africa.

5. Being "in transition" does not mean that the countries are necessarily en route to democracy. For more on the potentially misleading nature of "democratic teleology" implicit in a linear understanding of transition, see T. Carothers, "The End of the Transition Paradigm," *Journal of Democracy*, vol. 12, n.1, January 2002.

6. See P. Chabal & J. P. Daloz, *Africa Works: Disorder as Political Instrument*, Bloomington: Indiana University Press, 1999. See also B. Manby, "The African Union, NEPAD and Human Rights: The Missing Agenda", *Human Rights Quarterly* 26, 2004, at 983–1027, and M. Tshiyeme, "Inventing the Multination: Would a United States of Africa Work?" *Le Monde Diplomatique*, Sept. 2000.

7. Thanks to Vasuki Nesiah for this point: V. Nesiah, "Truth vs Justice," in Jeff Helsing and Julie Mertus, eds., *Human Rights and Conflict*, New York: US Institute of Peace, 2005.

8. Neither "the people" nor other categorizations used in this paper, such as "victims" and perpetrators", is a monolithic block of interests.

9. It is noteworthy that this genealogy is by no means comprehensive, and it presents a very particular understanding of transitional justice. There are many possible understandings of what constitutes justice in times of transition, including local and context-specific definitions that may lead to a different genealogy.

10. *Macmillan's Encyclopedia of Genocide and Crimes Against Humanity*, Oct. 2004. See also N. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, D.C.: US Institute for Peace, 1995.

11. L. Joinet, "The Administration of Justice and the Human Rights of Detainees—the question of

the impunity of perpetrators of human rights violations (civil and political),” revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, Oct. 2, 1997. These principles were revised by Diane Orentlicher and presented to the UN Commission on Human Rights. See D. Orentlicher, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity,” UN Doc. E/CN.4/2005/102, 2005, and “Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity,” UN Doc. E/CN.4/2005/102/Add.1, 2005.

12. Even the best-funded prosecutorial measures, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), have limited reach and impact.

13. See P. B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York: Routledge, 2001.

14. See L. Bickford, “Unofficial Truth Projects,” manuscript; and L. Bickford, “Memoryscapes,” in Ksenija Bilbija, Jo Ellen Fair, Cynthia E. Milton, and Leigh A. Payne, eds., *The Art of Truth-Telling about Authoritarian Rule*, Madison: University of Wisconsin Press, 2005.

15. See P. de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, forthcoming.

16. *Ibid.*

17. Transitional justice has a history dating back to the Athenian democracy of 411 and 403 B.C. See J. Elster, *Closing the Books: Transitional Justice in Historical Perspective*, New York: Cambridge University Press, 2004, pp. 1–23. Following the Athenian experiments, Elster finds no other “significant” episodes of transitional justice until the mid-twentieth century, where the end of World War II ushered in modern transitions to democracy.

18. Ruti Teitel’s analysis begins with the modern transitions, rather than those of Athens in antiquity. For more on the genealogy of transitional justice, see “Human Rights in Transition: Transitional Justice Genealogy,” *Harvard Human Rights Journal*, vol.16, n. 69, Spring 2003, p. 71.

19. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* 9 December 1948, 78 U.N.T.S. 277 (*entered into force* 12 January 1951). Of interest is the fact that this period served to solidify the modern understanding of human rights and what constituted victims and perpetrators, in a manner—sometimes contested—that continues to affect the perception of such rights.

20. The notable exception is the promulgation of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* 26 November 1968, 754 U.N.T.S. 73 (*entered into force* 11 November 1970), as well as the adoption of the Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1963, 1015 U.N.T.S. 243 (*entered into force* 18 July 1976).

21. See R. G. Teitel, *supra* note 18, p. 81.

22. There is even a suggestion of creation of a permanent truth commission to explore international conflicts, as well as “other kinds of international wrongdoings and problems,” particularly colonialism and third-world debt. See T. Forsbert and T. Teivanen, “Past Injustice in World Politics Prospects of Truth-Commission-Like Global Institutions,” *Crisis Management Initiative*, Helsinki, 2004, p. 26.

