

# The tensions between power sharing, justice and human rights in Africa's 'post-violence' societies: Rwanda, Kenya and the Democratic Republic of the Congo

*Sadiki Koko\**

Researcher, Institute for Dispute Resolution in Africa (IDRA), College of Law, University of South Africa

## Summary

*In recent years, power sharing has been used in Africa as a strategy to ensure national unity and social cohesion in a context of extreme ethnic polarisation (Rwanda), as a peace-making tool designed to end a stale-mated civil war (Democratic Republic of the Congo), and a mechanism to overcome a situation of inter-community violence and socio-political instability created by the mishandling of an electoral process (Kenya). This article argues that power sharing as a result of a stale-mated civil war and a mishandled electoral process tends to undermine the pursuit of justice and the protection and promotion of human rights; and power sharing in the context of a civil war that ended in a military victory is usually unbalanced and promotes victors' justice.*

## 1 Introduction

A characteristic of the wars that have plagued Africa since the end of the Cold War is the internal nature of these wars. Yet, this trend is not new in so far as Africa is concerned. In fact, interstate wars in post-colonial Africa have been rare, the three exceptions being the wars between Somalia and Ethiopia (1977-1978), between Uganda and

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\* BA (Hons) (Kinshasa), MCOM (Conflict Resolution and Peace Studies) (KwaZulu-Natal); sadikkf@unisa.ac.za. This article is a revised version of a paper presented at the International Expert Seminar on Law, Power Sharing and Human Rights held at the University of Antwerp, Belgium, 10-11 May 2012.

Tanzania (1978-1979), and the Ethiopian-Eritrean war (1998-2002).<sup>1</sup> The post-1990 context is dramatically different from that of the previous period as the end of the Cold War has diminished the incentives of the major powers to prevent or, at best, contain armed conflicts in the developing world, including in Africa. As a consequence, the number of civil wars in Africa quickly soared and, with it, attempts to resolve them. According to Annan:<sup>2</sup>

In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons.

As elsewhere in the world,<sup>3</sup>

[t]he pattern of war terminations in sub-Saharan Africa has changed substantially over the past two decades ... The number of state-based conflicts terminating in victories has decreased sharply, while the number ending in negotiated settlements has risen.

Negotiated settlements to end civil wars usually involve power sharing, which has since emerged as the preferred mechanism to end civil war in Africa. However, as has become so evident, the use of power sharing has not been limited to civil war situations. In both Kenya and Zimbabwe, power sharing has been used as a tool to break the deadlock created by contested electoral processes. Still, in the case of post-1986 Uganda and post-1994 Rwanda, power sharing was used by the victorious National Resistance Movement (NRM) and Rwandan Patriotic Front (RPF) as a strategy aimed at preserving a degree of national unity and fostering some kind of social cohesion in the context of state collapse as a result of either prolonged periods of instability (Uganda) or widespread identity-related killings (Rwanda).

This article seeks to investigate the tensions between power sharing, on the one hand, and justice and human rights, on the other, in African societies emerging from protracted violence, specifically Rwanda, the Democratic Republic of the Congo (DRC) and Kenya. The central argument is that, although power sharing as a peace-making tool or a mechanism to foster national unity and social cohesion is likely to contain violence, it raises tensions in so far as the pursuit of justice and the protection and promotion of human rights are concerned. Furthermore, while power sharing as a result of a stalemated civil war and a mishandled electoral process tends to undermine significantly the pursuit of justice and the protection and promotion of human rights, power sharing in the context of a civil

1 O Furley & R May 'Introduction' in O Furley & R May (eds) *Ending Africa's wars: Progressing to peace* (2006) 3.

2 K Annan 'The causes of conflict and the promotion of durable peace and sustainable development in Africa. A report of the United Nations Secretary-General' (1998) <http://www.un.org> (accessed 13 February 2012).

3 A Mack & T Cooper 'A new peace in Africa?' (2008) 4 *Conflict Trends* 9.

war ended in a military victory is usually unbalanced and promotes victors' justice.

Before turning to the specific country discussions, it is necessary to clarify the concept of power sharing and its links to justice and human rights.

## 2 Power sharing: Clarifying the concept

Power sharing and the different mechanisms designed for its operationalisation, namely, 'government of national unity', 'inclusive government', 'coalition government', 'grand coalition', and so forth, have varied meanings. 'Two, actually separate, strands of research use the term "power sharing", often without recognising the differences in terms of democracy and conflict management.'<sup>4</sup>

The first strand, labelled the 'consociational democracy' school, is concerned with practical strategies of distributing power among socio-political stakeholders in divided societies as a means of guaranteeing adequate group representation and fostering democratic participation. It can be traced back to Lijphart's 1968 article on 'typologies of democratic systems'.<sup>5</sup> Lijphart was concerned with addressing the exclusion of minorities brought about by a rigorous application of liberal democracy principles and rules in ethnically- and/or religiously-divided societies. He thus proposed the concept of a consociational democracy, a group-based form of democracy, with its four main components, namely,<sup>6</sup>

a grand coalition of the political leaders of all significant segments of the plural society ... the mutual veto or 'concurrent majority' rule, which serves as an additional protection of vital minority interests ... proportionality as the principal standard of political representation, civil service appointments, and allocation of public funds, and ... a high degree of autonomy of each segment to run its own internal affairs.

According to Jarstad,<sup>7</sup>

[w]here people vote along ethnic lines, political parties representing ethnic minorities have no chance of ever forming a majority, and shifting majorities in parliament are therefore unlikely.

Under such conditions, majority rule is not only undemocratic, but also dangerous; it spells majority dictatorship and civil strife rather than democracy.<sup>8</sup>

4 AK Jarstad 'Power sharing: Former enemies in joint government' in AK Jarstad & TD Sisk (eds) *From war to democracy: Dilemmas of peace building* (2008) 108.

5 A Lijphart 'Typologies of democratic systems' (1968) 1 *Comparative Political Studies* 3.

6 A Lijphart *Democracy in plural societies: A comparative exploration* (1977) 25.

7 Jarstad (n 4 above) 110.

8 A Lijphart *Patterns of democracy: Government forms and performance in thirty-six countries* (1999) 32-33.

As can be deduced from the arguments above, Lijphart's concept of power sharing applies to already-liberal democratic societies. At most, it could be extended to others that voluntarily and peacefully embarked on the process of crafting governance institutions consistent with the core values, principles and practice of liberal democracy. 'Although Lijphart takes power sharing and consociationalism as synonymous',<sup>9</sup> his concept of consociationalism does not necessarily cater for inclusive governance mechanisms emerging as a result of internal wars ending in stalemates, especially if such inclusive governance mechanisms were not based on social identity specificities.

The second strand of research relating to power sharing is rooted in the field of conflict management. 'In this discourse the main function of power sharing is to end violence.'<sup>10</sup> This practice of power sharing emerges in the context of civil (armed) conflict characterised by the inability of either party to defeat the other militarily. In such contexts, parties generally refer to a neutral and impartial third party to facilitate dialogue and possibly help them reach a middle ground as they commit to resolving their dispute through non-violent means. The rationale behind this practice of power sharing is the understanding that, '[b]y dividing power among rival groups during the transition, power sharing reduces the danger that one party will become dominant and threaten the security of others'.<sup>11</sup> This is relevant as 'exclusion, rather than greed alone, is the key factor behind most African conflicts'.<sup>12</sup> In this context, it becomes easy to understand why, with its emphasis on the inclusion of non-state stakeholders (rebel groups, political parties, civil society) in transitional mechanisms, power sharing is commended as 'a recipe for peaceful cohabitation'.<sup>13</sup>

This article focuses on the conflict management dimension of power sharing. It examines the practice of power sharing as a result of armed conflict or a contested electoral process. In contrast to the consociational approach that is both preventive and built on a long-term perspective, the conflict management dimension of power sharing is reactive and temporary. It seeks to address the problem of power illegitimacy through accommodative transitional mechanisms entrusted with conducting popular consultations and elections for institutional renewal in 'post-war' or 'post-violence' societies. Provisions of power sharing in this approach are generally derived from peace (or political) agreements signed by parties and, depending on a specific conflict situation, '[guarantee] the

9 R Lemarchand 'Consociationalism and power sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo' (2006) 422 *African Affairs* 106.

