

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

*Evelyne Asaala**

Lecturer, School of Law, University of Nairobi, Kenya

*Nicole Dicker***

PhD Candidate, University of Sydney, Australia

Summary

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

* LLB (Hons) (Nairobi), LLM (Human Rights and Democratisation in Africa) (Pretoria); evelyneasaala@uonbi.ac.ke

** BA LLB (Hons) (Sydney), MAAPD (Australian National); nicole.dicker@sydney.edu.au

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

1 Introduction

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

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

1 K Annan in GoDown Arts Centre *Kenya burning* (2009).

2 International Centre for Transitional Justice 'What is transitional justice?' <http://ictj.org/about/transitional-justice> (accessed 25 October 2013). See also AG Reiter *et al* 'Transitional justice and civil war: Exploring new pathways, challenging old guideposts' (2012) 1 *Transitional Justice Review* 137 138.

3 TD Olsen *et al* *Transitional justice in balance: Comparing processes, weighing efficacy* (2010) 2.

4 It is important to note that, while the inclusion of transitional justice by the UN Human Rights Council through its special procedures mechanism is new, the UN does have a significant history of engagement in the transitional justice sphere. Some examples of the other normative work conducted by the UN in the field of transitional justice include the UN-backed Khmer Rouge genocide tribunal in Cambodia (Extraordinary Chambers in the Courts of Cambodia); the Van Boven Principles, setting out the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; the UN-backed Commission for Historical Clarification in Guatemala; and the creation of the Commission for Reception, Truth, and Reconciliation (CAVR, for its acronym in Portuguese) under United Nations Transitional Administration for East Timor (UNTAET) and pursuant to a regulation of UNTAET.

Guarantees of Non-Recurrence, pursuant to Resolution 18/7.⁵ The Special Rapporteur is mandated to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law; to promote truth, justice, reparation and guarantees of non-recurrence in such contexts. At the time of its adoption, the creation of the mandate was hailed as 'a highly important resolution and a significant contribution by the [Human Rights] Council to establish accountability for serious crimes and human rights violations'.⁶ While the title of the mandate does not explicitly include the term 'transitional justice', the four measures of the mandate (that is, truth, justice, reparation and guarantees of non-recurrence) parallel those measures most commonly associated with the field of transitional justice. Further, the term 'transitional justice' features in Resolution 18/7. It is also the terminology adopted by the Special Rapporteur in annual reports to the UN General Assembly and Human Rights Council for the years 2012 and 2013, submitted in accordance with Resolution 18/7.⁷ In these annual reports, the term 'transitional justice' is used as 'shorthand' to denote collectively the four measures comprising the mandate.⁸ As such, the term 'transitional justice' is used in this article.

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

5 UN Human Rights Council Resolution A/HRC/RES/18/7 of 29 September 2011.

6 D Tolbert 'ICTJ welcomes establishment of UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence' (2011) <http://ictj.org/news/ictj-welcomes-establishment-un-special-rapporteur-truth-justice-reparation-and-guarantees-non> (accessed 20 October 2013).

7 P de Greiff 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' UN General Assembly 23 August 2013. See also P de Greiff 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, P de Greiff' Human Rights Council, 9 August 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/158/58/PDF/G1215858.pdf?OpenElement> (accessed 2 February 2013).

8 De Greiff (n 7 above) 3.

9 CIPEV 'Report of the Commission of Inquiry into Post-Election Violence' (Commission of Inquiry into Post-Election Violence, 2008). See also Human Rights Watch *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011) 3. See also Internal Displacement Monitoring Centre 'Speedy reforms needed to deal with past injustices and prevent future displacement' 10 June 2010 <http://www.internal-displacement.org/countries/kenya> (accessed 10 November 2012).

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

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

10 Ext/Assembly/AU/Dec 1, Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia; 12 October 2013 2-3, Decision on Africa's relationship with the International Criminal Court http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 17 October 2013).

11 ICC-01/09-02/11-830, Trial Chamber V(B), Situation in the Republic of Kenya, *The Prosecutor v Uhuru Muigai Kenyatta* [ICC] *Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial* <http://www.icc-cpi.int/iccdocs/doc/doc1667182.pdf> (accessed 20 October 2013).

12 While the crux of the analysis of this article considers transitional justice measures implemented in Kenya, the article considers also the ICC, implemented not in Kenya but at the ICC headquarters in The Hague. As such, the indictment of Kenyatta and Ruto by the ICC is analysed as a transitional justice process relating to and not located in Kenya.

13 De Greiff (n 7 above).

relevance given the challenge facing Kenya of having two ICC suspects at the helm of government.¹⁴

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

2 Defining 'transitional justice'

As set out in the introduction to the article, transitional justice denotes judicial and non-judicial measures geared to redress the legacies of massive human rights abuses.¹⁵ The term transitional justice does not have a universally-agreed upon definition,¹⁶ rather its meaning is 'contested territories with diverging bodies of (at least emerging) theory, policy, and practice'.¹⁷ Much of the ambiguity surrounding its precise meaning derives from the fact that the focus of transitional

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

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

16 See P Gready 'Telling truth? The methodological challenges of truth commissions' in F Coomans *et al* (eds) *Methods of human rights research* (2009) 159. See also C Huggins 'Linking broad constellations of ideas: Transitional justice, land tenure reform, and development' in P de Greiff & R Duthie (eds) *Transitional justice and development: Making connections* (2009) 332. See also M Lenzen 'Roads less travelled? Conceptual pathways (and stumbling blocks) for development and transitional justice' in De Greiff & Duthie (above) 76; Olsen *et al* (n 3 above). See also R Sarkar *International development law: Rule of law, human rights and global finance* (2009).

17 Lenzen (n 16 above) 77.

justice has evolved and shifted somewhat since its inception. Originally, transitional justice was concerned with political transitions from authoritarian rule to democracy, its application being to address and furnish justice for past atrocities of authoritarian regimes.¹⁸ In light of the focus on achieving justice within the context of 'transitions to democracy', the field came to be termed 'transitional justice'.¹⁹ Over the past two decades, however, transitional justice measures have been appropriated to respond to contexts of conflict, political strife, as well as human rights atrocities more generally – expanding the gaze of transitional justice considerably.²⁰ Usefully, as Jeffery explains '[w]hat unites these different approaches to transitional justice ... is that each seeks to achieve accountability for human rights violations'.²¹ Of relevance also is the use of the terminology of transitional justice by the Special Rapporteur, suggesting the term's continued currency.

