Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?

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Summary
Transitional justice in Kenya responds predominantly to the two-month period of violence that devastated Kenya in the aftermath of disputed presidential elections in December 2007. Post-election violence left over 1,300 dead and hundreds of thousands displaced; many suffered abductions, illegal detentions, torture and ill-treatment, sexual violence and property rights violations. In this context, transitional justice endeavours to, among other objectives, bring accountability for human rights violations, promote victims’ rights, and achieve national healing and reconciliation. The outcome of Kenya’s 4 March 2013 general elections, with the election of Uhuru Muigai Kenyatta and William Samoei Ruto as Kenya’s President and Deputy-President respectively, raised the stakes for transitional justice in Kenya. Both Kenyatta and Ruto have been indicted by the International Criminal Court, accused of crimes against humanity. While Ruto’s trial began on 10 September 2013, as this article goes to print there is some consternation as to whether Kenyatta will cooperate with the ICC. His trial is scheduled to begin on 12 November 2013. Significantly, on 29 September 2011 the United Nations Human Rights Council, pursuant to Resolution 18/7, resolved to establish the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. The Special Rapporteur is

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mandated to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law; and to promote truth, justice, reparation and guarantees of non-recurrence in such contexts. This article considers the significance for Kenya of the Special Rapporteur’s mandate, including the directive to, upon request, conduct country visits and provide technical assistance and advice on issues pertaining to the mandate. Given the hindrances to the effective implementation of transitional justice measures in Kenya, the article calls on the Special Rapporteur to issue a request to visit Kenya, in response to gross violations of human rights committed there.

1 Introduction

When you are riding in a train, and the train gets derailed, you are well advised to look backwards at the twisted rails to find out how you got to where you are, and then look ahead to find out how you now get to where you want to go. For Kenyans today, it is a question of doing just that: looking at the past to determine when and where the country got derailed. Once that is determined, you must fix and adjust the rails towards the direction of peace, justice and prosperity.1

Transitional justice refers to the set of judicial and non-judicial measures implemented by different countries in order to respond to and remedy past human rights abuses.2 The term has come to be widely embraced by scholarly and policy communities alike.3 Notably, the United Nations (UN) too has recently adopted the concept of transitional justice under its Special Procedures of the Human Rights Council mechanism.4 Specifically, on 29 September 2011 the Human Rights Council resolved to establish the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and

1 K Annan in GoDown Arts Centre Kenya burning (2009).
4 It is important to note that, while the inclusion of transitional justice by the UN Human Rights Council through its special procedures mechanism is new, the UN does have a significant history of engagement in the transitional justice sphere. Some examples of the other normative work conducted by the UN in the field of transitional justice include the UN-backed Khmer Rouge genocide tribunal in Cambodia (Extraordinary Chambers in the Courts of Cambodia); the Van Boven Principles, setting out the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; the UN-backed Commission for Historical Clarification in Guatemala; and the creation of the Commission for Reception, Truth, and Reconciliation (CAVR, for its acronym in Portuguese) under United Nations Transitional Administration for East Timor (UNTAET) and pursuant to a regulation of UNTAET.
Guarantees of Non-Recurrence, pursuant to Resolution 18/7.\textsuperscript{5} The Special Rapporteur is mandated to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law; to promote truth, justice, reparation and guarantees of non-recurrence in such contexts. At the time of its adoption, the creation of the mandate was hailed as 'a highly important resolution and a significant contribution by the [Human Rights] Council to establish accountability for serious crimes and human rights violations'.\textsuperscript{6} While the title of the mandate does not explicitly include the term ‘transitional justice’, the four measures of the mandate (that is, truth, justice, reparation and guarantees of non-recurrence) parallel those measures most commonly associated with the field of transitional justice. Further, the term ‘transitional justice’ features in Resolution 18/7. It is also the terminology adopted by the Special Rapporteur in annual reports to the UN General Assembly and Human Rights Council for the years 2012 and 2013, submitted in accordance with Resolution 18/7.\textsuperscript{7} In these annual reports, the term ‘transitional justice’ is used as ‘shorthand’ to denote collectively the four measures comprising the mandate.\textsuperscript{8} As such, the term ‘transitional justice’ is used in this article.

Transitional justice in Kenya responds predominantly to the two-month period of violence that devastated Kenya in the aftermath of disputed presidential elections in December 2007. Post-election violence left over 1 300 dead and hundreds of thousands displaced; many suffered abductions, illegal detentions, torture and ill-treatment, sexual violence and property violations.\textsuperscript{9} In this context, transitional justice endeavours to, among other objectives, bring accountability for human rights violations, promote victims’ rights, and achieve national healing and reconciliation. Some five years after the post-election violence period, the outcome of Kenya’s 4 March 2013 general elections, with the election of Uhuru Muigai Kenyatta and William Samoei Ruto as Kenya’s President and Deputy-President

\textsuperscript{5} UN Human Rights Council Resolution A/HRC/RES/18/7 of 29 September 2011.
\textsuperscript{8} De Greiff (n 7 above) 3.
respectively, has added great complexity to Kenya’s transitional justice project. Both Kenyatta and Ruto have been indicted by the International Criminal Court (ICC), accused of crimes against humanity. This has had the effect of bringing the African Union (AU) into direct confrontation with the ICC. While Ruto’s trial began on 10 September 2013, as this article goes to print there is some consternation as to whether Kenyatta will co-operate with the ICC, his trial scheduled to begin on 12 November 2013. In particular, that the AU resolved on 12 October 2013 that Kenyatta and Ruto’s trials should be suspended until they complete their terms of office, is concerning.10 It throws into question whether Kenyatta will attend those trial hearings which he has been ordered to attend, namely, all opening and closing statements, when victims testify, and any other hearing the judges deem necessary (including, if the case resulted in conviction, sentencing hearings and other post-conviction hearings).11

This article considers transitional justice mechanisms implemented in and relating to Kenya within the framework of the (relatively) newly-created mandate of the Special Rapporteur.12 The Special Rapporteur is mandated to report annually to the Human Rights Council and the General Assembly.13 The article functions as a response to the reports for the years 2012 and 2013, and contemplates the significance of the mandate. It applies the mandate of the Special Rapporteur as a framework for assessing the case of Kenya, including Kenya’s progress towards achieving justice and accountability for past human rights violations. The article considers in detail the four measures of the mandate: truth, justice, reparation and guarantees of non-recurrence, tracking their implementation in Kenya to date. As the article will demonstrate, the mandate resonates with a range of ongoing judicial and non-judicial transitional justice measures implemented in Kenya. In light of significant challenges hindering the effective implementation of transitional justice measures in Kenya, the article calls on the Special Rapporteur to turn his attention to the case of Kenya, including issuing a request to conduct a country visit. The suggestion of a country visit by the Special Rapporteur has particular

12 While the crux of the analysis of this article considers transitional justice measures implemented in Kenya, the article considers also the ICC, implemented not in Kenya but at the ICC headquarters in The Hague. As such, the indictment of Kenyatta and Ruto by the ICC is analysed as a transitional justice process relating to and not located in Kenya.
13 De Greiff (n 7 above).
relevant given the challenge facing Kenya of having two ICC suspects at the helm of government.  