23. Teitel states that in this phase of the transitional justice genealogy, transitional justice is generously applied to the extent that it is not clear the “threshold minimum beyond which historical, psychological, or religious inquiry ought to be characterized as justice-seeking”. See *supra* note 18, p. 89.

24. While Rwanda did not undergo a negotiated transition, the continued existence of active, armed opposition in neighboring countries affects the political decisions taken with regard to implementing transitional justice initiative.

25. In other words, the transition is nonteleological, and the justice measures increase options rather than solidify movement of a country in a given direction. See V. Nesiah, “Truth vs Justice,” in Jeff Helsing and Julie Mertus, eds., *Human Rights and Conflict*, New York: US Institute of Peace, 2005, p.2. According to Thomas Carothers, the very idea of “transition” is confusing, as “many countries that policy makers and aid practitioners persist on calling ‘transitional’ are not in transition to democracy”. See *supra* note 5, p. 6.

26. Or, in cases such as Angola, Mozambique, and Namibia, choose not to apply any of the transitional justice measures (at least at an official, governmental level).

27. Many African states find themselves grappling with state-building as much as with accountability. One remarks that the issue of a vacuous state “did not appear to be an issue in Southern Europe or Latin America, the two regions that served as the experimental basis for the formation of the transition paradigm.” See Carothers, *supra* note 5, p. 9.

28. Repeated use of transitional justice measures can increase the population’s cynicism about their usefulness. Thanks to Pablo de Greiff for this point.

29. Orentlicher, *Updated Set of Principles*, *supra* note 11, at Principle 1.

30. These preliminary suggestions do not sufficiently explain the challenges facing transitional justice in Africa. Outside Africa, the two states that may have similar experiences are Haiti and Timor-Leste.

31. In particular, prosecutions aspire to change the “reward structure” associated with various actions, such that the existence of punishment for an action would reduce the likelihood of repetition. See Elster, *supra* note 17, p. 204.

32. See P. Seils, “A Promise Unfulfilled? The Special Prosecutor’s Office in Mexico”, June 2004, at 18, available at <[www.ictj.org](http://www.ictj.org)>, access on August 18, 2006. However, in cases where violence is more widespread in the community, holding those “most responsible” accountable may not be very meaningful for victims who continue to see their perpetrators at large.

33. See Human Rights Watch, “Chad: The Victims of Hissène Habré Still Awaiting Justice”, 17, no. 10(A), July 2005. See also Human Rights Watch, “Ethiopian Dictator Mengistu Haile Mariam”, 1999; Amnesty International, “Accountability Past and Present: Human Rights in Transition”, April 1995.

34. See F. Borello, “A First Few Steps: A Long Road to a Just Peace in the Democratic Republic of the Congo,” Oct. 2004, pp. 20–26, available at <[www.ictj.org](http://www.ictj.org)>, access on August 18, 2006. See also Human Rights Watch, “Democratic Republic of Congo: Confronting Impunity”, Jan. 2004.

35. See Human Rights Watch, “Making Justice Work: Restoration of the Legal System in Ituri,

DRC”, Sept. 2004. By prosecuting individuals for crimes significantly minor to those for which they responsible, “the judicial system in Ituri is undermining its own credibility and placing its legitimacy at risk.”

36. See S’Fiso Ngesi & Charles Villa Vicencio, “Rwanda: Balancing the Weight of History,” In Eric Doxtader and Charles Villa-Vicencio, eds., *Through Fire with Water*, Rondebosch: Institute for Justice and Reconciliation, 2002, pp. 19–23.

37. The system, while flawed, may be a preferable alternative to the detention without trial, which is the *de facto* state of affairs.