10 Jarstad (n 4 above) 108.

11 K Papagianni 'Power sharing, transitional governments and the role of mediation' (2008) *CHD Background Papers* 42.

12 Lemarchand (n 9 above) 2.

13 As above.

participation of representatives of significant groups in political decision making, and especially in the executive, but also in the legislature, judiciary, police and army'.<sup>14</sup> They have 'a demonstrated ability to provide a sense of security to former combatants facing the immediate prospect of working together peacefully after a severe conflict such as a civil war'.<sup>15</sup>

However, it has been argued that the '[i]nclusion of warring parties in a power-sharing arrangement does not always end violence'.<sup>16</sup> Furthermore, by excluding the general public from matters affecting national life directly, power sharing is not only elitist but also tends to undermine democratic processes. In countries such as Liberia and the DRC, where the distribution of power encompassed the economic sector (public corporations), power sharing turned out to be an impediment to the countries' economic recovery. Still, by providing rebels with a share of state power, the practice of power sharing<sup>17</sup>

creates an incentive structure would-be leaders can seize upon by embarking on the insurgent path as well. As a result, and irrespective of their effectiveness in any given case, power-sharing agreements contribute to the reproduction of insurgent violence.

In the cases of Liberia and Sierra Leone, former Liberian transitional President Amos Sawyer argues that power-sharing governments established to end civil war in these two countries were 'substantially, if not totally, controlled by armed groups whose leaders could hardly find in such arrangements sufficient incentive to blunt their greed and ambition'.<sup>18</sup> This means that by bringing together diverse groups with diverging interests, power-sharing arrangements succeed with regard to inclusiveness without necessarily guaranteeing the effectiveness of these hybrid mechanisms.

Lastly, perhaps the most important discussion regarding power sharing as a peace-making tool relates to its relationship with justice and human rights, on the one hand, and peace and reconciliation, on the other. The protection and promotion of human rights are regarded as building blocks in the emergence of a justice-based society. Justice can be defined as a set of ideas, values and practices seeking to ensure that all individuals forming part of a society are treated in an equal, fair, deserving and righteous manner. Justice, according to Kofi Annan, is 'an ideal of accountability and fairness in

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14 Papagianni (n 11 above) 42.

15 Hoddie & Hartzell cited by A Mehler 'Peace and power sharing in Africa: A not so obvious relationship' (2009) 432 *African Affairs* 108 454.

16 Jarstad (n 4 above) 117.

17 Mehler (n 15 above) 455.

18 A Sawyer cited by Mehler (n 15 above) 463.

the protection and vindication of rights and the prevention and punishment of wrongs'.<sup>19</sup>

Although the ideals of human rights and the promotion of justice seem to be shared by all human beings in different societies, practice does not always match theoretical pronouncements. In the case of societies emerging from civil war, the pursuit of justice and the protection and promotion of human rights raise the philosophical question of the feasibility of peace and reconciliation and the avoidance of relapse into violence. In its negative and positive conceptualisations, peace is regarded not only as the absence of direct violence, but also a societal condition that emphasises the resolution of inter-personal and inter-community conflicts through peaceful means. For its part, reconciliation is a complex process that aims at bringing former conflicting parties together in a mutual recognition of their misdeeds, their readiness to forgive one another and their commitment to transform their relationships. It entails 'finding a way to live alongside former enemies'.<sup>20</sup>

So, the main question in societies emerging from protracted civil conflicts revolves around the extent to which justice and human rights can be pursued and protected without jeopardising the peace and reconciliation processes. As Järvinen puts it, '[o]ne of the greatest challenges to any post-conflict society is how to deal with past crimes ... and other human rights abuses'.<sup>21</sup>

In much of the literature relating to the question of justice in post-conflict societies, emphasis has been put on transitional justice as the most suitable perspective of justice that ought to be pursued. Transitional justice can be defined as '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'.<sup>22</sup> Its mechanisms are both judicial (trials) and non-judicial (truth and reconciliation commissions, amnesties, parliamentary or other inquiries, lustrations, reparations). Due to this combination of judicial and non-judicial mechanisms of pursuing justice, transitional justice is viewed as less antithetical to peace and reconciliation in post-conflict societies than a justice perspective exclusively focused on retributive mechanisms. Yet, it ought to be admitted that the balance between judicial and non-judicial mechanisms of post-conflict transitional justice is deemed to vary from one society to another, taking into consideration – among other things – the specific nature of a conflict and the mode of its termination. The next three sections analyse the

19 K Annan *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* (2004) 4.

20 D Bloomfield 'Reconciliation: An introduction' in D Bloomfield *et al* (eds) *Reconciliation after violent conflict: A handbook* (2003) 12.

21 T Järvinen 'Human rights and post-conflict transitional justice in East Timor' (2004) *UPI Working Papers* 47 36.

22 Annan (n 19 above) 4.

dynamic relationship between power sharing, justice and human rights in Rwanda, the DRC and Kenya.

### 3 Power sharing after a civil war: The case of Rwanda

#### 3.1 Background to the conflict

The power-sharing dispensation implemented in Rwanda between 1994 and 2003 emerged in the aftermath of the country's 1994 genocide during the civil war that started in October 1990. According to Lemarchand,<sup>23</sup>

[a]lthough there is general agreement among Rwanda specialists that the roots of conflict lie in the transformation of ethnic identities that has accompanied the advent of colonial rule, the chain of events leading to the killings begins with the Hutu revolution of 1959-62 ...

Enduring consequences of the revolution were the abolition of the Rwandan Tutsi-based kingship and the establishment of a Hutu-controlled republic in 1962 at independence, followed by the exile of thousands of Tutsi Rwandans to neighbouring countries, including Uganda, the DRC and Tanzania and beyond.

After a three-decade long exile, emigrated Tutsi formed the backbone of the RPF that would launch an armed insurrection from Uganda against the predominantly Hutu government of President Juvénal Habyarimana. The justification for the war thus stemmed from the prolonged confiscation of political power and the attending socio-economic privileges by successive Hutu regimes coupled with the marginalisation of the Tutsi minority.

A lack of meaningful preparation, inadequate manpower and military assistance from Mobutu's Zaire (DRC) to the Habyarimana regime, among other things, ensured that the RPF's early offensive in 1990 was a failure. However, three years later, emboldened military power on the part of the RPF, coupled with persistent tensions within the Habyarimana regime, led to a military stalemate, providing the ground for the Arusha peace talks in Tanzania. While the parties prepared for the negotiation process through the Arusha talks, in March 1992 an interim coalition government was put in place to manage the country until the completion of the negotiations. It encompassed representatives of Habyarimana's party, *Mouvement National Révolutionnaire pour le Développement et la Démocratie* (MNRDD), as well as opposition parties, including the *Mouvement Démocratique Républicain* (MDR), the *Parti Social-Démocrate* (PSD) and the *Parti Libéral* (PL). In spite of the signing of the Arusha Peace Accord in 1993 and clear indications of the unravelling of the transitional government starting a month earlier with the dismissal of interim Prime Minister Dismas Nsengiyaremye, the implementation of

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23 R Lemarchand *The dynamics of violence in central Africa* (2009) 81.

the agreement failed to materialise, mainly due to stalling tactics by parties on both sides as well as the difficulty of 'wringing resources out of a reluctant international community already fatigued by three years of post-Cold War nation-building experiments'.<sup>24</sup> According to Mamdani,<sup>25</sup>

[t]he Arusha Agreement was signed stillborn, mainly because it failed to take account of the extremist CDR [*Coalition pour la Défense de la République*], either by including it or by containing it. Instead, the peace agreement wholly excluded the CDR, even from the transitional government. Strong in both the government and the army, the extremists faced a double loss: of the government to the opposition and of the army to the RPF.

