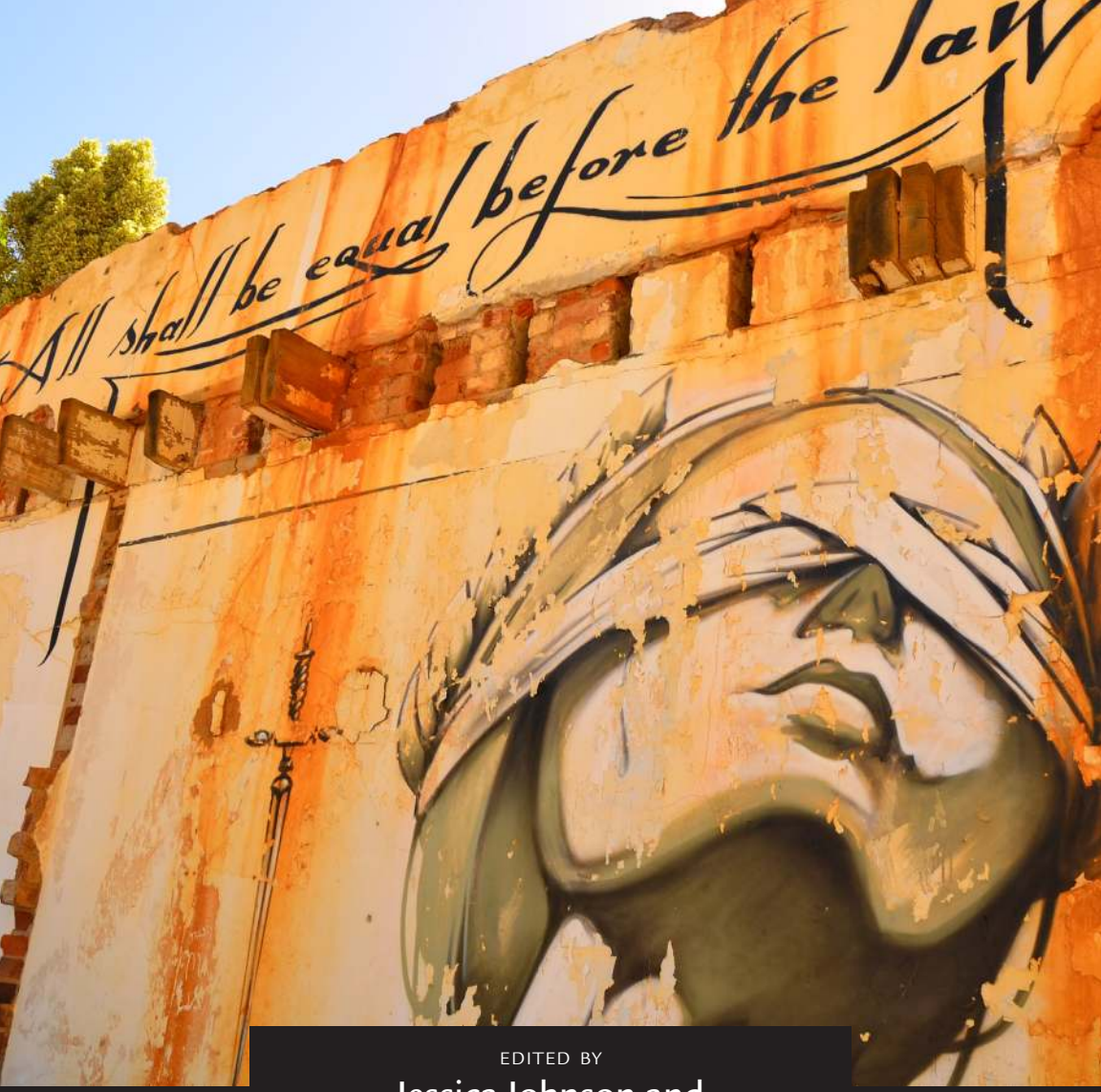

EDITED BY
Jessica Johnson and
George Hamandishe Karekwaivanane

Pursuing Justice in Africa

Competing Imaginaries and Contested Practices

CAMBRIDGE CENTRE OF AFRICAN STUDIES SERIES

Pursuing Justice in Africa

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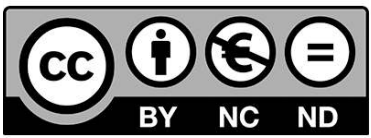

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Discussions with participants and audience members during the event convinced us that there was scope for a volume addressing engagements with justice on the African continent. We are grateful to all those who participated in the conference, including those whose research does not feature directly as chapters of the volume but whose contributions during the conference shaped our thinking and encouraged deeper reflection. Our thanks in particular to Jocelyn Alexander, Gerhard Anders, Phil Clark, Christopher Forsyth, Dorothy Hodgson, Sheryl McCurdy, Sarah Nouwen, Nicola Palmer, and Peter Redvers-Lee.

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Introduction

Re-centering Justice in African Studies

JESSICA JOHNSON AND
GEORGE HAMANDISHE KAREKWAIVANANE

IN RECENT DECADES, JUSTICE HAS BEEN OVERSHADOWED AS A subject of concern for scholars of Africa by vast literatures centering on rights, crime, punishment, policing, and social order. Given the increasing presence of international justice institutions, such as the International Criminal Court, on the African continent and the remarkable diversity of legal structures of justice, this neglect is striking. Indeed, across Africa complex pluralities of "customary," religious, state, and transnational justice regimes interact on what is often contested terrain.

This volume builds on recent work in sociolegal studies that foregrounds justice over and above concepts such as human rights, legal pluralism, or vigilantism. We do so in an empirical as well as a theoretical sense, asking both what it is that people mean when they invoke "justice" on the ground, and what we might gain as analysts by framing our studies through the lens of justice. We see justice as promising in its expansiveness, its ability to hold together disparate topics, time periods, and locations, and its broad appeal to scholars, policy makers, and ordinary citizens across Africa and beyond. There is an instinctive sense in which justice is greater than human rights and more capacious than law. And yet they are related in practice as they are in (legal) imaginaries. It is in their interstices that the chapters of this volume are located, and the authors work to delineate the specific relevance of justice to their particular concerns. Here, we ask more generally, why justice? What

might we gain and lose by focusing on justice in our efforts to understand the hopes and aspirations of men and women in Africa as they intersect with legal realms?

While the theme of justice has been accorded a somewhat marginal place in African sociolegal studies, it has been central to the field of moral and political philosophy. From Aristotle's musings about what it means to be a just person, through to John Rawls's and other latter-day philosophers' reflections on what a just society might look like, numerous theories of justice have been advanced.[1] "The positions," Robert Solomon notes, "have been qualified, the objections answered and answered again with more objections, and the ramifications further ramified and embellished. But the hope for a single, neutral, rational position has been thwarted every time."[2] It is, however, possible to discern an approach to thinking about justice that has proved to be increasingly dominant in the work of a number of contemporary philosophers such as John Rawls, Ronald Dworkin, and Robert Nozick. This approach seeks to define what a perfectly just society would look like in the abstract and to prescribe the institutional arrangements that are necessary in order to achieve it.[3] This "transcendental institutionalism" can be traced back to the work of Enlightenment thinkers such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. However, as Amartya Sen points out, there are two main problems with these theories of justice. First, they are, for the most part, not feasible as it is unlikely that a consensus about the perfectly just society could ever be reached. Second, a theory about the perfectly just society is of no real use when one is more likely to be confronted with a decision between imperfect but realizable options. Sen thus proposes an alternative theory of justice that focuses on the use of reason in deciding the more just of two or more realizable options.

Notwithstanding the insights offered by Sen and his interlocutors, in this volume we take a different approach. Our aim is not to propose an overarching and abstract theory of justice in Africa. The divergent understandings and experiences of justice from across the continent that are captured in this volume cast doubt on the usefulness of such a theory. Instead, we start from the proposition that "justice is inextricably contextual."[4] As Kamari Clarke and Mark Goodale have pointed out, individual and collective decisions about what justice means and how to pursue it are rarely, if ever, made from behind a Rawlsian "veil of ignorance."[5] Considerations about what makes a specific act an injustice, what a just arrangement would be, and how to go about restoring the

balance are all substantially influenced by specific sociocultural, economic, and political contexts. As such, at the center of this volume are real people in concrete circumstances and their quests for justice. The chapters therefore focus on particular actors pursuing specific visions of justice in Africa, and the authors attend to their aspirations, divergent practices, and articulations of international and vernacular idioms of justice. It is for this reason that we refer to the pursuit of justice in the volume title. Pursuing justice claims in Africa, as elsewhere, is necessarily a dynamic and historically situated process. We conceive of justice as something that is striven for rather than a state of being that could ever be taken for granted. Precisely what it is that people strive for when they seek justice cannot be assumed: as the chapters that follow show, aspirations for justice are many and varied, and there is much to be gained from treating justice as the subject of inquiry rather than proceeding as if the contours of justice were everywhere the same. As a result, we do not offer a pithy definition of "justice." One of the key things that connects the various chapters of this volume is a commitment to approaching justice from a position of openness. The authors ask questions such as What is being claimed in the name of justice, and How do people recognize justice or injustice when they encounter them? Within this shared orientation, disciplinary differences remain, and we see the multidisciplinarity of the volume as a further strength.

While our intellectual project differs from Sen's in an important respect, there is one objective we share. Like Sen, the contributors to this volume look beyond the canon of Western moral and political philosophy, seeking to uncover local understandings and practices of justice and to tease out the insights that emerge. As such, the chapters deal with such themes as Baganda debates about the administration of justice (Earle), the influence of *maslaha* (an Islamic concept connoting public weal) among Somali refugees (Ikanda), and Acholi ideas and practices of justice in the wake of a long and bitter civil war (Porter, Macdonald).

Nevertheless, it is not our intention to dismiss more abstract approaches to thinking about justice. The fundamental questions that have driven moral and political philosophers' inquiries into justice are similar to those that have exercised individuals and communities in Africa. These include questions such as, what does it mean to be a just man or woman? What constitutes a just society, and how might we achieve one? How can we come to terms with violent acts and the perpetrators of such acts? The chapters in this volume examine contextually grounded

responses to these fundamental questions about justice. The Muslim sermons Felicitas Becker examines, for example, wrestle with the question of what it means to be a just woman. At the same time, the *maslaha* talks Fred Ikanda investigates are concerned with restoring order after violence, while Olaf Zenker's chapter focuses on South Africa's struggle to create a more just society through the distribution of resources. At times, the writings of Enlightenment thinkers have informed African understandings of justice. It was not uncommon for educated elites to invoke Enlightenment philosophers in their critiques of colonial and postcolonial governments. As Jonathon Earle's chapter shows, classical liberal philosophers, such as Rousseau, shaped the thinking of the Ugandan politician Benedicto Kiwanuka. What all of the chapters in this volume share is a concern to understand what justice means to particular African actors in particular times and places.

Law, Rights, and Justice in Africa

Over the last three decades the field of African sociolegal studies has grown in breadth and depth as scholars have brought the theoretical insights and methodological approaches of their respective disciplines to bear on a range of themes. A central concern of many studies has been to understand the multiple ways in which law has been employed in past and present projects of state construction in Africa. Historical and anthropological studies of the colonial period, for example, demonstrate that law was central both to the constitution of the state and to the assertion of its power. Law, we have learned, was a key symbolic "language of stateness,"[6] while the courts instantiated the state and served as sites where its power was ritualized and performed.[7] Evidence from settler states such as South Africa and Southern Rhodesia (Zimbabwe) demonstrates that the adherence to legalism was actually about expanding, as opposed to constraining, state power.[8] Law was the means by which colonial officials commanded and demanded, empowering them to conscript forced labor, expropriate land, and extract tax. At the same time, they sought to use it to construct a new moral and social world in their African colonies.[9] The manipulation of the law by colonial states extended to efforts to "invent" customary law and co-opt African male elders in order to stabilize colonial governance through "Indirect Rule."[10] In much of this state-focused literature, however, the notion of justice was not subjected to critical reflection. When it did feature, it was used descriptively to refer to the legal system, or metaphorically as a way of talking about the administration of law.

Studies of the (ab)uses of the law by colonial states provoked two key responses. The first was an effort to counterbalance the narrative by showing how law could be appropriated by the ruled. Echoing E. P. Thompson,[11] scholars maintained that despite, and often because of, law's complicity with the colonial project, it was available for appropriation by colonial subjects.[12] The sites where it was administered could be usurped, albeit temporarily, and elaborate performances of state power could be subverted by nationalists who transformed courtrooms into theatres of resistance. However, optimism about the emancipatory possibilities of the legal arena was tempered by studies that showed its limits as a site of agency or resistance. Law, as Richard Abel cautions, is more effective as a shield than a sword.[13] In addition, courtroom victories against repressive authorities often served to expose legal loopholes that were swiftly closed and resulted in even more repressive legislation. The second response issued a caution against adopting a default cynicism toward legal struggles. In her examination of the Botswana Manual Workers Union strikes and litigation between 1991 and 2011, Pnina Werbner shows that the law is not simply an expression of the interests of the powerful. "Notions of fairness and unfairness," she notes, "permeate [workers'] relations with employers, and hence also litigation and negotiation in labor disputes."[14] Similarly, the presiding judges did not simply focus on the facts of the matter and the relevant law. Rather, they considered what was "morally and ethically at stake" in the cases before them, appealing to ideas such as "fairness," "reasonableness," and "legitimate expectations" in their rulings.[15] Taken together, such studies encourage a more nuanced view of the law and its effects in African contexts.

Approaching sociolegal studies from a different perspective, a wave of research on penality published in the 1990s and early 2000s evinced a preoccupation with power, owing, in part, to the influence of Michel Foucault.[16] Drawing on Foucault's work, many of these studies sought to investigate the ways in which power found expression through different penal practices. While some scholars, including Florence Bernault, found Foucault's ideas useful in thinking about the history of penal practices in Africa, several others cast doubt on the relevance of his work.[17] Among other things, they demonstrated that neither the concept of the "carceral archipelago" nor the shift from premodern to modern techniques of punishment, which Foucault distils from European history, map onto the experience of African countries particularly well. As Foucault's hold on the research agenda has waned, alternative

avenues of inquiry have emerged. Taylor Sherman, for instance, calls for new studies of punishment in colonial and postcolonial contexts that are not focused on single institutions or penal practices but instead explore "the interlocking nature of different practices and institutions" and the way they combine to constitute a coercive network.[18] In addition, recent social and political histories of prisons show that they were not necessarily only sites of suffering and death but were often also spaces where productive politics could, and did, emerge.[19]

It is in the research on crime, however, that the multiple ways in which legal language can be mobilized discursively have been brought to the fore most forcefully. Labels like "criminal," "deviant," and "delinquent" have often been deployed by powerful groups to serve their sectional interests. In colonial Mombasa, Justin Willis shows how the criminalization of palm wine was linked to concerns about labor supplies,[20] while Linda Chisholm demonstrates that the deployment of ideas about deviance in relation to white girls in early twentieth-century Natal signified a desire to control female sexuality and channel it in directions that were deemed respectable.[21] Similarly, Nakanyike Musisi notes that the application of the label "bad women" in colonial Uganda partly reflected the anxieties of male elders in the context of rapid social change and the erosion of patriarchal control.[22] As we shall see, the importance of paying attention to the languages of law is a key theme of this volume.

Scholars working in the field of African sociolegal studies have not been able to avoid dealing with the ever-present reality of violence in the legal arena. They have grappled with a range of questions, such as What is the relationship between law and violence? What forms of violence are utilized in the legal arena, and how are they legitimated? Who is targeted by specific acts of violence, and what intended or unintended meanings does such violence carry? Studies of flogging, in particular, reveal how law was used to authorize colonial violence. In colonial Natal, for example, flogging was legally sanctioned and brutally applied, and it served both as a deterrent and a performance of racial power.[23] Nevertheless, it is clear from the research on carceral, corporal, and capital punishment that investing legally sanctioned violence with meaning has never been easy.[24] For one thing, there were often disagreements within the colonial state about appropriate or legitimate levels of violence. This was further complicated by the inevitable discrepancies between the intended and received messages of violence, as well as possibilities for its subversion. Richard Wilson has highlighted the ongoing complexities of violence in

postapartheid South Africa, where the sanctioning of violent retribution continues to invite debate amid ambivalent local claims to legitimacy.[25]

Recognition of the complex uses and meanings of violence has also been central to studies of vigilantism. The fragmented sovereignty of many postcolonial African states, and their inability to command a monopoly of legitimate force, have given rise to the active privatization of violence. However, as Lars Buur and Steffen Jensen point out, the relationship between states and vigilantes need not always be viewed as antagonistic. Vigilantes regularly appropriate state symbols and practices, and they often operate with the tacit approval of state officials.[26] Studies of vigilantism have also paid attention to the "semiotic potential of vigilante violence."[27] As Atreyee Sen and David Pratten make clear, public acts of vigilante violence signify efforts to define the boundaries of the moral community by marking out who or what is deemed to be outside of it.[28] Of particular significance, however, is the more critical way in which the literature on vigilantism has engaged with the concept of justice. It is clear that vigilantism cannot simply be reduced to mob violence, and thus scholars have had to do more work to uncover the moral economies and notions of justice that animate vigilante groups.

It is in studies of transitional justice, however, that the concept of justice has received its most comprehensive treatment in recent years. The many experiments with transitional justice in Africa since the establishment of the South African Truth and Reconciliation Commission (TRC) and the International Criminal Tribunal for Rwanda in the mid-1990s have given rise to a vast literature that examines diverse efforts, at both local and national levels, to deal with the social, political, and economic legacies of large scale atrocities.[29] These studies have examined the retributive, deterrent, and restorative approaches to justice that have informed different transitional justice agendas. In addition, they have paid close attention to the institutions and processes behind them, from innovative Truth and Reconciliation Commissions to self-consciously "traditional" court procedures. More recently, scholars have begun to move beyond the usual sites where "ideas about justice, reconciliation and political participation are . . . instantiated and contested."[30] This shift has seen less conventional spaces, such as refugee camps, prisons, and reeducation camps for demobilized combatants, emerge as important sites of study.[31]

The transitional justice literature has persuasively challenged some of the normative assumptions about justice that have often shaped the

work of aid agencies. One such assumption is that "justice," by which is often meant instituting criminal proceedings against alleged perpetrators of war crimes in domestic or international legal forums, is an unambiguously "good" thing. The decision to forgo the prosecution of apartheid leaders, and to make reconciliation a central objective of the South African TRC, signaled the early questioning of this assumption. The prosecutions initiated by the International Criminal Court (ICC) in Uganda, the Democratic Republic of Congo, and Darfur revealed further tensions between justice and peace in contexts where arms have yet to be laid down or peace is still fragile.[32] In theory, the prosecution of alleged perpetrators of war crimes bears the promise of ensuring peace by acting as a deterrent to others who might be inclined to commit similar crimes. In reality, however, the threat of prosecution has often proved to be an obstacle to achieving peace, as alleged perpetrators have refused to lay down their arms until they are assured of amnesty. Clearly, an analytical framing that posits an opposition between justice and peace relies on a much narrower, not to mention externally determined, conception of justice than we propose in this volume.

The second and related assumption that has been challenged is the view that a liberal notion of justice is universally acceptable and can, therefore, be pursued in any context. The challenges of implementing externally imposed transitional justice mechanisms in areas like Northern Uganda laid bare the fallacy of such universalizing assumptions. This in turn led to a substantial investment by donor agencies, NGOs, and scholars in searching for "locally grounded and socially acceptable" means of dealing with people who have committed violent acts or crimes against the community.[33] It was hoped that these could be incorporated into broader national transitional justice agendas. The most significant effort to employ local idioms as a means of achieving transitional justice was the *gacaca* court system in Rwanda, which was based on a traditional Kinyarwanda practice of "conducting hearings in open spaces in full view of the community."[34] All told, between 2002 and 2012, over 250,000 lay judges tried approximately 120,000 alleged genocidaires in about 11,000 jurisdictions.[35] On the face of it, this concern with uncovering local practices and idioms of justice, such as *gacaca* in Rwanda, as well as *mato oput* in Northern Uganda, seems laudable. However, donor-driven searches for local practices that could be instrumentalized have resulted in rituals being taken out of their original contexts and "reinvented" for new purposes.[36] Building on Paulin Hountondji's work on

ethnophilosophy, Adam Branch has shown that donor-driven efforts in Northern Uganda have given rise to an essentialized view of Acholi traditional justice.[37] This "ethnojustice," he argues, poses the risk of helping uphold the power of a specific social group and legitimizing "a disciplinary social project . . . which imposes the same forms of domination and inequality that gave rise to conflict in the first place."[38] In an evocative phrase, Branch characterizes this as "the violence of ethnojustice."

When talking about justice in Africa, it is impossible to proceed without engaging with human rights. Human rights talk is loud in Africa, and it is often intimately intertwined with aspirations for justice and the expectation that where rights lead, justice will follow. Just as human rights have animated conversations, policy documents, media reports, and NGO programs in Africa, they have also been the subject of a great deal of Africanist scholarship, particularly in the field of legal anthropology. Importantly, the anthropological study of human rights has highlighted the broad reach of this global discourse, as well as illustrating some of the ways in which it has been subjected to transformation as it has come up against particular demands.

Across Africa, from large cities to remote villages, from conflict and postconflict zones to areas with no living memory of mass violence, human rights are discussed, debated, claimed, and rejected on a daily basis. Rights are engaged with in European and local languages, and by women, men, youths, politicians, civil society organizations, and donor representatives. Human rights are understood in myriad ways: embraced at the same time that they are held to account for their neocolonial intent,[39] their disruptive potential, and the sense that they have been pushed too far, undermining the fabric of society and respect for older generations and traditional ways of life.[40] For many "ordinary" African citizens, then, as for some of their leaders, the equation between rights and justice is not unambiguous.

Human rights came to prominence in the legal anthropological literature in the form of seemingly interminable debates weighing the merits of a universalizing schema against the broadly relativist sensibilities of the discipline.[41] Ultimately, the framework of universalism versus relativism proved limiting, and discussions of human rights began to focus on the effects of human rights discourse and practice on the ground, looking at how rights were being claimed, invoked, and put to use in particular settings.[42] This move made plain that human rights could be much more malleable than the earlier approach had allowed; they could be "vernacularized," in Sally Merry's terms, made to bear the imprint of

local understandings and concerns, albeit in a circumscribed manner.[43] This volume maintains an empirical focus on the ways in which African citizens, and other actors operating within Africa, engage with rights, both practically and rhetorically, in their efforts to address particular kinds of injustice.

More recent scholarship in legal anthropology has sought to tease out differences between human rights and justice. Goodale and Clarke thus argue that justice functions discursively "as an ever-receding and ever-shrouded social ideal, rather than as an alternative normative orientation characterized by a set of concrete expectations and practices."[44] They highlight what is perhaps justice's most captivating characteristic: its ability to unite people with disparate concerns and interests in its pursuit; in other words, its motivating force. Parties to disputes can usually agree that they are each seeking justice, that a just resolution to their differences is their shared goal. Of course, what constitutes justice in each situation is a more complicated (and contested) question. Human rights, on the other hand, vernacularized or not, are prescriptive; they exist in relation to a body of documents that has been ratified by governments around the world. Specified in this way they can be politicized, critiqued, and rejected. Perhaps most importantly, human rights are formally defined in advance of the claims that people make, the things that they worry about and aim for. Justice, on the other hand, is not.

Aspirations for justice play out on a number of different scales: as a matter of structural change, or in the realm of interpersonal relationships; as a question of personal ethics, religious beliefs, or individual conduct; as well as a concern for governments, militaries, and national and international criminal courts. The very notion of aspirations for justice indicates that justice exists on a plane with hope. There is a prospective quality to justice talk, just as there is to hope;[45] both contain within them a vision of the future, and both provide motivation for action that seeks to shape that future. Indeed, this could be said to be where justice's political potential lies.

The chapters in this volume investigate these varied aspirations for justice across Africa and the ways they have been articulated and enacted both in the recent and the more distant past. In part I of the volume, the chapters attend to the ways in which ideas about religion and morality shape individual and collective quests for justice. In so doing they also illuminate local languages of justice, which open the door to achieving a nuanced understanding of how individuals conceive of justice in Africa.

Part 2 of the volume is devoted to the theme of gender justice in Africa. The chapters in this section explore some of the ways in which women, girls, and sexual minorities seek recourse in the face of grave injustices. In addition, they cast light on the multiple tensions that the search for gender justice can provoke. In Part 3, the focus turns to the question of resource injustice in Africa and efforts to resolve it. These chapters tease out the complex nexus between justice and conflict. In what follows we lay out the key themes of the volume in more detail and introduce the individual chapters.

Morality, Religion, and the Languages of Justice

In large part, justice is of interest to scholars in the field of sociolegal studies because it combines legalism and morality, and research focusing on the relationship between morality and justice in Africa has a distinguished history, particularly in the work of Max Gluckman.[46] Gluckman's ethnographic engagement with Barotse law in Northern Rhodesia (Zambia) led him to write explicitly about the proximity of morality and justice, and about the ways in which those charged with administering the law strove to navigate a complex moral and legal landscape. Famously, he introduced the figure of the "reasonable man" to gain purchase on exactly how they did this, arguing that judges employed the concept of the reasonable man in order to weigh the cases before them against standards for the reasonable behavior of people occupying particular social positions: as reasonable brothers, sisters (reasonable men were not always male), uncles, aunts, parents, headmen, and so on. Crucially for Gluckman, "the upright man is implicit in the reasonable man,"[47] and thus considerations of moral judgment and comportment entered into judges' decisions. Indeed, as Pnina Werbner has recently pointed out, the concept of the reasonable man is misunderstood if it is "taken as a substantive description of a type of person rather than as a principle of practical ethical judgment."[48] It is also key to grasping how Barotse judges dealt with changing circumstances under colonial rule, which were reflected in shifting expectations for reasonable behavior.

For Gluckman, it was highly significant that concepts like "reasonable," "right," and "duty" were flexible in a way that provided leeway to interpret legal rules in the light of historically shifting moral and ethical considerations. He argued that the flexibility of linguistic terms like these, which blend the legal and the moral, allowed logical arguments to be built that served to "import justice into judgement."[49] Gluckman

insisted on the need to pay careful attention to vernacular terms while at the same time seeking to grasp their specificities through comparative efforts that necessitated the use of English-language legal categories and analytical terms. In the context of a volume that brings together studies from across the African continent in an effort to advance understandings of justice that transcend particular settings, it goes without saying that we require a language of justice that can travel. Nevertheless, African languages of justice are a fertile source of conceptual inspiration for our contributors.

The words employed to refer to concepts of rights and justice in African languages cover different semantic fields, and paying attention to these can be instructive, not least in bolstering Gluckman's claims as to the proximity of justice and morality. In the Chichewa/Chinyanja language, widely spoken in Malawi as well as in parts of Zambia and Mozambique, "justice" finds a ready and somewhat uncontroversial translation in the word *chilungamo,* which is derived from the verb *kulungama,* to be righteous, honest, and fair, as well as to be straight or upright. Human rights, on the other hand, have taken hold by way of the less straightforward coinage, *ufulu wachibadwidwe,* "birth freedom" or the "freedom one is born with," since the transition to multiparty politics in the mid-1990s. The individualizing use of "freedom" (*ufulu*) for "right" has had a narrowing effect on the kinds of claims that can be convincingly made in the Chichewa/Chinyanja language of human rights, particularly when combined with an emphasis on political and civil rights, however understandable the latter may have been at the dawn of the multiparty era. As Harri Englund has argued, when rights are individual freedoms, "obscured is the fact that people generally pursue freedoms from unequal positions."[50] Englund's discussion can be read alongside Kathleen Rice's recent examination of Xhosa terms for human rights, which include *irhayti,* a "Xhosaization of the English '[human] right.'"[51] This new coinage is apparently necessary in order to capture the values of "autonomous action and equality as parity" (35),[52] which, while seemingly central to the English language concept of human rights, are not contained within the vernacular term *amalungelo,* "a socially embedded and relational form of rights" (29).[53] By contrast with Chichewa/Chinyanja, in certain other African languages, rights have found more ready cognates, while translations for justice have proved difficult to pin down. This is the case in Kiswahili (see Becker's chapter in this volume and below).

Mark Hunter has offered similar analysis of the isiZulu term for "rights," also *amalungelo,* which invites comparison with the Chichewa/Chinyanja rendering of "justice." *Amalungelo* is derived from the verb *ukulunga,* meaning "to be right" or "to be in order." Hunter cites a dictionary definition of *lunga:* "Get or be in order, fit correct, be as it should be . . . Be morally good, be righteous."[54] He goes on to suggest that isiZulu invocations of rights thus speak to "historically embedded moral claims that do not rest on inalienable bodily traits";[55] in the realm of gender rights, he argues that these thus "always come together with gendered expectations of 'rights and wrongs.'"[56] While the Setswana term *tshiamo* combines reference to both "fairness" and "justice,"[57] the Shona word for "justice," *ruenzaniso,* refers to the act of balancing or weighing two sides of a story. Shona folktales dealing with the theme of justice thus praise the abilities of shrewd adjudicators whose ability to balance cases frustrates the unscrupulous. These very languages of rights and justice, infused as they are with moral considerations, almost render Gluckman's perceptive arguments about the proximity of law and morality redundant: more so than English, these African languages, in different ways, make the shared terrain of morality and justice explicit.

African languages of rights and justice draw our attention to the complex conceptual terrain that we are entering into, where neat distinctions between what is legal and what is morally right have to be created rather than assumed. Rights and justice share a semantic field with notions of righteousness, fairness, truth, equality, reason, and upright behavior; they jostle for space with invocations of obligation, respect, and entitlement. We are reminded that this is also the case in the English language, where "right" is only the clearest example of such slippage. When it comes to justice, this implies that more is at stake than legal procedure, or the application of legal rules and norms. Justice incorporates subjective assessments of behavior, intention, and appropriateness; it bridges the gap between particular happenings and abstract certainties.

Jonathon Earle's examination of the intellectual history of the concept of justice in the kingdom of Buganda, located in present-day Uganda, uncovers the different languages of justice that were invoked within Ganda society. He finds that justice has been the subject of vigorous and longstanding debate between different religiopolitical factions among the Ganda. While Baganda Protestants in the early 1900s emphasized *sala (o) musango,* a top-down approach to administering

justice, Catholics advocated for a more deliberative approach, which was captured in the word *bwenkanya.* Earle shows that advocates for these contending approaches to thinking about justice drew on diverse sources of elaboration and legitimation. In addition, they used these "to reinforce and reconstitute different types of political authority." Through his analysis, Earle makes a compelling case for the need for efforts to make sense of contemporary political processes in Uganda to be founded on an understanding of older vernacular historiographies and processes of knowledge production.

The promise, and indeed the challenge, of studying local languages of justice in Africa is made clear in Felicitas Becker's chapter. Becker notes the fecundity of the Swahili term *haki,* which can be used to refer to both "rights" and "justice." *Haki* is most commonly employed as a relatively straightforward translation of "right(s)," while "justice" seems to span the terrain of several Swahili concepts, including *usawa* or equality. In searching for vernacular equivalents for the term "justice," Becker finds a crowded linguistic field, demanding both linguistic and historical analysis. As she points out, part of the difficulty in identifying accurate translations for these English terms lies in the complexity of the English words themselves, which bear the marks of their various histories. Becker's analysis of Muslim sermons, for instance, reveals a conception of justice that it is at once connected to personal virtue, to the following of divine instruction, and to living harmoniously with others. The sermons, she argues, "portray the pursuit of justice as a question of forbearance, compassion, generosity, and patience, as well as obedience toward God and his law." In her analysis, morality is never far from view.

Morality is also central to Benson Mulemi's discussion of efforts to treat cancer patients in Kenya. At the core of his chapter is the argument that access to cancer care for the poor in Kenya is a question of social justice and thus that the government has a moral duty to fulfill this need. Mulemi observes that because of severe resource constraints, a two-tier system of cancer care has emerged in which wealthy patients receive preferential treatment and privileged access to cancer care facilities by virtue of their status. By contrast, the poor are left to suffer from both the debilitating effects of cancer and its destabilizing impact on their livelihoods. The response of medical personnel working in such dire circumstances has been to resort to improvisation in cancer care in order to make the limited resources reach as many people as possible, even if such improvisation does not translate into effectively treating

cancer. This, Mulemi argues, reflects "the convergence of a general sense of human and professional moral obligation to mediate desolate care circumstances." Overall, his chapter makes a strong case for a cancer care regime in Kenya that balances market justice with social justice.

Morality in Africa, as Kwame Gyekye points out, is not necessarily connected to religion. However, religion has often had an important influence on moral imaginaries.[58] Moreover, different religions and sacred beliefs have generally had something to say about justice. Judaism, Islam and Christianity all deal with distributive justice and enjoin their followers to engage in good deeds, to give alms, and to welcome strangers.[59] A similar concern with distributive justice, reinforced by religious belief, is evident within Diola communities in Senegal, Gambia, and Guinea Bissau. Among the Diola, those with wealth have an obligation to share it, and it is commonly held that failure to do so will result in a reversal of fortunes. In addition, Robert Baum notes that witchcraft accusations serve "as a powerful check against violation of a Diola ideal of universal access to arable land."[60] Religious movements often also contain within them a vision of social justice, which has, at times, been used to justify the waging of war. Early anticolonial uprisings, such as the Maji Maji rebellion and the Chimurenga uprisings in what are now Tanzania and Zimbabwe, respectively, as well as the millenarian Watchtower revivals that rocked central Africa during the first half of the twentieth century, are but a few examples of religious movements that aimed to bring about particular visions of justice by violent means.[61]

Nevertheless, it is not always obvious how religion shapes ideas and practices of justice in specific contexts. Fernanda Pirie's study of the notions of justice espoused by two Buddhist communities living at different ends of the Tibetan plateau reveals a striking contrast.[62] Among Nomadic pastoralists on the Amdo grasslands, conflicts often resulted in revenge attacks or the payment of compensation. These and other acts, she suggests, indicated that a form of retributive justice was in operation. By contrast, villagers of Ladakh sought to resolve conflict through community meetings in which the principles of public morality were invoked in order to restore harmony. During these processes of arbitration, there was no attempt at invoking the law or "adjudicating between the rights and interests of the individuals and households involved."[63] What this case so clearly illustrates is that while religion shapes ideas about justice, it does so in combination with a range of economic, sociocultural, and political factors, and the interplay between these factors

changes over time. This understanding informs the chapters in this section and their investigation of the role of religion in shaping notions of justice in Africa.

Duncan Scott's chapter asks what Christian relational ethics might contribute to efforts to lessen the injustice and inequality that has characterized postapartheid South Africa. Scott examines the work of a Christian nongovernmental organization, The Warehouse, which aims to tackle inequality, poverty, and racial division in the country. He is specifically interested in how the organization translates relational ideas about justice into social action in a context in which there is dire need for social and economic transformation. For Scott, The Warehouse's focus on transforming relationships does not necessarily divert attention from the structural roots of injustice in South Africa. Rather, it adopts an alternative transformation agenda that starts at the individual level. In countering criticisms leveled at other relational justice approaches, such as *ubuntu* and reconciliation projects, he maintains that, if transformed into practice, relational ethics provide a means of pursuing justice in South Africa from the bottom up.

Gender Justice

The notion of gender justice promises to take the study of justice into the realm of gender and marital relationships, of mundane domesticity, intimacy, and care. It asks what might constitute justice in the context of interpersonal relationships and suggests that answers to that question will be multiple and particular.

The clamor of external agents with something to say about appropriate gender relations and the treatment of women and LGBTQ+ communities in Africa can at times be overwhelming. Terms like "violation," "forced marriage," "harmful cultural practices," and "genital mutilation" ramp up the rhetoric and squeeze out dissenting voices, even when those voices are those of the people concerned. A focus on justice, and on what gender justice might mean to particular African men and women, opens up the possibility of bringing their voices to the fore, of asking rather than telling.

Thus we might recall the Maasai women activists whom Dorothy Hodgson has described proclaiming in frustration that "challenging polygyny and female cutting are not our priorities" when, for the umpteenth time, they came up against the realization that the international development apparatus, and indeed, local Tanzanian feminist

organizations, were moved more by their genitals than by their concerns with economic and political rights.[64] Their own priorities, on the other hand, included "land rights, livestock, hunger, poverty, and education."[65] While these Maasai women favor alternatives to female genital modification, which is "only one small part of a long series of ceremonies and celebrations that ritually transform a Maasai girl into a Maasai woman,"[66] they are also concerned to confront poverty and marginalization, and in doing so they find it more difficult to garner support from their feminist and development "partners." Literature on women's rights in Africa suggests that activism and rights struggles might look quite different were listening a more consistent starting point on the part of those seeking to "uplift" African women. Failing to do so is not the preserve of foreign actors; elite Africans, such as the participants in the Tanzanian Gender Festival that so irked the Maasai women activists, are often just as likely to proceed without taking on board the views of impoverished African citizens.

We are also reminded of Saba Mahmood's influential study of the women's piety movement in Egypt, in which she argues that the women with whom she worked, who actively embrace principles of women's subordination to male authority, are radically misunderstood by feminist scholars if they are seen as suffering from "false consciousness."[67] Mahmood challenges us to conceive of feminist politics beyond a universalizing assumption that women everywhere share a desire for "freedom" and a will to challenge rather than uphold social norms. She thus highlights the shortcomings of an approach that would foreground feminist concerns with women's resistance at the expense of an understanding of the lives, intentions, and commitments of the Cairene women with whom she worked. Hers is an argument for the importance of paying attention, in every case, to the specificities of people's lives and concerns, even when these do not converge neatly with those of the international development industry and "Western" feminism. The implication is that we must ask, rather than assume, what justice means for Cairene women, as we must for women elsewhere on the African continent.

African scholars of gender have also emphasized the need to reach beyond Western feminist sensibilities and Euro-American academic texts in order to understand gender relations and women's aspirations in Africa. In this vein, Nkiru Nzegwu has argued that a peculiar result of transformations in Africa since the nineteenth century has been the coming together of Western feminist and patriarchal African men's

visions of African societies: "Both are engaged in the enterprise of casting their patriarchal view of families as traditional and culturally rooted. Both share the task of representing African women as voiceless and inferior to men. Both have successfully established as true the myth that African women lack agency."[68] Much of this work contains a distinct nostalgia for precolonial gender relations, which, it is suggested, were less patriarchal prior to European missionary interventions, colonialism, and the subsequent collusion of African male elders.[69] However, while gender relations have been transformed over the past two hundred years or so, they have not converged with the experiences of women in other parts of the world. Ifi Amadiume, for example, has argued that there is a structural and historically significant difference in the way that motherhood is experienced and valued in Western and African settings. While Western feminists have often seen motherhood and marriage as undermining their efforts for recognition in the public sphere, African women's roles as wives and mothers might be better understood as central to their empowerment.[70]

The situations of Africans who identify as LGBTQ+ complicate the oppositional stance that women's advocates can take vis-à-vis Western interventionism and caution against the blanket romanticization of local solutions to matters of gender justice. The question of whether or not LGBTQ+ identities, relationships, and sexual practices can be considered "African" is a live one in many African countries today, even if scholars have long since debunked the idea of Africa as a heterosexual continent.[71] A rich anthropological and historical literature unsettles contemporary political debates by illuminating older conceptions and vernacular understandings of sexuality, as well as explicating more recent dynamics, complicated by religious ideologies and nationalist agendas.[72] It is all too easy to lose sight of justice in the midst of debates over what is foreign and what belongs in Africa.

Awareness of the historically constituted and presently lived texture of gender relations in Africa, and the great diversity of experience, expectations, and aspirations found across the continent, has to be a first step in efforts to think about gender justice. It is also a vital reminder that gender justice is unlikely to be something specifiable in general terms like the items on a list of international standards. Nevertheless, an argument for the multiplicity of forms that gender justice might take must not entail denial or obfuscation of injustice and violence. Several studies in this volume point to times and places where gendered injustices

have prevailed, including gender-based violence and rape. Here we see conflicting senses of what has happened, what ought to have happened, and how best to shape the future in light of the past. Firsthand experiences of gender and sexual injustice, and competing aspirations for gender justice, take center stage in these chapters, illustrating how the search for gender justice is often marked by tensions between local and external actors, as well as state and nonstate processes.

The quest for justice for gender and sexual minorities in Africa is the focus of Alan Msosa's chapter. By examining the heated debates that have erupted in Malawi since 2009 over the rights of LGBTQ+ people, he shows that the challenge facing the Malawian LGBTQ+ community is not limited to overcoming essentialist arguments about African culture and sexuality, but also includes addressing widespread confusion over what is meant by LGBT rights. This confusion is compounded by the multiple and conflicting understandings of the term "human rights" that stem, in part, from the different Chichewa translations of the term. For Msosa, however, all is not lost. He shows that the laws that criminalize same-sex relationships contravene the provisions of Malawi's constitution, and that the existing legal and policy frameworks can be interpreted in ways that advance the quest for justice for LGBTQ+ people. In addition, he sees a need to reframe the debate by employing locally resonant concepts such as *chilungamo,* the Chichewa word for justice. While he concedes that *chilungamo* cannot replace ideas of human rights, Msosa nevertheless argues that it serves a critical purpose in drawing the concept of human rights toward locally legitimate principles.

Patrick Hoenig's chapter directs our focus onto efforts to administer gender justice in the midst of armed conflict. He examines the operations of mobile gender courts in the Democratic Republic of Congo, the objective of which is to increase women's access to justice while fostering greater confidence in the rule of law. Through an examination of the trial of Congolese soldiers for rape in the town of Baraka in 2011, Hoenig finds several problems with these donor-driven efforts to deliver justice. In the first instance, donor pressure for high conviction rates risks jeopardizing due process, by encouraging judges to curtail the rights of the defense, and undermining the principle of the presumption of innocence. More important, however, was the fact that the criminal justice handed down by the courts failed to meet the needs and expectations of the survivors of sexual violence, especially with respect to witness protection and reparations. In some instances, it left them

vulnerable to future victimization. Consequently, women testifying in the Baraka trial dismissed the court as just another "foreign tribunal." In this regard, Hoenig's findings resonate strongly with Adam Branch's arguments about the "violence of justice." Ill-conceived justice interventions are not simply harmless mistakes, they carry the risk of exposing victims to further abuse or reinforcing structural violence.