The structure of the article is as follows: Following on from the introduction (part one), part two sets out a working definition of transitional justice for the article. Part three provides an overview of the Special Rapporteur’s annual reports and activities, and offers reflections on the significance, particularly in terms of the contribution to the evolution of the field of transitional justice. Part four provides an analysis of the context of transition and transitional justice in Kenya. Part five then systematically considers each of the four measures, or thematic areas, of the mandate: truth, justice, reparation and guarantees of non-recurrence, and the effectiveness of their implementation in Kenya. Part six considers the extent to which the goals of transitional justice – recognition, trust, reconciliation and strengthening of the rule of law, as identified by the Special Rapporteur in the first annual report – have been achieved in Kenya. The analysis of Part six is anchored in the recognition that such goals of transitional justice are difficult to measure. It is also understood that goals of reconciliation and rule of law strengthening take many years to crystallise, beyond the five years subsequent to the post-election violence period. Finally, the article concludes with a summary of the key arguments of the article. This part also proposes and highlights the value and relevance of a visit by the Special Rapporteur to Kenya.

2 Defining ‘transitional justice’

As set out in the introduction to the article, transitional justice denotes judicial and non-judicial measures geared to redress the legacies of massive human rights abuses. The term transitional justice does not have a universally-agreed upon definition, rather its meaning is ‘contested territories with diverging bodies of (at least emerging) theory, policy, and practice’. Much of the ambiguity surrounding its precise meaning derives from the fact that the focus of transitional

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14 This is not to presuppose Kenyatta or Ruto’s guilt (or innocence), but rather recognises the seriousness of the crimes with which both are charged, the importance of their co-operation with the ICC, and the challenge of balancing responsibility for governing while simultaneously responding to international criminal charges.

15 ICTJ (n 2 above). See also Reiter et al (n 2 above) 138.


17 Lenzen (n 16 above) 77.
justice has evolved and shifted somewhat since its inception. Originally, transitional justice was concerned with political transitions from authoritarian rule to democracy, its application being to address and furnish justice for past atrocities of authoritarian regimes. In light of the focus on achieving justice within the context of ‘transitions to democracy’, the field came to be termed ‘transitional justice’. Over the past two decades, however, transitional justice measures have been appropriated to respond to contexts of conflict, political strife, as well as human rights atrocities more generally – expanding the gaze of transitional justice considerably. Usefully, as Jeffery explains ‘[w]hat unites these different approaches to transitional justice ... is that each seeks to achieve accountability for human rights violations’. Of relevance also is the use of the terminology of transitional justice by the Special Rapporteur, suggesting the term’s continued currency.

Helpfully, Olsen et al acknowledge that, increasingly, many scholars and practitioners alike are adopting a version of the definition elaborated by the International Centre for Transitional Justice (ICTJ), as follows:

Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for the victims and promotion of possibilities for peace, reconciliation, and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.

This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe – and to demands in these regions for justice. At the time, human rights activists and others wanted to address the systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called ‘transitions to democracy’, people began calling this new multidisciplinary field ‘transitional justice’.

This definition is useful for clarifying the meaning of the term as well as its overriding objectives. It underscores the historical origins of transitional justice and so functions to track the field’s development. The definition is also noteworthy as it features a clear statement recognising the experiences of victims of human rights violations, rather than focusing narrowly only on the perpetrators of human

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19 ICTJ (n 2 above).
20 Reiter et al (n 2 above).
22 ICTJ (n 2 above). See also Olsen et al (n 2 above).
23 Reiter et al (n 2 above).
rights atrocities. This aligns with the focus championed by the Special Rapporteur in the first annual report to the UN Human Rights Council on the mandate, advocating for a ‘victim-centred’ approach to transitional justice.24

It is also worth noting that there is no consensus on the precise scope of transitional justice, that is, which mechanisms do and do not fall within the ambit of that which is generally considered to comprise transitional justice. One commonly-conveyed view, also put forward by the ICTJ, is that transitional justice mechanisms include criminal prosecutions, truth commissions, reparations programmes, and various kinds of institutional reforms (generally justice and security sector-focused).25 Yet some scholars contemplate a broader array of measures as constitutive of transitional justice, such as amnesties,26 apologies, commemorative practices, reconciliation initiatives, cultural and artistic works,27 and education reforms, so as to incorporate learning of past atrocities into school curricula.28 It is such lack of clarity and consensus surrounding the precise constitutive elements of transitional justice that contributes also to the ambiguity around its definition. This, then, is problematic methodologically for the field of transitional justice.

In order to frame the analysis, this article adopts the itemisation of transitional justice measures set out in the mandate of the Special Rapporteur. As set out both in Resolution 18/7 and the first annual report of the Special Rapporteur, thematically the mandate concentrates on measures intended to promote ‘truth, justice, reparations and guarantees of non-recurrence’ 29 Specifically, Resolution 18/7 mentions ‘individual prosecutions, reparations, truth seeking, institutional reform, and vetting of public employees and officials’. Each of these mechanisms will be considered according to their implementation in Kenya.30 Importantly, Resolution 18/7 also tasks the Special Rapporteur to identify potential additional elements or mechanisms, with a view to recommending ways and means to improve and strengthen the promotion of the four elements of the mandate. This is significant because it suggests that the list of transitional justice mechanisms is not a closed list, thereby giving

24 De Greiff (n 7 above) 17.
25 E Harwell & P le Billon ‘Natural connections: Linking transitional justice and development through a focus on natural resources’ in De Greiff & Duthie (n 16 above) 282; ICTJ (n 2 above) 14.
26 Reiter et al (n 2 above).
28 As above.
29 De Greiff (n 7 above).
30 Note that this article also considers the three cases pending before the ICC, to be heard external to Kenya, at the ICC headquarters in The Hague.
fluidity to the field of transitional justice as it develops and responds to new realities and challenges.

3 Significance of the Special Rapporteur’s mandate for Kenya

Resolution 18/7 of the Human Rights Council establishes the mandate for the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The creation of the mandate is significant as it demonstrates a commitment on the part of the Human Rights Council to justice and accountability for gross human rights violations and serious violations of international humanitarian law. Further, it functions to elevate transitional justice to the Special Procedures of the Human Rights Council, with the Special Rapporteur mandated to promote justice and accountability for human rights atrocities internationally. It is precisely this need for justice and accountability for egregious human rights abuses that exists in Kenya.

The annual reports of the Special Rapporteur to the UN General Assembly and Human Rights Council speak to the significance of the mandate. In particular, on 9 August 2012, the Special Rapporteur presented the first annual report to the Human Rights Council.31 The report provides an overview of key activities undertaken by the Special Rapporteur between 1 May (the initiation of the mandate) and 25 July 2012. As detailed in the report, key activities have included engagement in consultations with a number of experts, civil society organisations and UN bodies regarding priorities and strategies for fulfilling the mandate. The Special Rapporteur has continued to engage with an array of government and non-governmental actors and organisations as well as international bodies throughout 2013.

Further, demonstrative of the kinds of activities and approaches available under the mandate, in collaboration with the UN Special Rapporteur on Torture, De Greiff has addressed a letter to the government of Brazil, offering support and co-operation, including the provision of technical assistance or advisory services for Brazil’s National Truth Commission. Additionally, the Special Rapporteur has received an invitation to visit Uruguay and has sent requests for country visits to Guatemala, Guinea, Nepal and Spain.32 Since the presentation of the first annual report, the Special Rapporteur has conducted an official visit to Uruguay in September/October 2013 to assess measures adopted by the authorities in relation to the serious human rights violations perpetrated during the dictatorship of the

31 De Greiff (n 7 above).
32 As above.
1970s and 1980s. The Special Rapporteur has also conducted a country visit to Tunisia, and will visit Spain in January 2014. Requests for visits remain pending for Brazil, Côte d’Ivoire, Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Nepal and Rwanda. A visit to Kenya (additional to those visits pending) by the Special Rapporteur would be a powerful means of promoting truth, justice, reparation and guarantees of non-recurrence in that country. Access to technical assistance and advice, as well as the further elevation of crucial human rights issues at the international level, embody significant potential for positive justice outcomes.