The stage was thus set for the very unravelling of the Arusha Agreement itself. Only a trigger was needed for the cataclysm to befall the country. This came in the form of the assassination of President Juvénal Habyarimana on 6 April 1994.

### 3.2 The power-sharing mechanism

The power-sharing mechanism established in Rwanda in the aftermath of the country's genocide was peculiar in that it emerged in spite of one of the conflicting parties, namely the RPF, winning the war and assuming power militarily. The official explanation as put forward by the new RPF's rulers was that the spirit of the Arusha Peace Accord signed on 4 August 1993 by all Rwandan parties to the peace talks ought to be preserved. In fact, the RPF's emphasis on inclusiveness was so appealing that it earned the party praises, even from academic quarters, as illustrated by the long quote below:<sup>26</sup>

The government that was inaugurated on July 19, 1994, was a genuine government of national unity. It was fully in the spirit of the Arusha Peace Agreements of August 1993 which the *génocidaire* regime had sought to destroy. The new president, Pasteur Bizimungu, was an RPF Hutu who had been a government civil servant in the 1980s. Of the twenty-one ministries, the lion's share (eight) had gone to the RPF; the rest were evenly distributed, with four ministries going to the ... MDR ... three to the ... PSD, three to the Liberals, two to independent personalities, and one to the small Christian Democratic Party. In ethnic terms fifteen of the new ministers were Hutu and only six were Tutsi. After such a catastrophe the new cabinet looked like a small miracle of reason in a sea of madness.

However, in spite of the official proclamations and the external appearances, the newly-designed power-sharing mechanism was an expected far cry from the original compromise contained in the Arusha Accord that provided for a more balanced distribution of

24 G Khadiagala 'UN peacekeeping in the Great Lakes region: The DRC, Rwanda and Burundi' in A Adebajo (ed) *From global apartheid to global village: Africa and the United Nations* (2009) 312.

25 M Mamdani *When victims become killers: Colonialism, nativism, and the genocide in Rwanda* (2001) 211.

26 G Prunier *Africa's world war: Congo, the Rwandan genocide, and the making of a continental catastrophe* (2009) 7.

power among all actors in both the civilian sphere and the security sector. Furthermore, more than the quote above reveals, in reality the new balance of power had significantly tilted in favour of the victorious RPF, following a declaration made on 17 July 1994 by the latter that<sup>27</sup>

profoundly modified the nature of the political regime agreed in Arusha: It introduced a strong executive presidency, engineered the dominance of the RPF in the government and redrew the composition of the parliament. The new fundamental law was in effect a piece of subtle constitutional engineering, which attempted to hide the monolithic nature of political power.

The RPF's prominence within the new Rwandan inclusive transitional framework was not limited to legal aspects; it was equally consistent with the manner in which power was exercised. The latter was characterised by a 'closely controlled political environment'<sup>28</sup> in which the RPF reigned supreme and the very narrow power base which was made up of 'the army and the security services, the party officials ... and a fraction of the urban population ... in particular from Uganda, which returned to the country in the wake of RPF's victory'.<sup>29</sup>

The gap between the RPF's professed adherence to the spirit and letter of the Arusha Accord and the reality of their exercise of power in the context of a morally-shattered society contributed to the erosion of the Rwandan post-genocide power-sharing project. According to Prunier, the 'collapse of the national unity government'<sup>30</sup> came in late August 1995 with the sacking of Prime Minister Faustin Twagiramungu alongside four ministers, namely, Seth Sendashonga (Interior), Immaculée Kayumba (Transport and Communications), Alphonse-Marie Nkubito (Justice) and Jean-Baptiste Nkuriyongoma (Information). Of course, as Prunier later notes, in spite of this radical shift, the government of national unity continued to exist for eight more years until the April 2003 presidential elections, albeit 'with diminishing credibility'.<sup>31</sup>

But the credibility of a regime is not solely derived from its legislative intents and style of exercising power. It also owes to the perception it instils among its citizens as well as its bilateral and multilateral partners. In this context, the commitment on the part of the RPF-controlled transitional government of Rwanda (1994-2003) to bringing a sense of normalcy and statehood to the country in the aftermath of a blatant failure on the part of the United Nations (UN), helped legitimise the transitional process in the eyes of the international community. Internally, memories of the horror brought

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27 F Reyntjens *The great African war: Congo and regional geopolitics, 1996-2006* (2009) 24.

28 As above.

29 As above.

30 Prunier (n 26 above) 42.

31 Prunier 46.

about by the genocide and the feeling of guilt they instilled among the country's Hutu population in the context of an increasingly police state were key in not only quelling any militant fervour among Hutu politicians, but also in aligning the civil society movement and the general public to the imperatives of the new power wielders. This new reality had significant implications on all aspects of the evolution of post-genocide Rwanda, including in the areas of justice and human rights.

### 3.3 Implications for justice and human rights

The Rwandan crisis posed a daunting challenge to any idea of pursuing justice as well as protecting and promoting human rights in its aftermath. As a collective action, the genocide defied the very essence of the feasibility of 'modern' justice while raising the question of the possibility of a human rights-based regime amid inter-community polarisation. This was mainly due to the very scale of the violence. Firstly, the violence killed around one million people, the majority of whom were targeted simply because of their 'ethnic' identity. Secondly, although it was instigated by the elite and coordinated by middle-level party and government officials, the genocide was actually executed by ordinary community members.<sup>32</sup>

Four processes are worth analysing in so far as the pursuit of justice and reconciliation as well as the protection and promotion of human rights in post-genocide Rwanda are concerned, namely, the International Criminal Tribunal for Rwanda (ICTR); the national judicial process; the *Gacaca* courts; as well as the National Unity and Reconciliation Commission (NURC). From the onset it ought to be noted that the design of these processes was largely influenced by the mode of conflict termination in the country. As Brown argues:<sup>33</sup>

Given the RPF's victory on the battlefield and its virtual monopoly of political power, unchallenged in any significant way by local civil society and legitimated and reinforced by international donors, Rwanda's efforts in the area of justice and the rule of law closely reflect the ruling party's interests.

The ICTR was established by the UN Security Council through Resolution 955, adopted on 8 November 1994. Its purpose was to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other

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32 Strauss estimates the total number of perpetrators of genocide in Rwanda to be 'between 175 000 and 210 000'. He defines a perpetrator as 'someone who participated in an attack that killed another person, even if the individual did not himself kill'. See S Strauss 'Rwanda's security trap and participation in the 1994 genocide' in JP Chrétien & R Banégas (eds) *The recurring Great Lakes crisis: Identity, violence and power* (2008) 174.