Helpfully, Olsen *et al* acknowledge that, increasingly, many scholars and practitioners alike are adopting a version of the definition elaborated by the International Centre for Transitional Justice (ICTJ), as follows:²²

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

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

This definition is useful for clarifying the meaning of the term as well as its overriding objectives. It underscores the historical origins of transitional justice and so functions to track the field's development.²³ The definition is also noteworthy as it features a clear statement recognising the experiences of victims of human rights violations, rather than focusing narrowly only on the perpetrators of human

18 Reiter *et al* (n 2 above). See also R Teitel 'Transitional justice genealogy' (2003) 16 *Harvard Human Rights Journal* 69. See also R Teitel *Transitional justice* (2000).

19 ICTJ (n 2 above).

20 Reiter *et al* (n 2 above).

21 R Jeffery 'Enduring tensions: Transitional justice in the Solomon Islands' (2013) 26 *The Pacific Review* 156.

22 ICTJ (n 2 above). See also Olsen *et al* (n 2 above).

23 Reiter *et al* (n 2 above).

rights atrocities. This aligns with the focus championed by the Special Rapporteur in the first annual report to the UN Human Rights Council on the mandate, advocating for a 'victim-centred' approach to transitional justice.²⁴

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

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

24 De Greiff (n 7 above) 17.

25 E Harwell & P le Billon 'Natural connections: Linking transitional justice and development through a focus on natural resources' in De Greiff & Duthie (n 16 above) 282; ICTJ (n 2 above) 14.

26 Reiter *et al* (n 2 above).

27 P Gready 'Culture, testimony, and the toolbox of transitional justice' (2008) 20 *Peace Review* 41.

28 As above.

29 De Greiff (n 7 above).

30 Note that this article also considers the three cases pending before the ICC, to be heard external to Kenya, at the ICC headquarters in The Hague.

fluidity to the field of transitional justice as it develops and responds to new realities and challenges.

3 Significance of the Special Rapporteur's mandate for Kenya

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

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

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

31 De Greiff (n 7 above).

32 As above.

1970s and 1980s.³³ The Special Rapporteur has also conducted a country visit to Tunisia, and will visit Spain in January 2014. Requests for visits remain pending for Brazil, Côte d'Ivoire, Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Nepal and Rwanda. A visit to Kenya (additional to those visits pending) by the Special Rapporteur would be a powerful means of promoting truth, justice, reparation and guarantees of non-recurrence in that country. Access to technical assistance and advice, as well as the further elevation of crucial human rights issues at the international level, embody significant potential for positive justice outcomes.

The first annual report to the Human Rights Council sets out also the 'foundation of the mandate' (namely, Resolution 18/7, applicable international instruments,³⁴ the emergence and evolution of transitional justice measures across diverse contexts, and the normative conception of transitional justice)³⁵ – this is significant because it helps to clarify and correct misconceptions surrounding the mandate. This is important for its effective implementation going forward. In particular, the fact that the Special Rapporteur stresses that transitional justice mechanisms are 'neither meant to be a "soft form of justice" nor ... a means of pursuing the aim of reconciliation bypassing the implementation of the four measures under the mandate' is of great import.³⁶ Recognising that transitional justice is not a 'soft form of justice', nor that to achieve reconciliation, justice must be sacrificed, functions to reinforce approaches that target accountability for perpetrators of human rights violations. It also promotes the rigorous design and implementation of mechanisms that are geared towards this goal, as well as adequate justice and recognition for victims. This is relevant to the case of Kenya as it suggests that justice is a necessary precursor to peace (peace in the

33 UN transitional justice expert Pablo de Greiff in first official visit to Uruguay <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13777&LangID=E> (accessed 25 October 2013).

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

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

36 De Greiff (n 7 above) 6; ICTJ *UN Special Rapporteur delivers first annual report* 27 August 2012, International Centre for Transitional Justice <http://ictj.org/news/un-special-rapporteur-delivers-first-annual-report> (accessed 1 April 2013).

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

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

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

37 J Galtung *Theories of peace: A synthetic approach to peace thinking* (1967).

38 De Greiff (n 7 above) 1.

39 JN Clark 'Peace, justice and the International Criminal Court: Limitations and possibilities' (2011) 9 *Journal of International Criminal Justice* 521.

40 De Greiff (n 7 above).

41 ICTJ (n 2 above).

42 De Greiff (n 7 above).

dimensions of human rights violations.⁴³ It also echoes important calls for justice for sexual and gender-based violence committed in contexts of conflict, such as those articulated in UN Security Council Resolutions 1325⁴⁴ and 1820.⁴⁵ Indeed, as Hellsten asserts: 'The [transitional justice] mechanisms that bring long-term gender justice while abolishing structural violence, bias and injustice still are not fully established.'⁴⁶ The Special Rapporteur's bringing this significant shortcoming into the gaze of dominant transitional justice discourses is crucial to its advancement and rectification. Further, the push for a victim-centred focus is also noteworthy. The Special Rapporteur asserts that, without the 'meaningful participation [of victims]', goals of transitional justice cannot be achieved.⁴⁷ Both the issue of victim-centred and gender-sensitive (justice) strategies will be revisited in this article.

Finally, of significance is that the Special Rapporteur specifically articulates the importance of 'drawing tighter connections with other types of policy interventions such as development and security policies'.⁴⁸ The Special Rapporteur's report to the Human Rights Council for 2013 takes forward the discussion on connections and complementarities between transitional justice and development, the report highlighting the relevance of justice and rights considerations to sustainable development.⁴⁹ This dearth in analysis of connections between development and security policies has previously been identified and explained, for example by the ICTJ.⁵⁰ Further, in 2008, the *International Journal of Transitional Justice* devoted an entire issue to the topic of transitional justice and development, 'in which a number of contributors argued for the 'expansion of the purview of transitional justice to include development issues'.⁵¹ And as it relates to connections between transitional justice and development, Lenzen has asserted that 'practical experience is more advanced than policy in this regard, although too little of it has been systematically

43 S Buckley-Zistel & R Stanley *Gender in transitional justice* (2011). See also SK Hellsten *Working Paper No 2012/06 Transitional justice and aid* (2012).

44 UN Security Council Resolution 1325 (2000) para 11 on women, peace and security '[e]mphasises the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes, including those relating to sexual and other violence against women and girls'.

45 UN Security Council Resolution 1820 (2008) on Women and Peace and Security condemns sexual violence, and reaffirms the responsibility of states to end impunity for such crimes.

46 Hellsten (n 43 above) 16.

47 De Greiff (n 7 above) 17.

48 As above.

49 As above.

50 De Greiff & Duthie (n 16 above). The International Centre for Transitional Justice is also leading work in order to connect transitional justice and development actors as it relates to supporting 'positive complementarity'.