38. See Amnesty International, “Sierra Leone: Ending Impunity—an Opportunity not to be Missed”, July 2000.

39. Ralph Zacklin states that it is “impossible” to envision tribunals being set up for Liberia, the DRC, or Côte d’Ivoire, despite the abhorrent nature of the atrocities committed, and despite the fact that the Arusha Accord for Burundi and the Linas-Marcoussis agreement for Côte d’Ivoire both ask for judicial accountability. See R. Zacklin, “The Failings of Ad Hoc International Tribunals,” *Journal of International Criminal Justice*, Number 2, 2004, p. 545.

40. Inter-Congolese Dialogue, Resolution no. DIC/CPR/05, March 2005. With regard to the criminal justice program in Bunia, Human Rights Watch has remarked that one of its challenges is “the absence at the governmental level of a clear policy for fighting impunity”. See “Making Justice Work,” *supra* note 35.

41. See International Center for Transitional Justice, “The Special Court for Sierra Leone: The First Eighteen Months,” March 2004, available at <www.ictj.org>, access on August 18, 2006. See also Z. Bangura, “Sierra Leone: Ordinary Courts and the Special Court”, Open Society Justice Initiative, Feb. 2005, p. 57.

42. For more on the ICC, see Rome Statute for the International Criminal Court, UN Doc. A/ CONF.183/9, 1998 (entered into force 1 July 2002).

43. With regard to Zimbabwe, Brian Kagoro remarked that among some groups in Zimbabwe, if the state were to prosecute a perpetrator, the community in which the perpetrator belongs would feel targeted by unfair rules of the distant state. Instead, there is a preference for bolstering the local means of accountability, where the communities determine the appropriate sanctions for wrongdoers.

44. For more on the challenges that may result from an ICC referral of the LRA, see Refugee Law Project, “Whose Justice: Perception of Uganda Amnesty Act 2000: Potential for Justice and Reconciliation”, Feb. 2005.

45. See International Center for Transitional Justice and the Human Rights Center, “Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda”, July 2005, available at <www.ictj.org >, access on August 18, 2006.

46. See “Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,” UN Doc. S/2004/616, 2004, at xiv, para. 50. See also Hayner, *supra* note 13.

47. See Orentlicher, Updated Principles, *supra* note 11, Principles 6–13. See also “Report of the Secretary General on The Rule of Law,” *id.* para. 51.

48. For more on the relationship between civil society and truth commissions, see International Center for Transitional Justice, "Truth Commissions and NGOs: The Essential Relationship," April 2004, available at <www.ictj.org>, access on August 18, 2006.
49. See Resolution DIC/CPR/04, available at <www.drcpeace.org/docs/finalreport1\_1.pdf>, access on August 18, 2006.
50. The TRC is tasked with a 10-point ambitious set of goals, including establishing truth and the rule of law, birthing a "new political consciousness", and bringing about reconciliation. See DIC/CPR/04, *id.* at para. 6.
51. See A. Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*, New York: Oxford University Press, 2000, pp. 71–72.
52. See DIC/CPR/04, *supra* note 49, para. 10.
53. A section of the law provides for appointment of 13 more commissioners, though even then political parties retain control. The proposed changes in the composition of the commission are not likely to redeem the credibility of the commission. See Borello, *supra* note 34, pp. 41–42.
54. Sierra Leone Truth and Reconciliation Commission, "Witness to Truth: Final Report of the Truth and Reconciliation Commission for Sierra Leone," vol. 2, Chapter 2: "Reparations", para. 197.
55. Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone", United States Institute for Peace, Special Report 130, Feb. 2005, p. 5.
56. However, others have stated that the victims do achieve victory, their testimony compelling a (most likely) socially elevated perpetrator to come before the NRC. In addition, some people find the formal, court-like setting empowering.
57. See DIC/CPR/04, *supra* note 49. See also *Loi no. 04/018 du 30 Juillet 2004 portant organization, attributions et fonctionnement de la commission verite et reconciliation, 1er Aout 2004, Article 41 (on file)*.
58. In Sierra Leone, it is noteworthy a version of the report for children and another in video were made widely available in a relatively prompt manner.
59. The Sierra Leone TRC proposed to have "popular" and "children" versions of the Final Report, both which would be in written form. They also had a video version.
60. This is very different from the Argentinean commission's final report, which was a bestseller (although this does not necessarily mean that it was widely read). Thanks to Priscilla Hayner for this point.
61. In the cases under examination, only South Africa has implemented a reparations program, the challenges of which are discussed in detail below. Sierra Leone proposed a reparations program. For detailed analysis of reparations programs, see de Greiff, *supra* note 15.
62. See UN, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", C.H.R. res. 2005/35, UN Doc. E/CN.4/2005/ L.10/Add.11, April 19, 2005, para. 11.

