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RETHINKING THE ROLE OF LAW AND JUSTICE IN AFRICA'S DEVELOPMENT

An Edited Volume of Discussion Papers

United Nations Development Programme

DEMOCRATIC GOVERNANCE



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Rethinking the Role of Law and Justice in Africa's Development **An Edited Volume of Discussion Papers**

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The idea to produce this publication was conceived at the inaugural UNDP Democratic Governance Community of Practice (CoP) meeting for sub-Saharan Africa that took place in South Africa in November 2011. The scoping debates covered in this work are inspired by important contributions made by the community of practitioners from across Eastern and Southern Africa (ESA) and West and Central Africa (WACA) as well as key partners, both internal and external to UNDP.

We acknowledge the authors of the discussion papers; namely, Charles Manga Fombad, Warigia Razia, Mark Shaw, Tuesday Reitano, Abraham Korir Sing'Oei and Laura Young. Their collective contributions come together in this volume to provide a framework to inform on-going efforts to promote rule of law as a key variable in achieving inclusive and sustainable development in Africa.

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PREFACE

Several countries in sub-Saharan Africa have prioritized the promotion of the rule of law and enhancing access to justice in order to meet the aspirations of their citizens for a just, safe and secure society, and development approaches that result in sustainable livelihoods. Progress has been achieved by most countries in strengthening the rule of law and access to justice; there are examples of good practices. As essential as the rule of law and access to justice are, they are also complex notions whose meaning, content and impact depends on context specific considerations.

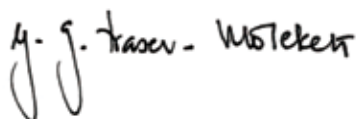
In Africa, UNDP has accumulated significant years of experience in rule of law, access to justice and legal empowerment work across different situations, including in post conflict and transition settings. UNDP uses various contextualized approaches and innovations to meet the requests of its national partners and key stakeholders. By supporting governments, judiciaries, national human rights commissions, correctional and police services, civil society organizations and Parliaments, UNDP has acquired knowledge, comparative advantage and gained confidence with its national partners.

The approach of supporting citizen-driven access to justice and legal empowerment, combined with capacity building of key supply-side institutions contribute to the realization of the citizens' rights particularly for the most marginalized groups. Furthermore, in responding to conditions of deprivation, discrimination, repression, violent conflict and corruption, UNDP support has facilitated the expansion of equitable opportunities and choices for individuals to improve their own lives. The work of UNDP is by no means exhaustive. The fast transforming, volatile and sometimes unpredictable geo-political and geo-economic context in Africa demands a constant review, re-articulation and re-thinking of the rule of law and human rights in the context of justice beyond the narrow juridical constructions.

This edited volume of discussion papers provides knowledge and ideas from practitioners working across the continent that seek to bridge the gap between policy and practice. It highlights the inter-linkages between the rule of law, justice, sustainable development, poverty reduction and human rights. The volume recognizes the promotion of effective rule of law and access to justice and legal security as an outcome of social struggles and policy reforms, producing legal and political outcomes that contribute to achieving sustainable human development by providing the functioning systems necessary to run effective social, economic and political processes like education and healthcare. It documents some achievements in the pursuit of inclusive development through the engagement of historically excluded groups in both policy development and programme implementation the of rule of law and access to justice programmes in a manner that ensures that the conception of justice represents the interests of all people.

In 2012 Member States renewed their commitments at the General Assembly High-level meeting to strengthen the rule of law as a basis for development. The world is framing the post-2015 MDGs and development agenda – a process that provides an opportunity to translate this commitment into action. This publication is therefore timely in ensuring that the knowledge and expanded conceptualization of law and justice, based on evidence from the field, is well linked to ongoing discussions on sustainable human development. It also resonates well with the growing momentum of integrating the expanded notion of law and justice within conflict prevention and recovery programmes. This will go a long way in enriching UNDP strategic thinking and regional programming for the period 2014 to 2018.

This publication is intended for use by UNDP and its partners including government agencies, regional institutions, civil society, universities, research centres and other development agencies. The discussion papers raise contested and yet critical aspects of UNDP work - work we have done for some time now. We hope that they will stimulate quality debates on how the rule of law, access to justice and legal empowerment can enable sustainable human development, inform programming methods and encourage action oriented dialogue.



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Contents

Acronyms	x
About the authors	xi

INTRODUCTION	xii
Evelyn Edroma	

PAPER 1	1
----------------	----------

The context of justice in Africa: Emerging trends and prospects	
Charles Manga Fombad	

PAPER 2	25
----------------	-----------

The evolution of organized crime and illicit trafficking in Africa, and its implications for citizen and state security	
Mark Shaw and Tuesday Reitano	

PAPER 3	47
----------------	-----------

Transitional justice in post-conflict and -crisis reconstruction and development in Africa: The controversies, contradictions and tensions	
Warigia Razia	

PAPER 4	77
----------------	-----------

Land and natural resource governance	
Abraham Korir Sing'Oei	

PAPER 5	97
----------------	-----------

Migration, development and social justice	
Laura A. Young	

Acronyms

AfDB	African Development Bank
ANCL	African Network of Constitutional Lawyers
APRM	African Peer Review Mechanism
AU	African Union
AUCIL	African Union Commission on International Law
BDP	Bureau for Development Policy
CAADP	Comprehensive African Agriculture Development Programme
CAR	Central African Republic
CBNRM	Community-based natural resources co-management systems
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CITES	Convention on International Trade in Endangered Species
CoP	Community of practice
CSO	Civil society organizations
DDI	Domestic direct investment
DDR	Disarmament, Demobilization and Reintegration
DfID	UK's Department for International Development
DRC	Democratic Republic of Congo
ECOWAS	Economic Community on West African States
EPZ	Export processing zones
ESA	Eastern and Southern Africa
FDI	Foreign direct investment
GDP	Gross Domestic Product
GIZ	German Agency for Technical Cooperation
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
IDP	Internally displaced person
ILO	International Labour Organization
IOM	International Organization for Migration
MDGs	Millennium Development Goals
MPRDA	Mineral and Petroleum Resources Development Act
NAPTIP	National Agency for Prohibition of Traffic in Persons and Other Related Matters
NEPAD	New Partnerships for Africa's Development
NGO	Non-governmental organization
NHRI	National human rights institution
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PAP	Pan-African Parliament
RBA	Regional Bureau for Africa
REC	Regional Economic Communities
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SGBV	Sexual and gender-based violence
TJRC	Kenya's Truth, Justice and Reconciliation Commission
TOKTEN	UNDPs Knowledge Transfer Through Expatriate Nationals Programme
TRC	Truth and Reconciliation Commission
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UN-HABITAT	United Nations Human Settlements Programme
UNODC	United Nations Office on Drugs and Crimes
USAID	United States Agency for International Aid
WACA	West and Central Africa
WHO	World Health Organization

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Charles Manga Fombad is presently a Professor of Law and the head of the African Comparative Constitutional Law Unit of the Institute for International and Comparative Law in Africa (ICLA), based at the Faculty of Law of the University of Pretoria. He holds a Licence en Droit (University of Yaounde), LL.M. and Ph. D. (University of London) and a Diploma in Conflict Resolution (University of Uppsala). Professor Fombad is the author/editor of eight books and has published more than 60 articles in peer-reviewed journals. In 2003, he received the Bobbert Association Prize for the best first article in the Journal for Juridical Science and was awarded the Wedderburn Prize. He is a member of several editorial boards including the African Journal of International Affairs and is a member of the Steering Committee of the African Network of Constitutional Lawyers (ANCL) and the Executive Committee of the International Association of Constitutional Lawyers (IACL). His research interests are in comparative constitutional law, delict (tort law), media law, international law, and legal history, especially issues of legal harmonization.

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Mark Shaw and Tuesday Reitano

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Laura A. Young is Research and Training Partner at ProRights Consulting, a Nairobi-based human rights and rule of law consulting group. She is a U.S.-trained attorney with substantial experience working on human rights issues in Africa, specifically focused on countries in transition. Ms. Young has researched and published on diaspora communities' engagement on human rights issues, specifically on how migrants and other marginalized groups interact with transitional justice processes in African countries.

INTRODUCTION

Evelyn Edroma

“...all persons, institutions and entities, public and private, including the state itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law”
(UN General Assembly, 2013: 1)

At the heart of development lies a fundamental commitment to improving the well-being of all human beings through the expansion of their social, civil, political, cultural and economic rights. Yet our modern paradox remains a reality in which millions continue to live in impoverished conditions within the presence of a surplus of global wealth and affluence. The development barriers that African nations continue to face are born of a legacy of historical injustice and structural disadvantages including social exclusion, unemployment, poor service delivery and state incapacity, all of which continue to stifle the growth of communities.

Central to these developmental deficits are the challenges, and in some cases failures, of democratic governance that engender new forms of injustice, conflict, organized resistances and state repression. The simplistic pursuit of legal equal treatment or access to justice does not guarantee that members of a society will have equal protection by law. Therefore in the different societal contexts, law and justice must have a retrospective, present and futuristic approach that focuses on social, economic, political and environmental considerations. These different nuances are important to understanding the trends and subject of rule of law and access to justice in Africa.

Africa has witnessed tremendous social, economic and political transformation. It is increasingly becoming interconnected through the African Union and regional economic communities. The size of the African economy has more than tripled since 2000. Despite inequalities, there is a genuine middle class that is emerging. Multiparty elections have become frequent, accompanied with an improvement in democratic quality. Population trends are showing large numbers of better educated, healthy young people now entering the job market to support these promising developments.

These changes create endless possibilities and tremendous opportunities for African people and for those who want to invest in Africa's future. The pursuit of opportunities by individuals and organizations casts a renewed interest on the potential role that effective laws, legal and judicial institutions can play in transforming societies through accelerating and sustaining growth, as well as in ensuring that growth is inclusive and equitable across society. The continent however is still faced with many risks.

Many countries continue to deal with how to kick-start, accelerate or sustain development, knowing that they face unmet demand for jobs from an increasingly young population. Changes in private laws, such as in protecting women's inheritance rights or legal capability to enter into contracts have to be explored to bring together ideas and capital necessary to create opportunities for accelerated and sustained growth with equitable and just development outcomes.

The rapid social and political changes, sometimes prompted by different financial crises, food insecurities, labour uncertainties, health crises and natural disasters make clear the likely impact of people's demand for access, reach and quality of opportunity and services. The increasing uses of technologies and social media stimulate a call for open, accountable and equitable governance. We witness from Libya, Tunisia and Egypt

how legal systems that do not address exclusion and inequity and that do not provide access to effective judicial institutions can create intense pressure for change. Despite recent progress on the Millennium Development Goals (MDGs), poverty that is changing in profile, exclusion and inequity persist in Africa, necessitating the need for new ways to examine the impact of insufficient legal security and access to justice on people's lives.

The UNDP and the wider development community continue to support member states and non-state actors responding to these challenges in fast changing environments. The UNDP looks at the protection of individual property rights; increase in voices and perspectives of citizens to contribute to solutions; guarantee of fair, credible and predictable contract enforcement; labour regulation; and facilitation of inclusive market creation and access, as enablers for economic growth. Increasingly, a direct link is being made between legal recognition and enforcement of rights for all segments of society – including economic and social rights – and equitable growth, delivery of public services, and the possibility of more effective redistribution of dividends.

Further, UNDP associates the ability of states to ensure physical safety and the fulfilment of basic needs of their citizens to the rule of law as a means of preventing and mitigating violent crime and conflict. Importantly, UNDP recognizes the interplay between law and justice on one hand, and strengthening accountability, reducing abuses of power and corruption; and supporting sustainable environment and natural resources management on another.

Advancing this discourse, the Democratic Governance Community of Practice (COP) for sub-Saharan Africa meeting in 2011 shifted the focus on the law, legal frameworks and judicial and legal institutions towards its untapped potential in promoting inclusive and sustainable development. The meeting examined the challenges related to the nature of legal frameworks, justice institutions, the level of consciousness and empowerment of the citizens, the nature of responses to social and economic issues, effective provision of services and sustainable management of natural resources.

From the discussions it emerged that the definitive expansion of law and justice was necessary because the current narrow focus remains absent of national specificities and exclusive of the perspectives and needs of the most marginalized in society. Such an understanding should build on existing local practices that serve citizens by addressing underlying socio-economic dimensions while also mainstreaming both in all areas of UNDPs strategy and operation. This way, socio-economic justice will not remain elusive to many or impact negatively on the overall efforts to strengthen governance and development on the continent.

Complimentary to this, more holistic approaches to the rule of law, access to justice and legal empowerment spanning beyond the juridical lens are required. Integrated strategies within the UN value system should be implemented to ensure inclusive growth by simultaneously addressing poverty, discrimination and exploitation. Drawing from this, financing, technical and programme support for rule of law and access to justice initiatives must address some critical questions; regarding the scope of justice, its multiple dimensions and linkages, who critically needs the access, and a review of the indicators of results. Accordingly, development support would have to redefine the role that law and access to justice play in the attainment of the ultimate goal of sustainable development and redirect catalytic action.

The governance practitioners reinforced critical debates on the capacity of the law, legal and judicial institutions to create conditions for and provide people with more equitable and just opportunities that include marginalized groups. This can be achieved when the law and associated institutions create the space to build human capital and assets, and free individuals and organizations to become productive in a stable environment. These legal frameworks and institutions can also promote inclusion by advancing responses to social and economic issues, empowering citizens to shift imbalanced power relations, and expanding

the reach and quality of services including access to justice for marginalized groups. Equity can be achieved when effective judicial and legal institutions support equality of opportunity, promote open and accountable governance and guarantee redistributive justice.

The law, legal frameworks and judicial and legal institutions therefore become the means for correcting previous injustices, managing transitions and challenges of development. The rule of law and access to justice in this context transcend the legal frameworks and international common standards in which it is so often embodied to extend into an examination of the historical legacies which shape justice, the context-specific values which inform it and to the individuals who stand to gain improved life chances from increased access to it.

The dialogue at the CoP meeting was stimulated by five background papers that were commissioned prior to the meeting that have since been adopted as chapters of this edited volume. The discussions culminate to provide a framework and policy options for incorporating law, access to justice and legal empowerment as a centre piece to sustainable development in Africa.

The volume opens up with Professor Charles Manga Fombard's *The Context of Justice in Africa: Emerging Trends and Prospects*, which assesses the emerging trends and prospects for promoting justice in Africa. This paper reviews pertinent literature and reflects on the historical context, especially with respect to human rights protection, prior to the 1990s. It looks at developments during the third wave of democratization that swept through the continent in the 1990s. It briefly reviews trends at the national and international levels, as well as other emerging influences and challenges. The paper considers in detail the policy and strategic options for overcoming the present challenges to attaining an effective and efficient justice sector in Africa and concludes by highlighting ways in which efforts to promote the rule of law and respect for human rights can be strengthened.

In looking at the challenges to citizen and state security in Africa, Mark Shaw and Tuesday Reitano illustrate how rising trends in organized crime and illicit trafficking are both a cause and a consequence. *The Evolution of Organized Crime and Illicit Trafficking in Africa, and its Implications for Citizen and State Security* makes an introductory assessment of the extent of illicit trafficking and organized crime on the African continent. The paper examines the impact of organized crime, and the ways in which it acts as a spoiler to broader development goals, not only in the weak and fragile states, but also in their middle income neighbours. This analysis concludes that countering crime has to be part of the development agenda for Africa.

The paper by Laura A. Young, *Migration, Development and Social Justice*, provides information to answer the fundamental questions of migration in sub-Saharan Africa and its relationship to human rights and development. Through remittances and livelihood diversification, migration has been shown to have positive links to poverty eradication. The paper explores key continental trends such as the increasing participation of women in migratory flows as well as distinctly regional trends through comparative cases of West Africa and its substantial contribution of remittances to the development economy; East Africa, where features such as long-term refugee populations, substantial pastoral movements and deliberate livelihood diversification are common, and; Southern Africa, where the relationship between migration, HIV/AIDS and circular labour migration is a key component of economies. By examining multiple instruments and human rights mechanisms that aim to protect the rights of migrants in Africa – including several UN treaties – Young concludes by calling for a consolidated effort to bridge the critical link between establishing norms, educating the public about normative protections, and implementing protections on the ground to protect vulnerable migrants in sub-Saharan Africa.

The effective management of land and natural resources in Africa presents a key opportunity to maximize both poverty eradication and economic growth on the continent. Drawing on a human rights and social justice framework, Abraham Korir Sing'Oei in *Land and Natural Resource Governance* contributes key interventions promoting land and natural resource governance in Africa. The paper begins with a historical overview of the central debates exploring, amongst many things, the complexities in defining customary property rights in the context of legal-pluralism and problematizing the implications of post-colonial centralization of the state control of land; land grievances as a source of conflict in many countries, and; gender equitable land reform. Within the discourse of a 'new scramble' for Africa, Sing'Oei provides critical insight into the trends and challenges of land governance, exploring significant solutions such as decentralization of planning and management, local control and increased participation and resource sharing. Key to this paper is an appeal for the mainstreaming of alternative approaches to natural resource governance, in particular, support to community-based natural resources co-management systems (CBNRMs). Sing'Oei concludes with an exploration of the role of the international community in land reform policy followed by programmatic options aimed at achieving key human rights-based principles.

In her paper *Transitional Justice in Post-conflict and Crisis Reconstruction and Development in Africa: The Controversies, Contradictions and Tensions*, Warigia Razia places transitional justice models within the historical trajectory of the continent. This paper begins with an overview of the broad trends of conflict across Africa from colonialism to the 'new wars' highlighting the various sources of conflict that continue to call for resolve. Razia examines several key transitional justice mechanisms found across Africa emphasizing in the end that for long-term sustainable peace, comprehensive approaches need to carefully balance both the legal-judicial goals of post-conflict reconstruction, as well as the holistic initiatives that prioritize the reconciliation of collective traumas. Razia gives particular attention to the repercussion of sexual and gender-based violence (SGBV) and the need for transitional systems to be more reflective of these experiences. In conclusion, Razia provides substantive policy recommendations aimed at various stakeholders including development partners, African governments, NGOs and UNDP.

These papers contribute to the argument that rule of law, access to justice, human rights and development are intertwined in a common destiny. The research within these works is revealing, providing the evidence that the expansion of law and justice – whether it manifests as the protection of migrants or restoration of law post-conflict – plays an important function in enabling key development outcomes. These papers prescribe the necessary roles for a diverse set of actors, including CSO, government, UNDP and the policy choices that endeavour to put to action the expansion of rule of law and access to justice in Africa.

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PAPER 1

The context of justice in Africa: Emerging trends and prospects

Charles Manga Fombad



Contents

1. INTRODUCTION	3
1.1 Background	3
1.2 Paper overview	3
2. LITERATURE REVIEW	4
3. HISTORICAL CONTEXT	5
3.1 The colonial period	5
3.2 The post-colonial period until the 1990s	5
4. DEVELOPMENTS IN THE 1990s	6
4.1 Trends at national level	6
4.2 International influences	7
5. OVERCOMING PRESENT CHALLENGES: POLICY AND STRATEGIC OPTIONS	11
5.1 The legal framework	11
5.2 Repositioning the judiciary to act as promoters and defenders of constitutionalism	11
5.2.1 Enhancing judicial independence	11
5.2.2 The expansion in the scope for judicial review	12
5.2.3 The judiciary as active agents of change	12
5.2.4 Expanding the scope of access to justice generally	13
5.3 Promoting the cross-fertilization of constitutional law ideas and concepts by the AU and RECs	14
5.4 Promoting a vigilant and active civil society	15
5.5 Role of external support and pressure	16
6. CONCLUSIONS AND RECOMMENDATIONS	18
Annex: Potential partners	20
References	21
Notes	23

The context of justice in Africa: Emerging trends and prospects*

Charles Manga Fombad

1. INTRODUCTION

1.1 Background

An overview of developments in Africa over the last two decades reveals a growing commitment by governments to the principles of human rights, to rule of law, to the ideals of transparent, accountable and democratic governance, and to a properly functioning justice system – in short, to constitutionalism. However, the pace of change has been slow, and in the last few years there have been ominous signs of a reversal: a return to the dark era of dictatorship with authoritarianism looming on the horizon.

The reforms of the 1990s saw new or revised constitutions which, for the first time, provided some prospects for constitutionalism. Most of these constitutions in diverse ways recognized and protected human rights and also provided for independent courts. As a result, the quantum of human rights protection in most African countries increased somewhat after 1990. There has, however, been a decline in the quality of human rights protection enjoyed in recent years. Nevertheless, pressure on African governments to adopt and conform to certain minimum human rights standards has arisen from the new human rights and democracy framework adopted by the African Union (AU), international treaty commitments, and the use of universal jurisdiction to deal with grave human rights abuses such as crimes against humanity and war crimes.

Because it is now clear that many of the constitutional changes of the 1990s either did not go far enough to address the real problems or were not sufficiently robust to withstand the threats of authoritarian revival, a number of reforms need to be considered. Ultimately, the prospects

for justice, human rights protection and the rule of law in Africa are, to a large extent, inextricably linked with the future of constitutionalism on the continent. An efficient system of administration of justice that ensures respect for the rule of law and human rights, among other things, is crucial to Africa's recovery from the paralysing effects of the prevailing global economic crisis, and the numerous other development challenges that the continent faces.

Although the nature and level of challenges in the different countries vary in scope and complexity, a combination of solutions is recommended in this paper.

1.2 Paper overview

In assessing the emerging trends and prospects for promoting justice in Africa, this paper starts with a brief review of some of the pertinent literature. This is followed by a look at the historical context, especially with respect to human rights protection, prior to the 1990s. The fourth section of the paper looks at developments as the so-called third wave of democratisation swept through the continent in the 1990s. It briefly reviews trends at the national and international levels, as well as other emerging influences and challenges. The fifth part of the paper considers in detail the policy and strategic options for overcoming the present challenges to attaining an effective and efficient justice sector in Africa. The sixth and final section summarizes and highlights ways in which efforts to promote the rule of law and respect for human rights can be strengthened.

2. LITERATURE REVIEW

Many of the apparently radical changes brought about from the 1990s onwards by the adoption of constitutions designed to promote constitutionalism in Africa have been widely commented upon in recent studies. These studies show that the new or revised constitutions provide somewhat better prospects for constitutionalism than almost all the pre-1990 constitutions that they replaced (Akiba, 2004; Federico and Fusaro, 2006; Fombad, 2007, 2008; Hatchard *et al.*, 2004; Oloka-Onyang, 2001). On two critical core elements of constitutionalism that are central to this paper, namely, human rights protection and the justice system, there is a dearth of comprehensive comparative studies that could help researchers and policy makers to adequately appreciate the extent of the progress that has been made.

Insofar as human rights protection is concerned, the only comprehensive study on the scope of rights covered by modern African constitutions suggests that the highest numbers of rights are recognized by the constitutions of Democratic Republic of Congo and Uganda, each of which recognizes 25 rights, while Tunisia and Libya with 10 rights each recognise the lowest number of rights (Heyns and Kaguongo, 2006). A more recent study concludes that although modern African constitutions now provide better prospects for human rights protection, there

remain enormous difficulties in enforcing those rights in a meaningful way that will improve the life of the ordinary person (Fombad 2011a). Poverty, problems of access to justice, resource constraints, lack of trained legal personnel and a host of other issues continue to impact negatively on human rights protection and enforcement.

An effective and efficient justice system is critical to the protection of human rights and maintenance of the rule of law. The only comprehensive studies on administration of justice in Africa looked at it from a formal perspective (Fombad 2007; Madhuku, 2002). A more detailed substantive study was limited to 11 common law countries in the southern African region, but nevertheless came out with some interesting findings (UCT Study, 2006). It concluded that although the overall picture of the justice sector in the region was 'not a happy one', there was some resilience on the part of judges in the face of strong political pressure (UCT Study, 2006: 100). There have also been studies that have tried to review the role of donor assistance to justice sector reforms in Africa. These show that the reform focus has changed fundamentally since the end of the Cold War, but effective reforms that will considerably enhance access to justice in Africa – without repeating the mistakes of the past – remain a challenge.¹

3. HISTORICAL CONTEXT

The rule of law, justice and human rights protection in Africa in general has gone through three main periods. This section will look at two of those periods: the colonial period and the post-independence period until the constitutional rights revolution of the 1990s. The subsequent section will discuss the third period, starting in the 1990s.

3.1 The colonial period

During the colonial period, the rule of law, justice and human rights protection were largely unknown in African colonies, regardless of whether they had been colonized

by the Belgians, British, Germans, French, Portuguese or Spanish. Any apparent differences in treatment were merely in degree of harshness. Because colonial rule was neither constitutional nor democratic, there were no restrictions based on fundamental laws on the exercise of legislative, judicial or executive powers. While flagrant human rights abuses were commonplace in all the colonies, some colonial regimes such as the Germans in Namibia and the Belgians in present day Democratic Republic of Congo gained notoriety for the atrocities they committed (Conrad, 1990; Fanon, 1963; Hochschild, 1998; Ibhawoh, 2007).

Although the European colonizers can be credited with introducing the modern system of courts in Africa, the system of justice under the colonial powers was dual in nature: the modern courts introduced by the colonizers were reserved for the whites or assimilated blacks,² while ordinary Africans continued to be subjected to a much 'tamed' system of customary or traditional justice.³ Perhaps the most enduring effect of the colonial treatment of customary⁴ justice, from which it has not yet fully recovered, is the fact that its development was stifled, if not actually frozen.

On the eve of independence, the colonial powers agonized over how to deal with human rights in the constitutions that were being crafted for the new states. Influenced by scholars such as Bentham⁵ and Dicey,⁶ the British initially did not believe in constitutionally entrenched bills of rights (Jayawickrama, 2002; Parkinson, 2007; Simpson, 2001). However, there was a dramatic change at the dawn of the 1960s. One possible reason was the hope of the British government that a constitutional guarantee of fundamental rights, including the prohibition of discrimination, would protect British citizens who had settled in large numbers in certain African countries such as Kenya, Uganda and Tanzania.

As for the other major colonial power at the time, the French, their own famous 1958 Constitution refers to human rights only parenthetically in the preamble, which in turn refers to the preamble to the 1946 Constitution and the somewhat rhetorical 1789 Declaration of the Rights of Man and the Citizen. The recitations contained in those documents have been interpreted by the Constitutional Council of France as a bill of rights. However, the French legacy of not guaranteeing fundamental rights and freedoms in the substantive provisions of the constitution was, with some exceptions, replicated in the constitutions

of its former colonial territories in Africa (Cabanis and Martin, 1999; Faure, 1981). The effect in the new states was a weak and unpredictable system of human rights protection, partly because, unlike in France, the preambles to these new constitutions were not regarded as a substantive part of the constitution.

3.2 The post-colonial period until the 1990s

At independence, most African governments inherited constitutions containing provisions that protected human rights to varying degrees. There was, however, no reason to expect the new leaders, who had no knowledge or experience of democracy or constitutional rule, to quickly forget the lessons of authoritarianism and repression that they had learned from the colonizers (An-Na'im, 2001). It was, therefore, no surprise that the new rulers quickly abrogated the constitutions or simply ignored their provisions and perpetuated the colonial pattern of human rights abuses.

Although the post-independence constitutions provided for independent judiciaries, these were quickly reduced to handmaidens of the various dictatorial regimes, and were thus incapable of operating as either guardians of the constitution, protectors of human rights or impartial enforcers of the rule of law. Thus, before the 1990s, Africa operated under "constitutions without constitutionalism" (Okoth-Ogendo, 1991: 87). In the absence of constitutionalism, the administration of justice virtually collapsed and there was little respect for the rule of law or the protection of human rights. The economic decline, political instability, civil wars, famine, disease and other ills caused by decades of authoritarian and incompetent dictatorship were all factors leading to dramatic changes in the 1990s.

4. DEVELOPMENTS IN THE 1990s

The so-called 'third wave' of democratization of the 1990s unleashed a sort of epidemic of constitution-making and re-making in Africa, and raised hopes for a new era of constitutionalism, respect for the rule of law and human rights, democracy and good governance. The changes brought by those developments in relation to the rule of law, human rights protection and justice can be gauged at two main levels: the national and the international.

4.1 Trends at national level

One of the most significant developments in the 1990s was the adoption by almost all African countries of constitutions that, for the first time, tried to promote constitutionalism.⁷ In its contemporary sense, the concept of constitutionalism encompasses the idea that a government's powers should be sufficiently limited in a way that protects its citizens from arbitrary rule, and that such a government should be able to operate efficiently in a way that it can be effectively compelled to operate within its constitutional limitations. The literature on the topic suggests that the following can be identified as the core elements of constitutionalism:

- a) recognition and protection of fundamental rights and freedoms
- b) separation of powers
- c) an independent judiciary
- d) review of the constitutionality of laws
- e) control of the amendment of the constitution, and
- f) institutions that support democracy.

(Giovanni, 1987; Henkin, 1998, Li, 2000; Murphy, 1993)

Constitutionalism needs to be reinforced by a regime with a strong rule of law. This requires a system in which all persons, institutions and entities, public and private, including the state itself, are accountable under laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

This also entails the entrenchment of measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁸

Recent analysis of the contents of the revised or new post-1990 African constitutions shows that – with the exception of a few countries such as Cameroon and Eritrea – most of these constitutions have in diverse ways gone to considerable lengths to incorporate the core elements of constitutionalism identified above (Fombad, 2007, 2008; Prempeh, 2007). Those studies show that the protection of fundamental human rights and freedoms has become a standard of constitutionalism recognized and accepted by most African countries. A study by Heyns and Kaguongo (2006) suggests that although since 1990, quantitatively, there has been a tremendous expansion in the scope of human rights protection in Africa, most international indicators show a decline in the actual quality of human rights protection on the continent in recent years (Fombad 2011a). A recent study indicates that the decline is due to the lack of rights-consciousness, the rising cost of litigation and the non-justiciability of socio-economic rights in many jurisdictions, among other factors (Fombad, 2011a).

Another serious gap in modern African constitutions is that they either glossed over or failed to address the numerous human rights abuses inherent in customary laws and practices, especially the issue of marginalization of women and youths.⁹

As regards the judiciary (the judicial branch or judicial authorities of the country) almost all post-1990 African constitutions recognize and sometimes purport to protect the independence of the judiciary (Fombad, 2007a). However, because of the substantial scope for political interference, the prospect for effective judicial independence in Francophone and Lusophone countries is quite limited as compared to Anglophone countries.¹⁰ The studies referred to earlier show that the prospects of obtaining fair judgments have been declining, which has contributed to the recent deterioration in human rights protection in Africa. The main causes of this have been the increasing politicisation of the judiciary, judicial corruption, lack of resources and judicial conservatism (Fombad, 2012b).

In spite of the existence of constitutional provisions that can promote constitutionalism and that entrench the recognition and protection of human rights, an independent judiciary and respect for the rule of law, there have been serious problems with implementing these provisions. For example, many of the constitutions merely paid lip service to the separation of powers, and in many instances overbearing and 'imperial' presidents were left to reign and dominate legislatures and control judiciaries (Fombad and Nwauche, 2012). As a result of these serious challenges, constitutionalism under many of these constitutions is neither real, effective nor meaningful.

For example, contrary to what many had expected, the constitutional entrenchment of fundamental rights, especially the legalization of multipartite systems, has not provided a solid foundation for the development of constitutional democracy, accompanied by a culture of tolerance, transparency and accountability as well as political stability. The old monolithic one-party dictators appear to have simply made way for multiparty 'democratic' dictators, who have maintained the repressive, exploitative and inefficient structures installed by their predecessors.¹¹ Many of the new democrats have turned out to be as unreliable, corrupt, violent, power-drunk, manipulative and inefficient as the regimes they replaced. The reforms did not address the fundamental problem of African absolutism caused by the concentration and centralization of power in the president and the presidency, which makes the constitutional separation of powers ineffective (Fombad and Nwauche, 2012).

A healthy and flourishing economy that offers employment and prospects for improving citizens' quality of life will make democratic progress easier. Thus, the deepening socio-economic crisis that has continued to ravage the continent has not helped the situation. Most of the economic statistics show regular economic growth during the last decade in many countries, but most of this growth has not created jobs, which affects youth most, as the most vibrant group in the economies.¹² Hungry people have little interest in democracy or constitutionalism, even if it would help to create the environment for their survival. The reality is that the promises of food, water, shelter, healthcare, employment, better wages, increased accountability and many other good things that were made by both new and old democrats in the 1990s have not materialized. Many post-1990 constitutions did not address the issue of socio-economic rights; or where they did, referred to them in obscure language that did not allow for those rights to be asserted through the justice system.¹³

Although no constitutional design can eradicate poverty and unemployment simply by entrenching socio-economic rights, it can at least provide a solid basis for addressing those problems. The South African courts, especially the Constitutional Court, have taken the lead not only on the continent but also on a global level in showing how to deal with issues of poverty. These courts have exploded the myth that constitutionally entrenching socio-economic rights may impose an unreasonable burden on the state. They have clearly demonstrated that including the right to housing, health care, food, water and social security in the constitution does not impose any burden other than to require the state to "take reasonable legislative and other measures within its available resources to achieve the progressive realization of these rights".¹⁴

4.2 International influences

The strongest international influence on the rule of law, justice and human rights development at the domestic level pre-dates the 1990s. That influence arose through what is now referred to as the internationalization of constitutional law principles and standards, which can be traced to the end of the Second World War when governments' treatment of their nationals became a matter of legitimate concern for the international community. Since 1945, numerous international instruments, both global and regional, have prescribed minimum standards of human rights protection and set up monitoring bodies to scrutinize national performance. Perhaps the most influential of these instruments is the Universal Declaration of Human Rights.

Beyond international treaty obligations, what is significant today is the growing number of regional and international frameworks designed to put pressure on African politicians and constitutional drafters to entrench certain minimum human rights standards in their constitutions. As a result, constitutional provisions to promote democracy, good governance and respect for the rule of law are no longer merely options which states can adopt at their pleasure, but are in many instances mandatory obligations for any state that wants to interact and cooperate with others.

At the global level, since the 1980s, most of the largest Western aid donors to Africa, such as Britain, France, Japan, the United States and the Scandinavian countries, sought to link their aid to constitutional reforms, respect for human rights and political as well as economic liberalization among receiving countries. The International Monetary Fund and

the World Bank also attached political conditionality to aid, loans and investments. Those policies imposed by Western governments and intergovernmental organizations have been controversial, but there is no doubt that these external forces have played a very important role in ushering in the new era of democratization and constitutional reforms.

The end of the Cold War saw a considerable devaluation of Africa as an ally to the West, which now concentrated its efforts in helping the former Eastern bloc states to democratize. Since 2001, the war against terrorism further distracted Western attention and pressure from democratization and human rights development in Africa. The onset of the economic crisis in the United States in 2008, the present threat of the collapse of the Euro and prospects of global recession have come at a time when China is fast replacing the West as an ally in Africa. China is less interested than the West in issues of constitutionalism, democracy and human rights in Africa. The combined effect of these developments is that the external pressure on African governments to maintain the course of democracy, good governance, respect for the rule of law and protection of human rights is much weaker today than it was between 1990 and 2000.

Be that as it may, the most interesting and potentially significant international influence on modern African constitutionalism has originated from Africa itself. It is an irony that the first institutional attempt to commit African states to democracy and good governance was initiated by the conservative Organization of African Unity (OAU), whose effort has been continued by its successor, the African Union (Fombad, 2006). Although by 1981 the OAU had adopted the African Charter on Human and Peoples' Rights, which recognized a number of fundamental human rights, the organization maintained a policy of not intervening to condemn human rights abuses in member countries. By the early 1990s, that was beginning to change, and by the mid-1990s, the OAU could no longer pretend to be indifferent to the winds of democratization blowing over the continent. The changes that followed were both at the level of human rights recognition and protection and also at the level of enforcement mechanisms, as outlined below.

Unlike the Charter of the OAU, the preamble of the AU Constitutive Act emphasises the importance of democracy and human rights. In addition, the basic democratic tenets of the AU are carefully developed in the objectives and principles stated in the Constitutive Act. The basic framework for promoting democracy and good governance

among member states of the AU is laid down in a number of instruments, including the Constitutive Act itself, the Declaration on the Framework for an OAU (AU) Response to Unconstitutional Changes of Government, the Declaration on the Principles Governing Democratic Elections in Africa, the Guidelines for African Union Electoral Observation and Monitoring Missions, and in 2007, the African Charter on Democracy, Elections and Governance. In fact, the latter contains some fairly radical ideas and thus it is not surprising that ratification by member states advanced slowly; the Charter finally came into force in 2012, once it was ratified by 15 governments. Mention must also be made of the New Partnership for Africa's Development and the African Peer Review Mechanism, which are supposed to provide a vision and strategic framework for Africa's renewal.

As regards enforcement mechanisms, the AU's judicial and quasi-judicial mechanisms aim to provide justice for victims of human rights violations by complementing national legal systems, either where there is no redress or where such redress is inadequate. For a long time, the African Commission on Human and Peoples' Rights was the only avenue offering some recourse with respect to state violations of human rights, but it has no jurisdiction to try individuals for criminal offences. It also had other limitations, such as the need for petitioners to first exhaust domestic remedies, inability to enforce its decisions, and reliance on the political will of the Assembly of Heads of State and Government.

The role of that Commission was strengthened in 2004 by the establishment of an African Court on Human and Peoples' Rights. In July 2008, that Court and the African Court of Justice provided for under the Constitutive Act of the AU were merged to form the African Court of Justice and Human Rights. Among its proposed functions are:

- a) to collect and undertake studies and researches on human and peoples' rights matters in Africa;
- b) lay down rules aimed at resolving legal problems relating to human and peoples' rights;
- c) ensure protection of human and people's rights; and
- d) interpret all the provisions of the African Charter on Human and People's Rights.

The establishment of such a court is certainly an indication of the determination of at least some African leaders to

make human rights protection a reality. Although this court has the potential to develop into an important instrument for human rights protection on the continent, it suffers from a number of weaknesses.

First and foremost, the court is yet to see the light of day, and given the fact that the major backers of the AU (and hence the court) such as Nigeria, Algeria, Egypt, and until recently Libya, do not have good human rights records, there are questions about the political will to see this court come into existence. Second, individuals and non-governmental organizations (NGOs) can only bring contentious cases before this court if the states involved have made a declaration to this effect. It is unlikely that certain states will be eager to make such a declaration. Third, the basis of the court's jurisdiction in the provisions on admissibility of claims is uncertain, due to the use of obscure languages such as 'unduly prolonged' or 'reasonable time'. Finally, the greatest challenge that the court will face is the problem of compliance of state parties, especially some of the major backers mentioned above, with its decisions (Ugiagbe, 2010). Nevertheless, when it becomes operational, the court will bolster the power of the African Charter on Human and Peoples' Rights to protect against serious human rights violations in Africa.

Perhaps one of the strongest weapons in the AU human rights enforcement armoury is article 4(h) of the Constitutive Act, which gives the AU the power to intervene in a state "pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity". By adopting article 4(h) the AU became the first regional organization to formally recognize the concept that the international community has a responsibility to intervene in crisis situations if the state is failing to protect its population. It is also a firm stand against impunity, which is particularly significant because many African leaders have arrogated enormous powers to themselves, then tried to protect themselves with a wide range of immunities from prosecution.

Another means used to enforce human rights in Africa in the last two decades, especially in cases of systematic violations of human rights during civil war, has been the so-called *ad hoc* tribunals with specific mandates. The failure of the international community to prevent the genocide in Rwanda, in which over 800,000 people were killed, so shocked the conscience of the world that in its aftermath, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) in 1994. Based in Arusha, Tanzania, the ICTR has jurisdiction over genocide,

crimes against humanity and war crimes committed in Rwanda and neighbouring states between January and December 1994.

A similar tribunal, the Special Criminal Court for Sierra Leone, was established in 2002 by special agreement between the United Nations and the Government of Sierra Leone in response to the atrocities committed during the 10-year civil war in that country. However, the mandates of these *ad hoc* tribunals are restricted geographically and temporally, and they only deal with those 'most responsible' for serious human rights violations. There are thus many more victims and seekers of justice than these tribunals can accommodate. Because of the considerable delays, high cost of trials and low number of indictments and convictions, especially for crimes of sexual violence, Rwanda established *gacaca* courts based on customary justice to prosecute many of the cases involving genocide and crimes against humanity.

Many of the eight Regional Economic Communities (RECs) in Africa are increasingly being seized with human rights questions (Ugiagbe, 2010). Although primarily created to address issues of an economic nature, some of those RECs have now linked successful growth with the exercise of fundamental freedoms and the prevention of conflicts. For example, state parties to the Pact on Security, Stability and Development in the Great Lakes Region have explicitly recognized the linkages between impunity, insecurity and under-development. Because of their proximity to member states, the courts of the RECs have the potential to be a useful avenue for addressing human rights violations, particularly where national courts are unable or unwilling to provide redress.

Beyond the continent, there are two important international processes that can considerably help to limit impunity and promote the enforcement of human rights in Africa. The first is the International Criminal Court (ICC), which came into existence in 2002 and builds on the experience of the *ad hoc* tribunals in Africa and in other parts of the world. It is designed to supplement and not supplant national legal systems and operates pursuant to the principle of complementarity. Out of 119 African countries, 33 are state parties to the Rome Statute of the ICC and have, therefore, consented to its jurisdiction.

Although the relations between the ICC and the AU, as well as a number of individual African countries, have soured because of the indictment of some African leaders, the possibility of ICC proceedings for gross human rights

violations remains a formidable threat that African politicians can no longer ignore. This is particularly important because pursuant to the complementarity principle, the intervention of the ICC is only possible when the national courts are 'unable or unwilling' to prosecute alleged perpetrators of serious human rights violations.

The second possibility is the use of the concept of universal jurisdiction, which dispenses with the need to establish any territorial or physical link between the accused and the state asserting jurisdiction. The AU has acknowledged that universal jurisdiction is a principle of international law by incorporating it in article 4(h) of the Constitutive Act. It has, however, observed that the abuse and misuse of indictments against African leaders could have a destabilizing effect and negatively impact on political, social and economic developments on the continent, and therefore declared that warrants based on universal jurisdiction should not be executed against AU member states.¹⁵

While there is some potential for universal jurisdiction to be abused, it is not clear why the AU should find this objectionable, especially when universal jurisdiction is based on several treaties such as the Genocide Convention and the Convention against Torture, which some African governments voluntarily ratified. The possibility of universal jurisdiction being used to indict African leaders was obviously the main reason for the AU taking this position. Although the prospect of that happening on a regular basis remains controversial, it can be said that the ICC process hangs like a sword of Damocles over human rights violations in Africa. Given that the ICC mandate is consistent with the AU's revulsion against impunity for gross violations of human rights, and since the AU's judicial mechanism so far exists only on paper, the organization should, with civil society backing, encourage African states to cooperate with the ICC.

5. OVERCOMING PRESENT CHALLENGES: POLICY AND STRATEGIC OPTIONS

The main focus of this section is to consider what institutional, structural, policy, strategic and other changes are needed to build on and consolidate what has been achieved so far and to prevent a reversal of these gains. It is becoming clear that many of the constitutional reforms either did not go far enough to address the real problems or were not sufficiently robust to withstand the recovery of many of the 'born again democrats'. Those leaders were perhaps caught off guard in the 1990s, but have sufficiently weathered the storm of the 'third wave' of democratization and are now fast sailing towards the 'safe' waters of dictatorship.

Based on developments in the last two decades, the prospects for constitutionalism, respect for the rule of law and human rights and the good administration of justice will be considerably enhanced if the reforms and other changes suggested below are implemented. The starting point is the legal framework for human rights protection and enforcement.