51 (2008) 2 *International Journal of Transitional Justice*.

captured',⁵² pointing out the need for continued research into such connections.⁵³ In the context of Kenya, questions of both development and security are pivotal: As it relates to development, Kenya is an important development hub, and a myriad of development actors are supporting and engaging in various transitional justice mechanisms. And yet, the election of Kenyatta and Ruto threw up new challenges for international development in Kenya, whereby key development partners, including the United States of America, the United Kingdom and the European Union, have indicated a reluctance to engage with the Kenyatta administration.⁵⁴ And as it relates to security, activities of militia groups, such as the Mombasa Republican Council (MRC), and Kenya's invasion of Somalia (and conflict with Al-Shabaab and ensuing terrorist attacks), pose significant challenges for Kenya's justice and security sectors.⁵⁵

The analysis in the subsequent pages describes the superficial and largely ineffectual manner in which Kenya has approached transitional justice to date. It points to a distinct lack of political will for transitional justice measures to be fully and effectively implemented in Kenya. Concomitantly, the Special Rapporteur suggests that the goals of transitional justice (such as providing recognition to victims, fostering trust, contributing to reconciliation and strengthening the rule of law) are most likely to be achieved where a *comprehensive* set of transitional justice mechanisms are *fully* implemented – the analysis below points to this shortcoming.⁵⁶ The article interrogates the transitional justice measures against the mandate of the Special Rapporteur, concluding with a call to the Special Rapporteur to issue a request for a country visit to Kenya.

4 Context of transition and transitional justice in Kenya

4.1 Human rights violations in post-independence Kenya

A historical narrative tracing Kenya's post-independence political regimes, and the commission of a myriad of human rights violations

52 Lenzen (n 16 above).

53 Dicker's PhD research considers transitional justice and development connections, focusing on three case study countries: Guatemala, Kenya and Solomon Islands. In particular, the research focuses on how international development actors engage with and support transitional justice, and that which constitutes effective development practice in this sphere.

54 J Gettleman 'Kenyatta is declared the victor in Kenya, but opponent plans to appeal' *The New York Times* (online) 9 March 2013, http://www.nytimes.com/2013/03/10/world/africa/kenyatta-wins-kenya-presidential-election.html?ref=global-home&_r=0 (accessed 19 October 2013).

55 CRJ 'Ethnicity dominant in Kenya's 2013 polls' *CRJ English* (online) 16 December 2012, <http://english.cri.cn/6966/2012/12/16/2361s738664.htm> (accessed 12 January 2013).

56 De Greiff (n 7 above).

by them (and various government elements, in particular excessive use of force by security agencies), underscores the need for transitional justice in Kenya. Successive post-independence Kenyan governments, under Presidents Kenyatta, Moi and Kibaki, have engaged in, condoned or overlooked the commission of gross human rights violations as well as other crimes, with impunity.⁵⁷ Such criminal acts have included political assassinations;⁵⁸ torture;⁵⁹ inter-ethnic violence sanctioned and allegedly incited by the state;⁶⁰ arbitrary arrests and detentions;⁶¹ extra-judicial police killings;⁶² banning of opposition parties; irregular allocation of land; and various other economic crimes.⁶³ Where such human rights violators have enjoyed impunity for their acts⁶⁴ – impunity then incentivising further violations – a strong argument may be made for the need for transitional justice mechanisms to be fully implemented in Kenya.⁶⁵ Indeed, the World Bank's World Development Report 2011, entitled *Conflict, Security and Development*, recognises a role for transitional justice in combating impunity as a means to ending cycles of conflict and violence.⁶⁶

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

57 E Asaala 'Exploring transitional justice as a vehicle for social and political transformation in Kenya' (2010) 10 *African Human Rights Law Journal* 377. See also TJRC Kenya 'Report of the Truth, Justice and Reconciliation Commission' (Truth, Justice and Reconciliation Commission, Kenya, 2013).

58 J Londale 'Moral and political argument in Kenya' in B Berman, D Eyoh & W Kymlicka (eds) *Ethnicity and democracy in Africa* (2004) 91.

59 R Ajulu 'Thinking through the crisis of democratisation in Kenya: A response to Adar and Murunga' (2000) 4 *African Sociological Review* 137 143.

60 Report by the National Christian Council of Kenya *The cursed arrow: Contemporary report on the politicised land clashes in Rift Valley, Nyanza and Western Provinces* (1992); Africa Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1993).

61 Ajulu (n 59 above).

62 KNCHR *Follow-up Report on Extra-Judicial Killings and Disappearances* August 2008.

63 TJRC Kenya (n 57 above). See also C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in W Oyugi *et al* (eds) *The politics of transition in Kenya: From KANU TO NARC* (2003) 65; MK Mbondenyi 'Entrenching the right to participate in government in Kenya's constitutional order: Some viable lessons from the African Charter on Human and Peoples' Rights' (2011) 55 *Journal of African Law* 30. Mbai writes on the famous 'Goldenberg scandal', the 'Anglo leasing scandal' and the 'Grand regency scandal' involving the embezzlement of government funds.

64 G Muigai 'Ethnicity and the renewal of competitive politics in Kenya' in H Glickman (ed) *Ethnicity, conflict and democratisation* (1995) 171; Africa Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1993).

65 KNDRC *Agreement on agenda item three: How to resolve the political crisis* 14 February 2008 3 <http://www.dialoguekenya.org/index.php/agreements.html> (accessed 1 May 2012).

66 World Bank *Conflict, security, and development: World Development Report 2011* (2011).

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

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

67 S Brown & CL Sriram 'The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya' (2012) 111 *African Affairs* 244.

68 CIPEV (n 9 above). See also Human Rights Watch (n 9 above) 3.

69 Brown & Sriram (n 67 above)

70 PB Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2011) 73.

71 See Human Rights Watch (n 9 above).

72 Human Rights Watch (n 9 above) fn 57-63.

73 De Greiff (n 7 above).

74 K Ambos 'The legal framework of transitional justice: A systematic study with a special focus on the role of the ICC' in K Ambos *et al* (eds) *Building a future on peace and justice: Studies on transitional justice, peace and development* (2009) 106.

4.2 Inception of transitional justice in Kenya

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

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

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

75 KNDR 'Annotated agenda for the Kenya dialogue and reconciliation' KNDR Conference, 2008.

76 KNDRC 'Agreement on agenda item three: How to resolve the political crisis' 14 February 2008 3.

77 TO Hansen 'Kenya's power-sharing arrangement and its implications for transitional justice' (2013) 17 *The International Journal of Human Rights* 307.