33 S Brown 'The rule of law and the hidden politics of transitional justice in Rwanda' in CL Sriram *et al* (eds) *Peacebuilding and the rule of law in Africa: Just peace?* (2011) 179.

such violations committed in the territory of neighbouring states, between 1 January and 31 December 1994.<sup>34</sup>

Overall, the ICTR has been reasonably effective in holding key perpetrators accountable for their crimes. Its retributive functions can be said to have thus contributed to the rule of law, albeit on a very limited scale, since it is only mandated to try a relatively small set of perpetrators of the worst atrocities under the international law. [I]t also discredited Hutu ... extremists and obstructed their efforts to reorganize abroad, as well as dissuaded Tutsi reprisals. The tribunal ... could potentially also have a deterrent effect, albeit a modest one, against future crimes on a massive scale.<sup>35</sup>

However, despite its achievements, the ICTR has received several criticisms. 'Located in Arusha, Tanzania, the tribunal has been both physically and psychologically distant from the people of Rwanda.'<sup>36</sup> Equally, the speed of trials has been alarmingly low.<sup>37</sup> In fact, between January 1997 and May 2012, the ICTR has only completed 62 trials, with 54 convictions and eight acquittals.<sup>38</sup> In the meantime, the cost of operations has nonetheless been very high. In its first decade (January 1997 to April 2007), the ICTR spent about US\$1 billion in 33 prosecutions, an average of about \$30 million per completed case.<sup>39</sup> Rapprochement between the tribunal and the Rwandan government have been fraught with tension, especially with regard to witnesses' protection. The ICTR views this protection as the responsibility of Rwandan authorities while the latter have repeatedly complained of not being kept informed of witnesses' movements between Rwanda and Arusha. Furthermore, '[t]he impact of the ICTR on reconciliation (an explicit objective of the tribunal) and broader peace building has been minimal'.<sup>40</sup> This perception is fuelled by the fact that not only all those prosecuted thus far before the tribunal have been Hutu, but also the Rwandan government has clearly opposed any attempt by the tribunal to investigate RPF's soldiers for their role in the conflict. Further criticisms have included 'a lack of qualified and competent personnel from the very beginning [and] allegations of mismanagement of funds and inefficiency'.<sup>41</sup> Lastly, some have gone as far as questioning the very relevance of the ICTR. According to Rwandan President Paul Kagame, the ICTR was 'established by the UN against the wishes of the Rwandan

34 Brown (n 33 above) 183.

35 Brown (n 33 above) 183-184.

36 Brown (n 33 above) 183.

37 SF Musungu & L Louw 'The pursuit of justice in post-genocide Rwanda: An evaluation of the international and domestic legal responses' (2001) 2 *East African Journal of Peace and Human Rights* 203.

38 British Broadcasting Corporation 'Rwanda "Gacaca" genocide courts finish work' <http://www.bbc.co.uk/news/world-africa-18490348> (accessed 18 June 2012).

39 Brown (n 33 above) 183.

40 Brown (n 33 above) 184.

41 NA Jones *The courts of genocide: Politics and the rule of law in Rwanda and Arusha* (2010) 184.

government'.<sup>42</sup> In this context, the international community's rush in establishing the ICTR is viewed as a face-saving scheme for its blatant failure to prevent or stop the genocide. According to Uvin and Mironko, the ICTR plays 'above all a symbolic role, a concrete demonstration of the international community's moral concern'.<sup>43</sup>

At the national level, the Organic Law on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity, enacted on 1 September 1996, provides for Rwandan national courts to prosecute individuals accused of crimes of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994. But the problem with the national justice system was that it faced serious infrastructure and logistical problems due to mismanagement under the previous regimes as well as a major personnel shortage as a direct consequence of the genocide. The majority of its personnel were either killed or had chosen exile because of their involvement in the genocide and/or fear of reprisals.<sup>44</sup> Yet, the system was able to process as many as 10 000 cases between 1997 and 2004.<sup>45</sup>

However, just like the international mechanism, the national justice system has also had its critics. It lacked capacity, especially in its early stages, while the quality of justice it serves has been described as 'poor due to inadequate defence representation, lack of resources, and especially political interference'.<sup>46</sup> A report released by Human Rights Watch in July 2008 found that the Rwandan judiciary was 'largely subordinate to the executive branch and even to elite unofficial actors who enjoy both economic and partisan political power'.<sup>47</sup> Furthermore, in spite of continuous efforts, the national judicial system remained, over a decade after the genocide, compounded by the large number of suspects awaiting trial and overcrowding in prisons this leads to. As of 2006, Brown writes:<sup>48</sup>

A dozen years after the genocide, about 80,000 Rwandans were incarcerated without having been convicted of any crime, still awaiting a verdict or in most cases for their cases to be heard – a clear violation of their right to a speedy trial. Conditions in highly overcrowded Rwandan prisons constitute in themselves a human rights violation.

If anything, the virtual impossibility on the part of government to process all genocide suspects through the national judicial system led to the establishment of *Gacaca* courts in 2001 'to achieve truth,

42 P Kagame 'Preface' in P Clark & ZD Kaufman (eds) *After genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond* (2008) xxv.

43 Cited by Brown (n 33 above) 184.

44 Musungu & Louw (n 37 above) 205.

45 Brown (n 33 above) 185.

46 L Wardof cited by Brown (n 33 above) 184.

47 Cited by Brown (n 33 above) 184.

48 Brown (n 33 above) 185.

justice and reconciliation among Rwandans'.<sup>49</sup> After a trial period between 2002 and 2004, the *Gacaca* courts were in 2005 launched countrywide. According to Rwandan President Paul Kagame, *Gacaca* jurisdictions constitute a<sup>50</sup>

revived and reformed traditional conflict resolution system that involves the population intimately in the prosecution of genocide suspects. All Rwandans own *Gacaca*, a system which allows those accused of lesser crimes to face their accusers, and permits in turn their communities to participate in deciding whether to acquit or punish those charged with genocide crimes.

However, although<sup>51</sup>

often portrayed as 'traditional' community-based justice, contemporary *gacaca* mechanisms differ fundamentally from the traditional form, which did not, for instance, habitually deal with serious cases such as murder, and emphasised collective restitution over punishment.

According to Waldorf, although<sup>52</sup>

few of the 'customary' features remain ... [the *Gacaca* system constitutes] an official state institution intimately linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than 'customary' law.

Hence the *Gacaca* courts are administered through the national Ministry of Justice.

There can be no doubt as to the contribution of *Gacaca* courts in clearing the backlog of genocide cases, delivering both retributive and restorative justice, facilitating processes of truth telling and truth hearing as well as initiating processes of healing, forgiveness and reconciliation and thus providing for positive peace in Rwanda.<sup>53</sup> Yet,<sup>54</sup>

the lack of representation for the accused violates international standards and the provisions of the Charter of the African Union and the Rwanda Constitution, which [are] antithetical to the concept of the rule of law.

Lastly, the transitional government of Rwanda established the National Unity and Reconciliation Commission (NURC) in March 1999 in an effort to rebuild a sense of national cohesion among all Rwandans. The NURC was conceived to prepare and co-ordinate national programmes for the promotion of national unity and reconciliation, educate the population on issues relating to national unity and reconciliation, conduct research and disseminate publications relating to peace, national unity and reconciliation as well

49 British Broadcasting Corporation (n 38 above).

50 Kagame (n 42 above) xxv.

51 Brown (n 33 above) 185.

52 Cited by Brown (n 33 above) 185.

53 P Clark *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (2010) 342.

54 Brown (n 33 above) 186.

as serve as a vanguard in denouncing and fighting acts, writings and utterances intended to promote discrimination, intolerance and xenophobia.<sup>55</sup> The NURC's activities have encompassed the organisation of meetings, workshops, conferences and national summits targeting different segments of the population and whose major themes specifically address civic education, conflict resolution and support to community initiatives aiming to achieve unity and reconciliation.<sup>56</sup>

## 4 Power sharing to end a civil war: The case of the Democratic Republic of the Congo

### 4.1 Background to the conflict

The DRC conflict that led to the 2003-2006 power-sharing dispensation being analysed hereunder started on 2 August 1998. It followed on a decision by Laurent-Désiré Kabila to send back to their country Rwandan troops that had assisted him in toppling the Mobutu regime a year earlier. In response to Kabila's decision, the Rwandan government took upon itself to topple its former ally and install a new and friendly leader in its giant neighbour. As was the case in 1996, it subsequently helped set up a Congolese rebellion, the *Rassemblement Congolais pour la Démocratie* (RCD), to make the whole initiative look 'authentically Congolese',<sup>57</sup> before being joined by Uganda and Burundi.