5.1 The legal framework

It may be too optimistic to expect renewed constitutional reforms as far-reaching as those of the 1990s. A more realistic scenario is to expect some changes, which may be quite radical, taking place in a slow and incremental manner. Nevertheless, the effectiveness of any human rights protection system depends on the constitutional foundation that supports both the recognition and enforcement of such rights. From a comparative analysis of the bills of rights in the different African constitutions, there is a clear need to expand the scope of rights that are recognized and protected by those constitutions, in particular, socio-economic rights.¹⁶

Second, all disputes concerning compliance or non-compliance with the human rights recognized and protected by the constitution must be justiciable, that is, enforceable by recourse to the courts.¹⁷ In fact, the heart of the human rights protection system depends on the

judiciary, whose role must be revitalized as a policy and strategic matter (Fombad 2011a).

5.2 Repositioning the judiciary to act as promoters and defenders of constitutionalism

The important role of an independent judiciary in the body politic is now, unlike in the recent past, recognized and accepted. However, there remain numerous problems such as judicial corruption, lack of adequate resources, judicial conservatism, huge backlogs of cases leading to long delays, inefficiency of staff, inaccessibility of courts to the poor because of cost and their location in urban areas, and the politicization of the judiciary (Fombad 2012b). Even in countries such as South Africa, the judiciary is not as free as it should be to operate independently and effectively without political interference. Bearing this in mind, any future reform agenda must pay particular attention to enhancing judicial independence, expanding the scope for judicial review, positioning the judiciary as active agents of change and modernizing the customary justice system, among other priorities.

5.2.1 Enhancing judicial independence

Two important things need to be done to strengthen judicial independence. First, there is a need to entrench the core principles of judicial independence in the constitution, rather than in ordinary legislation. Constitutionalizing judicial independence in this way is no guarantee against unwarranted interference by the executive branch with the judiciary, but it will certainly increase the odds against such interference (Fombad 2007a).

Second, it is necessary that the bodies that decide important issues such as appointments, promotions and dismissal of judges (such as the Judicial Service Commission or Higher Council of Magistracy) be made less vulnerable to partisan manipulation. They should be constituted in such a manner that the chair and majority of members are independent of the executive. Even if that is done, the effectiveness of the judiciary will depend on the scope of their powers to review constitutional violations.

5.2.2 The expansion in the scope for judicial review

Two main systems of judicial review were received and adopted in Africa: the American model and the French

(Fombad, 2012b). Although substantial improvements have been made to the inherited French model in the modern constitutions of many Francophone and Lusophone African countries, it remains a very restricted and consequently fairly ineffective means of ensuring that governments do not violate the constitution. There is no perfect system, but there are good examples such as the South African Constitutional Court, which is essentially mixed but based on the American model, and the Constitutional Court of Benin, which is based on the French model (Rotman, 2004). A recent study suggests that a mixed model such as that adopted under the South African constitution provides many advantages from which many African countries can learn (Fombad, 2009).

In order to expand the scope for judicial review and in this way improve the system of access to constitutional justice, a number of reforms are necessary with respect to constitutional courts and other courts exercising jurisdiction in constitutional matters. These can be summarized as follows:

- a) These courts should have the power of reviewing actual violations as well as potential violations (concrete and abstract review of constitutionality of laws).
- b) Litigants should be provided with a remedy not only when there is an actual violation of the constitution, but also where the alleged violation consists of a failure to fulfil a constitutional obligation, that is, unconstitutionality by omission.
- c) These courts should be given flexible powers when dealing with such violations, e.g. the power to afford the government or other authority concerned an opportunity to rectify the defect, instead of declaring a law or action as void.
- d) The rules of *locus standi* should be expanded in order to allow a person or organization to take legal action on behalf of another or in the public interest.
- e) The formalities relating to proceedings should be kept to a minimum to facilitate access to the court by the poor and disadvantaged.¹⁸

5.2.3 The judiciary as active agents of change

An independent judiciary with wide powers to undertake judicial review is not sufficient on its own. The first generation of constitutions and bills of rights were not destroyed so much by the intolerance of the executive branches as by the enthusiastic abdication of judicial responsibilities by the judges. Constitutionalism can only develop and grow with the participation of judges who are liberal, progressive, activist or have bold spirits, and not the “timorous souls”¹⁹ of some of the passive judges of the recent past. If constitutionalism is to survive in Africa, then judges must be ready to play a more proactive role. The constitutional rights revolution in general, and with respect for human rights in particular, can only be realized with a judiciary that is ready to use its powers to negate the continuous authoritarian impulses of elected politicians. This requires a new judicial attitude towards adjudication in which judges adopt a more principled and rights-sensitive approach that takes account of the radical political, economic and social changes of our times and the revulsion against dictatorship.

It is evident in many instances that the revised or new constitutions were not only designed to eliminate dictatorship and promote democracy and good governance, but also to promote a new human rights culture. That new culture would be particularly sensitive to issues such as hunger, poverty, unemployment, ignorance, illiteracy, disease and other social ills that have inflicted so much hardship on a majority of the population throughout the continent. Attaining these goals requires a judiciary that is willing to reflect the new spirit of constitutionalism when interpreting these constitutions.

Since the judiciary stands firmly between the individual citizens and the wielders of power, they are the ultimate arbiter of constitutional rights and need to take an activist role in adjudication. To place heavy reliance on judges to defend rights, and in many respects to attempt through the judicial process to fill some of the gaps left by the 1990 reforms, is bound to be controversial. However, the African judiciary cannot be immune from the forces of globalization, which have affected all areas of political, social and economic life. The conservative inward-looking culture of the old judiciary has to be abandoned, because judges must now see themselves as members of a global legal community where knowledge and ideas are exchanged across jurisdictions. The need for adopting broad interpretative techniques in interpreting constitutions is also inherent in the very nature of a constitution itself.

The idea of the judiciary adopting a more activist approach may well be controversial, but it is submitted that judges have an important role to play in entrenching the rule of law and constitutional governance in Africa. Two recent studies show the tremendous contribution that judicial activism has made to the development of modern constitutional law in general, and to human rights protection and the rule of law in particular, in two jurisdictions: one in Africa (South Africa) and the other in Asia (India). Their findings amply illustrate the contribution that this approach can make to constitutionalism (Fombad, 2011; Quansah and Fombad, 2008). They show that judicial activism is a powerful weapon that judges all over Africa can use both to counter authoritarianism and to promote policies that are socially and economically progressive.

The timely intervention of the apex courts in both India and South Africa has resulted in defective legislation being promptly remedied, and also led to new remedies and processes to address serious social problems that the government and legislature were too slow or indifferent to address. Thus, in both countries, the highest courts devised imaginative means to facilitate access to courts by the poor and needy. In India, the courts manoeuvred around the rigid doctrine of *locus standi* by introducing the device of socio-legal commissions of inquiry in the cases of *Bandhua Mukti Morcha v Union of India*²⁰ and *Gupta v Union of India*.²¹ In South Africa, the Constitutional Court achieved a similar end by introducing the concept of class action in the *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* case.²²

In the South African cases of *Government of the Republic of South Africa v Grootboom*,²³ *President of the Republic of South Africa v Modderskip*²⁴ and *Minister of Health v Treatment Action Campaign*,²⁵ the South African courts had no hesitation in taking decisions that compelled the government to urgently address the desperate social needs of the poor. To ensure that government effectively complied with court decisions, the South African courts in the Treatment Action Campaign case have exercised supervisory jurisdiction in circumstances where many courts would not have done so. They have also used the structural interdict²⁶ in the *August v Independent Electoral Commission*²⁷ and *Strydom v Minister of Correctional Services*²⁸ cases to achieve a similar result.

In similar circumstances, in the *Bandhua Mukti Morcha* case, the Indian courts have adopted the policy of setting up a monitoring agency. Fearing that it may take too long for the legislature to amend an unconstitutional piece of

legislation and that undue and unnecessary hardship will occur in the interim, the South African courts decided in the *Jaftha v Schoeman case*²⁹ to remedy the defect by reading into legislation words that would make it conform to the constitution. It is perhaps in the defence of constitutionalism that judicial activism in South Africa has manifested itself in the most compelling manner. In the *S v Makwanyane*³⁰ case and again in the *Bhe v Magistrate of Khayelitsha*³¹ case, the Constitutional Court did not hesitate to provide clarity to constitutional obscurities created by the inability of the Constitutional Assembly to agree on certain controversial issues.

Nevertheless, the impact of any new judicial approach to adjudication will only have an effect if the courts are easily accessible, especially to the poor.

5.2.4 Expanding the scope of access to justice generally and the special role of customary courts

The need to expand access to the courts is so important an issue that it should preferably be dealt with by way of legislation, or ideally by the constitution. For example, one of the major innovations of the 2010 Kenyan constitution is the expansion of the rules of locus standi in its article 22(2).

In the absence of a law facilitating access, judges could take action through judicial activism. In this regard, lessons could be borrowed from the practices of the Indian judiciary (Sripati 2007, Bhagwati, 1984-1985). One of the areas in which their judicial activism has been greatly felt is in the increase of individual access to the legal process, which had become chaotic, expensive, time consuming and too technical.³²

There are four other ways in which access to justice could be considerably increased. First, NGOs dealing with human rights issues should be encouraged to pursue claims on behalf of the poor and marginalized victims who do not have the means to do this on their own. Second, law societies and similar professional bodies of lawyers should, as a matter of law or on a voluntary basis as part of corporate social responsibility, require their members to deal with a minimum number of *pro bono* matters (cases handled without any fees) each year on behalf of indigent clients. This has great potential to expand the scope of access to justice, particularly where the law society voluntarily assumes this commitment and takes serious steps to ensure that all member lawyers meet this obligation.

The third way is through the use of legal aid or law clinics.³³ Many such clinics train law students in the spirit of justice and public service while providing desperately needed legal and informational services to poor and marginalized clients in underserved communities. Their clients include abused women and children, refugees, people living with HIV/AIDS, prisoners and poor rural villagers. Law clinics also promote access to justice in that they often lay a foundation of professionalism and dedication to public service among students that lasts throughout their career. For example, many of the students who participated in law clinic programmes go on to full or part time careers in public interest law and some create *pro bono* practices among lawyers. There is a need to expand law clinics in legal education institutions and encourage their creation in those institutions which do not have them.

Finally, the most important but often neglected aspect of access to justice is the potential role of traditional or customary courts. When considered as a part of the informal justice system, a recent study has indicated that they constitute a “cornerstone of dispute resolution and access to justice for the majority of the populations in developing countries because they usually resolve between 80 to 90 percent of disputes”.³⁴ For example, in Malawi it is estimated that 80 to 90 percent of disputes are processed through customary courts, and in Burundi, the figure is about 80 percent that go through its Bashingantahe institution as a first or sometimes only instance (Wojkowska, 2006).

Although the customary justice system is popular, more easily accessible (especially to the poor, uneducated and marginalized), quicker and provides affordable remedies, justice sector reforms have devoted more attention and most funding to the formal justice system. However, in the broad context of justice reforms, some organizations like the UNDP have identified promoting access to justice for those who are poor and disadvantaged as a specific niche area. Significant material and human resources are needed to research and develop strategies that will improve the quality of justice provided by customary courts.

Without going into the numerous criticisms that have been levelled against the customary justice system in Africa, it will suffice to point out that the following research is necessary:

- a) Studies to identify the existing customary laws and practices in the different countries.

- b) Studies to see how customary courts could best be integrated with the formal justice systems to ensure that both access to and quality of justice is enhanced.
- c) Studies to see how customary laws could best be adjusted to ensure that they are consistent with modern human rights standards.
- d) Studies on the possibilities of utilizing customary courts as forums for alternative dispute resolution.

The radical changes that have taken place since independence and the diverse approaches and attitudes adopted by different countries in dealing with customary law mean that no simple generalized solution should or can be developed that will work for all African countries.³⁵ Nevertheless, given the growing importance of these courts, there is urgent need for a comprehensive review to explore how their role in the justice system can be made more effective.

Ultimately, the ability of the courts and judges to play an activist role will also depend on their willingness to look beyond national frontiers and legal systems to see what ideas can be borrowed from other jurisdictions.

5.3 Promoting the cross-fertilization of constitutional law ideas and concepts by the AU and RECs

The post-1990 reforms have seen the gradual emergence of some independent judiciaries with judges who are better educated, more confident and increasingly assertive of their role to creatively promote the course of constitutional justice in every facet of their judgments. The commonality among African constitutions, in their provisions as well as in their basis in the same philosophy and international instruments, makes it not just possible but actually imperative for judges to investigate how similar legal questions have been solved in other jurisdictions, including both national and international courts. In interpreting the constitution, judges must try to keep in step with the standards and values of the times.

Due to of the numerous areas of convergence in many African constitutions, there is also scope for learning and borrowing from the approach adopted by other national and international courts through a process of international judicial dialogue. In this regard, internationalization of

constitutional law principles in general, and human rights principles in particular has provided considerable scope for cross-fertilization among legal systems. It is because of this approach that the South African Constitutional Court has rendered many innovative and groundbreaking decisions, especially in the area of socio-economic rights, which have been respected and followed in many jurisdictions (Quansah and Fombad, 2009).

A few other African courts are participating in this international dialogue to try to improve the corpus of their national constitutional law by learning from the experiences of other jurisdictions (Udombana, 2005). There are enormous possibilities for enriching national constitutional law through these processes.

However, the increasing internationalization of constitutional law principles and standards in Africa has exposed the lack of an intra-African constitutional legal dialogue. Problems of access alone cannot explain the fact that most cases cited and relied upon by African courts, especially the South African Constitutional Court, are not from other African national courts or from continental tribunals. Increasingly, the latest and most important decisions of African national constitutional courts and regional courts are just a mouse click away via the Internet.³⁶ As a result of the rapid advances in information and communication technology during the last two decades, not only judgments but also an extraordinary amount of constitutional material from different jurisdictions is now available.

The benefits of this will be completely lost if national legal experts and judges are too unbending and entrenched in past practices to see the benefits of learning from what is happening elsewhere in Africa. An important way of overcoming this artificial mental barrier could be through cross-national networking of judges from different jurisdictions. Such personal contacts among judges will enable them to share their experiences and see how judges in similar positions elsewhere confront the same kinds of problems. Although there are various forums where judges from different countries meet, with the exception of the recently established Judges' Working Group in the African Network of Constitutional Lawyers (ANCL)³⁷ these have often followed regional lines, and thus provided little opportunity for judges from the different legal systems in Africa to actually interact.

One would expect that as regional and continental tribunals in Africa become more active,³⁸ the process of

internationalization through cross-fertilization among African judiciaries will be intensified. This will be particularly so where national constitutional courts whose decisions are subject to review by those tribunals have to take into account the jurisprudence of these tribunals to avoid the embarrassment of their decisions being reversed on appeal. However, the AU and RECs will have to play a more proactive role in the process for it to be effective.

For example, the AU has recently established the African Union Commission on International Law (AUCIL).³⁹ At present, it is too similar to the UN International Law Commission, with a focus on strengthening and consolidating the principles of international law and finding common approaches to international legal development issues. It would be particularly useful to give the AUCIL a mandate to devise cross-systemic approaches to enhancing access to justice, for instance, through the harmonization of laws. It could also promote cooperation and good practice in the teaching of law and use of legal clinics in African legal education institutions for promoting cheap and accessible justice.

In addition, it can be argued that one of the strongest antidotes to authoritarian resurgence and its negative effects on human rights protection is the people themselves, acting either directly or through civil society organizations.

5.4 Promoting a vigilant and active civil society

A constitution that promotes constitutionalism and provides for respect for the rule of law and human rights and an independent justice system cannot on its own guarantee constitutionalism, good governance or any of the things it promises. As Gerald Caiden has rightly pointed out, people usually get the government they deserve.⁴⁰ If they are diligent, demanding, inquisitive and caring, they will get a good government. However, if they allow themselves to be intimidated, bullied, deceived and ignored, then they will get bad government (1986).

In fact, a constitution is only as good as the strongly manifested will of the people to defend it. A robust civil society can enable democratic transition to start, help to resist eventual reversals, contribute toward pushing transitions to their completions, and finally help to consolidate and deepen democracy (Linz and Stepan, 1996). To ensure that the good people we elect today do

not become the tyrants and dictators of tomorrow, the citizens must be ready to protest against any actual or threatened violations of the constitution. In addition, the creative intervention of the judiciary depends greatly on the willingness of civil society (such as professional or business groups, activist groups and the media), as well as on the activist quality of the legal profession.

Civil society in general, and the legal profession in particular, act as watchdogs in respect of the rule of law and as advocates of legal reforms, and also identify and present the diverse and intricate legal and social issues that judges need to consider. The legal profession plays a vital role in the promotion and defence of constitutional rights because it is they who choose the cases that go before the courts and prepare the necessary arguments. If the cases are well-researched and persuasive and provide solid evidence, the judge will be bound to consider these arguments seriously.

The role of judges in legal reforms can also be enhanced when there are vibrant civil society organizations that are ready to speak up for the weak, the poor and other voiceless members of society through *amicus curiae* representation in court.⁴¹ In many countries, as a result of the absence of effective and credible opposition parties owing to the all-pervasive dominant party syndrome, civil society organizations have filled the void and act as a powerful voice for the marginalized. NGOs, law firms and legal clinics with a human rights focus need to be supported to this end.

Some countries such as Botswana should be encouraged to establish an independent human rights commission. Where they exist, there is a need to ensure that these commissions can operate independently without interference from the government, for example in Cameroon. A human rights commission is absolutely critical in promoting and protecting human rights and ensuring that people can obtain redress in the face of injustice. Among other things, the commission can canvass in the courts the policy implications of different interpretations of the bill of rights, without necessarily representing the interests of either litigant before the court. It can also exercise promotional and advisory functions aimed at both state and non-state actors.

Mention must also be made of the important role that legal scholars – such as legal academics, legal researchers and others who contribute to the dissemination of legal knowledge through accredited journals, books

and newspaper commentaries and Internet blogs – can play in influencing developments in the legal arena. These scholars need to be more vocal in defending the constitution and respect for constitutionalism. More effort needs to be made to encourage academics and others to share information in the popular press on critical issues of constitutional law, particularly those dealing with human rights. The ordinary citizen who often desperately requires this information has no access to academic literature, and even with such access might find the content difficult to understand.

Finally, human rights education is still too much of an academic pursuit. It should not be so, since it affects the daily lives of all citizens. Even in law faculties, the human rights module is often scheduled as an elective. There is need for human rights to be mainstreamed and taught from primary school right through to university. The more that people are aware of their human rights, the more assertive they will be, and the fewer abuses that will go unpunished.

5.5 Role of external support and pressure

As we have seen with respect to the AU and more generally, there are a growing number of regional and international frameworks designed to encourage constitutional drafters to incorporate provisions that recognize and protect fundamental human rights as well as minimum standards of constitutional behaviour. The pressure from foreign donor nations and agencies, as well as international NGOs both within and outside the UN system, is crucial to keeping human rights protection systems in Africa within acceptable standards. The weak, ineffective and often corrupt national justice systems need to be complemented by the AU and other international justice institutions.

The nature and focus of donor support to justice reforms in Africa in general, and access to justice in particular, has changed considerably since the end of the Cold War.⁴² A report by the International Council on Human Rights Policy, highlighting the failings of donor approaches to justice reforms, set out a number of strategic approaches that have influenced many donor policies since its publication in 2000.⁴³ One of the issues highlighted was that priority has to be given to the needs of the poor, vulnerable and marginalized groups, by enhancing their access to justice,

tackling discrimination, ensuring minority participation, recognizing indigenous systems and paying attention to the rights of women.

In response to those recommendations, most donors adjusted their policy orientations. The new approach emphasizes support for domestic civil society organizations that demand better and cheaper justice, monitor human rights and provide legal assistance. For example, the UK Department for International Development has put the issue of insecurity and injustice at the top of its agenda. This approach has guided two of its large-scale programmes in Africa: the Malawi Safety, Security and Access to Justice Programme, which started in 2002, and the Nigeria Access to Justice Programme, begun in 2001.

For its part, the World Bank has adopted access to justice as one of three strategic objectives, the others being legal and judicial reform.⁴⁴ Their programme covers improving access to existing services, expanding access by encouraging non-traditional users, promoting the use of new dispute resolution mechanisms, and creating new rules on legal standing.

The UNDP considers access to justice as a vital part of its mandate to reduce poverty and strengthen democratic governance. It has identified the main barriers restricting access to justice and devised six types of support that are necessary to promote access to justice: legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society and parliamentary oversight.⁴⁵ The UNDP acknowledges that the justice sector requires “far-reaching reforms that can be designed only after a comprehensive review of the system”, and this requires “considerable time and resource commitments both by the UNDP and the national counterparts”.⁴⁶ Such a ‘comprehensive review’ is, as pointed out above, particularly necessary in the case of customary justice systems, in which many of these donor organizations have been quite active.⁴⁷

These developments show that a combination of both national and international efforts is essential to promoting effective and expeditious access to justice.⁴⁸ This joining of forces will also ensure that African leaders can no longer rely on their protective immunities to escape responsibility for gross human rights violations.

6. CONCLUSIONS AND RECOMMENDATIONS

The prospects for justice, human rights protection and the rule of law in Africa are inextricably linked with the future of constitutionalism on the continent. The experiences of the last two decades indicate that more needs to be done to maintain the reasonable progress that has been made and maintain the pressure and momentum for change. The nature and level of challenges differ in scope and complexity from country to country and call for a combination of different solutions.

States can no longer hide behind the principles of sovereignty and non-intervention to violate their constitutions in a manner that will put the lives of their citizens at risk, and also directly or indirectly threaten international peace and security. The adoption of a dysfunctional constitution that results in violence and political instability poses a threat not only to the state concerned, but also to neighbouring states and the international community as a whole. Mindful of these basic realities, some of the key issues that should be looked at for the future can be summarized as follows.

Strengthening the foundations for constitutionalism:

There are still many African constitutions that do not incorporate the core elements of constitutionalism. While constitutions that include those elements do not necessarily guarantee constitutionalism or justice, nor respect for the rule of law and human rights, the presence and operation of those core elements act as a powerful deterrent to potential dictators and tyrants.

- The AU and RECs need to play more proactive roles, for example by developing certain standard provisions for constitutions generally as well as provisions specifically dealing with judicial independence.

Strengthening the independence and capacity of national justice systems:

The ability of the judiciary to operate independently remains crucial to sustaining constitutionalism and ensuring the enforcement of human rights.

- The AU should develop a model law on judicial independence and encourage member states to adopt it. For the judicial and quasi-judicial mechanisms within the AU to work, the organization needs to put pressure on states to ratify and implement them. The African

Court of Justice and Human Rights will only make a difference and complement weak or inadequate national justice mechanisms if it is accessible to individuals and NGOs, has a criminal jurisdiction and can take decisions that are binding on member states.

- The quality of justice will be enhanced through better training of judges, greater awareness of the easy availability of legal resources on the Internet, especially judgments from other African jurisdictions, and the establishment of a forum for judges from the different legal systems in Africa to regularly meet and interact. The AU and the various RECs as well as foreign development partners can play a key role in promoting this intra-African judicial dialogue.
- Unless serious and innovative measures are taken, access to justice will remain a big problem in Africa. Besides generally encouraging programmes on legal aid, the use of legal clinics in African university law faculties should be promoted. The obligation of members of the legal profession to provide a minimum amount of voluntary service each year for indigent members of society (the so-called pro bono obligation) will also help.
- Given the cost, delays and other problems associated with modern courts in Africa, there is a serious need to revive, modernize and use the customary courts that have for so long been neglected in many countries. They will be cheaper, faster and more adapted to dispensing a form of justice for lesser offences, and free up the formal courts to deal with more serious cases in an expeditious manner. It may also be advisable to consider the use of community leaders,⁴⁹ but this option needs to be carefully studied.

Promoting the mainstreaming of human rights education:

Mainstreaming human rights education and knowledge about the constitution, as well as information about the role and responsibilities of every citizen to defend the constitution and human rights, is very important. This must be done in primary schools as part of social studies. In the case of law faculties, human rights modules should not merely be electives but should be incorporated into other modules, especially constitutional law. Law programmes should be adjusted to train future lawyers, judges and justice administrators to be knowledgeable of, and sensitive to, the pressing human rights issues of the

day. More generally, robust human rights civic education programmes could be developed to reach the rest of the population in places such as churches and mosques, and through village, community and other social associations.

Discouraging impunity and promoting the expansion and utilization of universal jurisdiction:

Advocacy work through human rights education should also aim to eliminate the impunity that manifests itself in different forms and at different levels. To mention a few examples, impunity is prevalent for gender-based violence during conflicts, for political and economic corruption, for the denial of rights and the commission of grave crimes during civil unrests and wars, and especially for crimes by leaders who want to prolong their stay in office at any cost.

Besides the Constitutive Act of the AU, many African countries are parties to treaties which permit or require the exercise of universal jurisdiction. This can act as a powerful disincentive against flagrant human rights abuses, and citizens therefore need to be educated about this avenue for seeking justice.

To help end impunity, the following measures are suggested:

- Established alliances should be nurtured to develop advocacy strategies to apply gentle but persistent pressure on African governments to ratify, domesticate and implement international, regional and national human rights instruments and policies.
- African civil society, the United Nations and other development partners should encourage the AU to implement its own strategies for combating human

rights violations and to operationalize the courts that are supposed to sanction human rights violations on the continent.

- It may be necessary to advocate and fight for recognition of an economic crime against humanity, in order to try rulers who have caused their people to die needlessly through bad governance. If it was a crime to kill over half a million people in Rwanda in 1994, it should also be a crime to cause millions of innocent people, especially vulnerable ones like children and elderly people, to die of hunger or malnutrition or lack of adequate health care as a result of gross misrule and corruption. The unacceptability, bestiality and inhumanity of dictatorship and misrule should be recognized for what it is: a crime that should be included in the crimes against humanity.

Promoting intra-African legal dialogue, knowledge-sharing and cross-fertilization among the diverse legal systems:

The AU, RECs and development partners need to promote greater dialogue, exchange of information and avenues for cooperation among African judges and other legal experts. Legal harmonization will facilitate the enforcement of human rights and other laws while also advancing economic cooperation and development among African countries.⁵⁰ This could be accomplished by promoting dialogue and online information sharing, creating an online database of decisions of all superior courts, and organizing workshops and conferences targeting key actors from the different countries. Judgments and other information from the ad hoc tribunals and truth commissions on the continent need to be archived and made easily available for analysis and to facilitate the sharing of lessons learned.

ANNEX: POTENTIAL PARTNERS

Potential partner	Area of interest
World Bank	Focuses on legal and judicial reform for purpose of strengthening market institutions
USAID	Operates through its rule of law programme that assists the justice sector in more than 50 countries
Ford Foundation	Focuses on human rights
Canadian International Development Agency (CIDA)	General programme on legal and judicial reforms
Swedish International Development Cooperation Agency (SIDA)	Focuses on justice and legal reforms in achieving democratic governance, poverty reduction and equality
Japanese International Cooperation Agency	General
European Union	Intervenes through the European Instrument for Democracy and Human Rights and the European Bank for Reconstruction and Development Legal Transition Programme
AusAID	Focuses on security and justice through its thematic strategy on effective governance
African Development Bank	Intervenes through its programme on law for development
Swedish Agency for Development and Cooperation (SDC)	Supports justice reform and the improvement of the legal framework for economic and social development
United Nations Operations for Project Services (UNOPS)	Has taken up justice and security sector reform as an integral part of its peacebuilding, humanitarian and development operations

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NOTES

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¹ See Piron (undated) and Penal Reform International (2000).

² For example, the French in their colonies grouped Africans into two categories: those who had been granted the status of citizen (citizen or assimilated French person) and the rest of the population who were classified as *sujet* or *indigène*. The status of an assimilated French person was reserved to a few dozen Africans who had, in the view of the colonizers, evolved from the status of natives by attaining an acceptable level of French civilization and culture. For an example of French policy of assimilation in Cameroon, see Gardinier, D.E. (1963).

³ For example, in Anglophone Africa, the pre-existing traditional or customary law was only allowed provided it was not (in the view of the colonial authorities) repugnant to natural justice, equity and good conscience, nor incompatible either directly or by natural implication with any written law for the time being in force. This so-called repugnancy test could be used to invalidate a rule of customary law. More generally however, administrative officials had the last word on what was customary law during this period. See, in general, Allott (1970) and Park (1972).

⁴ Note that elsewhere customary and traditional are often used interchangeably, but the term customary is being used in this paper for the sake of consistency, although some endnotes use the term traditional.

⁵ In commenting on the French Declaration of the Rights of Man and of the Citizen, Bentham described constitutionally entrenched human rights as "rhetorical nonsense – nonsense upon stilts". Quoted in Jayawickrama (2002: 106).

⁶ In his famous work, Dicey (1959: 199) boasted that habeas corpus was "for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".

⁷ The core elements of constitutionalism are reflected in these new or substantially revised constitutions. There have, however, been two main exceptions. The first is that the only two countries that have had transparent and democratic multiparty systems since independence, namely, Botswana and Mauritius, have maintained their independence constitutions of 1966 and 1968 respectively with few significant changes. The second is that most countries in northern Africa maintained their pre-1990 constitutions with very few significant changes until the events of 2010–2011, the so-called Arab Spring, which saw the removal of various long-serving dictators. As a result, Morocco adopted a new constitution in 2012, and Algeria, Egypt, Libya and Tunisia are in the process of drafting new constitutions. These are more likely to promote constitutionalism than the previous constitutions.

⁸ See, Report of the Secretary General (2012).

⁹ Women make up more than 50 percent of the population, and youths (defined here as people between the ages of 15–35 years) make up about 60 percent of the population. Examples of abuses include discrimination against women, early marriage, property grabbing, domestic violence, sexual violence, female genital mutilation and violence against children. See UNDP/ECA (2011).

¹⁰ The scope for judicial independence in Francophone and Lusophone countries is diminished by the fact that the constitutional provisions that are supposed to promote judicial independence are usually formulated in vague terms, leaving too many critical determinants of judicial independence to be governed by ordinary regulations. Perhaps the most serious concern in these countries is the decisive role that the executive plays in appointing, disciplining and promoting judges. See further, Charles Manga Fombad, 2007: 15–17.

¹¹ A recent study of 20 African countries showed that about 80 percent of them were controlled by dominant parties, with the term 'dominant party' referring to a party with more than two-thirds of the seats in the legislature. Such dominance enables those political parties to enact whatever legislation they wish, and to easily alter the constitution to perpetuate its dominance. See further, Charles Manga Fombad (2012).

¹² A few recent statistics on the state of poverty on the continent clearly illustrate the dire straits in which many Africans live. One in two people in sub-Saharan Africa survive on less than one dollar a day, 33 percent suffer from malnutrition, less than 50 percent have access to hospitals or doctors, and life expectancy is 41 years and dropping. Only 57 percent of African children are enrolled in primary school and only one of three children complete school. See Food 4 Africa (2009).

¹³ Less than half of African constitutions recognise the different types of socio-economic rights. See generally, Christof Heyns and W. Kaguongo, (2006: 673–717); Charles Manga Fombad (2011a: 33–64); and Charles Manga Fombad, (2011: 1007–1108).

¹⁴ For some of the large body of literature on the numerous cases decided by the South African courts, see Christopher Mbazira (2009); John Mubangizi (2007); Sandra Liebenberg (2010); and Swart Mia (2005).

¹⁵ See AU Assembly (2010) decision.

¹⁶ Until 2010, the bill of rights in the South African constitution of 1996 was considered to have set a very high standard as it contained the most detailed and carefully worded listing of rights, incorporating not just the classic civil and political rights but also embracing a panoply of social, economic and cultural rights. It has now been overtaken by the 2010 Angolan and Kenyan Constitutions, which contain even more elaborate provisions. These two countries appear to have learned from the South African experience and gone even further than the South African Constitution.

¹⁷ A bill of rights, no matter how elaborate and comprehensive, will serve no purpose if its provisions cannot be enforced or can be violated without any legal remedies or consequences. An effective bill of rights must provide a mechanism for obtaining legal redress for violations of its provisions. In many instances, the mechanism for reviewing violations of the constitution has coincided with the mechanism for reviewing and controlling the constitutionality of laws generally. See further, Charles Manga Fombad (2011: 55–57).

¹⁸ For detailed discussion of the basis of these conclusions, see Charles Manga Fombad (2011: 33–64).

¹⁹ Lord Denning, in *Candler v Crane, Christmas & Co.* [1951] 1 All ER 426.

²⁰ A.I.R 1984 S.C. 802 (1982).

²¹ (1982) 2 S.C.R. 365 (1981).

²² 2001 (4) SA 1184 (SCA).

²³ 2001 (1) SA 46 (CC).

²⁴ 2005 (5) SA 3 (CC).

²⁵ 2002 (5) SA 721.

²⁶ Structural interdicts are rare and extreme remedies applied only in those cases where no other judicial remedies will be effective or sufficient. They involve the assertion of judicial power that goes significantly beyond that normally exercised by the courts and often require the court, for instance, to supervise or monitor the implementation of its judgment by the government as a way of ensuring full compliance. See further, <http://lawteacher.net/human-rights/essays/structural-interdicts.php>, (accessed 29 September 2012).

²⁷ 1999 (3) SA 1 (CC).

²⁸ 1999 (3) BCLR 342 (W).

²⁹ 2005 (2) 140 (CC).

³⁰ 1995 (5) SA 391 (CC).

³¹ 2005 (1) SA 580 (CC).

³² The magnitude of problems faced by litigants can be best understood from B. Debroy's report in the Far Eastern Economic Review of 14 February 2002, titled 'Losing a world record', in which it was stated that there were "23 million pending cases in Indian courts – 20,000 in the Supreme Court, 3.2 million in the High Court and 20 million in the lower or subordinate courts".

³³ See for example, Open Society Foundations (2009) 'Legal clinics: serving people, improving justice', <http://www.soros.org/reports/legal-clinics-serving-people-improving-justice>, accessed on 23 May 2012; and Network of University Legal Aid Institutions, (NULAI), www.nulai.org

³⁴ See Wojkowska, (2006) 'Doing Justice: How Informal Justice Systems can Contribute'.

- ³⁵ This is a complex issue because customary courts in Africa have a variety of relationships with the state and the formal justice system. In some countries, such as Burundi and Zambia, they have no official links with the formal judicial system but are tolerated. Some countries such as Swaziland have subjected these courts to minimal regulations. Cameroon and South Africa are examples of countries that have fully integrated them in the formal judicial system. In Botswana, some of the customary courts are officially recognized and integrated into the formal judicial system while others operate outside this system unrecognized but tolerated. There is, therefore, no easy generalization of the structure of customary courts in Africa.
- ³⁶ The Southern African Legal Information Institute now provides free online access to the latest decisions from the superior courts in Angola, Botswana, Lesotho, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. It also provides access to the decisions of the following regional courts of justice: COMESA, the East African Court of Appeal, the East African Court of Justice and the SADC Tribunal, <http://www.saflii.org/>
- ³⁷ This mixed judicial forum consisting of constitutional court judges from Anglophone, Francophone, Lusophone and Hispanophone Africa was formally set up during the ANCL Annual Conference in Rabat in February 2011.
- ³⁸ Africa has an impressive number of continental and regional international tribunals, but there is little evidence of dialogue either between the national courts and these tribunals or among these tribunals themselves.
- ³⁹ See Decision of the Assembly/AU/Dec.209(XII) of the 12th Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, in February 2009, following the recommendation of the Executive Council in its Decision EX.CL/Dec.478 (XIV) adopted by the Fourteenth Ordinary Session of the Executive Council held in Addis Ababa, Ethiopia in February 2009.
- ⁴⁰ Original: Joseph de Maistre, 'Toute nation a le gouvernement qu'elle merite', [Every country has the government it deserves.] *Lettres et Opuscules Inedites* (1851) vol.1, letter 53, 15 August 1811.
- ⁴¹ This phrase literally means 'friend of the court', and refers to a person or organization who files a brief with the court in relation to a case, even though not a party to the litigation. This requires permission of the court in most cases, and is frequently used in public interest cases to bring the court's attention to important points of fact or law that may not be brought forward by the actual litigants of the case. See <http://legal-dictionary.thefreedictionary.com/amicus+curiae>, (accessed 29 September 2012).
- ⁴² See Laure-Helene Piron, (undated).
- ⁴³ See International Council on Human Rights Policy, (2000) and Harry Blair and Gary Hansen (1994).
- ⁴⁴ See Legal Vice Presidency (2003).
- ⁴⁵ See UNDP Practice Note (2004) 'Access to Justice'.
- ⁴⁶ *Ibid.* at p.24.
- ⁴⁷ For a report on some initiatives in this area, see Penal Reform International (2000).
- ⁴⁸ Other potential partners that could assist in promoting access to justice in Africa are indicated in the annex to this paper.
- ⁴⁹ One study shows that in many African countries, a significant number of citizens prefer to report crime to community groups rather than the police, who normally take complaints before the formal courts. See, Human Rights and Rule of Law, (2005: 179).
- ⁵⁰ The UN could support this effort using, for example, the UN Economic Commission for Africa.

PAPER 2

The evolution of organized crime and illicit trafficking in Africa, and its implications for citizen and state security

Mark Shaw and Tuesday Reitano



Contents

1. INTRODUCTION	27
2. AFRICA'S PLACE IN THE EMERGING GLOBAL CRIMINAL ECONOMY	28
2.1 Organized crime or just unregulated economic activity?	28
2.2 Understanding the scale of the problem	28
2.3 Emerging crimes – a home-grown phenomenon	29
2.4 The criminal economies of Africa	32
3. THE IMPACT OF ORGANIZED CRIME ON CITIZEN AND STATE SECURITY	33
3.1 Crime corrodes state institutions and democratic processes	33
3.2 Organized crime as a driver for conflict and instability	34
3.3 Urban areas as a locus for crime	35
3.4 Impact on citizen security	36
4. UNDERSTANDING AFRICA'S VULNERABILITY TO ORGANIZED CRIME	38
4.1 State fragility	38
4.2 Formal and informal economic activity	39
4.3 Social cohesion, social inclusion	41
5. CRAFTING A DEVELOPMENT RESPONSE	42
NOTES	44

The evolution of organized crime and illicit trafficking in Africa, and its implications for citizen and state security

Mark Shaw and Tuesday Reitano¹

1. INTRODUCTION

The global economy has doubled since 2001 – a remarkable statistic in its own right – but this pace of growth has been matched, if not exceeded, by the growth in illicit activities and global criminal markets. In 2009, the World Development Report estimated the annual value of revenue accruing to organized crime to be US\$1.3 trillion. By 2011, this estimate rose as high as US\$3.3 trillion – a 50 percent rate of growth per year, and approximately one tenth the value of global Gross Domestic Product (GDP).² In short, the increasing interconnectedness in the global economy and financial systems is running far ahead of the legitimate economy's ability to govern or regulate it.³

In the last decade, there has been significant growth in organized criminal activities and illicit trafficking of various contrabands: drugs, people, firearms and natural resources, among others. While such activities have existed in the past, both the scale and the geographic scope of the current challenges are unprecedented. The pace of globalization has created new opportunities for illicit activities and enormous unregulated openings for crime. But the paradigm shift that has occurred in the last decade or so is that globalization has connected previously disenfranchised weak, fragile and failed states with the global community in a way that has never been possible before. Countries where governments are weak or where there has been sustained conflict or political instability are now linked in multiple ways to the global economy. Yet, their governments and institutions are unable to regulate what happens on their sovereign territory or to create protective barriers against transnational threats.

Why is this relevant within the African context? Because, for a variety of reasons, Africa has proved itself to be a

fertile ground in which organized crime can take root. It is no accident that for the three most virulent forms of emerging crimes – cybercrime, piracy and environmental crime – African countries are the global locus for such activities. As for more traditional forms of crime, such as drugs, arms and human trafficking, as well as smuggling of all forms of illicit goods, those products are also being sold or sourced on the continent or transiting across Africa, to deadly effect.

Without being melodramatic or overstating the nature of the organized crime threat, this paper seeks to emphasize that there is a genuine reason for concern, which is consistently being underestimated, and for which the global response is poorly conceived and inadequate. Organized criminal groups are integrating into legitimate society in an unprecedented manner, and organized crime is seriously impacting on the continent's ability to achieve its sustainable development goals.

In some regions, criminal groups are seeking to perpetuate conflict and instability to ensure their sustained access to illicit markets and to protect trafficking routes. In other regions, state institutions are being eroded and political processes hijacked by corruption and vested interests, and throughout Africa, the security and livelihoods of ordinary people are being compromised by increased levels of violence and fear. Organized crime distorts the local economy, reduces the potential for legitimate business and quashes entrepreneurship. Organized crime impacts disproportionately on the poor and most vulnerable in any society, and nowhere are these devastating effects more clearly seen, and yet so poorly understood, as in Africa.

In looking at these trends, their causes and their consequences, this paper seeks to achieve three objectives:

- An introductory assessment of the extent of illicit trafficking and organized crime in Africa;
- An examination of the impact of organized crime on citizen and state security in Africa; and
- An exploration of the extent to which citizen and state fragility is both a cause and a consequence of the growth of organized crime on the African continent.

Global analysis of the causes and consequences of organized crime has increasingly demonstrated the need to adopt a broad-based development perspective to both

understand and respond to these problems. Therefore, the paper concludes with some broader policy directions for UN Development Programme (UNDP) in developing both a conceptual understanding of and a programmatic response to organized crime and the related challenges of citizen security in Africa. It has become increasingly clear that the characteristics of the continent that make it vulnerable to organized criminal activities are quintessentially development and governance challenges – inequality, lack of viable livelihoods and economic opportunity, weak regulatory frameworks, weak state institutions, corruption and conflict – and therefore require development-based responses.

2. AFRICA'S PLACE IN THE EMERGING GLOBAL CRIMINAL ECONOMY

Sustained economic growth in Africa has produced a series of new challenges as the continent and its different sub-regional economies become ever more integrated into the global economy, both licit and illicit. The importance of underscoring this global connection at the outset of the discussion is critical. The global economy has doubled in size since 2001 and Africa has benefited enormously from that growth.

The continued growth of GDP in sub-Saharan Africa countries, particularly in low-income states, is a welcome development – especially if in the longer term it ensures higher standards of living for poor people on the continent. Figure 1 (next page) illustrates the extent to which low-income countries in sub-Saharan Africa have continued to experience comparatively high levels of growth, both in contrast to their middle-income counterparts and as measured against overall global GDP levels.⁴

2.1 Organized crime or just unregulated economic activity?

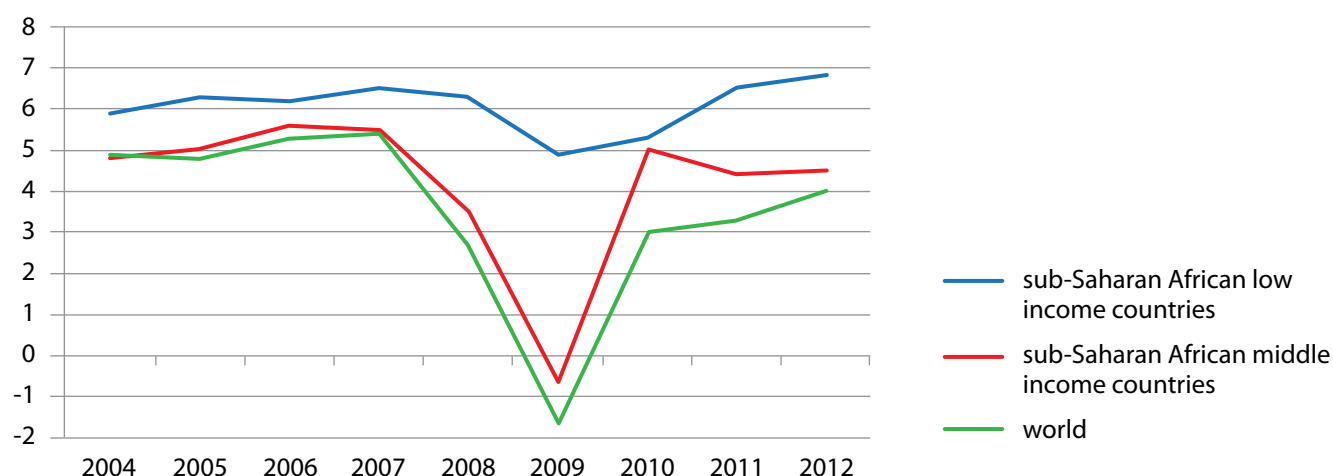
The growth in GDP in some low-income countries is to a large extent taking place outside the scope of effective regulation of economic activities, and is in part a function of the overall demand for raw materials from Asia. A prime example is found in the forestry sector and other

natural resource extractive industries. Enormous demand for timber from Asian markets has ensured an increase in exploitation and exports of timber resources from several African countries. However, in environments with poor regulation and pervasive corruption, meeting that demand has led to comparatively high levels of criminal penetration of some markets.