63. See de Greiff, *supra* note 15.
64. For more elaboration on the important variables on the design of reparations programs, see *Ibid.*
65. However, the ICC is considering a Trust Fund for Victims.
66. See C. J. Colvin, "Overview of the Reparations Program in South Africa," in de Greiff, *supra* note 15. See also A. Crawford-Pinnerup, "An Assessment of the Impact of the Urgent Interim Reparations" in *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa*, Brandon Hamber and Thloki Mofokeng, eds., Johannesburg: Center for the Study of Violence and Reconciliation, 2000.
67. The government allowed the payment of final reparations of a total of US\$80 million, much less than the \$400 million the TRC recommended. This low payment may have political reasons over and above the resource shortage.
68. Sierra Leone TRC Final Report, *supra* note 54, "Reparations", paras. 57, 58.
69. However, this is the most pragmatic approach to reparations in a country such as Sierra Leone, where asking for reparations measures any broader (especially in the form of cash awards) would be unrealistic and never would be carried out. Interview with Howard Varney, May 2005.
70. For example, a victim before the TRC stated, "What puzzles me is that the perpetrators are cared for and those of us who are victims are left out". For more on the resentment of victims toward perpetrators, see Sierra Leone TRC Final Report, *supra* note 54, "Reparations", para. 38.
71. See Colvin, *supra* note 66.
72. For more on the Trust Fund for Victims, see "Resolution on the Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of such Victims" (Resolution ICC-ASP/1/Res.6), adopted at the 3rd plenary meeting, on 9 September 2002, by consensus.
73. In other words, (while the actual operation of the Fund is still unclear) there is a possibility that out of a village of people who suffered war crimes, only a few victims whose cases are heard before the ICC can receive reparations. In the resource-poor environments from which the ICC's first cases are likely to emerge—such as Uganda, the DRC, or Sudan—such a "privilege" of some victims over others could create resentment.
74. For more on anticipated challenges for the Trust Fund, see P. de Greiff & M. Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints," in *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, Marc Bossuyt, Paul Lemmens, Koen de Feyter, and Stephan Parmentier, eds., Brussels: Intersentia, forthcoming.
75. See UN, Report of the Secretary General, para. 52. Vetting is one part of a multipronged approach of broader institutional reform strategies that can include, among other things, turning formerly repressive and abusive institutions into institutions that respect the rule of law and treat citizens with dignity, and reviewing repressive legislation.
76. The focus on personnel reform is best explained by Alexander Mayer-Rieckh, "Vetting,

Institutional Reform and Transitional Justice: An Operational Framework”, International Center for Transitional Justice and UN Development Programme, forthcoming. See also UN, Report of the Secretary General, para. 53.

77. Mayer-Rieckh gives a detailed operational strategy for vetting, which includes a four-prong strategy of assessing individual capacity, individual integrity, organizational capacity and organizational integrity. *Id.*

78. Sierra Leone TRC Final Report, *supra* note 54, “Findings”, para. 49.

79. *Ibid.*, at “Recommendations”, paras. 259–262.