However, the *blitzkrieg* Rwanda and the RCD had initially hoped for never materialised, mainly thanks to Kabila's ability to secure military assistance from Zimbabwe, Namibia and Angola, setting the stage for the five-year second Congo war. The war brought into Congolese territory seven national armies supporting either government (Angola, Chad, Namibia and Zimbabwe) or the rebellion (Burundi, Rwanda and Uganda). While Rwanda fully supported and controlled the mainstream RCD headquartered in the far-eastern city of Goma, Uganda sought to cast its own zone of influence by helping establish the *Mouvement de Libération du Congo* (MLC) before endorsing RCD's splintering groups, namely, the RCD-Kisangani/*Mouvement de Libération* (RCD-K/ML) and the RCD-National (RCD-N).

Still, the second war was also a confluence of foreign non-state armed groups pursuing a regime-change agenda against their respective countries. They included the *União para Independência Total de Angola* (UNITA); the *Alliance pour la Libération du Rwanda* (ALiR, later known as the *Forces Démocratiques pour la Libération du Rwanda*

55 See the NURC's official website on <http://www.nurc.gov.rw/index.php?id=10> (accessed 21 October 2012).

56 National Unity and Reconciliation Commission *Annual report of activities by the National Unity and Reconciliation Commission: February 1999-June 2000* (2000) 2.

57 Prunier (n 26 above) 396.

or FDLR); the *Conseil National pour la Défense de la Démocratie/Forces de Défense de la Démocratie* (CNDD-FDD/Burundi); and so on. Ultimately the war failed to produce a clear winner on the battlefield, setting the stage for the ceasefire and negotiation processes that would pave the way to the 2003–2006 power-sharing transitional mechanism analysed below.

#### 4.2 The power-sharing dispensation

The 2003-2006 power-sharing dispensation in the DRC was derived from the Global and Inclusive Agreement on Transition in the Democratic Republic of Congo, signed on 17 December 2002 through the Inter-Congolese Dialogue (ICD) process. The ICD was held in South Africa between February-April and September-December 2002. It was aimed at providing an opportunity for Congolese socio-political stakeholders to resolve the intractable crisis triggered by the second Congo war. The all-inclusive transitional mechanism it produced was inaugurated on 30 June 2003 when incumbent Joseph Kabila was sworn in as the transitional head of state. It was based upon a very sophisticated power-sharing equation that took into account not only the warring parties (the former government, RCD-Goma, RCD-K/ML, RCD-N, MLC and *Mai-Mai*), but also representatives of civil society and political parties. It provided for a president seconded by four vice-presidents. National government positions were proportionally shared among the parties. The same principle applied to the two houses of the transitional parliament, namely, the National Assembly and the Senate. Provision was made equally for power sharing at the provincial level, in the diplomatic corps as well as in state-owned enterprises. Power sharing was even extended to 'democracy supporting institutions', namely, the Independent Electoral Commission, the National Media Authority, the Truth and Reconciliation Commission, the National Human Rights Commission and the Commission on Ethics and Fight against Corruption. The security sector (national army and national police) was exclusively earmarked for warring parties. The transition was designed to last between two and three years, culminating in the organisation of free and fair elections throughout the country.

Despite some failures, the core provisions of the transitional mechanism as expressed in the Global and Inclusive Agreement were implemented. On account of this mechanism, the DRC was able not only to regain its territorial integrity after five years of a *de facto* balkanisation, but also, and more importantly, to hold the first free and fair elections in 41 years. Yet, these encouraging end results should not obstruct the disappointing shortcomings that represented the permanent features of the transitional dispensation. First, the transitional dispensation was fraught with exorbitant operational costs due to the large number of personnel it brought about at all levels. The national executive was made up of 60 ministers and deputy ministers, beside the president and his four deputies. The National

Assembly had 500 members and the Senate had 120, all unelected. Second, the transitional dispensation was in every regard ineffective and lacked internal cohesion. Throughout the transition, all inclusive institutions remained fractious. Ultimately, the transitional dispensation only held because of the persistence and commitment of the UN peace-keeping mission (MONUC)<sup>58</sup> deployed in the country, as well as other key international stakeholders. As Reyntjens rightly observed, '[w]hile MONUC has been rightly criticised for its lack of robustness, its sheer presence ... has been crucial in preserving the transition'.<sup>59</sup> However, he remarked that '[t]he externally-induced nature of the transition [was] also its weakness'. In fact, he argues:<sup>60</sup>

During the second war, regional powers, South Africa in particular, imposed a settlement and, together with international players, put the DRC under a *de facto* trusteeship and imposed elections on a reluctant domestic political class.

### 4.3 Implications for justice and human rights

With a death toll of between 3,5 and 5 million people, the second Congo war has been rightly dubbed the bloodiest armed conflict in the world since World War II.<sup>61</sup> The conflict equally displaced millions more, both within and beyond Congo's national borders. Narratives of the war are replete with accounts of alleged mass atrocities, war crimes, crimes against humanity and other large-scale human rights violations by warring parties on both sides of the conflict spectrum. In this context, it was expected that the end of the civil war would provide an opportunity for perpetrators of the most grievous human rights violations to be prosecuted and some form of justice to be dispensed to their victims.

However, from the onset the transitional mechanism deployed in the DRC following on the provisions of the Global and Inclusive Agreement did not emphasise the pursuit of justice and the promotion of human rights. The fact that the war ended through a negotiated settlement with representatives of all warring parties assuming strategic positions in all spheres of power brought about the paradigmatic dichotomy of peace versus justice. If anything, it was unrealistic to expect a commitment to justice from the very people who stood to be prosecuted in the first place. Instead, consistent with the Global and Inclusive Agreement, President Kabila enacted Decree-Law 03-001 of 15 April 2003, granting amnesty for all minor infringements to rules of war as well as political and opinion crimes

58 *Mission de l'Organisation des Nations Unies en République Démocratique du Congo* or United Nations Mission in the Democratic Republic of Congo.

59 Reyntjens (n 27 above) 263.

60 Reyntjens 7.

61 E Rogier 'Democratic Republic of Congo: Problems of the peacekeeping process' in O Furley & R May (eds) *Ending Africa's wars: Progressing to peace* (2006) 99.

committed between 2 August 1998 and 4 April 2003.<sup>62</sup> Although the amnesty law clearly avoided covering war crimes, genocide and crimes against humanity, there was no guarantee that the country's dilapidated justice infrastructure combined with the lack of commitment to justice on the part of all transitional actors would help in making any significant difference.

Cognisant of the difficulty of pursuing retributive justice within the context of power sharing, parties to the Global and Inclusive Agreement called for a South African-style Truth and Reconciliation Commission (TRC). According to Law 04/018 of 30 July 2004 establishing the TRC, the latter was conceived as a dialogue framework, as opposed to a judicial process, designed to unite the Congolese people. The proposed TRC process emphasised disclosure, forgiveness and reparation. Like other transitional institutions, the TRC's composition was designed to be inclusive of all parties to the Global and Inclusive Agreement.<sup>63</sup> In spite of the enactment of Law 04/018 followed by the actual appointment of all 21 members of the Commission, the latter was never operational due to a lack of funds and, more importantly, the lack of commitment from all actors. The same fate befell the National Human Rights Commission, established by Law 04/019 of 30 July 2004.<sup>64</sup> Its main objective consisted of protecting and promoting human rights. Both commissions failed to live up to their noble missions. As transitional institutions, they were formally phased out on 6 December 2006 when Joseph Kabila was sworn in as the first president of the Third Republic in the DRC.