78 Brown & Sriram (n 67 above)

79 KNDRC *Agreement: Commission of inquiry of post-election violence* (2008) 1.

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

81 CIPEV (n 9 above).

further recommended that, in the event that efforts towards establishing a special tribunal were frustrated, the names of the alleged perpetrators and accompanying evidence be referred to the prosecutor of the ICC. Brown and Sriram have since rightly described this self-enforcing mechanism as 'ingenious'.⁸² It is against this backdrop that the subsequent analysis in part five is set.

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

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

5.1 Truth

International law protects the right of victims and survivors to know about the circumstances of gross violations of their human rights, including who was responsible for the violations.⁸³ This right may be afforded through the effective implementation of various truth-seeking initiatives, including freedom of information legislation; declassification of archives; investigations into the missing and disappeared; and the establishment of non-judicial commissions of inquiry, including truth commissions.⁸⁴ The value of truth seeking rests in its contribution to the 'creation of a historical record' and, in so doing, preventing manipulation and the deliberate rewriting of history and a denial of atrocities by perpetrators.⁸⁵ Truth seeking is also esteemed for its perceived ability to 'help victims find closure by learning more about the events they suffered, such as the fate of disappeared individuals, or why certain people were targeted for abuse'.⁸⁶ Hayner also points to the value of truth seeking for confronting the legacy of past 'horrors', in order to lay a solid foundation on which to build a new society, warning against

82 Brown & Sriram (n 67 above).

83 The first judicial ruling articulating the existence of the right to the truth was by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case of 1988. See also IACHR *Ellacuria v El Salvador* Case 10488 of 1999 (*Ellacuria* case). See further HRC *Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay*, Communication 107/1981 para 14.

84 ICTJ *Truth and memory* International Centre for Transitional Justice <http://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory> (accessed 20 October 2013).

85 As above.

86 Human Rights Watch (n 9 above).

'bury[ing] ... sins, [as] they will reemerge later'.⁸⁷ And so, logically, the question arises: To what extent, if at all, has truth seeking contributed to achieving the above-mentioned objectives in Kenya; or has it been merely a case of burial of sins?

The task of truth seeking in Kenya has been broached through the mechanism of a truth commission – the Truth, Justice and Reconciliation Commission of Kenya (TJRC). Established pursuant to the TJRC Act, it came into operation on 17 March 2009.⁸⁸ Hayner's seminal work on truth commissions offers a useful starting point for framing critical thinking around truth commissions. Hayner defines a truth commission as a temporary body officially sanctioned by the state to investigate a pattern of abuses and to issue a report.⁸⁹ The definition adopted by Olsen *et al* which draws heavily on Hayner's definition, is also instructive: 'a newly-established, temporary body, officially sanctioned by the state or an international governmental organisation to investigate past human rights abuses'.⁹⁰ The explicit focus on 'human rights abuses'⁹¹ in Olsen *et al's* definition (and omitted by Hayner, who references only 'abuses'), is significant as it aligns with the articulation of the Special Rapporteur's mandate, which similarly is anchored within the language of human rights.⁹²

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

87 Hayner (n 70 above).

88 The TJRC commissioners were sworn in on 3 August 2009.

89 PB Hayner 'Fifteen truth commissions – 1974 to 1994: A comparative study' (1994) 16 *Human Rights Quarterly* 597. See also Hayner (n 70 above).

90 Reiter *et al* (n 2 above).

91 Olsen *et al* (n 3 above) (our emphasis).

92 UN Human Rights Council (n 5 above).

93 Asaala (n 57 above).

94 As above.

95 A Kiprotich 'TJRC employees raise red flag over allegations of corruption' *Nation Media Group, Kenya*, 9 October 2011 <http://www.standardmedia.co.ke/?articleID=2000044411&pageNo=1> (accessed 21 October 2013). See also 'Corruption and the Corruption commissions: Who is investigating whom?' <http://www.kenyaforum.net/?p=773> (accessed 21 October 2013).

96 Serious allegations of human rights violations surround Ambassador Kiplagat's reputation. A commission was established to investigate these allegations; however, having made no concrete findings, Ambassador Kiplagat was controversially reinstated.

organisations operating in Kenya came to distance themselves from the TJRC process as it proceeded. This occurred in direct response to the above-mentioned shortcomings whereas, at the outset of the TJRC process, such actors committed funding and technical assistance, and demonstrated significant goodwill for the process. Indeed, initially there was significant support for and optimism surrounding the TJRC.⁹⁷ Yet, many scholars and practitioners (including national and international civil society and international development agency representatives) came to seriously question whether the TJRC would be able to achieve its intended objectives, specifically, to 'promote peace, justice, national unity, healing, and reconciliation among the people of Kenya'.⁹⁸ This was particularly in light of ever-diminishing public confidence in the TJRC mechanism.⁹⁹

Further, the considerable delays in completing and publishing the final report of the TJRC were widely denounced, as well as actively opposed by two Kenyan civil society umbrella organisations - Kenyans for Peace with Truth and Justice and the Kenya Transitional Justice Networks. These two civil society umbrella organisations labelled requests for extensions (and subsequent granting by cabinet) 'reprehensible', 'tantamount to a betrayal of the people's trust', and driven by 'personal interest' and 'self-preservation'.¹⁰⁰ These civil society groups labelled the delays also as 'reek[ing] of political mischief'.¹⁰¹ The TJRC's failing to publish its findings prior to the Kenyan general elections of 2013 has been aptly described as having 'undermined one of the main rationales of the Commission and denied the people of Kenya information to which they were entitled as they went to the polls'.¹⁰² The failure of the TJRC to release its report prior to the elections corresponds also with the analysis of the ICTJ that '[m]any international observers, civil society and victims

97 S Robins "'To live as other Kenyans do": A study of the reparative demands of Kenyan victims of human rights violations' International Centre for Transitional Justice (2011) <http://ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> (accessed 21 October 2013); D Tolbert 'Kenya's truth commission must act now to salvage credibility' *Aljazeera* (online) 15 December 2012 <http://www.aljazeera.com/indepth/opinion/2012/12/20121213115429440429.html> (accessed 21 October 2013).

98 Sec 5 Truth, Justice and Reconciliation Act 6 of 2008. See, eg, ICTJ 'ICTJ Programme Report: Africa' (International Centre for Transitional Justice, 4 December 2012) <http://ictj.org/news/ictj-program-report-africa>; Tolbert (n 97 above). This assertion is concluded also on the basis of findings drawn from over 40 interviews conducted by Nicole Dicker in Kenya between August and September 2012.