The first annual report to the Human Rights Council sets out also the ‘foundation of the mandate’ (namely, Resolution 18/7, applicable international instruments, the emergence and evolution of transitional justice measures across diverse contexts, and the normative conception of transitional justice) – this is significant because it helps to clarify and correct misconceptions surrounding the mandate. This is important for its effective implementation going forward. In particular, the fact that the Special Rapporteur stresses that transitional justice mechanisms are ‘neither meant to be a “soft form of justice” nor ... a means of pursuing the aim of reconciliation bypassing the implementation of the four measures under the mandate’ is of great import. Recognising that transitional justice is not a ‘soft form of justice’, nor that to achieve reconciliation, justice must be sacrificed, functions to reinforce approaches that target accountability for perpetrators of human rights violations. It also promotes the rigorous design and implementation of mechanisms that are geared towards this goal, as well as adequate justice and recognition for victims. This is relevant to the case of Kenya as it suggests that justice is a necessary precursor to peace (peace in the


34 Applicable international instruments listed by the Special Rapporteur and detailed in Resolution 18/7 include the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977; the International Convention for the Protection of All Persons From Enforced Disappearance; and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the General Assembly in 2005.

35 As articulated in the Secretary-General’s report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), to which Resolution 18/7 refers. The Special Rapporteur explains that “[t]he ‘main components of a transitional justice policy ... criminal justice, truth telling, reparations and vetting ... far from being isolated ... should be thought of as parts of a whole’ (De Greiff (n.7 above) 6-7).

positive sense)\(^37\) – that Kenya needs to come to terms with its past in order to move forward.

An additional noteworthy element is the emphasis in each of the Special Rapporteurs’ reports for 2012 and 2013 on taking a comprehensive approach to transitional justice. The Special Rapporteur advocates for ‘an approach that combines the elements of truth-seeking, justice initiatives, reparations and guarantees of non-recurrence in a complementary and mutually reinforcing manner’.\(^38\) Building on this, the article argues that a ‘comprehensive’, or ‘multi-dimensional’,\(^39\) approach to justice is vital for Kenya (necessarily in an appropriately-sequenced manner, and cognisant of contextual realities). It is only with such a comprehensive approach that the goals of transitional justice can be realised fully (such as those identified by the Special Rapporteur in the first annual report to the Human Rights Council: recognition, trust, reconciliation and strengthening the rule of law).\(^40\) This perspective has been articulated effectively by the ICTJ: ‘[N]o single measure is as effective on its own as when combined with the others’ and that ‘[t]he different elements of a transitional justice policy are not parts of a random list, but rather, are related to one another practically and conceptually’.\(^41\) In response, the article considers the implementation of the broad gamut of transitional justice measures in Kenya, informed by the perspective that an effective transitional justice project for Kenya necessarily demands full and effective implementation of an array of complementary transitional justice measures. Yet, as will be suggested, in the case of Kenya various transitional justice measures (though not a comprehensive set) have been implemented, to varying degrees of success and efficacy.

The Special Rapporteurs’ annual reports are important also because they function to frame and further the conversation around transitional justice. That the reports are presented to the Human Rights Council and adopted by the UN General Assembly further elevates the conversation at the international and multilateral level (though noting that the UN has a significant history of engagement with transitional justice (see footnote 4)). The reports also serve to highlight key issues and developments currently playing out in the field of transitional justice, identifying priority areas where further work is required. In particular, the Special Rapporteur emphasises the importance of gender-sensitive and victim-centred approaches for transitional justice work.\(^42\) This emphasis aligns entirely with a growing call for transitional justice to better account for the gendered

\(^{37}\) JGaltung *Theories of peace: A synthetic approach to peace thinking* (1967).
\(^{38}\) De Greiff (n 7 above) 1.
\(^{40}\) De Greiff (n 7 above).
\(^{41}\) ICTJ (n 2 above).
\(^{42}\) De Greiff (n 7 above).
dimensions of human rights violations. It also echoes important calls for justice for sexual and gender-based violence committed in contexts of conflict, such as those articulated in UN Security Council Resolutions 1325 and 1820. Indeed, as Hellsten asserts: 'The [transitional justice] mechanisms that bring long-term gender justice while abolishing structural violence, bias and injustice still are not fully established.' The Special Rapporteur’s bringing this significant shortcoming into the gaze of dominant transitional justice discourses is crucial to its advancement and rectification. Further, the push for a victim-centred focus is also noteworthy. The Special Rapporteur asserts that, without the ‘meaningful participation [of victims]’, goals of transitional justice cannot be achieved. Both the issue of victim-centred and gender-sensitive (justice) strategies will be revisited in this article.

Finally, of significance is that the Special Rapporteur specifically articulates the importance of ‘drawing tighter connections with other types of policy interventions such as development and security policies’. The Special Rapporteur’s report to the Human Rights Council for 2013 takes forward the discussion on connections and complementarities between transitional justice and development, the report highlighting the relevance of justice and rights considerations to sustainable development. This dearth in analysis of connections between development and security policies has previously been identified and explained, for example by the ICTJ. Further, in 2008, the International Journal of Transitional Justice devoted an entire issue to the topic of transitional justice and development, ‘in which a number of contributors argued for the ‘expansion of the purview of transitional justice to include development issues’. And as it relates to connections between transitional justice and development, Lenzen has asserted that ‘practical experience is more advanced than policy in this regard, although too little of it has been systematically

44 UN Security Council Resolution 1325 (2000) para 11 on women, peace and security [e]mphasises the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes, including those relating to sexual and other violence against women and girls.
46 Hellsten (n 43 above) 16.
47 De Greiff (n 7 above) 17.
48 As above.
49 As above.
50 De Greiff & Duthie (n 16 above). The International Centre for Transitional Justice is also leading work in order to connect transitional justice and development actors as it relates to supporting ‘positive complementarity’.
captured', pointing out the need for continued research into such connections. In the context of Kenya, questions of both development and security are pivotal: As it relates to development, Kenya is an important development hub, and a myriad of development actors are supporting and engaging in various transitional justice mechanisms. And yet, the election of Kenyatta and Ruto threw up new challenges for international development in Kenya, whereby key development partners, including the United States of America, the United Kingdom and the European Union, have indicated a reluctance to engage with the Kenyatta administration. And as it relates to security, activities of militia groups, such as the Mombasa Republican Council (MRC), and Kenya’s invasion of Somalia (and conflict with Al-Shabaab and ensuing terrorist attacks), pose significant challenges for Kenya’s justice and security sectors.

The analysis in the subsequent pages describes the superficial and largely ineffectual manner in which Kenya has approached transitional justice to date. It points to a distinct lack of political will for transitional justice measures to be fully and effectively implemented in Kenya. Concomitantly, the Special Rapporteur suggests that the goals of transitional justice (such as providing recognition to victims, fostering trust, contributing to reconciliation and strengthening the rule of law) are most likely to be achieved where a comprehensive set of transitional justice mechanisms are fully implemented – the analysis below points to this shortcoming. The article interrogates the transitional justice measures against the mandate of the Special Rapporteur, concluding with a call to the Special Rapporteur to issue a request for a country visit to Kenya.