Besides its unwillingness to pursue effective justice, whether retributive or restorative, the transitional dispensation in the DRC was unable to protect and promote people's human rights. The signing of the Global and Inclusive Agreement as well as the subsequent deployment of a power-sharing mechanism did not necessarily translate into absolute stabilisation of the DRC. Continued low-intensity violence, especially in the eastern parts of the country – combined with the disappointing incoherence and ineffectiveness characteristic of all transitional institutions including in the security sector – meant that, for many Congolese, the signing of the Global and Inclusive Agreement did not bring much significant improvement in so far as their human rights were concerned. Even more disturbing was the fact that transitional leaders were not only unwilling to

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62 See 'Présidence de la République, Décret-Loi no 03-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d'opinion' *Journal Officiel* Numéro Spécial 17 April 2003.

63 See 'Présidence de la République, Loi no 04/018 du 30 juillet 2004 portant organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation' *Journal Officiel* Numéro Spécial 1 August 2004.

64 See 'Présidence de la République, Loi no 04/019 du 30 juillet 2004 portant organisation, attributions et fonctionnement de l'Observatoire National des droits de l'Homme' *Journal Officiel* Numéro Spécial 1 August 2004.

commit to protecting and promoting human rights, but were also responsible for violating them.

The ineffectiveness displayed by the transitional government in pursuing justice and protecting and promoting human rights paved the way to the International Criminal Court (ICC) to intervene in pursuit of Congolese war crimes suspects. With government co-operation, the ICC was able to arrest Thomas Lubanga and Mathieu Ngudjolo Chui in connection with the 2002-2003 inter-community violence in the Ituri district in North Eastern DRC. However, it ought to be mentioned that the inter-community violence in Ituri did not form part of the conflict network dealt with by the Global and Inclusive Agreement. Furthermore, government has refused to execute an ICC arrest warrant against Bosco Ntaganda, former commander of the *Congrès National pour la Défense du Peuple* (CNDP), arguing that this would jeopardise the peace process agreed upon in 2009 between government and the CNDP. However, three years after the signing of the Goma Peace Agreement between government and the CNDP, insecurity still persists in eastern DRC, as symbolised by the emergence of the Movement of 23 March (M23) in April 2012. The M23 is a new rebel group made up of former CNDP combatants and civilian officials. It officially claims to have been established as a result of the Congolese government's stalling on the effective implementation of the 2009 Goma Agreement. However, as subsequent developments have demonstrated, this official line of explanation masks the real motives behind the establishment of this rebel movement which ought, instead, to be found in President Kabila's 'attempt ... to rotate ex-CNDP soldiers out of the Kivus in a bid to [both] smash the ex-CNDP parallel chains of command' within the North Kivu military region and 'to break up the "mafia" controlling the east of the country'.<sup>65</sup>

## 5 Power sharing after a contested electoral process: The case of Kenya

### 5.1 Background to the post-electoral violence

It would be mistaken to envisage the 2007-2008 violence that engulfed Kenya following the controversial December 2007 elections as a mere case of post-electoral violence, especially if one takes into consideration the variations in patterns of violence observed in different locations of the country. Although it is true that the violence was triggered by the disputed result of the presidential election, it ought to be acknowledged that the violence was equally an expression of the major contradictions besetting Kenyan society and

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<sup>65</sup> P Jones 'Rwanda's connection to the M23 rebels must not be ignored' <http://www.opendemocracy.net/opensecurity/> (accessed 31 May 2013).

which have their root causes in the country's colonial legacy compounded by its peculiar post-colonial political experiences.

Kenya was a British protectorate and later became a colony between 1895 and 1963. The main pattern of British colonisation in Kenya was its policy of establishing white settler communities around the Rift Valley region, the homeland of, amongst others, the Kalenjin. The formation of settler communities thus formed part of the colonial urbanisation and socio-economic development drive. Hence, it targeted the country's most fertile lands and most development-prone region. The formation of settler communities was directly linked to large population movements, both as a deliberate colonial policy for the provision of cheap labour and as an ongoing private initiative as people sought to take advantage of opportunities brought about by urbanisation and the development of white settlements. The white settlement policy and its attending large-scale population movements contributed to disrupting patterns of land ownership in a society where land right was primarily a collective or communal right. This development triggered a two-pronged response on the part of those who lost their ancestral land. On the one hand, it fed anti-colonial sentiment, a precursor to nationalist awakening for the end of colonisation. On the other hand, it fed inter-ethnic resentment between 'migrant' ethnic groups (Kikuyu) and Rift Valley's 'native' communities (Kalenjin).

In this context, independence was regarded as an ideal moment to redress colonisation-orchestrated injustices, especially with regard to the land question. However, '[l]and policy in "independent" Kenya has faithfully perpetuated the colonial land tenure system'.<sup>66</sup> As far as the Rift Valley region is concerned, this has through the years translated into feelings of land dispossession among local groups (including the Kalenjin) in the hands of the 'economically and politically dominant Kikuyus, who redistributed government-held land to their own advantage after independence'.<sup>67</sup> But since land right was collective in its essence, protests for land restitution were deemed to be collective. In the process, they fuel inter-community tensions between 'original owners' and 'actual occupants'. Nevertheless, both the Kenyatta regime (1963-1978) and the Moi regime (1978-1992) prior to the introduction of multiparty politics were able to contain inter-community tensions borne out of colonial and post-colonial uneven development policies and access to land.

However, the introduction of multiparty politics in 1992 removed the lid that had helped contain inter-community conflicts thus far. This became even more problematic when it clearly appeared that 'government was [directly] involved in provoking ... ethnic violence for political purposes and [had] taken no adequate steps to prevent it

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66 Anonymous *Independent Kenya* (1982) 106.

67 K Moghalu 'Electoral conflicts in Africa: Is power-sharing the new democracy?' (2008) 4 *Conflict Trends* 33.

from spiralling out of control'.<sup>68</sup> According to Abdullahi, both the 1992 and 1997 elections were preceded by large-scale violence as a deliberate strategy of the Kenyan government under the ruling Kenya African National Union (KANU) to displace populations belonging to the Luo, Kikuyu and Kamba communities – considered hostile to the ruling party – and thus render them incapable of exercising their voting rights. The 2002 elections were less violent; yet they claimed between 116 and 209 lives.<sup>69</sup>

The December 2007 elections in Kenya thus took place against the backdrop of a legacy of election-related inter-community violence fuelled by the state. More importantly, they took place within a context of entrenched impunity in so far as election-related violence was concerned. In fact,<sup>70</sup>

[t]he Akiwumi Judicial Commission of Inquiry into Ethnic Violence, set up in 1998, had identified key politicians, civil servants and business people who may have been involved in the violence in certain parts of the country between 1991 and 1997. [Yet,] [n]o action was taken on the recommendations of the report.