This situation begs the question of whether unregulated economic activity should be considered as organized crime. If the activity is illicit, involves the use of violence or corruption, and is organized, it fits within the definition of organized crime, even though it may be carried out by legally registered companies. While economic growth is of great importance for all African citizens, when such growth takes place in an environment where state institutions and controls (for example, customs authorities) are weak, there are considerable opportunities for illicit or unregulated economic behaviour, and in extreme cases for the development of protection and/or kick-back schemes, which are a hallmark of organized criminal behaviour.

2.2 Understanding the scale of the problem

Organized crime is a truly globalized paradigm, for which the concept of the nation state has little relevance. The international community, based around multilateral

Figure 1: Real GDP growth (percentage change) for Africa and the world⁵

structures, is finding itself barely able to respond to the 'tidal wave' of crime that spans the globe, and is struggling to find the tools to understand its impacts via the traditional debates on democratic governance, rule of law, and economic and social development.⁶ There is a fundamental lack of understanding of the truly global nature of this problem, and a failure to appreciate that analysis, policy and response can no longer be meaningful if confined to a national context, or even a regional one.

Determining the impact of the growth of the illicit economy in Africa over the last few years is difficult. Current estimates of illicit flows due to organized crime suggest a figure of some US\$128 billion annually.⁷ Although this amount is less than some of the estimates above, it is calculated on a set of identifiable criminal markets and thus constitutes a reasonable basis for analysis. However, it excludes large-scale illicit flows, notably those from corrupt practices and from the illicit trafficking of marijuana, which has long been associated with Africa. Nevertheless, a conservative estimate of the proportion of these markets with links to Africa (either as a transit zone, source or destination) suggests that by 2010, Africa was linked in some way to between 7 and 10 percent of all global illicit flows.⁸ That stands in contrast to the 3 percent of global trade in both goods and services accounted for by the continent⁹ and to its approximate 2.4 percent of global GDP.¹⁰

Although these figures are difficult to verify, they do suggest that Africa has a disproportionately high level of illicit flows linked to organized crime. In addition, one must take into account that several of the criminal markets – cocaine trafficking, environmental crime and human trafficking –

are comparatively new, having grown strongly in the last few years. That suggests that the level of organized crime and illicit activities, as a proportion of total economic activity, has in the recent past grown disproportionately to overall levels of economic development.

2.3 Emerging crimes – a home-grown phenomenon

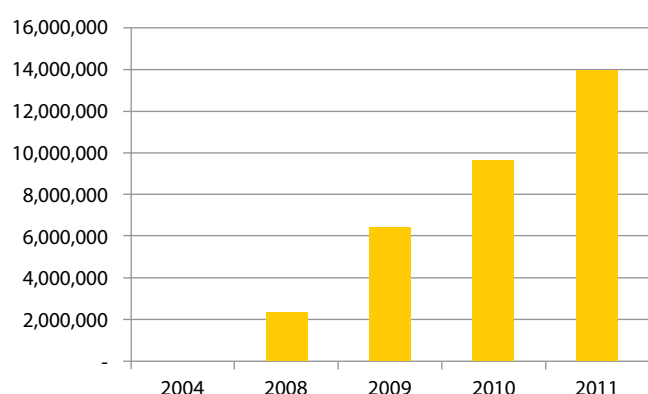
A rapid examination of the three most virulent forms of new and emerging organized crimes – cybercrime, piracy and environmental crime – demonstrates effectively how relevant the organized crime debate is for Africa, and how quickly the illegitimate economy has exploited the defining features of globalization, such as telecommunications and connectivity, for illicit profit.

The growth in the use of cyberspace, both in terms of user numbers and in global strategic importance (over 1.5 billion Internet users are recorded in 233 countries), has created new opportunities for crime.¹¹ The costs associated with cybercrime and cyber-attacks are significant – some analysts estimate as much as US\$1 trillion in 2008, although the actual extent is widely debated.¹² The nature of Internet-based fraud means that offenders may act as individuals from anywhere in the world, making it difficult to identify the criminal networks or individuals involved. It is thought that many currently active groups are operating from Eastern Europe, but Africa is also implicated: three West African countries (Nigeria, Ghana and Cameroon) are ranked among the top countries in the world for cybercrime activity, contributing to a global flow of some US\$600

million per year.¹³ A recent survey of businesses operating online found that one quarter had stopped accepting orders from certain countries due to repeated incidences of fraud. Of these, 62 percent included Nigeria among those countries, followed by Ghana with 27 percent.¹⁴

As broadband access and telecommunications innovation increase across Africa, so the opportunities for cybercrime increase too. Nowhere is this clearer than in East Africa, which has emerged as a global centre of mobile finance, an innovator in both the legitimate and illegitimate economies. Financial activities transacted via a simple mobile phone are now a feature of every state in the East African Community. The popular adoption of mobile finance has been most dramatic in Kenya, where 15 million consumers had signed up for Safaricom's M-Pesa system by April 2012 (see Figure 2 below). The volume of transactions conducted via M-Pesa is impressive, with the system registering 305 million transactions in 2010, valued at over US\$8.7 billion.¹⁵

Figure 2: Kenya's M-Pesa users¹⁶



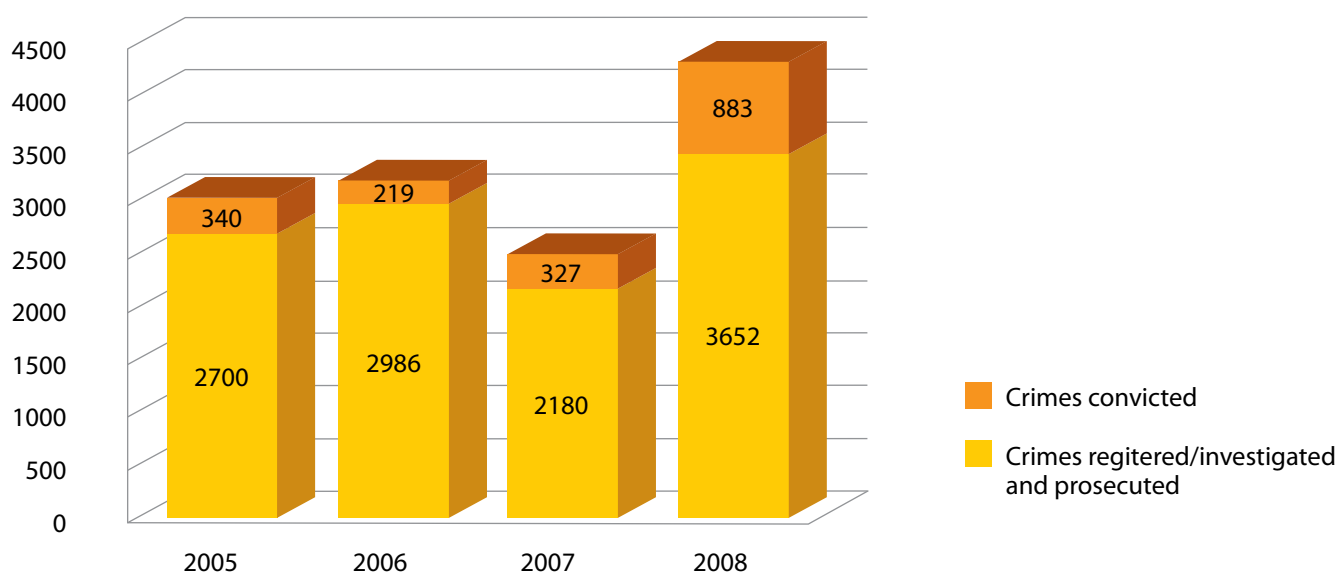
Mobile finance systems have been lauded for the development benefits they generate; however, they have also had a significant impact on criminality in East Africa. At the consumer level, mobile finance systems are, in part, popular because of the security they offer. Rather than having to transact in cash and be vulnerable to robbery, informal businessmen in Kenya now accept many payments via M-Pesa accounts. Even if a mobile phone is stolen, the value on the account is almost never compromised. However, consumers have been put at risk as criminals target them for fraud or 'phish' for their account details. In some cases, inmates have perpetrated such frauds from within Kenya's prisons.

In Kenya, kidnappers have increasingly demanded payment via M-Pesa, subverting the traceability of the systems by registering their accounts with fraudulent identification. Corrupt traffic policemen in Nairobi have likewise sought mobile finance leverage, demanding that bribes be sent to intermediaries via M-Pesa. It is likely that as mobile finance user rates increase in other states within the East African Community, frauds and criminal utilization of mobile finance will become both increasingly common and sophisticated.¹⁷

The resurgence of piracy, notably off the coast of Somalia and in the Gulf of Guinea off the coast of West Africa, is a phenomenon with drastic global implications, costing the world economy an estimated US\$12 billion in 2011.¹⁸ The definition of piracy is a criminal act occurring on the high seas. Criminal acts, regardless of the location, typically prompt a law enforcement, criminal justice and security response. Accordingly, this has been the nature of the international response to Somali piracy since 2009. Nevertheless, piracy continues to grow in scope, size and sophistication, seemingly resilient to international efforts.¹⁹

Its emergence in Somalia is often attributed to the weakness of state institutions and failure to address the land-based challenges of that country. However, the increasing geographic spread of the problem, first to West Africa and now as far south as Mozambique, demonstrates how quickly a successful criminal practice will be emulated in other regions, regardless of the relative condition of their state institutions and economic health.

An examination of the characteristics of environmental crime on the continent demonstrates how pervasive organized criminal activity can be at each strata of society. The growth of the Asian middle class has spawned a new market for a range of natural resource-based products sourced in Africa. Once considered to be a relatively small-scale and opportunistic crime, often perpetuated by local communities, illegal wildlife trading now ranks among the most valuable illicit markets in the world.²⁰ The trade in ivory between Africa and Asia is also highly organized, and elephant populations have been dramatically reduced in several countries, most notably the Democratic Republic of Congo (DRC), Cameroon and Zimbabwe. A strengthened market for ivory in China has again raised the demand and led to significant increases in poaching. In March 2012, for example, close to 450 elephants were slaughtered in Bouba N'Djida National Park in Cameroon by poachers believed to originate from Sudan who entered the country through neighbouring Chad.²¹ Prior to the latest attacks,

Figure 3: Environmental crimes in Kenya, prosecuted vs. convicted

Source: Kenya Wildlife Service, 2010.²⁵

there were believed to be fewer than 600 elephants living in the park. According to John Scanlon, Secretary General of the Convention on International Trade in Endangered Species (CITES), the incident “reflects a new trend we are detecting across many range States, where well-armed poachers with sophisticated weapons decimate elephant populations, often with impunity.”²² Illegal logging and trade in biodiversity products (flora and fauna) are environmental crimes that have existed for decades, but have only become a major concern in recent years. These activities threaten ecosystems and the future sustainability of forests, foster corruption and result in revenue losses for the state and businesses.

Environmental crimes, by their nature, tend to be concentrated in areas of low population density, in national parks and in remote areas or hinterlands. (This paper will discuss the dynamics of organized crime in both hinterlands and urban areas in the next section.) Studies have shown that poachers, sourced from local communities, are being equipped by organized crime groups and drawn into international supply chains.²³ Pastoral communities, whose poverty and lack of legitimate economic opportunity present them with few alternatives, are either convinced or coerced to become supporters and proponents of this illicit trade to secure a livelihood.²⁴

Corruption at almost every level facilitates environmental crime in Africa. Local and national officials permit illegal

loggers and poachers to gain access to forests and protected species, and in many cases provide false customs declarations to allow the commodities to exit the country or region undetected. The degree of local complicity makes it very hard to get a conviction for environmental crimes, as communities tend to protect their own people against law enforcement. The graph below demonstrates the relatively low percentage of convictions achieved for environmental crimes in Kenya.

Despite the growth of illicit activity in Africa, the past decade has seen surprisingly little literature on organized or serious crime and illicit trafficking in the African context. In part, this was a reflection of a generally held view that organized crime did not affect the continent, with the exception of two countries – Nigeria and South Africa. In these cases, particularly in South Africa, a growing literature and debate have focused on the causes of the problem and possible solutions.²⁶ However, the studies, while beginning to document the nature and extent of organized crime, have kept the focus within the borders of those two countries. Thus, for example, the South African literature considers the issue almost exclusively from a national perspective.

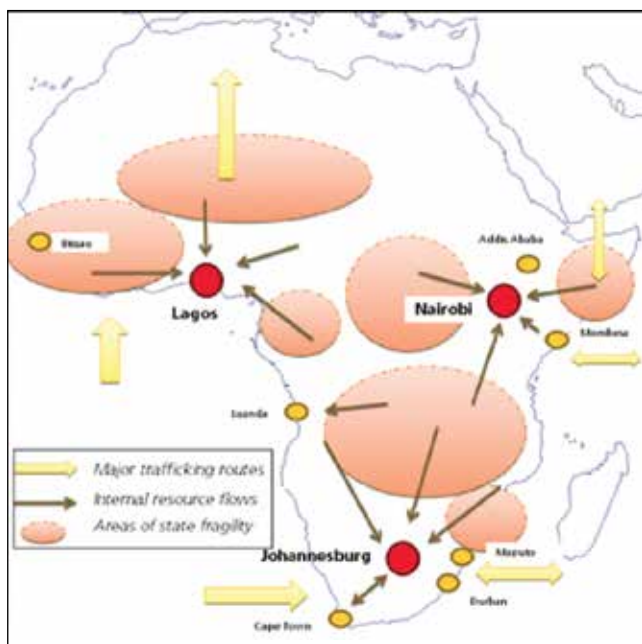
Organized crime on the African continent has been considered in greater detail in the literature in connection with corruption and the criminalization of African elites – and, by implication, of the African state. The works of

Jean-Francois Bayart, Stephen Ellis and others have been seminal in this regard.²⁷ However, these are not studies of organized crime or illicit trafficking as such, but rather a consideration of some of their implications for African state formation. A single study of the nature, impact and evolution of organized crime in Africa remains to be written.

2.4 The criminal economies of Africa

Taking an overarching view of organized crime and trafficking in Africa, it can be argued that there are three major interlocking sub-regional criminal economies in sub-Saharan Africa. These are illustrated in Figure 4, and described briefly below.

Figure 4: Hinterlands and the major hubs for illicit resource and trafficking flows



Source: Authors' elaboration.

In West Africa, Nigerian criminal networks play an increasingly important role in the trafficking of cocaine and other illegal commodities through the region. Profits from these activities along the fragile coastline are channelled back through the city of Lagos in Nigeria and, to some extent, through Accra in Ghana. Recent instability in Abidjan in Ivory Coast has reduced that city's role as a major regional transport and communications hub. The

increased projection of trafficking through the unstable Sahel region, together with the weakening of state control over the northern rim (of West Africa) in several states – especially Mali, Mauritania and Niger but also Nigeria itself – is providing a broader zone for illicit activities and their interaction with terrorism and insurgency.

For East Africa and the Horn of Africa, Nairobi has become a centre for the reception of illicit funds from both illicit trafficking and piracy. The city serves as a node for engagement with the outside world for four zones of state fragility: South Sudan; northern DRC and northern Uganda; eastern DRC; and Somalia. Mombasa port is an important trafficking and smuggling centre for drugs entering from South Asia. There have been several major seizures at the port, although there is evidence that seized drugs were not properly disposed of.²⁸ Drugs are also trafficked through Kismayo and Bosaso ports and transported overland to Kenya.

The criminal economy of southern Africa is more complex. Criminal networks in South Africa, including a prominent set of Nigerians and other foreigners residing there, play an important role in trafficking drugs and other contraband to and through that country. Nevertheless, the pattern of fragile hinterland and urban node repeat themselves, with Johannesburg serving as a hub for communications and banking across the region. The profits of illicit trafficking and associated criminal activities in the DRC and the broader region, including Zimbabwe, filter through the city. Organized crime in the region is characterized by the exploitation of natural resources and trafficking of other products, including cannabis, minerals, timber and wildlife. It is estimated that some US\$200 million in gross revenues is generated annually from these activities.²⁹ The huge foreign diaspora in Johannesburg provides a network of connections across the whole southern African region.

Much more analysis is required to develop this model fully, but the overall principle that criminal activities perpetuate, expand and attract other forms of criminal activity – sometimes referred to as criminal accumulation – in the fragile hinterlands and that resources are channelled through a limited number of major cities represents, in broad terms, the evolution on the ground. This has major implications for stability and governance in each hub city and profound implications for the political economy of each sub-region. These developments also need to be seen against a set of parallel and connected trends that are shaping the nature of the continent's criminal economy.

3. THE IMPACT OF ORGANIZED CRIME ON CITIZEN AND STATE SECURITY

Development actors have, for the most part, shied away from linking organized crime and illicit trafficking with the development agenda. This is beginning to change. The publication of the World Bank's 2011 *World Development Report* with its focus on 'Conflict, Security and Development' was a notable marker of the shift of the debate. The World Bank report points to the important linkage between weak states and the growth of criminal activities, and highlights the necessity of breaking the cycle of violence through a focus on strengthening institutions, amongst other interventions.³⁰ The report emphasized the positive correlation – demonstrated in a number of global theatres – between organized crime and the number of homicides and violent crimes, as well as the incidence of crimes against property and person. The connections between state fragility, citizen security and organized crime are likely to be a dominant feature of debate in and about Africa for some time to come.

Africa is not alone in failing to dedicate sufficient attention and awareness to the human costs of organized crime and the threats it poses to society at large. The 2011 United Nations Office on Drugs and Crime (UNODC) Globalization of Crime Study explained that while many forms of organized crime involve violence and carry personal consequences, these threats must also be measured in terms of both direct and indirect impacts on society.³¹ While the individual human costs may be more obvious in one region, countries rarely appreciate the spillover effects in other areas, whether they be origin, transit or destination countries. As the UNODC report highlights: "Only when viewed globally are the net costs of trafficking apparent, and only national governments, not their organized crime substitutes, have any incentive to look globally."³²

To facilitate an understanding of the impact of organized crime in the United Kingdom, that country's Serious and Organised Crime Agency has developed a Harm Framework for Organised Crime.³³ The framework analyses the harm caused across a number of broad categories at the individual or local level, at the level of the community or region, and at the level of the state or international system. We will briefly consider some of these categories of harm and their impact within the African context.

3.1 Crime corrodes state institutions and democratic processes

The flow of external resources has distorted the nature of legitimate local political struggles for power. In West Africa, for example, since the mid-1990s a series of weak and fragile states have developed into major transit points for flows of illicit drugs, especially cocaine destined for Europe, but also methamphetamines bound for the Far East. The case of West Africa has been crucial to putting the issue of organized crime more firmly on the agenda in Africa. In a relatively short space of time, drug traffickers targeted a set of small states along the West African coast, overwhelming both the political and economic frameworks of the country with drug money and influence. This phenomenon has included Sierra Leone, Liberia, Guinea and Guinea-Bissau.³⁴

The volume of funds generated by the transit trade is considerable, especially given the level of poverty in the region. In 2009, some 21 tonnes of cocaine were smuggled via West Africa to Europe. Valued at US\$900 million, that is the rough equivalent of the combined GDPs of Sierra Leone and Guinea.³⁵ Unsurprisingly given these volumes, the degree to which drug money entered the political elite became more evident over time; senior police, military and aviation officials, the wife and family of a president, prominent businessmen and politicians have all been implicated. This resource flow has also ensured that elements within the formal institutional structure of the state have orientated themselves to protect the trade, and by so doing, ensured their continued financial benefit. The clearest example is in Guinea-Bissau with the re-appointment of a drug trafficking kingpin, Jose Americo Bubo Na Tchuto, as Naval Chief of Staff, with considerable power to use military resources to protect trafficking routes.³⁶

There is increasing evidence of and growing concern over the extent to which criminal groups are disrupting democratic governance processes, either by undermining already weak state authority and the rule of law by fuelling corruption, or by compromising elections and sponsoring coups. In some regions, there is visible convergence between organized crime and terrorist groups. There is also growing evidence that illicit monies from the drug trade are funding electoral campaigns and political parties, and generally affecting political and broader state-society

relations. Weak legal frameworks and implementation mechanisms for regulation of party campaign financing, asset disclosure and money laundering make it extremely difficult to confirm these claims. The problem is particularly well documented in West African states, where parties emerging from conflict have failed to establish sustainable democratic processes that allow competing political and economic interests to be channelled through state institutions in a routine, smooth and violence-free manner, without resorting to frequent corruption and conflict.

The increasingly inter-woven nature of politics, organized crime and corruption poses a significant threat to the long-term development of democracy on the continent. The seeming impunity (with some exceptions) of African elites from prosecution and their ongoing connections to organized crime have undermined citizens' trust in democratic institutions, and both licit and illicit economic development may have bolstered some authoritarian regimes. Such trends, and their ability to perpetuate themselves, have long-term implications for future political and economic progress in both West Africa and in the Horn of Africa.

Thus, while a few years ago drug trafficking was nowhere near the top of the policy agenda for the West African region (with the possible exception of Nigeria), that is no longer the case, and the influence of criminal money must now be regarded as one of the key development challenges facing the region. In the Horn of Africa, a failure to understand the political ramifications of the control of both licit and illicit economic activity (through violence or the threat thereof) has presented obstacles to a peaceful resolution of the conflict.

There is no question that a political system in which organized crime has taken root will be characterized by high levels of corruption, including by state institutions that either act for criminal gain or allow criminal groups to do so without intervening, and by a political class that is the same as, or closely aligned with, criminal groups. We need to develop a broader understanding of political systems, since corruption can undermine all aspects of state institutions: local government, law enforcement, the military, legislators, the financial-management sector, the health system, the judiciary and social security. In some states, the whole structure may be compromised.

The hijacking of legitimate political processes by criminal actors has a fundamental impact on the capacity of the country to achieve a sustainable rule of law

framework. It undermines people's sense of inclusion and enfranchisement, which in turn makes them less likely to engage in institution-building activities, less likely to trust their state institutions, and thus more likely to engage in illicit activities themselves. Organized crime is characterized by its ability to displace itself when challenged, and constantly expand its influence to new geographic territories and new markets. In a recently published guide to understanding the impact of organized crime on fragile states, the authors noted that "the influence of organized crime on state structures is often compared with cancer, with the treatment being the same: to identify, isolate, and remove its growth before it kills the body".³⁷

3.2 Organized crime as a driver for conflict and instability

Illicit flows and their control by organizations resembling criminal groups or networks are not only crucial in determining patterns of violence, but have also acted as a disincentive for resolution of conflicts and the long-term consolidation of institutions. The impact of organized crime on Africa's small, conflict, post-conflict and fragile states has been severe. Resource flows to weak and fragile states during the Cold War perpetuated conflicts in a number of those states. In many cases, those resource flows have now been criminalized but their impact has not changed. The considerable income generated from illicit activities and control over natural resources presents a powerful incentive to vested interests and armed groups to sustain conflict. While the nature of this phenomenon has been explored in the literature on "greed and grievance",³⁸ the analysis has not yet extended to an examination of the broader criminal connections that make this possible. By not confronting this situation effectively, the international community may inadvertently empower criminal actors at the expense of ordinary citizens.³⁹

For example, although armed conflicts have declined markedly in the Great Lakes region of Africa, transnational organized crime activities and the money they generate appear to play a significant role in perpetuating instability, lawlessness and violence. That is particularly true in the east of the DRC, where it is estimated that there are still between 6,500 and 13,000 active members of armed groups who are benefiting from criminal activity.⁴⁰ Groups once divided by ideology have formed coalitions of convenience founded on greed, and the violence that accompanies their activities prevents the whole region from benefiting from sustainable development opportunities.

Organized crime in the Great Lakes region is characterized by the exploitation of natural resources and trafficking of other products, including cannabis, minerals, timber and wildlife. It is estimated that around US\$200 million in gross revenues is generated from those activities.⁴¹ This region is also severely affected by the trafficking of children into armed conflict.

Unless the flows of contraband are addressed, incentives for armed groups to continue to incite instability will persist and it will be extremely difficult to build state capacity and establish rule of law in this region. According to *Global Finance*, DRC and Burundi are ranked the poorest and third poorest countries in the world in terms of GDP per capita,⁴² and the others are not much better off. Even in parts of the region where the political will to secure order is the strongest, that order is under constant threat due to the lack of resources. This is occurring at a time when illegal flows out of the region are estimated in the hundreds of millions of dollars per year.⁴³ This context makes it difficult to provide an appropriate criminal justice response to crimes such as murder, rape and trafficking in children. Moreover, crime and violence spill over into neighbouring countries, and consequent refugee flows further augment cross-border populations. Even as some states have made great strides in development and governance in recent years, the security of the region as a whole is undermined by those that have lagged behind.

The impact of illicit drug money is now also affecting stability and state security further north along the Sahel band. That region has been affected not only by increased drug trafficking from the south, but also by instability to the north. State control over the region, always weak, has deteriorated and in some places (such as northern Mali) there is a dangerous intersection of drugs, crime, terrorism and insurgency. As a recent assessment notes: "Already vulnerable because of weak border control, a dire humanitarian situation, tensions between nomadic Tuareg groups and the central governments, and its location along cocaine trafficking routes, the region has become even more unstable due to an influx of weapons and fighters from Libya."⁴⁴

The case of the Sahel illustrates how illicit trafficking intertwined with other developments provides an easy entry point for instability. Thus, in the collapsed state of Somalia, the continuation of a protracted conflict has strong ties to the control of illicit flows. The long conflict has built a network of economic beneficiaries, and any change in the pattern of the conflict is liable to affect and

change economic interests. Indeed, the impact of illicit trafficking in Africa must be considered more widely than just in terms of those commodities – cocaine being the most prominent – that attract the interest of the Western media.

The proceeds from legitimate economic activities in Somalia dwarf anything made from piracy – though piracy is often reported in the Western media to be the mainstay of the local economy.⁴⁵ At the same time, the profitability of those enterprises has helped sustain the conflict in the context of a failed state. Economic activity is not possible in these conditions without violent protection methods; the provision of protection for businesses is a defining feature of organized crime, and the destabilization of society its unfortunate by-product.

3.3 Urban areas as a locus for crime

Beyond the obvious conclusions to be drawn about fragile states, there is also growing evidence that organized criminal activity may have even more serious implications for middle-income countries at regional level, whose major cities serve as hubs for trade and connections to the global economy. Interactions among these core states, the regional criminal economies, and neighbouring weak and fragile states, are an issue that requires much more attention.

The formation of cities in Africa did not serve as the basis for state creation as it did elsewhere in the world, based on strong linkages between cities and hinterlands. Rather, the formation of urban areas was to service the needs of the colonizer and this defined the future of the African city. The projection of administrative and political power from the capital into often sparsely populated rural areas is weak in many African states. The evolution of the continental criminal economy is strongly shaped by this development trajectory in two ways.

First, the lack of state reach into the rural hinterlands provides opportunities for the control of illicit activities by non-state entities. This phenomenon has already been explored above in respect of the linkage between organized crime and fragility. The point to emphasize here, however, is that fragility is not always confined within state boundaries, but often affects portions of states or regions that cross boundaries, where formal state institutions may only have nominal control.

Second, a series of major urban complexes on the continent now increasingly serve as interfaces or hubs between the African economy and the globe. This is a reflection of infrastructure, transport connections, banking and other factors. Perversely, criminal activities in the hinterland are increasingly connected to these major continental hubs. Illicit transactions (like their counterparts in the licit economy) require a degree of infrastructure. Those who control and profit most from criminal networks and illicit resource flows will not be found in the hinterland, but living in the major cities – each of these in turn exists in one of the continent's middle-income powers. The economic dominance of each of these countries, the role of their key cities, and the political economy of illicit activity in Africa are closely connected.

The cities that are the crucial sub-Saharan African interfaces with the global economy are all found in the emerging middle-income or regional powers. Nigeria, South Africa and Kenya are all engaged in fragile democracy building exercises, but in each case a mega-city – Lagos, Johannesburg and Nairobi respectively – serves as a hub for illicit trafficking, laundering of criminal proceeds and organized crime. In this respect, while the hinterlands of the continent may provide the space for illicit accumulation and trafficking, it is a network of cities that provides the nodes for criminal activity. The result is two-fold: first, heavy flows of illicit resources are being channelled through these cities; and second, the control of these illicit flows will increasingly have a direct impact on patterns of violence and political control in these major urban centres.

Take the case of Nairobi and Kenya. In 2010 alone, a staggering US\$2.1 billion found its way into the Kenyan economy without the government being able to explain the source. A recent US State Department report concludes that the Kenyan financial system may be laundering more than US\$100 million a year, including proceeds of drug trafficking and piracy ransom money.⁴⁶ These are significant sums, and they have filtered into the sinews of the political system. As a recent ground-breaking assessment notes: "Criminal networks have penetrated the political class and there are growing concerns about their ability to fund elections and to exercise influence in Parliament and in the procurement processes."⁴⁷

Such resource flows directed by key state actors not only have the potential to distort legitimate economic development by undercutting procurement processes and channelling state funds to criminal means, but they

also provide the means to buy protection and to project violence. In the context of urban centres that are growing across the entire continent at an estimated 15-18 million people a year, and considering that 70 percent of Africans are below the age of 25,⁴⁸ the resulting concentration of unemployed urban young men is a volatile mix. Political violence in the slums of Nairobi is inextricably linked with broader illicit resource flows and their infiltration of the political process.

While rising levels of violence, crime, fear and insecurity in urban centres have focused attention on the need to address urban fragility, it should be noted that these are symptoms of underlying developmental problems, and not security issues in and of themselves. Approaching urban fragility as solely a security problem often leads to short-term interventions that are disconnected from the underlying causes of insecurity; poor people frequently report the value that they place on security, but this includes security of tenure and livelihoods, as opposed to just physical security. A development approach is therefore required, to strengthen weak infrastructure, expand livelihoods for slum dwellers, and invest in long-term efforts to build local government capacity and accountability.

3.4 Impact on citizen security

While yielding high profits for its perpetrators and leaders, organized crime involves high risks and costs for the mid- and lower-level actors, not to mention the unwitting bystanders who fall victim to it. Every year, countless individuals lose their lives at the hands of criminals involved in organized crime, succumbing to drug-related health problems or injuries inflicted by firearms, or losing their lives as a result of the unscrupulous methods and motives of human traffickers and smugglers of migrants.

National counter-narcotics efforts have resulted in serious human rights violations, not least in the form of the death penalty imposed for drug trafficking offences. In some countries in southern and West Africa, drug trafficking has increased intravenous drug use, which has fuelled the spread of HIV through the use of infected needles.⁴⁹ Counter-narcotics efforts have long been dogged by the displacement effect – successes in suppressing production and trafficking in one country or region lead to the same problem emerging elsewhere. When drug trafficking finds new routes, other forms of organized crime tend to follow as trafficking groups diversify into other criminal businesses, such as trafficking in persons, arms and other

illicit products, extortion, kidnapping, protection rackets, gambling and prostitution.

Crime does not affect all citizens uniformly – race, class and gender are all major determinants of the nature of victimization. The significant inequality of income distribution in Africa is relevant in this respect. Wealthy communities are better able to insulate themselves from the more deleterious effects of organized crime, in ways ranging from the use of economic or political influence to reinforce their interests, to the use of private security to protect their people and property. By contrast, for a variety of reasons, poorer communities may be more vulnerable both to crime and its impact. This is an outcome of limited access to formal economic opportunity, social services and justice, and will be discussed further in the next section.

Studies on the impact of organized crime across the globe have demonstrated that the burden falls disproportionately on the most vulnerable in society – the poor, marginalized groups, and women and children. Men and women, girls and boys experience and participate in an organized crime economy in different ways. Typically, men and boys are seen as a resource for organized criminal actors, serving as low or mid-level actors in criminal gangs – whereas women are increasingly becoming the commodity and victims of organized criminal flows. Women and children also suffer disproportionately from increased violence in the community, which has long been proven to have a direct correlation to domestic abuse and gender-based crimes.⁵⁰

Furthermore, some contemporary forms of transnational crime directly involve gender-based violence and exploitation. This is clearly true of various organized criminal activities relating to trafficking in women and children for the purpose of their exploitation. There is strong evidence of the heightened vulnerability of women and children to certain forms of transnational organized crime – human trafficking, child soldiering and smuggling of migrants being the obvious ones. There are also reports of increasing recruitment of women into criminal organizations, though this is not well documented for Africa.⁵¹

Organized crime can also lead to human rights violations, affecting freedom of movement, freedom of expression, freedom from fear, and the right to liberty and security of person. In some cases criminals may violate these rights, but in other cases, an excessively heavy-handed response to crime by the state may violate people's rights. In either scenario, the implications for citizens' perceived and actual security and the broader impact on the rule of law and potential for development are severe.

One way to quantifiably measure the impact of organized crime activity is through analysis of the increased levels of violence in society. The notion of 'cost of crime' is a relatively new body of thinking and analysis that refers to the consequences stemming from crimes against property and people and the trafficking in illegal goods and services, all of which affect the well-being of victims and society. A related notion is the 'cost of violence', a concept that attaches an economic value to the damages caused by the infliction of force (or threat to intentionally inflict force), against oneself, another, a group, or the community as a whole.⁵²

There has been little or no data collection in Africa on the cost of crime – South Africa being the exception, where victim surveys and other statistical indicators of the impact of crime on society have been used since the post-apartheid transition in the 1990s. However, as an indicator of the potential scale of the cost of crime in societies beset by organized crime and trafficking, a 2000 study in Latin America estimated the costs of crime (measured as the cost of health, material loss, lost productivity, investment, labour and consumption) as representing 24.9 percent of GDP in El Salvador and Colombia, 12.5 percent in Mexico, and approximately 11 percent in Venezuela and Brazil.⁵³ While no such analysis has been done for sub-Saharan Africa, it is clear that in regions where organized criminal groups are active, notably in West Africa, the long-term costs of organized crime could be substantial.

4. UNDERSTANDING AFRICA'S VULNERABILITY TO ORGANIZED CRIME

Considerable progress has been made in development and peace consolidation in some parts of West Africa, as well as notable democratic and socio-economic advances in some instances. In spite of that, and notwithstanding the fact that some countries, such as Ghana, have no history of violent national civil conflict, it seems that there are structural deficiencies that have made much of the region susceptible to the emerging threats from transnational organized crime and trafficking. These vulnerabilities include fragile state institutions; massive income inequality; insufficient legitimate economic opportunities; weak regulatory frameworks; the inability of criminal justice systems to ensure effective operation of the rule of law and access to justice for victims; weak border control systems (leading to porous territorial boundaries); and inadequate coordination and information-sharing among relevant national agencies, as well as limited institutional cooperation across borders with neighbouring countries.

The above-noted weaknesses seem to be the result, in large measure, of years of economic mismanagement and lack of social investment, exacerbated by civil wars that in some contexts have significantly diminished human capital, social infrastructure and productive national development assets. Historical factors contributing to vulnerability include corrosive nationalism, diverse colonial legacies with different legislative and cultural affiliations, and the fact that national boundaries often do not coincide with the territories of traditional ethnic groups (some with historical animosities). These factors seem to have exposed the sub-region to the emergence of relatively new threats to peace and security and to have undermined capacity to respond adequately to organized crime, trafficking and terrorism.

To achieve a more strategic and effective response to the burgeoning threat of organized crime in Africa, it is useful to unpack some of the factors contributing to sub-Saharan Africa's fragility and vulnerability to organized crime, and to examine the linkages among them, which together create a context in which crime, insecurity and violence can flourish.

4.1 State fragility

It had always been assumed that organized crime was attracted to places where state control was weak as a result of conflict and/or political instability. More recent

thinking, however, suggests that patterns of transnational crime may be imperfectly associated with weak and fragile states, and that the relationship, while important, may be more complicated and affect different states in different ways. Case studies across a range of contexts have shown that corruption, economic distress, weak rule of law and poor security – all symptoms of state fragility rather than conflict – provide more significant enabling conditions for transnational threats.⁵⁴ In the State Fragility Index developed by the Centre for Systemic Peace, sub-Saharan Africa has the highest regional ranking for state fragility, and has the largest number of states whose fragility is increasing in the post-globalization period (defined as being since 1995).⁵⁵

What does state fragility really mean? Although there are varying definitions and indicators, a fragile state is typically defined as having some combination of the following elements: the government and state institutions are unable to provide basic services for, and meet the vital needs of, the population; there is unstable or weak governance institutions and rule of law; and there is a persistent condition of extreme poverty, lack of territorial control and a high propensity for conflict or war.⁵⁶

The failure of the state to provide basic services and meet vital needs in an equitable and transparent manner leaves the door open for other actors to take root within society. This is a theme to which we will return, but in cases where the central government lacks a monopoly on the use of force and cannot provide public security or deliver public goods and services to many of its citizens, people lose faith in, and motivation to engage with, the state. This makes the country more vulnerable to organized groups and criminal infiltration. Some studies have shown that criminal groups usually fill a void where the state is unable or unwilling to deliver public services.⁵⁷ They may enjoy a high degree of popularity because they deliver where the state has failed, providing people with benefits that may include economic opportunities, swift justice to insurgents, social protection during a period of violence and even social services like health and education. In fragile or failed states, illicit market structures may, in fact, be essential for survival.

Africa's recent history of violent conflict has also played a role in opening the door to armed groups and criminal actors, though as noted above it is not a perfect correlation. Violent conflicts typically have their origins in

human insecurity: insecurity linked to exclusion and lack of access to power and resources. A principle and purpose of democratic governance is to enable the protection of people through institutional safeguards, equality before the law and the advancement of human rights. Democratic practice links the empowerment of people to critical developmental outcomes such as education, health care and opportunities for livelihood.

Therefore, the manner in which peace, reconciliation and state-building processes are undertaken in the immediate aftermath of a violent conflict are key to understanding to what extent it is likely that organized criminal groups will take root in the country. The lesson learned in many Central African states is that it is necessary to address issues of vested interests and access to resources early in the peace process. The more successful transitions out of violent conflict have taken a broader definition of democratic governance that goes beyond just democratic elections, by adopting a more substantive and inclusive meaning that also puts emphasis on enabling human rights, physical well-being and human development.

One critical linkage between state fragility and organized crime emerges from an understanding of the impact of systemic corruption in fragile situations. The corruption may be structurally linked to a dominant party or executive power, as in Zimbabwe. In other cases, corrupt networks are run by business or militia groups that have 'captured' the state and dominate politics, for example in Chad. Where the state is absent or weak, organized crime may play an important role in economic, social and political activities, filling gaps left by the state. Structures of organized crime use and promote corruption as a method to escape prosecution and to dominate legitimate state institutions. Organized crime networks can also serve as enforcement mechanisms for corrupt deals and providers of protection services to individuals, businesses and institutions. The destabilizing effects of state corruption include the undermining of the legitimacy of the government in cases where its members are seen to be prioritizing their own ends over the needs of the population, which causes a sense of disenfranchisement and breakdown of trust between the people and the state.

Corruption exacerbates existing inequalities within the population and between political factions, thereby weakening the democratic governance framework and affecting social cohesion. This in turn can increase the risks of instability and the likelihood of conflict. This is especially true in countries where large amounts of

licit or illicit resources are available from sources such as natural resources or massive inflows of international aid. The situation is further aggravated by corruption of the national security forces by criminal forces, which can result in the state failing to provide adequate security. As a consequence, people seek protection from warlords, insurgents and other armed rivals of the state, thereby increasing fragility and the risk of conflict.⁵⁸

Another important dimension in understanding the impact of state fragility on the propensity for organized crime activity is the integrity of, and access to, justice systems. If the state criminal justice institutions are perceived as a primary instrument for the government and elites to maintain power through the perpetration of injustice, this is a powerful deterrent for communities to respect the rule of law and to seek redress through state-run systems. Politicization of the police, judiciary and correctional facilities leads to arbitrariness, discrimination, predation and abuse in numerous environments. Yet, even if the formal criminal justice system were more accessible, fair, representative and transparent, many communities – particularly among the rural poor – would prefer the informal system, which is usually community-based and often seeks reconciliation or restorative justice rather than punishment.

Across large parts of rural sub-Saharan Africa, traditional authorities and customary mechanisms remain the primary vehicle for conflict resolution for issues as varied as land disputes, family disagreements and inheritance matters.⁵⁹ In the absence of a positive relationship between communities and their legitimate justice systems, people are more likely to seek alternative forms of justice and protection, including vigilantism and retribution through gangs, armed groups and other extra-judicial actors. In addition, individuals who perceive that they have few alternatives to obtain justice are more likely to turn to criminal acts themselves.⁶⁰

4.2 Formal and informal economic activity

There are, broadly speaking, two spheres in which economic factors can facilitate the entry and growth of organized crime in sub-Saharan Africa. First is at the level of economic and regulatory frameworks and controls and the creation of strong financial systems within the state. As the introduction of this paper highlighted, phenomenal economic growth is sweeping Africa, and that growth is of great importance for all African citizens. But when

state and economic infrastructure is fragile, controls over economic growth are weak, and barriers against corruption, exploitation and crime are low, the tide of growth can come with a dangerous undertow.

The second sphere is at a higher level, where the lack of regulatory frameworks and governance mechanisms for the private sector provide a breeding ground for the growth of organized crime. The degree of transparency and effectiveness of the banking system affects the drivers of illicit activity, as does the feasibility of accessing financial services within a formal regulatory framework to conduct normal business activities. For example, if small or large businesses find it difficult to obtain loans, they will rely on illegal sources to obtain financial services at higher interest rates.

As part of the Global Competitiveness Index, the World Economic Forum maintains a survey of businesses aimed at measuring the costs imposed by organized crime on firms, which also provides an estimate of the extent of victimization of businesses by organized crime. The composite includes indicators of five core activities (trafficking in persons, firearms, stolen cars and cigarettes, in addition to fraud), as well as four secondary factors (costs for business, size of the informal economy as a proportion of GDP, levels of violence and amount of money laundering).⁶¹ While the 2010-2011 Index acknowledges Africa's impressive growth, it also notes that "an assessment of the competitiveness of African economies raises questions about how sustainable this growth will be over the longer-term and highlights areas in need of urgent attention to allow Africa to achieve its full economic potential."⁶² The areas in which Africa is most constrained in its ability to achieve long-term sustainable and credible growth fall predominantly in the security sector – threats from crime, inability to protect from crime, and low legitimacy of state institutions. In those categories, African countries cluster at the bottom of the world scale.

