# Transitional Justice and Postconflict Reconstruction in Somalia: The Role of the African Union and Pointers Provided by It

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## ABSTRACT

*Postcolonial Somalia is riddled with contradictions. While some of the contradictions relate to the disjuncture between the state and traditional social dispositions, a significant part could be attributed to Somalia's encounters with externalities. The encounters have often produced defining consequences, some of which conjure violence and paradoxes, manifested in various forms with considerable impact on state and society. And so, since its formal state organs "collapsed" in 1991, Somalia has been subject to sequences of episodes with outcomes that have confined it to a state of conflict and conflicting paradigms. It follows, therefore, that an imagination of a future Somalia requires a transcendent approach sufficient to enforce an emancipatory postconflict order. This article argues that for such a vision to be realized, a reconstruction agenda built around an integrated transitional justice framework ought to be set out. But as the article further claims, such a framework must be constituted with caution, especially given that the effects of the Somali condition are so vast that an orthodox transitional justice approach would be inadequate. What ought to be pursued, it is argued, is a*

*transformational framework capable of reaching out and tapping into the strength and heritage of Somali social institutions. In the African Union's evolving transitional justice framework, this article argues, there appears to emerge the formulation of an integrated nonhierarchical model that could offer a valuable template for Somalia.*

## 1. Introduction

For much of its postcoloniality, Somalia has been subject to, and made to suffer from, the excesses of conflict, excuses of politics, and failure of international law. The consequences that have followed Somalia's social and political trauma have reignited debate on the assumed capability of the African postcolonial state and the relevance of trans-state bodies in providing the guideposts to a just postconflict peaceful order. But while aspects of this debate often focus on Somalia's enduring crossroads and by so doing tangentially ascribe undue significance to the capacity of formal institutions, there has been a noticeable paucity of literature on transitional justice, especially in relation to the imagining of a postconflict Somalia. Although Somalia is still in a state of conflict, the end of conflict must not be conditional on the formulation of a reconstruction agenda; it must precede it. Thus a reconstruction agenda incorporating an integrated transitional justice framework ought to be set out with purpose. The importance of doing this is especially poignant in light of the devastating effects of the convergences of conflict, politics, and law. Even if the convergences are neither accidental nor unique, each of their components has fundamentally defined Somalia. Some of the effects are proximate with more visible outcomes, while others assume a host of implications that are as nuanced as they are poignant. Yet whatever the form or characterization, the impact of conflict on Somalia seems almost unprecedented. This is not solely in terms of the nature of the destruction and suffering that conflict has occasioned over many years, but rather in terms of the corresponding residual effect it has had on the outlook of the state and traditional institutions.[1]

The various cycles of conflicts that have erupted since the formation of the Somali Republic in 1960—with the amalgamation of two former colonies, one British, one Italian—have in many ways disrupted, redefined, and imposed habits and habitats on the Somali social order. One of the

visible effects of these disruptions has been the aggravation of tension between formal state institutions and traditional social entities. Such are the ruptures that the spaces of autonomy through which they operated now represent battlegrounds for dominance and reclamation of lost glories. In the years following the disruption of state institutions and symbols of authority, Somali social institutions have reconstituted themselves in different guises to play appropriate roles—both disputed and acclaimed— with force, and in patterns, rare in the narrative of African postcolonial statecraft. The spaces that have been claimed in the absence of functioning state organs are so vast as almost to constitute a kind of parallel state apparatus. The point here is that the particularities of the cycle of conflict in Somalia have gone beyond merely destabilizing spaces of existence; they have also fundamentally redefined and challenged the assumed emancipatory capabilities of the postindependence state. Particularly in the context of Somalia, conflict has been as central to its misfortune as it remains a consequence of it. The opprobrium that constantly emerges from these storied sequences of conflicts also generates an enforced encounter between social entities and what remains of the Somali Republic.

The devastations of conflict and the continuous struggles to "resuscitate" Somali formal institutions seem to expose both the fault lines in postindependence nation building on the one hand and their tendency to generate disorder on the other. Thus far, much of the political imagining in Somalia constitutes a recitation of abandoned promises. In particular, the failure and inability of political entities to envision a semblance of order suggest that the capacity of domestic spaces to self-liberate, let alone enforce a realistic road map for a postconflict afterlife, remains as inadequate as it is symptomatic of institutional paralysis. From the dawn of state formation to its eventual disintegration and beyond, the organization of politics and the multitude of actors that animate it has remained critical to the construction of a particular type of interface, which has largely conditioned a trajectory that for over two decades represented violence and disruption. But of course, Somalia's experiences with the excesses of conflict and excuses of politics cannot be understood outside the parameters in which law—international law—and its failures are constituted. For many centuries, the country and its people had been exposed to the competing interests of imperial forces played out in the shape of, and fronted by, Britain, Italy, France, and to a lesser extent, Egypt and Ethiopia.[2]

An institutional dimension was added to this with the introduction of the United Nations Trusteeship Council, which facilitated the ceding of southern Somalia to Italy in 1948.[3]

These imperial expansions were made possible through the acquiescence and complicity of international law and politics. The interventions in the wake of state disintegration in 1991 legitimated the involvement of United Nations and American troops under Security Council Resolutions 751, 775, and 794.[4] Taken together, these interventions have not done much to forestall a Somali political crisis. Rather, they have complicated many facets of the crisis by disrupting the structures and flow of lineage social governance, while also opening up spaces for predatory networks of extraction and violence. Thus the convergence of war, politics, and law ought to be revisited, as understanding their constituted telos is imperative for the construction of a transformational postconflict transitional justice framework for Somalia. Such a framework, though, must be constituted with caution, not least because the Somali crisis has dragged on for so long and its effects are so vast that an orthodox rendition of transitional justice and reconstruction would appear to be both reckless and inadequate. An effective and durable framework must be sufficiently inclusionary to allow scope for transformation. Crucially, also, such a framework ought to command a sense of ownership capable of forming a shield against the imposition of an external mindset incongruous with local needs and expediencies. The claim in this article is that in the African Union's evolving transitional justice framework, there emerges an integrated nonhierarchical model with the potential to provide a tabula rasa for a transformational transitional justice template for Somalia. The framework is particularly promising considering that part of it reflects and encourages traditional mechanisms and social governance. This argument is developed through the main sections into which this article is organized.

## 2. Transitional Justice: A Conceptual Overview

Despite the fault lines that characterized the Nuremberg Tribunals, their underlying rationale—the idea that societies need to confront past impunities in order to deal with them and move on—has now become one of the most enduring legacies of postwar attempts at international justice

and norms formulation. The need to deal with past wrongs is essential as a means to attaining a semblance of justice and closure. Doing so has become procedurally unavoidable, morally imperative, and, above all, a political absolute. This process and the components that animate it have morphed into what is generally called transitional justice. There are many definitions of transitional justice, with the emphasis on particular aspects of the concept often depending on orientation. The increasing attention accorded to the concept over the years has also helped to expand its meaning and underlying ethos, especially in the aftermath of the Cold War. But the divergence in definition has not undermined the fundamental essence of transitional justice, which remains largely the desire to confront past injustices so as to restore meaning to the future.