80. Sierra Leone TRC Final Report, *supra* note 54, “Findings”, para. 61.

81. See Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC),” *Diacritics* 32:3–4, Fall/Winter 2002, at 33.

82. According to Mahmood Mamdani, this limited definition of perpetrators came from the narrow manner in which “gross violations of human rights” were defined—where the Commission chose to focus on “conflicts of the past” in an individualized manner to the extent that the apartheid, the crime against humanity, was reduced to a contextual backdrop. For more on this discussion, see *ibid.*, at 33–59.

83. The Promotion of National Unity and Reconciliation Act, 1995, Chapter 1 (ix).

84. *Ibid.*, at Chapter 1 (xix).

85. Mamdani, *supra* note 81, at 38.

86. Numbers from the Global IDP project, 2001, available at [www.idpproject.org](http://www.idpproject.org). See also The World Bank, “Greater Great Lakes Regional Strategy for Demobilization and Reintegration,” Report No. 23869-AFR, March 25, 2003, at 2.

87. Jon Elster identifies four categories of individuals who commit wrongs: those who issue orders, those who execute the orders, those who act as intermediate links between the orders and the executions, and those who facilitate wrongdoing. See *supra* note 17, at 118. The determination of the gravity of crimes committed by perpetrators in itself—in other words, what constitutes “masterminding” or “facilitating”—can be a difficult task partly because of its subjective nature.

88. *Ibid.*, at 99–115.

89. See “Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa,” April 27–30, 1997.

90. See Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2001/95, stating that it would be “extremely unlikely that juvenile offenders will in fact come before the Special Court.”

91. See International Criminal Court, “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC,” The Hague, Jan. 29, 2004. The LRA has abducted more than 10,000 children. See Human Rights Watch, “Stolen Children: Abduction and Recruitment in Northern Uganda,” 15, No.7(a), March 2003.

92. See IRIN, "Burundi: Demobilisation of child soldiers begins," Jan. 26, 2004. For child soldiers in the DRC, see Amnesty International, "DRC: Children at War," AFR62/034/2003, Sept. 9, 2003. In Liberia, UN Agencies estimate that more than 15,000 children have been used in the fighting.
93. For more on the role of companies in the DRC conflict, see UN, "Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo," S/2002/1146, Oct. 16, 2002.
94. *Khulumani et al. v. Barclays National Bank Ltd. et al.* The lawsuit was filed in New York against 22 corporations that invested in apartheid South Africa. Businesses never appeared before the TRC, and South Africa does not have a law that can hold corporations to account for human rights abuses. The suit was subsequently dismissed because an affidavit filed by the ministry of justice on behalf of the government of South Africa. Presently, Khulumani has launched an appeal. Interview with Marjorie Jobson, Chairperson of Khulumani Board, Johannesburg, May 2005. Also See Cohen, Milstein, Hausfeld & Toll, International Lawsuit Filed on Behalf of Apartheid Victims, P.L.L.C., available at <[www.cmht.com/cases\\_cwapartheid1.php](http://www.cmht.com/cases_cwapartheid1.php)> and at <<http://khulumani.net/content/category/4/7/63>>, access on Sept. 11, 2006.
95. BBC News, "Rwanda Inquiry into French Role," Aug. 1, 2004.
96. See the Special Court for Sierra Leone, *The Prosecutor v. Sam Hinga Norman*, Case No. SCSL-03-1, available at <[www.sc-sl.org/normanindictment.html](http://www.sc-sl.org/normanindictment.html)>, access on Sept. 11, 2006. See also Sierra Leone TRC Final Report, "Findings," supra note 54, at para. 332.
97. See, e.g., see International Federation for Human Rights, "Victims in the Balance Challenges ahead for the International Criminal Tribunal for Rwanda," No. 329/2, Nov. 2002, at 16.
98. Even then, because of historical precedent, supporters of the Jerry Rawlings regime as well as the Armed Forces Revolutionary Council felt targeted by the NRC, and feel this is yet another partisan undertaking.
99. For example, in Ghana, following a decade of military rule, an amnesty-entrenching 1992 constitution was voted into existence by a referendum, in the interest of "peace and stability." At this time, the military government was still powerful. These permanent measures ensured that such persons as former president Jerry Rawlings would not be prosecuted. See Eric Darko, "Ghana NRC: Looking Back and the Way Forward," forthcoming. For more reasons why amnesties can be undertaken as a political choice, see Paul van Zyl, "Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies," in *Looking Back/Reaching Forward: Reflections in the Truth and Reconciliation Commission of South Africa*, Charles Villa-Vicencio and Wilhelm Verwoerd, eds., Cape Town: UCT Press, 2000, at 42-47; and Diba Majzub, "Peace or Justice?" Amnesties and the International Criminal Court," *Melbourne Journal of International Law* 3, Oct. 2002, 251-252.
100. Lomé Peace Agreement, Part 3, Article IX.
101. UN, "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone," Article 1. Interestingly, the Sierra Leone TRC concluded, "The international community has signaled to combatants in future wars that peace agreements containing amnesty clauses ought not to be trusted and, in so doing, has undermined the legitimacy of such national and regional peace initiatives." See Sierra Leone TRC Final Report, supra note 54, "Executive Summary" at para. 68.