The distorting effect that illicit activities have on domestic economies in Africa is an important externality that has not been well analysed. While there may be some benefits from organized crime, in that it generates resources that could promote development – the building boom in Nairobi, for example, is said to be driven by the illicit proceeds of piracy⁶³ – the benefit is far outweighed by the longer-term damage that criminal money has on legitimate economic activity, entrepreneurship and the international investment climate. In fact, a recent study by the Global Agenda Council on Organized Crime detailed

14 ways that the laundering of criminal money into real estate encourages further criminal behaviour and fosters insecurity.⁶⁴ Apart from the obvious fact that such money laundering may yield profits that allow criminals to sustain their activities and simultaneously provide stability and security for their investments, other socio-economic factors are at work. For example, criminals publicize their success by buying valuable real estate, which proves a tool for recruitment of prospective members into organized crime, especially impressionable youth.

Criminally inflated property booms push prices beyond the reach of legitimate real estate buyers, resulting in severe dislocations and economic distortions. The threefold increase of property prices in Mombasa, Kenya within only five years made it increasingly difficult for middle-income families to buy a house, and this situation in turn adds pressure to legitimate enterprises. In the mid-2000s, according to The Economist house price index,⁶⁵ South Africa had the largest price increase in housing of any major market analysed; the president of the Financial Action Task Force stated in 2005 that he suspected that money laundering was one of the reasons for the sharp increase in prices. Money laundering into construction companies can drive out legitimate investors who cannot obtain bank credit or compete against the money launderers, who have an excess of cash. Money laundering into property may lead to the decay of urban areas as well as increased crime, since in some cases the properties are bought then left vacant.⁶⁶

Alongside service delivery, regulation of the private sector is a major function of government. Many states clearly do not have sufficient regulatory frameworks to do this, most often because of their weak ability to legislate and insufficient attention to pro-poor legislation that upholds social and economic rights. This is a major state-building – and therefore development – challenge and a key reason that, at state level, organized criminal networks can easily exploit informal economic activity to self-perpetuate and spread criminal behaviour.

At the community and individual levels there is another series of economic factors at play. Poverty, inequality and the lack of viable legitimate livelihoods provide a ready supply of labour for organized criminal activities, and also create a favourable environment to exploit the social fabric as a foundation for organized crime. To take an extreme example, Guinea-Bissau – the much-touted 'narco-state' of West Africa – is one of the poorest countries in the world, ranked 176 out of 187 countries in the Human

Development Report of 2011.⁶⁷ Its entire state budget is equivalent to the European wholesale market price for 2.5 tonnes of cocaine, just a fraction of the 40 tonnes that supposedly transit through West Africa annually.⁶⁸

In such a context, corruption and crime may present themselves as socially acceptable solutions and a means of survival in a society, given that around 66 percent of the population live below the national poverty line, 80 percent of the poor are between 18 and 35 years old, unemployment is pervasive, and civil servants are only sporadically paid a meagre salary with which to provide for their families.⁶⁹ It can hardly be considered surprising in conditions like these that an illicit alternative is compelling as a livelihood option.

4.3 Social cohesion, social inclusion

Typically, when analysing transnational organized crime and responses to it, the temptation is to focus on structures and processes of criminal justice, law enforcement, intelligence, security and border control. Although rising levels of violence, crime, fear and insecurity, particularly in urban centres, have clearly highlighted the need to address fragility, the response has traditionally been to view these as a security problem. What this approach fails to capture – and part of the reason that it has failed to stem the growth of organized crime – is a genuine understanding of the underlying causes of fragility and security, which include perceptions of equality, justice, security of tenure and security of livelihoods.

The strength of social capital in the community is an indicator that has long been proven to be negatively correlated to violent crime.⁷⁰ While there are a number of different measures, social capital is broadly defined as the set of rules, norms, obligations, reciprocity, and trust embedded in social relations, social structures, and society's institutional arrangements, which enable members to achieve their individual and community objectives.⁷¹

A feature of globalization that has been touched on only lightly in this paper, but which is extremely important in discussions of social cohesion and social capital, is mobility and migration. Africa is characterized by very high levels

of migration, both within and across national borders. Urban growth rates are among the highest in the world, averaging about 7 percent annually, with several major African cities having growth rates in excess of 10 percent per year.⁷² Freedom of movement within certain regions and economic zones has made these cities into true sub-regional melting pots. This has contributed to traditional ways of life – particularly those of rural communities – breaking down, and to social identities and relations changing in a variety of ways.

Many of the home-grown transnational organized criminal groups in Africa have been defined along family or clan lines. The roots of organized crime in South Africa may have been in a loose affiliation of individuals, but its growth was typically based on family, community or close ethnic links. For example, Portuguese nationals resident in South Africa used their old contacts in war-torn Angola and newly peaceful Mozambique to secure their 'business interests'. Those contacts, in turn, used their local networks to procure minerals, drugs or weapons for the external contacts, and so a transnational organized crime network was born.⁷³

There is a major social and cultural risk in Africa that organized crime and trafficking are well placed to exploit, which is the attraction that drug money may have for young people who are away from their traditional family and community structures. In a society where formal jobs are scarce and education is too expensive for the vast majority of people, where the main way for men to earn respect is their ability to acquire money and girlfriends, and where girls are increasingly having to turn to prostitution and transactional sex as a means of survival, the promise of acquiring wealth through drug trafficking often presents itself as the only way to escape poverty in the short run. The new inflow of money helps to buy 'social respect' and results in a form of 'social becoming'.⁷⁴ This process was observed in the case of youth mobilization for war in Guinea-Bissau, as one example, where belonging to armed groups created the illusion of equality and the erosion of hierarchies.⁷⁵ In this way, gangs emerge as new models of social integration and community cohesion. In these contexts, violence turns into an organized survival strategy and/or an affirmation strategy for youth as groups and individuals.

5. CRAFTING A DEVELOPMENT RESPONSE

The issue of organized crime impacts directly on the mandate of the UNDP. The World Development Report 2011 identified organized crime as one of the most pernicious threats to human security, governance and the rule of the law.⁷⁶ To quote a recent Foreign Affairs article: "Increasingly, fighting transnational crime must mean more than curbing the traffic of counterfeit goods, drugs, weapons and people; it must also involve preventing and reversing the criminalization of governments."⁷⁷ A holistic response and a global strategy are required – one which reinforces state capacity, fights corruption and increases community level resilience.

Because transnational organized crime markets are global in scale, global strategies are required to address them. Anything less is likely to produce displacement side effects, especially in the most vulnerable communities and on the most vulnerable members of society – women, children and the poor. Countering transnational organized crime must therefore be seen as a development challenge, and requires leadership from the development community to respond effectively. Some credible policy options for future interventions include:

- **Improve information gathering and analysis**

Focus more efforts on ensuring better information on trends and impacts. This is an area of policy that is often driven by guesswork. As the scale of the problem grows, there is an urgent need to increase and enhance information collection and analysis and translate these into effective policy responses. In an age of greater Internet connectivity on the continent, civil society can play a key role in this respect. Supporting regional observatories to monitor illicit trafficking is one way of promoting the engagement of civil society groups, particularly given the key role that the media must play in drawing attention to crime and corruption.

- **Incorporate awareness of transnational organized crime as a crosscutting theme in all interventions**

Respond to organized crime as a crosscutting issue. It is increasingly relevant in many areas: peace and security, the environment (deforestation or poaching), health (counterfeit medicines are now a huge issue in several African states), education (youth gangs), transportation, resource extraction, communications and the use of the Internet. Specific responses, including in the area

of prevention, will need to be tailor-made for different sectors. Responding to the operation of criminal networks will increasingly go beyond the prerogative of any single government department or any one UN organization, and demand a combined effort.

- **Promote regional capacity, coordination and responses**

Explore options for greater regional responsibility in responding to organized crime. While not fully successful, the response of Kenya and other smaller regional states (e.g. Mauritius and Seychelles) to piracy off the coast of Somalia offers some interesting lessons, most notably the importance of building the capacity of stronger states to try offenders from weaker or fragile ones that lack the capacity to do so. Debates about establishing systems for regional prosecutions should be supported, particularly given that such approaches are more likely to be seen as the shared responsibility of developed and developing countries, rather than as externally imposed responses with little local ownership.

This also requires efforts to put crime and citizen security more firmly on the agenda of the African Union and the Regional Economic Commissions as a development issue. The response of the Economic Community of West African States in the case of cocaine trafficking has been prominent, but West Africa still suffers from multiple initiatives that are poorly coordinated and have almost no capacity for the effective collection of data on emerging trends and on the impact of current initiatives. In short, there is much greater scope for seeking regional solutions to a challenge that is transnational. Development actors, whose focus is often only on national response, must build cross-border dimensions into their responses.

- **Global awareness raising and dissemination**

An important obstacle to action against transnational organized crime and its infiltration into the nation state is a basic lack of awareness among citizens and policymakers about the extent of the phenomenon and its damaging effects. Awareness needs to be raised across the board, including among law enforcement authorities, intelligence agencies, military organizations, media outlets, academics and non-state

actors. Ignorance of the scope and scale of the problem makes it difficult to reduce the market for illicit goods, combat corruption, and to defend or increase national budgets to combat crime and address its systemic roots.

- **Mobilize political will**

There are essentially three principles for tackling organized crime: first, to target the heads of organizations, not the mid and lower-level players; second, to delink organized crime from political processes to break down vested interests; and third, to target the proceeds from organized crime. However, strong political will is essential to achieve all of these things. Clear statements of zero tolerance towards crime, corruption and other criminal acts can be extraordinarily potent in creating a bulwark against criminal actors and building strong state institutions with integrity.

- **Strengthen state institutions and service delivery**

There is a need to broaden the approach to fighting organized crime from one of pure law enforcement to a broader set of development responses. Democratic governance and state-building efforts need to be reinforced, coordinated and tailored to ensure that strategies to counter organized crime and corruption are included and are complementary to other efforts. To reduce the systemic vulnerabilities to organized crime, efforts to strengthen institutions must be focused on improved service delivery, particularly for the poorest, most marginalized and vulnerable groups.

UNDP and its sister development agencies could encourage innovation and experimentation among governments and donors in responding to organized crime and its impact on citizen security, through the strengthening of legal frameworks, strategies, capacity building and the implementation of targeted projects that improve human and state security.

- **Reinforce traditional structures of governance and justice**

Culturally driven, traditional approaches to governance and justice can reinforce community resilience and traditional social safety nets. Community advocacy, norms and values have shown to be remarkably potent tools in reducing criminal behaviour. For example, communities in Puntland have proven successful in expelling pirates through the use of social pressures

from community leaders and elders.⁷⁸ Traditional community structures have legitimacy that derives from people's shared beliefs and traditions, rather than from Western state models. Therefore, reinforcing support to such community structures and processes can help to safeguard against organized crime influences, and also prevent the growth of weak transitional state structures with the potential for greater corruption and exploitation by criminal actors and vested interests.⁷⁹

- **Promote a balanced approach between rural livelihoods and urbanization**

The urbanization trends in Africa are creating hubs for organized crime activity. A two-fold approach is required to mitigate this situation. Strategies to provide viable livelihoods and build social capital in rural communities can help to curb rates of urbanization and promote a return to traditional livelihoods and indigenous cultural values. At the same time, every effort should be made to improve security, service delivery and viable legitimate livelihoods in urban communities, and to address the needs of unemployed urban youth as a priority.

- **Emphasize community-based structures to rebuild trust in state institutions**

Identifying and overcoming the trust disconnect between state institutions and communities is an important strategy for sustainable, crime-free development. For those institutions for which a trust deficit exists, there are a number of strategies that can be effective, including community oversight mechanisms, facilitated community dialogues and reconciliation commissions.

Importantly, all crime reduction and prevention strategies must be rooted in a human rights-based approach. As noted, some attempts to quell organized crime and crime-related violence have taken the form of excessively heavy-handed crackdowns that have compromised the human rights of suspects and victims. Violations of human rights will only exacerbate trust deficits, and thus cannot be the foundation on which sustainable development rests.

Reducing income inequality and promoting sustainable livelihoods must be a priority. Strategies must take into account the freedom of movement in sub-Saharan Africa and the great mobility of populations, who will

naturally be drawn to areas of economic opportunity. Therefore, pro-poor efforts need to be coordinated through strategies at regional and sub-Saharan Africa level.

- **Incorporate transnational organized crime awareness and capacity into peacekeeping and peace building efforts**

This paper has identified the particular vulnerability of post-conflict states. While all of the above recommendations still apply, post-conflict and transitional situations require that even greater

attention be paid to organized crime threats, and that capacity to counter those threats be built into the UN System and other transitional entities. Especially as the UN System draws down its presence in a given area of conflict, there is a need to ensure ongoing analysis and capacity to counter potential spoilers who might try to move into that vacuum. The challenge in post-conflict states is the lack of political capacity to spearhead national efforts against organized crime and corruption; therefore, interlocutors in those contexts need to advocate consistently for a strong response to these threats.

NOTES

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PAPER 3

Transitional justice in post-conflict and -crisis reconstruction and development in Africa: the controversies, contradictions and tensions

Warigia Razia



Contents

1. INTRODUCTION	49
2. CONFLICT AND POST-CONFLICT CONTEXT	50
2.1 Contemporary conflict in Africa	50
2.2 Post-conflict and -crisis contexts	53
3. TRANSITIONAL JUSTICE	55
3.1 An introduction to transitional justice	55
3.2 Transitional justice in Africa	56
3.3 Gender and transitional justice	61
4. THE CONTROVERSIES, CONTRADICTIONS AND TENSIONS OF TRANSITIONAL JUSTICE	63
4.1 Balancing objectives	63
4.2 Tensions in transitional justice	64
4.3 The International Criminal Court	65
5. LESSONS LEARNED	67
5.1 For development partners	69
5.2 For African governments	69
5.3 For non-governmental organizations	70
5.4 For UNDP	71
5.5 For the UN system	72
6. CONCLUSION	73
REFERENCES	74
NOTES	76

Transitional justice in post-conflict and -crisis reconstruction and development in Africa: The controversies, contradictions and tensions

Warigia Razia¹

1. INTRODUCTION

States emerging from violent conflict or political repression are faced with pertinent questions centred on how best to deal with their painful pasts, while balancing the fragile stability that often characterizes post-conflict and -crisis countries. The dynamics of contemporary conflicts and crises compel us to consider these questions. How can past wrongs be righted without jeopardizing current stability and future prospects? How can cycles of violent conflict and political repression be broken in the medium- to long-term, so that lasting peace, development and a just social order can be achieved? Given the increasing need for mechanisms to address these questions in Africa, it is an apt time for discourse around the role of law and justice in Africa's development, particularly in post-conflict and -crisis contexts, which feature myriad challenges and complex dynamics that require unique solutions.

This paper explores transitional justice in Africa. It begins by locating the discourse in contemporary conflicts, showing the contexts in which transitional justice mechanisms are used. It delves into the development of transitional justice and the specific dynamics of post-conflict and -crisis settings, which are distinct from the historical contexts in which transitional justice

mechanisms emerged. This reveals the controversies, contradictions and tensions in transitional justice, particularly in the African context with its so-called 'new wars'. The implications of these for conflict transformation, peacebuilding and development in Africa are discussed, before concluding with considerations for future policy, strategies and interventions.

The paper argues that a comprehensive approach to transitional justice is essential if these mechanisms are to contribute towards their intended goals, and ultimately to a just social order. It postulates that a change is required from the legal-judicial approach, which has dominated the field since its emergence, to an approach that is multidisciplinary, context specific and nuanced, victim-centred, gender sensitive, long-term and well-resourced, and that addresses legal, political and social aspects of the situation. Furthermore, as transitional justice mechanisms do not function in a vacuum, they need to be accompanied by nation and state building measures, because the state remains the framework within which durable solutions to violent conflict, political repression and underdevelopment will be found.

2. CONFLICT AND POST-CONFLICT CONTEXT

2.1 Contemporary conflict in Africa

Transitional justice methods are increasingly being applied, particularly in Africa, to conflict and post-conflict contexts, as opposed to the post-authoritarian settings in which transitional justice first appeared. Therefore, to contextualize the discussion, this section provides an overview of contemporary conflict in Africa.

European colonialism had a devastating impact on Africa. To begin with, the artificial boundaries created by the colonial rulers on partition of Africa at the Berlin Conference of 1884–1885 threw together different ethnic groups within a nation and state, without efforts to provide for cultural and ethnic diversity. However, the colonizers created ethnic identities and afforded them hierarchies that had not previously existed. Additionally, one of the colonial strategies – divide and rule – actually pitted ethnic groups against each other. This sowed the seeds for ethnic rivalry, mistrust, competition for power and resources, cycles of ‘correcting’ perceived historical and other injustices.

As a consequence, some African leaders proclaimed the single party state as a means to curb the ethnically driven competition, equitably distribute goods and services, eradicate poverty and develop their countries as they emerged from colonial dominance. However, without the necessary nation building efforts that could have provided a unified societal countercheck, the one party state perpetuated political repression, negative ethnicity and kleptocracy.

The legacy of the Cold War had an equally devastating impact. For 50 years, the polarization of the world between the United States-led liberal democracy model on one hand, and the Union of Soviet Socialist Republics socialist-communist system on the other, led to a perception of wars being a result of the competition between different ideologies or great powers for world domination. Wars were considered to be “between states for clearly defined political aims where victory is absolute.”² Africa provided the superpowers a means to achieve geostrategic goals without the risk of nuclear war. Within client states, they did this through extensive aid and violence by proxy, which took the form of cash transfers, the provision of weapons and technology, and advisory or combat

support to insurgent forces or the state itself. Promising post-independence, African leaders who tried to steer a truly independent course faced Western hostility, coups and assassinations, as each superpower feared that such leaders would become a pawn of ‘the other’.

The end of the Cold War raised various expectations and speculations about its consequences. Some predicted that the end of the Cold War was going to lead to a worldwide reduction in military expenditure and investment in development and peace, because liberal democracies were seen to have triumphed. The world after the Cold War saw not only the collapse of the interstate system based on a bipolar world order, but also in many places, the collapse of the state itself. As focus shifted from maintaining the external bipolar world order, it turned inward and state viability came into sharp focus.³ “State collapse is a deeper phenomenon than mere rebellion, coup or riot. It refers to the situation where the structure, authority [legitimate power], law, and political order have fallen apart and must be reconstituted in some form, old or new ... it is not necessarily anarchy.”⁴

As the old order collapsed, illegitimate and corrupt regimes that had been supported as part of the strategic competition between the superpowers found themselves in crisis. States changed from nationalistic post-colonial regimes, to authoritarian, to new successor regimes, as they grappled with the changing world order as well as internal dynamics. This in turn brought about a retreat to ethnic nationalism as the residual and viable identity, with order and power (but not always legitimacy) cascading down to local groups – who were ethnically, regionally or commercially based and had access to small arms and light weapons. Governmental authority at the centre no longer held sway over the periphery. With no external aid and underdeveloped productive capabilities, there was little to no governmental capacity to generate and manage revenue, which was compounded by weak institutions. Moreover, weak legitimacy to maintain a hold on power amidst growing grievances, such as high inequality and lack of political rights, opportunities for predation by state and non-state actors to control primary commodity exports, and lack of social capital to mitigate fragility, all contributed to cycles of civil war and political unrest in a number of sub-Saharan African countries. Unpleasant tactics and atrocities accompanied the

Box 1: One face of post-conflict and post-crisis reconstruction and development in Africa

Statistics vary widely on the number of women and girls raped during the 1994 Rwanda genocide, with some studies claiming that 250,000 to 500,000 women and girls were raped in less than 100 days. "In a survey of Rwandan women in 1999, 39 percent reported being raped during the 1994 genocide, and 72 percent said they knew someone who had been raped." "In 2000, a survey of 1,125 women who survived rape during the genocide found that 67 percent were HIV positive." The statistics, whether accurate or not, do not reveal the depth of violence to which women and girls were exposed. Neither do the numbers reveal the magnitude of the consequences that the victims of rape continue to suffer long after the genocide, resulting from the terror they experienced as they became casualties of war through rape. It is only when one hears personal accounts that one begins to understand the depth of that terror.

Meet Ingabire*, a survivor of the genocide. "When the genocide happened, I was only 14 years old. My parents and siblings were killed, and I was raped. I could not tell anyone what had happened to me. It was only after the war, when I found myself very sick and weak, that I went to the clinic and was checked. Tests revealed that I was pregnant and HIV positive. I did not know what to do. I was angry and sad, and did not want to continue living. The government had a programme that was helping survivors of the genocide, who had been raped and infected, with medicine [antiretroviral drugs]. I immediately began to take it, and my son was born HIV negative.

When my son was born, I did not want to take care of him. I hated him. Every time I saw him I remembered what had happened to me. I was cruel to him as he began to grow up. This continued for the first five years of his life, until I joined a women's support group. Through this group I began to share my experiences with other women who had similar experiences. We also went through healing sessions, and were equipped to live positively in spite of the rape and HIV positive status. We later began income-generating activities as a group. As a result of the healing and support I got from the group, I began to realize that my son was innocent, and I could not continue punishing him for the rape. I also began to appreciate him for the gentle, helpful, loving and sweet boy that he is. He always helps and takes care of me when I am unwell, in spite of his young age or how cruel I treated him. I feel bad that I wasted five years of his life mistreating him, instead of being the mother he needed.

It does not end there. Now that he is 13, I am faced with a new dilemma. He is now starting to ask who his father is, and where he is. I told him that his father was killed during the war. One day, during last year's genocide memorial, we were un-burying bodies from a mass grave and re-burying them in individual graves. My son asked me if his father was one of the bodies. Before I could answer him, one of my neighbours who overheard his question and suspected that I had been raped shouted back, 'No, your father is in prison with the killers.' My son was hurt and in shock, as I was. I did not know what to tell him. I still do not know what to tell him a year later, and I see the confusion and hurt at war in him. What should I tell him? Should I tell him the truth, that he was conceived as a result of rape? Do I continue to lie about his father? What does one do? What would you do if you were in my shoes?"

See Kamau (2007a); UN OCHA/IRIN (2007); and UN Women (2011) for some statistics.

*Her name has been changed to protect her identity. Consent was given at the time of the interview to share the testimony using a pseudonym.

conflicts, including ethnic cleansing, the use of child soldiers, rape and other forms of sexual violence.⁵

The retreat to ethnic nationalism as a viable identity saw pundits like Samuel Huntington postulate that future wars and competition would occur between civilization blocs, because "culture and cultural identities, which at the broadest level are civilization identities, are shaping the patterns of cohesion, disintegration, and conflict in

the post-Cold War world".⁶ Others, such as Mary Kaldor,⁷ contributed to fundamentally changing the way contemporary war was understood after the Cold War by demonstrating that what was perceived as war – war between states in which the aim is to inflict maximum violence – was becoming a relic. In its place was a new type of organized violence, which could be described as a mixture of war, organized crime and massive violations of human rights and international humanitarian law.

In this framework, contemporary wars were differentiated from 'old wars'. Their goals (particularistic political ones), protagonists (global and local), methods of funding (public and private), and the very mode of warfare (tactics of terror and destabilization) were said to be completely different and more complex than wars of the past. The 'new wars' shifted away from the aim of gaining control of state power and spreading the ideology of socialism or democracy, and instead focused on 'identity politics', using identity as a method of acquiring power, as the autonomy of the state decreased and it could no longer maintain its former role of modernizing agent and promoter of economic development.⁸

"At the turn of the 21st century, more people were being killed in wars in this region than in the rest of the world combined." Moreover, most of the world's armed conflicts were being fought in sub-Saharan Africa.⁹ The disproportionate levels of violent conflict in the region have been variously attributed in the literature to a diverse set of factors,¹⁰ including:

- low income and poverty;
- slow economic growth compounded by unfair global economic practices;
- dependence on the export of natural resources;
- scarcity of resources essential for survival, such as grazing fields and watering sources for pastoralists, and land for agriculturalists;
- high population density coupled with poor service delivery;
- high levels of crime and corruption;
- alien models of governance, as some independence leaders sought to move into authoritarian positions vacated by colonial rulers rather than seek legitimacy;
- unstable and inequitable political institutions;
- concentration of power at the centre;
- weak state capacity;
- ethnically-based domination, discrimination and competition for power and resources;
- the presence of military entrepreneurs ready to engage in violent conflict;
- availability of small arms and light weapons;
- 'neighbourhoods' of crisis ridden states with spillover effects;
- artificial boundaries cutting across ethnic groups, creating cross-border tensions and internal power imbalances; and
- geographical factors, including mountainous terrain and some large territories with populations dispersed around the periphery, providing ample places for armed forces to hide.

Africa's conflicts have been diverse, complex and intractable, and it is difficult to generalize about them. However, the study of conflict trends reveals that in many cases they:

- erupt where there is limited scope for action by citizens to hold leaders accountable;
- intensify authoritarian and militaristic government;
- originate with, or develop, an ethnic element, which in extreme cases can result in ethnic cleansing and genocide;
- create a spiral of grievance and reprisal, which can leave countries and whole regions in a cycle of violent conflict;
- result in humanitarian crisis, including mass displacement, famine and loss of life;
- employ "rape as a weapon of war", leaving women and girls with "broken bodies and broken dreams" long after the guns have gone silent;¹¹
- use forced enlistment, necessitating subsequent demobilization, disarmament, and reintegration (DDR) programmes;
- stem from or result in a breakdown in the rule of law and a culture of impunity;
- intensify poverty, economic stagnation and/or regression, and destruction of property, infrastructure, systems and institutions;
- cause a breakdown of social infrastructure and loss of social capital;
- result in individual and collective trauma that can continue for generations; and
- conclude in political agreements that leave 'unfinished business', as no settlement can satisfy all parties.¹²

Post-colonial conflicts have included civil war in Burundi, the Democratic Republic of Congo (DRC), Liberia, Sierra Leone and the Sudans, genocide in Darfur and Rwanda, and political repression and violence in Ethiopia, Kenya, Uganda and Zimbabwe, among others. Both strong states (such as Ethiopia and Rwanda) and weak states (such as DRC and Liberia) have been affected by protracted or severe violent conflict. Authoritarian states (Sudan and Uganda) as well as states at various points in transitions to democracy (Ethiopia in 1998, Rwanda in 1994 and Sudan in 1986) have succumbed to violent conflict. Ethnically homogenous states, for example, Somalia, have been immersed in conflict, as have some states with sharp ethnic cleavages.¹³

Conflict trends in the 21st century indicate a shift away from intrastate wars. Most violent conflicts are being managed, resolved or transformed, with conflict-affected states transitioning from early recovery to post-conflict and post-crisis reconstruction and development. The global financial crisis, environmental degradation and climate change, fuel and food crises, rapid urbanization, limited economic opportunities, rising economic disparities, exclusion of vulnerable groups and a growing youth bulge in an information age are all linked to increasing unrest around claims for economic rights and against corruption.

This could eventually result in a retreat to class or generation, as opposed to ethnic or religious identity, as groups are faced with similar structural issues that they are seeking to redress. On the other end of the continuum, it could result in new nationalist movements coalescing around economic rights, instead of the civil and political rights that were the focus of past movements. Initial analysis of some current unrest and violent conflict that is manifesting in the continent as religious, primarily Muslim against Christian, is revealing the influence of economic drivers.

Geopolitically, Africa is likely to see heightened competition for resources and influence from China and the United States, and potentially a new form of Cold War. A new wave of proxy wars, which may already have started with Libya, Somalia and the Sudans, will focus on access to strategic resources rather than ideology, as Africa has a wealth of mineral and energy resources that are still largely unexploited and crucial for the survival of China and the United States. More than 50 years since independence, many African states are still beset by weak regimes and institutions. This makes them vulnerable to internal conflict and thus valuable candidates for assistance from either China or the United States, who may provide diplomatic, economic and/or military assistance to one or both sides of the internal conflict.

It is critical that academics, policy makers and practitioners alike remain alert to the rapidly changing context and dynamics, to ensure that present and future transitional justice mechanisms take comprehensive approaches that are context specific and sensitive, and which provide tailored solutions for complex realities.

2.2 Post-conflict and -crisis contexts

Experiences of violent conflict involve immeasurable human development costs, which erode and/or negate developmental gains made previously. In addition, countries emerging from violent conflict have a greater potential to return to it within five to 10 years of peace and/or political agreements. "The typical post-conflict country has little better than a fifty-fifty chance of making it through the first decade in peace. Indeed, about half of civil wars are post-conflict relapses".¹⁴ Furthermore, "the risk that a country in the bottom billion falls into civil war in any five-year period is nearly one in six".¹⁵

Cessation of hostilities does not necessarily usher in social or political peace. On the contrary, post-conflict settings are plagued with an increase in homicides, crime and sexual violence, which in the author's experience can be attributed to a culture of violence, weakened rule of law and institutions, and a fragmented social fabric. Unresolved trauma, feelings of resentment and victimhood, and a culture of impunity contribute towards acts of revenge in the immediate aftermath of conflict and to cycles of violent conflict and political repression in the long-term. Unresolved trauma affects not only those directly traumatized, but their families and future generations as well. It also negatively impacts on humanitarian and early recovery efforts.

Studies in some post-conflict and transition contexts have shown that trauma survivors tend to demonstrate apathy or simply lack the energy to begin the process of recovery and engage in productive activities.¹⁶ This has seen early recovery efforts – such as support to shelter and livelihoods – fail or have reduced impact, because survivors are dysfunctional and lethargic, and unable to work towards their recovery. For instance, a group of genocide survivors in Rwanda who had received materials to construct shelters, instead sold off the materials and sought assistance for ready-made shelter elsewhere. In another instance, during early efforts to bring genocide survivors together for income generation activities, some survivors were unable to interact with neighbours of different ethnicity or showed serious mistrust in them, which negatively impacted the functioning of groups. The lessons learned from this prompted the organization in question and others to adopt trauma healing as an integral part of their post-genocide recovery and development efforts, following which there were improved outputs and outcomes.¹⁷

There is a saying that, “peace is more than the absence of war”. For peace to take root, it is necessary that transformation occurs at every level (individual, family, community, and systems and structures). This refers to the transformation from destructive expressions of conflict toward constructive development and growth.¹⁸ Violent conflict must become the last resort in the assertion of rights, not the first response. Opportunities for conflict transformation need to be created for a society to overcome the effects of violent conflict and political repression. Those processes must focus on ensuring accountability, serving justice, providing remedies to victims, promoting healing and social cohesion, upholding the rule of law and promoting institutional change that restores confidence in the state. This transformation will encompass an end to the undesirable state of affairs and efforts to ensure its non-recurrence, collectively building something desirable. The actualization of such transformation is challenging and it does not happen in a linear progression.

Creating opportunities for the transformation of post-conflict and -crisis contexts through existing justice and rule of law mechanisms remains pertinent. Various forms of weakness affect institutions, including formal justice systems, following a conflict or crisis. A look at them prior to the conflict and crisis often reveals institutions that were already under strain and poorly resourced, based on laws and policies not harmonized to international legal norms. These limitations hamper their ability to deal with international crimes, such as those committed during violent conflict.

Formal justice systems are normally centrally located and expensive, which makes them physically inaccessible and unaffordable for much of the general public. Public needs often outweigh the capacity to respond, as the number of victims and cases resulting from a conflict can easily overwhelm the formal justice system. Consequently, cases either never make it to court or are delayed for months or even years, thus intensifying the frustrations of the conflicting parties. The period between the violation, the submission of a case and the hearing of the case in court is of critical importance, because that is when tensions are likely to escalate and trauma deepen.

Where people can be identified clearly as victims and offenders, formal justice systems play an important role in establishing order. However, those systems are of limited value in cases where identification is problematic. The sheer number of offences and delays in investigations

into war crimes make identifying offenders difficult, time-consuming and expensive. Furthermore, offenders are often unwilling to confess their crimes for fear of punishment, and because they see their actions as a form of self defence or an effort to achieve their own sense of justice.¹⁹

The key justice needs of victims have been found to include the need for: safety; information/answers/truth-telling from offenders; story-telling by the victims of their victimization; recognition and acknowledgement of atrocities committed against them by offenders and institutions; restitution; empowerment in the justice process; and accountability, including measures that ensure the non-recurrence of atrocities.²⁰ Formal justice systems tend to focus on identifying what laws have been broken, who broke them and how the state should punish the offender. Offenders are held accountable to the state instead of to their victims. Victims are usually left out of the process of criminal justice completely, and their needs and trauma are not addressed. Offenders are not encouraged to understand and address their responsibility to those they harmed. This is particularly true of common law legal systems. Victims have a larger role to play in civil law or mixed systems that incorporate elements of common and civil law. This focus on the punishment of the offender and lack of attention to the victim serves to further limit the value of formal justice systems in meeting post-conflict and -crisis needs.

Informal justice systems adopt a restorative justice approach in some cases. Restorative justice holds that offenders should be punished for their crimes, but that the methods and outcomes of punishment should be facilitated to promote reconciliation between offenders and victims.²¹ Though more accessible and affordable than formal criminal justice proceedings, if these methods are not harmonized to basic justice norms and victim needs to ensure that basic principles of equity and fairness are upheld, they can be unjust and fail to achieve their goals of healing trauma and transforming people (victims and offenders) and relationships.

These challenges faced by formal and informal justice mechanisms in responding to post-conflict and -crisis reconstruction and development needs gave rise to a new approach, which is commonly called ‘transitional justice’. The next section introduces the concept of transitional justice, before looking at its application in Africa.

3. TRANSITIONAL JUSTICE

3.1 An introduction to transitional justice

Box 2: A history of transitional justice

1940s: The origins of transitional justice can be traced to World War I. However, it was only following World War II, when the International Military Tribunal (often referred to as the “Nuremberg Trials”) in Nuremberg, Germany was established as a special court to try Japanese and German leaders and soldiers for war crimes, that transitional justice became understood as an extraordinary and international approach. This development was not enduring, due to the unique political conditions of the post-war period. In spite of this, the legacy of Nuremberg was the criminalization of state wrongdoing as part of a universal rights scheme, which became the basis of modern human rights law.

1970–1980s: Transitional justice was focused on criminal justice with an emphasis on human rights promotion. Universal conceptions of ‘justice’ became the platform on which transitional justice was anchored. Lawyers, law and legal rights, defining laws and processes on how to deal with human rights violations, and holding people accountable, were the aspects that dominated initial literature. The legacy from this phase was a victim-centred approach, which transitional justice retains to date.

1980–1990s: Transitional justice was influenced by the worldwide wave of democratization. It became associated with globalization, and typified by conditions of heightened political instability and violent conflict. The scope broadened from jurisprudence to the political considerations of developing stable democratic institutions and renewing society. The emphasis turned to questions such as settling past accounts without derailing democratic progress, developing judicial or third party forums capable of resolving conflicts, working out reparations, creating memorials, and developing educational curricula to redress cultural cleavages and unhealed trauma.

1990s: Transitional justice evolved from being seen as a special or ‘soft’ form of justice to become a paradigm of the rule of law. Beginning with Argentina (1983), Chile (1990) and South Africa (1995), truth commissions became its symbol, appearing in transitional contexts in Africa, Asia, Eastern Europe and Latin America. Following the 1994 Rwanda genocide, there were proposals for truth and reconciliation commissions in conflict and post-conflict contexts in other parts of Africa and the Middle East. However, truth seeking, including through truth and reconciliation commissions, is but one form of transitional justice. Other forms of this era included prosecutions, reparations, memory and memorials, and institutional reform. These methods have been employed either individually or in combination. The legacy of this phase was the construction of a body of law associated with pervasive conflict, which contributed to laying the foundation for the law on terrorism.

2000s: The creation of the International Criminal Court (ICC), following adoption in 1998 of the Rome Statute of the International Criminal Court and its entering into force in 2002, represented a major stride for international justice. (The *ad hoc* international criminal tribunals in the Balkans and Rwanda preceded it.) The ICC is a permanent international tribunal charged with the investigation and prosecution of genocide, crimes against humanity, and war crimes. In an unprecedented move, the Rome Statute classified sexual violence as a crime against humanity and war crime.

2010s: The crime of aggression was mentioned in the Rome Statute, but the states parties could not agree on its definition and the conditions for the exercise of the ICC’s jurisdiction over this crime until the 2010 Kampala Review Conference. There, it was agreed that the crime would constitute the use of armed force by one state against another, or one state allowing its territory to be used by a different state or non-state actors to carry out acts of armed force against another state. However, the Court will not be able to exercise jurisdiction until a decision is taken by states parties in January 2017.

Beyond this, momentum is growing towards a comprehensive transitional justice approach that contributes to the accomplishment of multiple objectives: preventing the recurrence of crises and future violations of human rights, while promoting social cohesion, nation-building, ownership and inclusiveness at national and local levels. The first UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence of serious crimes and gross violations of human rights was appointed in September 2011. One of the expected outcomes of this much-needed mandate is an increase in the visibility of transitional justice issues. Thus far, this phase has emphasized the integration of transitional justice with peace, security and development through context specific, victim-centred and gender sensitive approaches.

See International Criminal Court (2002); Lemarchand (2008); Teitel (2003); and Wikipedia, Transitional Justice, en.wikipedia.org/wiki/Transitional_justice

As discussed in Box 2, the origins of transitional justice date back to World War I. However, it was not until the late 1980s and early 1990s that people began to use the term 'transitional justice'. It was during that era that human rights activists and others were seeking to address systematic abuses by former regimes without endangering the political transformations that were underway. Those sweeping changes were popularly referred to as 'transitions to democracy'.²²

Transitional justice can be defined as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes".²³ Over time, transitional justice has also become a popular term to describe both judicial and non-judicial mechanisms, used to respond to human rights violations, atrocities or large-scale abuse, committed during violent conflict and political repression.

Transitional justice first emerged in post-authoritarian settings. Those contexts had well-developed institutions and legal systems to regulate state-society relations. However, they were unable to prevent the gross violations that occurred, and were actually instruments in the abusive exercise of state power. The transitional justice measures used in that era sought to respond to this particular situation. Therefore, the transitional justice measures endeavoured to restore institutions and traditions that had been brutalized.

More recently, transitional justice mechanisms have been transferred from post-authoritarian settings to conflict and post-conflict ones, as well as settings where no transition has taken place. Unlike in post-authoritarian settings, the significant violations in post-conflict and -crisis contexts are the result of generalized social conflict, with a plethora of offenders. In addition, the latter contexts are faced with weak institutions and economic challenges.

As a result of this evolution, the present day concept of transitional justice is not easy to define; it encompasses a series of discreet though overlapping and often conflicting actions, policies, processes and objectives, and their related institutions. It is informed by a society's desire to build (or rebuild) the social fabric, justice system, and a legitimate system of governance. Its mechanisms, therefore, focus on setting up new or strengthening existing justice systems that integrate the needs and desires of the local people, cultures and institutions, respect international human rights norms; and to do justice in a way that builds peace.

Transitional justice mechanisms increasingly offer a range of measures including institutional transformation, truth seeking (truth and/or reconciliation commissions), prosecutions (domestic trials, and international and hybrid tribunals), reparations, memory and memorials, and informal justice and conflict resolution mechanisms that employ restorative justice principles.²⁴ Restorative justice focuses on the needs of victims, as described above, as well as the needs of offenders, and the deeper causes of their behaviour in a bid to rehabilitate them. Transitional justice mechanisms are said to contribute towards achieving six themes or objectives, namely, truth, justice, forgiveness, healing, peace and reconciliation.²⁵

Different post-conflict and -crisis contexts will choose to adopt different measures, focus on different objectives, in different ways, and in different sequence. The overlapping and often conflicting nature of the measures and objectives, coupled with the complexities and dynamics of the contexts, make transitional justice a highly contested terrain replete with many contradictions, controversies and tensions.²⁶

3.2 Transitional justice in Africa

The challenges faced by African countries are exacerbated by the fact that many are emerging "from violent conflicts, many of which were protracted, recurrent and regional".²⁷ Transitional justice mechanisms can contribute to conflict transformation and peacebuilding processes, but can also serve as impediments, particularly where the conflict is regional and the pursuit of justice in one locale may impact upon conflict transformation or justice in another. In spite of the risks and frequently strong opposition from current and former state officials and political elites, transitional justice mechanisms have become increasingly common²⁸ and are playing a key role in building lasting peace and viable states in Africa.

Many senior state officials and political elite were immune from national and international human rights law during much of Africa's post-colonial era. However, the last decade has seen a reversal of this trend. This was catalyzed by the International Criminal Tribunal for Rwanda (ICTR), which has indicted and prosecuted some of those most responsible for the 1994 Rwanda genocide; and the Special Court for Sierra Leone (SCSL), which pursued war criminals in Liberia and Sierra Leone. In addition, the ICC, which has five African judges, is engaged in investigations or prosecutions in eight sub-Saharan African situations; Central African Republic (CAR), Côte d'Ivoire, Darfur, DRC, Guinea, Kenya, Nigeria,

and northern Uganda. There has also been a proliferation in the use of truth seeking, traditional conflict resolution, and domestic trials. Below are descriptions of key transitional justice mechanisms that have so far been utilized in sub-Saharan Africa (in alphabetical order by name of country).²⁹

Burundi

1995: UN established International Commission of Inquiry into 1993 assassination of President Melchior Ndadaye.

2012: Truth and Reconciliation Commission expected to be established in January, but this has been delayed to later in the year. Its 24-month mandate will be to establish the historical facts of the conflict, determine its causes and nature, classify the crimes committed since independence in 1962, and identify those responsible. Thereafter, a special chamber within Burundi's judicial system will be set up to prosecute those bearing the greatest responsibility for genocide, crimes against humanity and war crimes. Delays in its establishment have heightened concern that the Commission's mandate will coincide with the next electoral cycle, which begins in early 2013. This may have negative ramifications for its impact.

Central African Republic (CAR)

9 September to 27 October 2003: National Reconciliation Forum to enable dialogue and reconciliation between different political, social and religious affiliations, and to suggest how to transform relationships and build social cohesion after the war. Major political players were not involved.

January 2005: Government sends referral to the ICC to investigate war crimes.

May 2007: ICC Prosecutor opens investigations.

November 2010: ICC trial of Jean-Pierre Bemba Gombo for war crimes and crimes against humanity begins.

Côte d'Ivoire

April 2004: Independent Commission of Inquiry appointed by UN to establish the facts and responsibility for alleged atrocities committed on 25–26 March 2004 in Abidjan.

January 2005: Côte d'Ivoire, which is not party to the Rome Statute, asks the ICC to conduct investigations to determine whether crimes committed since September 2002 come under its jurisdiction.

April 2007: A new law provides amnesty for crimes committed since 2000; it does not exclude war crimes or crimes against humanity. However, international law expressly forbids amnesty for war crimes or crimes against humanity.

December 2010 and May 2011: President of Côte d'Ivoire confirms the country's acceptance of the ICC's jurisdiction.

3 October 2011: Investigations begun by ICC into alleged crimes committed since 28 November 2010.

23 November 2011: Arrest warrant issued by ICC for Laurent Gbagbo for four counts of crimes against humanity.

30 November 2011: Gbagbo transferred to the ICC detention centre at The Hague by Ivorian authorities.

5 December 2011: Initial appearance in court, and date for hearing of confirmation of charges set for 18 June 2012.

August 2012: Confirmation of charges hearing scheduled to start, but postponed until the issue of Gbagbo's fitness to take part in the hearing is resolved.

Democratic Republic of Congo

August 1991 – January 2002 and April–December 2002: Sovereign National Conference established by Mobutu's government to examine the country's history and find a way to deal with the multidimensional crisis. The Conference recommended the establishment of political institutions to manage the country's transition to multiparty democracy. The government did not officially endorse the recommendations and the institutions were not established.

May 2004: President Kabila sends a blank referral to the ICC to investigate crimes committed in DRC since July 2002, just as the ICC is about to initiate investigations on its own initiative.

November 2004: Truth and Reconciliation Commission established as one of the organs of the Pretoria Agreement (2002) on power sharing during the transition. It was charged with investigating political crimes and human rights violations that took place from 30 June 1960 to the end of the transition. As its mandate was coming to an end with elections in 2006, there was large-scale criticism of its work, with many recommending a second and more in-depth process over a longer period of time, given the extent of the mandate.