The symbolism in seeking redress for past impunities owes a great deal to the impact of Nuremberg. Yet the defining epochs of transitional justice are pretty recent, though the actual practice has much earlier historical origins.[5] The current substance of the concept began to evolve in the 1980s, coming against the backdrop of well-documented abuses in Latin America, especially in countries such as Argentina, Uruguay, and Brazil. Reflecting on the call for redress for the victims, Lawrence Weschler explains that there is a "primordial moment which has desperately to be addressed—and as desperately by the torture society as by the torture victim."[6] In the context of torture cases, Weschler believes there are pertinent questions that need to be asked: who knows what? Who ought to be held to account, and who is to hold the perpetrators to account? The outrage that followed the abuses in Latin America and many other abuses galvanized activists and scholars to rally around a campaigning slogan—*Nunca Mas*, or "Never Again." The campaign culminated in an important conference organized by the Aspen Institute in 1998.[7] As the recognition of the need for redress gained traction, definitions of transitional justice emerged from different normative and institutional orientations. The New York–based International Center for Transitional Justice defines the concept as a response to systemic violation of human rights so that "it seeks recognition for victims and promotion of possibilities for peace, reconciliation, and democracy."[8] Ruti Teitel, whose works have added considerable value to the field speaks of transitional justice as a "concept of justice intervening in a period of political change, characterised by a juridical answer to the wrongs of past repressive regimes."[9] It is this sense of retrospection that characterizes transitional

justice as "a field of activity and inquiry focused on how societies address legacies of past human rights abuses."[10] All these sustained attempts at fleshing out the normative contours of transitional justice arise against the backdrop of the increasing relevance of international criminal justice. This has been made possible by the proliferation of international tribunals in the post–Cold War period. For instance, in 1993, the International Criminal Tribunal for the former Yugoslavia was created to prosecute abusers, while the International Criminal Tribunal for Rwanda was set up a year later to prosecute those responsible for crimes relating to the 1994 genocide in Rwanda. The International Criminal Court, an expressed ideal of Nuremberg, became a reality in 2002.

Global institutions have also followed, with the ideals of transitional justice filtering into most of their instruments. For instance, the increasing consolidation and claims to universality of the UN human rights regime have also galvanized the co-optation of programmatic exercises aimed at giving effect to, and proselytization of, the symbolism, normativity, and moral significance of transitional justice.[11] In the context of the UN system, the adoption of transitional justice as a frame of reference is organically linked to the spirit of its founding instrument, the UN Charter.[12] However, more specific references to transitional justice are abstracted from a 2004 report in which the secretary-general defines the concept as involving

> the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both juridical and non-juridical mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[13]

The departure point for most of these definitions seems to be framed around the conceptualization of transitional justice as a process comprising judicial and nonjudicial mechanisms to deal with the legacies of rights abuses and authoritarian rule. The "sets of interrelated principles and processes" are driven by law and law-making apparatuses.[14] A corollary to this is the understanding that looking back helps people to confront dark chapters of the past with an elevated resolve to enforce some kind of social

repair. The aim of this retrospective inspection is to undertake a "before-and-after narrative of change" so that the "after will lead to something better."[15] The search for betterment is almost certainly incomplete if victims of violence and historical wrongs are unable to seek redress and closure. Denying people this right is taking away the value of memory. Doing this punctures people's identity and representation of the self, for as Michel Foucault points out, "since memory is a very important factor in struggle . . . if one controls people's memory, one controls their dynamism, and one also controls their experience, their knowledge of the previous struggles."[16]

It is also the case that retrospection, especially when institutionally driven, can overwhelmingly rely on a version of transitional justice strongly skewed toward retributive justice. What this means is that the dominant focus of realizing the objective of transitional justice has largely been the prioritization of prosecutions over other potentially viable alternatives. There is relevance in this approach, given that "by their punitive nature, prosecutions can help to restore the primacy of the rule of law and make clear that its breach carries consequences."[17] Yet questions abound on the perceived universal merits of such an adversarial litigious approach. Louis Arbour has, for instance, argued that this approach is "insufficient to deal with the range of grievances and remedial action required in societies emerging from conflict."[18] There is also an increasing recognition that trials formulate an incomplete rendition of the past, offering in the process an incomplete perception of justice.[19]

Yet in spite of the increasing ascription of relevance to the concept of transitional justice in discourse and in peoples' consciences, there is neither a formula nor a uniform approach to the mechanics and attainment of this concept. Some postconflict societies have opted for "forgiving and forgetting," while others have "prosecuted and punished."[20] The variations are due in part to the dilemma that pervades approaches to transitional justice and the continuous struggles to satisfactorily console victims or offer them some kind of closure. It may well be that however tough judicial sentences are, and no matter how sincere apologies may appear, they can only ease and not erase the wrongs or abuses suffered. Sometimes victims of abuses perceive transitional justice as imperative in opening spaces for healing, introspection, and, possibly, forgiveness. However, the inability of transitional justice to fundamentally obliterate or humanize pain gives rise to a set of normative and procedural dilemmas. Hannah Arendt

grappled with this in her extensive work on the Holocaust. And although her focus revolves around the notion of the "banality of evil," she seems to recognize a certain dilemma that produces a condition that makes the human species generally "unable to forgive what we cannot punish . . . and unable to punish what has turned out to be unforgiveable."[21] This dilemma often culminates in treading two occasionally competing parallel paths, which, according to Martha Minnow, amount to "too much memory and too much forgetting."[22]

Over the decades, political transformations in Africa, Eastern Europe, and Latin America have brought about changes in perception that have been, to a considerable degree, accentuated by globalization and other modes of influence. Such transformations partly account for the increasing appropriation and gradual localization of transitional justice approaches. In a sense, this expansionism has helped to move transitional justice "from the exception to the norm to become a paradigm of the rule of law."[23] The prominence of law in shaping both the ethos and the trajectory of transitional justice is perhaps influenced by Lawrence Langer's proposition that "the logic of law will never make sense of the illogic of genocide."[24] The ambition to confront wrongs also suggests that transitional justice has transcended the simplistic determination of whether memory needs to be enlivened and approached with a particular public conscience. Such is the importance attached to transitional justice that it has now risen to levels that often generate complex questions and differing modes of analysis. The scope of the concept has also expanded with new mechanisms for the dispensation of justice being experimented with around the world.