4 Context of transition and transitional justice in Kenya

4.1 Human rights violations in post-independence Kenya

A historical narrative tracing Kenya’s post-independence political regimes, and the commission of a myriad of human rights violations.
by them (and various government elements, in particular excessive use of force by security agencies), underscores the need for transitional justice in Kenya. Successive post-independence Kenyan governments, under Presidents Kenyatta, Moi and Kibaki, have engaged in, condoned or overlooked the commission of gross human rights violations as well as other crimes, with impunity. Such criminal acts have included political assassinations, torture, inter-ethnic violence sanctioned and allegedly incited by the state, arbitrary arrests and detentions, extra-judicial police killings, banning of opposition parties; irregular allocation of land; and various other economic crimes. Where such human rights violators have enjoyed impunity for their acts – impunity then incentivising further violations – a strong argument may be made for the need for transitional justice mechanisms to be fully implemented in Kenya. Indeed, the World Bank's World Development Report 2011, entitled Conflict, Security and Development, recognises a role for transitional justice in combating impunity as a means to ending cycles of conflict and violence.

While Kenya’s ongoing project of transitional justice responds predominantly to the harrowing period of post-election violence (triggered by alleged irregularities in the 2007 Kenyan general election), Kenya’s Truth, Justice and Reconciliation Commission, for example, spanned a temporally-broader timeframe, mandated to

61 Ajulu (n 59 above).
investigate human rights violations committed between 1963 and 2008. As such, the broader context of Kenya’s governance crisis and project of transitional justice was brought into focus. Focusing specifically on the post-election violence period, following a close presidential election in December 2007, ‘with extensive allegations of fraud, including irregularities in the final tallying of the vote’, Kenya was marred by two months of ‘fratricidal violence’.67 Over the course of the two-month period in the aftermath of the elections, ‘which pitted ruling party supporters and the police against opposition-linked armed groups and civilians’, an estimated 1 300 killings occurred, more than 500 000 people were displaced, and thousands of cases of sexual violence were reported.68 Divisions were predominantly along ethno-regional lines69 and, as Hayner explains, ‘political differences quickly turn[ed] into ethnically targeted attacks’.70

The alleged involvement and criminal responsibility of state actors is relevant to note,71 pertinent to the context of transitional justice and Kenya’s ‘transition’, more generally. What is of particular significance is that the same kinds of state-sponsored human rights violations are alleged to have spanned each of the three post-independence political regimes (under Presidents Kenyatta, Moi and Kibaki) (and, similarly, without adequate investigations/prosecutions),72 calling into question the extent to which Kenya is undergoing any process of transition, if at all. Significantly, the Special Rapporteur, in the first annual report, explains that transitional justice mechanisms may well be implemented in contexts ‘in which there has been no transition to speak of’73 – perhaps an appropriate categorisation for transitional justice in Kenya. And, as Ambos suggests, ‘the role of the (former) elite(s) in the process [of transition] affects the ... [success of transitional justice] in that the possibilities of transitional justice increase with the decreasing influence of the (former) elite(s)’.74 In the case of Kenya, where there has been no real transition to speak of, Ambos’s words have great resonance in explaining the shortcomings of Kenya’s ongoing project of transitional justice.

68 CIPEV (n 9 above). See also Human Rights Watch (n 9 above) 3.
69 Brown & Sriram (n 67 above)
70 PB Hayner Unspeakable truths: Transitional justice and the challenge of truth commissions (2011) 73.
71 See Human Rights Watch (n 9 above).
72 Human Rights Watch (n 9 above) fn 57-63.
73 De Greiff (n 7 above).
4.2 Inception of transitional justice in Kenya

As post-election violence escalated, emergency measures were necessary to quell the political stalemate and violence. Several regional attempts at bringing the then ruling party (Party of National Unity) and the then opposition party (Orange Democratic Movement) to a negotiating table were initiated. These efforts, however, were not successful initially. Then, in January 2008, the AU mandated a peace mediation process for Kenya, resulting in the establishment of the Kenya National Dialogue and Reconciliation Committee (KNDRC), under the leadership of former UN Secretary-General Kofi Annan. The KNDRC was tasked with mediating a halt in the violence and broader humanitarian and political crisis, as well as putting in place mechanisms geared at enabling Kenya’s transition to a just, human rights-compliant future.\(^{75}\)

Recognising impunity as a significant stumbling block hindering Kenya’s transition, the KNDRC forged an agreement as to the establishment of various transitional justice measures, including a truth commission and a comprehensive constitutional, legal and institutional reform process.\(^{76}\) As Hansen asserts, this agreement ‘seemed to provide a comprehensive framework for addressing the roots of political violence and other human rights abuses in the country’, yet, to date these measures have ‘remained detached from a fundamental transformation’, ‘captured’ and ‘manipulated’ by elites. Associated shortcomings are discussed below.\(^{77}\)

Relating to criminal justice, as Brown and Sriram assert, one of the ‘thorniest issues’ for the KNDRC was how to impose criminal accountability for the post-election violence.\(^{78}\) The negotiating teams agreed to the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV, also commonly known as the Waki Commission after its president, Justice Philip Waki).\(^{79}\) CIPEV was subsequently established and implemented, mandated to, among other things, investigate the violence and make recommendations as to legal redress.\(^{80}\) Significantly, in its final report of October 2008, CIPEV recommended the establishment of a special tribunal for the prosecution of those who bore the ‘greatest responsibility’ for crimes against humanity, arising from the post-election violence.\(^{81}\)

\(^{75}\) KNDRC ‘Annotated agenda for the Kenya dialogue and reconciliation’ KNDRC Conference, 2008.

\(^{76}\) KNDRC ‘Agreement on agenda item three: How to resolve the political crisis’ 14 February 2008 3.


\(^{78}\) Brown & Sriram (n 67 above)


\(^{80}\) Kenya Gazette Notice 4473, 23 May 2008. Note that CIPEV is highly regarded as having conducted its investigations and fulfilled its mandate effectively and in a credible manner.

\(^{81}\) CIPEV (n 9 above).
further recommended that, in the event that efforts towards establishing a special tribunal were frustrated, the names of the alleged perpetrators and accompanying evidence be referred to the prosecutor of the ICC. Brown and Sriram have since rightly described this self-enforcing mechanism as ‘ingenious’. It is against this backdrop that the subsequent analysis in part five is set.

5 Analysis of the extent of implementation in Kenya of the four elements of the Special Rapporteur’s mandate – truth, justice, reparations and guarantees of non-recurrence

This part systematically assesses the effectiveness of the implementation of the four measures of the Special Rapporteur’s mandate in Kenya – truth, justice, reparations and guarantees of non-recurrence.

5.1 Truth

International law protects the right of victims and survivors to know about the circumstances of gross violations of their human rights, including who was responsible for the violations. This right may be afforded through the effective implementation of various truth-seeking initiatives, including freedom of information legislation; declassification of archives; investigations into the missing and disappeared; and the establishment of non-judicial commissions of inquiry, including truth commissions. The value of truth seeking rests in its contribution to the ‘creation of a historical record’ and, in so doing, preventing manipulation and the deliberate rewriting of history and a denial of atrocities by perpetrators. Truth seeking is also esteemed for its perceived ability to ‘help victims find closure by learning more about the events they suffered, such as the fate of disappeared individuals, or why certain people were targeted for abuse’. Hayner also points to the value of truth seeking for confronting the legacy of past ‘horrors’, in order to lay a solid foundation on which to build a new society, warning against

82 Brown & Sriram (n 67 above).
83 The first judicial ruling articulating the existence of the right to the truth was by the Inter-American Court of Human Rights in the Velásquez Rodríguez case of 1988. See also IACHR Ellacuria v El Salvador Case 10488 of 1999 (Ellacuria case). See further HRC Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay, Communication 107/1981 para 14.
85 As above.
86 Human Rights Watch (n 9 above).
‘burying … sins, [as] they will reemerge later’. 87 And so, logically, the question arises: To what extent, if at all, has truth seeking contributed to achieving the above-mentioned objectives in Kenya; or has it been merely a case of burial of sins?