June 2004: ICC Prosecutor launches investigations with a focus on eastern DRC.

January 2009: The first trial in the case of Thomas Lubanga Dyilo begins.

November 2009: Second trial begins, in the case of Germain Katanga and Mathieu Ngudjo Chui.

September 2011: Confirmation of charges hearing in the case of Callixte Mbarushimana takes place.

December 2011: Pre-Trial Chamber I declines to confirm charges against Callixte Mbarushimana, and he is released from custody.

March 2012: Thomas Lubanga Dyilo found guilty of the crimes of enlisting and conscripting of children under the ages of 15 years and using them to participate actively in hostilities.

July 2012: Thomas Lubanga Dyilo sentenced to 14 years of imprisonment.

July 2012: Second warrant of arrest issued by Pre-Trial Chamber II for Bosco Ntaganda. Warrant of arrest also issued for Sylvestre Mudacumura. Both are still at large.

Ethiopia

August 1992–Present: Special Prosecutor's Office set up to "establish for public knowledge and for posterity, a historical record of the abuses of the Mengistu regime; and to bring those criminally responsible for human rights violations and/or corruption to justice". It is accountable to the Prime Minister. It was expected to conclude operations in 1998, but has not formally done so to date.

Ghana

May 2002–October 2004: National Reconciliation Commission established to "seek to promote national reconciliation among Ghanaians by establishing an accurate historical record of human rights violations and abuses inflicted on persons by public institutions and officers between 6 March 1957 and 6 January 1993, and to recommend redress for the wrongs committed".³¹ It had power to compel presence, as it did in the case of former President Jerry Rawlings.

Kenya

2002: Kenyans begin advocating for the establishment

of a truth commission. The Kenya Task Force on the Establishment of a Truth, Justice and Reconciliation Commission is created. Its final report noted that 90 percent of Kenyans wanted an effective truth commission established. Its recommendations were not implemented.

2006–2012: The Mau Mau War Veterans and the Kenya Human Rights Commission initiated a process to seek reparations on behalf of five elderly Kenyans, who alleged that they had been tortured by the British authorities between 1952 and 1960. After unsuccessful attempts to get the British Government to respond to the claim satisfactorily, in 2009 the Commission filed a lawsuit on behalf of the survivors in the British High Court. On 21 July 2011, the Court ruled that the claimants had an arguable case, which was the first step towards a full hearing and thus a victory for the victims. On 5 October 2012, the Court further ruled that the claimants had the right to sue Britain. The British Government has decided to appeal on the grounds that the normal time limit for bringing a civil action is three to six years. In this case over 50 years have elapsed, and the key decision makers are dead and unable to give their account of what happened. Additionally, they argue that the claimants should have instead sued the Kenya Government, which took over all liabilities after independence.

March 2008–September 2009: Commission for the Inquiry into Post-Election Violence established to investigate the facts and circumstances surrounding the violence following the 2007 election and the conduct of state security agents in their handling of that violence, and to make recommendations concerning these and other matters.

March 2009–Present: Truth, Justice and Reconciliation Commission began work in January 2010 as part of the arrangements of the political agreement (2008) following the post-election violence. Its mandate is to investigate historical injustices, human rights violations and major economic crimes committed by the state, groups or individuals between 12 December 1963 and 28 February 2008. No blanket amnesty is to be provided for past crimes, but individual amnesties may be recommended.

The Commission is not mandated to recommend prosecutions. Victims could apply to the Commission for reparation. The final report was slated for submission to the President on 3 August 2012, and should be made public within 14 days after submission. The final report was not submitted as scheduled, and the fate of the Commission

hangs in the balance following Parliament's rejection of a bill seeking to extend its mandate for an additional nine months.

March 2010: Pre-Trial Chamber approved ICC Prosecutor's request to investigate the 2007–2008 post-election violence after the Kenyan Government took no action to launch prosecutions. This is the first ICC investigation begun on the Prosecutor's initiative, as previous cases have all been referred by states parties or by the UN Security Council.

April 2011: Six Kenyan suspects voluntarily appeared before the Pre-Trial Chamber of the ICC.

September 2011: Confirmation of charges hearings held by ICC.

January 2012: ICC confirmed charges against four of the suspects, namely, William Samoei Ruto, Joshua Arap Sang, Francis Kiriimi Muthara, and Uhuru Muigai Kenyatta, and declined to confirm the charges against two others, Henry Kiprono Kosgey and Mohammed Hussein Ali. Trials are scheduled to open in April 2013.

Liberia

February 2006–December 2009: Truth and Reconciliation Commission established to promote national peace, security, unity and reconciliation by: investigating gross human rights violations and violations of international humanitarian law as well as other abuses committed from January 1979 to 14 October 2003 (the Commission was also allowed to explore the period before 1979, if it chose); providing a forum to address impunity; establishing an independent, accurate and objective record of the past, paying particular attention to gender-based violence; and compiling a report with findings and recommendations.

The final report of the Commission was released in December 2009. It called for: criminal accountability through establishment of an extraordinary tribunal, domestic criminal prosecutions, investigations and prosecutions of economic crimes, confiscation and seizure of private and public property, and repatriation of unlawfully acquired monies; reparations through the establishment of a Reparations Trust Fund; memorialization through a national memorial and unification day; a traditional truth seeking and reconciliation process through a 'Palava Hut' system; the protection and promotion of the rights of women and children; institutional reforms, including the banning from public office of 49 individuals

(including President Ellen Johnson Sirleaf) for 30 years; and a process of national renewal.

2006–2010: A United States court tried and sentenced Charles Taylor's son, Charles McArthur Emmanuel (also known as "Chuckie Taylor") to 97 years in prison for torture and war crimes committed while head of a Liberian paramilitary unit. Chuckie Taylor was the first American citizen to be charged and convicted of war crimes committed outside the country.

2011: Peace and Reconciliation Commission established by President Ellen Johnson Sirleaf to take the findings of the Truth and Reconciliation Commission further. The Peace and Reconciliation Road Map expected to be released in November 2012.

Rwanda

January 1993: International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990 established by a coalition of Rwandan and international human rights organizations, to look into human rights violations committed between October 1990 and January 1993.

November 1994: International Criminal Tribunal for Rwanda established by the UN Security Council, to prosecute those most responsible for organizing and executing the genocide and serious violations of international humanitarian law in Rwanda and neighbouring countries between 1 January 1994 and 31 December 1994.

1998: International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events established, by the Organization of African Unity (since replaced by the African Union), to determine how the genocide was planned and executed, and to "determine culpability for the failure to enforce the (1948) Genocide Convention in Rwanda and in the Great Lakes Region".³²

1999: National Unity and Reconciliation Commission established by the government with a broad mandate to promote reconciliation in the country. The Commission has since become a permanent institution that focuses on civic education, conflict mediation and community-based reconciliation initiatives.

March 2001: *Gacaca* courts, a modernized form of traditional justice, established by the government to speed up the trials of hundreds of thousands of genocide

suspects. The jurisdiction of the *gacaca* courts was limited to crimes of genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994. Those who bear the greatest responsibility for the genocide were tried either by the ICTR or by the national courts.

Sierra Leone

February 2000 – October 2004: Truth and Reconciliation Commission established by Parliament and began work in 2002. Its mandate was to investigate and describe the causes, nature and extent of the abuses committed from the war's beginning in 1991 until the signing of the Lomé Peace Accord on 7 July 1999. The Commission had the power to compel persons to appear. It made its final report to both the government and the UN Security Council in 2004. The final report includes the names of individual perpetrators and recommendations for the government moving forward.

January 2002–Present: Special Court for Sierra Leone established, and began hearing cases on 3 June 2004. Its mandate is to try those who have greatest responsibility for crimes against humanity, war crimes and other serious violations of international law committed since 30 November 1996. Charles Taylor was indicted in 2003, detained in 2006 in Sierra Leone, then moved to The Hague due to concerns that he could destabilize the region if he remained. He was found guilty in April 2012 of all 11 charges levied by the Special Court, including terror, murder and rape. He was sentenced to 50 years in prison in May 2012.

2008–Present: Reparations Programme established by the government in collaboration with the UN, to provide material and symbolic reparations to war victims in line with the recommendations of the Truth and Reconciliation Commission. The National Commission for Social Action is running the programme.

Sudan

June 2005: ICC began its formal investigation of the situation in Darfur, and has since opened seven cases. Warrants of arrest were issued by the Pre-Trial Chamber. Three of the suspects remain at large while three have had confirmation of charges hearings, with charges not confirmed against Bahar Idriss Abu Garda; the execution of arrest warrant is pending for one of the suspects. The ICC decision to issue an arrest warrant for President Omar al-Bashir received divergent responses from African states and civil society groups, who debated the mandate of the

ICC in Sudan. In 2009, the African Union (AU) at its 13th Ordinary Session declared a position of non-cooperation with the ICC warrant. Civil society groups challenged this position, particularly for those states that have ratified the Rome Statute.³³

June 2005: Special Criminal Court on the Events in Darfur, a hybrid panel of local and international judges backed by the AU, is created exactly one day after the ICC begins its formal investigations.

February 2009: High Level Panel on Darfur established by the AU to investigate and address the conflict and human rights violations in Darfur. The panel, headed by former South African President Thabo Mbeki, began its work in March 2009 and released a comprehensive report in October 2009, offering a range of recommendations on the revitalization of the Sudanese judicial system, including national legal reform and the use of a hybrid court. The panel's recommendations, in combination with the "ICC's announcement that it would reintroduce the charge of genocide against Bashir, has prompted the Sudanese government to revitalize the Special Criminal Court on the Events in Darfur".³³

Uganda

January 2000: Amnesty Commission established by Uganda Parliament in an effort to build security in Uganda. By the end of 2008, nearly 23,000 rebels had received amnesty.

December 2003: President Museveni requests the ICC to investigate war crimes committed by the Lord's Resistance Army (LRA) in northern Uganda. The ICC has charged several LRA commanders with crimes against humanity and war crimes.

2006: The use of traditional mechanisms such as *mato oput*, rather than blanket amnesty or prosecutions, continues to shape dialogue related to justice and peacebuilding in Uganda. *Mato oput* is a northern Uganda traditional justice process, which has been used to promote reconciliation and reintegrate former LRA rebels into communities.

2008: International Crimes Division established within the High Court to facilitate prosecutions of those accused of committing war crimes in the north.

May 2010: United States Congress passes a bill obliging the government to aid the Uganda Government in

tracking down and dismantling the LRA, as well as aiding communities affected by the conflict to recover.

October 2011: United States Government sends military advisers to train and advise the Ugandan army in the fight against LRA.

Zimbabwe

1985: Commission of Inquiry established by President Mugabe to investigate government repression of 'dissidents' in the Matabeleland region of the country during 1983. The final report was kept confidential on the grounds that it could spark violence over past wrongs.

2003: A group of Canadian and Zimbabwean lawyers filed a draft indictment with the Canadian Minister of Justice against Robert Mugabe and his close associates for crimes against humanity. The move, supported by a number of Canadian Members of Parliament, would make Robert Mugabe and officials liable for arrest and extradition to Canada in any country that has an extradition agreement with Canada. The various crimes included persecution, enforced disappearance of persons, torture and extermination by denying people food. They carry life imprisonment under the Canadian Crimes Against Humanity and War Crimes Act.

An Extradition Bid Committee comprising victims of torture, human rights activists and lawyers was formed to collect evidence against Mugabe and his associates. However, in November 2006, the Canadian Justice Minister refused to charge Mugabe on the grounds that Canada had no jurisdiction to prosecute him, because he enjoys immunity as head of state and the crimes he is alleged to have committed have no direct links with Canada. Zimbabwean civil society plans to appeal the decision, to study other jurisdictions in which Mugabe can be prosecuted (such as private prosecution in New Zealand), and to advocate for Canada to at least indict some of Mugabe's associates who do not enjoy immunity.³⁴

2005–Present: Various calls have been made for the situation in Zimbabwe (and Robert Mugabe specifically) to be referred to the ICC by the UN Security Council.

3.3 Gender and transitional justice³⁵

The aftermath of conflict and crisis mainly affects women and children, albeit in different ways. As varied as the contexts and conflicts have been, there are certain

commonalities with regards to women's experiences across the African continent.

Women in Africa suffer from unequal status prior to the conflict, which is exacerbated by violent conflict and political repression and their resulting consequences. Women are disproportionately singled out for sexual and gender-based violence (SGBV) during violent conflict. One unfortunate feature of the 'new wars' was the adoption of sexual violence as a deliberate weapon of war by parties to the conflict. Sexual violence is widespread and systematically used to destroy the social fabric of communities, to deliberately spread HIV, to impregnate women, to drive the displacement of populations, to terrorize whole communities and to simply demonstrate power.

There is an intersection of gender with other identities, such as ethnicity, religion, geographic location and language, which drives the extent and impact of sexual violence. Shame and stigma usually accompany SGBV crimes, which leads to underreporting. Generalized impunity surrounds crimes against women, but is even worse for conflict-related SGBV. In general, formal justice systems are unable to properly address conflict-related SGBV, as they are hampered by resource scarcity and national law that is not harmonized to international norms that codify SGBV as crimes against humanity. Lack of access to justice for women is not necessarily a result of inadequate policy, but rather the absence of substantive measures to ensure that justice processes meet the needs of women victims.

"Where women's experiences have been addressed through transitional justice mechanisms, they have generally been 'added' to the agenda as an afterthought."³⁶ While peace agreements may stop the killing, failure to address SGBV in ceasefires or peace agreements means that these crimes continue long after the guns have fallen silent. Post-conflict and -crisis contexts are often characterized by ongoing and sometimes increased levels of crime, violence and insecurity, in general.³⁷ This can be attributed to violence being 'normalized' during violent conflict, ineffective or non-existent DDR processes, trauma and impunity.

Women and girls (and boys in the cases of Burundi and Somalia³⁸) are again disproportionately targeted. For instance, a study in Liberia in 2007 (four years after the end of the violent conflict) found that in Nimba County, 26 percent of single women and 74 percent of married

or separated women had been raped in the previous 18 months.³⁹ Safety, security and protection are paramount needs for survivors of conflict. Women's justice priorities in the period following conflict or crisis, when the struggle for everyday survival increases their vulnerability to SGBV, reveal that after safety, security and protection needs are met, women's demands are often for basic services and the means to rebuild shattered lives. Economic justice, therefore, becomes more important to women after the conflict than justice for SGBV crimes. And when SGBV crimes are addressed, the priority of women is the recognition of atrocities committed against them, as well as reparations to enable them to recover and rebuild.⁴⁰

In spite of the numerous challenges that women face during conflict and crisis, post-conflict and -crisis settings have at times revealed opportunities. Looking at the history of international law and specifically transitional justice, there have been great leaps forward in the recognition of SGBV crimes in the past two decades. The shift has been seismic, from a time when rape was accepted as an inevitable part of conflict, to the unprecedented codification of SGBV crimes in the Rome Statute of the ICC as both war crimes and crimes against humanity, and thereafter to the recognition in five resolutions by the UN Security Council that sexual violence is a threat to international peace, security and development.

Of equal importance is the growing recognition that post-conflict and -crisis contexts provide an opportunity to transform the pre-conflict status quo and address underlying inequalities through a transformative approach to transitional justice, which is gender sensitive. During violent conflict traditional gender roles are unseated, women take on new roles, and the foundations for a new society are established. Post-conflict and -crisis contexts open up possibilities to promote women's leadership, enhance access to justice and build momentum for fundamental women's rights. In sub-Saharan Africa, some of the most significant changes with respect to the status of women have occurred in the post-conflict and -crisis context, because as the nation and state are being transformed at all levels, there are more opportunities to transform relationships between women and men, and 'rewrite the rules' of the social and political order.

In spite of the significant gains, the major challenge lies in translating these achievements into justice for women on the ground. This challenge is not unique to transitional justice, but rather cuts across all law reform efforts. The

only difference is that justice infrastructure has usually been shattered during the conflict or crisis, which exacerbates the problem. Transitional justice mechanisms on the continent have often failed to adequately tackle the extensive SGBV committed during conflict.⁴¹ "From DRC to Haiti, from Bosnia to Liberia, rape has been the slowest to register in the security radar, and lowest on the hierarchy of wartime horrors. It has been called 'history's greatest silence' and the 'world's least condemned war crime.'"⁴²

In addition, when SGBV has been addressed, it has been reduced to a 'women's problem'. Transitional justice mechanisms have not explored how men are affected by violent conflict. There are an increasing number of men who have been victims of conflict-related rape, for instance. Governments, aid agencies, non-governmental organizations (NGOs) and the UN barely acknowledge its possibility, let alone provide interventions to address it in post-conflict reconstruction and development, yet it does exist. Male survivors are beginning to privately speak about it in the Great Lakes Region and Somalia,⁴³ though it is still possibly the biggest secret of violent conflict. A reflection on the stated aims of sexual violence in conflict reveals that this would be the worst form of attack against males from the opposing side of the conflict.

Yet another challenge lies in the low number of prosecutions for SGBV crimes, resulting in widespread impunity; this is also common with other crimes committed during violent conflict and political repression. Lastly, considerations of gender and transitional justice are often limited to sexual violence, thereby missing other forms of victimization and gendered dimensions of violent conflict and political repression for women, children and men, and failing to recognize women's multiple roles beyond that of passive victims, and the roles of men beyond being perpetrators.

For transitional justice mechanisms to contribute towards gender justice in Africa's post-conflict and -crisis reconstruction and development, a holistic and transformative approach is needed. This would encompass establishing participatory procedures for the design and implementation of measures that take into consideration the different needs and opportunities of women and men, and of children, as they will not be equally served by the same measures. This will also entail integrating requirements for equality and fairness, which are underlying principles for any viable justice system, into domestic law and policy as well as and state institutions.

4. THE CONTROVERSIES, CONTRADICTIONS AND TENSIONS OF TRANSITIONAL JUSTICE

4.1 Balancing objectives

The legal-judicial paradigm has been dominant in the study of conflict and post-conflict contexts, proffering procedural, academic and institutional “remedies that too often fail to recognize other important perspectives”.⁴⁴ For durable peace and a just social order to be established, it is essential that a holistic approach is taken. This will seek to respond to the physical and psychosocial needs of individuals and groups, during and after violent conflict and political repression, as well as contribute to institutional transformation and a legitimate state.

Justice is a key transitional justice objective; however, it is only one of six objectives as discussed above. It cannot be pursued in isolation, but rather needs to form part of a comprehensive approach. Elevating it above or neglecting the other objectives contributes to a continued culture of violence and impunity, untransformed institutions and an illegitimate state, and unjust social order. For instance, reconciliation, which is both a process and an endpoint, aims for much more than peaceful coexistence, and also includes the reshaping of parties’ relationships for future constructive engagement. Without reconciliation, there can be no sustainable peace and the possibility of violent conflict remains.⁴⁵

The culture of violence must be replaced by one of peace, which is also a process. The effects of the so-called ‘normalization’ of violent conflict have been demonstrated in a number of contexts that witnessed an overall increase in crime, insecurity and violence following the conflict or crisis. Victims’ identification of their own needs reveals the importance of knowing what happened, of finding the truth.⁴⁶ Truth is, therefore, an objective as well as a measure, often described as truth seeking. Recognition of the atrocities committed is critical for forgiveness and healing to take place. Unresolved trauma together with a lack of forgiveness contribute to tomorrow’s atrocities, as yesterday’s victims, knowingly or unknowingly, become tomorrow’s perpetrators.⁴⁷

In addition, due to decades of impunity and unbroken cycles of violent conflict, it is difficult to reach a clinical definition of victims and perpetrators. In addition to the challenges in identifying perpetrators following

generalized social conflict, it often happens that past offenders become victims and vice versa, through cycles of violent reprisals. This creates grey areas and blurs ethical parameters⁴⁸ in the pursuit of justice. Whether retributive, deterrent or restorative justice is pursued, it remains undisputed that there is need for justice in post-conflict and -crisis contexts. Whether it is arrived at formally or informally, it needs to be nuanced and form part of a comprehensive approach that meets multiple objectives.

Forgiveness is a recent area of investigation in the study of post-conflict and -crisis contexts. A dilemma often exists as to whether to set up a justice mechanism that seeks to hold offenders accountable, without necessarily establishing a full account of the past, or whether to have a truth seeking mechanism that delves deeper into the actual events, without pursuing some form of justice. There is no guarantee that knowing the truth will result in forgiveness, as is commonly assumed. What seems critical to forgiveness is that accountability is pursued through an agreed mechanism, comprising measures that ensure the non-recurrence of atrocities, accompanied by recognition and authentic acknowledgement, including restitution.

Those who seek to implement or promote transitional justice face the fundamental questions of which of the six objectives to pursue, and in what way. These objectives must often be pursued simultaneously, which can prove to be problematic as the aims are not necessarily complementary. It must be decided whether it is feasible and necessary to punish perpetrators, and if it is, then what the punishment is designed to achieve – to bring the guilty to account, to deter future perpetrators by curbing impunity or to contribute towards wider objectives like healing, reconciliation and truth. Different transitional justice mechanisms have focused on different objectives with varying outcomes.

The justice versus truth nexus has seen debates on whether seeking to punish perpetrators will block the truth from emerging. Additionally, there is the peace versus justice nexus, which brings out the concern that pursuing justice may result in renewed violence and conflict. These concerns have, among other factors, informed decisions to grant amnesty to perpetrators.⁴⁹ In South Africa, for example,

the Truth and Reconciliation Commission (TRC) offered the possibility of amnesty in exchange for truth about crimes committed, due to concerns that punishing apartheid leaders could foment civil conflict. On the contrary, the International Criminal Tribunal for Rwanda is based on the conviction that it is necessary to punish perpetrators to fulfil the moral obligation to bring them to account and to contribute towards national peace and reconciliation.⁵⁰ Thus, while in South Africa it was deemed that punishment and reconciliation were contradictory objectives, Rwanda decided that, in fact, the two are inextricably linked.

The use of amnesty may contribute to short-term stability, but if accountability of offenders is forfeited in the long term, lasting peace may prove elusive owing to a culture of impunity, unresolved trauma and grievances. Therefore, it becomes a matter of careful sequencing. Some post-conflict contexts have opted initially to grant amnesty for the sake of stability in the immediate aftermath of violent conflict. Once stabilization goals have been attained, and justice and security systems and structures are in place to address potential backlash, the amnesty is lifted for accountability measures to be implemented.

Whether retributive justice results in deterrence of future perpetrators is another dilemma over which there is considerable difference of opinion. The argument for deterrence is that if the orchestrators and perpetrators of mass violence are punished, it will send a clear message that future orchestrators and perpetrators will also be punished, thus dissuading them from committing atrocities. It is argued that one of the root causes of the 1994 Rwanda genocide was a culture of impunity, as political leaders had not been held accountable for earlier crimes;⁵¹ that encouraged them to continue orchestrating violence, thus creating an environment that culminated in the genocide. The Commission of Inquiry into the Post-Election Violence in Kenya was informed by similar thinking when they recommended that a domestic tribunal be established to try perpetrators, failing which the ICC should take over. They asserted that a culture of impunity had contributed to an environment that allowed the post-election violence to happen, and that impunity had to be addressed to prevent future violent conflict.⁵²

Research indicates that the establishment of the ICTR contributed towards ending the violence perpetrated directly after the Rwanda genocide, including in the refugee camps in eastern DRC, especially after the indictment and arrest of principal *genocidaires*.⁵³ On the other hand, the International Criminal Tribunal for the former Yugoslavia

(ICTY) had already been established in 1993 in response to the atrocities in the Bosnian conflict, with jurisdiction over the entire former Yugoslavia, including Kosovo, when the conflict fully broke out in the latter. It was thought that the ICTY would serve as a deterrent or at least limit the violence; however, it seemed to have little or no effect on the violence in Kosovo.

4.2 Tensions in transitional justice

Turning now to the tensions⁵⁴ that exist in the realm of transitional justice, they include tension between aspirations in the post-conflict and -crisis context and the available capability and resources. As discussed above, these contexts tend to have limited capabilities and resources to meet the overwhelming needs, a challenge that is often compounded by past or ongoing conflict and a traumatized society. There are tensions within the objectives. For example, tensions within the justice objective include the debate over whether retributive, deterrent or restorative justice should be pursued. There are also tensions between the objectives, on whether to pursue more profound or pragmatic objectives, given the urgency of all the needs in societies emerging from conflict or crisis. For instance, should Rwanda have begun with the physical rebuilding of a shattered society, providing physical and psychological healthcare to survivors and reconstructing homes and roads, or with social reconstruction, pursuing the aims of justice and reconciliation?

Tension exists on the question of whether the past needs to be addressed, and if so, how far into the past transitional justice mechanisms need to delve to meet agreed objectives and victim needs. For instance, Kenya's Truth, Justice and Reconciliation Commission (TJRC)'s mandate extends back to independence. However, during the drafting of the TJRC bill there were calls for the mandate to go back to the colonial period, as the politically repressive post-colonial state can be linked to the legacy of colonialism.⁵⁵

Tensions are also evident in relation to the practical operation of transitional justice mechanisms. For instance, the location of the mechanism is often subject to debate, including whether having the mechanism based near the site of atrocities may raise security concerns or trigger further unrest, but on the other hand whether remotely locating the mechanism will fail to meet victim needs to engage in the process, thus jeopardizing the objectives.

The latter issue has plagued the ICTR, and some argue that it has not contributed to national healing and reconciliation because it is based outside Rwanda. It is also claimed that it would have cost less to host it in Rwanda, and the resources set aside for it would have been maximized and contributed to much-needed transformation of, and capacity building for, the national justice system and related institutions, as the hybrid SCSL has done in Sierra Leone.⁵⁶

There is also tension with respect to the terms used, such as transitional justice and post-conflict reconstruction. The famous William Shakespeare play of *Romeo and Juliet* contains the well-known line, "What's in a name? That which we call a rose, by any other name would smell as sweet."⁵⁷ This may hold true for many things: that what we call them does not change their nature. However, in the case of transitional justice, theory and practice have shown that the terminology used has in fact impacted on its focus. Does the term transitional justice truly do justice to the number of non-judicial mechanisms it encompasses? It gives the impression that justice has been prioritized above the other objectives of the process, which are all important. In addition, the conflict or crisis may not result in any transition, thus making transitional justice a misnomer.

On the other hand, 'reconstruction' presupposes that there was something prior to the conflict or crisis that was eroded and should be rebuilt. In most instances, however, there was an illegitimate state with floundering institutions and negative peace, which would not be desirable to reconstruct. Negative peace is considered to be the absence of violent conflict, but where structural violence exists. Conversely, positive peace is the "integration of human society"⁵⁸ or a state of social cohesion, where structural violence has been addressed and measures put in place for conflict to be peacefully resolved.

Given the realities of many post-conflict and -crisis contexts, at least in sub-Saharan Africa, the terms "post-conflict and crisis transformation" or "transformative justice" may serve better than continuing the use of 'transitional justice',⁵⁹ because what is really needed is a transformation of relationships, institutions, systems and structures towards building and supporting viable states, durable peace, social cohesion and development in the medium to long term. In line with this, Malan (2008) proposes that 'transitional justice' could more appropriately be called 'transformative' justice. "'Transition' refers to top-down processes ... Transformation on the other hand, calls upon society to 'reinvent itself'."⁶⁰

4.3 The International Criminal Court

The creation of a permanent international justice system, in the form of the International Criminal Court or ICC, is testament to the growing agreement among nations of the world on the principles of international justice and the means of their enforcement. The ICC represents a piece of the post-conflict and -crisis response, however, it is fraught with dilemmas and challenges. Under the principle of complementarity,⁶¹ the ICC is supposed to work as a complement to, and not a replacement of, national jurisdictions. The Court is mandated to investigate and prosecute those accused of the most serious crimes of international concern, but only if the national jurisdiction is unable or unwilling to do so. Difficulties arise when the national jurisdiction is reluctant to prosecute. For example, the Kenyan Government publicly declared their willingness to try perpetrators of the post-election violence. The country's justice system appeared able to try the cases; therefore, it seemed initially that the 'unwilling or unable' clause of the Rome Statute did not apply to give jurisdiction to the ICC.

However, Parliamentarians unequivocally voted twice against a bill to set up a national tribunal, claiming preference for the ICC trying key suspects as they had no faith in the integrity of the Kenyan judiciary. Nevertheless, once the ICC Prosecutor began to investigate the suspects and set court dates, efforts were successfully employed by the Kenyan Government with the AU (though it was unsuccessful at the UN Security Council) to stop ICC proceedings,⁶² and initiate the national tribunal. The ICC proceedings continue to date, as noted above.

The principle of complementarity was adopted for fear that the ICC would become a supranational court and result in countries losing domestic control of criminal prosecutions. This is understandable under the principle of sovereignty. However, given the responsibility to protect,⁶³ especially where mass atrocities have been committed, there is a place for a supranational mechanism that is protected from national and international manipulation. Such a mechanism is especially important because the principle of complementarity can be abused to shield those bearing the greatest responsibility, for example through governments trying perpetrators in national courts that do not comply with the basic tenets of justice and are merely going through the motions of a trial, thus fulfilling neither international obligations nor local needs for justice.

The ICC's focus on prosecuting those bearing the greatest responsibility creates a risk of an 'impunity gap' as other perpetrators go unpunished, particularly if the national jurisdiction does not play its role as expected.⁶⁴ The ICC also faces the above-mentioned tension of physical locality, given its headquarters in the Netherlands. Like the ICTR, it is removed from the citizens whom it seeks to assist. Since its inception, it has been beleaguered by limited funding and human resources, which has forced the Court to prioritize the situations it responds to, leaving it unable to address all the situations begging for its attention. This has contributed to criticisms that the ICC is no more than "a Western tool, deployed against the global south".⁶⁵ The ICTY and ICTR are seen to have heralded a new era in supranational justice, in which the process is not necessarily controlled by the victors, as was the case in the Nuremberg and Tokyo trials. It is, therefore, crucial that the ICC guard against this growing perception.

The existence of the ICC, especially given its attempts to be more responsive, has allowed for situations like Côte d'Ivoire and Kenya to be handled with unprecedented speed. The ICC could have the effect of creating incentives for conflicting parties to submit to peacemaking efforts, as well as a deterrent effect, as political and military leaders see others identified and indicted even before the guns fall silent. The Court could also contribute towards

addressing impunity at the level of the political elite, who have historically managed to evade justice. Similar to the ICTY and ICTR, the ICC will need to be sensitive to political considerations, to ensure that it receives the cooperation of sitting governments and takes an even-handed approach towards investigations and prosecutions of various 'sides' to a conflict, including those who gain power after violence.⁶⁶ The latter will be challenging to accomplish, but it remains essential in building the credibility of the Court.

Transitional justice processes usually do not delve into a whole range of unstated or unspeakable truths, such as: SGBV, including the rape of women and men, boys and girls; economic crimes; external collaborators; and shady financiers of merchants of terror. The Western – and now eastern – foreign capital interests that have fuelled conflicts in Africa are never subject to international justice proceedings. The beneficiaries of Sierra Leone's 'blood diamonds' and Congolese gold, coltan, diamonds and other minerals; the harvesters of opium in Rwanda during the genocide; the oil merchants from Angola; and those who fuel instability in the Great Lakes Region of Africa by providing small arms and light weapons, are hardly ever detained and brought before international criminal tribunals.⁶⁷ This leaves an impunity gap that the ICC needs to address.

5. LESSONS LEARNED

When one looks critically at the nature of contemporary conflict in Africa, it becomes apparent that violent conflict must be geographically contained to avoid it spilling over into neighbouring countries or the sub-region. Further, to ensure stability, a regional approach is preferable to individual neighbouring countries interfering in conflicts or political agreements. Post-conflict and -crisis contexts must be carefully managed, starting as early as possible. The implementation of political agreements should be closely monitored, including clear benchmarks, because failures in this regard are a major reason for violent conflict re-igniting. It must be borne in mind that extremist ideologies, including ethnic exclusion, are fostered during violent conflict and remain a threat to peace even after agreements have been signed. Cleavages, therefore,

must be addressed and cannot be glossed over as part of conflict avoidance, as this will only work in the short-term. The politicization of ethnicity, and subsequently of the state, economy, all public life, history, truth and even of the reconciliation process, remains a major challenge for transitional justice mechanisms, including the ICC, to guard against.⁶⁸

Transitional justice mechanisms have an important role to play in establishing or strengthening the rule of law and in transforming institutions and the social fabric. Because accountability and non-recurrence are but some of the needs of victims, and justice but one of six objectives, effective transitional justice mechanisms need to go beyond the legal-judicial aspects to ensure

a comprehensive approach that satisfies victims' stated needs as well as identified objectives. This does not negate justice, but rather lends itself to an appreciation and application of measures that meet the other objectives, such as informal mechanisms, which are often considered to fail in meeting the Western notion of justice.

Some of these informal mechanisms include Burundi's *bashingantahe*, Rwanda's *gacaca* and *abunzi*, and Uganda's *mato oput*. They may not hold perpetrators accountable according to Western perceptions, but they do contribute to meeting the other objectives, such as healing, forgiveness, reconciliation and truth, and can be simultaneously applied with accountability mechanisms. The preference of the West for the legal/judicial paradigm is seen in much of the criticism of Rwanda's *gacaca* process, which adopted a restorative justice approach.⁶⁹

Gacaca's primary aim was not to seek "punishment alone, but also reconciliation, seeking to restore a sense of social cohesion by facilitating face-to-face resolution between victims and perpetrators".⁷⁰ Critics stress that when *gacaca* is evaluated from the Western perspective, which sees justice as a neutrally-determined, universal virtue and free from all value-laden claims, it falls short and actually violates justice norms. When evaluated against victim needs, such as truth, recognition and acknowledgement of atrocities committed against them, story-telling by the victims, restitution, and empowerment in the justice process, *gacaca* has had some degree of success in providing a platform for genocide survivors and perpetrators to engage, thus contributing to a crucial ethos for reconciliation.⁷¹ Regarding accountability and ensuring measures for the non-recurrence of atrocities, *gacaca* has largely not met those needs. Evaluating *gacaca's* success from a retributive justice perspective alone ignores its social outcomes. The jury is still out on the success of *gacaca* in the social arena; however, it is certainly not the failure that some human rights and justice pundits have claimed it to be.

The purpose and legitimacy of any transitional justice mechanism needs to be critically examined in light of the context, and the articulated needs and objectives of society. One size does not fit all, and mechanisms need to be participatory from the outset, context specific, victim-centred, gender sensitive, timed and sequenced accordingly, as well as long term in perspective. In some cases, accountability procedures can be significantly delayed to suit the situation. Charles Taylor was indicted by the SCSL in 2003. He was granted exile in Nigeria in

the same year and thus protected from prosecution. In 2006, he was finally extradited to face trial before the SCSL. In another example, Ghana's National Reconciliation Commission was established in 2002, some nine years after the country's transition from military to civilian rule.⁷²

Transitional justice mechanisms need to meet the basic minimum needs of: accountability, including measures of non-recurrence, recognition of atrocities committed and authentic restitution. For each context, this will entail using multiple measures, staffing capacity in line with the different measures and objectives; and sequencing the objectives as necessary. More often than not, multiple objectives are pursued simultaneously. As discussed above, this could be problematic as their aims are not necessarily complementary. Therefore, it becomes a question of timing and sequencing to meet the local needs and demands for justice. "It is not a matter of an either/or choice", as discourse and practice has demonstrated in the evolution of transitional justice; "it is rather a both/and package",⁷³ which carefully considers 'when'. Given the repeated cycles of violent conflict and political repression, the timeline of events included in the mandate of any mechanism remains a key consideration. This ensures that the different cycles are addressed, so that multiple victims and perpetrators are included in the process.

Capacity bridging and building and empowerment are an important factor in the aftermath of conflict or crisis. Knowledge and skills in the following, among other areas, are pertinent: conflict analysis, conflict and gender sensitivity, rights-based programming and development, peacebuilding, nation and state building, and coherence and coordination. Equipping actors across the range of key governmental and non-governmental partners, and not just among traditional legal partners and institutions, is beneficial. This also provides an opportunity to ensure that systems and structures are transformed for gender responsiveness and equity, as well as ensuring gender representation.

Transitional justice should form part of an integrated peacebuilding framework that includes the engagement of all relevant actors (local and international). As already discussed, needs related to post-conflict and -crisis transformation and development are numerous, and can easily overwhelm states with weak capacities, systems and structures, especially when everything is seemingly urgent and resources are limited. With this in mind, it is essential for various actors and interventions not to

operate in isolation, but rather to ensure effective coordination and coherence from planning stages through to evaluation. This will help to maximize available resources and improve outcomes, as each actor plays a complementary role based on their expertise.

Transitional justice mechanisms alone will clearly not suffice in effectively addressing the challenges in Africa's post-conflict and -crisis transformation and development. They are not able to deal with the range of factors discussed above, inherent in Africa's states and society, which have made the continent especially prone to war, violent conflict and political repression in the post-colonial and post-Cold War eras. Measures of state and nation building are necessary, as part of the integrated peacebuilding framework. There is a critical role for law and justice, but only in tandem with other efforts.

Political repression, exclusion and trauma tend to cause people to retreat. They retreat into ethnic nationalism, kin, religious or other identities, enclaves, clans or other tight-knit groups, as a defence mechanism or coping strategy that impedes transformation and development efforts. Therefore, for any transitional justice mechanism to have lasting social cohesion benefits, it needs to address the causes and consequences of political repression and exclusion, as well as trauma. The political repression and exclusion aspects are often recognized, with efforts made to address the same through institutional transformation. However, trauma healing is often not incorporated into transitional justice mechanisms. "Politicians, negotiators, peacebuilders and the general public alike tend to think of trauma healing as soft, a warm fuzzy that has little or nothing to do with realpolitik, and no role to play in reducing violence."⁷⁴

So far, transitional justice has been reactive, responding to the consequences of violent conflict and political repression. It is critical that a dimension of prevention be added to its use. This can be done through the integration of peacebuilding, nation and state building measures. For instance, conflict analysis can be incorporated into existing frameworks for periodic democracy and rule of law assessments. Based on developed indicators, early warning information on potentially conflict prone areas can be identified, together with the drivers and triggers for potential violent conflict. This can then be linked to early response interventions. As the old adage goes, "prevention is better than cure".

Early recognition of state fragility, early warning for conflict, and disaster risk preparedness linked to early response can all mitigate and/or prevent political exclusion and repression, state collapse, violent conflict and natural disasters together with their devastating consequences. Transitional justice mechanisms can also be adopted as prevention mechanisms, rather than being limited to during and after violent conflict and crisis. For instance, political and conflict analysts claim that had Kenya instituted the TJRC as recommended in 2003, it would have begun a process of truth seeking, story-telling, recognition of historical atrocities, and measures towards non-recurrence which could have prevented or mitigated the 2007–2008 post-election violence.⁷⁵ In that case, the TJRC could have served as a framework for prevention instead of response. The same could be argued of delays in implementing 'peacetime' transitional justice mechanisms in DRC, Ethiopia and Zimbabwe, among others.

Some policy recommendations follow.

5.1 For development partners

- 1 Provide adequate resources for post-conflict and -crisis transformation. It is difficult, if not impossible, to overcome the challenges that lie at the root of violent conflict or political repression and state collapse, without the requisite resources to manage the crisis, facilitate early recovery, and thereafter for stabilization, peacebuilding and development. An accessible and flexible pool of funds that is jointly managed by development partners and partner states can facilitate the process until the state has restored its capacity to generate and allocate resources, and provide goods and services.
- 2 Adopt an integrated peacebuilding framework that incorporates transitional justice, nation and state building, as well as other pertinent post-conflict and -crisis interventions such as development and security, and allocate the requisite resources in a coordinated and coherent manner. In doing this, ensure that support builds local capacities and utilizes local resources.
- 3 Support transitional justice that is comprehensive, transformative and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully

designed, well-resourced system of legal, political and social measures. This system will contribute towards a just social order, through strengthening the rule of law, transforming institutions and repairing the social fabric.

- 4 Within the above system, secure and prioritize resources for trauma healing as an integral part of transitional justice and a key factor in advancing from fragility to resilience. An abundance of resources and energy has been expended on projects that achieved little change in communities because they were not thoughtfully built on the foundations of peace, healing and social cohesion.
- 5 Invest resources in the conceptual and practical development of transitional justice and nation and state building as frameworks for prevention. This will need to be coupled with investments in regular, systematic and structured conflict and context analysis integrated into democracy and rule of law assessments. It must be borne in mind that it is challenging to measure the impact of prevention interventions.
- 6 Determine, prioritize and safeguard quotas within transitional justice funding for gender sensitive and gender justice programming, and include incentives for the quotas being met by state partners.
- 7 Bear in mind that transitional justice, the transformation of relationships, systems and structures, and building social cohesion will take time and a heavy financial investment. This means that progress cannot be measured using traditional indicators, and that impact will only be measurable over a considerable period of time. Therefore, secure sufficient resources for the long term and allow for the development and utilization of innovative ways to measuring progress.

5.2 For African governments

- 1 Transformation is most effective when it starts with the individual, family, community and then state, in a bottom-up manner. Social cohesion and healing cannot be institutionalized or legislated. Approaches that take into consideration the victims' needs and secure their actual involvement are most effective. While there is almost always a

local demand for justice, there is not necessarily demand for specific mechanisms to be created.⁷⁶ It is important to ensure that whatever method is adopted, it has local support, and is neither an external imposition nor a top-down national government initiative. The latter in particular may have the unwanted result of communities 'pretending peace' and existing in negative peace rather than transformed relationships. The role of government is to create an enabling environment to facilitate these organic processes that must be driven by those affected, and to allow its members to get involved in their personal capacities as part of their personal journey towards healing.

- 2 Guarantee transitional justice mechanisms that will advance accountability, including measures for non-recurrence of violence, recognition of atrocities committed, and authentic restitution to victims. Reject amnesties for crimes of genocide, war crimes, crimes against humanity and gross violations of human rights, including SGBV.
- 3 Support favourable national jurisdiction that comprises effective judicial mechanisms, laws and policies, which incorporate the national ownership of rule of law principles based on international norms.
- 4 Transitional justice mechanisms alone do not suffice for meeting post-conflict and -crisis needs. The state remains the framework within which solutions to violent conflict, political repression and underdevelopment will be found. Therefore, allow for measures of nation and state building to be incorporated into transformation and development efforts, so that states become more viable, thus reducing or eliminating risks associated with violent conflict. Create opportunities for more South-to-South peer learning among the leaders of the continent; develop means of holding each other accountable and supporting each other; and establish a leadership mentoring system to identify and equip the next generation of leaders for smooth political transitions.

Transformation of the state is necessary, but this is missed in the oft-piecemeal and quick-fix institutional reform approach, which only scratches the surface. It will take time, concerted efforts and resources to effectively transform the state. Like

social cohesion and healing, it is not an automatic process. "Sovereignty needs to be reasserted as a responsibility, not as a cover for tyranny or a relic of the world order past."⁷⁷ In addition, support efforts to rebuild civil society, which must accompany efforts to transform the state and reinforce sovereignty. That said, given the challenges in post-conflict and -crisis contexts, allow for external assistance. Given the urgent needs, external assistance can provide interim structures and functions until the state can perform them again. "External assistance should be available as long as it must, but it should leave as soon as it can."⁷⁸

- 5 Build and strengthen sub-regional, regional and continental capacities and structures that can provide external assistance that is context specific. Existing mechanisms, such as the AU Panel of the Wise, Friends of the Panel of the Wise, and Panel of Eminent Africans, the AMANI Forum (also known as Great Lakes Parliamentary Forum on Peace), the Association of European Parliamentarians for Africa, and the Club of Madrid, provide relevant models for the formation of sub-regional, regional and continental mechanisms and rosters. Those mechanisms could mobilize former heads of state, legislators/parliamentarians and state officials to systematically accompany post-conflict and -crisis contexts through hands-on coaching and mentorship, for as long as needed. The criteria for personalities selected will be key to ensuring that persons of integrity and positive legacy are selected, to ensure that the peer learning is constructive.