The predominant focus of transitional justice, though, remains imagined in the lenses of formalized processes of adversarial justice and neoliberal institutionalism. In this focus, "justice is addressed in a skewed, partial and piecemeal manner, as much by practitioners as by scholars, and the attempt to marry peace and justice after conflicts remains largely incomplete."[25] Moreover, the adversarial and litigious roots upon which transitional justice has largely grown suggest that legal processes remain dominant factors in memory and the determination of how it is dealt with in negotiating the chronicles of past wrongs. The disproportionate reliance on law illustrates the extent to which the rules of the game can be influenced, which also implies that the process of international justice is not politically neutral.[26] It is imperative that the guiding beliefs on which

transitional justice is framed are not only locally sourced, but also command a certain sense of authority and relevance to local circumstances. This does not mean merely reflecting the local through what Amitav Achaya calls "norms localization," that is, "the active construction of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices."[27] What is needed, however, is the construction of a transformational alternative that is locally rooted and locally driven. This is significant, for as Rama Mani aptly notes, "if ideas and institutions about as fundamental and personal a value as justice are imposed from outside without an internal resonance, they may flounder, notwithstanding their assertion of universality."[28]

One of the factors that led to the alienation of local knowledge in the conception of early transitional justice processes was the prevalence of a type of analysis that prioritized the structural conditions for democracy as opposed to the causal fault lines. According to Dankwart Rustow, such a gap in structural approaches led researchers to "ask the same sort of questions and support their answers with the same sort of evidence."[29] For Rustow, "the question is not how a democratic system comes into existence," but rather "it is how a democracy, assumed to be already in existence, can best preserve or enhance its health and stability."[30] But the increasing relevance of transitional justice and the intersectionality of its core values make possible a certain degree of symmetry with instruments and mechanisms elsewhere. For instance, the evolving African Union framework taps into, and consolidates, aspects of the international norms-formulation agenda. This is evident in the values espoused by its Constitutive Act. Its substantive provisions make room for human-sensitive values rooted in transitional justice and peacebuilding. Equally, the framework also recognizes and encourages the pursuit of other alternatives with local inputs and orientation.

Despite its relatively late surge into popular discourse, transitional justice has now become an important ideal in the reconstruction agenda of conflict and postconflict states. At the heart of the surge is also the increasing yearning for justice and accountability, especially in the aftermath of wrongs and abuses. For some, transitional justice offers the opportunity for redress and possibility of closure, while others perceive its processes as critical to the convergence of peace and justice. Yet there still exist widening gaps in the conceptualization of approaches to transitional justice. The disparity in formulations perhaps illustrates more than ever the need

to transcend and transform both the ontological and the epistemological persuasions of transitional justice. This is even more so because the adversarial leaning of the development of transitional justice processes has thus far offered little scope for the reflection of alternative thinking and approaches. The dominance of the adversarial model has obscured other possible approaches while projecting a false sense of universality. But as Boaventura de Sousa Santos reminds us, universality and dominance are not desirable points of departure. Universality obscures other voices pleading that "there are practical alternatives to the current status quo of which, however, we rarely take notice, simply because such alternatives are not visible or credible to our ways of thinking."[31] It is the claim of this article that such alternatives are not only available, but that their reflection in the determination of transitional justice processes could further enrich broader understanding and accentuate the scoping of knowledge.

### 3. The African Union and Transitional Justice

The African Union was founded against the backdrop of changing dynamics in international society.[32] Particularly for Africa, these transformations have posed many challenges, not least because—at the best of times— African endogenous institutions had always struggled to cope with the disruptions of armed conflicts and their residual aftermath. Thus the new organization was founded in response to these challenges and with hope for a progressive future, an optimism that "was in part predicated on a popular belief that the institutional and normative settings upon which Africa was organised were being disentangled to provide a break from a troubled past."[33] This paradigmatic shift has ushered in a mindset that places urgency and value in the improvement of the human condition. Crucial to the African Union's evolving transitional justice framework is the affirmation of the sanctity of human life and the recognition that past wrongs, whatever their form and whoever the perpetrator, ought to be acknowledged, those responsible for them brought to justice, and, where appropriate, restitution paid to the victims.

It is imperative to note that the African Union's transitional justice framework is yet to be fully constituted. But its attempts to enforce a departure from the dominance of current retributive persuasions provide

valuable pointers in articulating a transformational transitional justice approach. The potential of the evolving framework hinges on the possibility of offering a kind of alternative that can achieve what Alexandra Boraine calls "a deeper, richer and broader vision of justice, which seeks to confront perpetrators, address the needs of victims and assist in the start of a process in reconciliation and transformation."[34] In the context of Somalia, where conflict has occasioned considerable disintegration and dysfunction to its institutions, the potentiality in the African Union's approach could help in formulating a locally driven, locally focused, locally managed, and locally imagined framework capable of repositioning the country on the pathways of justice, reconstruction, and development. To this end, the objective is as much an exercise in internal reinvention as it is a desire for collective reclamation.

The genesis of the African Union position lies in the Consultation Report abstracted from the African Union Commission Consultation with African Union Member States on Transitional Justice.[35] The consultation was aimed at developing "a clear and more coherent understanding of the application of transitional justice in Africa in light of the ongoing processes towards the development of an African policy framework on transitional justice."[36] The Consultation Report captures, in considerable detail, a range of perspectives on transitional justice and their contextual relevance to Africa. From the outset, the report makes attempts to situate and reconcile transitional justice within African policy discourse and needs. It notes that "one of the principle [sic] points of consensus emerging from the consultation was that while transitional justice may not have permeated the AU policy discourse, it is not a new concept and that the issues it aims to address are found in the various mandates of the AU organs and instruments."[37] These include the Constitutive Act, whose foundational ethos of humanity, justice, and peace resonates strongly with the operative premises of transitional justice. The Preamble to the Constitutive Act indicates, for instance, that the pervasive "scourge of conflicts in Africa constitutes a major impediment to socio-economic development." It goes on to underscore the "need to promote peace, security and stability as a prerequisite for . . . development and integration" in Africa.[38]

Similarly, the Protocol Relating to the Establishment of the Peace and Security Council of the African Union underscores the "development of strong democratic institutions and culture, observance of human rights

and rule of law, as well as the implementation of post-conflict recovery programmes and sustainable development policies," which are crucial "for the promotion of collective security, durable peace and stability as well as the prevention of conflicts."[39] Article 3 of the protocol places emphasis on the need to reflect in transitional justice processes a strong presence of "peacebuilding and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence."[40] Among the many strands of this approach are the incorporation of traditional justice mechanisms, the reinforcement of national legal systems, and the promotion of justice and reconciliation, which are considered "indistinguishable from the core objectives that underpin the formation of the AU."[41] The relational interface between the African Union and transitional justice is further underscored by the African Union High-Level Panel on Darfur, which affirms the interdependence between peace, justice, and reconciliation. Crucially, in highlighting the role of the African Union in Darfur, the panel indicates that "it should be the responsibility of the AU to initiate and establish a system for constituting the mixed judicial panels and nominating legal officers for the hybrid court."[42] Despite the normative and procedural fault lines that characterize aspects of these instruments, there seems to exist, within them, the foundational basis for the possibility of a transformational, African-focused transitional justice framework capable of agency.