Although the pre-election period was filled with tensions fed by ethnocentric propaganda by some media houses<sup>71</sup> and by inflammatory remarks by certain politicians, the bulk of the violence was only unleashed after the Chairperson of the Electoral Commission of Kenya (ECK) announced that incumbent President Mwai Kibaki had won the presidential elections. Overall, violence took at least three patterns. First, there were clashes between state security forces and supporters of the Orange Democratic Movement (ODM) whose leader and presidential candidate, Raila Odinga, claimed to have won the elections. Second, there were direct violent confrontations between supporters of the ODM and Kibaki's party, the Party for National Unity (PNU). Third, there were widespread ethnic-based reprisals targeting ordinary people – mainly but not exclusively in informal settlements and impoverished locations. According to Njogu,<sup>72</sup>

[t]he narratives show ... that whereas some of the post-election violence was spontaneous, much of it was organised and planned by political leaders and systematically targeted members of specific communities.

68 K Njogu (ed) *Healing the wound: Personal narratives about the 2007 post-election violence in Kenya* (2009) 7.

69 AM Abdullahi 'State creation of internally displaced persons in Kenya, 1991-98: The process and political dimensions' (2004) 1 *East African Journal of Peace and Human Rights* 10 1.

70 Njogu (n 68 above) 2-3.

71 A survey conducted in 2009 found that 'certain sections of Kenyan media were unethical and unprofessional before, during and after the elections and they may have contributed to ethnic polarization and accentuated violence'; Njogu (n 68 above) 9.

72 Njogu (n 68 above) 2.

This latter trend was the most vicious of all as it could hardly be contained, let alone prevented successfully by security forces. It was responsible for the large majority of deaths and displacements. It flowed from long-held inter-community resentments having their origins in colonial era policies but fuelled by ethnocentric policies implemented by post-colonial administrations.

In nearly two months, the violence had caused about 1 220 deaths as well as the displacement of over 300 000 people within the country and of scores of others to neighbouring countries.<sup>73</sup> Eventually the crisis was resolved through the signing of the National Dialogue and Reconciliation Accord by Mwai Kibaki and Raila Odinga on 28 February 2008 under the auspices of the African Union (AU). The Accord provided for an equitable sharing of government positions between the PNU and the ODM for the entire office term or until such time when the next general elections are held in the country.

## 5.2 Power-sharing dispensation

As argued above, the power-sharing mechanism for Kenya was provided for in the National Dialogue and Reconciliation Accord signed on 28 February 2008. It focused exclusively on the national government. This was mainly because neither the PNU nor the ODM disputed the results of the parliamentary elections as announced by the ECK. In fact, according to the ECK, the ODM had won 99 out of 210 parliamentary seats against 43 seats for the PNU. Yet, in spite of the ODM's overwhelming parliamentary victory, its presidential candidate, Raila Odinga had, according to the ECK, lost the presidential vote with 43 per cent to Kibaki's 47 per cent. If anything, the vast discrepancy between the parliamentary and presidential results – with both elections held the same day – contributed to strengthening the ODM's case that the presidential elections were indeed rigged, a view supported by several international election observers.

The National Dialogue and Reconciliation Accord was thus based on a power-sharing principle. It called upon the PNU and the ODM to form a government of national unity, the composition of which should reflect the parliamentary strength of the coalition members. The Accord also created the post of Prime Minister to be awarded to the leader of the largest party of the governing coalition as represented in the National Assembly. Concomitantly, there would be two Deputy Prime Ministers, one from each of the coalition partners.<sup>74</sup>

Furthermore, the contestants signed several side agreements to establish separate commissions: a Constitutional Review Commission [CRC]; a Commission of Inquiry on Post-Election Violence (CIPEV) ... a Truth, Justice

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73 G Maina 'Mediating to governments of national unity – A conflict transformation approach' (2011) 3 *ACCORD Policy and Practice Brief* 2; Njogu (n 68 above) 2.

74 Mehler (n 15 above) 469.

and Reconciliation Commission (TJRC); and an Independent Review Commission (IREC) to examine long-standing sources of grievance.

On 18 March 2008, the newly-elected Kenyan Parliament unanimously passed<sup>75</sup>

the National Accord and Reconciliation Bill (which outlines the concept of power sharing) and a Constitutional Amendment Bill (which creates the post of the Prime Minister and of the two deputy prime ministers).

Although provisions regarding the appointment of the new Prime Minister and his two deputies were fully implemented, the outlook of the new cabinet failed to reflect the balance of forces within parliament. Instead, the 42-member cabinet was constituted on an equal basis between the PNU and the ODM. Furthermore, the Constitutional Amendment Bill 'fell short of specifying the functions of the Prime Minister'.<sup>76</sup>

The signing of the 2008 Accord was instrumental in quelling the widespread post-electoral violence in Kenya. The subsequent Government of National Unity (GNU) has since provided an opportunity for co-operation between the PNU and the ODM. This was evident during the constitutional reform and referendum processes in 2009 to 2010. Both parties backed the new Constitution in contrast to the 2005 referendum when the ODM succeeded in mobilising the majority of Kenyan voters against a PNU-sponsored Constitution.

However, by its nature and the process through which it was arrived at, the GNU as designed in Kenya was 'a deterrent to democracy and a mockery of the choice made by voters'.<sup>77</sup> It represented a major setback to the Kenyan democratic consolidation process that had shown signs of maturation during the 2002 elections. The establishment of the GNU did not take into account the concerns of ordinary Kenyans, confirming thus the assumption of sceptic observers that Kenyan politics remained elitist in spite of the choreographed public consultations. Power sharing in Kenya represented a threat for good governance as it denied the country an opposition that could keep government in check. No wonder it has been blamed of being 'ineffective due to continued political tension, violence and corruption'.<sup>78</sup>

### 5.3 Implications for justice and human rights

There is no doubt that the immediate cause of the 2007-2008 post-electoral violence in Kenya was the inability of the ECK to withstand political pressure emanating from the ruling PNU and to perform its role impartially. It is equally true that the post-electoral crisis fed into

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75 As above.

76 As above.

77 Maina (n 73 above) 5.

78 Maina (n 73 above) 5.

both Kenya's legacy of election-related violence as well as the country's history of unequal access to socio-economic opportunities and key resources, including land, among communities, prompting inter-ethnic resentments and tensions. However, perhaps the most compelling reason for the mayhem was the general lack of trust by the Kenyan public in the country's judiciary. In fact, in spite of the electoral law providing for judicial courts as the only mechanism to challenge election results, the ODM deliberately decided not to follow such a route. According to Njogu, the Kenyan judiciary<sup>79</sup>

has over the years been perceived as not a true arbiter in electoral grievances. Attempts by presidential candidates in 1992 and 1997 to challenge the election of Daniel Arap Moi were not fruitful and over the years Kenyans have lost confidence in the judiciary, viewing it as corrupt and easy to manipulate by the state.

In this context, it is therefore not surprising that Kenyans opted to add the 'justice' dimension to their version of a truth and reconciliation commission. Still, the pursuit of justice in post-2007 Kenya has proven a difficult task. The Commission of Inquiry related to Post-Election Violence (CIPEV) published its report on 15 October 2008. Although it provided detailed accounts of violence and divided responsibilities between the ODM and the former PNU government, the report fell short of naming individuals that were behind the violence. The report has been qualified in human rights advocacy circles as 'a half-baked job that attempts to cover up offences committed by people who deserve no such protection'.<sup>80</sup> Njogu has observed the same trend in so far as the report published by the Kenya National Commission on Human Rights (KNCHR) in August 2009 is concerned. He laments that the report failed<sup>81</sup>

to capture the chronology of events leading to the post-election violence and ... detail specific violence-related activities of national and local leaders as well as retired military and police officers during the carnage.

However, it ought to be admitted that both the report by the CIPEV (also known as the Waki Report) and the report by the KNCHR provided a list of alleged perpetrators of the violence. The Waki report actually handed to Kofi Annan a sealed envelope containing the names of those believed to have played the largest role in the post-election violence. The envelope (containing the names of six key suspects) was later passed by Kofi Annan to the prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo.