Ngeyi Kanyongolo and Bernadette Malunga's chapter returns the discussion to Malawi, where they focus on cases of defilement, or sexual intercourse with girls under the age of sixteen. Kanyongolo and Malunga examine discrepancies between the conceptions of justice articulated by ordinary citizens and those that inform formal legal proceedings, and they show that these differences have an adverse effect on efforts to deal with child sexual abuse. The chapter highlights the underreporting of sexual abuse of young girls as a significant impediment to the pursuit of justice and considers a variety of causes of underreporting, from situations in which intercourse is not condemned because it occurs in culturally sanctioned settings, such as initiation camps, to mistrust of the police and the ongoing economic dependence of victims on perpetrators. What is clear is that the achievement of justice for victims of defilement requires coordinated efforts across the divisions between formal and informal authorities and state and "traditional" legal forums.

Holly Porter's contribution to this volume focuses on the experiences of rape victims seeking justice in Acholiland, Uganda. Her chapter reminds us that local approaches to justice are not always equal to the task of providing justice to victims, especially in contexts where long periods of violent conflict have disrupted the sociocultural, economic, and political landscape. Porter shows that most women continue the longstanding practice of seeking assistance from their relatives, who ultimately exert the most important influence on the course of justice after rape. However, in this way, women's access to justice is dependent on their relatives' approach. Customary views about appropriate sexuality in Acholiland tend not to be sympathetic to women who have been raped. In addition, the considerations that relatives prioritize after rape, such as social harmony or the avoidance of cosmological sanction, often work against the interests of women who have been raped. Of particular importance is the way that the war has undermined the ability of relatives to intervene. Central to Porter's chapter is the argument that interventions to assist victims of rape in accessing justice need to take account of the important roles that relatives play.

Resources, Conflict, and Justice

Some of the most contentious debates about (in)justice in Africa have been about the distribution of resources. In particular, precious minerals such as oil and diamonds have been at the center of conflicts that have pitched state and capital against aggrieved communities' demands for a just share of the income derived from minerals taken from their lands. Grievances about resources have, in some cases, led to violent conflicts and insurgencies.[73] However, a series of studies that draw on quantitative methods and rational choice theory have challenged the idea that violent conflicts in Africa have been primarily fueled by grievances. Paul Collier and Anke Hoeffler, for example, contend that economic motives are central to explaining armed conflict.[74] The roots of conflict, they argue, lie not in grievances over specific injustices but in rebels' assessments of the opportunity costs of insurgency. Therefore, the existence of high-value primary commodity exports makes an insurgency more likely. According to this view, it is greed, not grievance, that is important in triggering armed conflict.

However, it has become increasingly clear that this approach to understanding conflict in Africa is both empirically and conceptually flawed. In the first instance, it is reductionist to view the causes of conflict in terms of the greed-grievance binary as the drivers of violent conflicts are often complex and are transformed over time. The rational choice approach also fails to take into account structural factors that constrain individual choices.[75] In addition, the proxies relied on in these studies are often ambiguous. Historical studies of armed conflicts have also demonstrated the empirical shortcomings of materialist interpretations of conflict. Research on the armed insurgency in the Niger Delta, for example, demonstrates how longstanding grievances over resource injustices were an important driver of the conflict. The declining share of oil revenues distributed by the central government to local communities from the 1960s, as well as the destruction of the local environment, led to growing calls for a fairer distribution of oil money. These grievances were at the heart of the Ogoni Bill of Rights of 1990, issued by the Movement for the Survival of the Ogoni People, as well as the Ijaw Youth Council's Kaiama Declaration of 1998.[76] As Ukoha Ukiwo shows, the insurgency initiated by the Movement for the Emancipation of the Niger Delta in 2005–6 was a consequence of earlier failed efforts to elicit a positive response to their grievances from the government and oil companies through peaceful means.[77]

Land is another key resource around which concerns about distributive justice have coalesced in Africa in recent years. This is partly due to the increasing incidence of "land grabbing" across the continent. Global crises related to food, energy, finance, and the environment have led to large-scale purchases of "empty" fertile land in Africa for fuel and food production by local and international capital as a means of hedging against future price spikes. A study by the International Food Policy Research Institute estimates that, between 2005 and 2009, about twenty million hectares of land exchanged hands by way of these land grabs.[78] Much of this has taken place in those African countries where buyers can take advantage of weak or corrupt governments that do not have legislation in place to protect their citizens from land dispossession. As a consequence, the last decade has witnessed increasingly violent protests by local communities over land dispossession in countries such as Uganda, Senegal, Ethiopia, Liberia, and Kenya.

Recent struggles for land justice have also been connected to much older experiences of dispossession. Zimbabwe's Fast Track Land Reform Programme, initiated in 2000, stands out among these, both in terms of scale and in the way it has been deeply implicated in the country's economic and political crisis. Scholars have nevertheless been divided over how to explain the land occupations. On the one hand, Sam Moyo, Paris Yeros, and others take the view that the land occupations were the culmination of mobilization by a "land occupation movement" composed of the rural semiproletariat, the urban poor, and the urban petty bourgeoisie, united under the leadership of war veterans.[79] On the other hand, the land reform process has been seen by other scholars as a calculated political move designed to shore up ZANU (PF)'s waning political fortunes in the face of a challenge from the Movement for Democratic Change.[80] Whether one sees land reform in Zimbabwe as the result of the activities of an organic grassroots social movement or as a consequence of top-down manipulation by politicians, at its heart lies a historic injustice. The unresolved nature of this injustice rendered it available as a basis for mobilization by both political entrepreneurs and disenfranchised individuals.

Thinking about these struggles over resources shifts the focus onto justice's opposite, *injustice.* This, in turn, fixes scholarly attention more firmly onto concrete instances of injustice and efforts to alleviate them, as opposed to the abstract contemplation of justice.[81] It also throws into sharp relief the complex nexus of justice and conflict, a theme with which

the chapters in this section grapple. Whereas research into transitional justice focuses on justice processes that emerge out of conflicts, studies of resource struggles illuminate the process of conflict emerging out of injustice. The chapters in this section also illustrate the ways in which conflict reshapes ideas about justice, as well as the practices around it. In so doing they challenge an implicit assumption that often lurks behind the search for local approaches to transitional justice, namely, that local rituals and practices remain static, even as war disrupts the very social and economic foundations of the communities in question.

Stacey Hynd's chapter speaks to a key silence in the literature on conflict and justice: the voices of children. Their perspectives, she shows, have all too often been silenced in domestic and international law, as well as in transitional justice agendas. What is more, in those instances where their voices have been heard, they have often been appropriated to serve the agendas of ICC prosecutors or the humanitarian goals of international NGOs. Invariably, both groups tend to portray child soldiers as simple victims of conflict. For Hynd, such an approach misses the engaged and complex relationship between children and justice and weakens transitional justice efforts. Drawing on her research with former Lord's Resistance Army abductees in Northern Uganda, Hynd makes the case for a more meaningful incorporation of children's perspectives into domestic and international law in postconflict contexts, one that is more nuanced and moves beyond the standard international position that does not recognize the legal accountability of anyone under eighteen and, above all, one which acknowledges that children can be more than simple victims in conflict. Age, Hynd argues, needs "to be taken more seriously as a vector of, and for, justice."

Fred Ikanda's chapter examines the quest for justice among Somali refugees in the Dagahaley camp in Kenya. He demonstrates the centrality of *maslaha* talks as a means of resolving disputes, while acknowledging the important role played by other dispute resolution fora provided by the Kenyan state and international agencies such as the UNHCR. Chief among the contributions Ikanda's chapter makes to the study of justice is the way it highlights the centrality of sentiment to efforts to achieve justice. Significantly, he shows that it is not just "positive" sentiments, such as the indignation provoked by injustice, that are integral to the pursuit of justice, but also less well-regarded sentiments, such as the desire for "vengeance." However, he makes clear that *maslaha* is not a fixed practice, and nor is it universally adhered to. Efforts to initiate

maslaha proceedings were not always welcomed, and aggrieved parties sometimes resolved to take vengeance instead. At the same time, the presence of alternative avenues of recourse, and the pressure brought to bear by Al Shabaab's strict views about Islamic practices, were also reshaping dispute resolution processes in the camp.

Efforts to resolve historical injustices related to land dispossession are at the center of Olaf Zenker's chapter. He examines the continued efforts of the South African government to implement land justice by reopening the land restitution process in 2014. This effort, he shows, has been complicated by national politics as well global economic processes. On the one hand, the desire to appease traditional leaders has seen a progressive strengthening of their authority over land, a move that goes against an earlier position that emphasized individual rights to land. Zenker argues that neotraditionalist legislation has resulted in the transformation of South Africans "from rights bearing citizens to leaseholding subjects in perpetuity." He also demonstrates that the focus on the productive value of land, which undergirds the government's vision for land justice, is out of step with the desires and expectations of South African citizens, many of whom have elected to receive financial compensation as opposed to land. He thus suggests that the future of land justice in South Africa might lie in focusing more on the "distributive value" of land as opposed to its "production value."

Anna Macdonald's chapter focuses on land disputes in Northern Uganda in the aftermath of conflict and investigates the ways in which they are resolved. Macdonald challenges two false dichotomies that have tended to dominate debates about transitional justice in Northern Uganda, namely, local versus international, and restorative versus retributive approaches to justice. For parties embroiled in disputes over land, Macdonald shows, decisions about whom to turn to were not so much shaped by the desire to adhere to cultural norms as by the need to find adjudicators who possessed the relevant knowledge. Contrary to the position advanced in some of the literature, Acholi were not permanently wedded to "traditional" practices when it came to seeking justice. Rather, their decisions were shaped by pragmatic considerations. As Macdonald points out, "the hybrid nature of the public authorities that people draw on and the highly contingent nature of their justice decisions . . . are not based on the norms espoused in transitional justice debates but rather on the most pragmatic and effective means by which to restore balance and meaning to postconflict social relations."

This volume brings together work that takes justice seriously. Many of the chapters illustrate that this is not only a subject of reflection for scholars and students of Africa. African citizens, from rural villagers to educated elites, also often find themselves confronting questions of justice as they reflect on the past and contemplate the future. In addition, a great deal of applied work is being carried out across the continent by lawyers, humanitarian workers, and international donor representatives, among others. We hope that this volume will provide fresh impetus, as well as food for thought, for such actors. If there is one argument that cuts across a number of the chapters that might be of practical use in the realm of development interventions, it is the importance of paying attention to local social and historical contexts. An appreciation of local realities, concerns, and priorities can only improve efforts to help bring about "justice," whatever that might look like. While emphasis is often placed on the *doing* of development, the chapters of this volume suggest that it may be by *listening* that the greatest difference can be made.

Notes

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3. Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010), 8.

4. Solomon, *A Passion for Justice,* 8.

5. Kamari Maxine Clarke and Mark Goodale, eds., *Mirrors of Justice: Law and Power in the Post–Cold War Era* (Cambridge: Cambridge University Press, 2010). The "veil of ignorance" is a central notion in John Rawls's theory of justice. It refers to a hypothetical situation in which individuals do not know what place they will occupy in society or what kind of society they will enter. Rawls contends that if individuals find themselves in such a situation, they will come up with a social contract that ensures the fair distribution of liberties and social goods.

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PART ONE

Morality, Religion, and Languages of Justice

ONE

Competing Conceptions of Justice in Colonial Buganda

JONATHON L. EARLE

THIS CHAPTER EXPLORES THE INTELLECTUAL HISTORY OF JUSTICE in the colonial eastern African kingdom of Buganda. It begins by examining the genealogies of justice in modern history to argue that the logic of international justice in the nineteenth and twentieth centuries was tied to larger reconfigurations of global power and, in the case of sub-Saharan Africa, the emergence of racialized hierarchies that accompanied the expansion of colonial empires. It then shows how Protestant Baganda used folktales and historical argumentation in the early 1900s to create forms of justice that legitimized the kingdom's Protestant order. Protestant articulations of justice often underscored the importance of executive authority in legal and social adjudication. Justice was a highly contentious ideal, though, in colonial southern Uganda. Catholic intellectuals in the 1900s complicated Protestant claims by defining justice as the practice of dissenting parties gathering to resolve disputes (*-bwenkanya*). In doing so, Catholics sought to equalize power in a state structured principally around the authority of Buganda's Protestant monarchy and chieftaincies. The chapter concludes by exploring the political thought of Uganda's first elected prime minister, the Catholic activist Benedicto Kiwanuka. To castigate Uganda's Protestant elite, Kiwanuka drew from both classical liberal and Catholic sources to shape larger vernacular debates about the purported meaning and function of justice in colonial society.

While this chapter recognizes that Protestant and Catholic communities in colonial Buganda were not homogenous, it makes particular claims about competing etymological classifications of justice throughout the twentieth century to explore the extent to which colonial knowledge was reworked into local political argumentation. Where previous scholars have tended to focus their studies on 1950s Uganda by emphasizing the impact of postwar democratization movements or the force of religious claims, I use the recently unearthed library of Benedicto Kiwanuka to argue that textual practices among late colonial intellectuals blurred European literary classifications. These readings complicate contemporary scholarship on literacy in Africa, which has tended to focus on either religious or secular literacy. Moving beyond this dichotomy allows us to think in more complicated ways about shifting conceptions of justice in colonial eastern Africa. This piece also recognizes that debates regarding justice were unfolding beyond central Uganda. These processes, however, are beyond the current scope of this study, which is concerned with Buganda's ideational arena.

Genealogies of International Justice

By the early nineteenth century, the standardization of internationally recognizable forms of justice was tied to emerging understandings of territorial sovereignty. As the legal scholar Gerry Simpson has argued, early global classifications of war criminals, international outlaws, and terrorists were first described as perpetrators of crimes against the law of nations.[1] The emergence of industrial economies by the mid-1800s resulted in the reformulation of these emerging constructions of justice—and how justice would become commonly talked about in international politics. The transition toward colonial empires resulted in a noticeable shift in how legal relations were negotiated across national borders. Building on the earlier work of Charles H. Alexandrowicz,[2] for example, Partha Chatterjee has shown how trade practices between European states and India and South East Asia had been largely equitable prior to the nineteenth century. Even as Indian rulers surrendered territories in Bengal, Karnataka, and Maratha to the East India Company, notes Chatterjee, they did so as sovereign state builders through international treaties.[3]

As European traders and governments sought to increasingly control the regulatory apparatuses of global flows, international law and justice were recast in the language of positivist legal theory. Where earlier

revolutionaries in Europe and the New World sought to use natural law to imbue the historical world with universal or inalienable rights in the 1700s, later positivist approaches were used by the intellectual architects of emerging empires in Asia and Africa to argue that local political rulers and communities possessed recognizable legal rights only to the extent that their respective territories maintained European formulations of statutory law. It was argued that unruly regions needed, if not welcomed all together, newfound partnerships to administer local rule and expanding economies. Commenting on this transition, historians such as Kenneth Pomeranz and Christopher Bayly have shown how economic developments in modern China resulted in new trade regulations that were protected by European legal institutions.[4] The governor of India, Sir John Malcolm, concluded that among Indians "the very permanency of usurpation was a blessing; and it was natural for them to forget their prejudices against their European masters in a contemplation of that superior regard to justice, good faith, and civilization, by which they saw their rule accompanied."[5]

In eastern Africa, where communities' fluctuating purchasing habits impacted textile production in Massachusetts and Bombay,[6] similar arguments were made. Early colonial administrators asserted that precolonial kings were unwilling—if not entirely unable—to create and maintain just societies without external compulsion. In the late 1800s, the British mercenary Frederick Lugard used military force to compel the monarch of Buganda, *Kabaka* Mwanga, one who "had been found incapable of doing justice,"[7] to sign a treaty that placed political power under the control of the region's Christian chieftaincy. In doing so, Lugard sought to control trade routes that connected central Uganda with the Zanzibari coast, whose enslaved communities and citizens must "appreciate the advantages of equal laws and of a justice of which, till now, they have had no experience or conception."[8] The argument that social fairness within and between local "tribes" did not exist was used to reinforce the validity of empire in public debates across Europe.[9] Indeed, advocates for international colonization were often compelled to present their work as being about the business of creating and supporting ostensibly *just* polities to legitimize imperial strategy within the context of politics at home.[10]

But from the 1880s until the postwar period, the institutionalization of international justice was suspect. As the historian Mark Lewis has argued, the First and Second World Wars showed just how far

the language of "violations of the laws of humanity," "crimes against humanity," "crimes against peace," and "crimes against international peace and security" were adapted to reinforce shifting power dynamics in global politics.[11] Among Soviet state builders and historians in the early to mid-twentieth century, for instance, the language of justice was used to legitimize the expansion of Soviet interests throughout Eurasia and, in time, Cold War Africa.[12] In postwar Japan, the invention and implementation of international justice was no less controversial. Historians such as John Dower have convincingly argued that the Tokyo Tribunals pivoted around the production and performance of American jurisprudence. In a trial that took nearly three times as long to conclude as the Nuremburg prosecutions, eleven justices, the majority of whom were American, deliberated over cases during which attorneys argued that Japanese aggression demonstrated "criminal act without provocation, without parallel, and almost entirely without context."[13] The chief prosecutor, George Keenan, in a courtroom setting that Japanese litigants suggested had "the lighting of Hollywood,"[14] concluded that the Japanese had "determined to destroy democracy and its essential basis—freedom and the respect of human personality."[15] American embargoes and Europe's broader military involvement in the region were not discussed. Japanese communities were challenged to talk about justice—*seigi* or *kōsei* (public correctness)—in ways that made sense out of postwar economies and evolving governance throughout the occupation. Japanese historians sought to talk about social order and justice in ways that elicited idyllic pasts and alternative futures: possibilities beyond militarized cultures governed by Meiji generals or Truman's bureaucrats.[16]

That ideas of justice were tied to broader expressions of nationalism, sovereignty, and the regulation of economies following the Second World War meant that Africa's first generation of academic historians in the 1960s were challenged to adapt the language of justice and human rights. It was contended that newly formed states would transition into democracies to the extent that activists reworked localized legal frameworks to conform to the standards of modern human rights.[17] The burden to create societies governed by both statutory law and supposedly independent judiciaries was part of a much older historical process, the origins of which dated to abolitionist debates in the eighteenth and nineteenth centuries.[18] The transition from transatlantic trade in human cargo toward "legitimate" commerce accompanied the institutionalization of comprehensive legal measures that sought to civilize

African communities trapped in an ahistorical,[19] Hobbesian world. The invention of justice in colonial Africa was driven by much deeper claims being made about racial and cultural hierarchies. As I indicate in this chapter's conclusion, there is continuity between these nineteenth-century discourses and popular reflections on justice or human rights—or their alleged absences—in twenty-first century Uganda.

Protestant Historical Vision and Justice in Early Colonial Buganda

The Buganda kingdom in southern Uganda was a highly sophisticated state by the mid-nineteenth century.[20] Through the development and regulation of power between kings and clans, Ganda societies had developed different ways of talking about and practicing justice prior to the emergence of long-distance trade in the mid-nineteenth century. This resulted in numerous proverbs and songs about the supposed functions of justice in society.[21] In time, this large body of discourse provided an extensive archive from which Baganda could articulate different conceptions or characteristics of justice throughout the colonial period. As groups throughout the kingdom interacted with Zanzibari and European missionaries and exchanged goods and ideas, they worked to reinforce and recast older beliefs about the organization of fair societies. Throughout the colonial period, Ganda historians operating from different religious frameworks employed literary practices to show how their respective communities were supposedly influential in stabilizing the kingdom during a period of territorial expansion and religious conflict during the 1880s and 1890s. Protestant chiefs and British cartographers by the early 1900s had used military technologies to restructure Buganda's precolonial counties and courts according to religious devotion. Buganda's Muslim king, *Kabaka* Kalema (r. 1889–1890), was removed from power during a Christian coup. And chieftaincies and land were redistributed according to new-fangled religious allegiances; Muslim and Catholic communities received far fewer government posts and land titles than their Protestant counterparts.

Following the ousting of Buganda's Muslim administration, whose chiefs had deeply affected kingdom politics for approximately fifty years, Protestant intellectuals, who worked alongside British administrators, incorporated missionary literacy to rewrite Buganda's past and imagine new forms of jurisprudence that required the state's Christian chiefs. No Ganda historian utilized Arabic and English literacy more effectively than Apolo Kaggwa, who helped govern Buganda from the late 1800s until the mid-1920s. In the late nineteenth century, Kaggwa began

writing the most influential political history of Buganda in the twentieth century, *Bassekabaka be Buganda,* "The History of the Deceased Kings of Buganda." Kaggwa's history was the cornerstone of Protestant historiography in colonial Uganda. In it he presented a past that legitimized military intervention to remove Buganda's Muslim chiefs and kings from power. As Michael Twaddle has shown, "the imposition of colonial rule is rewritten in *Bassekabaka,* not only to heighten the importance of the military contributions of Kaggwa and his associates, but to Christianize retrospectively the whole anti-Muslim campaign as a kind of holy crusade."[22] Kaggwa's work presented a series of historical claims that writers and activists were challenged to address throughout decolonization.

Two years following the signing of the 1900 agreement that codified Protestant control of the state, Kaggwa published *Engero za Baganda,* "Folktales of the Baganda." In the collection, he produced eighteen stories that were selected "for all our young people in Uganda to read and learn."[23] Kaggwa's stories were politically instructive; each tale was designed to produce "some helpful lesson" that called readers to "think out carefully what it all means, and what it should teach."[24] In his collection, Kaggwa reimagined justice in Ganda society. He did this by recounting the story of Lunzi, one who journeyed "from village lad to judge." One day, recounted Kaggwa's story, Lunzi the woodcutter was chopping trees in a forest. After a hard day's work, he traveled home with a piece of timber. But along the way, Lunzi passed the home of a friend, which he entered after placing his log against a banana tree. While inside, a hunter walked past the compound with his dogs, which frightened a sheep that was tied near the leaning timber. This caused the animal's rope to break, allowing the sheep to slam into the log, which then collapsed onto and killed a young child.

Members of the community apprehended Lunzi, whom they accused of murder. The child's death instigated a complicated debate: Lunzi blamed the owner of the sheep; and the owner of the sheep accused the hunter, whose dogs triggered the chain of events that resulted in the child's death. The three men were brought before a local court, whose chief was unable to reach a verdict. It was then decided that the trial should be moved to the king's high court in the capital city of Mmengo. As the party traveled to present their case before the king, a young man, Kalali, asked the delegation about the nature of their journey. After the log cutter and dog owner narrated their respective stories, Kalali concluded that all of the objects and animals in question were responsible

for the child's death: "If I had to judge the case, I should take the log, and the sheep, and the dogs, and burn them all: *they* are the wizards who have killed the child." Without giving Kalali much consideration, however, the party continued toward the court of the king, who, after listening to the case, was unable to "come to any fair decision." After the court failed to offer "just judgment," the king learned about Kalali, whose "good judgment" impressed the court.

For his ability to "cut" the case with discernment, the king placed the county of Busujju under the governance of Kalali, who now judged "all matters concerning the princes and princesses of the land." In Kaggwa's story, Buganda's king handed his court over to Kalali, whose arbitration mesmerized the jury. By demonstrating superior judgment, Kalali quickly ascended the state's hierarchy; the kingdom's future kings and princesses were placed firmly under his authority.

Kaggwa's story was autobiographical. By recounting nineteenth-century folktales, he sought to demonstrate that—like Kalali—he was both able and willing to "cut cases" in a way that was sanctioned by the state's rulers. Indeed, public discussions regarding justice and social order during this period were intertwined with local arguments being made about the institution and health of Buganda's monarchy. In the early 1900s, one dictionary defined peace, *mirembe,* as the "duration of [a] king's reign."[25] As protectors of social welfare, respectable kings were believed to be able adjudicators and willing to execute subjects who instigated instability in the state. "The king is not the one who kills," suggested one proverb, "but the unjust accuser."[26] Kaggwa presented himself as the guardian of this conjured tradition.

Kaggwa's historical vision bolstered claims about justice that were being made by a number of Protestant chiefs. The Christian chief Jemusi Miti suggested that Buganda's precolonial hierarchy was comprised of a complicated series of courts that were designed to facilitate an optimal "administration of justice to all classes."[27] The Protestant elder Batolomayo Zimbe, in his comprehensive history *Buganda ne Kabaka,* noted that Buganda's earliest kings had been divinely endowed to administer justice.[28] The prominent chief and historian Hamu Mukasa suggested that the kings of Buganda were proverbially addressed, "*Segulu ligamba enjuba tegana munyazi,*" "Heaven's word is not final, sunlight cannot prevent thieves."[29] This implied that while the sun effused light to everyone, rulers could not be as indiscriminate. For social order to exist, pernicious subjects had to be judged. The responsibility of cutting cases,

it was argued, now belonged to Buganda's Protestant rulers, who, like Kalali, had acquired control of the state's courts.

Protestant intellectuals emphasized the place of executive authority within the practice of adjudication to legitimize control of the state's courts. Protestants recalled a fictitious period when the state held absolute power to administer justice. This argument was developed by constructing precise vocabulary. Prior to the religious wars of the 1890s, the Protestant missionary and linguist Reverend C. T. Wilson "began collecting vocabularies of words from the natives with whom [he] came in contact"[30] and suggested that *-mazima* expressed "justice,"[31] a phrase that was increasingly associated with Catholic understandings of social equity by the 1940s. The infinitive form of the verb "to judge" or its cognate, "judgment," by contrast, derived from *msala* or *msangu.*[32] In 1899 the translator George L. Pilkington expounded on Wilson's entry and noted that Protestant interlocutors used *sala 'musango* to describe the process of giving a verdict during a case, derived from *sala,* meaning to "cut (as with saw or knife)."[33] From the early to mid-twentieth century, Protestant dictionaries and grammars consistently categorized "justice" and its derivatives as *sala (o)musango.*[34] "Justice" accentuated the legal qualities of juridical execution and decisiveness, an authoritarian process of cutting and dividing off.[35] Justice was to be *decided* and *given* by a party in authority,[36] not negotiated. Similarly, the Protestant intellectual E. M. K. Mulira in 1952 defined "justice" as *èby'ênsonga* or *èby-obutuukìrìvu;*[37] the former derived its meaning from an earlier usage of the transitive verb *-kusonga,* meaning to "prod, poke, pierce,"[38] or *òkugoba ensonga,* to "stick to the point."[39] By adopting the metaphors of saws and poking irons, Protestants used political language that reinforced the boundaries of colonial jurisprudence: those with saws and prodding sticks to regulate justice (Protestants), and those without (Muslims and Catholics).

Catholic Interpretations of Justice (*-kkaanya*)

The standardization of Protestant justice resulted in the marginalization of Muslim and Catholic communities in Buganda. By the early 1900s, Catholics argued, the state's Protestant rulers were not exhibiting justice in ways that were consistent with the past. It was asserted that forms of justice that underscored the place of negotiation were eroding. For Catholic activists, inequities driven by Protestant justice were compounded by a disproportionate allocation of land and the practice of withholding government employment based on religious devotion. While Catholics

constituted the majority of Buganda's early twentieth-century population, they were apportioned only 37.4 percent of general land in Buganda, whereas 61.7 percent was allotted to Protestant counties.[40] Administrative appointments and salaries were also considerably less for Catholic chiefs. One report suggested that whereas Catholics constituted 14 percent more of Buganda's general population by 1934, they occupied 22 percent fewer chieftaincies, resulting in 35 percent less in salary distribution.[41]

In the early twentieth century, dissenting Catholics argued that Buganda's Protestant order created political chaos, especially in the kingdom's courts. Catholics asserted that Kaggwa was a purveyor of confusion in the state's legislative bodies. And to critique Protestant courts, dissenters authored songs that highlighted Kaggwa's inability to adjudicate:

> My friends, people confuse me,
> They have that man
> They call him 'kaggwa' (thorn)
> What type of (thorn) kaggwa?
> The one used to remove jiggers![42]

Among Catholics, Kaggwa was called Gulemye, a phrase that Kaggwa allegedly used in court to describe a case that could not be easily settled.[43] One proverb asserted, "*Gulemye: eyalemera e Mmengo,*" "A trial unable to be settled: so says the one who can't settle it at Mmengo."[44] If Kaggwa's earlier folktale was largely autobiographical, in that it told the story of a king who turned his courts over to an allegedly competent adjudicator, Catholic song production now showed that Kalali (Kaggwa or Gulemye) was incompetent.

Catholics praised their chief minister, Stanislas Mugwanya, by contrast, for his ability to arbitrate through discussion and negotiation.[45] He was compared to a proverbial rope that could be used to tie the one who could not oversee justice in Buganda's capital, Kaggwa (Gulemye):

> We have a man here
> I don't announce his name
> I call him a strong 'mugwa' (rope)
> The woven mugwa (rope)
> Which will tie Gulemye.[46]

Prior to the early 1900s, Catholic intellectuals concluded, difficult cases were solved through extensive conversations in the court. Like a long woven rope, hearings were purported to be lengthy and involved multiple

parties (or strands). By eliciting the language of long and braided plies, Catholics recalled a past where competing claimants discussed matters with chiefs who did not discriminate or rush due process. Legitimate forms of justice, it was stated, entailed prolonged mediation and drawn-out conversations between various interest groups. As one Luganda proverb recalled, "*Embozi teba nkadde,*" "A conversation does not grow old." Gulemye's vision of justice was skewed precisely because it undercut power sharing and conversational forms of justice.

During the interwar and postwar periods, Catholics had begun to employ the language of *-bwenkanya* to talk about social and political justice, a gloss that starkly contrasted the general meaning of *sala 'musango.* Before the early 1940s, Catholic and Protestant publications indicated that *-bwenkanya* (*-kkaanya*) was not extensively used to talk about legal or political justice.[47] It did not begin to appear extensively in the vernacular press until the early 1940s. Consistent with the then definition of *-kkaanya*, which meant "to discuss or to agree," writers used *-bwenkanya* to emphasize the *interactive* qualities of political justice. *Obwenkanya* simply meant to be in "the state in which" *-kkaanya* was observable. *Okukkaanya* (to agree, be agreed) implied togetherness, and in its reflective use meant "to observe or to pay attention."[48] Earlier definitions interpreted *-kkaanya* as "recognize by careful scrutiny,"[49] or more generally to "discuss matters or words."[50] It defined "justice" as two parties on equal footing coming together to discuss common concern. In a society governed by *-bwenkanya,* opposing parties were guaranteed equal representation, a practice politically withheld from Buganda's Catholic community throughout the early to mid-twentieth century. The language of Catholic pluralism derived its significance from the discriminating character of Uganda's peculiar religious order, not the stipulations of colonial law, which Catholics suggested had obstructed older forms of stabilization in society. Muslim historians were making similar arguments during this period.[51]

Political Theology and Classical Liberalism Reconsidered: The Political Imagination of Benedicto Kiwanuka

Catholic nationalists by the end of the 1950s had begun to incorporate the language of *-bwenkanya* or justice to vocalize the public agenda of the Democratic Party (DP), the country's foremost Catholic movement throughout decolonization. The party's motto was "Truth and Justice," *amazima n'obwekanya.* Like other anticolonial national parties in eastern

Africa, the DP emerged during a period when constitutional arrangements were beginning to be renegotiated within both Buganda and Uganda. The impact of the *Kabaka* Crisis of the 1950s—during which Buganda's king lived in exile for two years in London—intensified these debates. Earlier scholars maintained that the party's ethos was developed either in response to the demands of modernization and democratization sweeping across postwar Africa or to simply challenge the state's Protestant order. In the 1960s, for example, the American political scientist David Apter argued that the DP was the only organization in Uganda that considered questions fundamental to the nation's political future and the practice of civil rights.[52] Similarly, historians such as Michael Twaddle challenged scholars in the 1970s to think about the DP in ways that were not strictly driven by confessional politics.[53] By contrast, Carol Summers has convincingly shown how Catholic individuals and communities in the mid-1900s adapted catechetical literature to formulate social dissent and organization. For Summers, the Catholic antecedents of Uganda's party politics in the 1950s complicates histories that have interpreted the late colonial period strictly within the context of class or nationalism.[54]

The recent unearthing of private papers and libraries from the period, including the personal papers of Benedicto Kiwanuka, now shows that Catholic intellectuals in the 1950s drew both from the canons of classical liberalism and Catholic theology with remarkable ease and fluidity. Political thinkers in late colonial Uganda did not place their texts into mutually exclusive registers. As Catholic dissenters articulated different visions of social and political justice on the eve of independence, they coterminously used Catholic writings and the language of classical liberalism to rethink arguments that were already being made about political fairness within their communities by the late 1940s.

Benedicto Kiwanuka (1922–1972) was the DP's foremost activist in the late 1950s and Uganda's first elected prime minister in the early 1960s. Kiwanuka was an austere Catholic whose spiritual formation was shaped by the mentorship of Archbishop Joseph Kiwanuka,[55] the first sub-Saharan African Catholic bishop to be ordained. Following his Catholic training in Uganda and Lesotho, Benedicto Kiwanuka studied law at the University of London between 1952 and 1956. Through his Catholic and legal training, Kiwanuka became intimately familiar with Catholic theology and early modern European liberalism. Kiwanuka's personal library and papers include thousands of documents, annotated volumes, and notebooks. These sources show that Kiwanuka mined the

writings of Jean-Jacques Rousseau and the Oxford Tractarian John Henry Newman to develop a political vocabulary with which to imagine social justice in late colonial Buganda.

Shortly after assuming the presidency of the DP, Kiwanuka devoted several weeks toward scrutinizing Rousseau in his private study. In his notes on *The Social Contract,* which Rousseau drafted to contest inequitable kingship in seventeenth-century France,[56] Kiwanuka noted that Europe's early modern kings and landed bureaucrats "had taken too much power and enslaved people," which legitimized the necessity of protest.[57] To redress social injustice, Kiwanuka observed, Rousseau advocated for "liberty, equality, and universal suffrage,"[58] a vision that resulted in Rousseau's banishment from France.[59]

Rousseau translated easily enough for Kiwanuka in Buganda's royalist politics. When he defined his "cardinal principles to observe," he concluded both that "Kings should *never* and should be prevented, by force if necessary, to meddle in politics,"[60] and that it is "better to get rid of Kings then have them who interfere with the smooth running of democracy."[61] As he was studying Rousseau, in October 1958, Kiwanuka drafted a lengthy denunciation against the kingdom's Protestant prime minister (*katikkiro*), Mikaeri Kintu. In his letter, Kiwanuka argued that Buganda's Protestant chiefs exploited their subjects through burdensome taxation and corruption. "So that the Katikkiro may understand better," began Kiwanuka, the "common people are those the Katikkiro's lot mistreats day and night, making them kneel in puddles of mud to greet the nobility; they are the people they overtax or imprison for failure to pay; the ones they retrench from their jobs in favor of their relatives."[62] For Kiwanuka, Buganda's kingdom had become a state where its citizens "were not heard," a place where activists were "detained without trial." In Kintu's Buganda, Protestant authority was used to confiscate property and exploit Catholics and Muslims, "whom you regard as worthless and whose tax you use in sending your own people for studies overseas." Drawing from Rousseau, Kiwanuka argued that social justice and conversation, *-kkaanya,* was no longer evident in the kingdom's colonial order.

Kiwanuka began reading Newman's seminal work, *Apologia Pro Vita Sua,* by the mid-1950s. He used Newman's theology and social commentary to develop political essays throughout the late 1950s and early 1960s. Kiwanuka's existing copy of *Apologia* contains extensive underscored sections and annotations, which cannot be fully explored here.

Following the election of 1962, during which the patriotic party Kabaka Yekka (KY) (the King Only party) and Milton Obote's Uganda People's Congress (UPC) developed a coalition that prevented the DP from controlling Uganda's postcolonial government, Kiwanuka drafted a 37,000-word analysis of the election. The piece argued that the KY/UPC alliance was organized to prevent Catholics from controlling national politics. In *Apologia,* Newman had contended that Anglican communities in the nineteenth century had failed to demonstrate courage and "openness," or a willingness to discuss social discontent in the state.[63] Borrowing from Newman, Kiwanuka now asked his Protestant and Catholic colleagues to question the extent to which the recently appointed government would continue to obstruct social equity because of religious loyalties. Like Newman, Kiwanuka argued that political equality was predicated on one's "openness" to God's redemptive purposes on earth. By failing to engage in discursive forms of justice, Uganda's Protestant rulers were violating God's intended order. Drawing from Newman, who is directly cited in the inquiry, Kiwanuka invited his Anglican colleagues to practice inclusive and "open" politics: "But now where is this openness? Where is consistency in policy? Where is truth in ordinary dealings? . . . If we are to have democracy, let us have it in full."[64]

Kiwanuka's textual practices show that late colonial intellectuals used multiple genres of colonial literacy to imagine different types of justice. Kiwanuka comfortably drew from both Catholic sources and secular political theory, but in ways that were largely consistent with a particular articulation of justice in Buganda's colonial society. The relationship between justice and authority and the connection between justice and conversational forms of governance were central to these debates. Activists such as Kiwanuka argued that executive forms of justice—embodied in the politics of two of the state's foremost Protestants, *Katikkiro* Kintu and Prime Minister Obote—resulted in the marginalization of the kingdom's largest religious demographic (Catholics). Through the processes of textual exegesis, Kiwanuka expounded on a different conception of justice than his rival Protestants, the etymology of which emphasized inclusivity and the leveling of power.

Justice in Postcolonial Uganda

The intellectual history of justice in colonial Buganda is important because it shows that international conceptions of justice and colonial knowledge were malleable in modern eastern Africa and easily reworked

to suit local arguments. Where previous scholarship on justice in both Africa and Uganda has tended to emphasize the categories of classical liberalism or Catholic theology, often at the exclusion of each other, this study shows that intellectuals such as Kiwanuka recast disciplinary classifications and textual arenas by borrowing from both to engage in broader vernacular conversations and the larger work of local knowledge production.

Throughout the late twentieth century, more broadly, justice remained a highly contentious ideal in central Uganda, used by competing activists to reinforce and reconstitute different types of political authority. During the period of Uganda's postcolonial tumult—which included the constitutional abrogation of the state's precolonial kingdoms—state builders, military presidents, and rural patriots continued to debate the production of politically sustainable, inclusive definitions of justice. Today, in the early twenty-first century, international discourses concerning institutional and social justice in Uganda have been shaped by three contingencies. First, the history of instability and transitional justice in northern Uganda in the late 1980s and 1990s has resulted in an extensive body of political science literature.[65] Second, the influence of Al-Shabaab throughout eastern Africa—including the World Cup bombings in Kampala and the role of Uganda's military in Somalia—has raised larger questions about securitization in the region.[66] Last, international human rights activists and evangelical organizations have built on American and European sensibilities to evaluate Uganda's controversial antihomosexual legislation, often overlooking vernacular historiographies and local knowledge production.[67] In each of these fields, however, scholars of political science, activists, and policymakers have yet to recognize the continuities that exist between current, local frameworks and older practices of colonial jurisprudence: a period during which European governments and imperial architects were compelled to assert and regulate internationally recognizable forms of justice among ostensibly "backward" or "traditional" societies. The continuities between European arguments during the colonial period and, again, European and American arguments concerning human rights in the contemporary period are remarkably similar. Both are fundamentally preoccupied with the task of social and moral engineering or legislation. But as this chapter has shown, local debates about justice in southern Uganda constituted a dynamic moral economy throughout the nineteenth and twentieth centuries. And if the international and

academic question of (in)justice in contemporary Uganda—or Africa in general—is to move beyond its current Eurocentric foci, it must begin with policymakers and scholars interrogating local historiographies and vernacular landscapes.

Notes

1. Gerry J. Simpson, *Law, War and Crime: War Crimes and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 159–77.

2. Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Oxford University Press, 1967).

3. Partha Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (Princeton: Princeton University Press, 2012), 188.

4. Kenneth Pomeranz, *The Great Divergence: Europe, China, and the Making of the Modern World Economy* (Princeton: Princeton University Press, 2000); C. A. Bayly, *The Birth of the Modern World, 1780–1914* (Oxford: Blackwell Publishing, 2004).

5. John Malcolm, *The Political History of India, from 1784 to 1823* (London: John Murray, 1826), 1:6.

6. Jeremy Prestholdt, "On the Global Repercussions of East African Consumerism," *The American Historical Review* 109, no. 3 (2004): 755–81.

7. Frederick D. Lugard, *The Rise of Our East African Empire: Early Efforts in Nyasaland and Uganda* (London: Frank Cass, 1968), 2:35.

8. Lugard, *Our East African Empire*, 1:192.

9. For further discussion on the invention of tribes, see John Lonsdale, "Moral Ethnicity and Political Tribalism," in *Inventions and Boundaries: Historical and Anthropological Approaches to the Study of Ethnicity and Nationalism,* ed. Preben Kaarsholm and Jan Hultin (Roskilde: International Development Studies, Roskilde University, 1994), 131–50.

10. Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860–1900* (Princeton: Princeton University Press, 2007).

11. Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford: Oxford University Press, 2004).

12. Odd Arne Westad, *The Global Gold War* (Cambridge: Cambridge University Press, 2007), 39–72.

13. John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W. W. Norton, 1999), 471.

14. Ibid., 461.

15. Ibid., 471.

16. Following Emperor Hirohito's announcement of public surrender, the Japanese physician Michihiko Hachiya recounted that local communities blamed the state's generals for having poorly advised the emperor's government. See Michihiko Hachiya, *Hiroshima Diary: The Journal of a Japanese Physician, August 6–September 30, 1945,* 2nd ed. (Chapel Hill: University of North Carolina Press, 1995), 80–83. For Hachiya, social and environmental rupture complicated the state's regulation of public history, a past that was now described as unclear:

"Perhaps now that the waters of our history had become muddied, a big fish would grow and in the course of time a great figure appear" (145).