The report constructs a hierarchical approach that provides the framework upon which both the object and the focus of transitional justice are anchored. It states, for example, that the primary responsibility of dealing with past wrongs and abuses through transitional justice modalities rests primarily with states. In a sense, this ordering of roles is premised on the traditional assumption that states have the capacity, willingness, and interest to oversee transitional justice processes. The Consultation Report also acknowledges the crucial role of the African Union in the adoption and implementation of transitional justice in Africa through normative and institutional frameworks as well as by means of mediation and other methods.[43] The consensus from the consultation seems to be that this role of the African Union must continue and, where possible, be consolidated to generate a meaningful and durable impact. For this to happen, though, there is agreement that the "varied nature and development of transitional justice in Africa should reflect local ownership, context, participation and responsibility." To help facilitate this orientation, the report calls for greater

inclusion in the conceptualization and implementation of transitional justice modalities. In particular, the "involvement of non-state actors such as the broad civil society should be harnessed in order to ensure legitimacy and effective implementation of a comprehensive transitional justice framework."[44]

Inclusion is also driven by the understanding that an African transitional justice framework must command relevance as well as appropriate the capacity to transcend the limitations of current adversarial models. While such a framework should not be merely prescriptive, it nonetheless ought to comprise "a set of guidelines and principles to guide the process and address a range of imperatives and needs such as the achievement of peace, justice and accountability, national unity and cohesion, reconciliation, gender equity, socio-economic rights and development, and victims' right to effective remedies."[45] This desire is further reflected in the report's recognition of the need to incorporate the experiences of violence by minorities and the vulnerable such as women and children as means of strengthening accountability mechanisms. The rationale is that doing this serves the purpose of "mainstreaming gender considerations into all components of an effective transitional justice framework." Mainstreaming also requires "minimum levels of women's representation, as well as the inclusion of women's rights and access to justice in all post-conflict processes."[46] Fundamental to this inclusion is the value in the co-optation of traditional mechanisms of transitional justice whose significance is based as much in the attempt to challenge and offer alternatives to dominant conceptions as it is in the duty to facilitate a deeper sense of local participation and ownership. The report emphasizes, however, that accommodating traditional mechanisms must be underpinned by accountability and established processes. To this end, it presses for a fostered complementarity between the national and the international justice systems "with the view to ultimately strengthening domestic accountability for international crimes and serious violation of human rights."[47]

Prior to the consultation, two policy documents had already foregrounded elements of an African Union approach to transitional justice. The first was the African Union Policy Framework on Post-Conflict Reconstruction and Development (PCRD), and the second was the African Union Human Rights Strategy for Africa (HRSA). The PCRD was meant to offer the "development of comprehensive policies and strategies that elaborate

measures that seek to consolidate peace, promote sustainable development and pave the way for the growth and regeneration in countries and regions emerging from conflicts."[48] Similarly, the HRSA incorporates elements of transitional justice framed around gender justice, the rule of law, human security, and democratic governance.[49] Integrating these policy instruments into the African Union transitional justice framework promises to offer normative and institutional structures by means of which models and pointers could be harnessed for conflict and postconflict states in Africa. While the consultation that forms the basis for the framework was largely meant to reflect a multitude of viewpoints across African Union member states, its other, larger objectives are to optimize participation and accentuate ownership by opening up the possibility for an African-induced alternative to the dominance of current transitional justice approaches. This is particularly important because the priorities and needs of states, especially those that have experienced conflict, are often much more complicated than the formulaic rendition of current transitional justice processes.

The constitutive components of the African Union transitional justice framework are premised on four major themes complemented by sets of principles. The first theme is the co-optation of social, economic, and cultural rights into transitional justice processes as a way of moving beyond the traditional focus on civil and political rights. The Consultation Report reiterates the importance of conceptualizing "violations" in the context of socioeconomic rights, underdevelopment, and colonial legacies. Doing this, though, requires an understanding of the deeper causalities of conflicts and the weak governance systems that underline them.[50] Such an understanding allows scope for a certain orientation of transitional justice that, according to Louis Arbour, reaches "to and beyond the crimes and abuses committed during the conflict, which led to transition, into the human rights violations that pre-existed the conflict and caused or contributed to it."[51] Focusing on these violations also makes it possible to "expose a great number of economic, social and cultural rights violations."[52] Arbour further notes that there are broader reasons for doing this, given that violations of civil and political rights are "intrinsically linked to violations of economic, social and cultural rights, whether they are causes or consequences of the latter."[53]

The second theme propels gender justice onto the front burner of transitional justice. The report reiterates the imperative to "focus on

gender-based crimes and the gendered impact of conflict," noting that "war does not end for women with the cessation of hostilities." The report notes the need to adequately reflect the "impact of conflict on women and their needs for redress, as well as mainstreaming gender considerations into all sections of the framework."[54] The call for gendering transitional justice processes is all the more critical in light of the long tradition of legal cultures of characterizing women's experiences of conflict largely within a sexual context. The invisibility of women's experiences must be addressed to make the third theme of the African Union framework—reparation and development—relevant. In many ways, too, to mainstream gender issues would inevitably require the confrontation of existing power relations that often privilege men. Where the application of the framework involves communities with uneven social structures, a mechanism must be devised to rein in prejudice and discrimination.

Third, the Consultation Report emphasizes the value of reparations and their correlation with development assistance.[55] It underscores the need for a framework that incorporates judicial, social, and economic constitutive elements. This necessarily demands the focusing of attention more intently and intensely on victims and their specific needs in order to rebuild lives. Reparations could help provide some closure through reconciliation. An effective process of reconciliation may also galvanize a credible reconstruction of peace. But reparations can be fraught with difficulties. Postconflict states often lack the resources and constitutional structures to compensate victims. In such situations, informal justice mediated on grounds of fairness through traditional social governance has the potential to bridge a critical gap. In this sense, reparations function as a means of acknowledgment of victims' right to redress, a source of deterrence, and, crucially, a method of institutionalization of truth and memory. The truth remains, though, that however generous reparations are, they "can never restore victims fully to the *status quo ante*, and can be only a part of a package of transitional justice measures that may include institutional reforms, prosecutions, and truth-seeking."[56]

Fourth, the report speaks of calibrating the African framework around accountability as well as making it reflective of traditional transitional justice mechanisms. This recognition takes off from the understanding that there is huge potential and value in traditional mechanisms. The recognition may also be situated in the Constitutive Act of the African

Union, which, in addition to attempting a recuperation exercise for African endogenous institutions, is also strongly rooted in Pan-African values and ambitions. A corollary to this is the belief that African traditional institutions could offer practical solutions to the crisis of modernity and, in the process, trigger a reclamation exercise. In order to make this relevant, the report emphasizes "the need for complementarity between the international tribunals, hybrid courts and domestic legal systems with regards to prosecutions and investigations."[57] Traditional transitional justice processes have been tried in Rwanda with considerable success and may operate elsewhere if appropriate frameworks exist. But they must not be invoked at the expense of accountability and reconciliation, for at the apex of transitional justice is the accounting for wrongs and abuses.