The Kenyan national unity government has not been able to institute judicial actions against those suspected of being behind the 2007-2008 post-election violence in the country. Nor has it provided the necessary leadership for the Truth, Justice and Reconciliation

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79 Njogu (n 68 above) 3-4.

80 D Branch *Kenya: Between hope and despair, 1963-2011* (2011) 280.

81 Njogu (n 68 above) 2.

Commission to play its role effectively. By June 2012, only one individual, 24 year-old Peter Ruto, has been convicted by a Kenyan court for crimes committed during the 2007-2008 post-electoral violence. Ruto received a life in prison sentence at Nakuru High Court on 12 June 2012 for killing his 67 year-old neighbour, Kamau Thiong'o, in January 2008.<sup>82</sup> This state of affairs is a clear indication of the lack of commitment to justice on the side of Kenyan parties to the power-sharing government. As Branch observed,<sup>83</sup>

[b]oth the perpetrators and the organisers had escaped justice. Efforts to establish a tribunal to try the main organisers of the violence failed to get through parliament, not least because many MPs feared prosecution.

The reluctance on the part of Kenyan officials to set up a national prosecution mechanism for the post-election violence led to the International Criminal Court becoming involved in the process. The ICC has since singled out four individuals (from the original list of six), namely, Deputy Prime Minister and Finance Minister Uhuru Kenyatta, former Public Service chief Francis Muthaura, Kass FM radio presenter, Joshua Arap Sang, as well as Eldoret North Member of Parliament (MP), William Ruto, as suspects in the case. Although it remains unclear if these individuals will ever stand trial before the ICC, many Kenyans initially welcomed the ICC's move that they viewed as susceptible of 'detering politicians from hate speech and ensuring that they remain accountable for their actions'.<sup>84</sup>

In so far as human rights in post-2007 Kenya are concerned, it is worth mentioning the case of people who lost their lives and those who were displaced as a result of the violence. Just as the government of national unity has failed to ensure justice for the dead and their families, so has it betrayed the vast majority of the internally-displaced people (IDPs). Until the official end of term of office of the coalition government as symbolised by the March 2013 elections, IDPs were still awaiting relocation to promised settlements and compensation for their material losses during the crisis. Perhaps the most encouraging aspect of the March 2013 elections, as far as the victims of the 2007-2008 electoral process are concerned, has been their relative peacefulness. They did not bring about fresh cases of internal

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82 W Macharia 'Court convicts Kenyan over poll chaos' <http://www.nation.co.ke/News/politics/> (accessed 27 June 2012).

83 Branch (n 80 above) 283.

84 Maina (n 73 above) 6. However, it ought to be noted that the initially mostly favourable Kenyan public opinion toward the ICC prosecution seems to have been reversed by the March 2013 general elections, as reflected by the triumph of the Jubilee Coalition (represented by Uhuru Kenyatta and William Ruto), which campaigned against the ICC.

displacement, providing hope that existing victims may still have their concerns addressed by the new government.

## 6 Lessons learned and the way forward

As much as the nature of wars has changed from interstate confrontations fought by professional armies (generally along the borderlines) to internal wars with high levels of civilian participation and victimisation, so have mediated or negotiated processes emerged as the most common mechanism to end civil wars. In this new environment, power sharing has become a key tool in helping war-torn societies to transit from violence to peace and stability. The three cases analysed in this article provide the lessons below, highlighting nuances in patterns of power sharing in post-violence African societies and their interaction with justice and human rights.

- *Power sharing has not solely been used as a peace-making tool, nor has it only apply to societies emerging from civil war.*

In post-genocide Rwanda, power sharing was *voluntarily* chosen as a governance model by the victorious RPF as a proof of its unwavering commitment to building a new Rwandan society entrenched in the principles of inclusiveness, social cohesion and national unity. In post-2007 Kenya, power sharing emerged as a necessity suggested to the two main protagonists, namely, the ODM and the PNU, by international third parties as a mechanism to address the impasse brought about by the mishandling of the presidential elections by the country's electoral commission. The Rwandan and Kenyan cases did not thus fall into the 'classical' model of power sharing as applied in the DRC where it served as a peace-making tool designed to end the five-year second Congo war. The main objective of the DRC's power-sharing model was to provide the different stakeholders with a stake in the transitional dispensation so as to win their support for the peace and stabilisation processes that included the profound renewal of the country's ruling class through free and fair elections.

- *In spite of their shared perspective with regard to distributing power among the main socio-political stakeholders, power-sharing mechanisms implemented in post-genocide Rwanda, post-election Kenya and 'post-war' DRC differed very significantly in terms of their content and scope, a direct consequence of the different contexts in which they were applied.*

In Rwanda, the fact that the RPF had won the war and the defeated Habyarimana bureaucracy and security forces had almost entirely relocated outside the country not only imposed the RPF as the sole agenda setter in terms of the power-sharing mechanism, but also confined the latter to the national executive and legislature. In Kenya, power was only shared in the national executive because the post-electoral dispute only focused on the result of the presidential elections. However, in the DRC, power sharing was all-encompassing,

extending to spheres and sectors as different as the national and provincial executives, the national legislature, the diplomatic corps, the public enterprises, the national army and the national police as well as transitional institutions designed to support the democratic process, including the electoral commission.

- *Although acknowledged as a precious peace-making tool and a mechanism to foster inclusiveness, social cohesion and national unity, power sharing does not always perform well in the areas of justice and human rights in 'post-violence' societies.*

In post-genocide Rwanda, the military victory of the RPF on the battlefield provided an ample opportunity to the country's new leadership for the pursuit of justice and the punishment of human rights violations perpetrated during the war and the genocide. Seizing this opportunity, the international community established the ICTR while Rwandan authorities used the national judicial system, the *Gacaca* courts and the NURC, to prosecute human rights violations committed during the country's crisis and/or work toward national reconciliation. The ICTR, the national judicial system, as well as the *Gacaca* courts have all ensured that justice has been served for the victims of the genocide and that the perpetrators of human rights violations during Rwanda's darkest episode have been punished. However, it ought to be acknowledged that this only became possible because of the method of war termination in Rwanda (ending in military victory). Furthermore, although impunity has been avoided in Rwanda, the justice that has been served by the international and the national processes has been criticised as being one-sided, and as a victors' justice applying only to the losers.

In the DRC and Kenya, power sharing contributed to turning former conflicting parties and alleged perpetrators of human rights violations into key actors in the search for political stability and peace. As such, although it brought about relative peace and stability, power sharing quickly became a major stumbling block to the pursuit of retributive justice. Still, the same actors have equally displayed a disturbing lack of interest in pursuing restorative justice by undermining the reconciliation commissions and processes. In both countries, power sharing has turned into a shield designed to protect the elite from prosecution for their misdeeds. It has led to systemic impunity, raising the prospects for the direct and enhanced involvement of the ICC as a justice mechanism of last resort for the Congolese and Kenyan victims of human rights abuses at the hands of their self-styled rulers.

In conclusion, the cases of Rwanda, Kenya and the DRC analysed in this article thus highlight the need for

- further academic research into the concept of 'post-violence' power sharing in order to distinguish among different strands and their respective implications for justice and human rights;
- resolving the peace versus justice dilemma in post-violence societies through the formulation of a justice and human rights

- model compatible with power-sharing mechanisms, especially in societies where the latter imposed themselves as the only possible peace-making tools; and
- learning from the Rwandan experience that power sharing can be adhered to voluntarily as a mechanism to foster inclusiveness, social cohesion and national unity – especially in societies divided along identity lines and emerging from protracted violence – while at the same time pursuing justice for the victims and punishing the perpetrators of past human rights violations.