99 See, eg, 'TJRC seeks six-month extension of tenure' *Nation TV Kenya* 31 July 2012.

100 KPTJ 'Civil society says No! to further extension of TJRC mandate' 5 August 2012 <http://www.africog.org/content/civil-society-says-no-further-extension-tjrcman-date> (accessed 25 October 2013).

101 As above.

102 ICTJ 'ICTJ welcomes Kenya's TJRC Report' (2013) http://ictj.org/news/ictj-welcomes-kenyas-tjrc-report?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=b7ba70f50f-World_Report_Issue_23_May_2013&utm_medium=email&utm_term=0_2d90950d4d-b7ba70f50f-245955113 (accessed 23 October 2013).

groups see this [delay] as a clear sign of the Commission's politicisation'.¹⁰³ Further, the alleged political pressure placed on the TJRC commissioners and staff by the office of the President to amend the land chapter of the final report of the TJRC is concerning.¹⁰⁴ Prior to its publication, the final draft of the land chapter implicated Kenya's first President (and father of Kenya's current president, President Uhuru Kenyatta), President Jomo Kenyatta, in irregular land dealings.¹⁰⁵ These paragraphs were then allegedly censored prior to the publication of the report. In protest, the three international commissioners, Judge Gertrude Chawatama, the late Ambassador Berhanu Dinka, and Professor Ronald C Slye, published a dissenting opinion that reproduced the original paragraphs of the land chapter.¹⁰⁶

It is, however, a credit both to the Kenyan government and to the institution of the TJRC and its commissioners, that the final report has now been released. This is an important means of accountability for past human rights violations, for recognising the suffering of victims and restoring dignity.¹⁰⁷ The report is also of value for identifying and recommending a means of addressing the root causes of historical injustices and post-election violence.¹⁰⁸ Significantly, strong political will is essential for the implementation of the TJRC's recommendations set out in its final report.¹⁰⁹ It remains to be seen how this will be

103 Tolbert (n 97 above).

104 Judge G Chawatama, Ambassador B Dinka & Professor RC Slye, Dissenting Opinion with Respect to Chapter 2 of Volume 2B of the Final Report of the Truth, Justice and Reconciliation Commission of Kenya. See also G Chawatama *et al* 'Kenya Truth Commission report doctored by state house' *Pambazuka (AllAfrica.com)* (online) 6 June 2013 <http://allafrica.com/stories/201306071639.html?viewall=1> (accessed 22 October 2013). See also K Migiro 'Kenyan President's office censored report on high-level land grabbing – Commissioners' *AllAfrica.com* 3 June 2013 <http://allafrica.com/stories/201306041093.html?viewall=1> (accessed 22 October 2013). See further N Musau 'Kenya: How TJRC land chapter was censored' *The Star (AllAfrica.com)* (online) 3 June 2013 <http://allafrica.com/stories/201306040965.html?viewall=1> (accessed 22 October 2013). See also Professor RC Slye, B Dinka & Judge G Chawatama 'Opinion: Kenya: Missing paragraphs in the TJRC report on the land question' *AllAfrica.com* 3 June 2013 <http://allafrica.com/stories/201306032385.html> (accessed 22 October 2013).

105 In their dissenting opinion, the three international commissioners provide that they 'have no information with respect to whether the current President was aware of, or condoned, the actions of officials in the office of the President that we describe above. Needless to say, the same is true for the Deputy President.'

106 Dissenting Opinion (n 104 above).

107 LE Fletcher *et al* 'Context, timing and the dynamics of transitional justice: A historical perspective' (2009) 31 *Human Rights Quarterly* 163.

108 J Gondi 'Bridging the impunity gap in Kenya requires a holistic approach to transitional justice' 19 July 2012 International Centre for Transitional Justice <http://www.ictj.org/news/bridging-impunity-gap-kenya-requires-holistic-approach-transitional-justice#.UAgjyuOS0HM.facebook> (accessed 20 October 2013). See also M Mwangi 'Kenya: TJRC is a waste of time, claim civil society groups' *Capital FM AllAfrica.com* 5 August 2012 <http://allafrica.com/stories/201208050561.html> (accessed 22 October 2013).

109 Fletcher *et al* (n 107 above).

approached, though it is hoped that the recommendations will be wholly implemented without undue delay. There is a notable crescendo in the voices calling for the implementation of the report's recommendations, including by the Kenyan Diaspora Alliance (KDA), the conveners of which have said that this 'will help reconciliation and national healing' in Kenya.¹¹⁰ A number of national and international civil society actors have also called for the implementation of the recommendations, as has former Prime Minister Raila Odinga.¹¹¹

There are also some noteworthy elements of the TJRC which are important to highlight. It is worth acknowledging these elements for two reasons: First, it is not the intention of this article to dismiss the work of the TJRC. Rather, it is hoped that the voices calling for a credible and comprehensive implementation of the recommendations of its report bear fruit.¹¹² Second, some of the more innovative and impressive approaches of Kenya's TJRC may usefully serve as a model and guide of good practice for other countries considering implementing a truth commission. One of the key strengths of the TJRC is that its mandate extends to investigations of 'economic crimes'.¹¹³ This provision has been interpreted broadly by the TJRC as including violations of social, economic and cultural rights. This is a commendable approach, empowering the TJRC to address 'human rights violations more holistically, beyond classic violations of bodily integrity'.¹¹⁴ In fact, the Special Rapporteur touches on this strength in the 2013 report to the UN General Assembly.¹¹⁵ One further noteworthy strength is that the TJRC Act required gender equality to be accounted for in the appointment of commissioners.¹¹⁶ While it would be erroneous 'to assume that all female commissioners will bring expertise in addressing crimes against women – or that male

110 L Barasa 'Implement truth report, urge Kenyans in diaspora' *Africa Review* (online) 12 June 2013 <http://www.africareview.com/News/Implement-TJRC-report-say-Kenyans-in-diaspora/-/979180/1880234/-/521rs3/-/index.html> (accessed 21 October 2013).

111 Freedom House *Victims' voices heard in Kenyan Truth Commission Report* (2013) <http://www.freedomhouse.org/article/victims-voices-heard-kenyan-truth-commission-report> (accessed 20 October 2013). See also A Kisia & A Sum 'Raila Odinga calls for implementation of Truth, Justice and Reconciliation Commission report' *Standard Digital* (online) 26 May 2013 http://www.standardmedia.co.ke/?articleID=2000084568&story_title=raila-calls-for-implementation-of-tjrc-report (accessed 20 October 2013). See further Kenya Transitional Justice Network (KTJN) 'KTJN Press Release on the TJRC Report' 12 June 2013.