In sum, then, it is plausible to suggest that the evolving African Union framework appropriates a certain ethos that promises to offer a refreshing approach to transitional justice. The relevance of the consultation is further amplified by a report of the Executive Council of the African Union that laments the lack of coherence in transitional justice approaches in Africa, which has given rise to conditions where "responses to post-conflict situations have, in the past, remained fragmented and largely ineffectual."[58] Although still evolving, the African Union framework constitutes patterns of an approach that could potentially transform and transcend. In particular, the attempt to move beyond the limitations embedded in current transitional justice approaches provides scope for the articulation of a possible alternative. The need for an alternative and the quest for making it relevant is an essential part of restoring salience in contemporary transitional justice processes. It is important to assess the scope for possible alternatives in order to determine the formulation of a transitional justice model for Somalia.

## 4. The Somali State and Its Encounters with Violence

A distinctive attribute of post-Westphalia has been the emergence and consolidation of the nation-state as the primary entity for the organization of social life and the conduct of interstate relations.[59] Such is the state's centrality as conduit of legality and legitimacy that international society functions largely within its boundaries.[60] The notion of statehood so

conceived, however, is a novelty in African political history. For Somalia, like states elsewhere in Africa, this novelty imposed a certain artificial fictionality that produced adverse effects on its postcoloniality. The defining epoch for Somalia was perhaps represented by the wave of considerable external disruption to its primordial internal governance in the early nineteenth century and beyond. Like precolonial suzerainties elsewhere, Somalia could not arrest imperial expansionism, which rapidly attracted sufficient interest to trigger an interplay of colonial rivalry.[61] One of the many effects was the introduction of external value systems and particular perceptions of Somali society. For the most part, these externalities played a significant role in the formation and eventual disintegration of the modern Somali state.

The dawn of Somali independence brought challenges of a largely postcolonial nature. From the outset, it became clear that some of the colonial patterns were so entrenched that aspects of Somali social anatomy had been disrupted. This imperial meddling had the capacity to disrupt the social infrastructure that for many centuries had rendered the traditional administration of justice and maintenance of peace both possible and durable. Yet, in contrast to the political realm, in the social realm, the damage to the segmentary lineage that defines Somali social existence remained limited. The new postindependence political dispensation soon began work with initiatives meant to expand spaces of freedom anchored to a loose ordering of neoliberalism. Attempts were subsequently made toward consolidating governance structures, culminating in the organization of generally credible parliamentary and presidential elections.[62]

This was, however, short lived. Political differences and the failing promise of independence gradually led to discontent and the marginalization of some social groups and certain nonconforming constituencies. By the end of the 1960s, Somali postcoloniality had become a simulacrum of postindependence experiences elsewhere in Africa. During this period, ordinary Somalis in whose name the agitation for independence and unification had taken place increasingly became "detached from the state apparatus and its networks of governance."[63]

The weakening of the fledging democratic order disrupted social relations and ultimately led to disgruntlement and state implosion. Once the inability of the state to assert its empirical jurisdiction became evident, parallel entities took to violence and brought disorder. The assassination

of President Sharmake in 1969 was a turning point, as it most certainly reversed the promises of democratic constitutional governance that were made during the early life of the Somali Republic. Exposed in the midst of a succession dispute, the military seized power through a coup d'état on 21 October 1969 and installed Siad Barre as head of state. Barre ruled from 1969 until the collapse of the Somali Republic in 1991. His regime's many sins included the promotion of divisions between clans through politics of divide and rule, exploitation of the Cold War, and provocation of neighboring states leading to war with Ethiopia over the Ogaden territory. All these not only ultimately resulted in the collapse of Somali state institutions in 1991 but also disrupted most of the social institutional arrangements that had held together the homogenous construction of Somali society.

The Somali state's encounters with violence largely took shape in four periods. The first was the 1977–78 Ogaden war with Ethiopia. Though now long past, the Ogaden war remains a reference point for the periodization of Somalia's postindependence crises. The war was driven partly by irredentist agitations against the backdrop of strong nationalism and the desire for the unification of the larger Somali-speaking territories scattered across three main international boundaries—those of Kenya, Ethiopia, and Djibouti. The war impacted heavily on the Somali military forces, while also overstretching the state beyond what it could realistically afford. In addition to the human casualties and destruction caused by the war, Barre's regime emerged from the war weak and susceptible to domestic political agitation.[64]

The second period of violence came in the wake of the uprising and civil war that erupted in Northern Somalia in 1988. The genesis seemed to have been the creation of the Somali National Movement in 1981 by a group aligned to the Isaaq clan. Although the trigger for the conflict was the general lack of access to public goods, the marginalization and persecution of social groups such as the Isaaq by the Barre regime were also compelling factors that accentuated local grievances. The response from the regime was as brutish as it was defining: people were arrested en masse, some were forced into exile, while many more were killed and their property and means of existence destroyed.[65] A bloody civil war ensued, which resulted in the deaths of thousands of people, mostly as a result of atrocities committed by government forces.[66] Indiscriminate bombardment intended to completely subdue people also brought about

widespread destruction of homes and infrastructure.[67] When the Somali state collapsed in 1991, Northern Somalia seceded from the Somali Republic and emerged as the self-declared state of Somaliland with Hargeisa as its seat of political power.

The third period is represented by the disorder of the penultimate days of the Barre regime. With its governance structures weak and dysfunctional, the regime became increasingly susceptible to a melange of groups desirous of change in the political order. In wider society too, disgruntlement had peaked and, for most Somalis at the time, the state had effectively ceased to be a relevant element in their lives. By the beginning of 1990, the regime was merely surviving on the patronage of a very small constituency of family circles and loyalists who held dominant positions in the government. State implosion had been so deep that most institutions had by now atrophied. Groups fighting to dislodge the regime intensified their fight, and with the government's faltering grip, lawlessness gradually took hold. Violence consumed Mogadishu for much of November 1990. Two months later, in January 1991, President Siad Barre fled to Kenya. The state had effectively collapsed. Armed groups occupied the vacuum vacated by the state, prompting the United Nations to intervene in 1992.[68]

The fourth period pertains to the prolonged aftermath of state collapse and the destabilizing international engagement thereafter. The vacuum created by the absence of formal institutions allowed groups to arrogate to themselves space, territory, and influence. This raised tension and polarized already traumatized communities. Subsequently, the sequence of armed conflicts that had precipitated the state's collapse mutated into various cascading displays of multilayered violence. From this also emerged the Union of Islamic Courts, whose organization and fighting spirit allowed them to occupy vast swathes of territory. The group later morphed into Al-Shabaab, which, despite losing its grip on Mogadishu and some satellite towns, still controls—with its affiliate militia groups—a sizable part of southern and central Somalia. Following successive international failures to "bring back Somalia," new initiatives were attempted in 2004 by regional leaders, culminating in the creation of the Federal Transition Government (TFG). In 2006, the African Union invoked Article 4 of its Constitutive Act, a mechanism that grants it the right to intervene in a member state to restore order and prevent violations of humanitarian law, especially war crimes, crimes against humanity, and genocide. Although much progress

has been made, there are still huge challenges, as vast expanses of southern Somalia remain in the control of Al-Shabaab and its affiliate militia groups.