5.3 For non-governmental organizations

- 1 Play an active and constructively critical role to ensure a transitional justice process that is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully designed, well-resourced system of legal, political and social measures. Provide human resources and expertise to contribute to its objectives. This includes, but is not limited to, knowledge and expertise in conflict prevention and transformation, peacebuilding, nation and state building, and trauma healing, in addition to traditional legal and rule of law expertise. They should play a dynamic accountability role to ensure

that said mechanisms have local support, meet the needs and objectives articulated by victims, enhance local capacities for peace and justice, and adopt conflict and gender sensitivity, as well as a rights-based approach.

- 2 Actively engage in coordinated, regular, systematic and structured conflict and context analysis as part of democracy and rule of law assessments, using tools that are context specific. These tools will measure political exclusion and repression, state fragility and viability, conflict early warning signs, and disaster risk preparedness and reduction. Utilize the resulting data to inform interventions and evidence-based advocacy work.
- 3 As part of nation and state building efforts, work towards the parallel transformation of civil society along similar principles, to contribute to more viable states. "State functions cannot be left to even well functioning society, any more than society can abdicate its activities to the state."⁷⁹ Play this role responsibly, while maintaining critical engagement to hold the state accountable.

5.4 For UNDP

UNDP is uniquely positioned to address the myriad challenges facing Africa in post-conflict and -crisis transformation and development, because it works across the spectrum in fighting poverty, building democratic societies, preventing crisis and enabling recovery, protecting the environment, halting and reversing the spread of HIV and AIDS, empowering women, and building national capacity.

UNDP has done substantial work in strengthening the rule of law in crisis affected and fragile situations. Their approach is underpinned by a conviction that in the aftermath of violent conflict and crisis, and other fragile situations, unobstructed access to legitimate rule of law institutions is a decisive factor in efforts to rebuild societies and prevent a downward spiral into violent conflict. UNDP's work in this area seeks to enhance physical and legal protection of people and communities, ensure legal representation, access to justice and law enforcement institutions, and ensure that institutional security providers are subject to civilian oversight. Their engagement seeks to be gender sensitive, and particular emphasis is placed on tackling SGBV in areas affected by

violent conflict and fragility. UNDP's clear commitment to strengthening the rule of law contributes toward meeting the justice objective of transitional justice. Further, their engagement helps to address the following victim needs: safety; recognition of atrocities; accountability, including measures for non-recurrence; empowerment in the justice process; and restitution.

UNDP's involvement in solving post-conflict and -crisis transformation and development challenges could be enhanced by:

- 1 Enhancing institutional reform strategies to include nation and state building. It is essential that state fragility and collapse be anticipated and prevented, in addition to conflict prevention and disaster preparedness. If viable nation states are established and strengthened, they will be better able to engage in conflict prevention and disaster preparedness and manage the transition from fragility to resilience. Focusing on building resilience limits UNDP to addressing the symptoms or consequences of systemic failure or malfunction. A viable state is considered to serve the multiple functions of sovereign authority, decision-making institution, guarantor of security for the territory, source of identity and arena of politics. Because all these functions are intertwined, it becomes difficult to perform them separately, and a weakness or non-performance in one area negatively impacts on the others.⁸⁰
- 2 Broaden the role of law and justice in post-conflict and -crisis transformation and development to ensure that the transitional justice process is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred and gender sensitive; and consists of a carefully designed well-resourced system of legal, political and social measures. This would include ensuring that mechanisms have multidisciplinary expertise, and not solely legal and rule of law experts; adopt conflict and gender sensitivity and a rights-based approach from design, through to implementation to monitoring and evaluation; are designed to serve and meet specific objectives informed by the local context and not by external interests; build local capacities for peace and justice so as to enhance resilience; and are long term in perspective, with flexible funding to cater to early response and prevention interventions.
- 3 As part of its capacity building support, integrate systematic and structured South-to-South peer learning, coaching and mentoring, while maintaining a nuanced approach that is context specific. In addition, ensure that any political missions/interim structures and functions that the UN and AU support in post-conflict and -crisis situations are resourced from the sub-regional, regional and continental external assistance mechanisms and rosters proposed above.
- 4 Given how dynamic and fragile most post-conflict and -crisis contexts are, incorporate baseline studies as well as periodic conflict and context analysis into existing democracy and rule of law assessments. Develop and standardize context specific tools for those purposes that can be used by all stakeholders in a given context. Actors in post-conflict and -crisis contexts are increasingly recognizing the importance of analysis and assessments to maximize the positive impact of their interventions. However, many contexts are plagued with a variety of different actors, each with its own methodology and tools, and in some cases lacking the capacity and knowledge to undertake such research in post-conflict and -crisis contexts. This limits the usefulness and accuracy of the collected data.
- 5 Take the lead in further conceptualizing and implementing transitional justice as a framework for the prevention of violent conflict, political exclusion and repression, and state fragility and collapse.
- 6 In relation to sexual and gender-based violence: continue and expand strategies to promote women's security and equal access to justice, including through mobile legal aid clinics; increase and finance efforts to challenge impunity for SGBV crimes against women and men, girls and boys; support increased prosecutions of SGBV crimes to reduce the impunity gap; strengthen gender responsiveness of national law and policies, as well as justice systems and transitional justice mechanisms; prioritize trauma healing for SGBV survivors; and go beyond formal justice to promote the equitable treatment and participation of women in all aspects of post-conflict and -crisis transformation and development, including the negotiation of peace agreements, where transitional

justice decisions are made, and the implementation of UN peace operations.⁸¹ Additionally, highlight the need for, and support of, programming that addresses 'under the radar' consequences of SGBV, such as children born out of conflict-related rape, and the rape of men.

- 7 Taking into account the time and resources needed to transform relationships, communities, systems and structures, and to build viable states with social cohesion, take the lead in developing innovative measures of progress, evidence-based data gathering, and documentation without compromising transitional justice processes. Advocate for a shift away from a focus on quick impact and results, which can often lessen impact and cause more harm than good. For instance, elections are considered to be critical indicators of democracy and good governance, political participation and institutional reform. However, in the vacuum created by state fragility and/or collapse, the organization of election campaigning has the potential to trigger local level conflict or tensions, making it pertinent to re-think the sequencing of elections in the post-conflict and -crisis context.⁸²

5.5 For the UN system

- 1 In merging UN rule of law and peacebuilding architecture efforts in post-conflict and post-crisis contexts, political missions provide a better platform for ensuring coherence and coordination than separate UN agency interventions; therefore, these should be encouraged, strengthened and resourced in all such contexts in Africa. Including member states and other national stakeholders through active coordination will make them more robust and better placed to serve as much-needed interim structures. As part of efforts to support local/continental capacities and mechanisms, ensure that any interim structures or functions are resourced from the sub-regional, regional and continental external assistance mechanisms and rosters proposed above. Additionally, work with the AU to strengthen its capacity.
- 2 Apply conflict and gender sensitivity and a rights-based approach as underlying principles when formulating and implementing policies and resolutions, and in the design and implementation of all interventions, to ensure that they leave a positive impact on the context, do not exacerbate conflict, and uphold the dignity of all genders and peoples, as well as contribute to building viable African states from the inside out.
- 3 Link emergency response/humanitarian action, early recovery, and development in a seamless and coherent system that will not necessarily be sequential, but rather will overlap in many cases. Ensure that this system incorporates a transitional justice process that is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully designed well-resourced system of legal, political and social measures. Lastly, ensure that this system encompasses nation and state building, and prioritizes trauma healing. As the nation and state building measures remain weak, utilize the proposed 2012 High Level Meeting of the General Assembly on the Rule of Law at National and International Levels, and its proposed Programme of Action, to discuss how to incorporate these in rule of law efforts in post-conflict and -crisis situations. In addition, explore with states parties how to generate political will and increase levels of national ownership of those measures.
- 4 Considering advances made in conflict and post-conflict contexts to assist in establishing the rule of law by ensuring accountability and reinforcing norms, building confidence in justice and security institutions, and promoting gender equality,⁸³ and progress in prioritizing women's justice and security needs in the conflict and post-conflict continuum through a number of UN Security Council Resolutions (1325, 1820, 1888, 1889 and 1960), devote greater support and resources to supporting UN Women fulfil its mandate in general; and specifically to ensuring gender-responsive transitional justice and nation and state building, in concert with UNDP and others in the rule of law sector in the UN system and beyond.

6. CONCLUSION

The daily realities in post-conflict and -crisis contexts include, but are not limited to, experiences like that of Ingabire and her son, which were described earlier in this paper. Long after the 1994 Rwandan genocide, following the implementation of humanitarian action, early recovery, peacebuilding and developmental efforts, as well as a number of transitional justice mechanisms (including national prosecutions, *gacaca*, trauma healing and survivor support groups, and memorialization which were still underway) in 2007, she was still facing real dilemmas and challenges. Based on observations from similar contexts, one can imagine the difficulties that her son has faced since then, which could include lingering trauma from early childhood mistreatment, stigmatization by the community based on his mixed ethnic heritage and the circumstances under which he was conceived, identity crisis stemming from uncertainty about his parentage, disenfranchisement and exclusion. His current situation and future depend greatly on whether these problems have been addressed and the extent of his healing and inclusion in the community. If unhealed and excluded from society, he could be tomorrow's *genocidaire* or mercenary and agent of destabilization in the Great Lakes Region or elsewhere on the continent.

Without a doubt there is a role for law and justice in Africa's post-conflict and -crisis contexts. This role will be well served by a nuanced approach to transitional justice. An approach that is comprehensive, transformative, and meets multiple needs and objectives; is context specific, victim-centred, and gender sensitive; and consists of a carefully designed well-resourced system of legal, political and social measures. However, that alone will not fully meet the needs of post-conflict and -crisis contexts. Nation and state building remain key to transformation and development; so that African states can prevent experiences such as that of Ingabire and her son, as well as deal effectively with those that have already occurred. Given the untold consequences of doing nothing, or acting ineffectively, it is time that we got it right and invested the requisite time and resources for a just social order and prosperity in Africa. The future of the continent should increasingly witness transformed and healed relationships, communities, systems and structures for durable peace and sustainable development, situated in viable states that do not resort to violent conflict and political repression within or beyond their borders.

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NOTES

- ¹ Written by: Warigia Razia, a conflict prevention and peacebuilding specialist engaged in independent consulting.
- ² See Clausewitz (1976); Anonymous (2000a); and Zartman (1995).
- ³ See Anonymous (2000a); Zartman (1995).
- ⁴ Zartman (1995).
- ⁵ See Zartman (1995); Anonymous (2000a).
- ⁶ See Huntington (1996).
- ⁷ See Kaldor (2007).
- ⁸ See Zartman (1995).
- ⁹ Human Security Group (2006).
- ¹⁰ See Anonymous (2000a); Collier (2007); Gasana (2008); and Zartman (1995).
- ¹¹ See Human Rights Watch (2002); UN OCHA/IRIN (2007); and UN OCHA/IRIN (2005).
- ¹² See Anonymous (2000b).
- ¹³ Ibid., p. 32.
- ¹⁴ Collier (2007: 34).
- ¹⁵ Ibid. p. 32.
- ¹⁶ Gasana (2008: 145–169).
- ¹⁷ Ibid.
- ¹⁸ Schirch (2004: 45–55).
- ¹⁹ Ibid.
- ²⁰ See Yoder (2005); and Lemarchand (2008: 65–76).
- ²¹ See Schirch (2004: 45–55); Zehr (2002).
- ²² International Centre for Transitional Justice (2009: 1).
- ²³ Teitel (2003).
- ²⁴ Schirch (2004: 45–55); and Sriram and Pillay (2009: 1).
- ²⁵ Clark and Kaufman (2008: 191–205); and Clark (2010: 29–46).
- ²⁶ See Kagoro (2009).
- ²⁷ Sriram and Pillay (2009: 2).
- ²⁸ Ibid.
- ²⁹ See Centre for the Study of Violence, 'Justice in Perspective' (a), International Criminal Court 'Situations and Cases'.
- ³⁰ Centre for the Study of Violence (b) 'Justice in Perspective'.
- ³¹ Centre for the Study of Violence (c) 'Justice in Perspective'.
- ³² Centre for the Study of Violence (d) 'Justice in Perspective'.
- ³³ Centre for the Study of Violence (e) 'Justice in Perspective'.
- ³⁴ Centre for the Study of Violence (f) 'Justice in Perspective'.
- ³⁵ There can be no thorough discussion on transitional justice without an in-depth look at gender and transitional justice or 'gender justice' as some call it. However, due to the limitations of space this section only attempts to capture key issues, which would need a separate paper for thorough exploration and analysis.
- ³⁶ UNIFEM (2010a).
- ³⁷ Razia (2011) and Kamau (2007c).
- ³⁸ Ibid.
- ³⁹ UN Women (2011: 84).
- ⁴⁰ Kamau (2007a); UNIFEM (2010a); UN Women (2011).
- ⁴¹ See Scalon and Muddell (2009); and Storr (2011).
- ⁴² Margot Wallstrom, Special Representative of the Secretary-General on Sexual Violence in Conflict, at the Commission on the Status of Women, March 2010, in UNIFEM (2010c).
- ⁴³ Razia (2011); Scalon and Muddell (2009); and Storr (2011).
- ⁴⁴ Clark and Kaufman (2008: 1).
- ⁴⁵ See Lederach (2003, 1999, 1997, 1995).
- ⁴⁶ Clark (2008).
- ⁴⁷ See Mamdani (2002).
- ⁴⁸ See Kagoro (2009).
- ⁴⁹ International Crisis Group (2009).
- ⁵⁰ See Clark (2008: 191–205).
- ⁵¹ See Ngoga (2008: 321–332).
- ⁵² Commission of Inquiry (2008).
- ⁵³ Reference to Nsanzuwera, F.X. 'The ICTR Contribution to National Reconciliation', 944–99 cited in Jallow (2008: 266).
- ⁵⁴ See Clark, et al. (2008: 381–391).
- ⁵⁵ Kamau (2008); See also International Centre for Policy and Conflict, Monitoring Report of the Truth Justice and Reconciliation Commission (April 2008–June 2010) 'Case of Concealing Truth to Reward Impunity', Nairobi, which refers to the challenge of the timing being a limitation. Also author's personal experience.
- ⁵⁶ See Ngoga (2008: 321–332).
- ⁵⁷ Shakespeare, W. (2005) *Romeo and Juliet*, Delaware, Prestwick House Inc.
- ⁵⁸ Galtung (1964) 'An editorial', *Journal for Peace Research*, 1(1): 2.
- ⁵⁹ Malan (2008: 147).
- ⁶⁰ Ibid.
- ⁶² The principle of complementarity is a fundamental principle on which the functioning of the ICC is based. The ICC was designed as a court of last resort, therefore, under the Rome Statute it can only exercise its jurisdiction where the state party concerned does not, cannot or is unwilling genuinely to prosecute. See Wikipedia 'International Criminal Court', en.wikipedia.org/wiki/International_Criminal_Court, (accessed January 2012).
- ⁶³ Author's own witness. Also *The Star*, Kenya (2012); Capital News (2011).
- ⁶⁴ The responsibility to protect is an emerging norm based on the idea that sovereignty is not a right but a responsibility. It focuses on preventing and halting the crimes of genocide, war crimes, crimes against humanity and ethnic cleansing, which are collectively referred to as mass atrocities. The responsibility to protect has three pillars: a state has the responsibility to protect its population from mass atrocities; the international community has the responsibility to assist a state to fulfil this primary responsibility; and if a state fails to protect its citizens from mass atrocities and peaceful means have failed, then the international community has the responsibility to intervene through coercive measures, such as economic sanctions. Military intervention is the last resort. See Wikipedia 'Responsibility to Protect', en.wikipedia.org/wiki/Responsibility_to_protect, (accessed September 2012). There are concerns about the abuse of the responsibility to protect by some countries, but that lies beyond the scope of this paper.
- ⁶⁵ Bergsmo and Webb (2008: 357).
- ⁶⁶ International Crisis Group (2009).
- ⁶⁷ Zaum (2008: 370).
- ⁶⁸ See Kagoro (2009).
- ⁶⁹ Ibid.
- ⁷⁰ See Clark (2008: 297–319); and Clark (2010).
- ⁷¹ Clark (2008: 302).
- ⁷² Ibid. 191–205; and Clark (2010).
- ⁷³ Sriram (2009: 6).
- ⁷⁴ Malan (2008: 147).
- ⁷⁵ Yoder (2005: 5).
- ⁷⁶ Author participated in discourse through various fora, with key actors in peacebuilding and human rights, following the post election violence.
- ⁷⁷ Zartman (1995: 268).
- ⁷⁸ Ibid. 272.
- ⁷⁹ Ibid. 267.
- ⁸⁰ See Zartman (1995).
- ⁸¹ See Scalon and Muddell (2009); Storr (2011); UNIFEM (2010a); UNIFEM (2010b); UN Women (2011).
- ⁸² Zartman (1995: 271).
- ⁸³ United Nations (2011).

PAPER 4

Land and natural resource governance

Abraham Korir Sing'Oei



Contents

1. INTRODUCTION	79
1.1 Theoretical and historical overview	80
2. LAND AND NATURAL RESOURCE GOVERNANCE	81
2.1 Introduction	81
2.2 Trends and challenges in land governance	81
2.2.1 Centralized state control	81
2.2.2 Legal pluralism and land tenure	82
2.2.3 Conflicts related to land and natural resources	85
2.2.4 Informal settlements in urban areas	86
2.2.5 Gender and land rights	86
2.3 Natural resource governance	87
3. ALTERNATIVE INSTITUTIONAL EFFORTS TO ADDRESS COMPLEX LAND ISSUES	89
4. INTERNATIONAL INTERVENTIONS IN LAND POLICY REFORM	91
5. PROGRAMMATIC OPTIONS FOR UNDP	92
NOTES	94

Land and natural resource governance

Abraham Korir Sing'Oei

1. INTRODUCTION

This paper intends to analyse and draw out key issues relating to land and natural resource management to inform UNDP's democratic governance programming for Africa. The emphasis is on analysing land and natural resource issues through a human rights and social justice lens. This approach reflects UNDP's intent to understand the challenges faced by states, individuals, corporations and communities in Africa as they interact with land issues. Those interactions involve land as a key factor of production, as well as a source of livelihood, belonging, identity and even spirituality. Therefore, given the centrality of land in the economic, social, cultural and political life of many on the continent, individuals' and communities' experience of both, human security and social justice will increasingly depend on the extent to which states in Africa are able to respond effectively to land and natural resource governance challenges.

Land is inextricably linked with human rights, especially economic, social and cultural rights, through its relation to food security, culture and conflict, among other human rights concerns. The arithmetic of poverty in Africa conveys a damning picture. First, with some 40 percent of people living on less than US\$2 a day, Africa is the poorest region in the world.¹ Second, poverty in Africa is most predominant among inhabitants of rural areas, where more than two-thirds of the total population and 70 percent of the poor live. Third, the livelihoods of the African poor, both in rural and urban areas, are based on agriculture and more than two-thirds of the total labour force is engaged directly or indirectly in agriculture-related enterprises.

Moreover, urban poverty and rural poverty are interlinked, because the former feeds on the latter through rural-urban migration. Hence, for the majority of poor African households, improving the productivity of the domestic

food and agricultural systems (production, processing and marketing) is key to enhancing well-being and alleviating poverty. As the main foundation for agricultural production and rural livelihoods, land is at the core of the challenge of poverty reduction in Africa. Consequently, access to land and security of land rights are prime concerns for policies and strategies aiming at reducing poverty.

The issue of how best to increase the land tenure security of the poor and protect the land holdings of communities has been brought to the fore owing to increasing land scarcity, partly caused by high population growth.² Scarcity is being exacerbated by the effects of climate change³ in addition to increasing acquisitions of large tracts of land in Africa for agro-industrial enterprises, tourism, forestry and mineral exploitation, among other uses.⁴ In many cases, governments grant such concessions with the intent of fuelling commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, many of these land concessions include lands upon which whole villages rely. As a consequence, they dispossess rural communities and deprive them of access to resources vital to their livelihoods and economic survival.

For many years, experts and donors have attributed the interrelated problems of rural poverty, poor agricultural performance and low levels of economic growth to the persistence of farming systems based on customary tenure. This view inspired a variety of land reforms with a general trend toward market-oriented access to, and privatization of, land. The basic premise of these programmes was that individualized tenure offers the best certainty in land rights, which facilitates investment in agriculture and natural resources, which in turn contributes to increasing agricultural productivity and improving natural resource stewardship.

Yet other voices are challenging such a single-solution approach on the basis that social relations within and between local communities in rural Africa have traditionally been able to provide secure land rights. The fundamental question for states is how to ensure an approach to land governance that maximizes poverty reduction and fundamental human rights. Whether through formal or customary, individual or communal tenure, states must work in a consultative manner with all stakeholders to develop a land governance paradigm that serves the interests of national development as well as social justice.

1.1 Theoretical and historical overview

Land and natural resource management in sub-Saharan Africa is problematic from a social justice perspective in at least two ways. First, the nature and scope of property rights remain obscure, undefined and indeterminate. In the case of formal land tenure, these problems may arise because of inadequate registration systems and the failure to effectively enforce controls on land transfers and use. In the case of customary tenure, the obscure nature of rights often results from government structures paying insufficient attention to understanding and documenting customary systems; instead, they often rely on assumptions about customary rights that are based on distortions wrought by colonial legal systems.⁵

There is no doubt that customary land rights can be complex. With respect to land governed by customary law, Wanjala argues that such land “is always the subject of many interests and derivative rights. Such rights are vested in individuals and groups. The rights and interests frequently coexist with each other.”⁶ Coker agrees with this view, arguing that “several rights of the members could be inferior to the sum total of rights of a group ... customary law ascribes to the family the aggregate of the rights that could be described as ownership.”⁷ Ogendo adds to the complexity of customary rights to land by describing these rights as ranging along a continuum from the most temporary to the most permanent. An individual’s rights can move back and forth along the continuum. The overlay of a complex system of formal tenure rights established

through legislation can render land rights difficult to disentangle.⁸

The second challenge is that even when property rights are clearly defined and coherent, the manner in which they were appropriated and distributed in the first instance is often contested and deemed illegitimate by the citizenry.⁹ This challenge is especially prevalent in nations in which a substantial proportion of productive land remains in the hands of those who acquired property rights from colonial takings, such as in South Africa, Kenya, Zimbabwe and Namibia. In such countries, colonial land expropriation forcefully took over millions of hectares of land and converted indigenous African communities into labourers whose only claims to land would be entertained within reservations. The decolonization process, rather than yielding land rights back to communities that had suffered forced dispossession, led instead to the entrenchment of unjust land distribution regimes in many newly independent African states. Speaking of the agreements made by new democratic regimes in Africa, Palmer observes that, “these compromises justified, legalized and froze in time all that had gone before – a century of white land grabbing.”¹⁰

Unequal land relations are the foundation for bitter inter- and intra-communal tensions in a number of states in Africa. Although those tensions were suppressed in the immediate post-independence period, they have emerged more strongly in the 21st century as natural resource extraction has accelerated, in contexts where the overriding political impulse is based on a desire to reform the state, achieve sustainable development and address colonial wrongs. The lack of political and policy commitment to address these intractable issues is responsible for land and resource conflicts that have swept through a number of countries on the continent.

Given the nexus between rights to land and natural resources and the pursuit of social justice, this paper explores the status of land governance in Africa, exposing key trends and drivers that define the sector, and concludes by making recommendations for UNDP programmatic action.

2. LAND AND NATURAL RESOURCE GOVERNANCE

2.1 Introduction

Land makes up nearly three-quarters of the wealth of developing countries.¹¹ It is unsurprising, therefore, that land in Africa was not only the rallying call for liberation from colonial rule, but has also been an important aspect of the politics of pluralism in countries such as Kenya, Ghana, Zimbabwe and South Africa. For the poor, land plays an important role in the overall struggle against poverty, exploitation and oppression – whether by millions of urban slum dwellers, rural women or minority groups. At the elite level, land has been an important currency by which hegemonic political interests have sustained themselves, for example by dispensing public land to purchase political loyalty. This means that at the centre of strategies for addressing structural rural poverty and ensuring equity on the continent, there should be attempts at rationalizing land rights.

Current institutional arrangements for claiming and maintaining strong land and resource rights for the poor, however, remain largely inadequate.¹² Across Africa, land and resource rights of the poor are threatened by inappropriate policies and institutions; unequal social, political and economic relations; national and international elite and other oligopolistic interests; and the weakness of grassroots organizations.¹³

2.2 Trends and challenges in land governance

Land governance can be understood as “the process by which decisions are made regarding the access to, and use of, land, the manner in which those decisions are implemented, and the way that conflicting interests in land are reconciled.”¹⁴ Good governance in land matters is of a technical, procedural and political nature. This is because rights relating to land cannot be separated from civil, political and human rights, and are dependent on political, administrative and professional readiness to ensure fair treatment and equal opportunities for all.

There is no single land issue. A whole series of issues is expressed in terms of access to, and control over, land and natural resources. Not all are equally pressing in all circumstances, and their respective priorities are essentially political. For instance, the recent African Union (AU)

undertaking (in partnership with the African Development Bank (AfDB) and the UN Economic Commission for Africa (UNECA)) to develop a Framework and Guidelines on Land Policy in Africa¹⁵ identifies a number of key land issues and challenges. These include state sovereignty over land, legal pluralism, land conflicts, rapid urbanization, gender and control over natural resources. Emerging issues include the HIV/AIDS pandemic, climate change, bio-fuels, food security and environmental concerns, as well as the so-called ‘new scramble’ for the exploitation of Africa’s land and natural resources.¹⁶ The above-mentioned Framework and Guidelines recognizes effective land policy as “a basis for sustainable human development that includes assuring social stability, maintaining economic growth and alleviating poverty and protecting natural resources from degradation and pollution.”¹⁷

Other efforts to develop model frameworks for land governance have proliferated, largely driven by donors, multilateral institutions and regional inter-governmental bodies. For instance, in May 2012, the Food and Agriculture Organization’s Committee on World Food Security announced the endorsement of Voluntary Guidelines on the Governance of Tenure.¹⁸ Other examples are described in Section 4 of this paper.

2.2.1 Centralized state control

Immediately after decolonization, as Africa sought to break free from the economic stranglehold of neo-colonial enterprises, Africa and the rest of the developing world prioritized state sovereignty over land and natural resources.¹⁹ In many instances, that led to centralized state ownership and control over vast proportions of land and resources, making them unavailable for individual and community use. Indeed, sovereignty over natural resources constitutes a central facet of the right to development.²⁰ However, as described above, instead of vesting land and natural resource control in state machinery that would effectively manage resources for the benefit of the people, the massive dominance of the state has been extremely problematic in the majority of African nations. State control has failed to ensure equitable distribution or land use that alleviates poverty, but instead has led to unjust enrichment for a small group of elite, politically dominant families, thereby undermining food and livelihood security for the vast majority of Africans.

Recent movements, such as the policy initiatives described above, the indigenous peoples movement and donor realignments, now favour a more effective human rights-based approach to land and natural resource management. This approach emphasizes local control, participation, consultation and equitable resource sharing, as opposed to state domination. Decentralization of planning and management related to land and natural resources is a major component of this paradigm shift. For example, in relation to resource-dependent communities such as indigenous peoples, the UN Declaration on the Rights of Indigenous Peoples is explicit that:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired;
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.²¹

Although the state is inevitably interested in regulating the way that land is appropriated and used by citizens, given its role as ultimate arbiter of inter-generational interests, it is clear that over-dominance of the state in the realm of land and natural resource management has often not served development, poverty reduction, environmental or other interests of the general population. Given the often predatory character of the state in Africa,²² it has not always played a neutral and consistent role in the public interest.

State powers, such as eminent domain and land registration, have been abused in a manner demonstrating a lack of respect for the notion of public trust placed on the shoulders of the state. In Kenya for instance, according to a report by the African Centre for Global Governance, the “illegal allocation of public land is one of the most pronounced manifestations of corruption and political patronage in Kenya.”²³ On a conservative estimate, some 200,000 illegal titles were created and issued by the state

between 1962 and 2002. Of these, 98 percent were issued between 1986 and 2002. The categories of public land affected include forests, settlement schemes, national parks and game reserves, civil service houses, government offices, roads and road reserves, wetlands, research farms, state corporations’ lands and Trust Lands.²⁴ This tendency has particularly affected those who hold virtually their entire estates in common, such as hunter-gatherers and pastoralists, and in general, the politically weak, remote rural poor.²⁵

It has not helped that many expropriations in the public interest, whether in Ethiopia, Kenya, Tanzania, Uganda, Zimbabwe or South Sudan, are shrouded in a cloud of state secrecy which feeds into the perception that these deals are not above board.²⁶ Whereas the state may be justified in the public interest to deploy its powers to acquire private property compulsorily, the World Bank has decried the lack of procedural safeguards for property owners, arguing that “the way in which many developing country governments exercise this right, especially for urban expansion, undermines tenure security and, because often little or no compensation is paid, also has negative impacts on equity and transparency.”²⁷

Managing the disengagement of the centralized state from its overly-dominant role as a land holder, while continuing to develop process guarantees to ensure that state control of land and natural resources is transparent, equitable and participatory, is one of the major areas in which UNDP can provide assistance to African governments.

2.2.2 Legal pluralism and land tenure

Individual property rights, in the sense of those that are evidenced by a paper title issued by the state with respect to a defined surveyed land area, are more the exception than the norm across the continent. What prevail instead are customary practices and rules. In Zambia, 96.7 percent of the land is held under customary rules and is administered by traditional chiefs and village heads.²⁸ In Kenya, where attempts at individualizing and formalizing tenure have been pursued since the 1950s,²⁹ 63.5 percent of its entire land is still unregistered Trust Land, a form of state holding of communal lands that would otherwise have been managed under customary regimes. Another 14.9 percent is Trust Land registered as protected areas: parks, forests, and waterways.³⁰

That Trust Land is constitutionally vested in County Councils, who are to hold the land “for the benefit of the persons ordinary resident on the land and give effect to such rights, interests or other benefits in respect of the land as may, under African customary law for the time being in force and applicable thereto, be vested in any tribe, family or individual.”³¹ Adopting the position that customary tenure is the answer to rural landlessness, a 1998 Ugandan statute makes provisions for the formation of Communal Land Associations to own and manage tracts of land – a route available not only to customary landowners, but also to those who hold property in freehold, leasehold or *mailo* regimes.³²

Despite these and many other examples of state recognition of various forms of customary tenure, in most cases, African governments continue to view this tenure arrangement as a sort of illegitimate child whose existence in the family of land relations is transitory at best, or an aberration at worst. Alden captures the treatment of customary right to land thus:

Customary rights in land – including those in which land is held in common at local group, community, or tribal levels – have for most of the last century been tolerated rather than provided for, and admitted into national statutes only in the most permissive of terms. The general expectation has been that over time, through market forces and with the help of programmes of tenure conversion, these rights and the regimes which sustain them would disappear, absorbed into modern statutory forms and into those providing absolute and individual rights in particular.³³

The legal pluralism, which arises from the simultaneous application of a dominant statutory regime and subordinate yet legitimate customary rules, presents unique challenges. One of the difficulties posed by this encroachment of statute-based rules and institutions upon prior and often unwritten norms is that it makes the “land holding system unclear and insecure as a result of the ‘empilement’ ... Conducting land policy in this pluralistic atmosphere seems to be a perpetual attempt at managing the confusion.”³⁴ Aside from the confusion and related insecurity of tenure, Alinon cautions that the ambiguity pushes people to adopt opportunistic strategies and that, “The pluralism of arbitration institutions and authorities ... leaves many conflicts perpetually unresolved.”³⁵

Legal pluralism in itself is not inherently undesirable, but if mismanaged – as is the situation in many African nations

– it often undermines pro-poor development efforts and fosters ongoing conflict. Inadequate recognition for the customary land rights of the poor relegates them to the status of second-class citizens, who are discriminated against and live outside the bounds of constitutional protections. Even when African governments officially recognize certain types of customary tenure, state attempts to maintain control over the allocation and use of land make that recognition illusory. In Botswana, the Tribal Land Act, which transferred the chiefs’ powers over tribal land to statutory land boards whose members were mostly nominated by the Minister responsible for land matters,³⁶ was the earliest attempt at statutory recognition of customary land. South Africa’s attempt to legislate for the protection of community land was struck down by the Constitutional Court as not complying with the Constitution.³⁷

That ruling invalidated the entire Community Land Rights Act for having been enacted without following the procedures set out in Article 76 of the South African Constitution, which require consultation with the National Council of Provinces before enactment of any statute that impacts on provincial affairs. The court determined that the statute altered the authority of traditional institutions in relation to land, and thus required specific engagement with the Council of Provinces. Lund notes that the implementation of the Rural Code in Niger, although designed to enhance clarity, certainty and institutional order, has in fact had the opposite effects of increasing unpredictability, exacerbating institutional incoherence, and boosting the role of the state, which suffers from decreasing legitimacy.³⁸

Many states in Africa have now specifically granted normative recognition for community land based on customary ownership. Recent reforms have gone on to constitutionalize community land, including in Kenya³⁹ and South Sudan. The Transitional Constitution of South Sudan makes clear that communities “enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources”⁴⁰ and that they “shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest.”⁴¹ The Land Act of South Sudan specifies that community land includes forests as well as cultivation and grazing areas held by communities on the basis of ethnicity, residence or interest.⁴² That provision ensures that ownership is “vested with communities” on the basis of use and occupation.⁴³

Table 1: Land conflict triggers

Proximate causes	Examples of trigger events
Intensifying competition	Events that suddenly intensify competition for land resources increase the likelihood of conflict
Environmental change	While usually gradual, some such change can suddenly reduce access to land resources, as when gradual desertification in western Sudan is accelerated by drought
Changes in land use technology	Mechanization can result in expulsion of tenants and increasing landlessness, as in pre-1974 Ethiopia, bringing the Derg to power
Changes in commodity markets	High value export opportunities can increase competition for land near outlets, as in Ghana, undermining customary land rights
New land claimants (e.g. migrants)	In-migration from other areas can increase competition for land and lead to communal violence, as in the Ivory Coast
Displacement events	Events that displace existing users are perhaps the most common trigger events
Land disputes	Land disputes between individuals and families are sometimes symptoms of broader, underlying conflict, and can signal to others fearing loss of their land that it is time for them to defend it
Armed conflict	War and insurgencies can cause major displacements of population, as in Liberia. Ethnic cleansing, new landlessness and homelessness and resultant resentment can fuel conflict, as in Nigeria
Development projects	Some developments, in particular dams and other massive infrastructure, can displace large numbers of occupants, who seek land elsewhere
Protected areas	The creation of protected areas often deprives local communities of access to resources upon which they have depended for their livelihoods, as in Cameroon and Kenya
Concessions	Concessions granted by governments to investors can often displace customary land users and can even trigger the overthrow of a government, e.g. Madagascar and South Sudan
Slum clearance	Clearance of urban slums often leaves the displaced informal occupants without land or shelter, as in Zimbabwe, contributing to political conflict
Land reforms	Land reforms, while intended to ameliorate distributional problems, can be displacement events, as in Zimbabwe when immigrant labourers from Mozambique and elsewhere on commercial farms have been expelled to make room for others
Political events	Events of a political nature that can result in dormant or new claims being pressed more forcefully
Political emergence of subjugated groups	Organizing tenants or the landless may provide voice and trigger their appropriation of lands, as in Zimbabwe
Emergence of conflict entrepreneurs	Displacement may be facilitated by actors who personally seek to benefit politically or by acquiring land resources, as in Kenya
Political struggles over land issues	Embrace by a political party of a constituency with a land-related grievance can trigger conflict, as in Kenya
Political collapse, weakened governance	Where the rule of law collapses, opportunities arise for the appropriation of land resources, as in Rwanda

Overall, these reforms have not yet granted tenure security to common property or land held under customary systems, nor have they fully addressed the challenges presented by legal pluralism. Effective management of legal pluralism, especially in relation to land rights, requires that African governments implement a systematic approach to embracing customary tenure as a valid and equal mode of ownership. That approach will require extensive commitment of resources to education and training, for stakeholders including communities, judges, local government officials and central government leaders. It will also require massive investment in documentation and mapping of customary borders, customary practices, dispute resolution models and third-party interests. Finally, it will require state recognition of actual community control, and a true balancing of local and national interests.

2.2.3 Conflicts related to land and natural resources

When states fail to effectively manage a legal pluralist system in relation to land and natural resources, conflicts are the inevitable result. In both rural and urban areas, tenure insecurity and land scarcity lie at the root of many violent clashes.

As stated above, land is the most essential element of rural life in Africa. “Land is everything, as belonging to the land guarantees the rights of present as well as future generations”, according to Bøås.⁴⁴ Under conditions of increasing scarcity, increasing monetization, and lower productivity, land issues have also become increasingly vulnerable to the politics of identity and belonging.⁴⁵ It can be argued that in Côte d’Ivoire, Democratic Republic of Congo,⁴⁶ Liberia⁴⁷ and Kenya,⁴⁸ mass violence was linked to unresolved land grievances.

Land is intimately related to multiple conflict triggers, as illustrated in Table 1. Long-standing land grievances exacerbate other conflict triggers, often increasing the intensity, scale and duration of conflicts.

Land conflicts are not isolated, but rather are linked to systemic disputes and tensions. Land conflicts are, therefore, best conceptualized as ‘nested’ within larger conflicts or tensions. Population growth, increased international investment in rural areas, development of new commodity markets (such as biofuel), climate change and other socio-economic factors are contributing to greater competition for fewer resources, and are generating increased tensions over land and natural resources.

Those trends are also impacting how individuals and families allocate, use and manage their land, and leading to: increases in land-related conflicts (both large and small); expansion of informal land markets and accompanying improvised mechanisms for land transfer; and weakening of women’s, pastoralists’ and other vulnerable groups’ rights to land. In sum – as land grows in value, land markets remain illicit and unregulated, and legal pluralism leaves the ‘rules of the game’ undefined – the land rights of the most poor and vulnerable family and community members are becoming weaker. Woodhouse describes how,

When competition for land intensifies, the inclusive flexibility offered by customary rights can quickly become an uncharted terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the powerful.⁴⁹

In Tanzania, a presidential body set up to investigate land conflicts documented various sources of land conflicts in one month, as shown in Table 2:

Table 2: Land disputes in Tanzania⁵⁰

Type of land dispute	Incidences of disputes submitted
Double allocation	1,355
Claims for compensation or alternative land in cases of compulsory acquisition	2,717
Invasion of plots and farms	1,225
Stopped from developing the plots	936
Invasion of open or other public spaces	714
Failure to develop the plots	639
Taking plots without following proper procedures	605
Change in land uses without following proper procedures	469
Surveying of squatter areas	44

Table 2 shows that the primary factor driving conflicts over land in Tanzania is a dysfunctional system of land governance, which allows for double allocations and takings of private land through questionable procedures. The Tanzanian example demonstrates that citizens' frustration with existing land ownership structures are another contributor to conflicts. A critical area of intervention is to assist governments to clearly understand the links between land governance failures and conflict, and to identify strategies that effectively link land management with conflict resolution.

2.2.4 Informal settlements in urban areas

Tenure insecurity and land scarcity are no less of a concern in urban areas in Africa. African states have committed themselves to the protection of economic, social and cultural rights, such as the rights to health, adequate housing and a healthy and sustainable environment under the African Charter of Human and Peoples' Rights⁵¹ and the associated Maputo Protocol⁵² on the Rights of Women in Africa. However, in most African cities, according to the United Nations Human Settlements Programme (UN-HABITAT), "the worsening state of access to shelter and security of tenure results in severe overcrowding, homelessness, and environmental health problems."⁵³ This general rise in urban poverty and insecure tenancy takes place in a context of accelerated globalization and structural adjustment policies, which is characterized by: i) deregulation measures; ii) massive government disengagement from the housing sector; and iii) attempts to integrate informal markets — including land and housing markets — into the formal market economy, especially through large-scale land ownership registration and titling programmes.⁵⁴

In Africa, at least 40–50 percent of the population of cities live in informal settlements, either on the outskirts or in inner city slums.⁵⁵ Large segments of low and moderate income groups have no choice but to rely on informal land and housing markets. Aside from lacking essential services such as water, sanitation and health facilities, the structures erected for shelter are susceptible to frequent demolitions by authorities, who view the proliferation of informal settlements as a deterrent to private sector investment in more durable housing.⁵⁶ The lack of protection from involuntary removal from land or residence by the state leaves most urban slum dwellers at the mercy of capricious forces, who can manipulate them at will for political and economic interests. Conflict, often violent, is a common

phenomenon associated with these forced removals. Given the intense challenges of life in informal settlements, it is not surprising that slums have also become important sites for resistance and the emergence of gang cultures which challenge the legitimacy of the state.⁵⁷

The implications of these removals and the poor living conditions in informal settlements highlight the conflict between rule of law and social justice in the context of land conflicts. While African governments often use law-based arguments to justify mass evictions of slum dwellers, noting that the settlements are illegal and fail to meet health and safety regulations, those same governments have been less than successful in addressing the broader social justice concerns of the urban poor. Slum upgrading projects, designed to improve the living conditions of slum dwellers and enhance the security of access or tenure rights, have often resulted in new housing units that are in reality unavailable to slum tenants because of increased rent charges and reduced living quarters.

In the end, actual slum occupants are pushed out by economic constraints, opening up the upgraded housing for occupation by newer and relatively wealthier families. Currently, a small number of overburdened national and international non-governmental organizations take on human rights monitoring of urban evictions, slum upgrading projects and other attempts to address the plight of the urban poor. Support to states and non-state actors, to ensure that evictions are carried out in a manner that respects human rights, and that appropriate resettlement and slum upgrading actually benefits the urban poor, is a critical area of intervention.

2.2.5 Gender and land rights

When gender dynamics are overlaid onto ineffective land and natural resource governance systems, women and girls are often the biggest losers. The above-mentioned AU/AfDB/UNECA Framework on Land Policy in Africa recognizes the structural challenges confronting women in the context of ownership and use of land, especially in rural areas. Despite the AU's focus on land rights for women in rural areas (primarily because of their role in agricultural production), it is equally important that women in urban areas are beneficiaries of gender-equitable land reform processes.

Much discussion on land reform and gender focuses on moving women's land rights out of the customary sphere

and into the realm of formal titles. But African women continue to face major difficulties in gaining ownership of land under both customary and statutory systems, despite changes in law and attempts at policy reform.⁵⁸ For African governments, it is important to note that both formal and customary systems can provide protection for women's land rights, but patriarchy and society-wide gender biases undermine both systems. As one scholar describes, "If analysts are to avoid the trap of an approach that hides behind stereotyped views of household organization and ignores local power dynamics, they must come to grips with wider contexts ... [i]n particular more attention must be given to the way land and labour intersect."⁵⁹

In many customary systems, land is held by families, in which the ability of any family member to sell or lease out the land is subject to the other family members' rights of use and occupation, specifically including the wife.⁶⁰ It is true that sometimes women's customary rights are violated by more powerful family or community members. Those actions, however, do not always reflect the norms of the community, but rather constitute a violation of those norms.⁶¹ Those customary rights and obligations are deep-rooted and generally well-understood by women, who seek redress through their relational community networks for violations of their rights.⁶² It is here, within customary systems, where appropriate state intervention and support of women's equality can provide real benefits.