17. Basil Davidson, for example, argued that the adaption of traditional African legal practices would enable communities to navigate "foreign contribution" and emerging "political springboards." See Basil Davidson, *Which Way Africa? The Search for a New Society*, 3rd ed. (London: Penguin Books, 1971). The scholar David Apter argued that independence afforded the possibility of Africanizing Legislative Councils throughout the continent. See David E. Apter, *The Political Kingdom in Uganda: A Study of Bureaucratic Nationalism*, 2nd ed. (Princeton: Princeton University Press, 1967).

18. The Congolese philosopher Valentin Mudimbe has shown how the invention of Africa was partially driven by the concern to create supposedly sensible forms of political justice following the decline of transatlantic slavery. See V. Y. Mudimbe, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (Bloomington: Indiana University Press, 1988), 101–2.

19. For further insight into the emergence of "legitimate" commerce in western Africa, see Robin Law, ed., *From Slave Trade to "Legitimate" Commerce: The Commercial Transition in Nineteenth-Century West Africa* (Cambridge: Cambridge University Press, 1995).

20. The following sections draw from Jonathon L. Earle, *Colonial Buganda and the End of Empire: Political Thought and Historical Imagination* (Cambridge: Cambridge University Press, 2017).

The most recent works on precolonial Buganda include Richard J. Reid, *Political Power in Pre-colonial Buganda: Economy, Society and Welfare in the Nineteenth Century* (Oxford: James Currey, 2002); Holly E. Hanson, *Landed Obligation: The Practice of Power in Buganda* (Portsmouth, NH: Heinemann, 2003); Henri Médard, *Le Royaume du Buganda au XIXe Siècle: Mutations politiques et religieuses d'un ancien état d'Afrique de l'Est* (Paris: Karthala, 2007); and Neil Kodesh, *Beyond the Royal Gaze: Clanship and Public Healing in Buganda* (Charlottesville: University of Virginia Press, 2010).

21. The most extensive collection of Luganda proverbs is Ferdinand Walser, *Luganda Proverbs* (Berlin: Reimer, 1982). One of the earliest collections is Henry W. Duta, *Engero za Baganda* (London: Society for Promoting Christian Knowledge, 1902).

22. Michael Twaddle, "On Ganda Historiography," *History in Africa* 1 (1974): 87.

23. Apolo Kaggwa, *The Tales of Sir Apolo: Uganda Folklore and Proverbs,* trans. F. Rowling (London: The Religious Tract Society, 1934), 7.

24. Ibid., 8.

25. A. L. Kitching and G. R. Blackledge, *A Luganda-English and English-Luganda Dictionary* (London: Society for Promoting Christian Knowledge, 1925), 64.

26. Walser, *Luganda Proverbs,* no. 2041.

27. James Kibuka Miti Kabazzi, *Buganda, 1875–1900: A Centenary Contribution,* trans. G. K. Rock (London: United Society for Christian Literature, n.d.), 1:22.

28. B. Musoke Zimbe, *Buganda and the King,* trans. F. Kamoga (Mengo, Uganda, 1978).

29. Ham Mukasa, "The Rule of the Kings of Buganda," *Uganda Journal* 10 (1946): 136–37.

30. C. T. Wilson, *An Outline Grammar of the Luganda Language* (London: Society for Promoting Christian Knowledge, 1882), vii.

31. Ibid., 68.

32. Ibid.

33. George L. Pilkington, *Luganda-English and English-Luganda Vocabulary* (London: Society for Promoting Christian Knowledge, 1899), 97.

34. William Arthur Crabtree, *Elements of Luganda Grammar Together with Exercises and Vocabulary* (London: Society for Promoting Christian Knowledge, 1902), 224, 235; G. R. Blackledge, *Luganda-English and English-Luganda Vocabulary* (London: Society for Promoting Christian Knowledge, 1904), 154, 202; Charles W. Hattersley and Henry W. Duta, *Luganda Phrases and Idioms: For New Arrivals and Travellers in Uganda* (London: Society for Promoting Christian Knowledge, 1904), 49; W. A. Crabtree, *A Manual of Lu-Ganda* (Cambridge: Cambridge University Press, 1921), 172, 220; Kitching and Blackledge, *Luganda-English and English-Luganda Dictionary,* 91.

35. Kitching and Blackledge, *Luganda-English and English-Luganda Dictionary,* 91.

36. Crabtree, *Manual of Lu-Ganda,* 172.

37. E. M. K. Mulira and E. G. M. Ndawula, *A Luganda-English and English-Luganda Dictionary,* 2nd ed. (London: Society for Promoting Christian Knowledge, 1952), 174.

38. Blackledge, *Luganda-English and English-Luganda Vocabulary,* 88; Kitching and Blackledge, *Luganda-English and English-Luganda Dictionary,* 97.

39. Mulira and Ndawula, *Luganda-English and English-Luganda Dictionary,* 89.

40. Henry W. West, *The Mailo System in Buganda: A Preliminary Case Study in African Land Tenure* (Entebbe: Government Printer, 1965), 173.

41. "Synopsis of Comparative List of Catholic and Protestant Chiefs in Buganda," 1934, 31.6, Rubaga Diocesan Archives.

42. Joseph S. Kasirye, *Obulamu bwa Stanislaus Mugwanya* (Dublin: Typescript found in Seeley Library, University of Cambridge, 1963), 45.

43. Walser, *Luganda Proverbs,* no. 1927.

44. Duta, *Engero za Baganda,* para. 1152.

45. "Stanislas Mugwanya G. C. S. S.," *Munno* 23, no. 2 (1912): 164–65; "Ebaluwa ya S. Mugwanya (Ng'eyita eri His Highness Kabaka we Buganda)," *Munno* (April 1921): 85–86; Kasirye, *Obulamu bwa Stanislaus Mugwanya,* 46.

46. Kasirye, *Obulamu bwa Stanislaus Mugwanya,* 45.

47. This claim is based on an analysis of *Munno* from 1912 onward and a review of six Catholic grammars and dictionaries published between 1894 and 1932 and twelve Protestant grammars and dictionaries published between the late 1890s until 1951.

48. P. H. Le Veux, *Premier essai de vocabulaire Luganda-Français d'après l'ordre étymologique* (Alger: Maison-Carrée, 1917), 398.

49. Ibid.

50. Blackledge, *Luganda-English and English-Luganda Vocabulary,* 30.

51. Ali Kulumba, *Empagi Z'obusiramu mu Luganda* (Kampala: Sapoba Book Press, 1953).

52. Apter, *Political Kingdom in Uganda,* 344.

53. Michael Twaddle, "Was the Democratic Party of Uganda a Purely Confessional Party?" in *Christianity in Independent Africa,* ed. Edward Fasholé-Luke (Bloomington: Indiana University Press, 1978), 255–66.

54. Carol Summers, "Catholic Action and Ugandan Radicalism: Political Activism in Buganda, 1930–1950," *Journal of Religion in Africa* 39 (2009): 60–90.

55. While both Benedicto and the archbishop shared the same name, Kiwanuka, they were not immediately related.

56. Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings,* ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 2:xxiv.

57. Private Papers of Benedicto Kiwanuka (PPBK) [Personal Notes], "Jean Jacques Rousseau," October 28, 1958–December 3, 1958.

58. Ibid.

59. Ibid., "Rousseau," November 11, 1958.

60. PPBK [Undesignated D], Loose paper, n.d. While the manuscript is not dated, the style and calligraphy match Kiwanuka's production during the late 1950s and early 1960s.

61. Ibid.

62. PPBK [Undesignated], B. K. Kiwanuka to *Ow'Ekitibwa Katikiro,* 14 October 1958. In this paragraph, I am using the translation of Albert Bade, *Benedicto Kiwanuka: The Man and His Politics* (Kampala: Foundation Publishers, 1996), 40–41.

63. Newman, *Apologia,* 85, in Kiwanuka, "1962 Uganda Elections," 42, 904.4, Rubaga Diocesan Archives.

64. Kiwanuka, "1962 Uganda Elections," 42.

65. To review the existing literature, see Tim Allen and Koen Vlassenroot, eds., *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010).

66. Stig Jarle Hansen, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005–2012* (Oxford: Oxford University Press, 2013).

67. In the British press, writers framed Uganda's legislation as a matter of international law and human rights. See Saskia Houttuin, "Gay Ugandans Face New Threat from Anti-homosexuality Law," *Guardian,* January 26, 2015. American and Ugandan evangelicals have continued to work in partnership to challenge "the threat homosexuals [pose] to Bible-based values and the traditional African family" (Jeffrey Gettleman, "Americans' Role Seen in Uganda Anti-gay Push," *New York Times,* January 3, 2010).

TWO

Legal Pluralism and the Pursuit of a Just Life

Muslim Views on Law and Justice in East Africa

FELICITAS BECKER

AS DISCUSSED IN THE INTRODUCTION TO THIS VOLUME, THERE HAS been trenchant criticism of "rights-based" development agendas in Africa. Harri Englund, in particular, has shown that the practice of rights-based NGOs can easily undermine what they preach, and that their constant invocation of rights risks gaining very little traction in the lives of the poor.[1] The notion of universal equal rights, in other words, can be irrelevant or even counterproductive in contexts where different sorts of people are routinely assumed to have, and do in fact enjoy, different sets of entitlements and needs. Another metacriticism of the concept of human rights comes from historians, such as Lynn Hunt, who have examined their contingent, and from the outset conflicted, evolution in Europe.[2]

By contrast, the notion of "justice" would seem to have the advantage of accommodating the notion of different rights and needs for different people. Its examination forms part of the fraught and complicated search for concepts around which to mobilize poor African communities for their own interests, whose antecedents stretch back to debates about, for instance, empowerment and participation.[3] Unlike "rights," "justice" suggests everyone being given their "just" due, even if that may be quite different for different people. This greater flexibility, and the greater ease of finding emic language equivalents for the term "justice" in the Chichewa context, animate Jessica Johnson's interest in the term.[4] This paper adds to the examination of the notion of justice in

a different linguistic context: that of Tanzanian, and especially Muslim Tanzanian, Swahili speakers.

For better or worse, my findings suggest that it would be hard to make the term "justice" serviceable as a more flexible and more emic alternative to rights-based rhetoric in Swahili-language political discourse. The linguistic field in which both terms participate is quite crowded but does not contain a term with a meaning closely aligned with the English "justice." Ironically, the term most online dictionaries give for justice in Swahili is *haki,* which more commonly is translated as "right" (as in *haki ya kwenda shuleni,* "the right to attend school," or *haki za binadamu,* "human rights"). Unlike the English counterpart, the term does not overlap with "[factually] correct," though it shades into "righteous" in the adjectival construction *wa haki,* "of right." This does not mean that notions of justice are absent, of course. But different aspects of the meaning of the English term are distributed among different terms, and the notions of "right" and "justice" are difficult to separate out. Moreover, these meanings are positioned unstably in contexts of shifting, and at times very adversarial, political rhetoric.[5]

I hope to show that besides the wide use of the term *haki,* the notion most closely equivalent to "justice" is often rendered through *usawa,* literally "equality," and its derivations. But at the present moment (unlike the period around independence), this is more often understood as a relationship between communities—in particular, the Muslim and Christian communities—than between individuals. Meanwhile *uadilifu,* a term that actually is typically translated as "justice," can be used to describe relationships between individuals but is at least as likely to refer to justice as a quality inherent in individuals who respect and practice divine commandment. It denotes the quality of the just man or woman, someone who seeks to live righteously in the eyes of God. Arguably, these slippages in the notion of justice are part of the reason why Muslims' widespread sense of being unjustly treated as a community does not (urban Zanzibar aside) lead to a more pervasively confrontational style of activism. If the pursuit of justice in society at large is blocked, at least Muslims can pursue justice in the way they live among themselves.

This chapter proceeds by first examining a handful of Swahili terms that approximate the English "justice," showing the different topography of the Swahili linguistic field as compared with its English analogue. I then examine the political and social uses of *haki* (rights), *usawa* (equality), and *uadilifu* (the virtue known as justice) in greater detail, seeking

to show how they reflect the grievances and ambitions of Tanzanian Muslims. The material used includes newspapers, interviews about the history and current state of the Muslim community in Tanzania, and a close examination of claims about justice in Swahili-language sermons by Muslim preachers. The conclusion reflects on the implications of the findings for understanding the uneasy yet fairly stable coexistence of religious communities in Tanzania. It also relates them to the aim of making rights-based agendas more relevant and effective. It suggests that more important than the precise term used may be the way in which it is arrived at and deployed.

Looking for Justice in Contemporary Swahili Vocabulary

The term "justice" is surprisingly hard to find in Swahili-language public discourse. This is partly because invocations of development, *maendeleo,* and of the political and juridical terminology of donor-instigated reform, remain dominant in government pronouncements and journalistic commentary: terms like democracy (*demokrasi*), the free market (*soko huria*), and anticorruption initiatives (*kuzuia rushwa*).[6] The closest analogue to justice in this discourse is *haki,* which literally means "right" or "entitlement." Related terms and slogans are widespread: *haki za binadamu* are human rights; *haki ya kupata elimu* is the right to education.

One case where *haki* literally denoted justice was in an anticorruption slogan very widespread in the form of wall posters in the 2000s: *rushwa ni adui ya haki,* "corruption is the enemy of justice (or right, or the rule of law)." In this case, the distinction between rights and justice is hard to maintain. This is also true of what is probably the most widespread use of the term *haki* in colloquial language: as part of the expression *haki ya Mungu,* meaning "God's right," or indeed "God's justice." It is used to express emphasis, similar to an English speaker exclaiming "for God's sake," and it can be used in the most mundane of contexts, such as when telling off a child or arguing in the market.

This failure of terms to translate easily is only to be expected. After all, in English too, the linguistic field comprising the terms "justice" and "rights" is complex. Besides the (more or less) legally enforceable rights we hold through the "laws of the land," there are many rights we consider ourselves to hold by dint of what in colonial Africa would have been called "custom": for instance, not to be cheated on by a romantic partner, or to be included in our friends' gossip circuits. As for "justice," the term denotes very different things when we talk about "the justice system," on

the one hand, and, say, "divine justice," on the other. Slipperiness, in other words, is normal for such complex terms, and it bears the traces of history: we talk about "the justice system" because of the way judicial and penal institutions have coalesced over centuries into what we now call a system.[7]

To be clear, debates on justice in Swahili are not isolated from English-language ones. In part, they reflect the influence of attempts to "bring to justice" perpetrators in the continent's many conflicts. Attempts to pursue justice in a way that does not deepen the social divides that resulted in injustice, in the spirit of South Africa's Truth and Reconciliation Commission, are carefully noted, with Burundi and Rwanda next door.[8] Moreover, drawing on the spirit of South African activist approaches to law and community justice, some nongovernmental organizations in Tanzania explicitly seek to both use and critique existing law in order to achieve aims of fairness and justice. Their names make this aim clear enough: *hakiardhi,* "right-land," is one of them, another is *hakielimu,* "right-education." With some international financing and support from critical intellectuals, such as the indefatigable Issa Shivji, *hakiardhi* has accompanied recent reforms in land law in Tanzania with critical commentary.[9] *Hakielimu* similarly seeks to uphold the right of children to education whatever their circumstances, opposing, in particular, the ban on pregnant girls from continuing their education.

Even more, though, debates on justice draw on the lively popular political rhetoric decrying the decline of virtue in the political class. This rhetoric, found in conversations with taxi drivers as well as in political weeklies, also has international antecedents in donors' concerns with "good governance," but it does not depend on them. It turns above all on condemning selfishness: leaders are accused of "thinking only of themselves," of wanting "to eat by themselves" and not with others. The implicit positive contrast, often elaborated with reference to Julius Nyerere, is with leaders who show qualities such as *huruma,* literally "compassion" but perhaps here better translated as "solidarity," and *upendo,* or "(brotherly) love."[10]

This popular critical discourse also draws on another term, whose meaning straddles the legal and moral aspects of "justice" as used by English-language campaigners: *usawa,* or "equality." It combines the meanings of "individual rights inhering in a person" and "justice as a matter of relations between people." Since the 1990s, the term's greatest currency in Tanzanian politics has been as part of the slogan *haki sawa kwa wote,* "equal rights for all," the motto of the opposition party

known as Civic United Front or CUF. As I elaborate below, despite its universalist ring reminiscent of Western rights rhetoric, this slogan is typically heard as a protest against unequal relations between communities: Zanzibar islanders versus mainlanders, Muslims versus Christians.

But the notion of *usawa* has a long pedigree in postcolonial Tanzanian political discourse, which positions it closer to the rhetoric of universal individual rights that it evokes in Europe ("freedom, equality, fraternity"). Almost everyone from the "independence generation" in Tanzania can quote one of Julius Nyerere's most insistent slogans from when he led Tanzania's independence campaign: *watu wote sawa*, "all people are equal."[11] As we know from recent studies of the evolution of Nyerere's thought, this claim had many meanings for him; one of his concerns was the inequality in workload between women and men that he had witnessed growing up.[12]

In the context of the independence campaign, though, it denoted, in the first place, the equality between Tanzanian Africans and their colonial rulers: as the former were the equals of the latter, the latter had no business limiting their political rights. As the equals of Europeans, Africans were capable of governing themselves. That said, different Tanzanians already heard the words quite differently by that point. Among interview respondents, Shehan Zaina, descendant of a slave-owning family and, by his own understanding, an aristocrat, recalled the words with contempt: they had undercut his claim to *heshima*, honor or elevated status.[13] Down the road from his home in Lindi town, in Mingoyo, where many people have slave ancestry, Rajabu Feruzi Ismaili remembered the phrase fondly, precisely for this reason: it attributed equal claims to *heshima* to everyone.[14]

It is likely that CUF's call for *haki sawa kwa wote* resonates in Tanzania partly because of this history of the notion of *usawa*. It was mediated differently, though, in Zanzibar, CUF's place of origin: Nyerere mattered a lot less here until the unification of Zanzibar with Tanganyika in 1964 (and afterward he mattered in a much more negative way).[15] Instead, it was secular nationalists with socialist sympathies, inspired partly by the Arab nationalism of the era, who propagated the term.[16] As Jonathon Glassman has shown, rhetoric around equality was, in independence-era Zanzibar, closely tied to the politics of competing ethnic nationalisms and, in 1964, the violence of the revolution.[17] Although he treads carefully around this issue, Islam, too, was implicated in these contestations. Claims to superior religious knowledge underpinned Arabs' assertions of status.[18]

In this manner, the term *usawa* is tangled up in the history of social inequality within a postslavery society and its constant renegotiation throughout the twentieth century. It resonates with the ethnic, religious, and ritual distinctions through which these negotiations were worked out. Its universalist, emancipatory appeal was not therefore absent; Nyerere elaborated it at length and to great effect. But in his discourse, too, the invocation of equality, elaborated into communalism, could acquire overtones of threat. As James Brennan has shown, Indians in Nyerere's Tanzania faced constant intimations that they were trying to be "more equal than others," refusing to pitch in and become part of the nation.[19] The important point to take away from this discussion is that the meaning of *usawa* very much depends on context and is as likely to be divisive as connective. Similar considerations apply to related terms. The next section further considers them in the contemporary sociopolitical context.

Irreconcilable Demands for Justice in Contemporary Tanzanian Political Rhetoric

The reemergence of the notion of *usawa* in CUF's slogan *haki sawa kwa wote* is tied to the postrevolutionary evolution of the communal politics of status. When supporters of CUF were being chased back and forth on Kilwa Kivinje's waterfront by police in 2000, one observer commented that CUF "wanted to bring back the Arabs." He was referring to the period of Arab planters' dominance in the Kilwa region in the nineteenth and early twentieth century, a period of intense inequality based on slave versus free status, urban versus rural culture, skin color and race.[20] In other words, he heard their call for equal rights for all as a call for the reinstatement of Arab privilege.

Similar views can be found in comment threads for articles in the Swahili political weekly *Raia Mwema* ("The Good Citizen") that call for the renegotiation of the union between Zanzibar and mainland Tanzania on a more equal footing.[21] *Raia Mwema*'s main commentator on this issue is Ahmed Rajab, a political journalist and activist who has been following Zanzibari politics from British exile for many years.[22] He argues for the pursuit of constitutional reform by introducing a third separate government to the political structure, so as to make the union government separate from the mainland and islands regional governments (currently, the mainland government is also the union government, with the Zanzibari government's authority limited to the isles).[23]

How loaded this topic is with long-standing ideas of cultural inequality can be gauged from the reactions to an article that Ahmed Rajab published on May 30, 2012. Entitled "Patriotism and the Way to Save Oneself," it seems innocuous enough: it sets aside Zanzibar's troubles and, after deploring the parlous state of African politics and economies and the venality of the continent's leaders, calls on patriots across the continent to unite with those in the diaspora to come up with a plan to realize Africa's great economic potential. The views expressed, in other words, are fairly conventional, close to the analyses of World Bank officials, political scientists, and journalists that lay Africa's problems at the doors above all of its politicians.[24] Nevertheless, the comments below the article refer back to the author's association with a Zanzibari political agenda perceived by many as separatist (or, as the comments reveal, worse).

One comment addressed to the author states, "After burning churches in Zanzibar, you show off here (*unajidai kuvunga*) with news from Zambia [which the article cited as an example of anticorruption measures]. Go on bringing us news of *uamsho* [the most radical wing of Zanzibar's separatist movement, closely aligned with political Islam] and of your terrorism. I don't know why the editor goes on giving space to [literally *kufuga,* keep or breed] terrorists like you." This comment provoked a response from yet another reader, entitled "Makonde"; the name of a mainland Tanzanian ethnic group that Glassman found associated with mainland "backwardness" in 1950s Zanzibar. It reads, "You show stupidity, ignorance and a lack of civilization. You are still in the age of the wilderness and your thought is weak. I don't know if you participate in skinning people and cutting off the limbs of albinos [both references to acts of witchcraft that occurred recently in mainland Tanzania]. Teach yourself civilized ways, or come to Zanzibar to be cooked [apparently a reference to supposed mainland rumors about cannibalism in the islands]."

In different ways, both these commentaries draw on widespread tropes, albeit of very different provenance: the current discourse of the association of Islam with terrorism on the one hand, and on the other, notions of mainland backwardness versus island civilization that predate colonialism, became intensely virulent in the late colonial period, and, as the example shows, continue to be toxic. Under the cover of online anonymity, these two commentators, in their mutual vilification, show the persistence and transformation of strongly hostile and defamatory

clichés about mainlanders, on the one hand, and islanders, on the other (unlike an earlier period, the cliché about the islander no longer associates him with the age of slavery but rather with that of "Islamic" terror).

These are the tensions that surround CUF's demand for *usawa.* Some commentators see the island as having lost its sovereign rights and sacrificed its economic interests to the union with the mainland.[25] For them, *usawa* denotes the restitution of economic and political status to indigenous ("true" or "real") Zanzibaris, even if that means taking assets or rights, such as property in Zanzibar town and jobs in the tourism industry, away from recent immigrants from the mainland.[26] Owing to the CUF's political maneuvering since entering a unity government with the postrevolutionary ruling party, it is no longer the undisputed political home of this faction. On the other hand, Zanzibaris who support the postrevolutionary ruling party will cite its land distribution program (*ekari tatu,* "three acres") as a sign of its commitment to equality, whereas recent immigrants hear calls for a restitution of indigenous islanders' rights as a threat to their own equal status.[27]

Similarly irreconcilable positions can be found in mainland Tanzania surrounding the issue of *mahakama ya kadhi,* "Kadhis' courts," that is, courts that apply Islamic law. Such courts existed in Zanzibar until the revolution; they dominated the Zanzibari justice system, as well as that of those parts of the Kenyan mainland that retained political ties with Zanzibar.[28] The British administration of Tanganyika (mainland Tanzania) also experimented with them but ultimately let the office of the *kadhi,* the judge applying Islamic law, lapse. Settlements of divorces and inheritances under Islamic law could and can nevertheless be obtained from a *shehe* or sheikh. According to Tanzania's system of legal pluralism, sheikhs (like Christian pastors) can contract legally binding marriages.[29] But if a plaintiff in a divorce or inheritance case is unhappy with a settlement reached by a sheikh, he or she can challenge it in the secular "government" court, which may agree to apply a different, areligious set of rules.[30]

Muslim critics, including representatives of the government-founded Central Council of Tanzanian Muslims (*Baraza Kuu ya Waislamu Tanzania,* or Bakwata), deplore this situation as marginalizing Islamic law. For some years now, they have run a campaign for the introduction of official Kadhis' Courts to apply a version of Islamic law (*sharia ya Kiislamu*) to personal status (divorce, marriage, and inheritance) cases involving Muslim parties, with judgments as binding as those of secular

"government" courts.[31] They view this aim as part of an agenda to uplift and emancipate Muslims—in a sense, to restore justice to a Muslim community that has long felt its educational and political disadvantages, compared to Christians, strongly. Muslims have lagged behind Christians in secondary and higher education since the colonial period and are consequently underrepresented in the levels of administration and government that draw on graduates. A subset of Muslim activists has elaborated a narrative of Christian conspiracy and Muslim marginalization around this undeniable fact.[32]

Much of the opposition to this project, meanwhile, has come from Christian groups who, in their turn, view the project of introducing Kadhis' Courts as unjust. Initially, their objection was to the fact that, if such courts were made part of the government-run justice system, they would also receive government funding. This, they argued, would bestow an unjust privilege on Muslims, as there would be no equivalent Christian courts. Why should the government fund dispute settlement for only one of its religious constituencies? More recently, activist Christian leaders have also vociferously opposed a compromise proposal for a law that would have permitted Muslim organizations to run their own Kadhis' Courts, with their use not obligatory even for confessing Muslims. Even so, the proposal's Christian opponents held that legislating such courts would break the government's commitment to secularism.[33] Muslim activists, then, think it is unjust that they cannot enforce their religious laws through government-endorsed Kadhis' Courts; their Christian opponents argue that it would be unjust for the government to fund, administer, or even just endorse courts for the exclusive use of one religious constituency. It is hard to see a way these two perspectives could meet.

Overall, then, it is evident that the notions of justice at play here are polyvalent and polysemous. They are closely tied to both long-term and recent social and political history and involved in ongoing political contestation. In particular, there is tension here between notions of justice focused on the ability of Muslims to apply religious laws and a secular political tradition that holds that the state should "justly" refrain from endorsing any religious tradition. Both claims are more problematic than is immediately apparent. Christian activists' insistence on official religious neutrality elides the fact that Christian churches regularly consult and cooperate with the government.[34] On the other hand, Muslim demands for Islamic courts elide the thorny question of who gets to define and interpret what passes as the authoritative version of Islamic law.[35]

Notions of justice do not, therefore, easily provide a common ground on which different marginalized groups could meet to construct shared claims on the polity they inhabit. At the same time, though, these notions do not exhaust themselves in adversarial political activism. They interact with ongoing conversations on how to live rightly and well under the difficult conditions of contemporary Tanzania, which are sometimes contained within, and sometimes cross the boundaries of, the different activist constituencies. I will explore this further by examining notions of justice as they appear in Swahili Muslim sermons.

Law and Justice in Contemporary Muslim Preaching

As sermons are by their nature exhortations, they provide predominantly normative statements: "oughts" that do not necessarily describe the "is." Where they purport to describe the "is," moreover, they tend toward the polemical. Nevertheless, because of their more overtly programmatic, activist, and political nature, these statements offer insights into the horizon of possibilities within which individuals operate and into the concerns and constraints that cause that horizon to change. Combined with interviews, they provide at least a glimpse into the compromises made when seeking to square the many "oughts" with the "ises" of individual lives.

Let me first explain the nature of the recorded sources further. Muslim "preachers" perform at Friday prayers at mosques, or more often at *mihadhara,* religious-educational public gatherings. They have become increasingly common in recent years in the Swahili-speaking world and are documented on widely traded tapes and (increasingly) DVDs. The DVDs used here were recorded and acquired in locations in Kenya and Tanzania and, as far as they can be dated, document the last two decades. Increasingly, the material from these DVDs is also available, often in better quality, via YouTube. In addition to listening to these recordings, I have also conducted informal discussions with their purveyors and users. For practical reasons, I have relied on three Tanzanian research assistants, all of them themselves Muslim, for the conduct of more extensive interviews in 2012 and 2014.[36]

The popularity of recorded sermons among Tanzanian Muslims forms part of a wider trend in Muslim-majority countries.[37] There are dozens of different preachers now available on tape, DVD, and YouTube, and they differ greatly in their personal habitus, style of delivery, themes addressed, ways of reasoning, and level of erudition. Nevertheless, there

is a relatively small number of speakers who are the most commonly traded and whose names were by far the most likely to be mentioned by interviewees when asked about their preferences. Even this handful, though, differ greatly among themselves. To bring out the variety, it is helpful to give short characterizations of the most prominent ones.

First, Nassor Bachu, who died in 2013, is rarely mentioned by ordinary sermon listeners but was a major influence on the development of reformist preaching and sermon recording in Zanzibar. He was traded on tape well before DVDs became available. YouTube recordings show a very self-possessed, calm, and erudite speaker, sitting down, handling books, and explaining, not haranguing. His closest and best-known disciple in Zanzibar, by contrast, Sheikh Msellem, has moved on from preaching to political activism and speech making. The de facto leader of the network of preachers known as *uamsho* who campaign for Zanzibari independence, he was imprisoned at the time of writing on charges of inciting violence in the aftermath of street violence in Zanzibar that was partly fueled by rumors of extrajudicial abductions of preachers like him.

Another influential disciple of Bachu is Nuruddin Kishk, who operates out of a complex offering various religious and educational services in Dar es Salaam and combines rigid moral stances with abstinence from political questions. A competitor of sorts to Bachu's network is the Mombasa-trained Othman Maalim, who operates out of a private-sponsored mosque in Zanzibar and has a reputation as a "government-friendly" sheikh in Zanzibar's polarized politics. The most recent arrival on this scene is Hassan Hussein Nyundo. Like Maalim he is an individual actor, not connected to Bachu's network or *uamsho.* The polar opposite to Bachu and highly polarizing, he performs in trousers and combat vest and has a reputation for chiding women. To some reform-minded Muslims, he is an embarrassment because of these idiosyncrasies and his lack of a traceable educational pedigree. His judgmental stances notwithstanding, Nyundo is popular with a fair few female listeners, for reasons that will become clearer below.

The diversity of the speakers notwithstanding, the sermons are, by and large, united in their rejection of universally equal legal entitlements for all. In particular, they insist on the differences in rights and obligations between men and women. Concomitantly, they also present highly critical views on the kind of human rights discourse common among donors, development organizations, and the Tanzanian political establishment.

A common trope in this context is to oppose "man-made" (Western) and "divine" (Muslim) law and insist on the primacy of the latter.

This dichotomy permeates, for example, the sermon that Hassan Nyundo gave to an audience of women, entitled "the three things that send women to hell." With some venom, he quotes what he says is a common complaint of women: *tunanyimwa haki zetu!* "we are deprived of our rights!" Though the phrase echoes the kind of criticism made by rights NGOs, he refers to women making this claim during domestic disputes, such as when a husband is impatient or critical about his wife's cooking, or demands she account more carefully for time spent outside the home. By the standards of Islamic law, Nyundo insists, it is men, not women, who are deprived of their rights by wives failing to live up to their marital obligations. Notwithstanding their many differences, Nassor Bachu, too, used a sermon on the marital rights of wives and husbands to criticize the 1995 Beijing meeting and convention on the rights of women along similar lines.

In a context of lively debate about the meaning of the much-repeated official claim that *serikali haina dini,* "the government has no religion" (as the state's secularism is typically paraphrased), this positioning of divinely sanctioned rules as marginalized by a hubristic this-worldly government is unsurprising. Nevertheless, it is equally unsurprising that defenders of the secular order and of women's rights are disconcerted by, for example, Nyundo's pronouncements.[38] This is not only because they challenge the established legal order. They also appear to presuppose a thoroughly rigid, inflexible, and unforgiving understanding of Islamic legal rules, as well as an absolute clarity about the way they apply in complicated everyday situations that the salience of marital disputes in religious courts throughout the Muslim world clearly gives the lie to.[39] For these reasons, and because of their insistence on women's legal subordination, they are difficult to engage with for proponents of "grassroots justice" approaches.

At close sight, though, this rigid legalism is not the only thing going on in the sermons, even Nyundo's. A recurrent theme in Bachu's above-mentioned sermon is how forgiving God is, and how much husbands are called on to be forgiving of their wives. Moreover, preachers often emphasize that the divine commandments, far from random, are in tune with human needs and characteristics. It is said, for instance, that men need more wives than wives husbands because they have stronger sexual urges. The sermons also have much to say on human fallibility; on

how difficult it is for people to live by the law—to live just lives. When such passages are taken into account, the sermons present a much more complex perspective on the issue of justice in human relationships than merely deploring secular meddling with a rigidly defined divine order.

These issues can be traced in one of very few recordings to have the term *uadilifu* (justice as a virtue) in its title, which is also, among hundreds I have seen, the only one with a woman speaker. Its full title is given as *ujumbe kwa wanawake kukubali uke wenza na uadilifu,* "message to women to accept polygyny and justice." The speaker's name is given as Bi Fatma; the location as Madrasa-tul Mtoni (Madrasa by the River), in Zanzibar town. Since I bought my first copy in 2003, it is at least fifteen years old. The fact that I was able to obtain another copy in 2010 and the recording was uploaded to YouTube in December 2012 suggests that it has retained some currency for more than a decade after it was made. By October 2015, the video had been viewed over twenty-five thousand times.

The awkward ring of the English translation of the title ("accept polygyny and justice") is a reminder that *uadilifu* does not map neatly onto the English term "justice." The root in the word is *adili,* typically heard in the plural *maadili,* meaning, approximately, "virtue," especially "religious virtue." Neither term is heard much, although there is a sermon discussing *maadili kupotea,* "the decline [literally the "getting lost"] of religious virtue." Similar constructions with the *-fu* at the end, which denotes a state in a person or object closely related to the meaning of the main root, include *mtiifu,* meaning "obedient" and deriving from *kutii,* "to heed, obey," and a much more common word, *ukosefu,* meaning "lack, absence" and deriving from *kukosa,* "to lack, be absent."

Further consideration of Bi Fatma's discourse indicates what *uadilifu* is doing in its title. She elaborates a vision of polygynous marriage where all parties involved are given and do their due; not only the husband and each individual wife, but also the wives among themselves, and their friends and family. *Uadilifu,* the sermon suggests, is very much a relational thing, practiced between people—in this sense, Bi Fatma's perspective aligns well with that on justice that Johnson has identified among Malawian Chichewa speakers. But by doing one's duty, one also shows *maadili,* religious virtue, and becomes a "just" person: justice is about the individual's relationship to God as much as to others.

Living justly in this sense is in no way exhausted by sticking to the law, but the law provides a framework for it. Thus Bi Fatma stresses

that a polygynous marriage is set up by a contract between *one* woman and one man, not a man and a group of women: each wife contracts her marriage separately; each one of them, as an individual, has her attributed rights and obligations. As mentioned above, moreover, she describes polygynous marriage as in keeping with what a Western tradition would call "the law of nature": men are different from women in that they have greater sexual urges; therefore marriage is different for them.[40]

Much of the sermon, though, is taken up with discussing the difficulty of polygynous marriage, from the point of view of the women involved. Early on, Bi Fatma observes that many women who take their religious commitments seriously have told her that they nevertheless find the prospect of acquiring a cowife heartbreaking. She explores the widespread dysfunction in relations between cowives from many angles. As she puts it, "many people think that polygyny means enmity [among the wives; *uke wenza ni uadui*] but it is not that, polygyny is what the prophet (blessed be he) ordained, and nothing else."

With this sentence, Bi Fatma follows the common rhetorical pattern of opposing divinely ordained law to the human tendency to diverge from it. But it is set in the context of an extended discussion of the things cowives do to each other, and the way husbands do not help matters. The most common thing to go wrong among wives is what Bi Fatma calls *kusengenya:* talking badly about somebody behind their back. But no less a problem is the lack of cooperation between wives. In particular, they should pool their labor in looking after their husband's children. But instead, you often find that a woman will entrust her child to a neighbor, friend, or relative before turning to her cowife.

Men, Bi Fatma avers, increase tension between cowives by *kusengenya,* gossiping, about one wife with another. Here, Bi Fatma cites prophetic example: once when his favorite wife, Aisha, had prepared food for him and his guest, it ended up on the floor because of a miscommunication between her and her servant. The prophet picked it up and served it to his guests, keeping the mishap quiet. Today's husbands, by contrast, would go off and serve up the whole story to another wife, feeding it into all the gossip circuits. Husbands, like wives, should learn to keep the *siri za nyumbani,* the secrets of the home.

Men, moreover, are at fault for marrying without proper warning to existing wives, and by marrying their wives' household helps. These women's intimate knowledge of the longer-standing wife's ways, and

their transition out of subordinate status, are bound to be galling for first wives. She warns women against leaving small, friendly, intimate tasks, such as the pouring of *uji,* gruel, or the fetching of sandals, to their household helps: it is by carrying out these tasks that they win the husband's heart, for men *wamepambiwa kupenda wanawake,* have been created to love women. In this passage, Bi Fatma appears to come close to advising wives on how to avoid acquiring cowives. Loving attention is the way to keep a husband's heart.

Concomitantly, one of only two occasions when the term *uadilifu* actually appears in the text is the sentence *tusiwe nyuma kuwafanyia mapenzi na uadilifu,* which translates as "let us not be remiss in making love and [doing] justice to them [our husbands]." "Make love" here stands for "treat lovingly," as in the old-fashioned English usage of the term to denote courtship. But the phrase vividly evokes how closely a Godly, just way of life is tied up, in this account, with the intimate yet mundane details of married life—with things like fetching shoes.

The second occasion where the term *uadilifu* occurs, in turn, highlights how closely respect for the provisions of the law is tied up with just living. Delivered as part of a discussion of women's anger at their husbands' further marriage and envy of single wives, it reads,

> Ramadhan is coming and we are not ready for it, we go about . . . bad-mouthing people, especially bad-mouthing cowives. Muslims, it is necessary for us to practice justice (*uadilifu*) also in this law/right [*haki,* of the husband to take another wife]. This is everyone's right. . . . If a woman finds herself [*amepatwa na,* a term most commonly heard of contracting an illness] in polygyny, well, this is within rights, . . . for don't come along and observe a fellow wife who has no cowife, you cannot know, there is no mind that can know what [desire or decision] will befall him [the husband] . . . and it is everyone's right. If it has been ordained that this matter [the desire for another wife] befall him, well, it will befall him, and there is no way to avoid it (lit. no *ujanja,* cleverness).[41]

This passage is interesting in several ways, not least how it calls on women to practice self-control in the face of the apparently uncontrollable moods that may induce a husband to marry again. In its insistence that contracting extra marriages is every man's right, it also disregards those stipulations in Islamic marriage law that, based on a passage from the Quran, insist that a man limit himself to the number of wives he

can properly support.[42] But it also implies a close identification of just living with *both* respect for the law and respect for one's neighbors and cowives: all those people one might be tempted to gossip about.

It may appear at this stage that translating *uadilifu* as justice is simply misleading. But Nassor Bachu uses the term when calling on husbands to treat their wives equally despite the inevitable differences in his emotional relationships with them. Having different feelings for different wives is not sinful but inevitable, he asserts. But all the same, men are called on to treat all wives equally. "If you feed one well one day, feed the other equally another day," with "feeding" apparently denoting bringing supplies from the market for the woman in question to cook. The same goes for clothing and every kind of material provision, but also for kind words and attention. Polygamous men, in other words, have to watch themselves and to consciously steer their behavior so as to minimize the inequalities between wives that their hearts may induce them to practice.

Like Bi Fatma, who much deplores the pervasiveness of *kusengenya* and similar faults, Bachu, too, suggests that marriages typically fall short. Arguably, against such exacting standards, it would be difficult for them not to. But both also present a much more complex and human portrayal of the pursuit of just living in the context of marriage than mere insistence on the letter of the law would produce. They portray the pursuit of justice as a question of forbearance, compassion, generosity, and patience, as well as obedience toward God and his law. Clearly, they share with those who discuss rights and justice in the context of development an interest in how to enable people to live well. But their answers involve concepts that do not typically occur in the language of development.

Evidently, the notion of "justice" covers a great variety of virtues, social projects, and political stances among Swahili speakers, as anywhere else. Considering some of these meanings together brings to the fore how situated and context-dependent they are. It is clear that some of these meanings are more technical and institution-bound, whereas others can be described as popular. Despite a recurrent emphasis on mutual obligation and communalism in the latter, they are as far from uniform as the former, and the dialogue between both is ongoing, as is evident in the diverse meanings different communities attach to the debate on *sharia* courts. This variety serves as a caution against

thinking of any of these meanings as particularly "authentic" or as the one to grab onto in order to make popular concerns speak to those of politics or the aid world.

At the same time, the discussion of notions of justice presented above contains two marked contrasts. On one hand, in the political arena, different constructions of justice for different political constituencies face each other across deep social divides, posing a constant challenge to the maintenance of peace. On the other, preachers' calls for Muslims to live justly contain an intriguing mixture of rigid religious norms and calls for patience, compassion, and pragmatic accommodation between fellow believers.

With their focus on differential entitlements and on justice as an attribute of relations between people (as well as God), the notions of justice explored above arguably inhabit common ground with less legalistic ones found elsewhere in Africa. Whether "rights NGOs" and similar organizations could build bridges with Muslim leaders and communities through these notions is nevertheless questionable. At the very least, such NGO workers would have to take the leap of accepting Muslim legal experts' refusal to accord equal rights to husbands and wives, sons and daughters, and possibly also men and women not bound by such ties of relatedness. On the other side, many Muslims mistrust the type of organization involved in rights activism, whatever the specifics of their programs, and would have to set this mistrust aside.

There is also the question of how much the programmatic statements explored above tell us about the way everyday life is negotiated among Muslims. Two points are important here: first, Muslims who listen to preachers such as the ones discussed here are part of Muslim congregations, but not their sum total. Many people identify as Muslim and have little to no interest in the preachers. For these people, who may position their Muslim allegiance as less central to their identity, tensions between the notions of justice expounded by activists and preachers, and attempts to invoke notions of law and justice for socially progressive aims, are likely to be less salient.