- 102.** Conversations with Madeline Fullard about the case of Gideon Nieuwoudt (see Center for Studies of Violence and Reconciliation, Press Release, Feb. 11, 2004). For more on the case, see U.S. Department of State, "South Africa: Country Practices on Human Rights Practices—2004," released by the Bureau of Democracy, Human Rights, and Labor, Feb. 28, 2005, Section 4, available at <[www.state.gov/g/drl/rls/hrrpt/2004/41627.htm](http://www.state.gov/g/drl/rls/hrrpt/2004/41627.htm)>, access on Sept. 11, 2006.
- 103.** See Borello, *supra* note 34, p. 43.
- 104.** The Amnesty Act, 2000.
- 105.** See Refugee Law Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential For Conflict Resolution and Long-Term Reconciliation," Feb. 2005, p. 5.
- 106.** Amnesty Act 2000, Part II 3(1).
- 107.** See "Forgotten Voices," *supra* note 45, pp. 22—36.
- 108.** See "Greater Great Lakes," *supra* note 86, at 13. In Sierra Leone, it has been said that the incomplete nature of DDR in both 1997 after the Abidjan Agreement and in 1998–1989 played a part in the collapse of the peace processes.
- 109.** *Id.* at 57–58.
- 110.** See also Human Rights Watch, "Youth, Poverty and Blood: The Lethal Legacy of West Africa's Regional Warriors," 17 no. 5A, March 2005, p. 4.
- 111.** See "Greater Great Lakes," *supra* note 86, p. 14.
- 112.** See Peter Swarbrick, "DDRRR: Political Dynamics and Linkages" in *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of the Congo*, Mark Malan and João Gomes Porto, eds., Pretoria: Institute for Security Studies, Nov. 2003, 166–167.
- 113.** While there exists a distinction between "perpetrators" of human rights abuses and "former combatants" (some of whom may not have committed abuses), absent information to the contrary, many victims can conflate the two concepts.
- 114.** See *supra* note 54, "Reparations," para. 37.
- 115.** See *supra* note 54, "Reparations," para. 74.
- 116.** See de Greiff, *supra* note 2.
- 117.** Pablo de Greiff offers that even if trials, truth-seeking, vetting, and reparations were all executed with some degree of success, the society would not automatically be reconciled. *Id.*
- 118.** The issue of moral leadership is separate from, but related to, vetting discussed above.
- 119.** See Human Rights Watch, "DR Congo: Army should not appoint war criminals," Jan. 14, 2005.
- 120.** The former defense minister, to whom Chief Norman reported during the civil war, is the current president of Sierra Leone.
- 121.** Government of Rwanda, "President Kagame Commends Rwanda-World Bank Relationship," available at <[www.gov.rw/government/071602.html](http://www.gov.rw/government/071602.html)>, access on Sept 11, 2006. The World Bank President stated, "To stop the anger and bitterness, you must build hope."