112 Office of the United Nations High Commissioner for Human Rights *Rule-of-law tools for post-conflict states: Truth commissions* (2006). See also CS Villalba 'Briefing paper: Transitional justice: Key concepts, processes and challenges' Institute for Democracy and Conflict Resolution (2011). In order for a truth commission process to be considered effective, a credible report must be released and its recommendations implemented.

113 Sec 6(g) Truth, Justice and Reconciliation Act of Kenya 6 of 2008.

114 Hayner (n 70 above) 74.

115 De Greiff (n 7 above).

116 Sec 10(3); First Schedule, sec 7 Truth, Justice and Reconciliation Act 2008.

commissioners will not', it is a step towards achieving gender justice through transitional justice.¹¹⁷

5.2 Justice

The Special Rapporteur emphasises the need to act on 'truths' disclosed through truth-seeking processes¹¹⁸ – the TJRC identified by name a total of 255 alleged perpetrators and recommended their prosecution or further investigation by the Office of the Director of Public Prosecutions (ODPP), or appropriate action to be undertaken by the relevant body (such as the National Land Commission) for investigation.¹¹⁹ As such, there is a clear need for criminal justice in Kenya in response to past human rights abuses. Teitel explains that '[t]rials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule.'¹²⁰ Van Zyl asserts that 'prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms and begin the process of reforming and rebuilding trust in government institutions'.¹²¹ Through these words, one sees the great importance of criminal justice in responding to human rights violations. In his report, the Special Rapporteur is emphatic regarding the fundamental role for prosecutorial mechanisms, though simultaneously quick to warn of the inadequacy of 'isolated and piecemeal prosecutorial initiatives' to quell claims for justice.¹²² This warning has great resonance for the case of Kenya, where the government 'has failed to ensure the prosecution of perpetrators in all but a handful' of post-election violence cases.¹²³

The CIPEV report highlights the instrumental role for criminal prosecutions in responding to the post-election violence, recommending the establishment of a special tribunal to eradicate cycles of impunity in Kenya.¹²⁴ Yet, there have been very few prosecutions, and even fewer convictions, and, at the domestic level, 'a near total lack of investigations of those who organised and financed the violence'.¹²⁵ Further, prosecution efforts have proven controversial, threatening to divide politically factions within the former Government of National Unity,¹²⁶ amidst reported attempts by one faction (the Party of National Unity) to 'own' and 'shape' the

117 Hayner (n 70 above) 89.

118 De Greiff (n 7 above) para 23.

119 See generally ch IV of Vol 4 of the TJRC Report.

120 Teitel (n 18 above) 40.

121 As above.

122 De Greiff (n 7 above) 8.

123 Human Rights Watch (n 9 above) 3.

124 CIPEV (n 9 above) 472.

125 Human Rights Watch (n 9 above) 3.

126 The Government of National Unity is the coalition government created by the National Accord and Reconciliation Act.

transitional process, particularly prosecutions.¹²⁷ Nevertheless, the fundamental role for criminal justice in Kenya's transitional process is crucial. Criminal prosecutions may abate the deep-rooted culture of impunity and ameliorate perceptions surrounding the legitimacy of the current government and state institutions.

As set out above in part three of this article, CIPEV recommended that the failure to establish a special tribunal should result in the referral of the names of the alleged perpetrators to the ICC.¹²⁸ Following failed attempts at legislating for the special tribunal (pursuant to the Special Tribunal for Kenya Bill 2009), on 9 July 2009 Kofi Annan referred a list of alleged perpetrators – those deemed most responsible for the post-election violence – to the then Chief Prosecutor of the ICC, Luis Moreno Ocampo.¹²⁹ The Kenyan population lauded this step,¹³⁰ reflective of frustrations surrounding an extant culture of impunity. This was coupled with a very real fear of political manipulation of any special tribunal to be established, given the apparent ethno-regional and political tensions. In this vein, Brown and Sriram assert that the fundamental reason for the government's failure to initiate prosecutions in Kenya is because 'those in charge of establishing these processes are ... those whom it would prosecute or their close allies'. This stance points to the appropriateness of international justice, through the ICC, for the case of Kenya.¹³¹

The ICC has subsequently charged three Kenyans of crimes against humanity – William Samoei Arap Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta.¹³² Significantly, two of those charged (Kenyatta and Ruto) were elected as Kenya's President and Deputy-President in the general elections of 4 March 2013 (running together as the Jubilee Coalition). This clearly creates a highly complex, high-risk, and politically-charged political transition in Kenya. The cases against Kenyatta and Ruto have brought the AU into direct confrontation with the ICC. As articulated in the introduction to this article, the AU's resolution of 12 October 2013 – that Kenyatta and Ruto's trials should be suspended until they complete their terms of office – is concerning.¹³³ The resolution also requires that Kenya should renew efforts to seek deferral of the cases against Kenyatta and Ruto, in

127 G Musila 'Options for transitional justice in Kenya: Autonomy and the challenge of external prescriptions' (2009) 3 *International Journal of Transitional Justice* 40.

128 CIPEV (n 9 above) 473.

129 'Panic as Kenya poll chaos case handed to ICC' *Daily Nation* 9 July 2009.

130 'It's The Hague, Kenyans tell violence suspects' *Daily Nation* 18 July 2009.

131 Brown & Sriram (n 67 above).

132 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang and Uhuru Muigai Kenyatta*. For further information, see http://www.icccpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200109/Pages/situation%20index.aspx (accessed 17 October 2013).

133 Ext/Assembly/AU/Dec 1, extraordinary session of the Assembly of the African Union, Addis Ababa, Ethiopia 12 October 2013 2-3; Decision on Africa's relationship with the International Criminal Court http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 17 October 2013).

conformity with article 16 of the Rome Statute of the ICC – these efforts would be endorsed by all African state parties.¹³⁴ This resolution therefore further complicates the process of achieving justice and accountability for post-election violence in Kenya.