The collapse of state institutions following prolonged encounters with violence has meant that the structures critical for the provision of public goods have atrophied. From the ensuing vacuum, lineage social governance appropriated spaces beyond its natural habitat. I. M. Lewis has, on this note, interpreted the Somali state collapse as representing "a triumph for the segmentary lineage system and the political power of kinship." Lewis goes on to argue that "for better or worse, clanship has certainly prevailed, and the assertions of some Somali and non-Somali ideologues that clanship was an atavistic force doomed to oblivion in the modern world seem rather dated."[69] Even though there may be some value in Lewis's view, it is probably the case that the capacity of the segmentary lineage has invariably been weakened, however minimally, by decades of conflict and disruption. One consequence of this disruption has been the breakdown of law and order, which has also impacted the social structures traditionally necessary for the administration of justice—both formal and traditional. It is imperative, then, that an imagination of a future Somalia must necessarily demand a transcendent approach, one that is sufficient to enforce an emancipatory postconflict order. In what follows, an attempt is made to set out the pillars of a transitional justice framework for Somalia.

## 5. Transitional Justice in Somalia—Framework of a Realistic Approach

The purpose of transitional justice is to rectify wrongs, facilitate healing, and provide the parameters from which a postconflict future can be negotiated. But as noted above, the orthodox rendition of transitional justice seems too presumptuous to offer an inclusionary framework sensitive to, and capable of, addressing the particularities of the African postcolonial condition. In the context of Somalia, these particularities are especially poignant given the circumstances of its postindependence crises. Thus for Somalia to transcend its current impasse, there is a need for the formulation of a transformational transitional justice framework. And although Somalia is embroiled in conflict, the implementation of transitional justice should not be conditional on the end of war. In fact, enforcement of justice would

enhance the promotion and attainment of durable peace and reconciliation. Taking its cue from the African Union's evolving transitional justice framework and Somalia's segmentary lineage, a transitional justice model for Somalia is here proposed. The framework is underpinned by a mixture of restorative and retributive justice mechanisms. The rationale for this approach is to capture the interface between peace and justice—critical for the possibility of a credible transitional justice process.

Somali social governance structures represented by the lineage system have historically incorporated notions of justice, maintenance of peace, and dispute settlement. The sense of authority and acceptance the Somali lineage system commands offers a platform upon which communities could negotiate individual and collective security. Notwithstanding the rudimentary organization of the Somali social lineage, its founding values and nature of operation provide important lessons for the initiation of any transitional justice framework for Somalia. It is worth noting, however, that the perceived relevance and influence of the Somali social lineage system has attracted different viewpoints representing two main schools of thought—the traditionalist and the transformationist. The traditionalist school employs historical ethnography as a framework for the analysis of Somali society. Aligned with this paradigm is the role of the lineage structure in the organization of social life and the allocation of power, patronage, and influence. Said Samatar—one of the exponents of the traditionalist school—argues that lineage kinship has deeper effects than ordinarily perceived, given that it "produces a society of extreme individualism, in which each man is his own sultan with no one endowed, legally or morally, to exercise centralised national authority."[70] For Lewis, a veteram of Somali studies, "clanship is and was a multipurpose, culturally constructed resource of compelling power because of its ostensibly inherent character."[71]

The role of kinship as theorized by traditionalists lies in sharp contrast to the phenomenological proposition of transformationist Somali scholarship.[72] Transformationist scholars seek to deconstruct what they call the "ghettoization of Somali studies."[73] On this backdrop, Ahmed I. Samatar, one of the proponents of Somali transformationist scholarship, has for instance bemoaned the narrow canonization of clan lineage in an attack on the traditionalists.[74] He laments that the literature is increasingly held hostage by the idea that pastoral structure and clan lineage continue to

define Somali social existence and the depth of its cultural predispositions.[75] Identifying Lewis as a notable voice representing this strand of scholarship, Ahmed I. Samatar argues that this particular characterization has been repeated so vigorously that it has almost become axiomatic.[76] Even where there have been attempts to move away from this posture, Ahmed Samatar suggests, they are often not radical enough and it appears as if the influence of lineage on Somali society as claimed by traditionalists "has an aboriginal claim on the very ontology of Somalis that, in the end, little else matters."[77]

Despite Ahmed Samatar's claim, lineage has remained a defining frame of the Somali sociological order. David Laitin and Said Samatar have even gone so far as to suggest that it is hard to think of a significant development in postcolonial Somali political history that has not been influenced in some degree by clan considerations.[78] The general perception seems to be that the sociological construction of kinship has significantly impacted Somali society. The capacity and historical outreach of this construction also suggest that transitional justice values are not alien to Somalia. Ever since the collapse of the state organs, Somali social institutions have served as repositories of security requirements for communities constructed around the *xeer* system. Thus the transitional justice model proposed here taps into the capacity of Somali lineage governance.

### Utility of Somali Social Governance Structures

One of the main themes of the African Union Consultation Report is the strong case it makes for the co-optation of traditional mechanisms into transitional justice processes. The idea of tapping into local capacities to promote and consolidate peace as well as foster justice has become an increasingly fashionable one.[79] The African Union instruments frame this approach as an important step toward galvanizing local ownership. Following a workshop organized by the African Commission on Human and Peoples' Rights on the right to fair trial in Africa held in Dakar in September 1999, a declaration was signed recognizing "that traditional courts are capable of playing a role in the achievement of peaceful societies and [that they] exercise authority over a significant proportion of the population of African countries."[80] Although achieving peace and justice remains a challenge in many parts of Africa, for Somalia at least, there has been a long history of traditional social infrastructure with peacebuilding and

justice enforcement capabilities. The existence of this structure provides a basis for its co-optation into a transitional justice proposition for Somalia. Fundamental to this social structure is the *xeer* system. The *xeer* essentially functions as a dispute settlement outlet and draws its legality from customary law as well as a medley of principles from Islamic jurisprudence.