Second, much of what the preachers say is, I think, taken as a statement of identity and aspiration by their listeners rather than as a concrete guideline for daily living. In other words, people who endorse these sermons without living by them are not well described as hypocrites. Rather, they are people who accept the fact that they have to live in an imperfect world, not an ideal one. Listeners, after all, pick and choose between different preachers and consider the aesthetic and entertainment aspects of

their work as well as the content. Sermon listening is a layered experience and part of the constant negotiation between religious aspiration and the mundane constraints of daily living. This again suggests that there may be more scope for reconciling an interest in preachers' sermons with grassroots justice approaches than is immediately evident.

Nevertheless, the terms at play—human rights, Islamic law, justice—are all tied to specific social and institutional settings, and they unfold their specific powers (in Leander Schneider's terms, their "authority effects") within these settings.[43] The specificity and complexity of the Muslim case arises from the evocativeness of the notion of Islamic law, tied as it is to an idealized past and far-reaching ambitions for the future, from the difficulties Muslim institutions experience defining their place in the Tanzanian state, and from the difficulties of ordinary Muslims' lives. Islamic political mobilization, which further charges these terms, is itself partly a response to these difficulties. Similarly, the ramifications of rights agendas are tied to the institutional configurations of aid and development.

Against this background, the replacement of "rights" agendas with "justice" agendas may make those agendas more accessible and more open to genuine engagement and debate. But it will not change the institutional structures. This is not to say that terminology does not matter; it can express dramatically different analyses. Whether rural African developmental failures are parsed in terms of governance or of environmental constraint, for instance, will make a great difference to the resulting policy recommendations. But the question then arises why one or the other form of analysis is used, and that question leads back to the politics of the institutions that propose these analyses.

Ultimately, notions of both "rights" and "justice" are clearly active and productive among Tanzanian Muslims (as among other East Africans, or Africans, or people). To involve them productively in development processes would, arguably, require above all one thing that so far has been achieved very rarely: experts meeting their targets at eye level. Perhaps seeking to understand how the concepts of *haki, usawa,* and *uadilifu* hang together in, say, Zanzibaris' minds, is a step in that direction. But it is not likely to be sufficient in itself; the institutional structures and practices of the development world would also need to change.

Notes

1. Harri Englund, *Prisoners of Freedom: Human Rights and the African Poor* (Berkeley: University of California Press, 2006).

2. Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007).

3. For example, B. Cooke and U. Kothari, eds., *Participation: The New Tyranny?* (London: Zed, 2001); for an attempt at a constructive response to these criticisms, see Samuel Hickey and Giles Mohan, eds., *Participation: From Tyranny to Transformation?* (London: Zed, 2004).

4. J. Johnson, "Chilungamo? In search of Gender Justice in Matrilineal Malawi" (PhD diss., University of Cambridge, 2013).

5. It should be noted that the definition and meaning of the term "justice" are hardly uncontroversial in the English-language world, either. See the articles on different kinds of justice in *Stanford Encyclopedia of Philosophy,* s.v. "justice" at http://plato.stanford.edu/contents.html#j.

6. On postcolonial Tanzanian political discourse, see Emma Hunter, *Political Thought and the Public Sphere in Tanzania* (Cambridge: Cambridge University Press, 2015); for notions of social justice in recent years, see Felicitas Becker, "Remembering Nyerere: Political Rhetoric and Dissent in Contemporary Tanzania," *African Affairs* 112, no. 447 (2013): 238–61.

7. For very different takes on the history of European justice systems, see Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin, 1975), and various editors, *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2003–present).

8. Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (London: Zed, 2011); Alexander Laban Hinton, ed., *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (New Brunswick, NJ: Rutgers University Press, 2011). See also the activist, holistic approach to justice evident for example in the Treatment Action Campaign (TAC) for access to antiretrovirals in South Africa. See John Iliffe, *The African AIDS Epidemic: A History* (London: Penguin, 2006).

9. See for example Issa Shivji, *Not Yet Democracy: Reforming Land Tenure in Tanzania* (Dar es Salaam: IIED and Hakiardhi, 1998).

10. Hunter, *Political Thought.* For villagers expecting an "economy of affection" to function in relations with the state, see Goran Hyden, *Beyond Ujamaa in Tanzania* (Berkeley: University of California Press, 1981); for more recent critiques, Becker, "Remembering Nyerere."

11. I take the term "independence generation" from James Giblin, *A History of the Excluded* (Oxford: James Currey, 2007).

12. Viktoria Stoeger-Eising, "'Ujamaa' Revisited: Indigenous and European Influences in Nyerere's Social and Political Thought," *Africa* 17, no. 1 (2000): 118–43.

13. Sheikh Shehan Zaina, interview by Felicitas Becker in Lindi-Ndoro, August 2000. He contrasted this defiance with the survival of deference on Mafia Island, on which see Pat Caplan, *African Voices, African Lives: Personal Narratives from a Swahili Village* (London: Routledge, 1997).

14. Rajabu Feruzi Ismaili, interview by Felicitas Becker in Mingoyo, August 2000.

15. Sauda Sheikh Barwani, *Maisha yetu kabla ya mapinduzi na baadaye* (Cologne: Rüdiger Köppe, 2003).

16. Thomas Burgess, *Race, Revolution and the Struggle for Human Rights in Zanzibar* (Athens: Ohio University Press, 2009).

17. Jonathon Glassman, *War of Words, War of Stones: Racial Thought and Violence in Colonial Zanzibar* (Bloomington: Indiana University Press, 2012).

18. For the different resolution of this issue on the mainland, see August Nimtz, *Islam and Politics in Tanzania* (Minneapolis: University of Minnesota Press, 1981); Felicitas Becker, *Becoming Muslim in Mainland Tanzania* (Oxford: Oxford University Press, 2008).

19. James Brennan, *Taifa: Making State and Nation in Post-colonial Tanzania* (Athens: Ohio University Press, 2013).

20. On this context see Jonathon Glassman, *Feasts and Riot* (Oxford: James Currey, 1995).

21. Sadly, the website of *Raia Mwema* has since been deactivated and publication ceased, in keeping with a broader pattern of increasing repression against critical media in Tanzania. Print editions can be consulted at the National Library, Dar es Salaam, but the comment sections are lost but for printouts in the possession of this author.

22. Thanks to Yussuf Hamad for background on Rajab; his departure from Zanzibar is mentioned in Burgess, *Race, Revolution, Human Rights.*

23. The debate on constitutional reform, of which this "three government solution" forms part, can be well followed in the pages of *Raia Mwema.* See, for example, the article "uwezekano wa kupata katiba mpya kabla ya 2015 ni sifuri," published on July 24, 2014.

24. See for example Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (New York: Farrar, Straus, and Giroux, 2009); Nicolas van de Walle, *African Economies and the Politics of Permanent Crisis* (Cambridge: Cambridge University Press, 2001).

25. Ali Jumbe, *The Partner-Ship* (Zanzibar: self-published, 1994).

26. See the discussion thread for Ahmed Rajab's article "Pawe na fursa sawa kulimega andazi la taifa" [Let there be equal opportunity to bite the national doughnut], *Raia Mwema,* June 18, 2012.

27. There is far too little research on Zanzibari "loyalists," the supporters of the current political settlement. The continuing importance of the *ekari tatu* land reform program was brought to my attention by Martin Walshe of Oxfam, based on long experience of working in rural Zanzibar.

28. Elke Stockreiter, *Islamic Law, Gender and Social Change in Post-abolition Zanzibar* (Cambridge: Cambridge University Press, 2015), and Ahmed Idha Salim, *The Swahili-Speaking Peoples of Kenya's Coast: 1895–1965* (Nairobi: East African Publishing House, 1973).

29. See Tanzania Government Printer, "The Law of Marriage Act, 1971."

30. Brigita Pira (primary court judge), interview by Felicitas Becker in Lindi, October 2004.

31. Ali Salum (Bakwata secretary), interview by Felicitas Becker in Dar es Salaam, July 2012.

32. Mohamed Said, *The Life and Times of Abdulwaheed Sykes (1924–68): The Untold Story of Muslim Struggle against Colonialism in Tanzania* (London: Minerva Press, 1998); Becker, *Becoming Muslim,* chapters 7–8.

33. For an overview of the development of this debate, see Njonjo Mfaume, "Mahakama ya kadhi na siasa kali," *Raia Mwema,* August 8, 2015.

34. For example, through the Christian Social Services Commission, CSSC.

35. On questions of Islamic legal authority in Tanzania, see Stockreiter, *Islamic Law,* for the colonial period; on the de facto malleability of Islamic law more widely, see Wael Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009); and Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2010).

36. This is perhaps a good place to thank these research assistants—Zuhura Mohamed, Ida Hadjivayanis, and Yussuf Hamad—for their crucial contribution to this research. Interviews were partly scripted and partly semistructured.

37. The go-to study of the phenomenon is Charles Hirschkind, *The Ethical Soundscape: Cassette Sermons and an Islamic Counter-public* (Berkeley: University of California Press, 2006).

38. For a critique of Nyundo's insistence on making women responsible for male sexual continence, not unlike commentary by "Western" feminists, see interview with anonymous, educated woman by Ida Hadjivayanis in Zanzibar town, July 2012.

39. On the salience of female claimants in religious courts, typically in personal status and inheritance law cases, see Stockreiter, *Islamic Law,* and Abdullah Ali Ibrahim, *Manichaean Delirium: Decolonizing the Judiciary and Islamic Renewal in the Sudan, 1898–1985* (Leiden: Brill, 2008).

40. Note that this understanding of "law of nature" is different from the technical term "natural law," denoting use of correct procedure (equal hearing for all parties; use of unbiased judge) in the English common law tradition. It corresponds more closely to an intellectual tradition that contrasts "positive" (created by humans) law with "natural" (corresponding to the order of nature) law. See *The Stanford Encyclopedia of Philosophy,* s.v. "The Natural Law Tradition in Ethics," by Mark Murphy, accessed March 20, 2018, https://plato.stanford.edu/entries/natural-law-ethics/.

41. The passage leads up to the discussion of a case of witchcraft, where an existing wife hired a *mganga,* medicine man, to make a prospective cowife mentally ill. Mental illness in women is often explained with another woman's jealousy; Bi Fatma of course condemns this use of *uganga* strongly.

42. On these stipulations, see for example Barbara Stowasser, *Women in the Qur'an, Traditions, and Interpretation* (Oxford: Oxford University Press, 1994); the obligation of the husband to support his wife is well established in Zanzibari legal practice, as Elke Stockreiter shows, and mentioned also in other sermons. But the warning against taking wives in excess of economic capacity is not explicated.

43. Leander Schneider, *Government of Development: Peasants and Politicians in Postcolonial Tanzania* (Bloomington: Indiana University Press, 2014).

THREE

Social Justice and Moral Space in Hospital Cancer Care in Kenya

BENSON A. MULEMI

UNTIL THE MID-1960S, CANCER WAS THOUGHT TO BE A DISEASE OF the Western world unknown in so-called primitive societies. The reality of cancer as an increasing public health concern in both Africa and the West began to emerge in the 1990s. The disease is now rapidly becoming a global epidemic with rising numbers of cases in low- and middle-income countries (LMICs). Epidemiologists predict that there will be 17 million new cases of cancer globally every year by 2020, and 60 percent of these will be in developing countries.[1] Africa is experiencing the threat of cancer related to bacterial and viral infections, which seems to compensate for a lower incidence of other cancers that are more common elsewhere in the world.[2] However, sub-Saharan African governments, much like those of LMICs elsewhere, are inadequately prepared for the growing cancer burden. Cancer survival rates are often less than half those of more developed countries.[3] Epidemiologists predict that of 260 million cases worldwide by 2020, 150 million will be in developing countries, where 80 to 90 percent of cancers are currently incurable at presentation. Similarly, less than 5 percent of cancers in developing countries are deemed preventable as compared with one-third of cases in the developed world. Only about one-third of cancer cases in developed countries are incurable,[4] and up to half of patients are "cured."[5]

The increasing prevalence of noncommunicable diseases, such as cancer, in the context of fragile livelihoods, health systems, and low political commitment to their control exposes the complex connection between morbidity and the challenges of justice in sub-Saharan Africa. Disease and illness evoke consciousness about moral obligations or sentiments of mutual well-wishing.[6] As we shall see, acute and chronic illness bring to the fore norms of reciprocity, social exchange, and altruism that shape an ethos of care.

Drawing on hospital ethnography, this chapter explores the cancer care situation in Kenya from a social justice perspective. The increasing cancer burden in Kenya reflects national and global disparities in the management of cancer and other noncommunicable diseases. Cancer care in the resource-poor Kenyan health system draws on moral considerations as hospital practitioners attempt to balance care with the obligation to sustain hope and protect patients' rights. This chapter examines the link between cancer care struggles in a Kenyan public hospital and social justice in the wider society. Cancer care in the context of the country's limited health care resources calls for stronger government commitment to facilitating citizens' rights to care and mitigating the social injustices manifested in the health system. Unequal access to essential medical services shapes improvisations of cancer care in public hospitals in view of widely recognized moral obligations of care, yet therapeutic practices may also compromise patients' rights. Public hospital cancer care settings therefore constitute both social and moral spaces for safeguarding hope and contemplating patients' rights. While the enactment of the Cancer Prevention and Control Act of 2012 expressed the government's intention to ensure justice in cancer management, it is yet to be supported by the provision of adequate resources for quality treatment and care. Sustainable political commitment to social justice in health care would entail the mobilization of operational resources for cancer care as a moral duty toward the poor. This chapter underscores the need for increased international health cooperation to facilitate global health care justice and help ease the cancer care burden in Kenya and elsewhere in sub-Saharan Africa.

Ethnography in a Kenyan Cancer Ward

I conducted hospital ethnography in the cancer ward and treatment center of Kenyatta National Hospital (KNH) between July 2005 and August 2006. I made return visits in 2007 and carried out follow-up

key informant interviews in 2010. KNH is Kenya's largest teaching and national public referral hospital; it is located in Nairobi and caters to patients referred from both private and public hospitals all over the country. My ethnographic research entailed informal conversations and observation of cancer therapy and care practices in the adult cancer ward, where both men and women are treated. Additional qualitative data were collected at the Cancer Treatment Centre clinic and in the radiotherapy department. Kenyatta National Hospital/University of Nairobi Ethics and Research Committee approved the research.

Follow-up visits to ten purposively selected patients provided insight into how they coped with cancer after or in-between hospital treatment sessions. Conversational interviews and observation transcripts were analyzed thematically. Content analysis of current media reports and literature on the cancer crisis in Kenya complements the ethnographic data. The critical medical anthropology (CMA) paradigm provides the theoretical framework for the discussion of the wider social, cultural, and political context of current cancer care practice in Kenya.[7] CMA is an important theory for the analysis of the culture of medical care beyond individual, community, and clinical setting experiences. The aim of this perspective is to include an understanding of the impact of the wider political economy of health on the situation and experiences of hospital care for cancer patients. CMA theory emphasizes that social and political factors such as poverty, social inequality, exclusion, and structural violence are important for understanding and analysis of health care experiences in local care settings.

The concept of social justice from the vantage point of fairness, and the mitigation of harm inflicted by economic exploitation, oppression, discrimination, or inequality,[8] apply to the discourse on cancer suffering and care in Kenya. The emerging cancer epidemic reveals concerns about disparities in local allocation of livelihood and health care resources and the implications of this phenomenon for overall societal well-being. In addition, local and international commercial considerations in the production and provision of essential supplies for the management of the disease constrain fairness in access to cancer care and treatment resources among the poor in developing countries. Underfunding of public health services, and inadequate cancer care expertise among public health professionals, worsen the burden of cancer among the poor. Nevertheless, actual cancer care practices in resource-poor settings often belie a principle of justice, that is, to provide similar treatment to similar cases.[9]

The Pursuit of Cancer Care Justice in Kenya

Mr. Khasi[10] was sixty-five years old during the hospital ethnography in 2006. His help-seeking trajectory through the Kenyan health system for cancer diagnosis, treatment, and recovery was protracted. He recounted his experience of cancer care, which is characteristic of low-income patients in Kenya:

> I tried many places since 1999 when I felt that I was suffering. . . . I went to my doctor, in the hospital at home [in Western Kenya]. They would tell me, "Oh, [it is] malaria" . . . then they referred me to the district hospital where the doctor told me, "Oh [you are suffering from] typhoid." . . . It was more distinct in 2004 and they [doctors] told me . . . to go and check it with the bone specialist who used to work here [the hospital ethnography site]. I went to him and he wrote me an X-ray note to the government hospital in Bungoma, [a local district]. . . . The doctor in Bungoma said there was a problem on the bone and he wondered how a bone could have a disease. He referred me up to Eldoret . . . Moi teaching and referral [Hospital] [in the neighboring district]. When I arrived there . . . the doctor who was attending to me said, "No, this Maumooki is a qualified doctor! The way he has written is adequate; there is no other thing to add." So . . . he did not help me. He said . . . let him [Dr. Maumooki] do the way he has decided, because he taught me in Nairobi University!" (Mr. Khasi, 65-year-old patient, June 13, 2006).

Mr. Khasi's case is typical of protracted trajectories of cancer diagnosis, treatment, and care in Kenya. This points to the scarcity of medical technology and expertise in both rural and urban areas. Intercounty referrals are often futile because of delayed and inaccurate diagnosis and inappropriate treatment advice. Mr. Khasi, for instance, said, "I wanted him [the doctor] even to see what is required, or merely send me for examine me on the machine." The doctor instead referred him to other doctors back in his home county, who lacked appropriate expertise and technology.

Trajectories of cancer care in Kenya, particularly among low-income patients, typically follow varying paths of futile multiple referrals in the local health system. From the low-level dispensaries or health centers, patients dither between at least two county hospitals. Inaccurate or missed diagnoses result in protracted delays in reaching suitable cancer treatment facilities and receiving appropriate care. Disparities in the distribution of cancer technology and expertise in rural and urban areas

account for what patients, family caregivers, and hospital staff dubbed the "invisibility" of the disease or inability of actors located at the different levels of the health system "to see the disease." In addition to treatment delays, some patients, like Mr. Khasi, experienced additional suffering owing to either inappropriate or unnecessary interventions, especially surgery, amputations, or mastectomies.

The government fails to facilitate the fair distribution of public goods and to fulfil its moral responsibility for citizens' equal access to health services. The low priority historically accorded to cancer management and its unique matrix—the cultural, social, and political environment of care—shapes social justice concerns with respect to cancer care in Kenya and other countries in sub-Saharan Africa. Diagnostic and treatment technology is scarce across the country, and the available machines at the national referral hospital are both unreliable and overused. The negligible budgetary allocation to cancer management in Kenya may be attributed to a general lack of awareness among policy makers, the public, and international private or public health agencies concerning the magnitude of the cancer burden and its economic impact.[11]

Livelihood Context of Cancer Care Injustices

Thirty-two of the forty-two cancer patients who participated in the ethnography as principal informants were either married or had been married. Two women were divorced and three of the informants (two women and one man) had been widowed. Ten of the informants were single and dependent on their parents and other relatives. Most dependent patients were still students, though some had completed their studies before commencing regular hospital treatment.

A majority of the patients referred to the national referral hospital had neither formal wage employment nor other sources of regular income. The patients' narratives and those of their family caregivers pointed to their struggles to overcome the disruption that cancer diagnosis and treatment cause to small-scale entrepreneurship and informal livelihoods. A few of the patients who were formally employed earned low wages as primary school teachers, clerks, secretaries, low-grade technicians, and artisans. Overall, the ethnographic material indicates that cancer diagnosis and treatment trajectories often portend an irreversible path toward livelihood insecurity and destitution.

Small-scale cash crop production and subsistence farming supplemented the livelihoods of most study participants. Families relying on

subsistence farming often experienced crop failure and famine, exacerbating the strain of the cancer care burden. In these circumstances, a view of the cancer care liability in a Kenyan public hospital reveals only a small portion of the suffering that poor patients and their families bear as they seek medical assistance. This precarious section of the population continues to grow as inflation and unemployment rise with an increasing number of citizens lacking the kinds of skills that might generate greater economic security. Cancer diagnosis and care trajectories therefore mark the beginning of a journey that entails physical, emotional, social, and material stress.

The majority of self-employed or unemployed people in Kenya are not covered by the National Health Insurance Fund or other health insurance schemes. In the absence of cancer care subsidies from the government or other sources, help seeking among the poor involves trade-offs between daily survival struggles and the quest for proper and timely diagnosis and treatment. Cancer care experiences often feature poverty-stricken families facing the further threat of increasing livelihood insecurity. My informants' accounts of their help-seeking trajectories typified how the poorest members of society incur catastrophic expenses in the face of cancer-associated chronic illness.[12] Many of the cancer patients who arrive for referral at KNH soon face social and financial strains. Very few of the patients interviewed had a fixed monthly income or sustainable social support.

The demands of cancer care and treatment among poor people in Kenya coincide with extant livelihood fragility, which exacerbates social and economic instability. Families are all the more devastated when the cancer patient is a principal wage earner, such as a divorced, widowed, or unmarried single mother. Care fatigue within existing social networks can render such cancer patients and their immediate dependents ever more isolated, left to "fight their own battles," as one informant put it. Conversely, cancer patients from relatively elite backgrounds in Kenya are distinguished by their privileged access to exclusive care in private hospitals, either abroad or within KNH.

Inequality and Exclusive Cancer Care

While preferential treatment may be subtle in acts of triage and therapeutic negotiations, some practices in public hospitals perpetuate elitism in cancer care. Patients from economically or politically privileged backgrounds have the chance to receive more attention than those from less

privileged backgrounds. Some middle-class patients and their families seeking treatment at the national referral hospital, for instance, begin their care trajectory in the "Private Wing" (or Amenity Wards). These "private wards" are established within public hospitals to attract fee-paying, high-income patients who enhance revenue generation.[13] A revenue generation policy in this regard targets corporate clientele through more personalized and higher-quality specialized care, comparable to that provided in private hospitals.[14] The amenity ward and clinics are a post-colonial development that supports privileged access to social amenities and health services in Kenya. Access may be guaranteed by political or civil service privileges and is also available to commercial elites.

In both the colonial and postindependence health systems in Kenya, exclusive care has entailed the treatment of top political and civil service figures outside the country at public expense.[15] Preferential treatment of the elite in the Kenyan health system has also involved informal medical provision plans at specific public or private health facilities that guarantee prioritized allocation of amenity wards and clinics.[16] Well-to-do Kenyans may also seek medical care from private hospitals, where they are cared for by personnel who may be taking time out of their regular contractual care duties in public hospitals. A referral to the amenity wards or private wing at KNH contributes to the substantial financial burden of cancer care. Many cancer patients relocate to the public cancer ward when the cost of care in the private wing becomes unmanageable. Transfer to the public cancer ward and review clinic is often aimed at preventing increasing impoverishment because of the high cost of care in both private facilities and the exclusive wing at the hospital.

Cancer patients from the middle class and financially well-off families may request admission to the private wing wards, oblivious of the cumulative financial costs of care. Similarly, some cancer treatment consultants endorse further care either in local private hospitals or abroad, despite the fact that such care is more expensive and thus inaccessible to a large proportion of cancer patients. Their referrals may be futile, but consultants recommend them as a compromise in order to uphold the ethical principle of respecting a patient's right to self-determination in determining their care. Relatively few citizens enjoy the full benefits of effective medical technology or medical care because of financial and geographical limitations that place particular restrictions on the rural poor.[17] The adult cancer ward at KNH is different from other general wards owing to the patients' special needs, yet it is not as high quality

and comfortable as the amenity wards. The latter are an attractive option for family members who can access them as a means of fulfilling moral values and obligations of care, especially for relatives faced with acute and chronic illnesses.

The Accessibility of Cancer Care Resources

The role of public hospitals in meeting cancer care needs in Kenya is persistently undermined by generalized poverty and limited access to appropriate facilities and expertise. Because of high levels of poverty in Kenya, 40 percent of the rural population has no access to health services. In addition, 25 percent of households in the country have limited physical access to health facilities, which are located more than eight kilometers away.[18] Peripheral public health facilities in the country lack the capacity to provide proper and timely medical care because of limited financial and human resources as well as insufficient medical equipment. Cancer diagnosis, treatment, and referrals within lower-level government and private facilities are often inadequate. The brunt of the cancer care burden in this context is borne by the poorest patients and their families as compared with those in higher income strata.

A scarcity of pathologists and lack of essential cancer diagnosis and treatment facilities contribute to the problems of late diagnosis. While Kenya has two national public referral hospitals, KNH is the only one that is fully equipped for public cancer treatment. Most cancer patients are referred in the late, advanced stages of the disease, and their bleak prospects for successful care are worsened by the scarcity of cancer management experts and technology. In recent years, the Cancer Treatment Centre at KNH has employed only four medical oncologists, yet the volume of new patients per week is between fifty and sixty, in addition to those already being attended to. The cancer unit at Kenyatta National Hospital alone is estimated to require fifteen to twenty clinical oncologists.[19] However, the distribution of about five clinical oncologists, four medical oncologists, and eight hematologists in the whole country, 95 percent of whom practice in various facilities in Nairobi, belies the staffing expectations for effective care.[20] In addition, consultation time and interactions with patients arriving at the hospital are limited owing to long queues and a backlog of patients waiting for diagnosis, reviews, and treatment. Moreover, the concentration of more efficient cancer care facilities and expertise at the national referral and private hospitals in Nairobi leads to the exclusion of rural citizens from prompt quality

care. Residents of distant counties have only limited access to what little state-of-the-art cancer care technology exists in Kenya because it is concentrated in the capital city. With an ever-increasing number of cancer patients requiring personalized care, the situation in the Kenyan health system is dismal even at KNH because of the shortage of medical personnel.[21]

Frequent shortages of cancer medicines and treatment technology exacerbate the difficulties of accessing effective care both at KNH and throughout the public hospital system. Cancer patients and their families typically follow long therapeutic paths and approach the appropriate facilities for proper medical interventions very late. The hospital spaces in this sense portray microcosms of the social (in)justice realities that are perceptible in narratives of cancer care inequalities and enacted in public hospitals. Clinical spaces in resource-poor public hospitals often manifest injustice, violation of human rights, generalized poverty, violence, discrimination, and intolerance in the wider society.[22] Narratives of social and medical histories of etiologies, treatment, and care related to different cancers presented at the national referral hospital often reflect these experiences of injustice.

KNH procured and commissioned the only gamma camera machine available to the public health sector in late 2005. Prior to this, low-income patients could not easily access the facility in private hospitals. The machine serves all the units in the hospital, and this contributes to diagnostic backlogs and treatment delays. Both the purchase and the repair of cancer diagnosis and treatment equipment are prohibitively expensive. A radiographer who participated in the hospital ethnography reported that the repair of a treatment planning simulator that had broken down would cost slightly over ten million Kenyan shillings (approximately $288,739). The radiographer also said that a representative of the International Atomic Energy Agency recommended that "it would be more economical" to buy a C-arm X-ray machine as a substitute for the broken-down simulator. The radiotherapy department had in the meantime "borrowed" a C-arm X-ray imaging machine from the X-ray department, as the hospital sought funds for a new simulator. The senior radiographer estimated its cost at thirty to forty million Kenyan shillings. Problems related to cancer treatment also extend to the brachytherapy and cobalt-60 machines, which are too few in number and prone to frequent breakdowns. The collapse of some machines leads to protracted care delays, which are made worse by the shortage of skilled technicians

to operate and maintain the machines.[23] The shortage of treatment machines exacerbates cancer care difficulties owing to the widespread delay in the presentation and confirmation of diagnoses.[24] In what follows, I discuss how cancer caregivers in this resource-poor context strive to safeguard hope in hospital care through therapeutic improvisations that aim to humanize oncology by drawing on a cultural ethos of care.[25]

Care Ethos and the Hospital as Moral Space

A pharmacist narrated the challenge of sustaining patients' hope despite perennial shortages of cancer medicines. Scarcity of essential cancer drugs, combined with the high cost of drugs and slow procurement processes, significantly constrain cancer treatment at KNH and other public hospitals in Kenya. The pharmacist has to understand each patient's drug prescriptions and "their quantities in terms of the pharmaceutical products," yet this may be a mere formality owing to drug shortages and prohibitive costs in private pharmacies. Subsidized drugs and treatment regimens, along with alternative choices, may be unavailable in the hospital pharmacy. A pharmacist may calculate price variations depending on different combinations and their perceived affordability for particular patients and their families. All patients are told of the likely outcomes of drugs that are not available in the hospital, whether or not they can afford to source them from elsewhere. The prolonged inaccessibility of essential drugs contributes to treatment delays, interruption, and even abandonment among poor cancer patients referred to KNH.

The public hospital constitutes an arena for the invention of ways of "assisting patients" to cope in the face of scarce care resources. Medical personnel attempt to fulfil their moral obligation to ease suffering. They seek to balance hope for hospital cancer care against the experience of poor therapy outcomes and prognoses. According to a doctor on the cancer ward, medical staff strive to help patients, especially "when a patient has come once, twice . . . thrice . . . and every time they raise concerns of affordability, lack of bus fare." Thus, cancer care entails caregivers' emotional labor and involvement in patients' suffering. This reflects the significance of a sense of human and professional moral obligation to ameliorate desolate circumstances as an expression of awareness of the imperative of justice in cancer care. At least five dimensions of cancer treatment and care improvisations emerged from the hospital ethnography in Kenya in relation to the moral obligation and contextual ethos of care.

Instances of care improvisation could entail flexibility in either the drug regimen combination or the sequences of therapy administered. The concept of radiochemotherapy provided a justifiable framework for care flexibility and more improvised approaches to treatment. This occasionally involved an individual clinician's decision about medicine combinations or sequential therapies. Such improvisation by doctors may be part of desperate initiatives to help them "see the response." Eclectic therapy combinations were partly motivated by the fact that many patients were unable to consistently afford standard regimens. This necessitated the practice of admitting patients for about three courses of chemotherapy, followed by radiotherapy with unprecedented pauses in treatment courses. Radiotherapy followed cheaper chemotherapy preparations as a coping strategy "to help or do something for destitute patients."

The second aspect of cancer care ethos and improvisation entailed inventive ways of having some patients "share available chemotherapy drugs." Doctors improvised with whatever machines and medicines were available to treat patients and referred those who could afford further help to Uganda, South Africa, or India. In the absence of this option, cancer caregivers in the Kenyan referral hospital would resort to a third form of improvisation: a limited degree of triage. Social workers helped identify the poorest of the poor among the patients and recommended priority consideration for them when the hospital acquired subsidized drugs.

Retaining patients on the cancer ward or outpatient treatment schedules for "supportive management" constitutes the fourth care improvisation. This supplements the creative therapy combinations and drug sharing. "Supportive management" is a variant of palliative care, to ease patients' physical suffering in the absence of means to procure the recommended treatment. In addition, a fifth form of cancer care improvisation in the Kenyan health system is often couched in maxims of hope. Hospital caregivers feel morally bound to sustain hope among patients and their family members despite impending hopelessness. This is thought to promote the patients' self-determination and the hospital practitioners' obligation to safeguard both patients' and their family caregivers' confidence in hospital care.

Persistence with respect to disease-directed cancer treatment and hope-instilling activities often coincides with catastrophic financial costs, as well as emotional and social exhaustion at the end of the patient's

life. Conversely, oncologists and other cancer caregivers are aware that some forms of cancer, or the disease at particular stages, are incurable. They may even be able to predict when further disease-directed therapy will be futile, yet this may not be disclosed, particularly to patients. The moral dilemma in this experience relates to whether to continue with curative therapies or to spare patients the drug toxicity, financial expense, and false hope associated with such treatment.[26] Nondisclosure of prognosis and the realities of cancer treatment limitations in Kenyan hospitals obscures the need for palliative care that might enhance patients' quality of life. Persistence in offering arduous, yet futile, cancer therapies, such as chemotherapy, until the patients' last days increases livelihood insecurity and undermines quality of life.

Nondisclosure of cancer prognosis in Kenyan care practice entails a moral dilemma regarding "reporting bad news to patients." Care providers both at home and in clinical settings struggle with the desire to balance hope with initiatives that would elicit therapeutic endurance or treatment acquiescence. This balance between hope, adversity, and poor prognosis in cancer care creates space for patients' self-determination, that is, their freedom to determine care practices that affect their well-being. Avoidance of explicit disclosure of likely cancer treatment outcomes is a strategy aimed at justifying improvisation in the face of the injustices that contribute to cancer care resource scarcity and therapeutic futility. The resource-poor context of cancer treatment in the Kenyan health system necessitates a trade-off between the moral duty of humanizing oncology and safeguarding patients' rights.

Cancer patients and their relatives may be informed about their treatment options, yet they are often limited to chemotherapy and radiotherapy. Up to 70 percent of patients require radiation therapy in the course of their treatment, "but they still have a right to say yes or no to that treatment," as a radiation oncologist explained. He observed that while patients are "not forced to accept treatment," they are persuaded to "think about it." Ideally, patients are expected to sign if they refuse to continue with treatment, "so that they don't hold the doctor responsible for their refusal."[27] Cancer management in the Kenyan referral hospital therefore involves the redefinition of therapy, care, and patients' rights in view of the scarcity of resources and a local ethos of care. This constitutes contextualized care and improvised justice, aiming to help patients by redefining their rights in relation to principles of dignity and autonomy, and through efforts to attend promptly to their care needs. The

public hospital in Kenya typifies resource-poor African health systems where cancer care clinical settings constitute moral spaces and places to encourage hope through sociomedical activities.[28]

Public Health Justice and the Status of Cancer Care

Several public health justice issues shape the current status of cancer care service delivery in Kenya. Exploration of different forms of justice that relate closely to conceptualizations of the social justice perspective underscores an understanding of health justice issues in cancer care. First, *corrective justice* is necessary in order to address disparities in the utilization and distribution of cancer management resources, both locally and internationally. Corrective justice in the context of the cancer care burden among the poor would entail mechanisms by which insurance schemes and tax regimes targeting high-income groups could "trickle down" to channel health care advantages to vulnerable groups. Self-employed and unemployed citizens, for instance, could pay modest contributions for the National Hospital Insurance Fund (NHIF) for service equivalent to that enjoyed by those who pay higher rates owing to their higher income. Unfortunately, the prohibitive cost of hospital treatment for cancer, coupled with the general scarcity of cancer drugs, technology, and expertise, negates this initiative at present. Corrective justice in this sense denotes the idea that liability rectifies the injustice inflicted by one person on another.[29] Arguably, the process of individual or collective betterment despite stark socioeconomic inequalities implies either direct or indirect injustice that produces disadvantaged groups in African health systems in the first place and calls for a form of corrective justice. Drawing tax from the better-off in society in this regard can alleviate the suffering of poorer cancer patients. This social commitment can be equated to payment of a quantity of damages that corrective justice requires in order to establish equality.[30] Central to this conceptualization of justice is the need to address the historic and contemporary dynamics that shape the low priority given to the management of cancer and other noncommunicable diseases in Kenya and the rest of sub-Saharan Africa.

Second, *redistributive justice* can remedy the poor status of cancer care as well as more general health system inequalities, which contribute to the political invisibility of the disease. Distributive justice entails the distribution of whatever is divisible, including goods and resources for human dignity and honors among members bound to the same state

by the social contract.[31] In addition, redistributive justice denotes the need to remedy skewed distributions of goods and services that have implications for societal well-being. This form of justice entails attempts to equalize material goods and wealth ownership through political interventions. Like corrective justice, redistributive justice would include levies intended to facilitate economic empowerment through the transfer of wealth from one sector of the population to another. It is possible that the implementation of the new, 2010 constitution of Kenya will have far-reaching consequences for redistributive justice, which may alleviate the health care burden among the poor. The devolution of health care, in particular, may ease the suffering cancer patients experience by seeking treatment centralized in major urban centers and especially in the capital city. The envisaged reparation of historical injustices might enhance well-being nationwide through the promotion of equality in wealth and health production, which have a reciprocal influence on societal well-being.[32] Social justice is therefore an aspect of the conceptualization of health justice in its broad sense.

Social justice underpins the fair distribution of common advantages and the sharing of collective burdens. This perspective captures the twofold moral considerations in public health practice, especially improvement of health. The first moral concern of social justice is about advancing human well-being by improving health, while the second is about achieving the former by paying attention to the needs of the most disadvantaged.[33] Part of this should entail redistributive justice in integrated palliative care for cancer patients. The dire status of care for terminally ill patients draws attention to the moral duty to relieve suffering through beneficence, compassion, and nonabandonment.[34] However, the cancer care infrastructure in Kenya reflects operations of "market justice" or political influence, which favor the rich, powerful, and socially connected over and above the poor.[35] There is a disproportionate concentration of high-quality care technology and expertise in the oncology units of private hospitals as compared with those in major public hospitals. Services in the private hospitals—including the private wing or amenity wards of the public hospital—contradict the essence of social justice in public health. From the perspective of market justice, provision of quality cancer treatment and care in private hospitals and private wings of public hospitals is not determined by need, but by ability to pay. This approach to the allocation of goods and services poses a moral dilemma as it draws on moralities of individualism. This

includes the right to self-interested profit making, quests for rewards for personal investors or creators, as well as benefits for intellectual labor.[36]

The cancer situation in Kenya raises concerns about the moral obligation of public health to support all members of society to access health care and avoid premature death and preventable morbidity.[37] This may take a while to materialize with regard to cancer control challenges owing to widening socioeconomic inequalities, the limited political visibility of cancer, and low government commitment to providing funds to mitigate the care burden. The wider socioeconomic context of cancer management in Kenya's main referral hospital reveals a growing political economy of exclusion in cancer care. This matrix characterizes decreased access to health care services, comprehensive insurance policies and coverage, and safety-net systems for the poor.[38]

Government Stewardship and Care Coverage

Kenya is among the few African countries with legislation and institutionalized organization for cancer care.[39] The Cancer Prevention and Control Act of 2012 was an important step toward political visibility for the disease. The Kenyan government also expressed commitment to cancer control by formulating the National Cancer Control Strategy 2011–2016[40] and the 2013 National Guidelines for Cancer Management.[41] These initiatives resonate with the cancer care vision of other African countries, including Rwanda, Uganda, Nigeria, and Algeria. However, health care justice for cancer patients through institutionalized programs remains uncertain because of inadequate political and social will to finance them. The disparities between rural and urban cancer management resources form one obvious challenge to the devolved model of health care.

The 2012 Cancer Prevention and Control Act mandates the National Cancer Institute of Kenya (NCI-K) to coordinate all care and treatment services. However, there are concerns about how this will be implemented in the context of the devolution of health care functions. Despite reservations about implementation, however, the act was a gesture of political will for government stewardship in the pursuit of cancer care justice. This positive step toward the organization of cancer management may be hindered by a new phase of waiting for quality care owing to insufficient resources. Cancer care legislation processes, from the drafting of the bill to the enactment of the act and its eventual operationalization, are a new kind of delay with respect to the government's responsibility for cancer prevention, early diagnosis, treatment, and palliative care services.

Cancer remains politically invisible among the poorest people in rural areas who lack health care infrastructure. Private-sector players continue to invest millions of shillings in state-of-the-art cancer care expertise, equipment, and infrastructure in the main urban areas. Internationally accredited and highly trained experts support these exclusive private sector cancer care initiatives, while patients in the public sector continue to wait for a year or more for equivalent care.[42] This implies that the government ought to be more proactive in turning the stipulations of the Cancer Prevention and Control Act into reality.[43] In a few exceptional instances in March 2015, the government negotiated for a discount with private hospitals to treat patients from public hospitals after both of the machines available to them at KNH broke down for about a week. The government demonstrated responsibility for its citizens, but the partnering private hospitals offered cancer care framed by the market justice principle of charitable behavior. New approaches to integrating social justice values for equitable access to quality cancer care call for sustainable government support and commitment.[44] However, as the following section demonstrates, efforts toward equity in cancer care in Kenya are mediated by global health injustices.

The Global Health Justice Context for Local Cancer Care

Low- and middle-income countries (LMICs) have very limited budgetary allocations for cancer control, yet only about 5 percent of global health spending on cancer is directed at these countries.[45] Developed countries register higher rates of cancer prevention and successful cure and care compared to LMICs. Less than one-third of cancer patients in developing countries have access to either cancer screening or proper treatment and care services. Whereas developed countries such as Austria have a radiotherapy machine for every two hundred thousand citizens, LMICs may have only one for more than five million people, and the poorest countries may have none at all.[46] Cancer care disparities between developed and developing countries are also manifested in differential access to (and affordability of) drugs, effective analgesics, and qualified care personnel.

Critical medical anthropology (CMA) theory provides a framework for situating cancer care in Africa within the context of international economic and health justice systems.[47] The national public referral hospital in Kenya, for instance, is linked to the state, which in turn seeks the services of other national and international actors in health care.[48]

Some of these actors, such as international pharmaceutical companies, have an interest in the health care sector that is geared toward financial profit. Similarly, the business practices of drug firms as well as medical technology producers and suppliers, which intersect with government budgeting and hospital procurement processes, have implications for patients' well-being. Nevertheless, global and national disparities in health care might be bridged through a balance between market justice and social justice. Market justice supports the supply of health care resources on the basis of market rates, which may conflict with moral obligations to support universal access to health services and technology. Typically, market justice underscores individual responsibility, downplaying collective action and emphasizing freedom from collective obligations, except where that conflicts with other people's fundamental rights.[49] The challenge of cancer in both the global North and South calls for attention to the ethos of burden sharing, alleviating human suffering, and the protection of vulnerable lives.