**122.** For a longer discussion about these two dimensions of reconciliation, as well as the challenges that arise when they are confused with each other, see Tristan Anne Borer, "Reconciling South Africa or South Africans? Cautionary Notes from the TRC," *African Studies Quarterly* 8:1, Fall 2004. For a broader treatment of the subject and the various ways in which it may be understood, see de Greiff, *supra* note 2.

**123.** The two dimensions of reconciliation can contribute to each other in obvious ways. National/ political reconciliation and constitutionalism can enable interpersonal reconciliation, but the prerequisite of such a political reconciliation is not that individuals in the political space like each other and be reconciled, but that their relationships are mediated by uniformly applicable laws. Borer makes an important recommendation about processes being explicit and clear which type of reconciliation they pursue, to avoid confusion.

**124.** Borer, *supra* note 122, p. 32.

**125.** See Shaw, *supra* note 55.

**126.** In other words, it is possible that sections of the population understood the reconciliation advanced by the national truth commission of the interpersonal level, and found it unable to meet their expectations, or even contrary to their cultural practices.

**127.** See Alcinda Honwana, *Children of War: Understanding War and War Cleansing in Mozambique and Angola*, in *Civilians in War*, Simon Chesterman, ed., Boulder, Colo.: Lynne Rienner Publishers, 2001. See also Alcinda Honwana, "Sealing the Past, Facing the Future: Trauma Healing in Rural Mozambique," in Jeremy Armon, Dylan Hendrickson and Alex Vines, eds., *The Mozambican Peace Process in Perspective*, Accord Series, London: Conciliation Resources, 1998.

**128.** See Paul Conway, "Truth and Reconciliation: The Road Not Taken in Namibia," *Online Journal of Peace and Conflict Resolution*, 5.1, Summer 2003, pp. 66–76.

**129.** See "Truth Commissions and Transitional Justice: A Short Guide," Amnesty International Dutch Section, Sept. 2003, p. 9.

**130.** This is not to assume that recent transitional justice initiatives in countries such as Haiti or Timor-Leste have fared better than those assessed herein.

**131.** There are many more problems with international justice, of which transitional justice is a subset, that obviously significantly influence the manner in which transitional justice is implemented in Africa. The broader problem includes holding justice in poor countries hostage to international funding and politics. See Charles T. Call, "Is Transitional Justice Really Just?" *Brown Journal of World Affairs* XI:1, Summer/Fall 2004. It is also important to point out that the discussion of the "weak state" does not confine the responsibility for this condition to the state itself. It is possible for a state to be weak because of many actions including those of third parties such as multinational companies. Thanks to Yasmin Sooka for this point.

**132.** See Chabal, *supra* note 6, pp. 5–6.

**133.** *Ibid.*, p. 14, 136.

**134.** See de Greiff, *supra* note 2.

**135.** It appears that countries and leaders want accountability, if only for the fact that it increases

their international legitimacy and respectability. On the other hand, they are unwilling to pay the price for a meaningful processes, for such reasons as lack of economic resources, political will, and adequate infrastructure to aid reform are all too common, as are processes whose authenticity is questionable, given the culpability of those involved in designing/implementing the accountability strategies. Chabal, *supra* note 6, at 37. There are various motivations for this, one of which is to access international funding. After all, governments are not known to fall on account of their human rights records. See also Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security*, vol. 28, n. 3, Winter 03/04, pp. 33, 42.