But the legitimacy of the *xeer* system is generally dependent on, and draws continuity from, the quasi-judicial functions of clan elders and community networks. The *xeer* constitutes sets of rules, arrangements, and unwritten agreements often concluded following interclan mediation. The obligation to enforce agreements constructs the frame of understanding among the respective clans bound by it. It is the case that such arrangements not only tend to work on the basis of a certain operative degree of trust but also thrive on the mandatory existence of a counterbalancing eligibility criterion. This is central to the possibility of impartiality as it excludes relatives of disputants from taking part in the *xeer* adjudication process. Others normally excluded include people with known personal grievances against individual disputants and also women, who have continued to be barred from the process.

The *xeer*'s ease of access and resonance has helped to embed its premises and promises into Somali society, often functioning in parallel with formal state organs. The *xeer* remains popular and its dispute settlement components are integral to Somali society. This has filtered into postindependence Somalia, where the resolution of conflict through lineage governance has emerged as an important part of the juridical culture. The various facets of lineage governance perform certain security functions that combine individual autonomy with community empowerment. It is to the credit of the vibrancy of Somali society that lineage social governance has survived for several centuries. And despite the turbulence that has come Somalia's way, lineage "has retained its primacy and continues to offer, for good or bad, an alternative to the absence of state institutions."[81] Amina Mahamoud Warshim has captured both the importance and the entrenchment of Somali lineage governance. She notes that

> a large part of conflicts never passed the local police station and were never referred to courts. When cases ended up in the courts, it was common for these cases to be "taken out" of the court by elders of the two conflicting parties and solved according to tradition. In fact, in

some instances, like family cases, Somalis prefer to settle them through traditional methods. It can cause embarrassment to the "elders" and the other family members when such cases are taken to law courts.[82]

Indeed, much has been written, and much has been agreed about, the potentiality and capability of traditional social governance. In most parts of Africa, traditional social entities "keep the heart of society in harmony" by holding "secrets of peacemaking locked in their ways, formed from centuries of custom before the disruption of colonization."[83] Such entities have often, however, been excluded where they are most needed and recommended where they are most unwelcome. This selective, yet often misguided, exclusion has meant that while traditional mechanisms have played a major role at critical junctures in Somalia's crisis, they have "been most notable for [their] exclusion from internationally sponsored peace conferences."[84] The reason for this may well be the belief of those involved in international mechanisms, traditional institutions "possessed little intrinsic value on their own."[85]

There are of course, several comparative merits of the *xeer* system over other possible transitional justice approaches. The first relates to longevity. Somali lineage governance has had a long history of existence, most of which has tested and consolidated the processes that constitute its anatomy. A practical benefit of this presence has been a sense of familiarity with a strong institutional memory. In addition, this longevity has reinforced the legitimacy and acceptance of Somali lineage governance. Although adherence to lineage governance may well be driven by the ascription of authority, a major compelling factor pertains to the ease with which decisions arising from *xeer* adjudication are enforced. The influence of lineage governance in community life persuades many to accept the authority of the *xeer* system. This reinforces the influence of customary law in Somali social life. Also, the existence of the social infrastructure upon which lineage governance operates implies that the implementation of *xeer* transitional justice will require minimal resource mobilization. Prolonged conflicts often result in disruption of institutions and attrition among judicial and security personnel. And however elaborate reconstruction agendas are perceived, disjuncture in the capacity of institutions may hinder their functionality.

For Somalia, where institutions have long been undermined by

protracted conflict, lineage social governance offers a practical alternative. The logistic inputs required for the system to operate are both accessible and locally manageable. This proximate interface with communities allows the *xeer* system to claim a duality of functions, which, though appearing to privilege restorative justice by seeking to restore social order, nonetheless performs critical roles in peacebuilding. For many Somalis, lineage social governance remains the most accessible outlet from which to seek sanctuary, pursue redress, and demand restitution. This is very attractive considering that the *xeer* is sufficiently localized, with the capacity and legitimacy to offer a credible alternative to current state-centric models. There are, however, procedural and normative fault lines in Somali lineage governance. These ought to be considered, so as prevent reinforcement of the very injustices and inheritance of disempowerment that transitional justice seeks to address. After all, transitional justice can have meaning only if states "pursue both justice and truth, no matter how imperfect, in order to sustain their democratic order and achieve reconciliation among different segments of the society."[86] The African Union framework provides pointers toward overcoming some of the fault lines of transitional justice and, crucially, opens up a window of opportunity through which traditional mechanisms such as Somali lineage governance could be harnessed.

## 6. Conclusion

Transitional justice has become both fashionable and desired. Its capacities for healing and reconciliation continue to provide attractive prescriptions for societies entrapped in conflicts and those transitioning to democracy. The basic tenets of transitional justice and their increasing imposition of a duty on states to confront legacies of past wrongs through memory optimize interest and offer templates for peace and the search for truth. The mainstay of these templates remains predominantly imagined and pursued in the form of prosecutions that may in some ways offer remedies to victims of abuses. The adversarial approach is, however, often inadequate in an African context, especially in cases of serious human rights abuses. This not only suggests the existence of normative and procedural fault lines in current transitional justice approaches but also suggests that there ought to emerge alternatives with a degree of locality in their conception,

management, and direction. In the context of Somalia, where conflict, law, and politics have converged to condition a destabilizing order, transitional justice offers an opportunity to transcend and transform impunity and modes of violence.

This article has set out to argue that despite the dominance of the adversarial dimension of transitional justice, lineage social governance through the *xeer* system appears more suited to Somalia. The *xeer*'s long history and attributes of acceptance and legitimacy make it amenable to Somali society. Crucially, Somali lineage governance accommodates strong peacebuilding capabilities that are critical for the emergence of a transformational transitional justice model for Somalia. Of course, like many traditional systems, the *xeer* suffers from some internal disjuncture that may reinforce patriarchy and other forms of disempowerment. But as argued above, the African Union's evolving framework on transitional justice provides some pointers that could help address some of the fault lines of Somali lineage social governance. The African Union's Constitutive Act also mandates it to emphasize peace, security, and justice. It would be churlish, however, to force a choice between the capacity of the *xeer* and the promises of the African Union framework, or to overemphasize their potential for success. Both offer hope for alternative transitional justice approaches, but as Lydiah Bosire warns, transitional justice approaches "in Africa continue to be laden with high expectations, notwithstanding the mitigating realties of institutional deficiencies, poor leadership, poverty, and the chasm between the government and the people."[87]

Thus for the evolving African Union framework to gain any purchase, it must, as proposed by the African Union Panel of the Wise, "respond judiciously and expeditiously to the difficult dilemma of balancing the immediate need to secure peace with the longer term importance of establishing the rule of law and preventing future conflicts."[88] As suggested above, the internalization of transitional justice processes in Somalia must not be dependent on the end of conflict. Peace ought to be both a means and an outcome. In the *xeer*, there is the social infrastructure to help in both the attainment of peace and the enforcement of transitional justice. The utility of the *xeer* system lies, perhaps, in its ability to serve both as a mechanism for peacebuilding and as a locally manageable framework through which justice could be enforced. This enforcement involves, in part, the payment of compensation, a feature that strongly resonates

with the restitution dimensions of the evolving African Union framework. Social history illustrates that the *xeer* constitutes an important aspect of Somali society, and its entrenchment in the conscience and environment of communities and cultures lends credence to its functional durability. At least for now, the African Union framework provides a principled basis for the legitimation of traditional social governance as a possible alternative to the dominance of adversarial transitional justice.