Improvising Health Justice and Cancer Care in Local Hospital Spaces

Cancer treatment in the Kenyan national referral hospital reflects protracted trajectories of just care seeking and moral dilemmas faced by medical professionals. The dire cancer care situation, particularly among the rural poor, is a product of socioeconomic disparities and the political invisibility of noncommunicable diseases. Personnel in the national public hospital strive to improvise justice by balancing medical improvisations with their obligation to safeguard hope and confidence in contextualized oncology. The pursuit of health justice and cancer care calls for deliberate government efforts to reduce local social and economic disparities that limit equity in the health system. Attention to health care disparities within developing countries and between low- and high-income countries is also imperative. However, a concern for rights to health for cancer patients may contradict the tenets of market justice. A plea for commensurate reward for cancer care service, products, and expertise should be balanced against the imperative of attending to the needs of all patients. Conversely, attempts at humanizing cancer care are in line with the justice principle of fair disbursement of common gains and the sharing of health care burdens.[50] The current cancer care crisis in Kenya and beyond indicates the need to pursue global health justice

and increased cooperation between the global South and North. In addition, centralization of cancer care technology and expertise in the national public referral hospital and other public hospitals and private facilities in the main cities of Kenya entails the exclusion of the poor. Cancer control efforts seem to be taking too long to elicit the requisite political and social will. There is clear need to provide adequate budgetary allocation for devolved cancer prevention, diagnosis, treatment, and palliative care services.

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FOUR

Relational Justice and Transformation in Postapartheid South Africa

DUNCAN SCOTT

VIOLENCE IS AN ENDURING FEATURE OF SOUTH AFRICAN SOCIETY. AS the authors of the South African Truth and Reconciliation Commission (TRC) report noted in 1998, "Violence has been the single most determining factor in South African political history."[1] It was widely expected that the end of conflict and the establishment of democracy would lower levels of violence, but annual crime figures confirm that South Africa consistently exceeds the global average murder rate of 6.2 per 100,000 people—by a factor of five.[2] Moreover, the interpersonal violence of murder and aggravated robbery has been accompanied by the state-on-citizen violence of police brutality such that there has been a "breakdown in relations" between the South African Police Service (SAPS) as a state institution and the citizens it serves.[3]

When South Africa entered the democratic era, the TRC was conceived as a mechanism to encourage reconciliation and forgiveness by providing victims the opportunity to narrate their experiences and giving perpetrators a platform to make apologies and seek forgiveness.[4] The significance of the current reality is that the TRC's high-profile promise to build a peaceful postapartheid South Africa based on the relational principles of *ubuntu* and reconciliation seems to have failed: violence persists in old and new forms. Certain commentators contend not only that these relational ethics have been unsuccessful but also that

they have helped legitimize economic injustices in the postapartheid era.[5] Ingie Hovland in particular has argued strongly that macrolevel economic structures that perpetuate poverty and inequality also fuel interpersonal tensions at the microlevel. She claims that these tensions ultimately emerge as the "individual acts of violence" captured annually in the country's crime statistics.[6]

The Warehouse

In a climate of manifest injustice characterized by violent interpersonal and institutional disrespect, this paper responds to the allegations that otherwise noble ideas of reconciliation and *ubuntu* have been reduced to mere rhetoric while exacerbating power differences in society. Unlike the mainly theory-driven material produced on *ubuntu* and reconciliation, whether it be positive or negative, this chapter adds a unique angle to the discussion of the future of relational ethics in South Africa by drawing on empirical qualitative research conducted between August and December 2013 in Cape Town, South Africa. It examines how The Warehouse, a Christian nongovernmental organization (NGO) with a relational worldview, is mobilizing discourses of transformation and relationship building to take action against material poverty, inequality, and racial division.[7]

The Warehouse, which as of 2013 had fifteen part- and full-time staff members, grew out of a racially mixed Anglican parish's 1998 community development initiative to respond to the devastating effect of HIV and AIDS in Cape Town. Following several years of organizational planning and after securing a centrally located rental property—a former fish and chip warehouse in Wetton, a semi-industrial neighborhood just off a major transport route—The Warehouse became independent in 2003, adopting a nondenominational character in the process. Its location in Wetton established the organization as a node within the city, a meeting point for training and discussion and a space for receiving and storing food and clothes for the purposes of emergency relief. One of the original organizers explained in an interview that prior to becoming independent from the parish, the project directors had envisioned working in the "gray spaces" of the city, by which he meant that they wanted to encourage social change without having too conspicuous a hand in the process. They settled on The Warehouse as a name that was suitably nondescript so as to foster a discreet organizational character.

The small Christian organization, which emphasizes relationship building as the foundation for tackling social and economic injustices

in the city, comprises four men and eleven women—the higher numbers of women may be due to The Warehouse's historical emphasis on social work, a profession dominated by women in South Africa.[8] Of the fifteen employees, five are black, two are Coloured (in the local terminology), and eight are white. Although it originally ran a variety of social assistance projects at churches throughout the city—including a project for young HIV/AIDS orphans, as well as a program that helped school leavers access further education and jobs—and the provision of emergency relief for flood- or fire-affected township communities, the organization decided in 2010, following a review of its programs, to take an increasingly facilitative approach to development.

Since making the move away from a programmatic approach to a facilitative one, The Warehouse has focused on building relationships with church leaders by visiting them individually and helping them develop plans to respond to local community needs. Although The Warehouse does not have a list of members or clients, it has built an ecumenical network of churches that extends from the wealthy, and predominantly white, neighborhoods that surround Table Mountain to the poorly serviced, almost exclusively black and Coloured townships created by the apartheid regime on the outskirts of the city. The organization's hope is that church leaders (from Anglican, Catholic, Evangelical, and Charismatic/Apostolic churches) will be able to conduct their own community initiatives rather than rely solely on external donors. In the process of changing its organizational structure to suit its strategy, The Warehouse has created a management position to lead the partnership building aspect of its strategy, with the manager coordinating a team of four staff members to engage church leaders across Greater Cape Town. A second manager oversees another three staff members in the planning and execution of training events on community-led development as well as discussion forums that bring together diverse church leaderships to confront divisions in the city and encourage interdependence between churches for development purposes.

By analyzing fifteen semistructured interviews with Warehouse employees and approximately fifty-four hours of participant observation data, this chapter examines how research participants translate ideas of relational justice into social action. Ultimately, this chapter asserts that it is unlikely that a small organization will overturn the structural violence that is inescapably linked to the physical violence experienced by so many in the country. However, it is an instructive example of how relational

ideas of justice can challenge oppressive social and political norms, with the very real possibility that material transformation will ensue.

In what follows, I first present a short history of the reconciliation and *ubuntu* projects in postapartheid South Africa and consider some of the critiques that have been leveled against them. Second, I describe the national transformation project in South Africa and examine The Warehouse's relational ideas and practices as they apply to the organization's intentional transformation strategy. I conclude by discussing how the case study's relational ethics further our understanding of the continued applicability of ideas of relational justice in South Africa today.

The Troubled History of Relational Ethics in Postapartheid South Africa

Relational ethics emphasize that interpersonal connectedness is indivisible from personal freedom. Wendy Austin describes this succinctly, saying, "If ethics is about how we should live, then it [relational ethics] is essentially about how we should live together."[9] This emphasis on respectful, relationship-based action has played a prominent role in South Africa's transitional and postapartheid eras, most notably in the work of the TRC. Led by the former archbishop, Desmond Tutu, the TRC confronted the violence of the apartheid years with restorative ideas of reconciliation—rather than retribution—to restore and sculpt the postconflict nation. Indeed, South Africa's TRC is often discussed as a flagship mechanism of restorative justice, a paradigm held by scholars of relational theory to be the most appropriate means to restore respect to human relationships based on sustained dialogue between all parties involved in an injustice.[10]

The TRC's mix of Judeo-Christian ideas of forgiveness and reconciliation combined to promote a strong relational project of nation building under Nelson Mandela's presidency. However, a second relational ethic, *ubuntu,* was just as important in this process.[11] *Ubuntu* refers to a communitarian worldview, often evoked in South Africa's postapartheid politics. It is commonly explained using the phrase "a person is a person through other persons" or "I am because we are," denoting the principle that the achievement of personhood is fundamentally tied to harmonious interactions with others.[12] The term does not appear in the current South African constitution, but the interim constitution of 1993 explicitly referred to the need for *ubuntu* in society, and this ultimately informed the restorative nature of the TRC.

Two years after the TRC's first hearings in 1996, the final report presented by the commissioners called for South Africans to foster a "spirit of *ubuntu*" to help in the nation-building project.[13] Today, academics and politicians continue to celebrate *ubuntu* as an African, postcolonial ethic of human interdependence, which they claim contrasts with Western ideas of individualism.[14] Yet the positivity surrounding the implementation of this indigenous moral framework is by no means universal. On the one hand, critics have censured the TRC itself for burdening individual victims of atrocities with a duty, derived from specific religious and cultural backgrounds, to forgive their perpetrators. From a relational perspective, the goal of this forgiveness is the reparation of the essential human relationship between those who committed crimes and those who suffered from them. But detractors have argued that the conflation of *ubuntu* principles, reconciliation, human rights discourse, and the language of transitional justice resulted in a watered-down form of justice for victims of apartheid.[15]

Beyond the TRC, critiques of postapartheid South Africa's ethics of reconciliation and *ubuntu* have extended to business and the economy. For example, commenting on how *ubuntu* principles have been co-opted by big business, McDonald states that "pro-market *ubuntu* rhetoric is exactly that, rhetoric, serving more to justify postapartheid capitalism and neoliberal policy-making, than to provide any serious or realistic alternative to economic management in the country."[16] Somewhat jarringly, a subgenre of research into business management proposes not only the ethical viability but also the economic value of an *ubuntu* business model, one paper going so far as to argue explicitly for the "competitive advantage" offered by an *ubuntu* management style.[17] Hovland, meanwhile, asserts that the political focus on reconciliation after apartheid allowed big business to maintain and even reinvigorate capitalist policies that have perpetuated social strains caused by poverty and inequality.[18]

Considering that proponents of *ubuntu* and reconciliation emphasize the interconnectivity of human beings and the importance of respectful relationships for personal and communal well-being, McDonald and Hovland's allegations highlight the contradictions in how these relational ethics have been used by the corporate sector and the state to further their interests. Matolino and Kwindingwi have ventured so far as to proclaim the "end of ubuntu" itself, precisely because they see it as an elite-led project that has little bearing on how most South Africans

live.[19] Hovland, who describes the reconciliation agenda as "opium for the people," argues that as long as the rhetoric of reconciliation detracts attention from enduring social and economic injustices, "the notion of reconciliation should be laid to rest."[20]

Those who contend that *ubuntu* and reconciliation projects are not only morally compromised but also ill-suited to tackling the country's problems need only refer to the state of South Africa's economy to support their arguments. Since the 2008 global recession, the country's GDP growth rate has been slower than many other emerging economies in Africa and beyond.[21] Approximately 37 percent of youth in South Africa (defined as people aged 15–34) were reported as unemployed in mid-2015,[22] and the overall unemployment rate in the formal labor sector remains high at 25.5 percent of the working-age population.[23] Furthermore, according to the IMF's calculation of South Africa's Gini Coefficient, which gives a measure of income inequality, South Africa is a more unequal society than Brazil, Russia, China, and a host of other emerging economies.[24] In these circumstances, detractors of relational ethics assert that reconciliation "is idealistic, utopian, unlikely to succeed, prone to boondoggles, guilty of moral overstretch, and contrasts with a more preferable politics that is practical [and] hard-bitten."[25] *Ubuntu,* with its emphasis on forgiveness and communal harmony, as opposed to hard-boiled human rights,[26] hardly fares better in this regard. Critics have argued instead for a rights-based redistributive program, "a vision of justice that aims to establish social equality through the redistribution of goods guaranteeing liberty."[27] As Patrick Bond, the outspoken critic of the Mbeki regime's neoliberal economic policies, states, "No peace without justice, no reconciliation without redistribution."[28]

These forthright calls for strong action to eliminate inequality are compelling, not least because they seem to confront the power differentials in South African society. Moreover, the well-known South African Reconciliation Barometer, an annual survey that has traced race relations in South Africa for more than a decade, concludes that racial interaction correlates with income levels: a black South African earning a middle or high income is more likely to interact socially with a white, Coloured, or Indian South African who has a similarly high living standard, and vice versa. In contrast, poorer South Africans, the majority of whom are black, are highly unlikely to socialize with other racial groups.[29] From this evidence it seems that racial divisions are materially driven and that a "redistribution first, reconciliation later"

approach would suffice to heal the nation. Yet such a conclusion does not capture the divisions that persist within class groups. The prominent black South African singer Simphiwe Dana describes her experience of Cape Town, a city often accused of being racist and not merely racialized, saying, "Cape Town has mastered the art of racism. People see you but they look over you. You can feel it. I have exposed prejudices that people still have even though they say let's be friends."[30] In a newsletter subtitled "Focus on Racism: Is Cape Town a Racist Hotspot?" published by the Institute for Justice and Reconciliation (IJR), the same organization that produces the Reconciliation Barometer, one of the authors writes, "As a young black professional, I have never left Cape Town to work elsewhere. Yet in my own experience, the resilient status dynamics between white, colored and black African people in the Western Cape and Cape Town seems to reflect apartheid's legacy more than anywhere else in South Africa."[31] The experiences of middle-class, black South Africans indicate that material equality does not necessarily lead to interracial relationships characterized by mutual respect. At the very least, this raises the dilemma of whether it would be wise to discount the role of relational ethics such as *ubuntu* and reconciliation, both of which encourage meaningful relationships between people and tie in with a notion of justice based on intersubjective respect and recognition.[32]

The research that led to this paper took as one of its starting points the consensus in postconflict literature that the rebuilding of relationships, respect, and dignity has particular importance in societies emerging from conflict.[33] Considering the deep mistrust between opposing parties that characterizes these societies, the empathic process that eventually allows members of previously antagonistic groups to imagine the social and emotional state of the other can be a protracted one. However, the importance of such a process, which prompts individuals to change their attitudes toward one another and promotes institutional change in the postconflict era, is undeniable. Jennifer Todd draws on the example of Northern Ireland's peace process to remark that "it is only when institutional changes are accompanied by changing self-perceptions that new institutions begin to create new dynamics of interaction; otherwise new institutions and practices become assimilated within older meanings and oppositions."[34] More than twenty years after apartheid ended, South Africa is caught between institutional intransigence, as black South Africans continue to suffer from exclusionary economic and educational structures and the new corruption associated

most strongly with President Jacob Zuma's regime. Poverty, joblessness, unequal access to vital resources, and divisions along class and race lines characterize the current social climate.

By contrast with the secularization trend in Western Europe, South Africa (like much of Africa and South America) has historically shown relatively high levels of religiosity.[35] Several nationally representative surveys indicate that South Africans are more likely to trust religious institutions than other public institutions, including the presidency, national and local government, political parties, and the police service.[36] Moreover, religious institutions played a prominent part in the antiapartheid movement and in the country's transition to democracy. For example, religious leaders constituted a large proportion of the commissioners at the TRC. Considering religion's historical peacebuilding role in South Africa and its enduring importance in the private and public sphere, the research on which this paper draws focused on how The Warehouse, which explicitly pursued transformation in Cape Town communities, might be able to contribute to the national transformation project, a social, economic, and political program that in recent years has been undermined by a lack of political will and widespread corruption at all levels of government. Importantly, The Warehouse emphasized a relational ethic in pursuing transformation in Cape Town. The following section briefly explains the meaning of transformation in South Africa and elaborates on research participants' understanding of the concept, especially as it relates to their work. This is the first step in examining how The Warehouse's relational ideas and practices help us think about justice in South Africa today.

Material, Relational, and Individual Transformation: Religious Understandings of Transformation

Achille Mbembe has described transformation in postapartheid South Africa as a particular form of redistributive justice, namely, "the set of policies designed by the government and the private sector to redress past racial discriminations and to redistribute wealth and income to previously disadvantaged groups."[37] With Nelson Mandela as its president, the African National Congress (ANC) successfully oversaw full political transformation when it won 62 percent of the vote in the historic 1994 elections. By contrast, economic and social transformation have been significantly slower processes and are still to be realized. Affirmative action, equal employment, and black economic empowerment policies have sought, after centuries of colonialism, to normalize access to

the labor market and ownership of business. However, these top-down redistributive strategies have been plagued by allegations that they are ineffective and prone to elite cronyism; large tenders, for example, are habitually awarded to well-connected businesspeople—or tenderpreneurs, as they are colloquially known.[38] More than two decades after the advent of democracy, "moral questions of justice and equality and pragmatic and instrumental questions of power and social engineering" have still not been conclusively answered.[39] It is against the background of the continued need for social and economic transformation within a climate of injustice and disrespect, that The Warehouse posits its own, religiously inspired transformation agenda based on a relational idea of justice.

In its strategy, The Warehouse expressed that it wanted to see transformation in communities in Cape Town and to be a transformational community itself. It was evident after analyzing interviews conducted with staff members that the organization held a particularly relational understanding of transformation. Most participants believed that there were three elements to transformation, what I have termed material transformation, relational transformation, and individual transformation. According to participants, none of the transformational elements exists independently of the others. Moreover, while these elements are discernible as different aspects of a holistic notion of transformation, they frequently overlap in practice.

Most strikingly, the inclusion of relational and individual types of transformation distinguished the group's conception of transformation from the material, policy-focused transformation pursued by the South African government and other development NGOs. The organization recognized the need for structural change in the economy, better basic education, universal access to sanitation, and job creation. However, it insisted the country's overarching material problems could not be fully addressed without also ensuring successful relationship building across racial, economic, and spatial divides. That is, relational transformation is necessary both to heal the scars of the past and to pave the way for future material changes in society. Furthermore, Warehouse participants believed individual transformation in the form of self-recognition and empowerment through realizing one's "authentic" identity in a relationship with God needed to occur in tandem with the other two elements. One participant concisely captured the character of this idea of transformation when he stated that social change occurs by working "inwardly outwardly." It is a religiously inspired process of individual

change that occurs in relation to, and with, other South Africans, many of whom have vastly different life experiences.

Sceptics of relational ethics in South Africa may worry that The Warehouse's overt focus on establishing respect between people and building relationships across historical divides in Cape Town (geographic, economic, symbolic) is no different from the "old" reconciliation and *ubuntu* projects associated with Nelson Mandela and the TRC. In fact, very few of the study participants formulated their idea of transformation using the rhetoric of reconciliation. Where they invoked a relational facet to transformation, they envisioned a more fundamental, relational state of being. One of the most telling comments in this regard was made by Justine, a white woman in her early thirties who was working on a global anticorruption campaign run out of The Warehouse offices. When I questioned her on the campaign's objectives, she answered that "the main goal is to tackle [material] systemic issues." However, she also added that a major goal was the "transformation of the individual—so their thinking about what it means to be a Christian in the world, how my actions affect people and the world affects me, and how important it is to see yourself not as an isolated entity, but that we, yah, it's impossible to live without people so therefore we should all work together."

Another participant, Emma, who had worked at The Warehouse for several years, similarly described the interconnected nature of people's lives. A white, thirty-seven-year-old woman, Emma linked material and relational transformation ideals, saying, "There's the sense that, kind of, for the freedom of the whole of society, we all need to do this together. We're not free, none of us are free if you're not, you know, if you're still under the yoke of injustice. And so, so my involvement with you if I'm, I come in with a power dynamic that is, I'm wealthier than you materially, but yet I'm just as needy as you are for everything to be [short pause] for Shalom to take place."

As a consequence of this relationally informed idea of transformation, participants emphasized that relationship building between churches, church members, and development organizations needed to take into account the racially based privilege and structural injustices that have long defined social interactions in South Africa. Participants recognized the power imbalances in society and emphasized what they termed "interdependency" as a way of forging more equal relationships. They encouraged solidarity with others rather than forgiveness for past wrongs. Participants suggested that, whereas many development

projects tended to reproduce "dependency" and power relations reminiscent of the apartheid and colonial eras, the transformation principles they espoused valued equality based on mutual recognition of needs. One participant described this as a form of "vulnerability," a statement that "we actually need you and you need us."

At the heart of this idea of interdependence is the notion that transformation is fundamentally reciprocal. As a member of The Warehouse management team expressed, "transformation is something that happens to both—there isn't a transformer and a transformed. We're all transforming." The following excerpt taken from my field notes describes a portion of a discussion forum on unity in the church, held at The Warehouse's offices in October 2013: "Standing at the white board, Nkosinathi introduced the idea of 'interdependence' as an alternative to 'partnership.' The first, he explained, was a 'deeper' kind of relationship—a way whereby churches and Christian organizations could work in unity across racial and economic boundaries. In contrast, he described a partnership as inevitably being characterised by unequal power relations. There is 'a sponsor' and 'a beggar,' he said."

Still standing at the front of the hall, Nkosinathi, a thirty-year-old black South African and Warehouse staff member, asked the approximately thirty people in attendance that afternoon to consider the following question: "How do we better build authentic interdependence across racial and economic boundaries?" which he wrote on the board behind him. Earlier in the afternoon, Warehouse staff members had ensured that the five tables in the room were racially diverse and included at least one staff member among them. My own group, in which I was the only white person, included two township church leaders and two Warehouse employees. This reflected the constitution of the remaining four tables. After a twenty-minute discussion period, a feedback session ensued in which a spokesperson from each table relayed their group's views on the challenges that needed to be surmounted in South Africa before interdependence could be possible. One black participant noted the perception among affluent, white churches that township residents have nothing of value to offer. He recounted an anecdote that clearly repudiated this assumption—a story about a white woman whose deep distrust was revealed when she had to rely on two black teenagers to help her restart her car, which had broken down on a major highway. Within a room containing white and black South Africans from vastly different backgrounds, the man's us-and-them story was raw and uncomfortable.

The Warehouse intended the two-hour event, and others like it, to confront the social effects of racial and economic divisions and encourage church leaders to find common ground to address social needs in concert with one another. According to Warehouse employees, one of the main characteristics of the relational aspect of transformation is that people or organizations building relationships should self-consciously address the power imbalances in society. Akhona, a forty-seven-year-old black male Warehouse employee, demonstrated how this relational element of transformation intersects with the individual element of transformation. He described how The Warehouse attempts to empower individual church leaders to respond effectively to their community's needs. "The challenge also is not just helping [church leaders] to fish, it's also to so empower them to be aware that even though there may be a fish pond, there may be others who are controlling the fish pond [laughs]. So they need to be aware also, how do you deal with those who control the fish pond as well."

Akhona thus expressed the organization's view that each person needs to realize their potential to effect social change. Warehouse staff members envisioned this sort of recognition of one's agency as a form of self-in-the-world. By this I refer to their view that self-actualization should lead to the realization of one's interconnectedness in society. As a person comes to know their identity in God, what one participant referred to as "destination journeys," they simultaneously realize their duty to pursue justice for themselves and wider communities. Onke, a black former staff member in his midthirties who had maintained ties to The Warehouse, described transformation in the following terms: "Oh, yah, transformation for me, yah, is to understand yourself first before you engage with other people. You must understand yourself, like who you are, who you are. And once you know that you can be able to open your hands for other people, saying, like, yah, there is my brother. Yah, you know. Yah, transformation, yah, to make sure, like, yah, the people they are equal."

Onke's comment illustrates how individual, relational, and material transformation are closely related processes. Indeed, many of his former colleagues pointed to Onke's transition from a junior Warehouse staff member to a community leader in a nearby informal settlement as a perfect example of The Warehouse's model of transformation in action. According to his own and former colleagues' accounts, since leaving The Warehouse Onke had demonstrated a growing self-confidence and willingness to engage critically with the City of Cape Town on crucial

issues of development affecting his community. He was the epitome of the self-in-the-world and demonstrated The Warehouse's hope that church and community leaders across the city would take the initiative to pursue social change and confront corruption and lack of political will at local and national levels.

In promoting their idea of transformation and its relationship to development in Cape Town, The Warehouse incorporated three main activities into its strategy. The first of these involved visiting church leaders in surrounding areas to discuss their local situation and help churches evaluate and respond to their communities' needs. Warehouse staff members described this as a relational practice, as they strived to build facilitative relationships with the network of church leaders they had built up over the course of a decade. I did not join Warehouse staff members on their visits to individual church leaders as I was wary of disrupting The Warehouse's painstaking efforts to win the confidence of church leaders. I chose instead to attend the organization's various "transformational encounters," which constituted the second branch of the organization's strategy. These included training days and discussion forums such as the one described above. Both types of events brought together a range of church leaders and Christian development organizations from across Cape Town. Participating in these events allowed me to observe and experience the difficult process of encouraging relationship building between groups of people with common religious beliefs (or at least an ecumenical outlook) but vastly different economic realities.

The third and final means by which The Warehouse attempted to promote their idea and practice of transformation was within the organization itself. Of the fifteen Warehouse staff members interviewed, only one expressed concern with the organization's transformation agenda. The staff member in question, a sixty-three-year-old white woman and an employee of several years, communicated her frustration that the transformation process espoused by the organization was too vaguely defined to be sure of success. Although she was the only staff member to criticize the strategy, her colleagues were nonetheless aware of the difficulties involved in implementing their relationally based transformation program. One of the ways they acknowledged the difficulty of confronting power relations in trying to form relationships across divisions in Cape Town, was by insisting that lasting transformation in South Africa would be realized only through intentional action. Participants noted that pursuing the three elements of transformation

can involve deep personal discomfort; they underlined this notion of discomfort when they described how transformation involves having "hard conversations" with coworkers and acquaintances from different racial or economic backgrounds.

Recognizing the challenges involved in undertaking a transformative development agenda, staff members explained that The Warehouse had purposefully decided to live out transformation as an organizational community. One longtime staff member, Barbara, described the drive to be a transformational community as "a work in progress. It's a machine that's being built as we go." A white woman in her early sixties, Barbara explained an "exhausting" process that entails continual self-appraisal and adjustment as the organization strives to model an alternative community in Cape Town, one whose relational values will help encourage a more just society, which values interpersonal respect and recognition of each others' dignity. One of the ways the organization has tried over several years to build this model is by scheduling regular times for staff members to tell their life stories. In her interview, Barbara evocatively stated that The Warehouse employees are "inching towards each other." As the staff members adopt what is essentially a *lifestyle* of transformation, one staff member, a forty-year-old Coloured woman named Lauren, noted that they were able to leave behind "a lifestyle" defined by race, in which people associate primarily, sometimes despite their intentions, with people from their own racial group. Staff members valued the opportunity to experience other people's lives through listening to their stories in a process of self-recognition and recognition of another person's lived reality. It was one of the first steps in individual transformation and relational transformation, as staff members began to recognize their own identity in relation to and in relationship with their coworkers.

Pursuing Justice through Transformation: Putting Relational Ideas into Practice

It is impossible to speak of justice in South Africa in terms of ideas alone. Despite government promises to weed out corruption and expedite social and economic transformation, much of the country still suffers multiple injustices. When we talk of pursuing justice in South Africa, we must examine how ideas of justice are put into practice and evaluate their potential to generate a more just society. Considering that relational ethics such as *ubuntu* and reconciliation have been criticized during the postapartheid period, there are two natural questions

that arise from this paper's analysis of The Warehouse's understanding and practice of transformation. The first question is, By taking the view that transformation is based on relationship building, does The Warehouse perpetuate injustice in society, as critics of relational ethics might argue? The second question is, What do The Warehouse's relational practices tell us about pursuing justice in South Africa more than twenty years after the democratic transition? To the first question I suggest that The Warehouse does not perpetuate injustice by obscuring macroissues with microlevel ones. As we have seen, it is a multiracial organization that encourages relationship building to respond to poverty, injustice, inequality, and division in Cape Town. Relationship is not an end in itself but part of the organization's focus on social change, including individual and material transformation alongside relational transformation. In contrast to examples of the failure of relational ethics in South Africa, The Warehouse's discourse on relationship building and interdependency does not emanate from the state or big business. It is a small NGO, based in a middle-ground in Cape Town that positions it well to be a meeting place for people and ideas. The Warehouse employs a bottom-up rather than top-down approach, including multiracial discussions on the future of the church and how Christian denominations can work together to initiate locally relevant development activities and address the injustices experienced by community members.

With regard to the question of how The Warehouse's relational practices inform the idea and implementation of justice, this chapter argues that the answer lies in the way The Warehouse has drawn on its religiously inspired beliefs and values to propose an alternative idea of transformation. To be sure, it is difficult to measure the success of The Warehouse's transformation strategy. Participants acknowledged that the organization's emphasis on facilitating relationship building and encouraging interdependency between like-minded but differently resourced churches is a lengthy process. However, far from seeing the time involved as an impediment to success, The Warehouse staff believed that anything less than a long-term project was destined to fail. Indeed, the national context of violence—a violent democracy, a violent police service, the violence of exclusionary economic structures—coupled with widespread corruption in business and politics, requires change based on a vision of society that differs drastically from the status quo. In the case of The Warehouse's long-term, relational vision of society, continual

engagement with others and critical engagement with oneself—a lifestyle approach—should encourage mutual respect. In line with the principles of relational ethics, establishing this respect is in itself a form of justice, which is noninstrumental. Forming respectful relationships challenges the unjust interpersonal and institutional *dis*respect that persists in South Africa and recognizes that every person's life is constituted by their interactions with others.

The fact that The Warehouse's relational idea of justice has led staff members to adopt a lifestyle approach to transformation suggests that there is a second, instrumental aspect to the organization's relational ethic. Haenfler, Johnson, and Jones observe that alternative lifestyle practices, though not traditionally political in the sense of protest movements that target the state for change, "serve to withdraw support from structures deemed unjust and/or provide the cultural foundations for broader social change."[40] The Warehouse's relational ethic and lifestyle approach might, as scholars have suggested, "promote and inspire *new* ideas for daily action" that are taken up by other churches in the country, or perhaps by other sectors of civil society.[41] Though The Warehouse and their affiliates seem to take an apolitical approach by focusing on relationship building to meet the needs of people and churches, their connections to more clearly political groups such as the interfaith Western Cape Religious Leaders Forum could prove valuable as a pathway from individual lifestyle action to a more mainline, collective-action approach to pursuing justice. In this way, relational *ideas* of justice are borne out in *practice.*

It is self-evident that, on its own, The Warehouse will not be able to restructure the economy or pressure government into doing so. Neither will it be able to enforce institutional change so that national public institutions such as the SAPS treat citizens and other people living in South Africa in a manner that respects their dignity. There is nevertheless the possibility within The Warehouse's alternative relational ethic, independent of the state or big business, for bottom-up, community-led justice initiatives focusing on relational as well as material change. Ingie Hovland, cited in this paper as a fierce critic of the national reconciliation project, sums up her assessment of relationally based justice initiatives in the following terms: "The point here is not to say that micro-level forgiveness and development projects should not be initiated by NGOs; but that, if one of their aims is to work *on* reconciliation rather than simply *in* the reconciliation flow, they should aim to incorporate a

concern for the macro/micro dynamic. This includes a concern for the continuing issues of division, exclusion, reproduction of poverty, uneven access to the means of production and uneven access to decision-making processes."[42]

The evidence from The Warehouse's understanding and practice of transformation is that the organization does indeed take poverty, injustice, division, and inequality into account as it conducts its work in Cape Town. The organization's transformation work gives us insight into how the idea of relational justice, which in the form of *ubuntu* and reconciliation has received criticism in South Africa, can be put into practice so that justice is actively pursued.

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PART TWO

Gender Justice

FIVE

Chilungamo and the Question of LGBTQ+ Rights in Malawi

ALAN MSOSA

HOW MIGHT THE IDEA OF JUSTICE HELP ADDRESS THE CHALLENGES that Malawians confront in debates over whether or not to recognize and respect LGBTQ+ rights? I argue that the idea of LGBTQ+ rights falls short of persuading many Malawians because the concept of human rights lacks local legitimacy in terms of its political origins, local meanings, and usage in daily life. In this chapter I argue that a framework grounded in the idea of justice, based on locally resonant terms, would reduce the exoticness that the concept of human rights carries, offer well-established and locally identifiable meanings, and therefore enhance the likelihood that ordinary Malawians would deploy it as a means of demanding protection. This chapter is divided into three key sections. First, I establish the way in which the concepts of sexuality, human rights, and justice are understood in Chichewa, Malawi's national language and lingua franca, to identify the challenges associated with the use of human rights rhetoric in daily undertakings by ordinary people. Second, I discuss the history of the debate surrounding LGBTQ+ rights in Malawi to demonstrate that rejection of LGBTQ+ rights is more of a rejection of the concept of rights than of the actual protection of LGBTQ+ persons. Third, I propose an alternative framework in which the idea of justice (*chilungamo*) might enrich local advocacy of LGBTQ+ rights by speaking in terms that ordinary

Malawians find relatable. Overall, I suggest that the assumption that human rights are universally valid and applicable has led us to overlook the possibility that the idea of justice might better facilitate a locally resonant framework through which to effectively guarantee the protection of LGBTQ+ persons.

What Do (Homo)Sexuality, Human Rights, and Justice Mean to Ordinary Malawians?

A key achievement of social scientists over the last century in relation to the understanding of sexuality has been the overthrow of nineteenth-century theories of medicine (sexology) that took sexuality as a biological instinct based on genetics and hormones for the ultimate purpose of procreation.[1] Early sexuality researchers such as Mary McIntosh, Ken Plummer, and Jeffrey Weeks pioneered what are now known as social construction theories of sexuality. They argued that homosexuality is a social category with varied characteristics, the meanings of which are shaped by particular histories and social contexts.[2] McIntosh, for example, argued that homosexuality, as it existed in Britain at that time, could not be assumed to exist in the same form and with the same meaning everywhere else. Plummer, on the other hand, pointed out that the act of naming something as sexual is what signifies its sexual nature.[3]

Social constructionist theories have opened up new areas of research and established that sexualities found outside the West, where most of the early theories emerged, do not map exactly onto Western categories. The use of English terminologies such as "homosexuality" or "LGBT" creates the impression of a universal form of nonheterosexuality. Words being "sticky," they have retained (at least elements of) the meanings that they carry in their context of origin, even if non-Western communities might also accord them different meanings.[4] The use of English terms to describe same-sex identities and sexual conduct has obscured indigenous terms that are better placed to describe identities and practices as they are understood by local communities. Early European researchers labeled as homosexuality everything that they observed as deviant from heterosexuality.[5] However, Chichewa terms, and the meanings that they carry about homosexuality in Malawi, are different. First, there is no word for "sexuality." One can describe sexuality but hardly find a word to name it. Homosexuality is locally translated as *mathanyula* or *cha matonde,* both of which are derogatory terms referring to anal sex between males.[6] Chichewa has no direct translation for same-sex identities or

conduct between lesbians, transgender, or intersex persons. For the purposes of this chapter, I have chosen to use the term LGBTQ+ not as an acronym (Lesbian, Gay, Bisexual, Transgender, Queer) but to signify that there is no appropriate term that adequately describes nonheterosexuality in the Malawian context. LGBTQ+ indicates the infinite range of identities and conduct that falls outside of heterosexual norms.

People whose identities and sexual conduct fall outside of heterosexual norms are often confronted with the need to negotiate for, or explicitly claim, their identity, conduct, and relationship-based rights.[7] Such claims may be formally pursued through international, regional, and domestic human rights mechanisms. At the international level, the Universal Declaration of Human Rights, adopted by all United Nations member states, is the basis for treaties that outline sets of rights that all human beings ought to be entitled to. Treaties such as the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social, and Cultural Rights; the Convention on the Rights of the Child; and the Convention on Elimination of Discrimination against Women have been interpreted as extending human rights provisions to cover sexual orientation and gender identity. However, there is a heated debate among United Nations member states as to whether the rights enshrined in such treaties necessarily extend to LGBTQ+ persons.

At the regional level in Africa, the African Charter on Human and Peoples Rights is not considered by member states as guaranteeing the protection of human rights based on sexual orientation and gender identity. At the domestic level in Malawi, section 20 of the constitution guarantees equal protection of human rights. In addition, the constitution recognizes several regional and international human rights treaties as part of domestic law.

In principle, therefore, all persons in Malawi ought to be entitled to human rights in accordance with domestic, regional, and international human rights law. That all humans are entitled to human rights leads us to take for granted that human rights are universal. After all, they are defined by prominent scholars as equal rights that each person holds on the basis that they are human beings.[8] The universality of their definition, meanings, and terminology is rarely questioned. However, in his social construction theory of human rights, Benjamin Gregg expresses skepticism about the universality of human rights. "The problem," he argues, "is that the very idea of human rights, as commonly understood,

implies a claim to universal validity. How does a community realize the potential for universal validity of a cultural construct that is valid only locally?"[9]

Gregg's questioning of the universality of human rights must not be misinterpreted as an effort to replace human rights. Rather, it represents a quest to motivate local communities to seek the negotiation of a human rights framework based on their own terms. The resulting frameworks might well be similar, but that should only be coincidental. The relevance of Gregg's intervention is crucial because there are societies in which human rights frameworks are approached with the suspicion that they have been "copied and pasted" from elsewhere, and, as such, that they are inappropriate to the setting in which they are encountered. It is possible to compare the ICCPR and the Malawi constitution to demonstrate where this suspicion might arise from. Adopted in 1966, article 2(1) of the ICCPR reads, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[10] This common clause on nondiscrimination is also found in most regional and international treaties. Adopted in 1995, section 20(1) of the Malawi Constitution reads, "Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status."[11]

Human rights principles such as nondiscrimination serve a central importance that is necessary in legal instruments. However, the resemblance of the language in the two treaties makes it possible to see the latter as the result of a copy-and-paste project. This suspicion is enhanced by the fact the official text of the constitution is available only in the English language. The English-Chichewa dictionary does not contain a translation for human rights.[12] The absence of the word suggests that it is a relatively recent concept in the Chichewa language. In a study of Chichewa expressions for human rights among Malawians, Harri Englund has noted that *ufulu wachibadwidwe* is the most common phrase used to describe human rights.[13] He notes that *ufulu* in Chichewa means "freedom," "liberty," or "independence." He also notes

that *wachibadwidwe* means "birthright."[14] *Ufulu wachibadwidwe* can therefore be translated as "a birthright of freedom, liberty, or independence." Over time, since the emergence and flourishing of the language of human rights during the advent of multiparty democracy from the mid-1990s, *ufulu wachibadwidwe* has gained prominence as the dominant Chichewa translation for "human rights." "Human rights" can also be translated with the slightly extended form of *ufulu wa chibadwidwe wa munthu,*[15] the literal translation of which is "the freedom that a human being is born with."[16] This translation offers better qualification of the term "human rights" as articulated in the English language as well as the English-language legal documents in Malawi.

While the official Malawi constitution is in English, in 1997 the National Democratic Institute for International Affairs (NDI), a US institution, engaged the services of three Malawian consultants to translate the document into Chichewa.[17] The Chichewa constitution translates "human rights" as *ufulu wa anthu,* "freedom of people." Although *ufulu* ordinarily translates into English as "freedom," "right" in article 15(2) of the English version of the constitution is translated as *ufulu* in the Chichewa version. It can thus be concluded that *ufulu wa anthu* should be translated as "rights of people." However, the Chichewa constitution also translates the mention of liberty in article 18 as *ufulu.* In article 40, the term *ufulu* is used interchangeably to translate "right" and "freedom." *Ufulu* therefore carries multiple meanings in this Chichewa version of the constitution.

It is important to note that the two Chichewa translations of "human rights" do not carry precisely the same meaning. *Ufulu wa anthu* refers to more than one person (*anthu,* people) and may imply collective claims. *Ufulu wa chibadwidwe wa munthu* refers to a single person (*munthu,* person) and connotes individual rights. *Ufulu wa anthu* may suggest that human rights are valid if they advance collective aspirations. It might imply that individual interests that do not serve collective aspirations fall outside of this *ufulu.* However, *ufulu wa chibadwidwe wa munthu* specifically connotes that an individual has rights simply by the fact of being born human. Thus the English and Chichewa terms do not necessarily encapsulate the same basic ideas about human rights. This leads to two conclusions: that the language of human rights among Malawians is relatively new, and that the meanings understood by Chichewa speakers may be varied and distinct from the meanings intended by the authors of the original English-language texts.

Concurring with Englund that human rights are commonly understood through the concept of *ufulu,* Alessandra Sarelin noted in her research in relation to the right to food in Malawi that meanings about human rights continue to evolve as communities negotiate access to rights in their everyday lives.[18] Through such negotiation, the communities were giving new meanings to human rights as opposed to utilizing predefined concepts.[19] While the formal language in the English legal documents remains static and changeable only through the courts or parliament, local meanings are fluid and flexible, and they evolve in the course of daily interactions between citizens.

Culturally legitimate norms or values are those that are respected and observed by members of a particular community on the basis that they bring satisfaction or benefit to community members.[20] Discrepancies between Chichewa and English versions of human rights make it difficult for human rights to attain such legitimacy. Legitimacy would be attained if Malawian citizens felt that they were able to negotiate and author their own human-rights framework.[21] However, the resemblance between the ICCPR and the Malawi constitution raises the specter that the latter was not a product of local authorship. Nevertheless, that does not mean that human rights should be rescinded in Malawi. Human rights have served as an important tool to guarantee concrete improvements in the lives of Malawian citizens. However, an alternative framework has potential to improve the sense of local ownership.

"Justice" is translated as *chilungamo* in Chichewa. The term is found in the Chichewa dictionary. Unlike the term "human rights," *chilungamo* is not an alien term. It does not carry varied meanings in the (unofficial) Chichewa version of the constitution. It is a well-established local term. It is also a common term in everyday use. *Chilungamo* connotes righteousness, honesty, fairness, and personal integrity. *Chilungamo* is relational to other persons. It can refer to the singular and the collective. One must be honest, fair, righteous, and uphold integrity toward others. While *ufulu* is about securing a person's freedom from the interference of others, one does not need to be righteous, honest, or fair.[22] Some Malawians have associated *ufulu* with a lack of respect and insolence since it does not necessarily require *chilungamo* in terms of integrity.[23] For example, a girl-child might demand her *ufulu* to go to school instead of doing domestic chores and could argue that this was a matter of *chilungamo* in terms of dignity and fairness. On the other hand, a fifty-year-old man might claim that he has the freedom or right (*ufulu*) to

marry a fourteen-year-old girl, but he would be hard pressed to express this in terms of justice (*chilungamo*). *Chilungamo* might therefore offer an alternative that could be deployed to eliminate injustices and human rights violations without the rhetorical backlash that can be unleashed against the perceived exotic or alien basis of claims made in the name of *ufulu.* The rest of this chapter elaborates how *chilungamo* might offer an alternative framework for addressing the shortcomings of human rights with respect to LGBTQ+ rights in Malawi.