Whether the deferral will be granted by the UN Security Council (UNSC) relies on a finding that the trial represents a threat to international peace and security as per chapter VII of the Charter of the United Nations. One view is that, in order to salvage the continental relevance of the ICC for Africa and ease tensions with the AU, the UNSC may grant the deferral, for fear of a threatened *en masse* continental withdrawal from the ICC. Alternatively, the UNSC may decline or ignore Kenya's request (as has previously been its approach), thereby risking its relationship with the AU and possibly compromising any future co-operation with the ICC. Yet, the recent majority decision by judges of the ICC to allow Kenyatta to be absent from some of the hearings of his trial (citing the attack on the Westgate shopping mall in Nairobi as one reason for the ruling), may assuage AU state parties, potentially fostering continued co-operation with the Court.¹³⁵

Moving to consider domestic criminal justice initiatives in Kenya, as stated above, domestic investigations and prosecutions have been limited. A Human Rights Watch report labels domestic prosecution efforts in Kenya as a 'half-hearted' effort at accountability. As such, 'hundreds of ... perpetrators of serious crimes continue to evade accountability'.¹³⁶ This deficiency can be attributed to a host of challenges, including inadequate investigations by police in terms of competencies and human and technical resources as well as a distinct lack of a political will in some cases.¹³⁷ Tensions surrounding ethnicity and inadequate witness protection programmes are significant challenges. As it relates to the state witness protection programme, there are significant concerns surrounding its credibility and independence. Indeed, as Ndubi suggests, 'those who are supposed to protect the witnesses are the ones the witnesses are likely to testify against'.¹³⁸

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

134 n 133 above, art 10(vii).

135 *The Prosecutor v Uhuru Muigai Kenyatta* [ICC] *Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*, <http://www.icc-cpi.int/iccdocs/doc/doc1667182.pdf> (accessed 17 October 2013).

136 Human Rights Watch (n 9 above) 4.

137 Human Rights Watch (n 9 above).

138 'Will witness protection law work?' *The Standard* 26 July 2009.

created to try cases of post-election violence, to be effective as of late 2013.¹³⁹

This special division would complement (and not replace) the ICC criminal prosecutions, and have jurisdiction to try, *inter alia*, international crimes.¹⁴⁰ Importantly, the success of this initiative depends on the 'political, financial and institutional commitment' of the Kenyan government, as emphasised by the Judicial Service Commission sub-committee tasked with overseeing the setting up of the ICD.¹⁴¹

5.3 Reparations

UN guidelines require states to provide effective remedies, including reparations, to victims for acts or omissions which can be attributed to the state and which constitute gross violations of human rights or serious violations of international humanitarian law – this must be 'adequate, effective and prompt'.¹⁴² Yet, to date, there has been no comprehensive reparations programme in Kenya for gross human rights violations suffered. Only some limited forms of assistance to victims have been afforded – this has not been accompanied by any measure of accountability. The Kenyan government has made some minimal payments to a minority of all people displaced during the post-election violence of KSh 10 000 and KSh 25 000 (approximately US \$117 and US \$293 respectively). These payments were to provide for basic needs and the reconstruction of homes.¹⁴³ Yet, these payments have not been framed (or conceived of) in terms of reparations *per se*; rather, they have functioned as mere emergency assistance, and are far from comprehensive.¹⁴⁴ Further, allegations of

139 R Obala 'Special court to complement ICC to be created' *The Standard* 17 December 2012 http://www.standardmedia.co.ke/?articleID=2000073088&story_title=Kenya-Special-court-to-complement-ICC-to-be-created (accessed 2 February 2013). See also P Seils & E Gonzalez 'ICTJ Forum: March 2013' http://ictj.org/news/ictj-forum-march-2013?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=90aebc6693-World_Report_Issue_21_March_2013&utm_medium=email (accessed 20 October 2013).

140 Obala (n 139 above) 127. The Chief Justice's articulation of the intended jurisdiction of the ICD includes, *inter alia*, crimes against humanity, post-election violence, piracy, money and cyber crimes.

141 F Oluoch 'International crimes to be tried locally' *The East African* (online) 1 December 2012 <http://www.theeastafrican.co.ke/news/International-crimes-to-be-tried-locally/-/2558/1634454/-/s6kt45/-/index.html> (accessed 20 October 2013). Note, however, that some civil society actors in Kenya have called for the creation of a hybrid tribunal in Kenya, external to the Kenyan High Court. The intention is that the hybrid tribunal would be comprised of both Kenyan and international judges, in an attempt to somewhat safeguard the independence of the tribunal.

142 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted in 2005. Note that these guidelines stem from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are binding on states.

143 Robins (n 97 above).

144 Robins (n 97 above) 10-11.

'non-uniformity of the compensation, which both victims themselves and the organisations working with them see as favouring Kikuyu victims' have fuelled 'confusion and tension'.¹⁴⁵ Allegations of the insertion of ethnicity into the compensation programme are certainly extremely perilous and inflammatory. Notably, civil society organisations have called for transitional justice mechanisms in Kenya to better account for the needs and concerns of victims, in particular calling for the establishment of a comprehensive reparations programme.¹⁴⁶

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

5.4 Guarantees of non-recurrence

5.4.1 Constitutional reform

In August 2010, a new Constitution was promulgated for Kenya, the Constitution of Kenya, 2010, replacing the Constitution which had been negotiated at independence in 1963. Kenya's new Constitution is noteworthy for its incorporation of a robust bill of rights¹⁴⁷ and provisions for the creation of an independent electoral management body,¹⁴⁸ an independent judiciary,¹⁴⁹ executive¹⁵⁰ and parliament,¹⁵¹ a decentralised political system and a framework regulating a system of devolved government.¹⁵² The constitutional reform process has served to lay the ground for important institutional reforms of Kenya's justice and security apparatus and other governance institutions, geared to prevent the recurrence of human rights atrocities.

Further, the new Constitution is lauded for vastly diminishing the extensive executive powers enjoyed under the previous dispensation – this was one perceived causal factor of the post-election violence.¹⁵³ Such provisions relate to public appointments, lack of separation of powers, undue influence over the parliamentary calendar, weakened oversight bodies, and lack of adequate checks and balances. For

145 Human Rights Watch interview with IDP Network Chairperson Patrick Githinji, Nakuru, 24 October 2011 in Human Rights Watch (n 9 above) 79.

146 Robins (n 97 above).

147 Arts 19-51 Constitution of Kenya, 2010.

148 Art 88.

149 Art 160.

150 Arts 129-155.

151 Arts 93-105.

152 Arts 174-200.

153 C Moser & D Rodgers *Understanding the tipping point of urban conflict: Global policy report (draft)* (2012).

example, all public appointments under the new constitutional order require a robust process of recruitment, which is further subject to parliamentary approval.¹⁵⁴ Additionally, provisions aimed at eliminating political influence of the executive (that had perpetually marred judicial operations) have facilitated judicial independence. Another key strength of the Constitution is the creation of an ombudsman commission,¹⁵⁵ as well as other oversight bodies¹⁵⁶ important for the effective and accountable functioning of government.