**136.** Dominique Bangoura, "National Conferences: The Only means for Overcoming Crises," *African Geopolitics* 17 (Winter 2004–2005).

**137.** See Manby, *supra* note 6, p. 1024.

**138.** Transitional justice stakeholders cannot get away from the fact that state infrastructure is critical for the success of their work. Similar to the argument made in development of a "poverty trap"—a threshold below which countries cannot take advantage of trade or investment because of disease, low savings, and poverty—one can find an analogy in post-conflict countries with relation to transitional justice. Below a certain institutional minimum (this could be thought of as the degree of institutionalization corresponding to the conditions in the countries in which transitional justice was first established, although its precise nature is a matter of empirical research, beyond the scope of this paper), transitional justice measures can be implemented, but they cannot be expected to yield desired outcomes. Above that minimum, however, they are able to contribute sustainably to establishing the rule of law and justice, as envisioned in the theory. Similar to development, below the minimum, the international community can be seen as having a responsibility to help the country break out of the trap by investing in basic public and legal infrastructure, ensuring police salaries are paid on time, etc. Thanks to Roger Duthie for pointing out the parallels. For more on poverty traps, see Millennium Project, "Investing in Development: A Practical Guide to Achieving the Millennium Development Goals," UNDP: New York, 2005, pp. 32-43.

**139.** See Snyder, *supra* note 135, p. 12.

**140.** *Ibid.*, p. 25.

**141.** This should not be taken to be an endorsement of the approach of Mozambique, but rather a broadening of the sets of options to be explored in transitions. For more on various local initiatives and their potential contribution to reconciliation, see Roger Duthie, "Transitional Justice at the Local Level," manuscript.

**142.** Thanks to Roger Duthie for this point.

**143.** See the collection of books edited by Argentine scholar Elizabeth Jelin for the Social Science Research Council's project on Collective Memory and Repression in the Southern Cone, available at <[www.ssrc.org/fellowships/coll\\_mem/memory\\_volumes.page](http://www.ssrc.org/fellowships/coll_mem/memory_volumes.page)>, access on Sept 11, 2006.

**144.** While these approaches do not depend on state institution, they may require a basic infrastructure that protects freedom of expression, and may also benefit from public policies which make resources available to artists and civil society.

**145.** See Valmont Layne, "The District Six Museum," in *Transitional Justice and Human Security*, in Alex Boraine and Sue Valentine, eds., Cape Town: International Center for Transitional Justice and Japanese International Development Agency, 2006.

**146.** This is not to imply that cultural measures will necessarily be partial and free of politicization. See Bickford, Louis, "Memory, Museums, and Memorials: Building a New Future," in *Transitional Justice and Human Security*, id.; and Ksenija Bilbija, Jo Ellen Fair, Cynthia E. Milton, and Leigh A. Payne, eds., *The Art of Truth-Telling about Authoritarian Rule*, Madison: University of Wisconsin Press, 2005.

**147.** See Tshiyeme, *supra* note 6.

**148.** The Constitutive Act of the African Union, adopted 11 July 2000 Article 4(h); Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, 9 July 2002, Article 7(e); New Partnership for Africa's Development, adopted by the 37th Summit of the OAU in July 2001, para. 74; CSSDCA Solemn Declaration, adopted by the thirty-sixth Ordinary Session of the OAU Assembly of Heads of State and Government, Lomé, Togo, July 2000, AHG/Decl.4 (XXXVI) 2000. See especially items (k) under the sub-heading "security" and (l) under the sub-heading "stability" under the Plan of Action.

**149.** See Manby, *supra* note 6, pp. 1005–1011.

**150.** Undertaking measures that *appear* to be address root causes by undertaking a variety of public processes without actually doing so can be problematic: peace processes have been known to backfire, and countries in transitions have proceeded to have new cycles of repressions and abuse.

**151.** Such assumptions underlie, for example, the low international funding patterns for these mechanisms, the sequencing of initiatives, etc.