The task of truth seeking in Kenya has been broached through the mechanism of a truth commission – the Truth, Justice and Reconciliation Commission of Kenya (TJRC). Established pursuant to the TJRC Act, it came into operation on 17 March 2009. 88 Hayner’s seminal work on truth commissions offers a useful starting point for framing critical thinking around truth commissions. Hayner defines a truth commission as a temporary body officially sanctioned by the state to investigate a pattern of abuses and to issue a report. 89 The definition adopted by Olsen et al which draws heavily on Hayner’s definition, is also instructive: ‘a newly-established, temporary body, officially sanctioned by the state or an international governmental organisation to investigate past human rights abuses’. 90 The explicit focus on ‘human rights abuses’ in Olsen et al’s definition (and omitted by Hayner, who references only ‘abuses’), is significant as it aligns with the articulation of the Special Rapporteur’s mandate, which similarly is anchored within the language of human rights. 92

When the TJRC was agreed (in the context of the KNDRC process), it was seen to be a less controversial transitional justice measure than criminal prosecutions. 93 Unlike criminal prosecutions, there was perceived to be general agreement among the political class, civil society and the general public as to its utility and value for Kenyan society. 94 Unfortunately, however, allegations of corruption (including embezzlement of TJRC-designated funds), 95 serious allegations of human rights violations made against the TJRC Chairperson, Ambassador Bethuel Kiplagat, 96 and dubious political will for and commitment to the process, severely undermined the perceived legitimacy and overall effectiveness of the TJRC. The great majority of international development agencies and many civil society

87 Hayner (n 70 above).
88 The TJRC commissioners were sworn in on 3 August 2009.
90 Reiter et al (n 2 above).
91 Olsen et al (n 3 above) (our emphasis).
92 UN Human Rights Council (n 5 above).
93 Asaala (n 57 above).
94 As above.
96 Serious allegations of human rights violations surround Ambassador Kiplagat’s reputation. A commission was established to investigate these allegations; however, having made no concrete findings, Ambassador Kiplagat was controversially reinstated.
organisations operating in Kenya came to distance themselves from the TJRC process as it proceeded. This occurred in direct response to the above-mentioned shortcomings whereas, at the outset of the TJRC process, such actors committed funding and technical assistance, and demonstrated significant goodwill for the process. Indeed, initially there was significant support for and optimism surrounding the TJRC. Yet, many scholars and practitioners (including national and international civil society and international development agency representatives) came to seriously question whether the TJRC would be able to achieve its intended objectives, specifically, to "promote peace, justice, national unity, healing, and reconciliation among the people of Kenya." This was particularly in light of ever-diminishing public confidence in the TJRC mechanism.

Further, the considerable delays in completing and publishing the final report of the TJRC were widely denounced, as well as actively opposed by two Kenyan civil society umbrella organisations - Kenyans for Peace with Truth and Justice and the Kenya Transitional Justice Networks. These two civil society umbrella organisations labelled requests for extensions (and subsequent granting by cabinet) "reprehensible", "tantamount to a betrayal of the people's trust", and driven by "personal interest" and "self-preservation". These civil society groups labelled the delays also as "reek[ing] of political mischief". The TJRC's failing to publish its findings prior to the Kenyan general elections of 2013 has been aptly described as having "undermined one of the main rationales of the Commission and denied the people of Kenya information to which they were entitled as they went to the polls". The failure of the TJRC to release its report prior to the elections corresponds also with the analysis of the ICTJ that "[m]any international observers, civil society and victims..."
groups see this [delay] as a clear sign of the Commission’s politicisation’. Further, the alleged political pressure placed on the TJRC commissioners and staff by the office of the President to amend the land chapter of the final report of the TJRC is concerning. Prior to its publication, the final draft of the land chapter implicated Kenya’s first President (and father of Kenya’s current president, President Uhuru Kenyatta), President Jomo Kenyatta, in irregular land dealings. These paragraphs were then allegedly censored prior to the publication of the report. In protest, the three international commissioners, Judge Gertrude Chawatama, the late Ambassador Berhanu Dinka, and Professor Ronald C Slye, published a dissenting opinion that reproduced the original paragraphs of the land chapter.

It is, however, a credit both to the Kenyan government and to the institution of the TJRC and its commissioners, that the final report has now been released. This is an important means of accountability for past human rights violations, for recognising the suffering of victims and restoring dignity. The report is also of value for identifying and recommending a means of addressing the root causes of historical injustices and post-election violence. Significantly, strong political will is essential for the implementation of the TJRC’s recommendations set out in its final report. It remains to be seen how this will be

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103 Tolbert (n 97 above).
105 In their dissenting opinion, the three international commissioners provide that they ‘have no information with respect to whether the current President was aware of, or condoned, the actions of officials in the office of the President that we describe above. Needless to say, the same is true for the Deputy President.’
106 Dissenting Opinion (n 104 above).
109 Fletcher et al (n 107 above).
approached, though it is hoped that the recommendations will be wholly implemented without undue delay. There is a notable crescendo in the voices calling for the implementation of the report’s recommendations, including by the Kenyan Diaspora Alliance (KDA), the conveners of which have said that this ‘will help reconciliation and national healing’ in Kenya. A number of national and international civil society actors have also called for the implementation of the recommendations, as has former Prime Minister Raila Odinga.

There are also some noteworthy elements of the TJRC which are important to highlight. It is worth acknowledging these elements for two reasons: First, it is not the intention of this article to dismiss the work of the TJRC. Rather, it is hoped that the voices calling for a credible and comprehensive implementation of the recommendations of its report bear fruit. Second, some of the more innovative and impressive approaches of Kenya’s TJRC may usefully serve as a model and guide of good practice for other countries considering implementing a truth commission. One of the key strengths of the TJRC is that its mandate extends to investigations of ‘economic crimes’. This provision has been interpreted broadly by the TJRC as including violations of social, economic and cultural rights. This is a commendable approach, empowering the TJRC to address ‘human rights violations more holistically, beyond classic violations of bodily integrity’. In fact, the Special Rapporteur touches on this strength in the 2013 report to the UN General Assembly. One further noteworthy strength is that the TJRC Act required gender equality to be accounted for in the appointment of commissioners. While it would be erroneous to assume that all female commissioners will bring expertise in addressing crimes against women – or that male


\[\text{113} \] Sec 6(g) Truth, Justice and Reconciliation Act of Kenya 6 of 2008.

\[\text{114} \] Hayner (n 70 above) 74.

\[\text{115} \] De Greiff (n 7 above).

\[\text{116} \] Sec 10(3); First Schedule, sec 7 Truth, Justice and Reconciliation Act 2008.
commissioners will not’, it is a step towards achieving gender justice through transitional justice.  

5.2 Justice

The Special Rapporteur emphasises the need to act on ‘truths’ disclosed through truth-seeking processes – the TJRC identified by name a total of 255 alleged perpetrators and recommended their prosecution or further investigation by the Office of the Director of Public Prosecutions (ODPP), or appropriate action to be undertaken by the relevant body (such as the National Land Commission) for investigation. As such, there is a clear need for criminal justice in Kenya in response to past human rights abuses. Teitel explains that ‘[t]rials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule.’ Van Zyl asserts that ‘prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms and begin the process of reforming and rebuilding trust in government institutions’. Through these words, one sees the great importance of criminal justice in responding to human rights violations. In his report, the Special Rapporteur is emphatic regarding the fundamental role for prosecutorial mechanisms, though simultaneously quick to warn of the inadequacy of ‘isolated and piecemeal prosecutorial initiatives’ to quell claims for justice. This warning has great resonance for the case of Kenya, where the government ‘has failed to ensure the prosecution of perpetrators in all but a handful’ of post-election violence cases.