The (Re)Emergence of the Homosexuality Debate in Malawi

Public debate about homosexuality in Malawi emerged in December 2009 following a national newspaper article about Steven Monjeza Soko and Tionge Chimbalanga Kachepa. The two had performed a *chinkhoswe,* a traditional marriage ceremony, in Blantyre City. Both Monjeza and Chimbalanga were born male. However, Chimbalanga lived as a female and was known as such by her community.[24] The news of their *chinkhoswe* set off shockwaves of moral panic and disbelief nationwide. Monjeza and Chimbalanga were arrested and charged with the criminal offences of carnal knowledge against the order of nature and gross indecency under sections 153 and 156 of the Malawi penal code, respectively[25] (section 153 criminalizes "unnatural offences").[26]

They were subjected to involuntary medical examinations, including anal examinations to confirm charges of sodomy, and psychiatric tests to affirm that they were of sound mind to stand trial.[27] They were denied bail on the grounds that releasing them would put them at security risk from the outraged public.[28] Throughout the trial, the two were subjected to humiliation and homophobic outbursts from the public galleries at the court. According to newspaper reports, for example, at one point during the trial Chimbalanga fainted owing to malaria and was subjected to homophobic abuse by the people sitting in the public gallery.[29]

In May 2010, the two were found guilty of the offences and sentenced to a maximum fourteen years' imprisonment. In the judgment, the magistrate stated that the conclusion of the case secured the course of justice by protecting the community. During sentencing, the magistrate emphasized the shock experienced by Malawian citizens, concluding with a harsh warning to all LGBTQ+ Malawians: "So this case being the first of its kind, to me, that becomes the worst of its kind. I cannot imagine more aggravated sodomy than where perpetrators go on to seek heroism, without any remorse, in public, and think of corrupting the

mind of a whole nation with a *chinkhoswe* ceremony. For that, I shall pass a scaring sentence so that the public must also be protected from others who may be tempted to emulate their (horrendous) example."[30]

The harsh sentence was widely praised in Malawi, not least by prominent politicians and religious and traditional leaders. For example, chiefs in the central region marched to the capital city of Lilongwe in support of the maximum sentence, proclaiming that cultural norms were under threat because of the actions of Chimbalanga and Monjeza.[31] The Presbyterian church was among the many churches that welcomed the sentence on the basis that homosexuality was un-African and un-Christian.[32] The government, through its minister of information, also stated that it was pleased with the maximum sentence.[33] The conviction was locally praised as a step toward the eradication of "homosexuality" in the country.

However, in a dramatic turn of events, United Nations Secretary-General Ban Ki-moon visited Malawi. In his speech to parliament he called for an end to discrimination on the basis of sexual orientation, suggesting the repeal of antigay laws.[34] At the end of his visit, he addressed a joint press conference with Malawi's president at the time, Bingu wa Mutharika, who announced that he had pardoned the couple unconditionally.[35] Nevertheless, he stressed that "these boys committed a crime against our culture, our religion, our laws," further reiterating his position that his pardon did not imply support for homosexuality.[36] Although he ordered an end to the discussion of the issue, the case has reemerged in heated public debates numerous times since.

In 2011, in a move that was directly related to the presidential pardon of Monjeza and Chimbalanga, the Parliament amended the penal code to introduce a new section 137(a) aimed at criminalizing same-sex conduct between females. The section on indecent practices stated that "any female person who, whether in public or private, commits any act of gross indecency with another female shall be guilty of an offence and liable to a prison term of five years." In May of the following year, incoming president Joyce Banda announced in her maiden state of the nation address that her government would repeal all antigay provisions in the penal code.[37] In response, the leader of the main opposition party cautioned her against being dictated to by donors.[38] Banda eventually changed her position following expressions of outrage from many Malawians, especially prominent politicians and traditional and religious leaders.[39] During this wave of controversy, the minister of justice

declared a moratorium on the use of the three penal code provisions (sections 137[a], 153, and 156) that could be employed against LGBTQ+ people.

In February 2015, the Malawi Parliament passed the Marriages, Divorce and Family Relations Bill into law. The new law defined sex, in relation to the gender of a person, as the sex assigned at birth. The parliamentary memorandum accompanying the bill stated that Malawian law presupposes that marriages are heterosexual and as such the sex of a person could be only male or female. It went further to emphasize that such restrictions were necessary to guarantee nonrecognition of anyone who attempts to change their sexual identity. This was the first time that Malawian laws had been used to regulate sexual identity, a shift from previous laws that targeted only same-sex conduct. While the new law received praise for increasing the minimum age of marriage and thereby outlawing child marriages, it has been criticized for effectively prohibiting recognition of nonheteronormative sexual and gender identities.

In December of the same year, Kelvin Gonani and Cuthbert Kulemela were arrested and charged with committing "unnatural acts."[40] While in detention they were subjected to compulsory anal examinations and HIV tests. Their arrest was condemned by two local civil society organizations, the Centre for Human Rights and Rehabilitation (CHRR) and the Centre for Development of People (CEDEP), as well as the international community. Following domestic and foreign pressure, the minister of justice announced that the state had unconditionally dropped the charges and reiterated the moratorium set in 2012.[41]

The following year, in January 2016, two gay Malawians granted a local television program an interview to discuss their sexual orientation. In the interview, they called on the government to either kill them or give them their rights.[42] The media coverage triggered public outrage and a prominent politician took to social media to call for the killing of "homosexuals," arguing that "the devil has no rights."[43] CEDEP and CHRR lodged a criminal lawsuit of incitement to break the law under section 124 of the penal code.[44] However, the director of public prosecutions (DPP) discontinued the case.[45] Currently CEDEP and CHRR are challenging the DPP's decision. While not exhaustive, the account of recent debates presented here is sufficient to demonstrate that the issue of "homosexuality" is highly contentious in Malawi, and no resolution has been achieved thus far.

Why Is "Homosexuality" So Contentious in Malawi?

Many Malawians say that they are opposed to homosexuality because it is an alien practice. The prevailing narrative is that "homosexuality" did not exist in the country until white "homosexuals" introduced it, thereby corrupting indigenous moral values and practices. As mentioned above, "homosexuality" is primarily understood by way of the local terminology of *mathanyula,* which implies anal sex between males; it is often associated with the capacity of an adult male to molest underage males. It is only as a result of the recent debates that "homosexuality" has accrued associations with other nonheterosexual practices and identities.

Malawians who oppose "homosexuality" tend to cite cultural and religious arguments to justify their position. First, they believe that Malawian culture is inherently upright and the emergence of homosexuality is a sign of moral degradation. Homosexuality is therefore viewed as leading to the erosion of Malawi's cultural values through the domination of alien practices. Second, they insist that the laws of nature have no room for nonheterosexual intercourse, citing essentialist arguments that sex is primarily aimed at procreation. Third, "homosexuality" is taken as a grave sin and an abomination in the context of the two dominant religions of Christianity and Islam. Christians and Muslims make up over 90 percent of Malawi's population. Finally, the equation of homosexuality with the act of anal sex has facilitated perceptions of it as unhygienic, unhealthy, and disgusting. Criminal laws are thus seen as appropriate tools to curb the practice.

On the other hand, a minority of Malawians who have called for the protection of human rights for LGBTQ+ people have cited entitlements outlined in the constitution and international human rights treaties that Malawi is party to. The main argument presented by those who support rights for LGBTQ+ persons is that Malawi's constitution, which is the supreme law of the land, guarantees human rights for everyone without discrimination. They have also argued that Malawi's international human rights obligations require human rights protections for LGBTQ+ persons. They see so-called antigay laws as an obstacle to human rights guarantees and thus call for their repeal. In 2013, CEDEP and CHRR joined a high court confirmation case of three sodomy convictions, where the court called for interested parties to join the case in which they would also review the constitutionality of section 153(a) of the penal code.[46]

Advocates for LGBTQ+ rights also argue that protection of LGBTQ+ persons makes for better health policies. For example,

CEDEP and CHRR have argued that men who have sex with men (MSM) have higher risk of HIV infection and therefore need to have their health rights promoted.[47] With an HIV prevalence rate of 21.4 percent,[48] which is twice the national average, MSM are deterred from accessing health-related HIV services by the unfriendly treatment they sometimes receive in public health facilities. They may also avoid going to health facilities for fear of being arrested and charged with homosexual crimes under the penal code. Calls based on the need to promote the health of LGBTQ+ persons have been supported by stakeholders within Malawi and beyond.

Locally based international partners have repeatedly called for respect for "LGBT rights" or "gay rights." They have also reiterated that human rights protection for LGBTQ+ persons is a positive step in the HIV and AIDS response and the popularization of human rights practices. For example, following the arrest of Monjeza and Chimbalanga in 2009, donor representatives warned the Malawi government that persecution of homosexuals risks isolating the country from the global community.[49] Following the arrest of Kulemela and Gonani in December 2015, the international community again expressed concerns, reminding the Malawi government to honor its human rights obligations and the moratorium on arrests. The issue was also raised by a member of Parliament in a House of Commons debate in the UK Parliament.[50]

However, public attention was aroused when the United States ambassador to Malawi, Virginia Palmer, posted a statement on the official US embassy Facebook page on December 15, 2015, which read,

> I remind the government of its stated policy not to arrest, detain, charge, or pursue people engaged in consensual same-sex activity. The rights of LGBTI persons are human rights. As a matter of human rights, public health, and public order, LGBTI persons should not be discriminated against in any way.
>
> I urge the government to make good on its international human rights obligations, drop the charges, and resolve this unfortunate incident as quickly as possible.[51]

Palmer's post received overwhelming responses from outraged Malawians who accused her of disrespecting their cultural and religious values. They also accused her of interfering in domestic issues. Curiously, none of the posts challenged her proposition that the rights of LGBTI persons are human rights. However, the ambassador's public

statement marked a turning point that resulted in the withdrawal of charges against the two men.

Interventions by international actors are perceived by some Malawians as evidence of a conspiracy to impose alien immoral practices. Some critics have argued that because most Malawian civil society organizations—including LGBTQ+ rights organizations—rely on donor funding, the agenda of those advocating for LGBTQ+ rights may be influenced by their international partners.[52] For critics of these donor interventions, any calls for human rights in relation to "homosexuality" are perceived as an initiative to validate, legitimate, and proliferate the practice of "homosexuality." If "homosexuals" have human rights, they fear that it implies a right to practice their "homosexuality," which is commonly thought to include a right to molest underage males. It is also feared that accepting that homosexuals have human rights will give way to the legalization of gay marriages. For others, such rights are thought likely to popularize a Western "gay culture," which is said to promote activities that conflict with conservative values and dominant representations of local ways of life.

The government has been cautious so as to avoid conflict with the electorate. Many state officials have spoken in support of protecting LGBTQ+ persons, but they have tended to retract their comments or fall silent following public outrage. For example, before the arrest of Monjeza and Chimbalanga in 2009, the principal secretary of the Ministry of Nutrition, HIV and AIDS said at a public event that Malawi must recognize the rights of LGBTQ+ people in order to step up the fight against HIV and AIDS. Her remarks provoked a public backlash and she later withdrew the statement.[53] It is little wonder, as discussed earlier, that Joyce Banda retracted her intention to repeal antigay laws following public criticism from her potential voters. Similarly, the current president, Peter Mutharika, has avoided disclosing his opinion on whether LGBTQ+ persons have rights, opting for the safer option of suggesting a "yes" or "no" national referendum vote.[54] His caution echoes the view of the former president of Botswana, Festus Mogae, who publicly stated in a BBC debate in 2011 that during his presidency he could not have supported calls for human rights protections for LGBTQ+ people because he was not willing to sacrifice his political career for gay rights.[55]

Where the government has been seen to be progressive regarding LGBTQ+ people, the motives are not simply respect for human rights.

For example, in 2015 Malawi was granted funding from The Global Fund amounting to $380 million on the basis of a project proposal that included targeted services for LGBTQ+ Malawians. During the bidding process, the government exercised moderation in terms of antigay rhetoric. By contrast, at the United Nations Universal Periodic Reviews (UPR), Malawi has consistently rejected recommendations about the protection of human rights for LGBTQ+ people. During Malawi's review at the 16th Human Rights Council session in 2011, government representatives responded to concerns about homophobia in the country by rejecting calls for gay rights and urging other UN member states to respect the wishes of Malawians.[56] Nevertheless, in 2015 Malawi unprecedentedly accepted one UPR recommendation to take effective measures to protect LGBTQ+ people from violence and prosecute perpetrators of such violence, as well as to guarantee access to health services and HIV/AIDS treatment for LGBTQ+ communities. On balance, however, it might be concluded that the government is not entirely committed to securing meaningful human rights protections for LGBTQ+ persons.

The Legal and Policy Framework

From 1891 to 1964 Malawi was declared a British territory. It was called British Central Africa and later Nyasaland. The laws that were introduced by the colonialists favored the interests of colonial settlers. The interests of the "natives" were disregarded, and they did not have democratic rights.[57] It was during this period that Nyasaland inherited laws such as the Offences against the Person Act of 1861[58] and the Criminal Law Amendment Act of 1885,[59] which included the crimes of "buggery" and indecent practices between males, respectively.

These laws are part of the colonial legacy of the British Empire, which introduced antigay laws across its colonial territories. The British Empire first introduced these antigay laws in India's penal code in 1860 through section 377 on unnatural offences, which states that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment . . . for a term which may extend to 10 years, and shall be liable to a fine. Explanation–Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section." This provision has similarities with section 153 of the Malawi penal code. Criminalization of same-sex conduct was part of

a broader British colonial legacy imposed on its colonial territories to "correct and Christianise native custom."[60] While the former colonizer has since repealed antigay laws, some of its former colonies such as Malawi jealously guard them, claiming that they are the last hope for "autochthonous" values. It should however be noted that the laws have been inactive until recently, when African leaders began to use antigay rhetoric and persecution as a powerful tool to mobilize consensus in the face of popular discontent because of economic and political turmoil. This includes the rhetoric of the long-serving Zimbabwean president, Robert Mugabe, who stated at a book fair in 1995 that homosexuals are worse than animals,[61] and Gambian president Yahya Jammeh, who threatened to behead homosexuals in his country.[62]

After years of struggle for freedom and self-rule from the British colony, Malawi gained independence in 1964 under the leadership of Dr. Hastings Kamuzu Banda. Dr. Banda was soon crowned life president and led the one-party state for thirty years. His reign was characterized by political oppression and the abuse of human rights. It was toward the end of his rule, in the early 1990s, that movements emerged demanding rights and political freedoms, and the concepts and language of human rights began to flourish. Following a national referendum in 1993, Malawi opted to end the one-party system of government, ushering in multiparty democracy and a democratically elected government in 1994. A comprehensive new constitution was adopted, which contained a bill of rights to protect citizens' freedom and liberties.[63]

The 1995 constitution is the supreme law of the land to the extent that "any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."[64] Application of its principles is without exception, and there is a strict test for any justification of limitation of rights in article 44, which states that "laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question."[65]

The bill of rights at the core of the constitution includes rights to life, liberty, human dignity and personal freedom, equality, family and marriage, education, culture and language, economic activity, development, freedom of association, freedom of conscience, freedom of opinion, freedom of expression, and freedom of assembly, as well as guaranteeing the rights of children and the rights of women. As we saw above, article 20(1) of this bill of rights guarantees equality and nondiscrimination. Sexual orientation or gender identity is not explicitly mentioned as a

prohibited ground for discrimination. This is unlike the South African constitution, which is the only African constitution to explicitly mention sexual orientation as a ground for equality. However, it can be argued that not mentioning sexual orientation or gender identity does not necessarily mean that the bill of rights excludes LGBTQ+ persons from the enjoyment of the human rights specified therein.[66]

The constitution provides for the establishment of independent institutions such as the Malawi Human Rights Commission (MHRC) and the Office of the Ombudsman, which have a mandate to receive complaints about human rights abuses. Both MHRC and the ombudsman have successfully investigated cases of human rights violations in the country.[67] These institutions were established with guaranteed independence from the state or any other interference. The constitution also provides for international law as a source of law in Malawi, prescribing different rules for the application of such law.[68]

In addition, Malawi is a signatory to many key international and regional treaties that are relevant to the promotion of LGBTQ+ rights.[69] Similar to the equality principle in article 20(1) of Malawi's constitution, these treaties have in common the prohibition of any form of discrimination that would limit the enjoyment of the human rights defined in the bill of rights.[70] While sexual orientation is not mentioned in these treaties, it can be argued that reference to "other status" alongside factors such as race, sex, language, and religion implies the inclusion of sexual orientation, and by extension gender identity. In the 1994 case of Toonen v. Australia,[71] the Human Rights Council heard a complaint by a Tasmanian resident that Tasmanian laws criminalizing sexual activity between consenting adults of the same sex were discriminatory under the ICCPR. The Human Rights Committee held that states should protect individuals from discrimination on the basis of sexual orientation.[72] Nondiscrimination clauses in domestic and international human rights instruments therefore ought to adopt the same principle, inclusive of nondiscrimination on the basis of sexual orientation and gender identity.

Criminalization of same-sex conduct in sections 137(a), 153, and 156 of the penal code and regulation of sexual identities under the Marriages, Divorce and Family Relations Act are obstacles to the enjoyment of constitutional and international human rights for LGBTQ+ persons in Malawi. For example, they cannot freely enjoy their right to liberty or dignity in accordance with articles 18 and 19 of the constitution because

they face potential public backlash. As a further example, LGBTQ+ persons cannot freely access their human right to health for fear that they will be reported to the police when they visit health facilities. Similarly, LGBTQ+ persons may also withdraw from school owing to fear of arrest. The repeal of such laws is therefore necessary to facilitate access to human rights by LGBTQ+ persons.

It should however be clarified that such rights are discussed in reference to consensual same-sex conduct between adults, and to nonheteronormative sexual and gender identities. This clarification preempts the arguments of critics who fear that calls for LGBTQ+ rights imply a passport to the molestation of children. Any molestation of children ought to be criminal, whether heterosexual or homosexual. Similarly, all nonconsensual sexual conduct ought to be criminal.

Malawi's National HIV/AIDS policy was launched at the height of the AIDS epidemic in 2003. Long before the homosexuality debate emerged in 2009, this policy recognized that persons engaging in same-sex relationships were vulnerable to the impact of HIV and AIDS. The policy stated that LGBTQ+ persons "are often underprivileged socially, culturally, economically or legally, may be less able to fully access education, health care, social services and means of HIV prevention; to enforce HIV prevention options; and to access needed treatment, care and support. They are thus more vulnerable to the risks of HIV infection and suffer disproportionately from the economic and social consequences of HIV/AIDS."[73] The policy proposed a review of antigay laws. So far the government has not initiated any review of the relevant sections of the penal code or the Marriage Act, citing that Malawi is not ready to review its antigay laws.[74] However, the policy remains in force and is the basis for the national HIV and AIDS strategy.

As we have seen, the legal and policy landscape indicates that there is potentially a sufficient framework for the protection of human rights for LGBTQ+ persons in Malawi. The supreme law of the land, which contains a bill of rights and recognizes key international human rights instruments, provides a comprehensive list of human rights that LGBTQ+ persons ought to be able to access. The constitution renders the antigay provisions of the penal code invalid. Criminalization of same-sex conduct, at least between males, is a legacy of British colonialism, contrary to the prevailing myth that the laws are indigenous. The national HIV/AIDS policy supports decriminalization and human rights protection.

Chilungamo as an Alternative for Protecting LGBTQ+ Persons

In the local debate, the terminology mostly cited about human rights in the context of same-sex sexuality is that of "LGBT rights" or "gay rights." Conservatives state that they do not want Malawians to endorse *ufulu woti amuna adzikwatirana* or *ufulu wa anthu ofanana ziwalo,* literally translating as "freedom that men should marry each other" or "freedom for people who have similar sexual organs (to have sex)," respectively. However, such rights do not exist under Malawi's current domestic, regional, and international human rights obligations. The Chichewa phrasing suggests that Malawians are rejecting LGBT rights or gay rights that are understood narrowly as a right for people of the same sex to engage in sexual intercourse, as opposed to the entitlement of LGBTQ+ people to all constitutional or international human rights, such as access to hospitals (right to health) or entitlement to attend public schools (right to education). In principle and practice, the local rejection of "LGBT rights" does not necessarily constitute the rejection of the latter.

While there is potential to reframe LGBTQ+ rights by clarifying that they represent not a call for an imaginary right for people of the same sex to engage in sexual relations but rather a call for recognition of the fact that LGBTQ+ persons are equally entitled to human rights, restricted interpretations of the concept of human rights remain an obstacle to the attainment of local legitimacy. Many Malawians reject LGBTQ+ rights because of their negative attitudes toward LGBTQ+ people. However, their suspicions that the concept of human rights is foreign complicates efforts to facilitate protection for a seemingly deviant group whose practices are commonly misinterpreted as alien.

To put the problem into perspective, it may be useful to draw reflections from a recent human rights debate that emerged following a spate of killings of persons with albinism in the country. Since 2014, Malawi has experienced a surge in abductions and gruesome murders of persons with albinism. It is believed that the killers are harvesting the victims' body parts for witchcraft rituals. The crisis in Malawi prompted the United Nations independent expert on the enjoyment of human rights by persons with albinism, Ikponwosa Ero, to visit Malawi for a fact-finding and consultative mission. Following her visit, she warned that persons with albinism faced extinction. All sectors of Malawian society have united in calling for an end to the killings and abductions. They have called on the government to step up efforts to protect the rights of

persons with albinism. It is from these calls that the language of rights of persons with albinism emerged. These calls have received so much support that even an extreme call by a member of Parliament for the resumption of the death penalty for the killers received little criticism.

The question of whether the rights of persons with albinism were new rights did not arise. But what if Malawi was confronted with a person with albinism who was LGBTQ+? Would such a person be entitled to human rights? Would such human rights then be "LGBT rights"? If not, how can we distinguish LGBT rights from human rights, or indeed from the rights of persons with albinism?

If we refer to Malawi's policy and legal framework discussed earlier, an individual who has albinism and is LGBTQ+ should enjoy entitlement to human rights, rights of persons with albinism, and LGBTQ+ rights. However, it would be difficult to claim legitimacy and local validity for such rights under the banner of LGBT rights. For human rights in relation to sexual orientation and gender identity to be acceptable to Malawians, there is a need for an alternative, complementary framework.

The concept of *chilungamo* offers an alternative that can complement and support demands for human rights for LGBTQ+ persons, even under the banner of LGBT rights or gay rights. Justice presents conceptual and practical advantages. Malawians who oppose gay rights might intuitively say that an LGBTQ+ person with albinism must not have "LGBT rights." However, such a denial could be said to be lacking in *chilungamo. Chilungamo* demands fairness and righteousness in the entitlement and access to human rights. *Chilungamo* is a necessary extension of human rights.

In terms of legitimacy, the term *chilungamo* preexists rights-based terminologies in Malawi. Its common usage does not suffer the contamination of prominent international, regional, or domestic legal instruments. Principles of righteousness, honesty, fairness, and integrity preexisted colonialism. While *ufulu* as a concept preexisted colonialism, its past meaning did not include human rights as understood today. The concept of human rights that is used in Malawi was born, at least in terms of international human rights law, at a historical time and place in 1948 during which the Universal Declaration of Human Rights was drafted and disseminated. The concepts of *ufulu wa chibadwidwe wa munthu* and *ufulu wa anthu* were coined in the post-1948 period and popularized only through the 1995 constitution after Malawi attained democratic independence. Unlike *chilungamo,* which already enjoyed

local legitimacy, the legitimacy of *ufulu wa chibadwidwe wa munthu* and *ufulu wa anthu* diminished with the proliferation of the English language of human rights. Qualifying *ufulu wa chibadwidwe wa munthu* and *ufulu wa anthu* with *chilungamo* would strengthen the relevance of human rights as a concept and as a practice.

It should once again be noted that *chilungamo* cannot replace *ufulu wa chibadwidwe wa munthu* or *ufulu wa anthu* in the bill of rights or international human rights mechanisms. However, it offers a critical alternative to complement the current human rights framework toward local legitimacy.

I have argued that the concept of human rights lacks local legitimacy in the Malawian context because it does not fully translate into local terminology and meanings. Human rights are perceived as an alien concept imported from the West. However, the concept of *chilungamo* (justice), which enjoys local legitimacy and consistent meaning, has the potential to complement the current human rights framework to extend protection to LGBTQ+ persons by highlighting principles of fairness and righteousness in relation to entitlements and access to human rights. I have discussed the theoretical foundations of the concepts of human rights and justice in the human rights context, presented the key issues in the debates surrounding LGBTQ+ rights, and signaled the relevance of the idea of *chilungamo* for the protection of human rights for LGBTQ+ persons. In conclusion, I call not for the replacement of the human rights framework but for an idea of justice that addresses the challenges encountered in the application of human rights in Malawi.

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SIX

Justice Intervention

Mobile Courts in the Eastern Democratic Republic of Congo

PATRICK HOENIG

MOBILE COURTS BELONG TO A NEW GENERATION OF NONMILITARY devices introduced in countries of sub-Saharan Africa to extend the reach of the state in areas where it has lost control, or where its control is being contested. Local judges, accompanied by public prosecutors, defense counsels, victims' attorneys, and clerks, travel from their urban bases to remote villages to settle land disputes and inheritance matters or to deliver justice in proximity to communities affected by acts of violence, often qualifying as crimes against humanity. The law applied in such cases is domestic civil or criminal law. In some instances, however, when they are being supported, in cash or in kind, by intergovernmental and nongovernmental organizations (NGOs), mobile courts have been known to directly apply international human rights law. And yet, being what they are, namely, regular state institutions, mobile courts come with none of the baggage making international legal mechanisms, such as the International Criminal Court (ICC), so controversial. Domestic actors perform the duties assigned to them by the constitution, thus upholding the rule of law, while the international donor community, lending mere financial and logistical support, leaves a light footprint. The social group standing to benefit most from increased court mobility are women and girls, an added advantage of mobile courts in the eyes of their proponents because women, as voices in transitional justice literature point out, are "overrepresented among the poor, the illiterate

and those with little information, and overburdened with family-related obligations that make traveling large distances a difficult task."[1] According to their supporters, mobile courts are thus minimally invasive, conducive to promoting gender equality, and fully compatible with the hierarchy of legal enforcement mechanisms for human rights.

Criticism has been voiced on various grounds. First of all, mobile courts are expected to operate under conditions that are often less than ideal, within timelines astonishingly short given the complexity of the cases to be adjudicated, deprived of access to legal texts and the internet to check precedents or facts, and, depending on the season, in sweltering heat or heavy rain. In such circumstances, judges are prone to cut procedures short and arrive at snap judgments. Furthermore, skeptics point out that in legal systems that have been notoriously understaffed, overburdened, and open to the payment of bribes, such as in the Democratic Republic of Congo (DRC), the introduction of mobile courts may be a drop in the ocean of justice-sector reform efforts, bringing to justice a few perpetrators of abuse while leaving unaddressed the plight of the vast majority of survivors who continue to suffer from the consequences of violence-related trauma. As Kamari Maxine Clarke explains in the context of the ICC, movements aiming to establish court authority through the moral imperative of ending impunity cannot "evade the incessant reminder that the capture of a commander, or the deployment of command responsibility to reassign guilt, will not end violence." The essence of violence does not lie, she adds, in the ability of a commander to order—or prevent—an attack on civilians but in the "banality of the everyday and its dramas to control the terms of life and the production of death."[2] In other words, criminal justice, or so the argument goes, is of no help when violence is systemic and collective.

The need to refocus attention on the political economy of violence—and its gendered nature—became clear to me when, in 2014, a local journalist told me about his observations of a mobile court in Burhinyi, approximately one hundred kilometers southwest of Bukavu, the capital of South Kivu Province. The court traveled on a shoestring budget and relied on the village chief for food, accommodation, and local transport. From the resulting report, commissioned by a local women's rights organization, I have picked three cases to highlight the nexus of patriarchal family structures, competition for scarce resources, and gender-based violence.[3]

The first case concerned a woman who had been battered and humiliated by her husband and in-laws. "The son of my husband's little brother

was possessed by evil spirits in school. My husband's family said I had bewitched the kid. They pulled me from my bedroom and paraded me naked through the streets of the village." The second case was brought by a woman who said her husband had attacked her with a machete before throwing her out of the house. "My husband accused me of witchcraft after our grandson had suddenly died. He told my son—the father of the child—that I was to blame. They ganged up against me and chased me from my own land." In the third case a woman claimed she had been abandoned by her husband for another woman. The husband had then come to take the children against their will, and now she had three and her husband had the remaining three. She said she had no means to support herself or the kids and the husband paid her no maintenance.

The cases from Burhinyi are but a small window into the manifold forms of violence and humiliation that darken, disrupt, and destroy the lives of women in the eastern DRC. In all three cases, the men were convicted by the mobile court for offenses such as causing bodily harm, attacking someone's "modesty," uttering death threats, defamation, or adultery. In all three cases the men were sentenced simultaneously to prison terms and the payment of compensation. However, no one on the bench of the mobile court seemed to have noticed that one part of the judgment canceled out the other because sending those found guilty of gender-based violence to jail would bar them from engaging in gainful economic activity, resulting not only in financial distress for themselves and their dependents but also making the payment of compensation more unlikely than it may have been in the first place. This is not a call for letting bygones be bygones, nor do I intend to argue that sexual and gender-based violence should not trigger criminal sanction. However, looking at the cases from Burhinyi gave me pause and made me wonder what good it will do for survivors to be paraded before the bandwagon of the fight against impunity.

This chapter reflects on the idea of bringing justice to the people and posits that mobile courts, under the guise of increasing access to justice and nurturing confidence in the rule of law, follow trajectories long associated with interventionist politics. Using material from the Baraka trial of 2011, I try to show that mobile courts impose criminal justice solutions in line with donor agendas while potentially stymieing restorative processes of bringing about atonement for wrongs committed. At the same time, it appears to me that testimonies of survivors of sexual violence cannot easily be cited in support of one stream of analysis in

transitional justice at the expense of another. If we look at what justice survivors say they want, there seems to be room for ambiguity and overlap at the interstices of discourses revolving around retributive and restorative justice concepts. The chapter is based on extensive participant observation, focus group discussions, and interviews conducted during field trips in five consecutive years (2012–2016). Apart from the vast literature on transitional justice interventions in postconflict societies of sub-Saharan Africa and campaigns to stop sexual violence in the eastern DRC, I have drawn on a range of primary sources, including reports from local as well as international civil society groups and media outlets.

Contextualizing Mobile Courts in the DRC

Mobile courts have featured on the peacebuilding agenda of intergovernmental organizations and NGOs operating in the Central African Republic, Sierra Leone, Somaliland, South Sudan, and, most prominently, in the DRC. Judging from the footprint it leaves in the media, in civil society fora, and academic debates, the DRC is a model state for justice intervention. Being the largest country in sub-Saharan Africa and the second largest in Africa as a whole, after Algeria, the DRC struggles with a flailing economy, fragmented infrastructure, poor public services, and the consequences of two devastating wars in the late 1990s and early 2000s, which laid to waste much of the eastern borderlands. The repercussions are ever present as people in the DRC continue to suffer from the "brutality of armed groups and political instability" as well as an "appalling lack of governance."[4] The justice system, in particular, is marked by resource scarcity and political interference. According to Savage and Kambala wa Kambala, the judiciary in the Congo has been, throughout history, "the plaything of political forces."[5]

A sense of how loosely linked ordinary Congolese think the legal system is to the idea of justice was conveyed to me in a conversation early on in my research in the eastern DRC. "What are you doing in Congo?" a local truck driver asked after picking me up from a road swirling with dust to give me a lift to the next motorcycle taxi stand. When I told him I wanted to find out how mobile courts helped people get justice, he burst out laughing. "Justice in the Congo is a field of peanuts, my friend. It holds promise for many when you start planting but after bringing home the harvest only the farmer eats." "But who is the farmer?" I asked. The truck driver rolled his eyes. "Who do you

think I'm talking about? The judge, of course! The judge collects from everyone participating in legal proceedings and then gives a judgment in favor of the highest bidder."

Almost everyone I talked to agreed that the legal system in the DRC did not serve all in equal measure but primarily those who could afford to pay for services rendered. Analysis shows that the list of shortcomings is long.[6] Some of the obstacles to justice taking its course include prohibitive court fees and travel costs for survivors to file a case, especially when they live in a rural environment. A case may collapse even after it has been filed because survivors flinch at the prospect of testifying in a possibly hostile court of law. Last but not least, justice may take a course other than the one intended by the law because a bribe is offered and accepted, or because the military hierarchy has inexplicably arranged for the transfer of an officer to a post in a far-flung area just when legal proceedings are about to proceed.

Mobile courts were introduced in independent Congo, then known as Zaire, in 1979. They ceased to operate when the first Congo war broke out in 1996 and resumed, under the support of international actors, after peace was restored and a transitional government was formed in 2003. In 2006 general and presidential elections were held in the DRC, and from 2009 onward mobile court programs were expanded in the eastern provinces of North Kivu, South Kivu, and Maniema, as well as in the district of Ituri, which became a province in its own right in 2015. Mobile courts have received backing, mostly in terms of logistics, from intergovernmental organizations, such as the United Nations Development Programme (UNDP) and the United Nations Organization Stabilization Mission in the DRC, named MONUSCO after its French acronym. However, the main driving force has been international NGOs, such as the American Bar Association (Washington, DC), the Open Society Foundation (New York), Avocats sans Frontières (Brussels), People in Need (Prague), and Vivere (Lausanne). It is for the most part on their initiative and from their budgets that activities have been planned, travel costs reimbursed, and allowances paid for time spent in the field.

Some of the mobile courts set up in the eastern DRC in recent years were mandated to look into land and inheritance issues, but the bulk of the caseload pertained to particularly shocking incidents of violence covered in the international media and a staggering backlog of crimes relating to sexual violence. A UNDP report states that 60 percent of

the cases taken up by the mobile court system in eastern DRC in the period from January 2011 to December 2012 were concerned with sexual or gender-based violence.[7] The focus in international justice reform programs on sexual violence can be explained by the growing influence of streams of analysis linking findings of gender and conflict theory. Human Rights Watch was the first international NGO to describe sexual violence in the eastern DRC as a "weapon of war," a military tactic used by commanders to win and maintain control, not so much over land but people.[8] Sexual violence as a weapon of war has since become a fixture in power-point presentations beamed on the walls of lecture halls around the world. The explanatory value of describing sexual violence as a tactic of asymmetrical warfare may be limited in the face of Congo's complex political and social realities, but stories of rape generate instant attention and are conducive to stirring audiences unfamiliar with the intricacies of the conflict into action.[9]

Apart from recourse to the language of war, the case for intervention is bolstered by the portrayal of the DRC as a "failed state." International NGOs regularly publish meticulously researched reports in which they hold the DRC government to task for allowing the country to fray at the edges and for failing to provide security and access to justice.[10] Such detailed stocktaking of public authority failure boosts critical debate but may have unintended consequences. The more the DRC is depicted as a breeding ground for human rights abuse, arbitrary rule, and serial rape, the more justifiable it seems to interfere with the way things are and call on external powers to impose a system of checks and balances on domestic actors.[11]

Meanwhile, it is often overlooked that the introduction of mobile court programs, in the name of human rights, sits uneasily with the colonial history of such courts. Bérengère Piret reminds us that King Leopold II of Belgium, when he took over the Congo as his private property following the Berlin Conference in 1885, worked on the assumption that he had to build a legal system from scratch in the newly acquired territory. Piret explains that mobile courts, a cost-efficient alternative to establishing a comprehensive judicial system, were introduced to give the colonial regime visibility. The reach was limited because, as Piret makes clear, European judges had little penchant to move around the countryside, but like their counterparts today, itinerant courts planted the idea of a uniformly applicable law in areas that otherwise lacked the experience of a central authority.[12] However, for

all their potential to create spectacle, there was, according to a Congolese historian to whom I spoke privately, something eerily ephemeral about the way mobile courts came, meted out their version of justice, and left. They seemed like a ploy, a feature of colonial grandeur that rolled through village after village, beaming a bright light into the night. People were stunned, mesmerized, perhaps electrified by the attention paid, for once, to their rural lives, but when morning broke, the court in its tent was gone.

Similarly, Nancy Rose Hunt describes the dispatch in the 1920s of mobile medical teams who carried census books and acted as surveyors, messengers, and emissaries to extend "coercive state methods" to ever-more-remote regions of the Belgian Congo.[13] Seen through that lens, the pull of mobile institutions, both in the legal and medical fields, may have been—and perhaps today still is—not so much their expediency as their theatricality. Showing the trappings of the state where otherwise it has little presence does not necessarily turn a dysfunctional administration into an effective one. However, it serves as a demonstration of the political will that, as we have seen above, representatives of the international community find so conspicuously absent when they visit the DRC. As for the light footprint that international actors claim they leave when they help organize mobile court programs, it should be recalled that any international support to existing national institutions in fulfilment of their constitutional mandate, couched as it may be as complementary, auxiliary, or secondary, meets the definition of intervention.[14] In the next section, I will show that this has consequences both for the accused and for the witnesses testifying in internationally assisted mobile courts.

The Baraka Trial

International observers point out that mobile court programs in the eastern DRC represent a "viable forum in which to try relatively high-ranking military officials for war crimes"[15] and give a fresh impetus to initiatives seeking "to finally put an end to impunity and injustice."[16] However, what emerged from the interviews I conducted with legal practitioners in the eastern DRC was something else. Many of my interlocutors asserted that the fast-tracking of trials for sexual violence exacerbated many of the problems associated with law enforcement in fragile situations. I was told that courts were faced with donor expectations for high conviction rates, thereby compromising the principle of

presumption of innocence. Defendants and defense counsels were given insufficient time to apprise themselves of what were often voluminous dossiers, resulting in an infringement of the right to a fair trial. The well-being of survivors was no more a priority than the rehabilitation of anyone found guilty and sent to prison. I learned that survivors of sexual violence, despite their fear of retribution, social rejection, and stigma, were lured into testifying by locally organized and internationally funded outreach and awareness-raising campaigns that combined legal counseling with medical and psychosocial assistance for the duration of the trial.[17] After they had testified, however, survivors lacked support and protection in the local community, as well as the means to build a new life elsewhere. Compensation—if it was awarded at all—was not paid in most cases.

In what follows I will illustrate the findings of my interviews using as an example the proceedings of a mobile court dispatched to a small town in the southern part of South Kivu Province to look into the Fizi incident, arguably the most widely publicized case brought before a mobile court in the eastern DRC. On New Year's Day 2011, Congolese soldiers attached to a unit under the command of Lieutenant Colonel Daniel Kibibi Mutuare attacked the civilian population in Fizi, two hundred kilometers south of Bukavu. According to reports that trickled in over the next few days, houses had been broken into, property had been looted, civilians had been beaten, and dozens of women had been raped. With the discourse on sexual violence as a weapon of war well entrenched in the DRC, the incident instantaneously made international headlines as the "New Year's rape in Fizi."[18] Conforming to expectations expressed by the diplomatic community and supported by Open Society Foundations,[19] the Congolese authorities expeditiously dispatched a military court to try Colonel Kibibi and ten others in Baraka, a small town situated on the bank of Lake Tanganyika, a short distance from Fizi on a bumpy road.

Journalist Michelle Faul describes how for three days the court sat in closed session to hear the testimony of forty-nine women, referred to by numbers to protect their identities. The evidence brought against the colonel was conclusive: "One woman said Kibibi raped her for 40 minutes. She said she knew the colonel because he often bought food from her."[20] Once the women had testified the proceedings resumed in open court. A large crowd was in attendance. Hundreds gathered to hear the additional evidence and listen to the arguments of the defense.

Galya Ruffer, a legal scholar observing the trial, recalls that most of the bench seating was taken up by local NGOs and journalists. As there was not enough space for the audience, some spectators were hanging on the walls of the courtroom to get a glimpse of the proceedings. Police officers were standing guard with their guns at the ready. The atmosphere was raucous and the audience, mostly men, had to be reminded of court decorum as people erupted in laughter and ridiculed some of the accused for their lack of education. Soldiers from Kibibi's unit observed the commotion from a truck parked close to where the trial was held.[21] Judgments were delivered on February 21, a mere eleven days after the commencement of the trial. Nine of the accused were convicted, one was acquitted, and another transferred to a juvenile court because he was found to be a minor. Of the nine convicted, four were sentenced to twenty years in prison, among them Colonel Kibibi, two more to fifteen years, and the remaining three to ten years.[22] The verdict was announced in the presence of the governor, who returned to Bukavu on board a UN helicopter the same day.

The trial and conviction of Colonel Kibibi were celebrated by international observers as a victory of what is often called "global justice." In a press conference held in Bukavu the following day, the US ambassador, freshly arrived from Kinshasa, urged the Congolese authorities to take all measures necessary to help the victims and bring the perpetrators of rape to justice.[23] Kelly Askin, in her capacity as senior legal officer with the Open Society Justice Initiative, wrote that she and her colleagues had been allowed privileged access to a closed session hearing of the "Fizi rape trial," giving them an opportunity to listen to the "heart-wrenching testimony from young girls and elderly women who had their lives and families shattered by horrific violence." When one woman said that trials like the one held in Fizi were "a necessary ingredient to bring peace to her country," Askin noted, she "felt like a proud mother, listening to someone praise her baby."[24] Analysts stressed the symbolic meaning and preventive effect of punishing an officer of the Congolese army, the Forces Armées de la République Démocratique du Congo (FARDC), and were impressed with how the judgment, as one expert put it, "combined elements of Congolese civil, criminal, and military law with the most up-to-date international human rights protections regarding SGBV [sexual and gender-based violence]."[25] However, closer analysis reveals that the trial and its representation pose problems on several levels.