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6. Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers* (Chicago: Chicago University Press, 1998), 242.

7. See the Aspen Institute, ed., *State Crimes: Punishment or Pardon* (New York: Aspen Institute, 1989); Neil J. Kritz, *Transitional Justice,* vol. 1, *General Considerations* (Washington, DC: United States Institute of Peace, 1995).

8. International Center for Transitional Justice, "What Is Transitional Justice," available at *www.ictj.org/eng/tj* (accessed 7 July 2014).

9. Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69.

10. See Dinah Shelton, ed., *Encyclopaedia of Genocide and Crimes against Humanity*, 3 vols. (Detroit: Macmillan, 2005).

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12. The UN Charter articulates the ambitions of the postwar legal order, which include "saving succeeding generations from the scourge of war."

13. United Nations Secretary-General, "The Rule of Law and Transitional Justice in Post-Conflict Societies" (2004), UN Doc. S/2004/616, 4.

14. Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 12.

15. Kimberley Theidon, "Editorial Note," *International Journal of Transitional Justice* 3, no. 3 (2009): 1.

16. Michel Foucault, *Foucault Live* (*Interviews 1966–84*)*,* ed. S. Lotringer (New York: Semiotext, 1989), 92.

17. Lydiah K. Bosire, "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa," *SUR International Journal on Human Rights* 5 (2006): 72.

18. Louis Arbour, "Economic and Social Justice for Societies in Transition," paper presented at the New York University School of Law, 25 October 2006, available at *www.chrgj.org/docs/Arbour_25_October_2006.pdf* (accessed 7 July 2014)

19. Bosire, "Overpromised, Underdelivered," 73.

20. Lavinia Stan, *Transitional Justice in Postcommunist Romania: The Politics of Memory* (New York: Cambridge University Press, 2013), 1.

21. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1989), 241.

22. Martha Minnow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1999), 4.

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24. Lawrence Langer, *Admitting the Holocaust* (New York: Oxford University Press, 1995), 171.

25. N. Heyzer, "Women, War and Peace: Mobilizing for Security and Justice in the 21st Century," UNIFEM, the Dag Hammarskjold Lecture, 22 September 2004, 4.

26. See Barbara Oomen, "Donor Driven Justice and Its Discontents: The Case of Rwanda," *Development and Change* 36 (2005): 887–910.

27. See Amitav Acharya, "How Ideas Spread: Whose Norms Matter? Norms Localisation and Institutional Change in Asian Regionalism," *International Organisation* 58 (2004): 245.

28. Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Oxford: Polity Press, 2002), 49.

29. Dankwart A. Rustow, "Transitions to Democracy: Toward a Dynamic Model," in *Transitions to Democracy*, ed. Lisa Anderson (New York: Columbia University Press, 1999), 14.

30. Rustow, "Transitions," 14.

31. Boaventura de Sousa Santos, "Epistemologies of the South: Reinventing Social Imagination," unpublished paper presented at the Staff-Student Seminar, School of Law, University of Warwick, UK, 12 April 2010.

32. See Declaration of the Assembly of Heads of State and Government of the Organisation of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, 11 July 1990, Twenty-Sixth Session of the AHSG.

33. Abou Jeng, *Peacebuilding in the African Union: Law, Philosophy and Practice* (Cambridge: Cambridge University Press, 2012), 136.

34. Alexandra Boraine, "Transitional Justice: A Holistic Interpretation," *Journal of International Affairs* 60 (2006): 18.

35. The consultation was held in Cape Town, South Africa, 12–13 September 2011. The consultation and the report were aimed at outlining the fundamental ethos that should underpin an African transitional justice policy framework. Involving largely member states, independent experts, representatives of international organizations, and civil society groups, the consultation adopted a participatory format that was sufficiently intensive to make a credible engagement possible.

36. African Union Commission Consultation with African Union Member States on Transitional Justice: Consultation Report, Cape Town, South Africa, 12–13 September 2011, 4.

37. African Union Commission Consultation Report, 4.

38. "Constitutive Act of the African Union," paragraph 8. To realize this, the preamble speaks of a determination to "take all necessary measures to strengthen . . . common institutions and provide them with the necessary powers and resources to discharge their respective mandates effectively."

39. "Protocol Relating to the Establishment of the Peace and Security Council of the African Union."

40. Other relevant instruments include the African Charter on Human and Peoples' Rights, as well as the African Charter on Elections, Democracy, and Good Governance. Specific mention of the AU's role in enhancing transitional justice processes in Africa was reflected in the 2009 Recommendations of the African Union High-Level Panel on Darfur (AUPD). The panel emphasized that the "objectives of peace, justice, and reconciliation are interconnected," but that to achieve them requires "a comprehensive, integrated, systematic and innovative approach." Report of the African Union High-Level Panel on Darfur, 2009, 79.

41. Report of the African Union High-Level Panel on Darfur, 83.

42. Report of the African Union High-Level Panel on Darfur, 79.

43. African Union Commission Consultation Report, 4.

44. African Union Commission Consultation Report, 5.

45. African Union Commission Consultation Report, 5.

46. African Union Commission Consultation Report, 5.

47. African Union Commission Consultation Report, 5.

48. Focusing on human rights, justice, and reconciliation, the African Union Policy Framework on Post-Conflict Reconstruction and Development (PCRD) was conceived to transcend "limited interventions," especially given that "post-conflict reconstruction and development activities do not stop with stabilisation but seek to achieve long-term sustainable development as underpinned by the African vision of regeneration and growth." See Executive Council, Ninth Ordinary Session, 25–29 June 2006, Report on the Elaboration of Framework Document on Post-Conflict Reconstruction and Development (PCRD), EX.CL/274 (IX).

49. As the African Union Consultation Report notes, the African transitional justice framework would complement both the PCRD and the African Union Human Rights Strategy for Africa (HRSA by) enhancing values and approaches as well as addressing human rights, justice, and reconciliation. See African Union Commission Consultation Report, 21.

50. African Union Commission Consultation Report, 21–22.

51. Arbour, "Economic and Social Justice."

52. Arbour, "Economic and Social Justice."

53. Arbour, "Economic and Social Justice."

54. African Union Commission Consultation Report, 24.

55. African Union Commission Consultation Report, 26.

56. Bosire, "Overpromised, Underdelivered," 81.

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71. Lewis, *Blood and Bone*, 233.

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