The CIPEV report highlights the instrumental role for criminal prosecutions in responding to the post-election violence, recommending the establishment of a special tribunal to eradicate cycles of impunity in Kenya. Yet, there have been very few prosecutions, and even fewer convictions, and, at the domestic level, ‘a near total lack of investigations of those who organised and financed the violence’. Further, prosecution efforts have proven controversial, threatening to divide politically factions within the former Government of National Unity, amidst reported attempts by one faction (the Party of National Unity) to ‘own’ and ‘shape’ the

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117 Hayner (n 70 above) 89.
118 De Greiff (n 7 above) para 23.
119 See generally ch IV of Vol 4 of the TJRC Report.
120 Teitel (n 18 above) 40.
121 As above.
122 De Greiff (n 7 above) 8.
123 Human Rights Watch (n 9 above) 3.
124 CIPEV (n 9 above) 472.
125 Human Rights Watch (n 9 above) 3.
126 The Government of National Unity is the coalition government created by the National Accord and Reconciliation Act.
transitional process, particularly prosecutions. Nevertheless, the fundamental role for criminal justice in Kenya’s transitional process is crucial. Criminal prosecutions may abate the deep-rooted culture of impunity and ameliorate perceptions surrounding the legitimacy of the current government and state institutions.

As set out above in part three of this article, CIPEV recommended that the failure to establish a special tribunal should result in the referral of the names of the alleged perpetrators to the ICC. Following failed attempts at legislating for the special tribunal (pursuant to the Special Tribunal for Kenya Bill 2009), on 9 July 2009 Kofi Annan referred a list of alleged perpetrators – those deemed most responsible for the post-election violence – to the then Chief Prosecutor of the ICC, Luis Moreno Ocampo. The Kenyan population lauded this step, reflective of frustrations surrounding an extant culture of impunity. This was coupled with a very real fear of political manipulation of any special tribunal to be established, given the apparent ethno-regional and political tensions. In this vein, Brown and Sriram assert that the fundamental reason for the government’s failure to initiate prosecutions in Kenya is because ‘those in charge of establishing these processes are … those whom it would prosecute or their close allies’. This stance points to the appropriateness of international justice, through the ICC, for the case of Kenya.

The ICC has subsequently charged three Kenyans of crimes against humanity – William Samoei Arap Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta. Significantly, two of those charged (Kenyatta and Ruto) were elected as Kenya’s President and Deputy-President in the general elections of 4 March 2013 (running together as the Jubilee Coalition). This clearly creates a highly complex, high-risk, and politically-charged political transition in Kenya. The cases against Kenyatta and Ruto have brought the AU into direct confrontation with the ICC. As articulated in the introduction to this article, the AU’s resolution of 12 October 2013 – that Kenyatta and Ruto’s trials should be suspended until they complete their terms of office – is concerning. The resolution also requires that Kenya should renew efforts to seek deferral of the cases against Kenyatta and Ruto, in

128 CIPEV (n 9 above) 473.
131 Brown & Sriram (n 67 above).
conformity with article 16 of the Rome Statute of the ICC – these efforts would be endorsed by all African state parties. This resolution therefore further complicates the process of achieving justice and accountability for post-election violence in Kenya.

Whether the deferral will be granted by the UN Security Council (UNSC) relies on a finding that the trial represents a threat to international peace and security as per chapter VII of the Charter of the United Nations. One view is that, in order to salvage the continental relevance of the ICC for Africa and ease tensions with the AU, the UNSC may grant the deferral, for fear of a threatened en masse continental withdrawal from the ICC. Alternatively, the UNSC may decline or ignore Kenya’s request (as has previously been its approach), thereby risking its relationship with the AU and possibly compromising any future co-operation with the ICC. Yet, the recent majority decision by judges of the ICC to allow Kenyatta to be absent from some of the hearings of his trial (citing the attack on the Westgate shopping mall in Nairobi as one reason for the ruling), may assuage AU state parties, potentially fostering continued co-operation with the Court.

Moving to consider domestic criminal justice initiatives in Kenya, as stated above, domestic investigations and prosecutions have been limited. A Human Rights Watch report labels domestic prosecution efforts in Kenya as a ‘half-hearted’ effort at accountability. As such, ‘hundreds of perpetrators of serious crimes continue to evade accountability’. This deficiency can be attributed to a host of challenges, including inadequate investigations by police in terms of competencies and human and technical resources as well as a distinct lack of a political will in some cases. Tensions surrounding ethnicity and inadequate witness protection programmes are significant challenges. As it relates to the state witness protection programme, there are significant concerns surrounding its credibility and independence. Indeed, as Ndubi suggests, ‘those who are supposed to protect the witnesses are the ones the witnesses are likely to testify against’.

Significantly, signalling a potentially-positive development (assuming effective implementation) in December 2012, Kenya’s Chief Justice Mutunga announced the creation of an International Crimes Division (ICD) within Kenya’s High Court – a special division

134 n 133 above, art 10(vii).
136 Human Rights Watch (n 9 above) 4.
137 Human Rights Watch (n 9 above).

This special division would complement (and not replace) the ICC criminal prosecutions, and have jurisdiction to try, \textit{inter alia}, international crimes.\footnote{Obala (n 139 above) 127. The Chief Justice’s articulation of the intended jurisdiction of the ICD includes, \textit{inter alia}, crimes against humanity, post-election violence, piracy, money and cyber crimes.} Importantly, the success of this initiative depends on the ‘political, financial and institutional commitment’ of the Kenyan government, as emphasised by the Judicial Service Commission sub-committee tasked with overseeing the setting up of the ICD.\footnote{F Oluoch ‘International crimes to be tried locally’ The East African (online) 1 December 2012 http://www.theeastfrican.co.ke/news/International-crimes-to-be-tried-locally/-/2558/1634454/-/s6kt45/-/index.html (accessed 20 October 2013). Note, however, that some civil society actors in Kenya have called for the creation of a hybrid tribunal in Kenya, external to the Kenyan High Court. The intention is that the hybrid tribunal would be comprised of both Kenyan and international judges, in an attempt to somewhat safeguard the independence of the tribunal.}

\subsection*{5.3 Reparations}

UN guidelines require states to provide effective remedies, including reparations, to victims for acts or omissions which can be attributed to the state and which constitute gross violations of human rights or serious violations of international humanitarian law – this must be ‘adequate, effective and prompt’.\footnote{UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted in 2005. Note that these guidelines stem from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are binding on states.} Yet, to date, there has been no comprehensive reparations programme in Kenya for gross human rights violations suffered. Only some limited forms of assistance to victims have been afforded – this has not been accompanied by any measure of accountability. The Kenyan government has made some minimal payments to a minority of all people displaced during the post-election violence of KSh 10 000 and KSh 25 000 (approximately US $117 and US $293 respectively). These payments were to provide for basic needs and the reconstruction of homes.\footnote{Robins (n 97 above).} Yet, these payments have not been framed (or conceived of) in terms of reparations \textit{per se}; rather, they have functioned as mere emergency assistance, and are far from comprehensive.\footnote{Robins (n 97 above) 10-11.} Further, allegations of...
'non-uniformity of the compensation, which both victims themselves and the organisations working with them see as favouring Kikuyu victims' have fuelled 'confusion and tension'. Allegations of the insertion of ethnicity into the compensation programme are certainly extremely perilous and inflammatory. Notably, civil society organisations have called for transitional justice mechanisms in Kenya to better account for the needs and concerns of victims, in particular calling for the establishment of a comprehensive reparations programme.