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

5.4.2 Judicial reform

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

154 See, generally, ch 13 Constitution of Kenya 2010, on commissions and independent offices.

155 The Commission on Administrative Justice, created under the Commission on Administrative Justice Act, 2011 created pursuant to ch 15, Constitution of Kenya, 2010.

156 Art 248 of the Constitution of Kenya, 2010 establishes numerous oversight bodies.

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

158 ICC Pre-Trial Chamber *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article (19)(2)(b) of the Statute, 30 May 2011 ICC-01/09-02/11-96.

159 n 158 above 6.

judiciary had 'acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution'.¹⁶⁰ As such, the judiciary was not seen as a legitimate forum for the resolution of disputes, and therefore ineffective in limiting violence.¹⁶¹ The Task Force on Judicial Reforms (appointed by the government of Kenya in 2009) has since acknowledged the manifest corruption of the Kenyan judiciary.¹⁶² Significantly, in terms of achieving judicial reform, some noteworthy headway has been made (such that this is one of the *qualified* success stories of Kenya's transitional justice project): specifically, the adoption of a stringent method of appointing judicial officers and the vetting of current judicial officers. The Constitution of Kenya provides for the establishment of an independent Judicial Service Commission, imbued with the authority to make judicial appointments.¹⁶³ The Constitution also calls for the enactment of legislation for the vetting of judges and magistrates.¹⁶⁴ This constitutional provision has been implemented pursuant to the Vetting of Judges and Magistrates Act 2011 (Kenya). Under the Act, to date 69 High Court Appeal judges have been vetted, with 14 removed from office, and 351 magistrates vetted.¹⁶⁵

Significantly, the Kenyan Parliament enacted legislation that sought to insulate the decisions of the Judges and Magistrates Vetting Board.¹⁶⁶ Importantly, the law sought to suspend judges or magistrates who requested a review of the Board's decision until such reviews were fully determined.¹⁶⁷ This positive development responds to the dubious decision by the Kenyan High Court that sought to reinstate a suspended judge pending the determination of their appeals.¹⁶⁸ This was despite the effect of an exclusion clause in the Constitution that 'a removal, or the process leading to the removal of a judge from office by virtue of the operation of legislation ... shall not be subject to question in, or review by any court'.¹⁶⁹ Ambos suggests that one indicator of the success of transitional justice is the 'extent to which it contributes to ... the consolidation of ... the domestic judicial system'.¹⁷⁰ Applying this to Kenya's judicial reform efforts to date (in particular, a robust vetting process), coupled with the proposal for the

160 CIPEV (n 9 above) 460. See also MK Mbondenyei 'The place of the judiciary in democratic transitions in Africa: A comparison of post-apartheid South Africa and post-authoritarian Kenya' (2010) 9 *Judiciary Watch Report* 303.

161 Seils & Gonzalez (n 139 above).

162 Report of the Task Force on Judicial Reforms (2009) 74-77.

163 Art 20 Constitution of Kenya, 2010.

164 Art 23.

165 Seils & Gonzalez (n 139 above). However, note that there are mixed reports on how effective the process of vetting of magistrates has been.

166 The Vetting of Judges and Magistrates Act 43 of 2012.

167 Secs 21 & 22 The Vetting of Judges and Magistrates Act 43 of 2012.

168 *Hon Lady Justice Jean Gecheche v The Judges and Magistrates Vetting Board and the Judicial Service of Commission*, Judicial Review Application 295 of 2012.

169 Art 23(2), Sixth Schedule, Transitional and Consequential Provisions, Constitution of Kenya, 2010.

170 Ambos (n 74 above).

creation of the International Crimes Division within Kenya's High Court, there is some early indication of the transformative potential for transitional justice.

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

5.4.3 Police reform

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

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

171 *International Centre for Policy and Conflict & 5 Others v the AG & 4 Others* Constitutional and Human Rights Division Petition 552 of 2012 (2013) eKLR, http://kenyalaw.org/CaseSearch/view_preview1.php?link=11903065891756192934559 (accessed 17 May 2013).

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

173 Human Rights Watch (n 9 above) 4.

174 As above.

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

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

175 The National Task Force on Police Reforms 2009 (commonly referred to as the Ransley Task Force) http://marsgroupkenya.org/pdfs/2012/11/Report%20of%20the%20National%20Task%20Force%20on%20Kenya%20Police%20Reforms%20-%2021st%20October%202009%20-%20The%20Ransley%20Report_.pdf (accessed 25 October 2013). See also the report by the UN Special Rapporteur on Extra-Judicial Executions 28 May 2009. This was later captured under the National Police Service Commission Act 30 of 2011.

176 Arts 243 & 246 Constitution of Kenya, 2010.

177 National Police Service Act 11A of 2011.

178 Sec 10 National Police Service Act.

179 National Police Service Commission (Amendment) Bill 2013.

180 S Omondi ‘Killing the National Police Service Commission’ KNCHR 7 August 2013 <http://www.knchr.org/SamsonOmondiKillingtheNPSC.aspx> (accessed 20 October 2013).

181 National Task Force on Police Reforms (2009) 82.

182 Established under Independent Policing Oversight Authority Act 35 of 2011.

6 Have the goals of transitional justice been achieved in Kenya?

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

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

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

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

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

183 De Greiff (n 7 above).

184 As above.

185 Ambos (n 74 above) 22.

186 E Brahm 'Uncovering the truth: Examining truth commission success and impact' (2007) 8 *International Studies Perspectives* 16. This point is picked up also in Olsen *et al* (n 3 above).

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

7 Conclusion

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

187 De Greiff (n 7 above) 11.

188 D Miriri & H Malalo ‘Second Kenyan minister charged with inciting violence’ *Reuters* (online) 27 September 2012.

189 Gondi (n 108 above).

190 As above. See also Brown & Sriram (n 67 above). See also Human Rights Watch (n 9 above).

191 Seils & Gonzalez (n 139 above).

The authors of this article therefore call on the Special Rapporteur to issue a request to the government of Kenya in order to conduct a country visit, pursuant to the Special Rapporteur's mandate. Such a focus on Kenya by the Special Rapporteur could have an important impact in ensuring that Kenya avoids further gross human rights violations. Access to quality technical assistance and advice, as well as the further elevation of crucial human rights issues to the international level, may have a powerful impact. In this context, the words and derisive tone of Kenyan poet, Phyllis Muthoni, have great resonance, and point to the urgent need for response (and yet are extremely haunting):¹⁹²

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

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

192 P Muthoni *Lilac uprising: Poems for the city and other places* (2010) 92.