Legally speaking, there are indications that the court, in pushing through a heavy agenda in very little time, failed to uphold the principles of fair trial and presumption of innocence. In an interview he gave me in his office in Bukavu, Alfred Maisha, the lawyer representing Colonel Kibibi, stated that on numerous occasions the rights of the defense had been infringed in order to bring the trial to a speedy conclusion. He noted that on the day prior to his client's conviction, he had submitted a lengthy document raising points that he thought were pertinent for ascertaining the guilt of the accused. He wondered how it had been possible for the court to consider the submission on its merits and reach a verdict the same day. Maisha further claimed that neither he nor his client had received the judgment in writing and that he had never been notified to appear for a hearing on the appeal he had filed after the verdict was announced more than four years ago. Maisha said his client had since been transferred to Kinshasa, which made it hard to represent him, given the fact that a plane ticket to Kinshasa from Bukavu was as expensive as a ticket from Europe.[26]

I cross-checked Maisha's allegations with the lawyers of the American Bar Association (ABA), who had supported the witnesses testifying in the Baraka trial. I was told that the judgment had been issued in writing and that if Kibibi's attorney was not in possession of the document, then this could be explained only by negligence on the part of the defense. When asked for a copy of the judgment, the lawyers said it was not for them but for the court to provide documents pertaining to a trial that had reached the appellate stage.[27] Confronted with the statement of the ABA, Maisha is reported to have replied that he had not seen the judgment and was not aware of its existence, but if indeed it had been circulated without being communicated to him or his client, it would mean that the court had "violated the constitution."[28]

The views expressed by the parties are indicative of a climate of distrust and suspicion, which is probably not helped by the biased approach taken by the very organization that had assisted the authorities in getting the proceedings underway. Two years after the trial, Open Society published a brochure titled "Justice in DRC" that contained a summary of the proceedings in Baraka and their outcome under the heading "The Guilt of Soldiers in Fizi." The brochure correctly stated that all but two of the accused were "found guilty." However, it failed to mention that throughout the trial the defendants had insisted that they were innocent. Even more glaring was the omission that the sentences

had been delivered by the court of first instance and that the defendants had filed an appeal, which means that the judgment, at the time the report was written, was not final (the appeal was still pending at the time of writing).[29] Such blatant misrepresentation of facts notwithstanding, the brochure was still available on the web for download when I last checked in August 2017.[30]

Independent observers cautiously distanced themselves from the role of Open Society in, and its representation of, the Baraka trial. A former judge at the Supreme Court of the State of New York, Mary McGowan Davis, who was invited by Open Society to follow and assess mobile court proceedings the year after the Baraka trial, offered the view that hearing lower-profile cases that might otherwise escape attention was of "equal or, perhaps, greater value" than the proceedings in Baraka. As examples of "crimes that beset every community every day," she cited the case of a thirteen-year-old girl who was raped by a relative in her bedroom and the case of a ten-year-old who was sexually assaulted by a police officer while gathering grass to feed her guinea pigs.[31] In a similar vein, Galya Ruffer notes that the Open Society report omits some of the facts that complicate the local situation. "For example, what sparked the incident was a fight over a girl in a bar. One of the soldiers, not wearing a uniform, had tried to pick up a local woman. Her boyfriend, angered, attacked the soldier, who later died. The soldiers looted the village in retaliation for the death of the soldier."[32]

Ruffer points out that on that particular night none of the attackers was wearing a uniform, which leads her to conclude that by couching the incident in terms of international humanitarian law, the Open Society narrative "inscribes only the identities that have to do with war and conflict," ultimately shaping justice in a way that ignores "the experience of victims as speakers of their social condition." Ruffer highlights "the need to better understand how local testifiers and actors identify or not with the new vocabularies of sexual violence as an atrocity crime" and to what extent the qualification of rape as a crime against humanity has been able "to give voice to epistemic injustice." In the case of the Baraka trial, the concerns of the women testifying in the proceedings were not addressed, she observes, which is why the court was perceived as just another "foreign tribunal."[33]

Related to the problem of not listening closely enough to what witnesses say and how they say it are the issues of witness protection and reparation. Many of my interlocutors on the ground felt that the Baraka

trial had yielded little in terms of compensation, unnecessarily exposing the witnesses and, once they had provided testimony, leaving them to deal with the consequences. One such critic was Thérèse Kulungu, then director of the Panzi Foundation's Legal Clinic, who formed part of the legal team representing the women testifying in the Baraka trial. Interviewed for this research, Kulungu recounted the stories of the women who had testified in court. From evening to early morning they had been raped by one band of soldiers after another, on orders of Colonel Kibibi. There was no escape. Women who tried to hide were pulled from their hiding places, and the troops had license to kill those who resisted. In the end, she said, Colonel Kibibi and some of his men had been convicted and sentenced to prison terms and payment of compensation. Was that justice? The prosecutor had asked for the death penalty and appealed against the verdict, but so far no hearing had taken place at the appellate court.[34] Meanwhile, the convicted had been transferred to Bukavu Central Prison where, she intimated, jail breaks were the order of the day. Kulungu concluded her account on a somber note. "Show me the survivor who still has the courage to come forward and bring a case when she knows that after the trial she will have no protection and she will also not get compensation. And threats are directed not at the woman alone but at her whole family and even the lawyers representing her. If we [the women's advocates] are alive after such a trial it's only by God's mercy."

At this point of the interview Kulungu mentioned, almost incidentally, that she had gone to Fizi after the trial, not in her capacity as counsel, but as part of a fact-finding mission. She related that she had wanted to speak to the women who had testified in court to see how they were faring. The ones that the mission was able to locate were restless. They said they constantly worried about their safety. Others, according to Kulungu, had moved away for fear of reprisal.[35] Apparently, the measures taken to protect the identity of the witnesses, such as the screening off of the proceedings during testimony, had not proven to be effective, hardly a surprise in a milieu where the comings and goings of people are inevitably noticed and routinely talked about. What international stakeholders had propagated as the strength of mobile courts, namely, the holding of a trial in proximity to the locality where the crime has been committed, had in the case of the proceedings in Baraka turned out to be a major impediment to ensuring security for the witnesses on whose testimonies the convictions had depended in the first place.

Limitations of Criminal Justice

Bearing in mind the colonial baggage that mobile court programs carry and the limited effect they had for rural populations in colonial times, I felt that it was imperative to speak with survivors of incidents recently taken up in mobile courts. What would they share with me about their day in court, what kind of justice would they tell me they had obtained? I discussed the possibility of going to Fizi with my local collaborators whenever I came to the eastern DRC. However, even before fighting broke out in Burundi in 2015 and turned trips to nearby Fizi into a logistical challenge, we had doubts about what such a visit would accomplish. We wondered whether it was possible for academic research to account for death and destruction and whether it was legitimate for researchers to cite from accounts provided by survivors of sexual violence, and if so, in what form.[36] We felt that even if we managed to identify and interview some of the survivors, it would not be safe for them to talk to us. We were also not sure what counseling they had received, if any, and how our questions might affect the healing process. In 2016, we identified a local NGO that provided shelter and psychosocial support to survivors of sexual violence in the southern parts of South Kivu Province where Fizi is located. They offered to explore the possibility of calling a meeting with survivors of the attack that had given rise to the Baraka trial in 2011. When we learned that the women contacted by the organization would welcome an opportunity to speak with us, we decided to go to Fizi and meet with them. Eight survivors turned up; I met them alone, accompanied only by an interpreter, a person whom the survivors knew and trusted. The meeting took place in a safe house provided by the organization.

To my initial surprise, none of the women had much inclination to speak about the Baraka trial or, to the extent they had been called as witnesses, their experience of taking the stand. This is not to say that the way a survivor is treated as a witness in court has no effect on how she will be able to heal and recover from potential trauma. To the contrary, studies in victimology suggest that respect for a survivor testifying in a court of law and regard for her well-being, as part of a concept termed "therapeutic jurisprudence," reduce the risk of retraumatization and may boost her self-esteem.[37] But why did the proceedings in Baraka hold so little meaning for the survivors, who more than anybody needed their sense of justice to be restored? Were my interlocutors disappointed with the court? Had there been something wrong with its demeanor? Those

who had gone to Baraka to give evidence stated that the proceedings had been long and the logic of the questioning had not always been clear to them but that overall they had been treated with respect and in a courteous manner. What was the problem then?

With time I came to understand the reach and the depth of the damage that had been done. It was not possible for survivors then, and it is not possible for them today, to speak about the "Fizi incident" as if it was a mere sequence of events that can be adequately or easily described. I will not provide details here of the violence these women witnessed and endured. There is no need for such an account in this volume on justice. I will limit myself to noting the fallout. Common to all my interlocutors was the experience of social exclusion, indicating a splintering of societal cohesion following the breakdown of law and order. The sorrows articulated by the women in the room were mundane and existential at the same time, ranging from raising money for medical treatment to maintaining a roof over their head. Mothers talked about how, as a consequence of suffering rape by armed intruders, they had been abandoned by their partners and shunned by their families, and how, despite everything, they tried to keep sending their children to school.[38] One of the survivors said, "When my husband learned I had been raped he threw me out of the house, along with my children. I pleaded with him, not for my sake but for the sake of the children. After all they are his kids, too. He only said, 'They no longer need me. They have five fathers now.' He said this because I had been raped by five men, one after the other."

Survivors noted that apart from the moral satisfaction of the conviction of the main accused in the Baraka trial, they had hoped for material compensation. The nonexecution of the judgments, which did indeed provide for compensation to the tune of $10,000 each, is considered a major drawback by virtually all observers of the Baraka trial. However, from the halting way the women spoke, it appeared to me that there was still something else that bothered them. Finally, one woman stated, "I went to testify in court. They asked me many questions. I was happy with the judgment but when I came back to my village, there was nothing for me to eat and no place to sleep. Looking back I think the judges made it easy for themselves. If they really want to know how we suffer here in our community they should not ask questions but see for themselves. Why don't they go and feel the pain?"

Other women I interviewed, both in Fizi and elsewhere in the eastern DRC, echoed that sentiment. The very quality that judges pride

themselves on, namely, the ability to parse the facts and to determine what is pertinent and what is not, bewildered them. It made them feel that their stories had been cut short. This is a problem typical of criminal justice because the formalization of procedural rules, as important a safeguard as it may be for the rights of the accused and the defense, reduces the witness to a source of information, someone filling in the blanks, not drawing a picture of their own. The position of "victim" has advantages for survivors of sexual violence since it comes with the recognition that the infliction of harm results in rights and entitlements, such as the right "to speak up," the right to reparation, including monetary compensation, and the right to an apology and assurance of nonrecurrence of any of the violations experienced. However, such role-play is harmful to the extent that restricting survivors of sexual violence to the position of "victim," which is the prerequisite for allowing them to become beneficiaries of any compensation resulting from the conviction of a perpetrator in a criminal trial, deprives them of the agency to tell their own story of what they endured and how they coped. The court, not the "victim," determines what facts are relevant to decide a case on its merits, and international entrepreneurs of transitional justice, rather than limiting themselves to amplifying the voices of survivors, speak on behalf of "victims," reproducing relationships of dependency and inferiority.[39]

Kelly Askin, describing her feelings as a "proud mother," may be an example of international observers or activists taking center stage when listening is all that is required. In a social climate where, as we have seen in the context of the cases taken up by the mobile court in Burhinyi, witchcraft provides an excuse to settle scores or snatch land, where women are blamed for strokes of bad luck, chased away or abandoned at will, criminal justice is no panacea and to pretend otherwise distorts the often complex articulations of survivors. Pamela Scully warns that "contemporary campaigns against violence against women, now traveling under the sign of gender-based violence, like their colonial predecessors, attempt to create the 'modern woman' by seeking to bring women under the aegis of the state." In the process, she continues, campaigns place an emphasis on the individual as a victim of sexual violence, thus undermining traditional solidarity networks and, because women are more likely to be targeted when they are of childbearing age, "severing generational ties between older and younger women."[40] Restorative justice concepts at first seem better equipped to promote social healing

processes because they call for solutions based on holistic assessment rather than the application of formal law to a given case. However, restorative justice follows a communitarian approach to political judgment, and so, just like its sibling, retributive justice, presumes a "basic consensus on who should be understood as 'victims,' who should be addressed as 'offenders,' and what constitutes a 'crime.'"[41] The use of justice scripts, whether written locally or internationally, silences the individual survivor's often surprisingly nuanced account of what happened to her and how she could be restored to her rights. Human rights law and the corresponding enforcement mechanisms designed to protect women from violence, as Chiseche Mibenge observes, are sometimes blind to "the pain that law and justice can inflict, the omission they make, the control they keep [over women's lives in patriarchal societies]."[42]

The Baraka trial brings home the fact that the issue of transitional justice in the context of sexual violence is twofold. First, there is a problem of conception because criminal justice features so prominently in the discourse and yet knows no other approach than to decide a case on its merits and ascertain the guilt of the accused, thus narrowing the scope of possible redress. Second, agents of transitional justice are faced with a problem of representation as complex situations are all too often simplistically couched in the language of rights, which is then used as a tool for advocacy. However, from a survivor's perspective, justice is more than the application of legal rights. Internationally assisted mobile courts and their inherent drive to make global justice solutions work at the local level bring the Congo back on the radar of the international human rights community but create obstacles, rather than opportunities, for survivors of violence to define, and perhaps achieve, their own version of justice.

Irrespective of how information on the DRC is packaged and which methodological tools are applied, most strands of analysis that factor in sexual and gender-based violence, perhaps *because* they factor in such violence, converge on the idea that international intervention is inevitable. At the same time, it is clear that international justice mechanisms neither have the capacity nor the mandate to try but the most severe cases of human rights abuse. Against this background, mobile courts, first introduced by the Belgian colonial regime, seem a fitting response to address a broader range of human rights violations. Perhaps it is

possible to argue that mobile courts open up space for debate in local communities on the issue of sexual violence and its root causes. However, as I have demonstrated in this chapter, internationally supported mobile court programs, based on the principles of complementarity, universality, and uniformity, do not give access to justice to all in equal measure. Rather, they give priority to those who claim to have suffered forms of abuse that conform to patterns of violations that are internationally deemed to be of particular gravity. Thus they validate one particular justice narrative at the expense of other narratives and foreclose avenues available through other means of conflict resolution. On the flip side, survivors testifying in criminal proceedings take considerable risks. As the Baraka trial illustrates, they have reason to fear stigmatization and retribution, and the prospects of reparations are slim. Pushing the law of the land to the dotted lines of international borders may restore to state authorities a semblance of control in areas of limited statehood but does little, it seems, to rehabilitate survivors or address structural problems of postconflict situations in sub-Saharan Africa.

Notes

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22. United Nations Organization Stabilization Mission in the Democratic Republic of Congo, "Progress and Obstacles in the Fight against Impunity for Sexual Violence in the Democratic Republic of the Congo," UN Office of the High Commissioner for Human Rights, April 2014, 13, http://www.refworld.org/docid/534b931f4.html.

23. It should be noted that "all measures necessary," in diplomatic jargon, is a reference to the use of armed force.

24. Kelly Askin, "Fizi Diary: Mobile Court Tries Landmark Rape Case," *Open Society Foundations,* February 17, 2011, http://www.opensocietyfoundations.org/voices/fizi-diary-mobile-court-tries-landmark-rape-case.

25. Lake, "Organizing Hypocrisy," 517.

26. Alfred Maisha, interview by Patrick Hoenig, Bukavu, July 2015.

27. Lawyers of the ABA, interview by Patrick Hoenig, Bukavu office, July 2015.

28. E-mail from one of my Congolese collaborators present at the meeting with Maisha, November 2015.

29. The United Nations Joint Human Rights Office has noted in a different context that the right to appeal is not satisfactorily respected in the military court system in the DRC. See United Nations Organization Stabilization Mission, "Progress and Obstacles," 16.

30. Open Society Foundations, "Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo," 2013, http://www.opensocietyfoundations.org/sites/default/files/justice-drc-20130114.pdf.

31. Mary MacGowan Davis, "Justice under a Tent in Congo," *Open Society Initiative for Southern Africa,* March 6, 2012, http://www.osisa.org/book/export/html/4009.

32. Ruffer, "Testimony of Sexual Violence," 264.

33. Ibid., 264–66.

34. Because of a moratorium, the death penalty is presently not carried out in the DRC.

35. Thérèse Kulungu, interview by Patrick Hoenig, Bukavu, September 2013.

36. For the question of representation, see Tshepo Madlingozi, "On Transitional Justice Entrepreneurs and the Production of Victims," *Journal of Human Rights Practice* 2, no. 2 (2010): 208–28 (arguing that "we should not only ask whether the victim can ever speak, but whether it is ever legitimate for others to speak about or for the victim").

37. Jo-Anne M. Wemmers, "Restoring Justice for Victims of Crimes against Humanity," in *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation,* ed. Jo-Anne M. Wemmers (New York: Routledge, 2014), 39–41.

38. Survivors of the FARDC attack on Fizi on New Year's Day 2011, interviewed by Patrick Hoenig, Fizi, July 2016.

39. Susanne Buckley-Zistel, "Redressing Sexual Violence in Transitional Justice and the Labelling of Women as 'Victims,'" in *Victims of International Crimes: An Interdisciplinary Discourse,* ed. Thorsten Bonacker and Christoph Safferling (The Hague: T.M.C. Asser Press, 2013), 95–97; see also Joe Oloka-Onyango and Sylvia Tamale, "'The Personal Is Political,' or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism," *Human Rights Quarterly* 17, no. 4 (1995): 691–731 (describing the dominant mode of international feminism as "predatory" and "paternalistic").

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SEVEN

Conflicting Conceptions of Justice and the Legal Treatment of Defilement Cases in Malawi

NGEYI RUTH KANYONGOLO AND BERNADETTE MALUNGA

THE MALAWI PENAL CODE UNDER SECTION 138 CRIMINALIZES SEXUAL intercourse with a girl below the age of sixteen with or without her consent. This is the offence of defilement. Research shows a number of challenges in the legal treatment of defilement cases by both formal and informal traditional systems, which affect the protection of girls from sexual abuse. Such challenges include inefficiencies in the delivery of public services by such agencies as the police, courts, and traditional systems. The inefficiencies reflect, and result from, a distinction in conceptions of justice as held by communities and applied by the formal justice system. This paper explores the implications of these differences for the protection of girls. The paper thus examines discrepancies between the conceptions of justice articulated by ordinary citizens and those that inform formal legal proceedings. It shows that these differences have an adverse effect on efforts to deal with cases of child sexual abuse. The paper highlights the underreporting of sexual abuse of young girls as a significant impediment to the pursuit of justice and considers a variety of causes of underreporting, including situations in which sexual intercourse with children is not condemned because it occurs in culturally

sanctioned settings, such as initiation ceremonies, as well as the ongoing economic dependence of victims on perpetrators. What is clear is that the achievement of justice for victims of defilement will require coordinated efforts across the divisions between formal and informal authorities.

The paper is based on research conducted in eight districts of Malawi. The research set out to investigate the extent to which the justice delivery system protects the rights of children who have been sexually abused. The findings show that there are conflicting conceptions of justice between communities and the formal justice system, which ultimately adversely affects the protection of children from sexual abuse.

The Malawi constitution provides for the protection of children from any treatment that is likely to be harmful to their health or their physical, mental, spiritual, and social development,[1] and this includes defilement. Defilement of children is harmful to their well-being.[2]

Statistics indicate that one in five females experience sexual violence.[3] In the Machinga District of Malawi, for example, the prevalence rate is particularly alarming, and police records indicate that a total of fifty-five cases of defilement were reported there between January and September 2015.[4] In 1999 research conducted by the Centre for Social Research at the University of Malawi found that 55 percent of women in Malawi indicated that they had been raped or forced into sex.[5] There is also research that shows that only a small proportion of incidents of defilement are reported to police.[6] Further, those that are reported and brought to court often end in acquittal for want of evidence, in part owing to the incapacity of personnel in the system to handle such cases.[7] The prevalence of defilement cases is due to a number of reasons, including the myth that sexual intercourse with a young girl cures HIV/AIDS.[8]

Conceptions of Justice in the Formal and Informal Justice Systems

There have long been debates around the concept of justice. Rawls defines justice as fairness and argues that self-interested rational persons would choose two general principles of justice to structure society in the real world. The first principle is about equal liberty and states that each person has an equal right to the most extensive liberties compatible with similar liberties for all. The second is the difference principle, which states that social and economic inequalities should be arranged to the

greatest benefit of the least advantaged persons and attached to offices and positions open to all under conditions of equality of opportunity.[9]

Rawls's definition of justice as fairness resonates with conceptions of justice in defilement cases that would balance the interests of both the accused persons and the victims. In most criminal trials, emphasis is placed on the right to a fair trial for the accused person, whereas the victim is relegated to the background. For example, the constitution of the Republic of Malawi clearly stipulates various rights accruing to accused persons.[10] The constitution is, however, silent on the rights of victims in criminal matters. In criminal law, the concept of justice as fairness takes a number of forms. Some criminal law scholars advocate for retributive justice, which is equated with punishment or just deserts for the offender.[11] This kind of justice does not focus on the victim.

By contrast, other scholars advocate for restorative justice. While it must be acknowledged that there are several different approaches to restorative justice, what all definitions of restorative justice share is a common moral vision: that justice requires more than the infliction of the "just desert" of pain on an offender.[12] For instance, Marteni argues that something more than punishment is required if we want to implement a system that really pursues justice.[13] He suggests that a path worth exploring in that regard is the one laid down by restorative justice. He states that the restorative justice approach is an approach to justice that has the victim at its center. Further, it also focuses on the unique needs of the individuals affected by specific incidents of crime and invites them to participate in a personalized and private experience where they have the opportunity to consider what is necessary to help them heal. Restorative justice therefore aims to empower the victim and give him or her influence over decisions relating to how the offender should make up for the crime committed.[14] Restorative justice does not negate accountability for offenders. Apart from calling the offender to account, proponents of restorative justice argue that it goes beyond the benefits found in court-based, adversarial modes of administrating criminal justice.[15] Through restorative justice, the victims can experience at least some form of reparation for the wrongs suffered, restitution for the losses incurred, and compensation for the suffering endured. This approach is thus said to go beyond giving offenders their just deserts.[16]

The paper shows how evidence from ordinary people reflects a sense of justice as fairness. This goes beyond retribution and incorporates aspects of restorative justice in defilement cases. It shows how the

criminal justice system has to go beyond its focus on offenders receiving what they deserve and also ensure that victims of such offences receive justice. The focus on both victims and offenders can have an influence on the rate of reporting and prosecution of these offences and therefore can reinforce justice for both the accused and the victim.

The Formal Justice System

The formal justice system is defined in the paper as a system in which the delivery of justice is within the limits imposed by patterns of state law.[17] Under section 41(2)(3) of the Malawi constitution, everyone has the right to access any court of law or any tribunal with jurisdiction for the final settlement of legal issues. In addition, every person has the right to an effective remedy by a court of law or tribunal for the violation of his or her rights and freedoms. While everyone has the right to access formal state justice as per the constitution, in practice this is often denied for a number of reasons. Our research shows that proceedings are often subject to considerable delays at all stages, mainly as a result of the sheer number of cases being processed through a limited number of courts. Further, the attitude of the criminal justice system toward victims of sexual assault is often negative and judgmental. The woman or girl may be blamed for the crime of which she is a victim.

One particular form of injustice to defilement victims in the formal state system is shown by the continued requirement for corroboration of the victim's evidence. It is the practice of the courts in Malawi to require corroboration of the evidence of a complainant in every sexual offence, including defilement. Corroboration is defined as independent evidence supporting the testimony of the complainant.[18] The need for corroboration is applicable to each aspect of every sexual offence. As such, in defilement cases, the state has to bring corroborative evidence to support the core elements of the offence, namely, penetration, the age of the victim, and the identity of the accused person. However, corroboration is required as a matter of practice by the courts and not by authority of statute. Consequently, it is possible to convict on the uncorroborated evidence of the victim if the court is convinced about the trustworthiness of the complainant. Before conviction in such cases, the court is required to recognize and put on record that it is aware that practice demands corroboration, that the court has looked for it in vain, that it is aware of the dangers of convicting in the absence of corroboration, and finally that, despite the absence of corroborative evidence, the court is

convinced that the evidence represents the truth. Without recognizing and stating the above, the decision may be overturned by the high court in its supervisory or appellate position.[19] For example, in the case of *Tinazari v. Republic,* the high court stated that where the only evidence against an accused person in a sexual offence case is the uncorroborated evidence of the complainant, the court may, in rare cases, accept the evidence as the truth and convict, provided that the court expressly record that there is no corroboration.[20] As such the requirement of corroboration, though only a practice in Malawi courts, has almost become a rule of law that is applicable in every sexual offence case.[21]

The requirement of corroboration in sexual offences is an injustice because it makes the prosecution of sexual offences unlike the prosecution of any other criminal offence. It brings an intense focus on the character and motivation of the complainant, which are unrelated to the proof of the essential elements of the offence. The prosecution may thus lose its case on the basis of what would appear to be irrelevant factors in other cases—for example, if the victim takes a long time before reporting the assault, or if the victim did not appear distraught at the time she reported the assault, although neither is an element of the crime.[22] These rules, which shift the usual focus of a criminal trial from an inquiry into the conduct of the accused to that of the moral worth of the complainant, give legitimacy to the saying that sexual offences are the only offences wherein a victim is treated as an offender.[23] The origins of the requirement for corroboration point to the fact that the rule was specifically developed to apply to women and girls as victims of sexual offences. Owing to the fact that women and girls constitute the majority of complainants in sexual offences, prejudices appear to have entered considerations to the effect that women are not to be trusted in sexual matters and therefore their evidence must always be treated with caution.[24] A police prosecutor at Nsanje police station stated that the need for corroboration has made many perpetrators escape prosecution and conviction in defilement cases. He stated that cases with no corroborating evidence are often not prosecuted and that, if prosecuted, they end up in acquittal for lack of corroboration, thereby denying the victims of such offences the opportunity to see formal justice being served. Our research further shows that it is not easy to secure corroborative evidence in defilement cases. This is because the cases tend to be reported late when all corroborative evidence is gone. This late reporting is often due to the victim's fear (perhaps following threats by the perpetrator) or

because of the relationship of trust that they have with the suspect. As such, without an intervening factor, such as pregnancy, cases may never be reported.

In addition, the form of justice administered by the state seldom involves restorative or compensatory awards or sentences. In this it is often out of step with the expectations of people whose view of justice is based on traditional justice models. The emphasis under the formal system is on the punishment of the wrongdoer by the state. Any fines that are imposed are paid to the state. The victim, therefore, is relegated to the status of witness and ignored as far as her compensation needs are concerned. Under these circumstances, the state system is seen as repressive, patently unjust, and wholly inappropriate to the needs of the parties, and it is viewed as operating simply to further the interests of the government.[25] The issue of compensation also plays a crucial role in the reporting of defilement cases. Though the penal code is clear that compensation can be ordered as punishment for any criminal offence, courts tend not to order such compensation in defilement cases. Thus, most families would rather not report the case and instead discuss the matter out of court with the perpetrator so that compensation might be paid.[26] In Mzuzu and Mzimba, some of the respondents suggested that the formal justice system is unsatisfactory in the way it settles disputes, particularly in its emphasis on the arrest and imprisonment of the perpetrator as opposed to compensation for the victim and her family. As a male respondent in Ekwendeni, Mzimba, put it, "Arrest and imprisonment is not enough and does not profit the victim in any way. When defilement cases are resolved at community level, the victim and her family gets compensated and this is more fulfilling." Community members thus expressed dissatisfaction with the court system, which they claim sidelines the victim and her family in relation to the remedies provided.

In addition, there is a lot of mistrust by communities in the credibility of the justice system. Most communities stated that the formal system is full of corrupt officials and that therefore they do not trust it to settle defilement cases. Low confidence in the police's ability to handle defilement matters effectively contributes to low reporting of defilement cases. The police were branded corrupt and reputed to favor people with money, who will give them bribes in exchange for the release of a perpetrator. Our research revealed that some reported cases were not investigated by the police or taken to court. In Mitundu, Lilongwe, a

female respondent summed up local attitudes toward and expectations of the police as follows: "The police do not attract respect and confidence from the people in the way reported cases are handled. As such as part of showing discontent with the way cases of defilement and other offences such as theft and murder were being handled, the community vandalized their own police station in the year 2011."

Similarly in Nsanje, some respondents reported that defilement cases were better off being handled by the community rather than the police, who were considered to be corrupt. Participants suggested that, as a result of police corruption, cases of defilement are not properly investigated and prosecuted. The same was stated in Chimaliro, Mzuzu, by a local community leader and party chairman, who said, "We have no confidence with the way police handle defilement cases in this area. The police is not effective, does not attach importance to defilement cases and they are often bribed by the perpetrators. I have a number of cases in mind which were reported to police but have not been followed up."

Further, it was shown in some areas that accused persons with mental health issues were not prosecuted by the police but released from custody once it was reported that the accused was not of sound mind. This has also contributed to the low trust that people have in the police when it comes to dealing with defilement matters. For example, in Ekwendeni, Mzimba, the family of a victim was suspicious about the way the police handled their matter as regards the perpetrator. After the police arrested the perpetrator, the family alleged that they were called by the police, who told them that the perpetrator wanted to discuss the case out of court. They declined to do so because they wanted the case to be settled by the court. They were surprised to see that the perpetrator was released a few days later and that the case was discontinued because the police claimed that the suspect was mentally ill. Similarly in Mtandile/Mtsiliza in Lilongwe, the police did not take an accused to court once they learned that the accused was mentally ill. However, the law in section 11 of the penal code presumes every person to be of sound mind and to have been of sound mind at any time that comes in question until the contrary is proved. As such, the police practice of shielding accused persons with mental health issues can be challenged as against the law owing to the fact that it is the duty of the court to assess whether or not a person is mentally stable according to the evidence brought before the court.

The need for compensation and the issue of mistrust in the formal system shows that the formal system does not relate to the way of doing

things in the communities. The formal system is more oriented to the accused person, and the needs of the victim are rarely taken into account. Community members expressed the need to be involved in the cases but said that most of the time they are not informed of what is happening once a case has been reported to the state authorities. This lack of information creates suspicion about the way cases are handled by the state. This has contributed to low levels of reporting of defilement cases and the concomitant settlement of such cases at the community level.

In addition, the law and procedure practiced in formal courts were found to be unfamiliar and complicated from the perspective of most citizens. Not least because proceedings are generally carried out in English, a language that most Malawians do not understand. Despite the fact that court clerks serving as interpreters are made available, the question remains as to whether substantive justice is done in all cases.[27] Furthermore, some respondents were dissatisfied with sentences meted out against convicts of defilement, arguing that they were on the low side. Others argued that the formal system is filled with men and that the lenient sentences are a sign of men protecting their fellow men.

The Informal Justice System

Informal justice is the social phenomenon consisting of settling disputes between litigants outside state courts.[28] It is defined broadly as encompassing the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party who is not a part of the judiciary as established by law, or whose substantive, procedural, or structural foundation is not primarily based on statutory law.[29]

The rationale may be that court procedures are generally too slow and costly to be useful in resolving relatively minor disputes and that the adversarial process is not always the best mechanism for resolving such disputes.[30] It has been argued that informal justice transforms current conceptions of justice away from an adversarial all-or-nothing, blame-and-guilt orientation and toward a conception that is aimed at conciliation of disputants or reintegration of deviants into society. It also expands the range of relevant issues to be taken into account when processing disputes so that all factors and not merely those that go to guilt or innocence can be given full consideration.[31] Thus, the informal justice system may be more accessible than formal mechanisms and may have the potential to provide quick, relatively inexpensive, and culturally relevant remedies.[32]

One such informal justice system is founded on values of *umunthu. Umunthu,* which is similar to the more widely known Zulu term *ubuntu* (see chapter by Scott, this volume), connotes both human dignity and humanity as basic human attributes of every individual, as well as the basis of an individual's dignity and their relation to others.[33] There is tacit understanding among some scholars of African indigenous epistemologies that *umunthu* implies, among other things, a comprehensive ancient African worldview that has normative implications associated with humaneness.[34] However, it has not been taken seriously at the state level such that there is a disjunction in the conception of justice between the state with its adversarial all-or-nothing, blame-or-guilt orientation and *umunthu* principles that promote unity, dependency, reciprocity, and not vengeance.[35] Thus, the formal justice system, which seeks to punish the offender in defilement cases, leaving the victim with no other remedy, breaks the sense of dependency and unity embedded in *umunthu.* It can be argued that this helps explain the resort to informal justice where everyone "wins" in the sense that the liberty of the offender is not always compromised and the victim is compensated or considered through informal justice procedures. The informal justice system therefore shares certain characteristics with the idea of restorative justice rather than retributive justice. However, the informal justice system is not free from the violation of human rights. It can also reinforce discrimination and neglect principles of procedural fairness.[36] For instance, traditional and customary setups can take a skeptical attitude toward girls who report sexual abuse. Girls who are victims of defilement are often thought to have brought the act on themselves. In Nsanje, for example, most male respondents stated that women encourage defilement incidents through the way they dress, which was said to provoke men to commit these offences. Similar sentiments were echoed by an elderly woman at Zolozolo in Mzuzu, who said, "There was a case which happened in 2002 where a young girl in her early teen years was defiled. Most people questioned the morals of the victim and she was labelled as promiscuous. As such people did not feel sorry for what happened to her." Analogous sentiments were also recorded in Chilomoni, Blantyre, where some male respondents argued that men are sexually aroused if a young girl is not dressed "properly" and are therefore led to commit such offences. As such, many cases go unreported because the girls feel they would rather protect their reputation and keep a "clean" record by not exposing their experience to public scrutiny.

In other instances it is the parents, guardians, or family members of the victim who prefer it not to be widely known that their daughter has been defiled. Consequently, once the offence has occurred, the victim may be transferred from where she was living to another location so as not to feel the sting of shame and stigma. It ought to be noted that the impact sexual assaults can have on girls in a patriarchal society is significant and long lasting. This is due to the fact that, in such contexts, a girl who has had numerous sexual partners may be devalued and demeaned. Rape and defilement may be seen as sordid, and victims of sexual assault may be stigmatized.[37] For example, in Ekwendeni, Mzuzu, it was discovered that among people who identified as Ngoni, a girl child is highly valued and regarded as a source of wealth by means of the payment of *lobola* (bride price) upon marriage. It was reported that, if a girl had been defiled or raped, men were often unwilling to pay a high bride price since she was regarded as "contaminated." This adversely affects the reporting of defilement cases, as families do not want to receive a lower bride price.

Further, in some settings, defilement cases are not reported so as to protect the perpetrator. Perpetrators are often people who are known to the victims rather than strangers. The perpetrators in this research were generally men who were close to the girls, such as fathers, step-fathers, grandfathers, employers, teachers, and house helpers. A traditional leader in Ekwendeni, Mzimba, reported as follows: "I have presided over such cases where the family does not want to report defilement to police to protect the perpetrator. One such incident comes to mind where the victim's family did not want to report the matter as the perpetrator was a friend of the family and as such they wanted to resolve the matter at family level. They did not want the perpetrator to be prosecuted and possibly serve a long term jail sentence."

In some cases the perpetrator is a breadwinner for the victim and other family members. In such cases the families may remain silent about the offence rather than suffer because of the perpetrator's arrest and possible imprisonment. Women may thus be caught in a bind when it is their husband or a male relative who has defiled their daughter.[38] A woman who reports her husband or male relation lays herself open to divorce and social exclusion. Fear of the consequences, social and economic, of taking defilement cases to state authorities contributes to low rates of reporting, meaning that perpetrators are going unpunished by the formal system and victims are not seeing formal "justice" being done.

The discussion above about the formal and informal justice systems raises the question of how to balance the two systems and their different senses of justice. This paper argues that the formal state system should be allowed to evolve and incorporate positive aspects being implemented in traditional systems. The following discussion shows how the offence of defilement is constituted under formal and informal justice systems. It highlights a number of issues that result in injustice for the victims of the offence and how they might be redressed. The constitution of the offence of defilement under the law and in people's understanding has a bearing on whether victims of such offences receive justice or not, and what kind. In some cases, the constitution of the offence prevents the victims from accessing formal justice. Further, there are differences between the ways in which defilement is conceived between community members and the formal justice system. What the formal justice regards as defilement is not the same as what many communities would regard as defilement. This affects community perceptions and practices in the handling of the offence of defilement as compared with the expectations of the formal justice system. These differences also affect the protection of the victims of defilement cases. Below is a discussion on the elements of the offence of defilement, how it affects justice, and how the two systems differ in its conception.

The Concept of "a Child"

The formal and informal systems of justice differ on the definition of the child. The offence of defilement under formal law is committed against female children under the age of sixteen. It is noted, however, that the provision does not protect all female children, as the definition of the child under international instruments is all persons below the age of eighteen.[39] The standard of the Convention on the Rights of the Child (CRC) has to be adopted by all state parties to the convention.[40] The CRC aims at protecting children from all forms of exploitation because a child is, by reason of her physical and mental immaturity, in need of special safeguards and care, including appropriate legal protection. Malawi is a party to the CRC and is therefore under obligation to protect people who are under the age of eighteen.[41] The age of defilement emphasizes that a child is incapable of consenting to sexual intercourse as well as participating in sexual activities. The difference in the protection of children of various ages applies when imposing penalties. Currently in Malawi, the penalty for defilement is the same for all

children. In Kenya, on the other hand, the Sexual Offences Act protects children up to the age of eighteen against the offence of defilement but specifies different levels of punishment depending on age. Section 8 of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged eleven years or less ought to be sentenced to life imprisonment. Defilement of a child between the age of twelve and fifteen years attracts a prison term of not less than twenty years, and defilement of a child between the age of sixteen and eighteen is punished by a term of not less than fifteen years.[42]

The informal or traditional system is no better than the formal system in protecting young girls from defilement cases. This system has no clear definition of who is a child, and in most cases a girl who has reached puberty is considered mature and ready for sexual activities.[43] Customary law has no specific minimum age for capacity to marry. Capacity to marry is determined by the physical and intellectual capability of a particular individual to sustain a relationship. As a result, sexual intercourse with a girl who has reached puberty would not necessarily be reported as defilement.[44] In this way, many girls are denied protection from sexual abuse. This is in view of the fact that girls often experience menarche before the age of fifteen, which has been said to be the median age for menarche in Malawi.[45] In some of the research areas, such as Mitundu in Lilongwe, it was discovered that a number of people are of the view that once a girl reaches puberty, she is mature enough to indulge in sexual activities. As such they argue that it should not be an offence when a girl of such age is proven to have given consent to the sexual act. In the words of a male respondent, "There is nothing wrong with having sexual intercourse with a girl who has reached puberty. Some girls at the age of twelve are capable of consenting to sexual intercourse. I consider a girl who has reached puberty well matured to understand and appreciate and therefore consent to the act of sexual intercourse."

Different conceptions of the age at which a girl can consent to sex in the formal and informal justice systems have a direct effect on the protection of victims of such offences and their sense of justice.

Consent to Sexual Intercourse

It is not necessary to show lack of consent to sexual intercourse in order to prove defilement. This is unlike other sexual offences where lack of consent is always an element of the offence. As such, whether the girl consented to the sexual contact or not is irrelevant. If consent is proven,

the accused person would still be guilty. In the case of *Republic v. Goliati,* two accused persons slept with a ten-year-old girl on agreement with the girl that they would give her money, which they did.[46] The court held as follows: "Consent of the complainant provides no defence to a charge of defilement. A girl who is under the age of thirteen[47] is not capable of giving that consent." Similarly, in the case of *Republic v. William John,* the court held that for offences of defilement, it does not matter whether the girl consented or was willing to have sex.[48] The act is still criminal even in cases where a girl below thirteen years initiated the sex. This is because the law deems such girls too young to give proper consent to the act of sex (prior to 2014, defilement was defined as a crime against girls up to the age of thirteen). In the case of *Republic v. Luwishi,* consent to sexual intercourse with a girl under thirteen years was given by her sister;[49] the court held that consent on behalf of a girl under thirteen to the commission of an offence against her is irrelevant to the issue of the guilt of the offender. However, though the issue of consent under formal law is irrelevant to the question of guilt of the accused person, the courts have decided that consent can be relevant to the issue of sentencing. Further, the courts have held that where the girl consented, the court cannot make an order for compensation: "Be that as it may, consent may be taken into account when considering sentence. It is not proper to make a compensation order following a conviction for defilement where it is established that the complainant consented to the sexual intercourse, since it may act as an inducement to her to encourage others to commit similar offences with the hope of obtaining other compensation orders."[50]

The factoring in of consent when sentencing has the effect of bringing in the element of consent through the back door. If consent is inconsequential in proving defilement cases, then it ought not to feature at all, even in sentencing. Girls within the protected age of defilement are unable to give consent, and that should be taken as such.

Though consent is not an important element in formal courts, it plays a big role under customary law and practices. In most communities and under customary law, it is unlawful to have sexual intercourse with a child with or without their consent. However, in some cases customary law and practices allow sexual intercourse with a girl under the age of sixteen. There is evidence to suggest that sexual violence against children can be perpetuated in the administration of various cultural practices, including rituals related to rites of passage, funerals, and marriages.[51] In certain circumstances, sexual intercourse with a girl under sixteen

may not be questioned or reported to formal authorities. Consent to sexual intercourse in these circumstances is given by people entrusted with the care of the girl, often fathers or uncles, and such instances are not labeled as defilement. As a local NGO officer in Nsanje told us, "In this community, there are so many cultural practices that allow sexual intercourse with a girl under the age of sixteen, such as initiation ceremonies. Such cases are not seen as bad by the villagers because they consider them as part of their culture."

Child Marriages

In Malawi, some children marry or are forced to marry before they reach the age of maturity. Economic pressures and the association of puberty with adulthood are significant contributors to this problem.[52] In these instances, the consent of the child is hardly sought. This commonly happens when the parents seek *lobola,* which they receive from the husband's family. This practice is common in the northern part of Malawi, where cultural practices may force girls from poor families, some as young as nine years old, into marriages, particularly when their parents need to settle loans.[53] In Nsanje, in the far south of the country, where patrilineal kinship norms also prevail, some respondents indicated that a practice known as *kutomera* is conducted in the district. *Kutomera* entails a customary marriage, which is arranged with an older man on behalf of a girl who has yet to reach puberty. Reasons given as to why families would conduct *kutomera* centered on the poverty of the parents, who receive money from the man who marries their daughter. This was explained to us by a female respondent in Nsanje, who said, "In *kutomera* the girl is given in marriage before she starts her monthly periods and she still lives with her parents until she reaches puberty and in most cases it's between the age of twelve and fourteen. The man is required to support the girl while she is still living with her parents."