At the international level, the ICC may grant reparations to those victims of post-election violence who have applied for reparations through the ICC process. However, this would in no way absolve the Kenyan state of responsibility to furnish reparations; reparations ordered through the ICC would not reach the great majority of those adversely impacted by the post-election violence.

5.4 Guarantees of non-recurrence

5.4.1 Constitutional reform

In August 2010, a new Constitution was promulgated for Kenya, the Constitution of Kenya, 2010, replacing the Constitution which had been negotiated at independence in 1963. Kenya’s new Constitution is noteworthy for its incorporation of a robust bill of rights and provisions for the creation of an independent electoral management body, an independent judiciary, executive and parliament, a decentralised political system and a framework regulating a system of devolved government. The constitutional reform process has served to lay the ground for important institutional reforms of Kenya’s justice and security apparatus and other governance institutions, geared to prevent the recurrence of human rights atrocities.

Further, the new Constitution is lauded for vastly diminishing the extensive executive powers enjoyed under the previous dispensation – this was one perceived causal factor of the post-election violence. Such provisions relate to public appointments, lack of separation of powers, undue influence over the parliamentary calendar, weakened oversight bodies, and lack of adequate checks and balances. For

145 Human Rights Watch interview with IDP Network Chairperson Patrick Githinji, Nakuru, 24 October 2011 in Human Rights Watch (n 9 above) 79.
146 Robins (n 97 above).
148 Art 88.
149 Art 160.
150 Arts 129-155.
151 Arts 93-105.
152 Arts 174-200.
example, all public appointments under the new constitutional order require a robust process of recruitment, which is further subject to parliamentary approval.\(^{154}\) Additionally, provisions aimed at eliminating political influence of the executive (that had perpetually marred judicial operations) have facilitated judicial independence. Another key strength of the Constitution is the creation of an ombudsman commission,\(^{155}\) as well as other oversight bodies\(^{156}\) important for the effective and accountable functioning of government.

The influence of the new Constitution has been felt in various transitional justice processes in Kenya, primarily in relation to criminal justice and institutional reform efforts. For example, shortly after the promulgation of the Constitution on 27 August 2010, the Kenyan government seemed to have found a legal basis to retreat from the ICC route. On various occasions, the government referred to the new Constitution as its new strength to try the ICC suspects.\(^{157}\) In this regard, several avenues were exploited in an attempt to keep the ICC at bay. On 31 March 2011, the government of Kenya lodged an application before the ICC, challenging the admissibility of the Kenyan situation in accordance to article 19 of the Rome Statute.\(^{158}\) Endeavouring to demonstrate capacity and willingness to prosecute alleged perpetrators, the government of Kenya urged the ICC to take into account the comprehensive constitutional and judicial reforms that had been adopted.\(^{159}\) Although the pre-trial chamber dismissed the challenge, the fundamental role the new Constitution continues to play in Kenya’s transitional justice project cannot be underestimated. The Constitution has not only informed several transitional justice measures in their substantive form, but also in the various procedural avenues that have been adopted. These will be captured in the debates on judicial and police reforms.

### 5.4.2 Judicial reform

At the time of the post-election violence, the Kenyan judiciary was in dire need of reform. The CIPEV report highlighted that the Kenyan

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157 ‘Mutula to Ocampo, quit Kenyan probe’ Sunday Nation 19 September 2010 1. See also ‘Why go to The Hague’ Sunday Nation 19 September 2010 15. The then Minister for Justice and Constitutional Affairs called upon the ICC to quit the Kenyan probe and to allow Kenya a chance under the new Constitutional Court structures to deal with the cases.


159 n 158 above 6.
judiciary had ‘acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution’.160 As such, the judiciary was not seen as a legitimate forum for the resolution of disputes, and therefore ineffective in limiting violence.161 The Task Force on Judicial Reforms (appointed by the government of Kenya in 2009) has since acknowledged the manifest corruption of the Kenyan judiciary.162 Significantly, in terms of achieving judicial reform, some noteworthy headway has been made (such that this is one of the qualified success stories of Kenya’s transitional justice project): specifically, the adoption of a stringent method of appointing judicial officers and the vetting of current judicial officers. The Constitution of Kenya provides for the establishment of an independent Judicial Service Commission, imbued with the authority to make judicial appointments.163 The Constitution also calls for the enactment of legislation for the vetting of judges and magistrates.164 This constitutional provision has been implemented pursuant to the Vetting of Judges and Magistrates Act 2011 (Kenya). Under the Act, to date 69 High Court Appeal judges have been vetted, with 14 removed from office, and 351 magistrates vetted.165 Significantly, the Kenyan Parliament enacted legislation that sought to insulate the decisions of the Judges and Magistrates Vetting Board.166 Importantly, the law sought to suspend judges or magistrates who requested a review of the Board’s decision until such reviews were fully determined.167 This positive development responds to the dubious decision by the Kenyan High Court that sought to reinstate a suspended judge pending the determination of their appeals.168 This was despite the effect of an exclusion clause in the Constitution that ‘a removal, or the process leading to the removal of a judge from office by virtue of the operation of legislation … shall not be subject to question in, or review by any court’.169 Ambos suggests that one indicator of the success of transitional justice is the ‘extent to which it contributes to … the consolidation of … the domestic judicial system’.170 Applying this to Kenya’s judicial reform efforts to date (in particular, a robust vetting process), coupled with the proposal for the
creation of the International Crimes Division within Kenya’s High Court, there is some early indication of the transformative potential for transitional justice.

The perception of a reformed judiciary overwhelmingly enjoyed public trust in the judicial institution. This trust was, however, short-lived. Regarding a subsequent constitutional question as to whether the current President was fit to vie for presidency given the fact that he was an ICC indictee, the same High Court declared its lack of mandate to deal with a presidential election petition even when this was not an election petition *per se*, but a matter of constitutional interpretation based on the integrity requirements of public officers.171 Similarly, the Supreme Court of Kenya shied away from invalidating presidential elections despite their very own findings of irregularities.172 What is most saddening is the fact that this is the Kenyan judicial system that has apparently undergone drastic reforms. The traces of impunity, however, remain inherently ingrained and evident in their judicial decisions.

5.4.3 Police reform

Police reform in Kenya is vital: Allegations of an estimated 962 police shootings (405 fatal) and a myriad of cases of sexual assault perpetrated by the police in the context of post-election violence necessitates drastic reform.173 Notably, no police officer in Kenya has been convicted of any such crimes, thereby ‘demonstrat[ing] the extent of impunity for certain groups that appear to be protected’.174 Further, a raft of constitutional and legislative provisions aimed at police reform remains to be implemented – the slow progress of police reform in Kenya has been disappointing. Of greatest concern is the failed attempt at vetting the leadership of the police force. As such, questions arise as to how other institutional reforms may be executed effectively where corresponding reforms have not occurred within the police. An effective justice chain relies on the proper functioning of each of its components – for example, in crude terms, prosecutions will not be successful where police have failed to collect appropriate evidence.