Formal land rights transferred to women through statutes may be less well known and understood by women, especially those in rural or minority communities. Moreover, there is evidence that formal titling and registration efforts can exacerbate gender inequalities: for example, when only the name of the male head of household is put on the certificate, women are effectively stripped of any legal acknowledgement of their land claims. Land tenure policy in Kenya, for instance, has had a negative impact on women's rights. Since the 1960s the government of Kenya embarked on a policy of converting Trust Lands into group ranches, and then converting those to individual ownership. While under the Trust Lands and Group Ranch systems, women's access to lands would have been protected at least in some respects by community custom, which often protects land use rights for women. When land was converted to individual ownership, it was generally registered in the name of a male head of household.⁶³

Under the Registered Land Act, women were cut out of formal land ownership and their rights to use the land

were also suppressed as the land was transferred out of customary management.⁶⁴

Although attempts have been made to address this problem through legislation and programming, laws prohibiting discrimination or providing for redistribution of land are not sufficient to secure equality for women. Research in southern and eastern Africa indicates that culturally accepted male dominance disadvantages women under customary and formal systems, and results in poor access to information among women, thus reducing their participation and the exercising of their rights in land programmes.⁶⁵

2.3 Natural resource governance

The global transfer, use and sharing of natural resources is one of the foundations of human development. In recent years, key lessons learned on natural resource governance for poverty reduction and sustainable development have been disseminated by a wide range of actors, including governments, donors, multilateral institutions and non-state actors. This section discusses selected models that are relevant to the issues in this paper. Given space constraints, this paper cannot address all relevant models, but readers who desire additional information can access the references identified in this section.

Like land governance, the management of the process of natural resource discovery, exploitation, use and sharing of benefits can have powerful impacts, both positive and negative, for individuals, communities and nations. As described in the AU/AfDB/UNECA Framework on Land Management:

land is an important factor for many ... uses that are increasing in importance to the development of African economies. These include manufacturing, mining, energy development, ... and tourism. These uses require large fiscal, technological and human investments, which are often provided by foreign investors or international financing. If those investing in these activities are to use land in a manner that is environmentally sustainable and cost-effective government policies will have to be such as to guarantee net gains for African populations.⁶⁶

In order to guarantee 'net gains' for Africans through natural resource governance, the literature⁶⁷ reflects an emerging consensus on several central principles:

- Legitimacy: the governance body has popular acceptance, has appropriate regulations and guidelines, and follows its legal mandate;
- Accountability: operates in a transparent manner, includes public oversight mechanisms;
- Inclusion: real participatory engagement with all relevant stakeholders on an equal basis;
- Equity: costs and benefits are equitably shared, human rights and cultural practices are respected, current and future generations are considered;
- Well-informed: diverse inputs of knowledge, decisions are based on evidence, information is widely shared and the public is well-informed;
- Competent and effective: delivers outcomes, enhances investment, improves resources condition and efficiency of use, and builds capacity of all engaged in the governance mechanism;
- Coherence: accounts for context from the local to global level, coordinates across different scales of government, policy sectors, and geographies;
- Responsive and durable: the governance structure is adaptable and can learn from experience, but also maintains key principles of operation over time to maintain policy longevity.

Mainstreaming these principles into African governments' policy frameworks and legal regimes on natural resources can be an important area of intervention for UNDP. Moreover, translating these broad principles into concrete activities at the local and national level will require ongoing support from partners such as UNDP. For example, devolved governance structures are key means to implement these principles in many contexts, but devolution often proves extremely challenging in African states with a long legacy of centralized control.

Despite the challenges of implementing a natural resource governance structure based on the principles above, certain practices reflect the emerging success of these types of policies. Community-based natural resources co-management systems (CBNRMs), for example, are

increasing in importance in a number of African countries. In Namibia, legal reforms in the land and natural resources sectors in the 1990s enabled residents of communal lands to form organic local institutions that were vested with user rights over wildlife. These areas consequently raised revenue in excess of US\$2.5 million from wildlife-based activities. Wildlife populations also recovered during the same period.⁶⁸ While this model has worked in a number of southern African countries, the establishment of wildlife conservancies and community forests associations in East Africa has been less satisfactory from the perspective of benefit sharing for communities. In West Africa, similar trends have been noted, with resource exploitation producing "tension between local communities and mining companies with regard to expected direct benefits to the local communities, security of land rights, livelihoods and compensation, resettlement packages, pollution and environmental degradation."⁶⁹

In relation to benefits from mineral exploitation, the general practice, especially in common law Africa, is that states are under no obligation to share mineral wealth with communities in (or under) whose land the minerals are discovered.⁷⁰ However, responding to inequities created by this state practice, especially on marginalized communities, new models that facilitate some measure of benefit sharing with the state are beginning to emerge in some parts of the continent.

In South Africa, for instance, the Mineral and Petroleum Resources Development Act, (MPRDA)⁷¹ makes provision for ongoing benefit sharing by means of royalties payable directly to communities to fund development plans. The community involved must be given access to technical and financial resources,⁷² which could be achieved through joint-venture arrangements. The duration of a preferential right is five years initially, easily renewable for further periods of five years at a time – effectively issued indefinitely, provided there is compliance with the development plan.⁷³

3. ALTERNATIVE INSTITUTIONAL EFFORTS TO ADDRESS COMPLEX LAND ISSUES

Given the centrality of land in socio-political and economic relations in Africa, the ability of states to make the right institutional choices, free from prejudices and political interference, has been constrained. Although institutional reforms devolving rights over land and natural resources to the local level have been successful in countries where public institutions are relatively efficient and the rule of law operational, the norm across sub-Saharan Africa is that state institutions are characterized by patrimonial relationships, in which state resources are distributed as rewards for political loyalty, and weak rule of law. Consequently, “in these countries, the devolution of valuable natural resources ... to the local level is fundamentally at odds with the interests and incentives that dominate the governance process.”⁷⁴

Due to the confluence of interests in land and natural resources on the one hand, and the high political and financial costs of radically reforming the sector on the other, most governments in the region are hesitating on the brink of reform in one critical respect or another, wary of the long, untidy and contentious road ahead. Policy-making processes have slowed in Uganda, Malawi, Zambia, and Ethiopia; enactment of important new laws or amendments is being withheld in Kenya and South Africa, and the implementation of promulgated laws has been delayed in Tanzania.

The most common approach to harmonizing land relations on the continent has been the establishment of land commissions, statutory bodies vested with significant powers over land administration at the national and local level. Some countries have adopted institutional arrangements beyond commissions. Thus, South Africa's land redistribution programme was ushered in by the post-apartheid Constitution (1996), of which section 25(7) contains language that has been used by community groups to reclaim lost territories:

a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of parliament, either to restitution of that property or equitable redress.

The Restitution of Land Rights Act 1994⁷⁵ created a Land Claims Court and a Commission on Restitution of Land Rights. While those institutions have made remarkable efforts in discharging their duties, some argue that they have largely “failed to redress the moral harm done to victims of apartheid forced removals.”⁷⁶

Others nations such as Mozambique, Tanzania, Uganda and Eritrea have constituted formal tribunals independent of the judiciary (but with recourse to ordinary courts), operating at the local level, and in some cases operated by community members. This approach has been problematic in that it creates “the multiplication of arbitration authorities”, which deliver contradictory findings, as a result of which “outcomes cannot be predicted” and “conflicts escalate.”⁷⁷

Institutional failure in the land sector often has devastating ripple effects on the economy, on development in general and on vulnerability to conflict. Nevertheless, for the most part, states have been unable to negotiate the establishment of land reform institutions – mediated by legitimate institutions and backed by central government – to provide an enabling framework of law as well as institutional support for local level processes. Moore points to the importance of “practical institutional possibilities” because “rights without remedies are ephemeral”; hence the need to “create an appropriate space where legitimate claims [can] be acknowledged and acted upon.”⁷⁸

Because of the challenges in land and natural resources management, judicial institutions such as national and regional courts have proven to be the most viable avenues for addressing complex land grievances between communities, states and commercial interests. Important judicial decisions since the 1990s have begun to reshape the vertical relationship between the state and citizens, as well as horizontal relations among citizens themselves.

In the 2006 case of *Sesane Setlhobogwa and Others v. Attorney General*, a minority community, the Basarwa or Bushmen, challenged the decision of the Botswana government to remove members of the community from their lands within the Central Kalahari Game Reserve. The government had implemented its policy decision by terminating the provision of vital human services such

as water, food rations and healthcare in the area. It also withdrew the 'special game licences' that had allowed the Basarwa to hunt in the reserve, and prevented them from entering the reserve without a permit. Compensation for the loss of their homes and resources was never provided, despite explicit provisions for compensation in the event of compulsory land acquisition in the Tribal Land Act (ch. 33). The High Court of Botswana ultimately ruled that such policies were illegal and that the community should be allowed to return.⁷⁹

In the *Richtersveld* case, the South African Constitutional Court gave land back to a community, holding that the rights of an indigenous group survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.⁸⁰ In a Ugandan case involving the Benet community, a hunter-gatherer group had been evicted to pave the way for conservation. Justice J.B. Katutsi of the Ugandan High Court found the occupation of the land by the Uganda Wildlife Authority to be illegal and returned the land to the Benet, saying they were the "historical and indigenous inhabitants" of the land and were entitled to "stay and carry out economic and agricultural activities including developing the same undisturbed."⁸¹

Regional adjudicative tribunals have also been outspoken on land challenges on the continent. The African Commission on Human and Peoples' Rights in the *Endorois* Communication declared that Kenya's action to create a national game reserve on land customarily held by a community, after forcefully evicting them without compensation, violated Article 14 of the African Charter on Human and Peoples' Rights, therefore the Commission ordered restitution and compensation.⁸² Similarly, the Southern Africa Development Community (SADC) Tribunal invalidated the decision of the Zimbabwean government to compulsorily appropriate private land that had mainly been in the hands of white Zimbabweans, without compensation, for purposes of redistribution to black

citizens, on the grounds that this action offended the norm of anti-discrimination.⁸³

Disappointingly, apart from the *Richtersveld* decision, the other three progressive decisions noted above have been ignored by the relevant states, exposing the intransigence of executive organs to respect judicial decisions in flagrant disregard of rule of law principles. Deprived thus of any legitimate remedy, it is not unforeseeable that communities will resort to the use of violence to redress land issues. Nevertheless, recent trends and developments suggest that the time is perhaps ripe for replacing the domination of colonial land jurisprudence with much more progressive judicial interpretations that support community sovereignty over natural resources, in a manner consistent with the UN Declaration on Permanent Sovereignty over Natural Resources.⁸⁴

Despite the continuing proliferation of land and natural resource laws, policy frameworks, land commissions, land boards, and so on, communities have always had, and in many cases continue to have, customary management regimes for the land they occupy and the natural resources they use. In the past, these management regimes often controlled both intra- and inter-community access to resources. But those systems were developed under conditions of less land and resource scarcity than currently exist in Africa.⁸⁵ These systems have been flexible and adaptable over time, but current conditions of land scarcity, high monetary value for land, and state intervention are straining or obliterating customary management regimes in many communities. When there are substantial power inequities in the dispute, as with rural communities taking on state-supported corporate investors, traditional dispute resolution based on social approbation is rarely effective.⁸⁶ Accordingly, it is imperative that those systems that remain functional for disputes between individuals and communities are supported, but that communities are also assisted to develop the capacity to engage with formal governance structures at national and regional levels.

4. INTERNATIONAL INTERVENTIONS IN LAND POLICY REFORM

Recognizing the critical importance of land and natural resource governance, a plethora of international actors, including UNDP, has engaged in the sector over the past several decades. This section provides a brief overview of some of the key actors and interventions, and highlights certain gaps.

The UN Commission for the Legal Empowerment of the Poor, the World Bank's Justice for the Poor programme and various other bilateral and multilateral initiatives have, in the past few years, focused on understanding and leveraging customary legal systems as a way of ensuring access to justice and extending the rule of law to the poor. The Human Settlements Programme of UN-HABITAT has taken a lead role in the development of pro-poor land tools, and the Food and Agriculture Organization is currently finalizing a set of voluntary land policy guidelines, as mentioned earlier.

The World Bank has taken an active approach to developing a coherent land policy framework, publishing in 2003 a policy report⁸⁷ based on four regional conferences held in Africa, Asia, Europe and Latin America. In 2005, it published a guide to Land Law Reform. Some bilateral donors, such as the UK's Department for International Development (DfID) and the German Agency for Technical Cooperation (now GIZ) have produced land policy guidelines. The United States International Development Agency (USAID), working with Tetra Tech ARD, has developed an elaborate 'toolbox' of resources on land tenure and policy.⁸⁸ Unfortunately, so far the largest bilateral donors seem the least disposed to coordinate, while the smaller agencies with more modest budgets seem to perceive the need more clearly, and are more willing to work together.⁸⁹

Regional and sub-regional organizations are well-placed to support and guide development and implementation of land policy in their member states. An important initiative is the 2010 Framework and Guidelines for Land Policy and Land Reform in Africa developed jointly by the AU, AfDB and UNECA, already mentioned in this paper. Cognizant of the varied stages and successes in policy and administrative reforms of different countries, the initiative recognizes exchange of information and lessons learned, as well as access to technical expertise and reviews of ongoing processes, as catalysts to reforms across the continent. With the support of UN-HABITAT, benchmarks

and indicators of land policy and land reforms are being developed through that initiative, to allow for monitoring and evaluation of policy development and implementation processes and their outcomes.

The New Partnership for Africa's Development (NEPAD), a programme of the AU, coordinates a number of projects and programmes aimed at promoting coherent agricultural development in Africa. The NEPAD peer review mechanism potentially has a greater role to play in evaluating in-country implementation of the AU/AfDB/UNECA Framework and Guidelines. One of NEPAD's actions to achieve agriculture, trade and market access objectives is to "improve land tenure security under traditional and modern forms of tenure, and promote the necessary land reform."⁹⁰ This objective is implemented under the Comprehensive African Agriculture Development Programme (CAADP), which rather than over emphasize tenure security, focuses on irrigated agriculture as a basis of food security. Some land experts, however, caution that:

The mould of CAADP's irrigation schemes, which will be driven by the state ... and foreign agri-capital forces to engage in mechanized farming (for export and not food crops) is likely to entrench dispossession of rural farmers' land. The Sudanese Gezira irrigation project ... which turned rural farmers into waged plantation labourers, provides a vivid example of an undertaking associated with this approach to agricultural development.⁹¹

Regional economic communities in Africa also have an important role to play with regard to land policy in their member states. For example, within the framework of the implementation of its Regional Agricultural Investment Plan,⁹² the Economic Community of West African States (ECOWAS) is developing a strategy to promote consensus and the convergence of national land policies in the region, on the basis of principles defined in the AU/AfDB/UNECA Framework and Guidelines. In southern Africa, the SADC has established a Land Reform Technical Support Facility,⁹³ intended to provide access to expert advice, training and technical support to its member states on different aspects of land reform.

Other emerging interventions have been designed to create broad policy standards and clear implementation guidelines for state and corporate action. In many cases, it

is corporate interests that end up undermining legislative protections for communities and individuals. For instance, the Natural Resource Charter is a global initiative designed to assist the governments and societies of countries rich in non-renewable resources in managing those resources in a way that generates economic growth, promotes the welfare of the population and is environmentally sustainable.⁹⁴ The Charter's first precept is that "the development of a country's natural resources should be designed to secure the greatest social and economic benefit for its people. This requires a comprehensive approach in which every stage of the decision chain is understood and addressed." The Charter has been adopted by NEPAD and endorsed by the African Development Bank as a guiding framework, and is undergoing pilot programmes in several African countries. The Charter specifically addresses the

entire decision chain of natural resource management but appears to operate at a very high level.

These initiatives reflect the diversity of policy-level programming that has been ongoing in Africa and beyond; however, a major gap remains in the area of incentivizing governments to actually implement policy and legal reforms. Moreover, building capacity of communities to engage on an equal basis with states and corporations at national, regional and international policy development forums has not been sufficiently addressed. This lack of capacity is directly linked to broader development programming and rule of law development. Finally, there remains a critical gap in the independent and evidence-based monitoring of the verifiable impact on communities of these manifold policy development processes.

5. Programmatic options for UNDP

Programmatic intervention by UNDP and its partners should be informed by the key principles that have emerged in the literature over time. Specifically, UNDP's programming on land and natural resource governance should reflect the principles that have been highlighted throughout this paper. Moreover, a hallmark of UNDP's work is the human rights-based approach, which brings an important perspective to the land and natural resource management debate. Accordingly, the recommendations below reflect the lessons learned from various examples described in this paper, while also adopting a human rights-based approach to programming.

Legitimacy

UNDP can support African governments to:

- Review their land and natural resource governance laws and policies to ensure that they comply with human rights obligations to which each government has agreed, specifically including the African Charter on Human and Peoples' Rights and the Maputo Protocol on the Rights of Women in Africa.
- Develop or update policies, regulations and guidelines to ensure that securing the greatest social and economic benefit for current and future generations is the guiding principle behind the formulation and implementation of policy.

- Adopt platforms on land and natural resource governance that have built-in regional and international monitoring mechanisms, such as the Natural Resource Charter, an international initiative endorsed by NEPAD.
- Drawing on UNDP experiences in dryland areas, ensure that devolution of governance to the local level is a central component of land and natural resource management planning where appropriate.

UNDP can enhance support to local communities and non-state actors to:

- Continue to develop rights-based educational programmes and materials specifically focused on land and natural resource management that are appropriate to the local context.
- Develop compacts, charters of expectations, and/or social contracts with land and natural resource governance authorities to enhance legitimacy and monitoring by local stakeholders.

Accountability

UNDP can support programmes to:

- Build the capacity of local communities to monitor the activities of land and natural resource management governance mechanisms, and to seek redress for abuses.

- Engage in direct litigation on land and natural resource rights, especially where state institutions have proven resistant to addressing clear violations of human rights and/or principles of equity.

Inclusion

UNDP can support programmes that:

- Elaborate principles of participation in relation to development, in particular the concept of free, prior and informed consent in relation to different cultural communities and issues.
- Demonstrate specific pathways for women's participation in land and natural resource governance mechanisms at the local, national and regional levels.
- Enhance the capacity of both rural and urban communities to actively participate in land and natural resource management debates.
- Assist existing customary dispute resolution systems related to land and natural resources to remain effective and to incorporate human rights principles into their processes.

Equity

UNDP can support programmes that:

- Equalize power imbalances in the process of engagement on land and natural resources, through the provision of legal aid or other forms of direct assistance to marginalized groups, such as women, indigenous peoples, people living with HIV/AIDS, the disabled, the youth and the elderly.
- Develop the capacity of communities and governments to effectively negotiate equitable benefit sharing agreements in relation to natural resource development projects, such as mining, tourism and protected areas.

- Support governments to engage with technical experts who can provide detailed information about benefits and detriments of various proposed programmes for current and future generations.
- Create knowledge products and training tools on a human rights-based approach to implementing land and natural resource governance.
- Provide direct education to government actors, especially at the local level, on the key principles for good land and natural resource governance.

Well-informed

UNDP can support African governments to:

- Partner with technical experts to develop systems to gather the environmental, geographic, cultural, financial, and other types of data necessary to make evidence-based decisions about land and natural resource management.
- Develop systems that disseminate information about land and resource governance in local languages, using communication methods that are accessible to diverse stakeholders including rural and isolated communities, women and the disabled.

UNDP can support non-state actors to:

- Develop the capacity to use laws and policies on access to information to hold governments and corporations accountable for land and natural resource decision making.
- Train media on principles of good land and natural resource governance.
- Undertake research on the impact of different institutional arrangements in Africa on tenure security, equity and increased productivity.

NOTES

- ¹ *Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa*, Economic Commission for Africa, 2004, p. 15.
- ² Chris Huggins and Jenny Clover, (eds) *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, Institute for Security Studies, 2005, p.58.
- ³ 'Mapping population and climate change: Interactive map', *Population Action International*, 2009, at http://www.populationaction.org/Publications/Data_and_Maps/Mapping_Population_and_Climate_Change/Summary.php (accessed 29 September 2012).
- ⁴ E.g. David Deng, *The New Frontier: A Baseline Survey of Large-Scale Land-Based Investment in Southern Sudan*, Norwegian People's Aid, 2011; Laura A. Young and Korir Sing'Oei, *Land, Livelihoods and Identities: Inter-community Conflicts in East Africa*, Minority Rights Group International: London, December 2011.
- ⁵ Ben Cousins, 'More than socially embedded: the distinctive character of communal tenure regimes in South Africa and its implications for land policy', *Journal of Agrarian Change*, 7(3) 1 July 2007, pp. 281–315. According to Cousins, the filtration of the customary rules by the colonial administration transformed custom by overly emphasizing the group-based nature of land rights, redefining women's land rights as secondary and subordinate to the land rights of men, and eroding "mechanisms that constrained the power of traditional leaders and kept them responsive to rights holders, these being replaced by a requirement for 'upward accountability' to the state, creating opportunities for abuse of power and corruption", *ibid.*, p. 300.
- ⁶ Wanjala Smokin, 'Land and resource tenure, policies and laws in East Africa', in Munyaradzi Saruchera, (ed.) *Securing Land and Resource Rights in Africa: Pan-African Perspectives*, Programme for Land and Agrarian Studies School of Government University of the Western Cape, Bellville, South Africa, 2004, p. 15.
- ⁷ G.B.A. Coker, *Family Property among the Yorubas*, Sweet and Maxwell: London, 1966, pp. 30–33.
- ⁸ Okoth Ogendo, 'Agrarian Reform in sub-Saharan Africa: An assessment of state responses to the African agrarian crisis and their implications for agricultural development', in Thomas J. Bassett, Donald Crummey and Thomas Leiper, Kane Collection, (Library of Congress: Hebrew Section), *Land in African Agrarian Systems*, Madison WI: University of Wisconsin Press, 1993.
- ⁹ Coasian reasoning seems to have informed the maintenance of colonial property relations in Africa by advancing the argument that the cost of re-allocating property rights to new owners would exceed its benefits and create sub-optimal consequences to nascent economies. Coase had argued that "[I]f market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast." The theorem's assumptions – no transaction costs and no importance attached to equity or distributions concerns – are essentially those of the neoclassical model. See, R.H. Coase, *The Problem of Social Cost*, University of Chicago Law School, Chicago IL, 1960.
- ¹⁰ See Robin Palmer, *Robert Mugabe and the Rules of the Game*, Oxfam, July 2000, at www.mokoro.co.uk/files/.../robert_mugabe_and_rules_of_game.pdf, (accessed 29 September 2012).
- ¹¹ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Black Swan: London, 2001, p. 86.
- ¹² Where these institutions begin to function, they become targets of intense attack by political actors. In the pitched battle that ensues, these institutions lose out through attacks on their legitimacy or outright dissolution. See section 3 of this report for further details.
- ¹³ Munyaradzi Saruchera, (ed.) *Securing Land and Resource Rights in Africa: Pan-African Perspectives*, Programme for Land and Agrarian Studies School of Government, University of the Western Cape: Bellville, South Africa, 2004, p. 1.
- ¹⁴ K. Deininger, H. Selod and T. Burns, *Using the Land Governance Assessment Framework (LGAF): Lessons and Next Steps*, World Bank, 2010, at <http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/SelodNewPaper.pdf> (accessed 29 September 2012).
- ¹⁵ *Framework and Guidelines on Land Policy in Africa*, Economic Commission for Africa, November 2008.
- ¹⁶ *Ibid.*
- ¹⁷ *Ibid.*, at para. 1.1.2.
- ¹⁸ See <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>
- ¹⁹ See UN General Assembly resolutions 1803 (1962), 3201 (1974) (Declaration of the Establishment of the New International Economic Order) and 3281 (1974) (Charter of Economic Rights and Duties of States).
- ²⁰ Declaration on the Right to Development, UN Doc. A/RES/41/128 (4 December 1986), at Preamble.
- ²¹ United Nations Declaration on the Rights of Indigenous Peoples, Human Rights Council, Report to the General Assembly on the First Session of the Human Rights Council, at 58, UN Doc. A/HRC/1/L.10 (2006), Article 26.
- ²² Mutua's conception of the African state is that it is a predatory vampire state. Makau Mutua, *Human Rights NGOs in East Africa: Political and Normative Tensions*, University of Pennsylvania Press: Philadelphia PA, 2009. See also, George Ayittey *Africa Unchained*, Palgrave Macmillan: New York, 2005.
- ²³ *Ibid.*, p. 11.
- ²⁴ *Mission Impossible? Implementing the Ndung'u Report*, AFRICOG, 2009.
- ²⁵ Michael Taylor, 'Rangeland tenure and pastoral development in Botswana: is there a future for community-based management?', Centre for Applied Social Sciences and Programme for Land and Agrarian Studies, 2007. See also, Clement Ng'ong'ola, 'Land rights for marginalized ethnic groups in Botswana, with special reference to the Basarwa', *Journal of African Law* 41(1), 1 January 1997, pp. 1–26.
- ²⁶ See, e.g. Dessalegn Rahmato, *Land to Investors: Large-scale Land Transfers in Ethiopia*, IS Academie: Maastricht, 2011.
- ²⁷ *Land Policies for Growth and Poverty Reduction*, World Bank Publications: Washington D.C., 2003, p. 37.
- ²⁸ Nelson Marongwe, 'Land and resource rights in Southern Africa', in Saruchera, *supra* note 13, p. 25.
- ²⁹ In Kenya, the Swynnerton Plan of 1954 articulated this vision thus: "Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will support his family. He must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security such financial credits as he may wish to secure."
- ³⁰ Republic of Kenya, Sessional Paper No. 4 of 2009 on Land Policy.
- ³¹ Constitution of Kenya, Chap IX Art 115(2) see <http://kenya.rcbowen.com/constitution/chap9.html>
- ³² Republic of Uganda, Land Act, 1998, section 16 pp. 24–7. Mailo is a quasi-freehold tenure system established by the British colonial government to reward colonial agents who advanced British interests in many regions of Uganda; it remains a relatively secure and well-defined system of tenure.
- ³³ Liz Alden Wily, 'Reconstructing the African commons', *Africa Today* 48(1) 2001, pp. 77–99.
- ³⁴ Kofi Alinon, 'Land tenure and legal pluralism: The West African situation', in Saruchera, *supra* note 13, p. 41.
- ³⁵ *Ibid.*, p. 46.
- ³⁶ *Tribal Land Administration in Botswana*, Institute for Poverty, Land and Agrarian Studies, University of Western Cape, 2009.
- ³⁷ Constitutional Court of South Africa, Case CCT 100/09, *TONGOANE and Others v Minister for Agriculture and Land Affairs and Others*, Decision of May 2010.
- ³⁸ Christian Lund, et al., 'Land rights and land conflicts in Africa: A review of issues and experiences', Danish Ministry of Foreign Affairs, 2006.

- ³⁹ Constitution of the Republic of Kenya, 2010, Art. 63.
- ⁴⁰ Transitional Constitution of the Republic of South Sudan, 2011, Art. 171(9).
- ⁴¹ Transitional Constitution of the Republic of South Sudan, 2011, Art. 171(10).
- ⁴² Land Act of 2009, South Sudan, art. 11.
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- ⁴⁸ David Anderson and Emma Lochery, 'Violence and exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?', *Journal of Eastern African Studies Journal of Eastern African Studies* 2(2) 2008, pp. 328–343.
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- ⁵² Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005.
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⁸⁴ The right of peoples and nations to permanent sovereignty over their natural resources was affirmed in the 1962 General Assembly Declaration on Permanent Sovereignty Over Natural Resources No 1803 (XVII), 14 December 1962. The term 'peoples' to which this principle applies was originally intended to refer to nation states within the context of decolonization, but it is now equally understood to refer to people within a nation state. There thus exist both internal and external dimensions. See Margot Salomon, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, Minority Rights Group, 2003, p. 35.

⁸⁵ Huggins and Clover, *supra* note 2, p. 58.

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⁸⁷ *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report, 2003, at <http://info.worldbank.org/etools/docs/library/34919/landpoliciesexecsummary.pdf> (accessed 29 September 2012).

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⁹¹ Munyaradzi Saruchera and Daniel A. Omoweh, *Nepad, Land and Resource Rights*, PLAAS Brief, 2004, p. 2.

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PAPER 5

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Contents

1. INTRODUCTION	99
2. AFRICAN MIGRATION: TYPES, PATTERNS, PARAMETERS	100
2.1 Migration destinations	100
2.2 Rural-urban migration	101
2.3 Skilled migrants and brain drain	101
2.4 Low-skilled and irregular migrants	102
2.5 Forced migration	103
3. THE MIGRATION-DEVELOPMENT NEXUS	104
3.1 Migration's impact on economies	104
3.2 Migration and poverty reduction	104
3.2.1 Migration and other development indicators	104
3.2.2 Remittances	105
3.2.3 Diaspora influence on development	106
4. THE MIGRATION-RIGHTS NEXUS	107
4.1 International normative framework	107
4.2 Regional and sub-regional normative framework	109
4.3 Protecting vulnerable migrant populations	110
4.4 Access to health services	111
4.5 Xenophobia and security	111
4.6 Access to justice	112
5. CONCLUSION AND POLICY RECOMMENDATIONS	112
ANNEX: INNOVATIVE PRACTICES FOR MANAGING MIGRATION IN AFRICA	115
NOTES	117

Migration, development and social justice

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1. INTRODUCTION

This background paper was commissioned by UNDP as part of its Governance Community of Practice Meeting for sub-Saharan Africa. Migration is increasingly considered as a critical topic in relation to governance and development in contemporary discourse on Africa's political economy. The African Union developed a strategic framework for a Policy on Migration in Africa in 2007. The first UN Global Forum on Migration and Development also took place in 2007.

In 2006, at a global high level dialogue on migration and development, the UN Secretary-General declared:

the evidence on migration's potential benefits is mounting. With remittances reaching an estimated 167 billion dollars last year, the amount of money migrants from the developing world send back to their families exceeds the total of all international aid combined. And money is far from being the whole story. Migrants also use their skills and know-how to transfer technology, capital, and institutional knowledge. They inspire new ways of thinking about social and political issues. They form a dynamic human link between cultures, economies, and societies.

(Secretary-General Address, New York, 14 September 2006,
<http://www.un.org/migration/sg-speech.html>)

The increasing policy and strategic focus on migration as a component of development has caught up with the reality on the ground – a reality that has seen migration affect the lives of millions of individuals, families and communities for centuries. The emerging recognition of migration as a normal state of affairs for the human race, instead of a phenomenon to be controlled and invariably reduced, will enable UNDP to integrate migration considerations effectively into programme and policy development.

Apart from its relationship to positive development goals, as described by the UN Secretary-General migration is also deeply integrated into multiple governance and development challenges such as poverty, conflict cycles and human rights violations. Despite this, migration has not been effectively mainstreamed into policy discussions on the Millennium Development Goals (MDGs) nor into development discourses in general. When it has been incorporated, it is often viewed as a negative factor, creating a drag on national development priorities.¹ This trend is beginning to change, but more work needs to be done to provide policy makers and advocates with accurate and timely information about migration. Incorrect information and faulty assumptions can lead to inappropriate strategies that do not account for this basic human behaviour.

2. AFRICAN MIGRATION: TYPES, PATTERNS, PARAMETERS

A comprehensive view of the types of migration impacting on the African continent is important for understanding policy options. The following section describes in brief the types and patterns of African migration. A few terms warrant definition at the outset.

- Migration refers to the entire phenomenon of people moving around the planet, for any number of reasons. Migration may be forced or voluntary, as described below.
- Migrants are the individuals who participate in this process of movement.
- Emigration refers to the process of leaving one's country of residence whereas immigration refers to the process of entering a new country.

Migration is often viewed in terms of push and pull factors – economic, social and political factors that push and pull migrants from rural to urban areas and across borders. However, migration typologies based on push or pull factors have been questioned as to their relevance to the reality on the ground.² In effect, categories overlap and bleed into each other when examined from the perspective of the daily lives of individuals and family groups in Africa. Moreover, using push and pull factors as a basis for migration typology tends to support a policy framework of controlling migration by controlling the push and pull factors. On the other hand, viewing migration as a normal human phenomenon and working to integrate that understanding into policy may not require such typologies.

2.1 Migration destinations

Migration inside sub-Saharan Africa is by far the most important component of overall African migration in terms of the number of individuals participating, the effects on countries of emigration and immigration, and policy implications.³ It is estimated that up to 70 percent of all cross-border migrations of Africans take place within sub-Saharan Africa.⁴ In 2010, according to the International Organization on Migration (IOM), 64 percent of sub-Saharan African migration was intraregional and employment related.⁵

On the other hand, about one-third of Africa's international migrants leave the continent for other destinations such as Europe, the Middle East and the United States. In terms of absolute numbers, the key migrant-sending countries in Africa were Nigeria, South Africa, Ghana, Somalia, Ethiopia and Senegal.⁶ Of Ghana's population of 19 million, for instance, 10 percent currently live abroad, principally in Nigeria, the United States, Canada, Germany, Italy and the United Kingdom.⁷

Migration from certain African countries to Europe and North America is growing.⁸ Half of all African immigrants in the United States have arrived since 2000.⁹ In 2009, about 1.5 million African immigrants resided in the United States, with the top sending countries being Nigeria, Egypt, Ethiopia, Ghana and Kenya. The destination for migrants depends on their skill levels, with higher-skilled migrants making up a larger proportion of migrants to the United States, Canada and Australia.¹⁰ Despite this, African-born immigrants make up less than 4 percent of the US immigrant population.¹¹

Sub-Saharan Africans make up about 5 percent of all migrants in Europe.¹² Proximity and colonial ties have made Europe an attractive destination for African migrants. As well, prior to the sovereign debt crisis in the eurozone, Europe was facing a major labour shortage of both unskilled and skilled workers.¹³ While attempting to stop irregular immigration of unskilled workers, Europe was actively recruiting skilled labour, leading to the brain drain phenomenon discussed below.

The relationship between African states and migrant-receiving countries in Europe has been changing. As African countries have become more engaged in partnering with Europe on stemming the tide of irregular immigration, African governments have been more proactive about trying to influence European immigration policy and related labour policies. The 2006 EU-Africa Declaration on Migration and Development was an important development in this regard, and spurred consideration of mobility partnerships that would allow workers from Africa to enter Europe for time-limited labour contracts.¹⁴

2.2 Rural-urban migration

Rural-urban migration has exploded in Africa in recent decades. This phenomenon includes migration inside African nations as well as those who relocate to another African country. For instance, in Mali, migration out of rural areas has resulted in a quadrupling of the urban population since the 1950s.¹⁵ It is predicted that sub-Saharan Africa's urban population will outnumber its rural population by 2015.¹⁶

Rural-urban migration is primarily based on livelihood diversification or outright survival strategies. The recent drought in the Horn of Africa, for example, saw large numbers of Somali pastoralists moving into Mogadishu (a rare event) because the herds they rely upon for their survival had been decimated.¹⁷

Despite its recent increase, the phenomenon was significantly influenced earlier by the development of large colonial administrative centres where labour was required and services were provided. In Nigeria, the creation of colonial rail links between sea ports in Port Harcourt and Lagos into rural areas increased rural-urban migratory flows.¹⁸ The trend accelerated after independence was achieved in many African nations, and today generally continues, with some exceptions. Migration to urban areas has become a critical component of livelihood diversification as population pressure and environmental degradation has reduced agricultural productivity in many areas. Moreover, educated individuals from rural areas have few options other than to seek employment in cities, as non-agriculture based employment in rural areas is virtually non-existent.

The future of rural-urban migration in Africa is somewhat contested. In part, this is a result of the fact that data on migration is sparse across African countries, leading to difficulty in its measurement and analysis. While urbanization is expected to continue, many scholars agree that it has slowed; some researchers point to reversals in specific regions,¹⁹ where migrants have begun leaving the cities to return to rural communities.

In addition, some argue that African urban centres are becoming less and less able to absorb migrants, leading to the urbanization of poverty. As Adepoju notes of migration in sub-Saharan Africa, the "persistence of city-ward migration, in spite of worsening employment opportunities in the cities, and the continued possibility of earning a living, however meagre, in rural areas is a seemingly paradoxical characteristic."²⁰

2.3 Skilled migrants and brain drain

There has been substantial migration of skilled-professional labour within Africa for many decades. For example, an estimated 14,000 Ghanaian teachers migrated out of Ghana during the late 1970s, with a substantial majority going to Nigeria.²¹

As opposed to the 'brain drain' phenomenon discussed below, this type of movement has come to be known as 'brain-circulation'. The flow of highly educated professionals around the continent is often related political factors – as oppressive regimes come into power, the highly educated are often the first to flee. Uganda reportedly lost more than half of its high level and professional or technical personnel during Idi Amin's rule from 1971–1979.²² A second factor, as with all migration, is economics. Professional migration within Africa is often part of a stepped migration pattern, as migrants gradually move toward higher and higher wage economies. After Nigeria's economy experienced a downturn in the 1980s, Ghanaian professionals who had migrated there began leaving in large numbers for South Africa or for destinations outside Africa.²³

An estimated 2 percent of African migrants living outside of Africa are highly skilled professionals.²⁴ This migration of African-trained professionals away from the continent to work is the long-studied brain drain phenomenon. Adepoju clearly describes the dynamics of the brain drain in the following:

The global migration market allows developed countries to select – unilaterally and freely – which people should be admitted, what skills combinations and income profiles they should have, when they should be admitted, and for how long. This process persists without reference to the countries of origin that have invested human capital in the form of these migrants.²⁵

The impact of this migration market is particularly severe for small and very poor countries. The stock of skilled emigrants constitutes an average of 30 percent of the skilled workforce in small countries, and almost 25 percent in low-income countries.²⁶ However, the share of migrants among the tertiary-educated populace is highly variable across countries, ranging from 3 to 82 percent.²⁷

The issue is particularly controversial in relation to health care workers. Research suggests that the equivalent of almost a quarter of the total physicians practising medicine

in sub-Saharan Africa are doing so in OECD countries.²⁸ Of Mozambican doctors and Liberian nurses, 75 and 81 percent respectively, are working outside their country of origin.²⁹

In relation to development, the brain drain “is rarely the root problem but rather a symptom of myriad other development problems.”³⁰ Many factors influence the brain drain phenomenon, including recruiting by receiving countries, political and economic crises in Africa, and working conditions and remuneration levels for those who stay on the continent. A World Health Organization study found that availability of training, standard of living and working conditions were all significant factors determining whether health professionals migrate.³¹ The brain drain tends to self-reinforce as well, given that the loss of professionals increases the burden on those who remain, further exacerbating negative working conditions. This decreases the motivation of, and quality of service provided by, those who remain.³²

Although the brain drain is a serious challenge for African states, it is important to avoid easy generalizations about whether out-migration of skilled professionals is always negative for Africa’s economies.³³ Some recent research suggests that overall, the out-migration of highly skilled workers from Africa is positive for the sending countries, and at a minimum is not detrimental to economic growth. However, studies remain inconclusive given the difficulty of measuring many of the effects of high-skilled out-migration.³⁴ The impact is affected by levels of remittances, skill transfer and rate of return of professionals. It also depends on the ability of a given economy to adapt to the out-migration, through increased training or recruiting from other sources.

Policy efforts in the past decade have focused on addressing push factors within African economies that encourage out-migration of skilled labour, and on addressing recruiting practices by European employers in particular. In addition, substantial effort has been placed on developing programmes that encourage African diaspora populations to return to their country of origin. Programmes that offer incentives such as higher salaries, help in finding employment, or subsidies for housing and return expenses, to encourage the return of professionals have not shown clear successes in achieving the numbers required to significantly impact on the brain drain

phenomenon.³⁵ Programmes such as UNDP’s Transfer of Knowledge Through Expatriate Nationals (TOKTEN) programme, which brings diaspora volunteers back to their country of origin for short-term assignments, have had some achievements but do not address long-term migration patterns.³⁶ Moreover, these programmes are expensive. For the Liberian TOKTEN project, the budget to bring just 20 expatriate national professionals and 15 local professionals into the programme for 18 months was just over US\$2 million.³⁷

2.4 Low-skilled and irregular migrants

Driven by lack of opportunity on the continent and in many cases abject poverty, every year hundreds of thousands of unskilled workers decide to migrate, creating a substantial pool of irregular (also called undocumented or illegal) migrants. Irregular migration is by its nature difficult to quantify because data is lacking or unavailable. Data on irregular migration should, but rarely does, include the examination of unlawful entry, unrecorded returns, registered voluntary returns, deportations, visa overstaying, withdrawal of residence status, rejection of asylum claims, regularization, changes of the legal status of irregular migrants, and births to irregular migrant mothers, for example.³⁸ Some indication of the volume of irregular migration can be gleaned from expulsion data. For instance, Spain generally expels more than 100,000 irregular migrants every year.³⁹

The pool of unskilled, often irregular, migrants is predominantly young people entering their most productive years. However, irregular migrants often do not significantly improve their fortunes through migration.⁴⁰ Moreover, unskilled migrants may not gain new productive skills that are of benefit to them or their home country should they return, voluntarily or involuntarily.⁴¹ Irregular migration, through smuggling and trafficking in particular, reduces migrants’ ability to contribute productively to the host economy and to remit to their home country. Resources they might earn are confiscated by smugglers or traffickers and irregular migrants often have to use expensive or unreliable back-door channels for remittances so as to avoid detection. These purely economic costs do not take into account the human costs and rights violations that many irregular migrants must endure.

2.5 Forced migration

Forced migration, including internal population displacements and refugee movements across borders, is a dominant feature of migration within Africa. In 2010, there were more than 2 million refugees in Africa, and 40 percent of the world's internally displaced people are in Africa.⁴² Over the past decade, there has been a steady decline in African refugee populations from more than 3 million in 2000 down to 2.2 million in 2010. However, 2010 witnessed an increase from 2009 due to conflicts in Cote d'Ivoire, the Democratic Republic of Congo and Central African Republic as well as drought in the Horn of Africa. Kenya remains Africa's most important refugee hosting nation and the sixth most important in the world with more than 400,000 refugees.⁴³

Conflict displaces staggering numbers of people, with huge implications for governance and development policy. During the height of the Great Lakes refugee crisis from 1993–1998, nearly 1.3 million people arrived in western Tanzania as refugees from Rwanda and Burundi, an influx that increased the populations of the Kagera and Kigoma regions by more than half.⁴⁴ The Liberian conflict resulted in almost a third of the population leaving the country, and some have estimated that almost every Liberian (more than 3 million people) was internally displaced or had to leave the country at some point during the conflict, which lasted more than 20 years.⁴⁵ Even relatively short-lived conflicts can lead to massive displacement. Kenya's 2007–2008 post electoral violence, despite lasting for only a few weeks, reportedly displaced more than 300,000 people,⁴⁶ many of whom remain displaced four years later.

According to the World Bank, roughly 10 million people are displaced each year due to development, such as dam construction, urban development, transportation

and infrastructure programmes.⁴⁷ Most believe that this figure fails to capture the actual number of people who are displaced because it narrowly defines the category of 'displaced person' and does not account for extractive industries or conservation projects. Research on development projects in Africa's newest nation, South Sudan, suggests that a significant proportion of the country's available land, close to 9 percent, has already been allocated for private development schemes, ranging from mineral extraction and large-scale agro-forestry to conservation and tourism projects.⁴⁸ Looking broadly at the numbers who reside in the areas in and around the planned developments, and considering the prevalence of pastoralism and cultivation based on rotation amongst widely dispersed fields, tens of thousands of South Sudanese families could be affected by projects on this scale over the coming decades.⁴⁹

Displacement as a result of environmental and climate change is another component of forced migration. Vulnerability to this type of displacement depends on the extent to which communities are dependent on natural ecosystems that are climate-sensitive, on their adaptive capacity and on an array of other factors that influence migration decision-making. Capacity to adapt is particularly relevant to discussions of social justice and migration given that adaptive capacity "is a function of access to economic resources, technologies, information and skills; the degree of equity in a society; and the quality of governance."⁵⁰ Accordingly, development policies may have a substantial impact on climate-induced displacement, insofar as they enhance or undermine support for adaptation and resiliency among vulnerable communities. Livelihood diversification has been shown to be a critical component of resilience and adaptability for communities facing climate change and resulting vulnerability.⁵¹ Migration forms an important component of this diversification.