The National Task Force on Police Reforms (Ransley Task Force), established in 2009, has been central to informing the police reform agenda. The final report of the Ransley Task Force underscored the

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172 See, generally, *Supreme Court of Kenya Petitions 3, 4 & 5 of 2013; Reports on re-tally of 22 polling stations in Petition 5 of 2013; and Report of the scrutiny of 33 400 polling stations. These reports are as a result of the Supreme Court’s own suo moto motion.*

173 *Human Rights Watch (n 9 above) 4.*

174 As above.
need to establish an independent National Police Service Commission, responsible for the appointment, remunerations, disciplinary and general performance of the police – essential for the effective functioning of the police.\textsuperscript{175} Indeed, the 2010 Constitution further bestows a constitutional mandate on the National Police Service Commission as the body in charge of the National Police Service in terms of appointments, disciplinary and any other functions conferred upon it by statute.\textsuperscript{176} Additionally, Parliament further enacted a law that created yet another office within the security forces, the National Police Service headed by the Inspector-General.\textsuperscript{177} The functions of the Inspector-General were generally to co-ordinate the functions of the police at the national level and to advise the government on policy matters.\textsuperscript{178} Even then, the two offices – that of the Inspector-General and the National Police Service Commission – have been at loggerheads over who should exercise the key functions of discipline, recruitment and transfer of forces. These events have prompted the introduction of a bill to the National Assembly that seeks to amend the National Police Service Act by transferring the most crucial functions of the National Police Service Commission, recruitment, transfer and disciplinary of forces, to the Inspector-General.\textsuperscript{179} Not only has this move been politicised, but also the Kenya National Commission on Human Rights has criticised the same as essentially ‘killing the National Police Service Commission’.\textsuperscript{180}

On a positive note, a Police Civilian Oversight Board was also established in 2009, in accordance with the recommendations of the Ransley Report.\textsuperscript{181} This board has been established to provide civilian oversight of the work of the police.\textsuperscript{182} While this community-policing model is promising, further efforts are required to ensure that the Kenyan public feels the positive impact of the Civilian Oversight Board.

\begin{footnotes}
\item[177] National Police Service Act 11A of 2011.
\item[178] Sec 10 National Police Service Act.
\item[179] National Police Service Commission (Amendment) Bill 2013.
\item[181] National Task Force on Police Reforms (2009) 82.
\item[182] Established under Independent Policing Oversight Authority Act 35 of 2011.
\end{footnotes}
6 Have the goals of transitional justice been achieved in Kenya?

As the Special Rapporteur sets out in the first annual report to the Human Rights Council, ‘the four elements under the mandate serve to assist in the pursuit of twomediate goals, that is, providing recognition to victims and fostering trust, and two final goals, that is, contributing to reconciliation and to strengthening the rule of law’.183 The Special Rapporteur explains also that these goals are most likely to be achieved where a comprehensive set of transitional justice mechanisms are fully implemented.184 Kenya has fallen short of this. As Ambos suggests:185

The role of the (former) elite(s) in the process [of transition] affects the ... [success of transitional justice] in that the possibilities of transitional justice increase with the decreasing influence of the (former) elite(s).

In the case of Kenya, where there has been no real transition to speak of, Ambos’s words have great resonance in explaining the shortcomings of Kenya’s ongoing project of transitional justice.

Certainly, the point should also be made that there is very little evidence-based understanding as to whether transitional justice mechanisms do actually achieve their stated objectives. Indeed, Brahm asserts that most strong ideological stances on the social impact of transitional justice processes are very much intuitively informed, based on some limited ‘anecdotal evidence’, but very little substantive empirical data.186 This poses a further challenge to concluding with certainty what impact transitional justice has had (or indeed can have) in the process of political transition and reconstruction in Kenya. Further, the relatively short time frame (between the time of post-election violence, the KNDRC process and the implementation of various transitional justice measures in Kenya) is an important consideration, recognising that the fulfilment of goals such as recognition, trust and reconciliation is difficult to quantify and not capable of attainment instantaneously.

So, to what extent might it be said that these goals have been achieved in Kenya, acknowledging methodological measurement difficulties? It is argued that the recognition of harm suffered by victims in the Kenyan context is blemished with numerous failures and minimal successes. In terms of the successes, despite associated challenges, the ICC process has been agenda setting in achieving some recognition for victims as rights holders. The indictment by the

183 De Greiff (n 7 above).
184 As above.
185 Ambos (n 74 above) 22.
186 E Brahm ‘Uncovering the truth: Examining truth commission success and impact’ (2007) 8 International Studies Perspectives 16. This point is picked up also in Olsen et al (n 3 above).
ICC of alleged perpetrators of human rights atrocities was a powerful act of recognition; the completion of the trials would elevate this. The ICC process has also functioned to raise awareness of and pressure for criminal prosecutions domestically. Yet, the inadequacy of local truth-seeking and criminal justice efforts denies public acknowledgment of harm suffered by victims. The lack of a comprehensive reparations programme further functions to deprive victims of justice. In terms of fostering trust – that which the Special Rapporteur explains as trust ‘between individuals and trust of the individuals in state institutions’ \(^{187}\) – while arguably there is enhanced confidence in various state institutions (particularly the judiciary), this does not seem to have occurred between divided individuals and groups. For example, the Tana Delta clashes in August and September 2012, in which two ethnic communities turned against each other, killing hundreds, suggest a lack of trust, in particular along ethno-regional lines. (Of concern, various politicians have been accused of inciting this violence.) \(^{188}\) These instances of ethnic violence also suggest that very little headway has been made in achieving reconciliation in Kenya. \(^{189}\) Finally, with respect to the goal of strengthening the rule of law, despite some noteworthy reform efforts (namely of the Constitution and the Kenyan judiciary), the continued impunity of the ‘big fish’ suggests that the rule of law remains elusive in Kenya. \(^{190}\)

### 7 Conclusion

This article endeavours to respond to the creation of the mandate on the promotion of truth, justice, reparation and guarantees of non-recurrence, and corresponding first and second annual reports against the mandate. Each is of great significance and contributes to advancing the transitional justice discourse and evolution of the field. Indeed, the critical analysis in this article on the extent of implementation in Kenya of the four elements of the Special Rapporteur’s mandate – truth, justice, reparations and guarantees of non-recurrence – points to substantial shortcomings. It is submitted that the failure to fully and effectively implement each of these elements has meant that goals of recognition, trust, reconciliation and strengthening of the rule of law in Kenya remain unfulfilled. Accordingly, Seils’s diagnosis of the ‘panorama for transitional justice in Kenya’ as ‘uniformly bleak’ seems an accurate assessment. \(^{191}\)

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187 De Greiff (n 7 above) 11.
188 D Miriri & H Malalo ‘Second Kenyan minister charged with inciting violence’ Reuters (online) 27 September 2012.
189 Gondi (n 108 above).
189 As above. See also Brown & Sriram (n 67 above). See also Human Rights Watch (n 9 above).
190 As above. See also Brown & Sriram (n 67 above). See also Human Rights Watch (n 9 above).
191 Seils & Gonzalez (n 139 above).
The authors of this article therefore call on the Special Rapporteur to issue a request to the government of Kenya in order to conduct a country visit, pursuant to the Special Rapporteur’s mandate. Such a focus on Kenya by the Special Rapporteur could have an important impact in ensuring that Kenya avoids further gross human rights violations. Access to quality technical assistance and advice, as well as the further elevation of crucial human rights issues to the international level, may have a powerful impact. In this context, the words and derisive tone of Kenyan poet, Phyllis Muthoni, have great resonance, and point to the urgent need for response (and yet are extremely haunting): 192

A slit throat, a bludgeoned head. Some bodies resembled porcupines ... the smell of roasted flesh burning in church? ... We laugh at Somalia and DRC.

As such, the effective implementation of transitional justice measures, geared towards avoiding a country spiralling into cycles of violence and gross violations of human rights, are pivotal.