3. THE MIGRATION-DEVELOPMENT NEXUS

3.1 Migration's impact on economies

Migration is strongly related to economic growth, a critical component of development. In general, economists agree that voluntary labour migration, like the free movement of goods, is positive for economic growth. Economic models predict that increasing the volume of migration so that migrants from developing countries make up 3 percent of the developed world's workforce would lead to large economic gains globally, perhaps US\$150 billion per year.⁵² That is three times the estimated amount of funds needed to fully finance the MDGs. This prospect, however, does not remove the very real political barriers to increasing labour mobility.

Studies also demonstrate that labour migration generally has an overall positive effect on the economies of individual migrant-receiving countries.⁵³ For developing economies, many of the economic impacts derive from remittance flows, skills transfer and links with diaspora communities.⁵⁴ For instance, research in West Africa indicates that cross-border migration can help diversify income sources, and accordingly enhance welfare by facilitating trade and exploiting differences in seasonal patterns, particularly in relation to agriculture.

The key to migration having a positive impact on economic growth is supporting voluntary migration. Forced migration, such as large internally displaced persons (IDPs) and refugee movements, has severely negative impacts on receiving countries, overwhelming many social protection and governance systems and requiring the provision of international humanitarian assistance. While refugee influxes can increase the aid-based economy in a particular area for a time, the effects of that increase are not economy-wide and disappear quickly.

3.2 Migration and poverty reduction

Remittances and livelihood diversification through migration have both been shown to have positive links to key poverty indicators within the MDG framework. Increases in numbers of nationals living abroad and sending home remittances lead to decreased numbers of individuals living in poverty;⁵⁵ while livelihood

diversification and migration 'experiences' lead to higher literacy and educational attainment of households who engage in these strategies.⁵⁶ Migrants perceive that migration will help improve the economic situation of themselves and their families, which is their main incentive to move. In this sense, migration has been called the "oldest action against poverty."⁵⁷ Migration has been the human response to livelihood challenges and poverty for centuries.

In line with those popular perceptions, research generally indicates that in many ways migration is a positive factor in poverty reduction. But, migration and poverty reduction are linked in complex ways. Because the act of migrating takes resources, the very poorest of the poor often do not migrate, or they migrate very short distances. Accordingly, those most in need often do not have the opportunity to benefit from migration of a family member, through remittances for example.

Accordingly, the poorest countries are not often the largest migrant-sending countries. On the contrary, a nation must achieve a certain degree of wealth in order to begin sending substantial numbers of migrants. As development increases the wealth of a given country, one sees an increase in outward migration as people accumulate the means to migrate. This outward migration continues until countries reach a certain level of development where wealth and governance at home offer enough opportunities that individuals will choose not to migrate.⁵⁸

In relation to development aid from rich to poor countries then, it cannot be assumed that success in enhancing development will reduce migratory flows from the beneficiary country – in fact, just the opposite is likely to occur in the early stages of development.⁵⁹

3.2.1. Migration and other development indicators

Through its relationship to poverty reduction, but also independently, migration has important links with other key development indicators. Data are relatively scarce, but some studies from outside of Africa suggest that remittances can contribute to better school attendance, higher school enrolment rates and additional years in school.⁶⁰ Some studies also suggest that migrant-sending

households are more likely to have girls in school.⁶¹ In Kenya and Uganda, households devote 15 percent or more of domestic and intraregional remittances to education. Nigerian households devote 20 percent of intra-African remittances to education. Livelihood diversification and migration also reportedly lead to higher literacy and educational attainment of households who engage in these strategies. Related to education and literacy, remittances help households increase access to information technology, such as phones, radios, televisions and computers.⁶³

Remittances spur spending not only on education but also on health. A 2010 study found that higher remittances per capita were associated with greater access to private treatment, and that remittances complemented foreign health aid in poor countries. According to a 2009 study, remittances were linked to reduced overall child mortality, although that effect was greater among the richest households than the poorest households.⁶⁴ Studies also suggest that households receiving remittances accessed more modern health care.⁶⁵

Migration involves leaving, living abroad, and, in many cases, returning home. Each part of this migratory cycle presents opportunities to develop appropriate policies that will enhance poverty reduction and other development goals.⁶⁶ Migration is most effective in addressing development goals and reducing poverty when it is a free choice and is effectively planned.

3.2.2 Remittances

The World Bank estimates that about 120 million people in Africa receive money from about 30 million relatives and friends who left their home country (including for destinations within Africa), for a total of US\$40 billion each year. This is equivalent to 2.6 percent of Africa's 2009 gross domestic product.⁶⁷ A study by the Federal Reserve Bank of Chicago estimated that Nigerians in the United States alone remit US\$1.3 billion each year, which is more than six times the annual flow of US aid to Nigeria.⁶⁸ The value and potential of remittances cannot be underestimated, but harnessing them effectively for development and poverty reduction requires continuing research and evaluation of policy effectiveness.

African migrants remit twice as much on average as migrants from other developing countries. The average annual remittance sent by an African emigrant household

is US\$1,263. Africans also tend to remit more often, and migrants from poorer African countries are more likely to remit than those from richer African countries.⁶⁹

The leading remittance recipients in Africa relative to gross domestic product (GDP) are small, undiversified economies such as Lesotho, Togo, and Cape Verde. The leading recipients of remittances in terms of absolute amounts are Sudan, Kenya, Senegal, South Africa, and Uganda.⁷⁰

The World Bank reports that remittances are one of the most stable forms of foreign exchange flowing to developing economies.⁷¹ Globally, despite a drop due to the economic crisis in 2009, remittances have been resilient and appear to have recovered in 2010. Remittances are expected to continue growing globally in the next few years.⁷²

Research has shown that remittances, not surprisingly, have a direct impact on poverty indicators. For instance, World Bank statistical analysis has predicted that a 10 percent increase in the share of international remittances in a country's GDP will lead to an average 6 percent decline in the proportion of people living in poverty.⁷³ In Uganda, research suggests that remittances may have reduced the share of poor people in the population by 11 percent.⁷⁴ Remittances are reported to have positive, direct impacts on economic growth, an important factor in poverty reduction. Remittances enhance consumption spending as well as spending on health, education and new business starts, all contributing to economic growth.⁷⁵ In Sierra Leone, a study found that remittances decreased income inequality in poor, rural areas.⁷⁶ Remittances are also used by many households as a form of insurance for periods of instability or to address economic shocks.⁷⁷ Food security can also be positively affected by remittances.⁷⁸

Much previous literature has focused on enhancing the productive use of remittances and discouraging their use for consumption. Newer data, however, suggests that a substantial proportion of remittance funds are spent on human and capital investment, such as health, education, and developing physical and business assets. The World Bank's Africa Migration Project found that a significant portion of international remittances were spent on land purchases, house building, business investment, farm improvements, agricultural equipment and other investments.⁷⁹

While the picture is generally a rosy one, policy makers must be aware of some key challenges related to remittances.

Large remittance inflows can present a macroeconomic challenge by causing exchange rates to appreciate, potentially reducing the production of tradable goods.⁸⁰ Moreover, remittance flows can enhance opportunities for money laundering.⁸¹ Macroeconomic studies indicate that migration is an important factor in reducing inequality on a global level, but those findings do not repeat themselves at local levels, with changes in inequality being highly variable depending on the particular sending or receiving country.⁸² Remittances are inequitably distributed, with the poorest of the poor often not benefiting because they have no resources to send a family member abroad. Accordingly, while remittances outstrip development aid, they cannot be viewed as a substitute for aid.⁸³

3.2.3 Diaspora influence on development

Recognizing the critical role of remittances, the brain drain phenomenon and other effects of migration on development, the international community has begun actively courting and engaging diasporas to enhance development goals. UNDP has been a leader in this regard with its TOKTEN programme. In 2008, the African Union began the process of designating the diaspora as a Sixth African Region and developing “modalities for Diaspora [sic] participation in the organs and activities of the Union.”⁸⁴ This recognition of the diaspora’s role was a significant step and has encouraged and/or reflected policy development in many member countries.

Diasporas influence development in multiple ways including through foreign direct investment, diaspora philanthropy, engagement in peacebuilding (or fomenting conflict in some instances), and influencing host country development policies and foreign relations.

Increasing efforts are being made to attract diaspora-led foreign direct investment, beyond remittances. Diasporas can have unique knowledge that enhances their ability to mediate direct investments from abroad. A USAID report suggests that diaspora direct investment is superior to foreign direct investment in many ways, but often is overlooked in policy discourses.⁸⁵ Diaspora investment can enhance technology transfer, be less volatile in the face of political risks and other economic shocks, and catalyse other foreign investment. Surveys suggest that Africans are ready to invest but that governance and corruption concerns are holding them back.⁸⁶

Diaspora philanthropy has also been an emerging phenomenon in recent decades. Research with the Liberian diaspora in the United States and United Kingdom indicated strong diaspora philanthropy to contribute to the post-conflict rebuilding of the country. Asked about their contributions, expatriate Liberians indicated that they had assisted with development contributions including, sharing knowledge about starting and operating businesses, operating children’s clinics, developing infrastructure, providing medical supplies and teaching.⁸⁷ Much diaspora philanthropy operates through diaspora associations based on hometown, region, ethnic or school affiliation. A study with Liberians in the United States revealed that diaspora associations run scholarship programmes, supply hospital beds and medications, repairing public buildings, schools textbooks/materials, completed construction of a clinic, provided funding for teachers’ salaries and provided scholarships specifically for girls.⁸⁸ One association noted that it had worked with a US-based foundation to raise matching funds. The European Federation of Liberian Associations has instituted “The Development Challenge for Liberia” and held a conference on the issue in Paris in the summer of 2008. The Liberian diaspora is by no means unique in these respects, and similar examples exist in many other African diasporas, especially after political transitions.⁸⁹

However, diasporas also report significant challenges in investment and philanthropy in their home countries. Depending on their immigrant status, migrants may not be able to easily return to their home country and begin a pattern of circular migration. Diaspora members also report:

- Weak governance and rule of law frustrating their attempts to provide development assistance.
- Difficulty reintegrating into the labour economy without the networks needed to grease the wheels.
- Being seen as a threat because of resources, skills and perhaps new political ideas.
- Challenges integrating family members of a different nationality or who were born abroad.⁹⁰

Many in the diaspora see barriers to dual citizenship as an impediment. Dual citizenship can be an important factor in encouraging diaspora returns, but only 21 of Africa’s 54 countries allow dual citizenship.⁹¹

4. THE MIGRATION-RIGHTS NEXUS

Migrants are some of the most vulnerable members of society. Not only are they usually a minority group (ethnically, linguistically, and culturally in many cases), but their legal status is often precarious. Primary instruments to protect the rights of migrants at the international level include International Labour Organization (ILO) treaties protecting the rights of migrant workers, the 1951 Refugee Convention along with its protocols and implementing regulations, and guidelines from the Office of the United Nations High Commissioner for Refugees. UN treaties and guidelines on citizenship, women's and children's rights, as well as human trafficking are also important frameworks for the protection of migrants.

At the regional level, there has been important and specific action to address migration related issues through binding normative agreements. The African Union and specifically the African Commission on Human and Peoples' Rights have addressed this issue. However, the critical link between establishing norms, educating the public about those protections, and implementing protection mechanisms on the ground, is still missing for migrants in sub-Saharan Africa in most cases.

4.1 International normative framework

Migrants' rights are human rights. Migrants are thus protected at all times by the web of normative instruments dealing with human rights generally. Although nations have a right under international law to determine who can be admitted through their borders, this power is limited by considerations of due process of law, non-discrimination, prohibition of inhuman treatment, respect for family life, and other human rights and refugee law protections. Multiple human rights instruments deal specifically with migrants, as described below.

The 1951 Refugee Convention⁹² and its associated Protocol establish the basic parameters for when groups fleeing hostilities or political repression are entitled to international protection and assistance. The critical obligation on states is the international principle of non-refoulement, described in Article 33 of the Refugee Convention. Basically, this means that states have an obligation not to return individuals to another country where they are likely to be killed, tortured or subject to cruel, inhuman

or degrading treatment. The rights of migrants who are not fleeing persecution are protected by the international covenants on human rights (the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights), as well as by other migrant-specific treaties.

Migrant workers are protected by a number of instruments, but the most comprehensive is the International Convention on the Protection of the Rights of All Migrant Workers and Their Families,⁹³ which came into force in 2003. The Convention distinguishes between regular and irregular migrants with respect to certain protections, but generally focuses on protection of basic freedoms, due process, labour rights, protection for families and children of migrant workers, cultural and economic rights, as well as the right to information. All migrant workers have the following rights:

Basic freedoms:

- Right to freedom of movement to and from their countries of origin (article 8)
- Right to life (article 9)
- Right to freedom from torture or cruel, inhuman or degrading treatment or punishment (article 10)
- Right to freedom from slavery, servitude or forced compulsory labour (article 11)
- Right to freedom of thought, expression, conscience and religion (articles 12 and 13)
- Right to privacy (article 14)
- Right to property (article 15)

Due process:

- Right to a fair and public hearing with all the guarantees of a due process (articles 16–20)
- Right to be provided with necessary legal assistance, interpreters and information in an understood language (article 16)
- Right to liberty and security and freedom from arbitrary arrest or detention (article 16)
- Right to be presumed innocent until proved guilty (article 19)
- Prohibition to be subject to measures of collective expulsion (article 21)
- Right to have recourse to diplomatic or consular assistance and protection (article 23)

- Right to recognition everywhere as a person before the law (article 24)
- Right to equality with nationals before the courts and tribunals (article 18)

Employment:

- Right of equal treatment with nationals in respect to remuneration and other conditions of work such as overtime, holidays, etc. (article 25)
- Right to join freely any trade union (article 26)
- Right to enjoy the same treatment as nationals regarding social security benefits insofar as they fulfil the legislation requirements (articles 27)
- Right to emergency medical care (article 28)

Family and children of migrant workers:

- Right to a name, registration of birth and nationality (article 29)
- Right of access to education (article 30)

Cultural and economic rights:

- Right to preserve a cultural identity (article 31)
- Right to transfer earnings and savings upon the termination of their stay in the State of employment (article 32)

Information:

- Right to information from the State of origin, State of employment, or the State of transit about their rights arising from the present Convention, the conditions of their admission, and their rights and obligations in those states (article 33)

Migrants with regular or legally documented status have the following additional rights:

- Right to be temporarily absent for reasons of family needs and obligations, without effect on their authorization to stay or work (article 38)
- Right to liberty of movement in the territory of the State of employment (article 39)
- Right to form associations and trade unions in the State of employment (article 40)
- The right to equality of treatment with nationals in respect of protection against dismissal, unemployment benefits and access to alternative employment (article 54)
- In case of violations of work contracts by the employer, the right to address his/her case to the competent authorities of the State of employment
- Right to participate in the public affairs of the State of origin, in accordance with its legislation (article 41)

- Right to vote and to be elected in the State of origin, in accordance with its legislation (article 41)
- Right to exemption from export and import taxes on personal and household effects (article 46)
- The right to equality of treatment with nationals of the State of employment, including access to educational, vocational and social services (article 43)
- Right to information, including all conditions concerning their stay and their remunerated activities (article 37)

The following nations in Africa have ratified the Convention: Algeria, Burkina Faso, Cape Verde, Egypt, Ghana, Guinea, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles and Uganda. The following nations have signed (but not ratified) the Convention: Benin, Congo, Gabon, Guinea-Bissau, Liberia, São Tome and Principe, Sierra Leone and Togo. While this is a substantial percentage of nations showing commitment compared to other regions, many major sending and receiving countries are still not parties to the Convention.

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families is the body that monitors implementation of the Convention. The Committee reviews national compliance with the Convention through a periodic reporting procedure. The Convention also provides for individual complaints to be submitted to the Committee; however that procedure will not come into force until 10 countries specifically ratify that provision – only two have done so to date. Continued advocacy on adoption and domestication of the Convention, as well as subsequent monitoring, is important to expand protection for migrant workers.

The ILO has developed two Conventions and two Recommendations specifically regarding migrant workers. These are:

- the Migration for Employment Convention (Revised), 1949 (No. 97), and its accompanying Recommendation, the Migration for Employment Recommendation (Revised), 1949 (No. 86)
- the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and its accompanying Recommendation, the Migrant Workers Recommendation, 1975 (No. 151)

Other relevant UN instruments include the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)⁹⁴ and International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁹⁵ both of which specifically address discrimination in employment. CERD does not affect the legal provisions of states concerning nationality, citizenship or naturalisation, but does prohibit countries from granting preferential admission to migrants from one country over another.⁹⁶ The UN Convention against Transnational Organized Crime, along with its Anti-trafficking Protocol (the Palermo Protocol)⁹⁷ and its Anti-smuggling Protocol⁹⁸ are also critical instruments for the protection of migrant rights.

4.2 Regional and sub-regional normative framework

Migrants in Africa are protected at all times by the African Charter on Human and Peoples' Rights,⁹⁹ as well as the Maputo Protocol on the Rights of Women in Africa¹⁰⁰ and the African Child Rights Convention.¹⁰¹

The African Union adopted a Migration Policy Framework for Africa in 2006. It addresses the full range of migratory concerns impacting African governments. Its recommendations call on African states to incorporate into national legislation the provisions of the international instruments discussed above, including ILO Conventions No. 97 and No. 143, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the UN Office on Drugs and Crime (UNODC) Protocols on Trafficking and Smuggling.

In regard to refugees, the 2006 African Union Framework encourages states to adopt the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which in some respects is more protective of the rights of refugees than the 1951 Refugee Convention. However, the OAU Convention makes its provisions subject to national law (Art. 2(1)), effectively creating a patchwork regime of refugee protection standards across the continent.

The African Union adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa in 2009. The so-called 'Kampala Convention' is the first legally binding regional instrument of its kind that obliges states to protect and assist IDPs. However, it has not yet entered into force given the low ratification numbers to date. It has been signed by 31 of the 53 African Union

member states, but ratified by only 11: Uganda, Sierra Leone, Central African Republic, Zambia, Gabon, Somalia, Djibouti, Gambia, Togo, Mali and Guinea-Bissau.

The regional initiatives of Economic Community of West African States (ECOWAS) related to the free movement of persons are at the most advanced stage on the continent. Multiple protocols on free movement, residence and establishment for nationals of ECOWAS countries are in force. The ECOWAS Common Approach on Migration, adopted in 2007, seeks to enhance regional harmonization of policies. ECOWAS states reaffirmed their commitment to implementation of the Protocol on the Free Movement of Person within the ECOWAS zone, and the International Convention on the Rights of Migrants and Their Families. Nevertheless, free movement remains a challenge for many within West Africa. For instance, *de facto* discrimination is used to prevent non-nationals from gaining employment, for example by requiring that workers speak a local vernacular, traders are harassed at borders, and the ECOWAS passport is not yet available in all 15 member nations.

In East Africa, the Common Market entered into force in 2010, in an effort to enhance the free movement of goods, labour, services and capital in that region.¹⁰² Legal instruments governing the free movement of people already exist within the Common Market for Eastern and Southern Africa, which include the Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements and the Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence. However, since the adoption of the Free Movement Protocol in May 2006, only four countries have signed it, namely Burundi, Kenya, Rwanda and Zimbabwe, and only one country, Burundi, has ratified it.

The Southern African Development Community (SADC) is also working toward implementation of the SADC Protocol on the Facilitation of Movement of Persons, but there too, ratifications have been slow. The regional harmonization of laws seems to be the most problematic aspect hampering ratification efforts. The Migration Dialogue for Southern Africa has begun taking steps to promote harmonization in migration policy, as well as to improve cooperation in migration management and the facilitation of movement across borders. Governments in the SADC region are also involved in a number of bilateral agreements that allow for visa-free entry for SADC nationals between member states. In the Great Lakes region, the Great Lakes Pact and its associated protocols make multiple UN guidelines and

best practices related to IDPs directly applicable to states' parties. Although domestication in national laws and public education to enable communities to use the Pact has been lacking, as a normative framework, the Pact is powerful in its binding coverage: 11 countries including Angola, Burundi, CAR, DRC, Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia are all states' parties. Derogations are not permitted, so those parties are bound by all provisions of the Pact and its protocols.

Despite this relatively comprehensive framework of normative protection instruments for migrants, gaps remain. Specifically, many treaties leave migrant protection to the development and implementation of national level legislation and policies. This has proven to be a major challenge as individual nations in each region have failed to implement treaty provisions in a timely fashion. Moreover, harmonization of laws and procedures for free movement remains a challenge in all of the regions. This has undermined voluntary labour migration and led to migrants remaining vulnerable and unprotected in many contexts.

4.3 Protecting vulnerable migrant populations

Failure to protect vulnerable migrating groups can lead to various negative effects; the most common include human trafficking, which has a disproportionate impact on women and children, abusive and exploitative labour conditions, inhumane conditions of detention, as well as refoulement and other failures to provide sanctuary to those fleeing persecution.

Trafficking is a huge concern in migration policy. The ILO estimates that more than 2 million people are trafficked across borders every year around the globe, making trafficking an estimated US\$7 billion per year industry.¹⁰³ According to IOM research in East Africa, characteristics such as gender, socioeconomic status, education, employment and personal aspirations may be related to an individual's likelihood of being trafficked.¹⁰⁴ Above all though, research studies agree that a lack of decent work opportunities is the primary factor contributing to trafficking.¹⁰⁵

Research suggests that increasing numbers of unaccompanied children are migrating, and are extremely vulnerable. Research on child migrants in West Africa indicates that most are from very poor areas and they may decide to migrate as early as age 10. The reasons

that children report for migrating include trying to access primary education, saving to go to secondary school, accessing resources to get married, and gaining marketable skills.¹⁰⁶

Trafficking is closely related to exploitative labour conditions, but trafficking victims are not the only migrants who are subject to exploitation. Women and irregular migrants are particularly vulnerable to this risk. For women migrants, movement allows them to access income streams that may be unavailable in their home region or country; however, many end up in vulnerable situations. A study of domestic workers in Cairo found that 27 percent had been physically abused by their employers and even more had been verbally abused, while 10 percent had been sexually harassed.¹⁰⁷

Migrants often find themselves in jobs that are dirty, dangerous and/or difficult. This type of work puts immigrants at higher risk for occupational death and injury.¹⁰⁸ Migrants, especially irregular ones, may fear being replaced if they complain about working conditions or if they point out safety risks. Irregular migrants are less likely to join unions or trade associations that could support them in addressing unsafe working conditions. Export processing zones (EPZ) – industrial centres that are governed by special rules often circumventing national labour laws – are frequent destinations for both internal and international migrants. Although EPZs attract foreign investment, they often limit the participation of unions in negotiation and oversight of labour conditions. The majority of workers in EPZs are women, because they have fewer skills and can be paid less to maximize profits.¹⁰⁹ There is evidence of sexual exploitation of women and girls in EPZs around the world. In Kenya's EPZs, for example, sexual exploitation has been extensively documented, often in the form of sex for job arrangements. In a survey of female EPZ workers in Kenya, 90 percent reported that they had experienced some form of sexual harassment.¹¹⁰ Discrimination and dismissal of workers who become pregnant is also commonly reported.

Irregular migrants who are detained are extremely vulnerable. In many countries, methods of arresting migrants, conditions of detention and means of deportation have been described as inhumane. In South Africa, many have raised concerns about the treatment of migrants in detention and during deportation. In 2006 alone, 260,000 migrants were arrested and deported. Conditions in detention centres such as Lindela have been the subject of numerous human rights complaints

and investigations.¹¹¹ In the United States, which hosts thousands of African migrants, there are no mandatory standards for immigration detention facilities, and as a result migrants are frequently denied their rights to necessary medical care and humane conditions of detention. Immigrant detainees, who have not been tried for any offence, are held in jails or other prison-like settings and, in many respects, are treated the same as the rest of the prison population of convicted criminals.¹¹²

4.4 Access to health services

Migrants often face barriers in accessing health services. This is a particular problem given that rates of infectious diseases such as HIV and tuberculosis have been found to be higher in migrant populations than non-migrants.¹¹³ Because of the association between migration and vulnerability to communicable diseases, migrants and especially refugees may be stigmatized upon arrival at their destination. Research shows, however, that programmes that intensively screen and exclude or quarantine migrants on health grounds tend to cause people to circumvent regular migration channels, instead of actually stopping the spread of communicable disease.¹¹⁴

A major issue in recent years has been the exclusion and/or deportation of HIV-positive migrants from countries where they have migrated or sought asylum. Conditions of detention are especially problematic in these cases, because many HIV-positive migrants are held in conditions in which they cannot access their regular treatment regime.¹¹⁵

Research on conditions of detention in Malawi and Zambia found that for immigrants awaiting deportations, conditions can be life threatening.¹¹⁶ Although prison conditions were generally deplorable for all inmates, research revealed that conditions for immigrants, especially with regard to health, were even worse. Discrimination made conditions of overcrowding, malnutrition, rampant infectious disease, grossly inadequate medical care, and routine violence at the hands of prison officers and fellow inmates even more prevalent for immigrants.¹¹⁷

Irregular and temporary economic migrants often fall through the cracks of social protection systems. Governments regularly put restrictions on access to

certain services, but even when legal migrants can access services there may be barriers. Both governmental and non-governmental forms of social protection often depend on stability or proof of residence and thus generally disadvantage migrants.¹¹⁸ Migrants may also not be aware of their entitlements and available services.¹¹⁹ Language and cultural barriers often play a significant part in migrants' lack of access as well. A 2011 study in the European Union found that in many countries migrants are often required to pay for health services that are provided free to non-migrants, such as emergency care, maternal health services and health care for children.¹²⁰

4.5 Xenophobia and security

Xenophobia directed against migrants is a global problem. In 2010, for instance there was a series of drive-by shootings of African migrant agricultural workers as well as mob attacks in Italy.¹²¹ Law enforcement officials had to evacuate more than a thousand migrant workers from the area to protect their safety. Italy is by no means unique.

While discrimination against, and fear of, migrants is serious and widespread, South Africa has been a hot spot of concern over this issue in recent years. A study by the Centre for the Study of Violence and Reconciliation in 2008 documented the experiences of female migrants from across Africa while they were in South Africa. Many had left their countries of origin as a result of inter-ethnic violence or political oppression. Their experiences of xenophobia in South Africa often brought to the surface memories of the violence they had been trying to escape.¹²² Moreover, xenophobia increased feelings of insecurity among migrants, who reported that they felt they could not start a life anywhere because they had been driven away from their home country and might be driven out of South Africa as well.¹²³

Xenophobia can have a particularly severe impact on migrant women, who as "bearers of culture" may face the choice of either assimilating and losing identity, or being targeted by xenophobic behaviour.¹²⁴ Most importantly, migrant women in South Africa reported that xenophobia had a negative impact on their ability to seek and effectively access health services, and that they experienced discrimination and degrading treatment while accessing reproductive health services in particular.¹²⁵

4.6 Access to justice

Like other minority and marginalized groups, migrants often face discrimination, language, and cultural barriers in effectively using the justice system. Physical and financial access can be major concerns depending on where migrants are located in relation to courts or administrative centres. A study conducted by a non-governmental organization (NGO) in the US state of Minnesota (home to a significant African immigrant population) found that language barriers were the most significant obstacle

facing women immigrants trying to access the justice system for domestic violence claims.¹²⁶ Other obstacles included: barriers from within immigrant communities that impede investigations, fear of government institutions, inadequate funding of services, delays in service provision, ineffective screening of individuals seeking services, poor documentation of crimes and injuries, inadequate record-keeping, inadequate coordination of services across agencies and limited access to culturally specific programming.¹²⁷

5. CONCLUSION AND POLICY RECOMMENDATIONS

UNDP can maximize its programmatic impact by focusing on assisting African governments to effectively manage migration. Managing migration entails maximizing benefits of migration for all parties involved at the micro and macro levels, including for the migrant, migrant family members who stay behind, the host society and the home country. This process also involves minimizing costs and other negative consequences associated with migration. Ultimately, managing migration implies balancing risks and equitable sharing of benefits.

A key aspect of this management paradigm is in enhancing human rights protection for migrants. Migrants who arrive through regular channels, and whose rights are effectively protected, are better able to contribute to development, both in their host country and home country.¹²⁸ Politically, however, the notion that protecting migrants' rights increases incentives for migration to a given destination still holds sway.¹²⁹

Managing migration demands policy regimes that are consistent with international standards, coherent, regionally coordinated, gender sensitive, transparent, flexible, and based on social dialogue evidence and data. Such policies are a challenge to achieve, and UNDP can assist African governments in continuing to mainstream migration issues into policy and programmatic development. The following Annex provides examples of best practices for managing various aspects of migration for development benefits and enhancing social justice from across Africa. Those examples could form the basis for UNDP interventions in other countries.

Specifically, UNDP can support the implementation of the following recommendations related to migration policy.

Protecting migrants' basic rights

UNDP can support African governments to:

- Develop an explicit national policy and action plan on migration for development. Each national policy and action plan should identify goals and provide for implementation measures as well as the requisite administrative structures to implement, supervise and evaluate them, in addition to identifying the roles and responsibilities of different branches of government and of other stakeholders, particularly social partners.¹³⁰
- Ratify and domesticate key international instruments protecting the rights of migrants, in particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- Incorporate provisions from ILO Conventions No. 97 and No. 143 into national legislation.
- Base national legislative policy development on the African Union Strategic Framework for Migration.¹³¹
- Ensure that labour standards on treatment and conditions at work, such as occupational safety and health, maximum hours of work, minimum wages, non-discrimination, freedom of association and maternity leave, apply to all workers.¹³²
- Ensure that identity document systems facilitate migrants' access to services without harassment.
- Establish, in consultation with service providers and migrants organizations, a comprehensive support and education system for migrants on their arrival, to

educate migrants about the labour market and their legal rights and obligations as workers, to provide advice and support on finding a job and accessing services, to offer language teaching and provide general information about life in the host country.¹³³

- Adopt policies that facilitate family reunification.¹³⁴
- Begin (or continue) to provide antiretroviral treatment to HIV-positive individuals in detention awaiting deportation and re-examine policies related to deportation of HIV-positive individuals to countries where treatment and social support structures are inadequate.¹³⁵
- Provide the same healthcare and social protection benefits for migrant workers as for non-migrants.¹³⁶

Reducing illegal/irregular/undocumented migration and trafficking

UNDP can support African governments to:

- Continue to harmonize national law and policy within sub-regions to facilitate implementation of ECOWAS, SADC, and East African Community treaties on freedom of movement.
- Enhance the opportunities for legal migration by reducing administrative barriers to migration, and making the process as transparent as possible.
- Reduce costs and waiting time for legal migration to facilitate regularization and reduce the incentives for irregular migration.
- Develop bilateral migration agreements based on the UN Global Forum on Migration and Development good practices, such as information sharing, capacity building, ensuring equal access to employment by women, and providing the possibility of repeated migration.¹³⁷
- Adopt policies on irregular migration that:
 - Are based on internationally accepted norms and instruments, promoting a rights-based approach as elaborated in the ILO Multilateral Framework on Labour Migration.
 - Ensure respect for basic human rights and all labour rights in the workplace for migrant workers in irregular status.
 - Treat irregular migration as an issue related to the labour market and decent work conditions, rather than only a legal/security issue.
 - Expand legal migration options for unskilled workers in line with labour market needs.
 - Regulate and monitor recruitment processes across origin and destination countries.¹³⁸
- Develop and implement national legislation on human trafficking with the following core elements:

- A definition of human trafficking that focuses on the criminal acts of the trafficker rather than on the state of mind of the victim.
- Uses the UNODC treaty definition of human trafficking.¹³⁹
- Includes protections for victims and witnesses, including benefits and services, privacy and identity protection, protection from summary deportation, compensation, right to file a civil claim, and special protection measures for child victims.¹⁴⁰
- Carry out public awareness campaigns about the dangers of human trafficking to sensitize the public on strategies for avoiding traffickers and seeking help.¹⁴¹

Protecting migrant domestic workers

UNDP can support African governments to ensure that they ratify and incorporate into national legislation the Convention on the Elimination of all Forms of Discrimination against Women as well as the Maputo Protocol, and that they incorporate the following into law and policy:

- Clearly forbid in law the seizure of workers' documents.
- Ensure freedom of association so that migrant domestic workers have the choice to join organizations of their choosing.
- Develop and promulgate a standard contract for hiring migrant domestic workers that must be used by all employers and employment agencies.
- Create a complaints hotline for migrant domestic workers to raise concerns and legal issues.
- Allocate sufficient personnel and resources to effectively prosecute employers who violate the labour law, or who physically or sexually abuse migrant domestic workers.
- Provide shelters for victimized migrant domestic workers, with appropriate services to assist their recovery and protection for those who are witnesses in criminal proceedings.
- Monitor recruiting agencies to ensure they operate in accordance with all government guidelines and laws.
- Provide for periodic opportunities for illegal/irregular migrant workers to apply for legal status, employing a clear process (explained in the languages of migrants) that is both inexpensive and fair.
- Train government authorities, especially police, to enable them to quickly and accurately identify victims of human trafficking.
- Work with the private sector to provide substantive orientation sessions for incoming migrant domestic workers on labour and other relevant laws, policies and regulations of the Government; on cultural and social expectations of domestic workers while they

are in the country; and on mechanisms for them to access assistance.¹⁴²

Enhancing diaspora remittances, investment, philanthropy and knowledge transfer

UNDP can support African governments to:

- Develop policies that create a permissive climate for remittance sending while also maintaining controls on money laundering. Policies that are too restrictive can have a direct negative impact on remittance sending. For instance, US policy in relation to material support for terrorism has forced all US banks to close their money transfer programmes to Somalia. The last bank to allow these transfers (in the US state of Minnesota where a huge Somali refugee population resides) closed its operations because of concerns over violating US law at the end of 2011, causing migrant protests.¹⁴³
- Partner with organizations with technical expertise to effectively gather data on migratory flows, of all types, so as to enable evidence-based policy development.
- Identify communities that receive a high level of remittances and work effectively in those areas to enhance the ways in which remittances can be effectively used for long-term benefits.
- Consider establishing a matching programme to encourage remittances for development purposes. For example, a successful programme in Zacatecas state in Mexico matched with government funds every dollar remitted by a Mexican migrant worker to their hometown association.¹⁴⁴
- Discourage exclusive agreements between providers of remittance services (such as commercial banks, post offices, credit and savings cooperatives, microfinance institutions, and mobile money transfer services) and international money transfer agencies, which keep costs high.¹⁴⁵
- Focus on reducing corruption and ensuring that diaspora investments are treated at least as favourably as foreign direct investment.
- Reduce duties and other fees on importing humanitarian supplies and other materials associated with philanthropic projects, as a means to encourage diaspora philanthropy.¹⁴⁶
- Establish joint programmes with countries of destination to provide seed grants and technical support to diaspora groups that wish to undertake philanthropy.

- Consider promoting financial instruments targeted at overseas migrant workers and offering higher interest rates for foreign currency accounts.¹⁴⁷
- Promote home country government bonds to migrants as attractive investment vehicles. This approach has been successful in Brazil.¹⁴⁸
- Ensure that international financial institutions provide equal treatment to domestic direct investment (DDI) and foreign direct investment (FDI); provide DDI investors with brokering assistance to establish businesses in their home country; and work to reform their economies to make them more amenable to foreign investment.¹⁴⁹
- Establish well-coordinated offices of diaspora engagement in embassies in key countries of destination.
- Create databases of diaspora skills to facilitate mobilization and assistance to projects in the home country.
- Consider legislation to allow voting rights for the diaspora as well as dual citizenship.¹⁵⁰

Managing the brain drain

UNDP can support African governments to:

- Work with destination countries to adopt codes similar to the Commonwealth Codes of Practice for Recruitment of Teachers and Health Care Workers, to manage recruitment agencies in those countries. Governments may want to consider mandatory legislation, as voluntary codes have to date not proven effective.¹⁵¹
- Develop multilateral approaches, rather than unilateral or bilateral approaches that run the dual risk of diverting migrant streams to destination countries that are not party to agreements and of displacing the problem of skills shortages onto home countries that are not covered by agreements.¹⁵²
- Work with governments that benefit from the employment of migrant health workers to design schemes to train health personnel in developing countries for temporary employment for a specified number of years in the health service of the destination country, on the understanding that they would then return to their home country. Such schemes should be designed with the input of developing countries, migrants' organizations and employers.¹⁵³
- Work with destination countries to provide for portability of pension and other employment benefits.¹⁵⁴

ANNEX: INNOVATIVE PRACTICES FOR MANAGING MIGRATION IN AFRICA

Keeping health professionals in Ghana

The Ghanaian Ministry of Health established incentive schemes to keep medical professionals in the country.¹⁵⁵ The programme reduced the need for specialized training outside the country by establishing the Ghana College of Physicians and Surgeons, and also established a comprehensive salary structure for physicians, outside of the normal civil service salary schedule. The college has increased the supply of labour in remote districts, as part of the training is conducted in hospitals outside of Accra. The programme attempted to provide additional remuneration for physicians who stayed in remote areas to provide services, but was unsuccessful in that regard.

France/Mali co-development programme

France and Mali developed a partnership focused on encouraging migrant return, diaspora engagement and creating jobs in Mali.¹⁵⁶ The programme provided financing for local development and small enterprise projects in Mali that were initiated by Malian migrants living in France for at least two years. The programme also provided technical assistance to examine the feasibility of the proposed venture in Mali and assisted with monitoring for a year. In France, the National Agency for Admission of Foreigners and Migrations provides orientation information to migrant candidates for the programme on the preparation and implementation of local development projects and creation of enterprises.

The projects are usually developed in the areas of education, health, trade, handicrafts, agriculture, and information and communication technologies. Second-generation members of the diaspora are also encouraged to participate. Projects are designed, implemented and managed by the Malian migrants and migrant associations in France together with the communities in Mali. For the period 2003–2005, the programme supported 300 projects to support migrants to return home and start businesses, 22 local development projects, 10 youth social and cultural exchange projects, and 100 expert and skills transfer missions. The total amount allocated to the 22 local development projects reached €1 million.

Spain/Morocco Catalunya Maghrib programme

This joint programme between Morocco and Spain focused on reducing youth migrant flows to Spain.¹⁵⁷

The programme worked to increase awareness among Moroccan youth who were considering migrating to Spain, about the risks of migration and poor employment prospects in Catalonia. The programme also facilitated return of unaccompanied minors, albeit in small numbers. Because of the importance of Tangier as a departure point, the programme established an office at the Moroccan Ministry of Youth in Tangier to house a training centre and to manage a vocational training centre. It provided Moroccan and European qualifications in several areas including hotel services, computing, electricity, construction and textiles. The programme also created a Child and Family Assistance team and a Psycho-Pedagogic Assistance team comprising Moroccan professionals trained by the programme, and provided housing for a small number of at-risk minors in Tangier. Finally, the programme entered into agreements with Moroccan and European companies in the region of Tangier to establish training contracts and work experience for those children and minors.

Anti-trafficking legislation and programmes in Nigeria

In 2001, Nigeria ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,¹⁵⁸ supplementing the United Nations Convention against Transnational Organized Crime (2000). An anti-human trafficking bill to implement the Protocol was subsequently presented to the National Assembly and approved in 2003 as the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act. The Act establishes a multi-dimensional crime fighting instrument known as the National Agency for Prohibition of Traffic in Persons and Other Related Matters (NAPTIP). Apart from enforcement work, that agency also carries out important rehabilitation and victim services activities. The agency has rehabilitated 477 victims through enrolment in school or assistance to attend vocational training. About 280 of those were provided with equipment to assist in starting a trade and a resettlement allowance for personal needs in the short term.

South Africa's legislation on domestic workers

In South Africa, migrant domestic workers are covered by most key national labour laws, including those on wages, formation of unions, equity and non-discrimination, skills development, as well as the unemployment compensation scheme.¹⁵⁹ Migrant domestic workers thus have the same

protections afforded by a written contract, and their rights are enforceable in court.

Send Money Africa

Launched in 2011, Send Money Africa¹⁶⁰ is a web-based service that allows migrants to easily compare costs when they select money transfer companies. A joint project of the African Union Commission, the European Commission, and the World Bank, the website contains information about sending and receiving relatively small amounts of money from selected countries worldwide to a number of African countries, as well as within the African continent. According to the World Bank, the objectives of the database are to increase transparency in the market and provide migrants with complete and reliable information on all components of the transaction. Send Money Africa provides data on 50 corridors, from 15 sending countries to 27 receiving countries. For instance, for the United States, information is so far available for sending money to Cape Verde, Ethiopia, Ghana, Kenya or Nigeria. For the United Kingdom, information is available for Ghana, Kenya, Nigeria, Sierra Leone, Somalia, South Africa, Tanzania, Uganda and Zimbabwe.

M-Pesa international money transfer in Kenya

Kenya's M-Pesa system¹⁶¹ has become known worldwide for its ease of money transfer, in small amounts, to those who are traditionally excluded from the banking sector. The system, which is mobile phone based, allows billions of Kenyan shillings to be transferred every year in the form of domestic remittances within Kenya. The mobile phone companies Safaricom and Vodafone have expanded the system to allow remittances from the United Kingdom to Kenya, in accordance with the regulations of the Central Bank of Kenya and the United Kingdom. Safaricom was authorized in 2009 to transact foreign exchange business, and was the first company to offer a mobile based international money transfer service. In 2009, it was awarded "Best Mobile Money Service" by Global Mobile Awards, for its innovation.

Coordinated approach to migrant worker permits in Tanzania

In the face of public concerns about migrant workers competing for jobs in Tanzania,¹⁶² the government took the initiative to make processing work permits for foreigners transparent and to involve more key stakeholders. A tripartite committee comprising inter-ministerial

departments and social partners was established in 2002. The Work Permit Committee on Employment of Foreigners processes foreigners' work permits, and includes representatives from each responsible Ministry as well as civil society partners, including the Trade Unions Congress of Tanzania and the Association of Tanzania Employers. The Committee meets three times per month to discuss applications for work permits. Recommendations are then sent to the Immigration Department, which decides on issuance or rejection of permits. The Committee may also defer decisions pending further information or improvement of the employment offer.

Ugandan law on recruitment of migrant labour

In 2005, the Ugandan government passed the Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers Abroad, Regulation No. 62.¹⁶³ The regulations include a substantial section on regulation of private recruitment intended to protect the rights of migrant workers. The law and accompanying regulations specify the minimum qualifications for persons operating recruitment agencies, as well as requirements to obtain a licence such as proof of financial capacity and the amount of minimum required capital, proof of marketing capability (experience and international connections), and clearance of members of the Board of Directors, partners and proprietor by government agencies.

Applicants for a licence are required to:

- ensure that prospective Ugandan migrant workers receive orientation on recruitment and terms and conditions of work;
- ensure that contracts of employment are in accordance with the standard employment contract and other laws, regulations and collective bargaining agreements;
- ensure that migrant workers examine contracts before they sign them and receive copies; and
- guarantee compliance with labour and social legislation of Uganda, of the country of employment, and international labour bodies.

Importantly, recruiters assume joint liability with the employer for all claims and liabilities in connection with implementation of the employment contract, including wages, death and disability compensation, and repatriation. In 2006, for instance, the programme licensed 10 recruitment agencies and the regulations benefited 600 Ugandan emigrants.

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