Another practice is known as *nhlazi,* which entails giving in marriage a young relative of the wife as a reward to her husband for being good to her family. The girl need not consent; the decision is made by the senior members of her family.[54] Child marriages, which are sanctioned by the community, are not seen as entailing defilement. These instances are rarely reported to police for investigation as community members do not see them as a form of injustice against the girl child.

At times, the reasons for engaging in such practices are religious or include a low appreciation of the importance of girls' education.[55]

Data from the Education Management Information System (EMIS) shows that, in 2010, there were 3,371,289 children enrolled in primary school; of these, 1,713,982 (50.8 percent) were girls. It is noted that gender parity in lower classes (1.04) has been achieved, but disparities remain in upper primary school, particularly from grade 6 onwards, when students are adolescents (there are eight grades—referred to as "standards"—of primary school in Malawi). Less than 25 percent of girls transit to postprimary education.

Initiation Ceremonies

In some, although by no means all, Malawian communities, when a girl reaches puberty she undergoes an initiation ceremony welcoming her into adulthood. Girls are taught about pleasing their future husbands as well as being gentle and obedient wives. In some instances in the far south of the country, female initiation rites can involve bringing in a man, known as *fisi* (hyena), who is expected to have sexual intercourse with the girl to test the knowledge she has gained.[56] This sexual intercourse is without the girl's consent because it is sanctioned by the community.[57] As such, even if the girl is below the age of sixteen, such cases are not considered defilement offences by most local community members and they are very rarely reported to the police. In Nsanje, respondents also referred to the custom of *kuchotsa fumbi* (shaking off the dust), according to which girls are supposed to have sexual intercourse with a man during their initiation ceremonies in order to prepare them for marriage. In Balaka, some respondents referred to the custom of *kugwira ndodo ya mfumu* (holding the chief's rod), which is also not regarded as defilement by the community. As an officer from a community-based organization in Balaka explained: "In this community girls who have attained puberty undergo initiation ceremony, where they are counselled about life. One such ceremony is that of *kugwira ndodo ya mfumu,* which allows a local chief to have sexual intercourse with female initiates during initiation ceremonies. This is done to prepare the girls for marriage obligations."

Certain cultural practices, and the corresponding customary law, can thus be said to have the potential effect of denying girls access to justice when the customs allow girls to be defiled under the disguise of "culture." This leads to nonprosecution of instances of defilement at the community level since cases are rarely reported to the police. It should be noted, however, that these practices are slowly being abandoned,

owing in part to the vocal condemnation in terms of the human rights of girls as well as to favorable laws recently introduced.

For example, in the year 2013, the country enacted the Gender Equality Act, which makes it an offence to engage in harmful cultural practices. Recently, a magistrate court convicted a man, Eric Aniva, for engaging in harmful cultural practices contrary to section 5(1)(2) of the Gender Equality Act.[58] Aniva was convicted of having sexual intercourse with over one hundred women and girls during so-called sexual cleansing rituals. He was arrested on the order of President Peter Mutharika soon after he confessed to BBC radio that he had sex with over one hundred girls and widows.[59]

Further, in the past it was difficult to challenge these harmful cultural practices. This was so because—although these practices could be challenged under section 23(4) of the constitution, which protects children from economic exploitation or any treatment, work, or punishment that is or is likely to be hazardous, interfere with their education, or be harmful to their health or to their physical, mental, spiritual, or social development—there was a contradiction with sections 22(7) and 22(8) of the same constitution. Subsection 7 allowed marriages between persons between fifteen and eighteen years old where the parents or guardians had given consent, and subsection 8 obligated the state to discourage marriages of children under the age of fifteen years. Although the legal age of marriage under section 22(6)[60] is eighteen years, the above provisions entailed a possibility of marriage with a girl less than sixteen years of age without prosecution for defilement because the law had not forbidden such marriages, and the state had only been given authority to discourage them. This affected the reporting of defilement cases. The provision has since been amended. In February 2017, Malawi's parliament took a historic step toward ending child marriage and removed from the constitution the provision allowing children between the ages of fifteen and eighteen to marry with parental consent. Parliament has now established the minimum age of marriage at eighteen years of age.[61] As such there are improvements, albeit minimal, toward achieving justice for girls in defilement cases.

The effective prosecution of defilement cases in Malawi depends on a number of factors, including the study of how the formal and traditional systems handle and affect such prosecutions. Defilement is viewed and

conceived differently in the light of various cultural practices and traditions in Malawi that often run counter to what the formal justice system conceives as defilement. As such, many cases of defilement go unreported and unprosecuted, thereby promoting injustice in such offences. This is so because the perpetrator is never punished for his offence and the victim's sense of dignity and justice is never vindicated. It is therefore contended that aspects that promote injustice in the formal state system should be reviewed. Further, traditional forms of justice should also be considered and taken into account in the formal laws. Good practices shown in the traditional systems, such as the emphasis on compensation, should be adopted by the formal system, whereas bad practices should be condemned and outlawed in order to comprehensively protect victims of defilement.

Notes

1. Section 23(4)(c) of the Malawi constitution.

2. Section 138 of the penal code, which provides for the offence of defilement, mentions defilement only as an offence against girls and not boys.

3. Youth Net and Counselling (YONECO), "Curbing Defilement through Mobile Court Initiative," 2015, accessed March 26, 2018, http://www.yoneco.org/site/index.php/news-and-events/articles/591.

4. Ibid.

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6. Bernadette Malunga, "The Rule on Corroboration in Rape and Defilement Offences: A Systematic Violation of the Rights of Women and Girls in Malawi" (master's thesis, University of Zimbabwe, 2014).

7. Ibid.

8. US Department of State, "2010 Country Reports on Human Rights Practices—Malawi," April 8, 2011, accessed March 26, 2018, http://www.state.gov/j/drl/rls/hrrpt/2010/af/154356.htm.

9. John Rawls, "Justice as Fairness: Political Not Metaphysical," *Philosophy and Public Affairs* 14, no. 3 (1985): 224.

10. Section 42 of the Malawi constitution.

11. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right,* trans. W. Hastie (Clark, NJ: The Lawbook Exchange, 2010).

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13. Mike C. Marteni, "Criminal Punishment and the Pursuit of Justice," *British Journal of American Legal Studies* 2, no. 1 (2013): 298.

14. Ibid., 299.

15. Mantle, Fox, and Dhami, "Justice and Three Individual Theories," 292.

16. Ibid., 5.

17. Mark Tebbit, *Philosophy of Law: An Introduction*, 2nd ed. (New York: Routledge, 2005), 21.

18. Lillian Tibatemwa-Ekirikubinza, *Criminal Law in Uganda: Sexual Assaults and Offences against Morality* (Kampala: Fountain Publishers, 2005). See also Republic v. Wyson Ngulube, High Court of Malawi, Criminal Appeal Case Number 63 of 2011.

19. Republic v. Stanford YoleYole Chirwa, Magistrate Court of Malawi, Confirmation Case Number 51 of 1994.

20. Tinazari v. Republic, 3 ALR (Mal) 184.

21. Malunga, "Rule on Corroboration."

22. B. McFarlene, *Historical Development of the Offence of Rape* (Canada: Bar Association, 1993), accessed May 14, 2018, https://archive.org/stream/413655-hist-devel-of-offence-of-rape/413655-hist-devel-of-offence-of-rape_djvu.txt.

23. Tibatemwa-Ekirikubinza, *Criminal Law.*

24. Ibid.

25. Penal Reform International, *Access to Justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems* (London: Astron Printers, 2000), http://www.gsdrc.org/docs/open/ssaj4.pdf.

26. Section 32 of the penal code allows courts to order compensation in addition to fines or imprisonment where necessary. However, this provision is yet to be fully used by the courts in Malawi.

27. Penal Reform International, *Access to Justice*.

28. Asem Khalil, "Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law," *Études rurales* 184 (July–December 2009): 172, http://www.jstor.org/stable/40929446.

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39. Article 1 of the Convention on the Rights of the Child.

40. The preamble to the CRC.

41. Report of the Law Commission on the Review of the Children and Young Persons Act, October 2005, 111.

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44. Ibid.

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46. Republic v. Goliati and Jonasi, 1971–72 ALR (Mal.) 251.

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48. Republic v. William John, High Court of Malawi, civil cause No.13 of 2009.

49. Republic v. Luwishi,1923–60 ALR (Mal.) 982.

50. *Goliati and Jonasi*, 1971–72 ALR (Mal.) 251.

51. Malawi Government, Ministry of Gender, Child Welfare and Community Services, *Study on Violence against Children in Malawi.*

52. Malawi Human Rights Commission, *Report on Cultural Practices and Their Impact on the Enjoyment of Human Rights Particularly Rights of Women and Children in Malawi* (Lilongwe: Malawi Human Rights Commission, 2006), accessed May 14, 2018, http://www.mwfountainoflife.org/files/4413/9395/3331/cultural_practices_report.pdf.

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56. Malawi Human Rights Commission, *Report on Cultural Practices.*

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58. Republic v. Eric Aniva, Magistrate Court of Malawi, Criminal Case Number 87 of 2016.

59. Chilenje Chilenje, "Nsanje Court convicts 'Hyena' Eric Aniva," *Malawi 24*, November 18, 2015, accessed March 26, 2018, http://malawi24.com/2016/11/18/nsanje-court-convicts-hyena-eric-aniva/.

60. Section 22(6) states, "No person over the age of 18 years shall be prevented from entering into marriage."

61. Luke Bisani, "Malawi MPs Change Law to End Child Marriage," *Malawi 24,* February 15, 2017, accessed March 26, 2018, https://malawi24.com/2017/02/15/malawi-mps-change-law-end-child-marriage/.

EIGHT

"Home People" and "People of Human Rights"

Understanding Responses to Rape in Northern Uganda

HOLLY PORTER

"No Good Acholi Pursues Justice Alone"

The woman in front of me seemed hollow. She sat hunched over, her shoulders drawn in. "I was raped four days ago," she said. The man who raped her was her late husband's nephew. He resented her presence on "his" family land. Her husband had died years before, and since she had been married traditionally, she still belonged to his family under the care of her brother-in-law and was entitled to use and benefit from family land. Her nephew is well-known to be HIV positive. She narrated how four days earlier he knocked down her door in the middle of the night and said, "Since my uncle your husband is dead you should go and join him. I'm going to infect you now," and then he raped her. She reported him to her in-laws and called her brothers, who gathered under a mango tree for a joint family meeting to decide how to handle the incident. Their decision was to take her for an HIV test. Postexposure prophylactics would have been more appropriate, given his status. If anyone had known that an international nongovernmental organization (INGO) had a center nearby and a hotline that could have made the drugs available to her, she would have had more peace of mind. Instead she was told to come back after three months when the virus might be detectable in her blood. In regard to the perpetrator, they decided to admonish him, strongly. He disappeared after the meeting. She told me how she was struggling to

sleep in a hut alone, not knowing his whereabouts and feeling deeply unsafe. She wished her relatives had involved the police. If it were up to her, she said, he should be imprisoned. "But," she explained, "I didn't tell the police. I told the home people and they decided to settle it that way. I have to accept it because I can't decide anything like that alone."[1]

Her situation highlights common dynamics that exist after rape in northern Uganda. NGO services were available yet unutilized. Her relatives made a decision in the interest of social harmony contrary to her private wishes. She was resigned to the situation, because in the aftermath of crimes such as rape, no good Acholi would pursue justice alone. Indeed, the end goal of responses to wrongdoing may not be primarily about a victim's needs or a perpetrator's deserts. Although justice is commonly invoked as a fundamental moral standard in social life, a moral imperative as universal as "human hunger or thirst,"[2] what this looks like and how it is established have been contested in different cultures and societies throughout history. In Acholi, there is no word for justice. "*Ngol matir*" is the most common translation. Literally, it means to "cut straight," to "decide a question,"[3] or to "determine a way forward." This raises the question of what the prevailing priorities are in such determinations.

The study this chapter draws from examined responses to the wrongdoing of rape as a window into understanding end goals of determining a way forward after crime. By looking at the experiences of women who were raped, it found that the pursuit of social harmony was central.[4] This chapter focuses on understanding why so many women never access justice or take advantage of available services after rape in northern Uganda. Interpretations of their experiences are rooted in over ten years of living in northern Uganda, 187 interviews with a random sample in two Acholi villages conducted between 2009 and 2011, as well as ethnographic data collected over the same period. In this study, it was found that out of a total of 187 women interviewed in the two villages, 76 (just over 40 percent) had been raped, some of them in more than one situation, making a total of 94 different rape situations.[5] These rapes were perpetrated by civilians as well as combatants in the war between the Lord's Resistance Army (LRA) and the government of Uganda.

In the individual interviews, all women were asked to whom they would go if they experienced the kind of violence we had been discussing (forced sex). Figure 8.1 shows their responses. Some mentioned several categories of actors, so the figure indicates the number of times a category was mentioned.

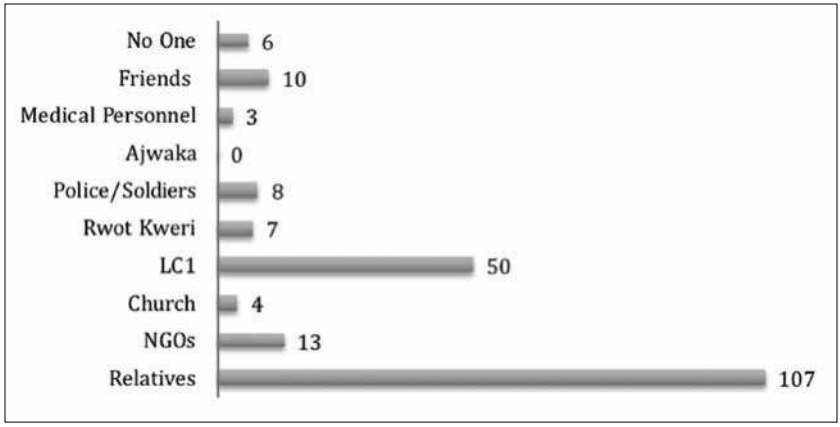

FIGURE 8.1. Actors women said they would involve

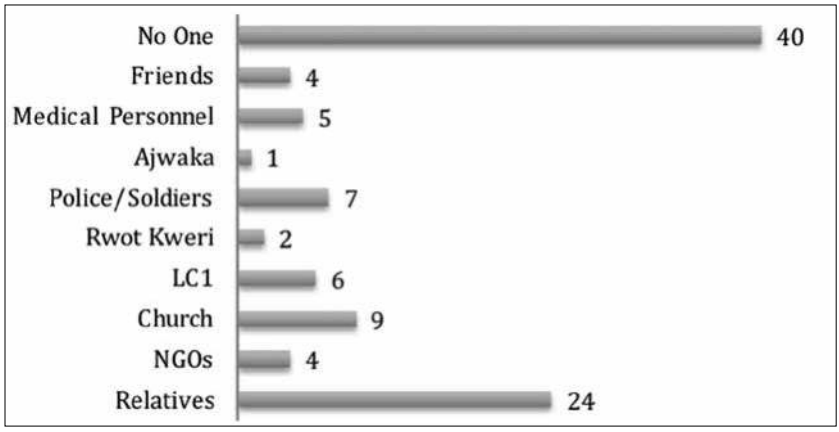

FIGURE 8.2. Actors actually involved after rape

Figure 8.1 represents the answers to a hypothetical question asked of everyone whether they had or had not experienced sexual violence. Figure 8.2 depicts what actually took place after the experiences of forced sex that women narrated (in ninety-four situations of rape).

Although the numbers of responses are different, visually the difference between what women said they would do and what they actually did is striking, especially the first row, depicting how few said they would (hypothetically) tell no one and how many actually remained silent. Much of the rest of this chapter explores why.

The following sections elaborate the roles of relatives and NGOs. The chapter looks first at practical ways they were—or were not—involved after the situations of rape that form this study. Second, it examines

how they have influenced notions of rape, appropriate sexual behavior, and responses to crime. This examination of their roles in shaping moral imaginaries and as practical actors after crime perpetrated by civilians and combatants alike grounds understanding for scholars and practitioners in the fields of gender-based violence, access to justice, and transitional justice.

Relatives

Relatives continue to play both the most practical and the most common role in the aftermath of rape, and they also exert considerable influence on notions of rape and redress. Several dynamics of relatives' role are apparent. First, women have situated freedom within a social system that highly values social harmony. The tendency within such a system is to deal with the situation expeditiously. This can take different forms, depending on the perceived threat of the crime or wrongdoing to social harmony. There are situations where punishment protects social harmony.[6] When it does, communities find satisfaction in meting it out to perpetrators. Second, the context for acceptable and unacceptable violence against women is strongly affected by communal exchange of customary payments and bridewealth. And last, the strength of the kinship system, which is understood in the Acholi "ideal" as both patrilineal and patrilocal, has been weakened by the confluence of changes ignited by war and modernization.[7] What this has meant for women has been mixed. It has created more space for individual freedom and understanding of rights. It also means the authority of the most formidable actors has been eroded. The social protection that relatives are meant to provide, in the "ideal" Acholi situation, has been and is being undermined, and there is no clear replacement.

Relatives' Practical Role after Rape

A common Acholi saying is *Rwodi pa mon pe,* meaning "women have no chiefs." What women do have are relatives, with male relatives often taking prominence: husbands, brothers, fathers, paternal and maternal uncles, brothers-in-law, and fathers-in-law. The particularities of the situation and personalities involved determine which relatives might be part of determining "the way forward" after rape. In most situations when relatives were involved, it was "finished *gang gang*" or "finished down home," through punishment, shaming, cleansing, payment, marriage, or some combination of these. As this middle-aged woman described, "In Acholi

when there is a problem within your house a woman will always go to her eldest brother-in-law and then he will call her and her husband and talk to them. After he fails to resolve the problem then he will involve their fathers to come and talk about it. How good it [the decision] is, I mean whether it is good for the women or not, depends on the character of the brothers-in-law. If they are respectful and trustworthy, it might be good." This gets at the heart of the issue when she indicates that the result for women varies widely depending on the character of her relatives. In instances of marital rape, or forced sex in a relationship where customary exchanges have occurred, most women (thirty-two, or 80 percent of them) had not discussed it with anyone apart from their husbands.

However, eight women (20 percent) raped by their husbands sought social support. In half of these cases, it was to seek advice from their aunts, cowives, mothers, or sisters. They distinguished this from "reporting," as they did not expect action to follow from consultation with "their fellow women." The other half reported their husbands and hoped for action. All (four) of these instances were when sexual violence was one of many abuses they suffered at his hands. These exceptions highlighted the potential of the kinship system to protect women. One woman had been violently forced by her husband to have sex after a serious disagreement. She told her brother and the man's elders, who then "warned him seriously," and he reportedly never did it again. Likewise, another was said to have reformed or at least temporarily improved after his brothers and father admonished him.

In the other instances, elderly relatives and in-laws supported women in separating from their sexually violent husbands. This was the case when sexual violence was combined with other serious behaviors, such as severe alcoholism, obvious neglect, extreme violence, or sexual conduct that drastically raised the risk of sexual diseases at home. In one instance, when in-laws' stern warnings failed, the woman was even allotted nearby clan land, and her brother-in-law acted as male provider and protection for her family, much as if her husband had died.

Not all women had relatives who acted in their interests. Many more anticipated that they would not and so were convinced there would be no benefit in telling anyone. Out of ninety-four different situations of rape my informants shared with me, forty of them had never told anyone else. Many of them gave explanations similar to the following given by one woman: "I do not tell anyone about this thing. Even if I went to elders they would ask me, 'What brought you to this home? When you

get married that's what you're there for—to sleep with him.' So I have that shame. They'll just tell me it's my duty." Talking about her relatives, another woman explained, "it will just cause more problems if you tell someone who can't understand."

In some cases, telling a relative did bring more problems, such as when a young girl's father entered her hut after a man had raped her. Rather than consoling her, he beat her for promiscuous behavior. At times, relatives encouraged or coerced (or employed some variety of social and economic pressure in-between) the girl/woman into marrying. The following story is illustrative. The girl was raped when she was still a teenager after a young man who was a fellow student and three of his brothers grabbed her on her way home and locked her in his home.

> When it happened I told my mother what had happened and she went to school and reported the case. They gave him a big anthill to dig up. That was his punishment. His father was a policeman so he hid his son's case. So they took it to the *rwot kweri*'s [a community leader] home.[8] When they reached there they set a date in which the boy and his father were to report and the amount of money they should pay but they did not show up. When we tried to follow up with what happened, the father of the boy and his son went to Kampala.
>
> It happened again when he came back from Kampala. I had gone to my auntie's place in town since she had delivered her newborn baby and I went to help her. On my way back I saw him on the road and he grabbed me and dragged me all the way up through the grass and to his home and that's how I started my marriage. I just stayed in that home. After I'd stayed at his home for two nights I escaped to my sister's home. But my sister's husband took me back to him and said that I should stay there. When my parents heard about it they came and took the things I was bringing them from my auntie's place. They said since it was the second time we had slept together they couldn't remove me and bring me home again so I should just stay.

The war disrupted social protection in dramatic ways. The level of insecurity and circumstances into which it thrust people exacerbated weaknesses of the system. Thus, relatives act with diminished power and often within limited and weakened wider social networks. As in this situation, relatives were involved but unable to act effectively on her

behalf. Further, the social authority of the *rwot kweri* that would have compelled the man to appear in his "court" had been undermined, allowing him to escape judgment in the city. When he returned and raped her again, marriage was determined to be the right way forward.

Relatives' responses evidenced a number of considerations. Common themes included social factors, fertility and children, and, importantly, the expected cosmological consequences—which if left unaddressed might entail a myriad of grave misfortunes not only to the individuals in questions but to relatives, neighbors, and even future generations. The location of where sex occurs, consensual or otherwise, is important in Acholi understandings of illicit and acceptable sexual behavior. Sex "in the bush" or near water is considered particularly dangerous. A girl who had been raped by a neighbor explained, "It happened by the well here [she pointed in the direction of the well] and I told my parents, and they said I should be cleansed and leave alone the rape case or taking it to a court. It is because it happened in the wrong place."

It was more important to deal with possible consequences of committing an abomination/taboo (*kiir)* of sex near a well than to hold the boy accountable for his crime. Women who had been raped "in the bush," in a garden, or near a well had fears of cosmological consequences. All sex that happened in the context of the LRA, even if it occurred within huts in the more permanent LRA camps, is considered to have taken place in the moral space of "the bush." During the war, fighting in the bush, displacement, and the practice of night commuting all provided many more opportunities than usual for sex to happen in the wrong places.

After rape in the context of "forced marriage" in the LRA, the fact that the women had been abducted was usually well-known. Relatives, neighbors, and extended social networks assumed they experienced sexual violence. Often they returned with children and sometimes resultant health problems.

Most such forced husbands whom women discussed in this study were either still in the bush or dead. A few had returned and received amnesty. The strong reaction of many civil society actors after the intervention of the International Criminal Court (ICC) in 2005[9] could be interpreted as a version of the extended family role of settling the issue *gang gang* by themselves by responding to LRA violence in the interest of social harmony, trumping concurrent beliefs that wrongdoing deserves to be punished.

Relatives' Role in Shaping Ideas

Notions of appropriate sexual behavior—and therefore what constitutes sexual crime—are deeply influenced by one's relatives. Many women who were raped by their husbands or who began their marriage after someone forced them to have sex had sentiments similar to that expressed by one woman who said, "You just tell yourself that maybe this is a normal way of settling in a home. It was like that [forced] my first time and I was annoyed and depressed at first but I realized that it was also my fault because I am the one who accepted going to his house."

My informants told me that long ago, close female relatives, usually aunts, were meant to teach girls about what to expect when they "went to a man's home." Such education focused more on caring for children and proper respect for husbands than providing any specific sexual education. Sexual education often happens in unintentional ways, more by osmosis than by deliberate imparting of norms.[10]

An important aspect of relatives' contribution to notions of appropriate and unacceptable sexual behavior is how they shape the understanding of consent. Though not explicitly taught, most women come to understand that a good Acholi girl should refuse and even fight the first time they have sex, regardless of desire. As such, ascertaining consent is complicated, and how a man distinguishes whether his partner has given it or not is problematic.

Many people equate consent with going to a "solitary place" with a man. The vulnerable position this erroneous assumption puts women in is illustrated well by the experience of a young woman raped twice by different men when they were alone. Because of this, she did not consider these instances "rape," yet she said she had not wanted to have sex with them, that they forced her, and that she was deeply aggrieved. The first was a man she had begun dating but had not yet decided to sleep with. The other was a family friend. Trusting him, she assumed when he invited her to his house that he had something important to discuss with her. Instead he drugged and raped her. In both cases, she told no one about what happened because of her notion of consent.

But perhaps the most crucial way in which relatives impact ideas around sex, sexual violence, and about the right way forward in its aftermath is through social agreements that are formed through the exchange of *luk,* customary payments related to sex, and of bridewealth. During the war, many girls and women were abducted by the LRA,

raped "in the bush," and forced to act as "wives" to designated men. They have been referred to as "sex slaves" but were also expected to cook, clean, garden, and bear and raise children.[11] It would seem that life as a forced wife might not have been drastically different from the lives of girls and women abducted and forced into marriage by noncombatants. Scholars working in other areas have noted that the plight of war victims and women harmed by forced sex in their own homes and communities was at least qualitatively similar.[12] There are, however, distinct and significant differences in the harm they experience.[13] One is worth mentioning here. It is related to the connection between customary payments and the social permissibility of violence against women and girls.

Acholi language and represented attitudes around bridewealth and women's place in a family are often tied to notions of property rights. Adultery or rape of another man's wife can be understood as a trespass on his property. This idea is not new or unique to Acholi. Other commentators have noted a number of analogies between theft, trespassing, and other property laws and laws pertaining to sexual violence.[14] Similarly, many women in this study who recalled confrontations with their husbands about his sexual violence toward them were given the excuse that his father's cows purchased them and as long as they are wives husbands should "have access." Their husbands insist that after the payment of bridewealth the women's bodies ceased to be their own, and they have no right to refuse access to "the owner."

I point out this metaphor between property and sexuality with some pause, and I wish to add an important caveat, because if understood in isolation it risks painting a distorted picture of what I have come to see as the deeper meaning behind bridewealth for many Acholis. Although for some, it may be related to notions of individual property rights (as values of individualism are being imported and assimilated, the idea of women as personal property seems to go hand in hand), in general, it is better understood as akin to establishing social belonging. It has to do with social order, identity, entitlements, protection, and responsibility. The common saying in Acholi in figure 8.3 points to a conscious belief in the difference between wives and property.

Iwila ki lab lyec?

Did you buy me with elephant tusks?

A rhetorical question used by wives who are mistreated by their husband to draw a distinction between slaves, who were bought with elephant tusks, and wives for whom bride price is paid.

FIGURE 8.3

The idea of ownership is still in play, but as with other understandings of property rights in this context, it is often communal. Sexual transgression, then, is a trespass not only on an individual man's property but against the social foundations of Acholi society.

Because this belonging, established through payment of bridewealth, is so critical to social harmony, unless sexual violence that occurs in conjunction with this system of exchanges is extreme or coupled with other types of socially unacceptable behavior, much violence, including marital rape, is ignored or effectively condoned.

A crucial social distinction concerning a woman who was abducted by LRA and forced to become a "wife" in the bush is that the man in question did not enter into a social contract with the woman's family, nor involve her relatives in her selection or in negotiating bridewealth or other payments. Thus, an LRA "husband" was related to her in ways that were outside of Acholi social norms. The sexual violence and forced marriage she endured broke conventions of interaction between men and women and are therefore experienced as a crime or wrongdoing perpetrated against both her family *and* his; indeed, it is against Acholi identity.

Women often talk about being married "to a home" rather than being married to a man. If a woman married traditionally (*nyome),* and all customary payments such as *luk* and bridewealth (*lim akumu*) were paid, she and all of her children belong to the man's family and wider clan. Before war and displacement, both individual families and wider kinship groups typically had more resources—including cattle, which were depleted during the war—both to pay and to refund bridewealth. Many women today are in "their homes"—that is, the man's family home—but are not *nyome,* meaning that no bridewealth has been paid. What this means in practical terms is that she has more freedom to leave but she is less protected by her own relatives and her in-laws, another example of the mixed effects on women of a weakened kinship system.[15]

On the other hand, women who have been married with payment of bridewealth might (depending on the character of both his family and clan and hers) have greater social protection. The ownership or social belonging established through customary payments can work in her favor. It gives her husband's extended family more authority to intervene on her behalf if her husband mistreats her. After all, he is mistreating "their" wife. They contributed financially to bring her into the family and they have a stake in her well-being. It can, and in some instances does, work against her interest to keep her in a position where she is at

risk of violence and unable to leave without refunding the payments, which her family may be unable or unwilling to do. Given current economic constraints, many families are unlikely to be capable of refunding bridewealth, making many women less able to leave sexually violent marriages. In sum, a woman is largely at the mercy of the particular ethical attributes of her in-laws and the good hearts and economic ability of her parents' kin.

"People of Human Rights" or Nongovernmental Organizations

> We used to follow the culture that we had in the olden days, but now we women are realizing that we have rights and anything that oppresses us we don't accept. You see, that's why I have separated [from my husband]. The way I found out that I had rights is through the radio and also because of being in the IDP [Internally Displaced Persons'] camp. NGOs used to call gatherings and talk to us about women's rights.

Based on information provided by women in this study, NGOs' roles have several dynamics. First, NGOs teach that rape is something that should be considered a violation of human rights and reported, with some action to follow. Second, among women interviewed, many expressed their belief that NGOs could be trusted to uphold their interests. This was in contrast both to governmental authority, which they often deemed corrupt and inefficient, and to relatives or traditional authority, which were commonly perceived as not sharing a progressive understanding of rights and the women's own evolving concepts of gender. Despite this, few benefit from existing services both because of a lack of awareness regarding the availability or relevance of services and because of the strong social constraints and the diminished yet still paramount role and priorities of relatives in decision making.

When asked where they would go for help if someone committed a violent crime against them, one woman's response typified that of others when she said, "I heard that there is some group of people that are helping women but because I'm not educated I don't know the name of that group. I hear they stay in town. I heard they're from other countries, but I don't know."

A few had slightly more specific knowledge, saying they would visit the "people of human rights" and that "all NGOs are human rights

people." A few described the location of a particular Ugandan NGO in Gulu commonly referred to as "the people of human rights." Knowledge of what NGO services are available and how to access them is low. Even where knowledge exists, very few women take advantage of opportunities. My comments here are not expressions of doubt about the intellectual capacity of the "grassroots" to grasp human rights as an idea (as indeed they often expressed their claims in terms of rights and felt NGOs might in theory uphold them). They do however direct critical attention to the relevance and competence of NGO services for which women were the intended beneficiaries. Many women had an awareness of their own human rights and felt they were entitled to have them recognized, but NGOs had largely not made their services accessible or communicated their services in ways that were obviously relevant to women's challenges. The following section looks in greater detail at how NGOs were involved in the aftermath of the rape of women in this study.

NGOs' Practical Role after Rape

In northern Uganda the influx of NGOs during the war resulted in a high level of activity aimed at the prevention of and response to gender-based violence (GBV). Child protection committees and GBV committees were formed and, at the time of my research, existed in all subcounties and in most parishes in the Acholi subregion. Training was conducted for police, the judiciary, "traditional" leaders, teachers, and other parties identified as "stakeholders" in the protection of women. Lay counsellors have been trained, sometimes in case management. There was an operational hotline to report instances of sexual violence and centers where services can be accessed. Services have been mapped and referral pathways have been written for most subcounties. A lead NGO was designated in each subcounty to partner with local government authorities to prevent and respond to GBV.

Despite this flurry of NGO efforts in the region, and specifically in the two villages where this study was conducted, only four of the interviewed women had any interaction with NGOs after they were raped.[16] Of these, two women had been raped within the LRA and talked positively about the assistance they received from a reception center after their return. One of them said,

> What has helped me is that when I was in [the reception center] those people helped me with counseling. Not only that,

> they took me to the hospital and I had the bits of bombs and a bullet that were in my body removed. I was also given tests and treatment and I left there healthy. Then they inquired my interest since I didn't have access to education and I chose tailoring and they trained me in that. They didn't have a sewing machine to give me then, so I went home and I would begin thinking that I should do something even if I can't be educated, and I managed to struggle to buy my own machine, and even today I have some good customers and I get at least a little money and it's sustaining me.

The other two had been raped by their husbands and tried to access services from NGOs. One went to a Ugandan NGO, but according to her they did not help. The other reported to a "group that helps women," which I found was the child protection/GBV committee for her area. They wrote a report documenting her problems with her husband, which included sexual violence as well as serious neglect. She expected their report to be followed by action. When it was not she sought help from her relatives, mediated by the local councilor I (village-level elected leader often involved in dispute resolution) to separate from her husband, which she eventually succeeded in doing.

Some women in the more remote villages where this research was done mentioned an INGO, and their trained lay counselors, as being helpful after rape. But none actually went to the center or counselors after rape. Some said they visited the center for other reasons, such as their husbands beating them seriously. A woman whose husband rapes her commented on why: "We have people like [the INGO] and also the people of human rights. They might help in a difficult situation or your conflict. But with problems like mine [a sexually violent husband] of course they can't help. If there are issues in the home you settle it between the two of you or you can call in the brothers of the husband, but if it passes them then we call family elders."

Even when the sexual violence was perpetrated by people other than husbands, relatives and elders were the primary sources of decision making on responding to rape. Women in this study who were raped by combatants and passed through a reception center (with the exception of the two cases discussed above) were unaware of how NGOs or other actors might benefit them. They were equally unaware of policy discussions regarding reparations.

Reparations efforts have limited scope thus far in providing individual redress even in the most straightforward and obvious ways—even more so with the more complicated and delicate nature of reparations for sexual crimes. One woman who had been deformed by a bullet wound and also raped commented that although she had not received reparations for either injury, the harm of her sexual violence could not be photographed and thus her invisible wounds would be impossible to compensate. The reparations measures to be put in place, among other transitional justice mechanisms, remain in their initial stages in northern Uganda. The ICC's Trust Fund for Victims (TFV) at the time of research (2009–12) had been one of the only actors on this front and was supporting an NGO-run program of responding to gender-based violence. However, the violence the program responded to was current and perpetrated by civilians. It was not war-related crime within the jurisdiction of the ICC outlined in the Rome Statute.[17] This begs the question of why the TFV was not operating within its mandate. Perhaps it is in part because of the way the TFV works, namely, through NGO partners. As the result of wider learning, NGOs have largely recognized that singling out particular categories of people for assistance, rather than using a more needs- or rights-based approach, can create new problems. However, the TFV is not an NGO. It is meant to be about justice after crimes against humanity, not "a donor of last resort," which is how a senior TFV staff in Uganda described their funding approach to me in an informal conversation. Perhaps in recognition of this, and in response to an external evaluation of the impact of its programs completed in 2013, leadership in the TFV indicated in 2014 they would take a new tack in their next phase targeting interventions that alleviate psychological and medical harms resulting from LRA sexual violence.[18] In 2014, TFV leaders at The Hague indicated that the medical support is aimed at assisting women who suffer from fistula. From what I understand from women in forced marriages within the LRA, this condition is very rare indeed. Although the TFV note that some "spillover" outside of their mandate is unavoidable, it is likely that the majority of the medical assistance from the TFV could be considered "spillover."[19] According to a former employee of TFV, there has been much soul-searching about such issues within the TFV, but more is needed if it is to play a normative or reparative role for victims of sexual crime within the jurisdiction of the court.

Another often-cited issue with respect to sexual violence and reparation efforts (particularly the TFV) is the difficulty of knowing exactly

how to identify victims and how to design targeted assistance to women whose rape would be counted among crimes of concern to the court. Evidence from this study is suggestive of material ways reparations could respond to the harm of rape. Others working on representing victims' views regarding reparations have highlighted some of these, which resonate with many of the sentiments expressed by my informants, particularly health, education, housing, land inheritance, rebuilding livelihoods, and proper treatment of the dead.[20] The current study also reveals that women who have been raped can be identified and are often willing to self-identify for assistance. Many women I spoke with expressed sentiments similar to the woman with the bullet wound, who said, "Everyone knows what happened to me. Why should I be afraid to come forward if it can help me?"

NGOs' Role in Shaping Ideas

One way of engaging with interlocutors' dilemmas in the context of violence and profound gendered patterns of life is to move beyond static structural models to examine how people actively reassess and reshape forms of power through dramatic shifts.[21] Evidently, one of the powerful opportunities for reassessment amongst Acholi came in the form of NGOs. Particularly, radio and other mediums of exposure to ideas about violence against women and women's rights have influenced the way women think about their own experiences of sexual violence and perceptions of appropriate responses.

The idea that "rape never used to be there" is not an uncommon response when I tell Acholis about my research. I have found that what is meant by this statement is usually one of two things. First, that the notion of rape as a crime as it is talked about by NGOs did not exist prior to the war. An example is the reaction of one of the elderly women I interviewed. She laughed at my questions and said they were "very useless" because, as she said, "it is hard to even say whether a man forced you to have sex when you never even thought that refusing was an option and you were never asked if you agreed." Another elderly woman said that she and her age mates did not know what "rape" was in those days, although she added that of course men used to force them.

Another meaning of the idea that "rape never used to be there" is driven by values associated with Acholi identity "above history," a vision of an ideal continuous past and of how Acholi society is at its best when all social protections are functioning as they should. It is less a

statement of understood reality and more an expression of values and ideals, a "benign" patriarchy (if that were possible): that women should be protected from sexual violence and that it should not happen if all is healthy in the community.

These notions have been dramatically impacted since war and an influx of NGOs. In Acholiland, there are few places that remain untouched by NGO interventions, and certainly by radio airwaves. Although many Acholi women talk about rape as something "normal" or *gin matime* (literally, "something that happens"), they equally talk about it as morally wrong with negative impact on their relationships, mental health, and bodies. When asked how they came to this understanding, radio and NGOs were the most common responses.

One woman commented on how she viewed changes in the way people think. Her own experience with sexual violence had been severe. She was abducted and spent five years as a forced "wife" in the LRA, only to survive a second sexually violent marriage before she settled with a man who treats her well.

> In case the girl changes her mind after she has gone somewhere alone with the man, but she's embarrassed to scream, she will show that she's very annoyed and also fight him. Sometimes she'll end up giving in because he overpowers her, but afterwards she'll sack the boy. And in today's situation she can even take that person to court. In the past people were ignorant of their rights. But today with sensitization of NGOs people know their rights. Not only that, in the past the issue of age brackets wasn't considered. It was just whether the girl has breasts or not. Now it's if someone is under 18 they are considered children, and so if someone sleeps with them the person can be taken to court. But in the past, the girl could report to her parents and from there the parents would go and talk to the parents of the boy and sometimes they would have to make a payment called *luk. Luk* doesn't mean they have to stay together necessarily, but in some cases they do get married. Either way, that payment, *luk,* would need to be paid.

The idea that a girl who was unhappy about a sexual encounter could sincerely fight or "sack the boy" would not have occurred to many of my elderly informants in their youth. Even though virtually none of the women in this study accessed legal avenues of redress, the knowledge that laws are part of what defines appropriate sexual behavior and how

they do so is a more recent phenomenon that is attributed to NGOs. The idea of sexual violence has evolved from *only* a social crime—as the discussion of *luk* indicated—to a crime that also abuses the rights of an individual that should be protected by the state.

Evidence from women in this study suggests that NGOs have had an impact on notions of rape and appropriate responses to it. They have contributed to a growing sense of individual rights that women feel are violated by being forced to have sex, even by their husbands. It also shows the limits of NGO impact. Despite the fact that the majority of women said that they trusted NGOs to help them, and many said they would turn to an NGO for help after sexual violence, only four actually did, and just two felt they were helped in a meaningful way. Women's experiences point to two main contributors to this state of affairs. Many women, especially in rural areas, are unaware of how or if NGO services are relevant to their needs and situations—and indeed, there is a question of relevance and approach. Another study showed that the services that NGOs supported—for example, health services—tended to focus on sexual violence from a stranger and not the overwhelmingly more common forms of sexual violence such as intimate partner violence.[22] NGO programs tend to target women as individuals in their gender-based-violence response programs. They emphasize "confidentiality" and offer services that are medical, psychological, and legal to individual women—some of these services are most relevant for the least common experiences of sexual violence. Focusing on individual needs, NGOs tend to respond within frameworks of global best practices and have the supremacy of human rights as a driving factor. Yet decisions surrounding how to respond to wrongdoing seem to be made within the context of extended family structures and tend to have the supremacy of social harmony as a driving factor.

While both relatives and NGOs influence the evolution of social norms, reactions to crime and wrongdoing more generally are still primarily determined by decisions made in the context of extended family and kinship structures. Whether the perpetrator of a crime such as rape is a rebel, a soldier, a husband, a relative, a neighbor, or a stranger, notions of how to maintain or restore social harmony largely determine what to do in the aftermath, trumping individual sentiments regarding what the man deserves and what the woman needs.

> Despite a growing understanding of individual rights as promoted by NGO and human rights discourse, the most important thing that women need (and often value) after suffering crime is still for the people who are closest to them to agree that the course of action taken after rape is appropriate. "In our tribe in Acholi here, I think settling it down at home [*gang gang*] is best because if you take it to another level like the LC and police it will bring hatred between the clans, so doing things traditionally by getting elders to just warn them is good. The community seals the issue within themselves."

In the final analysis, "home people" and not "the people of human rights" determine what "justice" after rape looks like. The "home people" are certainly not homogenous, and as explored above, reactions to rape vary greatly. Yet, while there are multiple and sometimes competing voices, home people typically grant cosmological consequences and the effects on social harmony precedence in their deliberations. An often evidently valid concern in the pursuit of justice raised in regard to "traditional" authority is the existence of gendered hierarchies and inequalities that exist within them.[23] The postconflict moment of transition offers a window of opportunity to forge more just gender relationships. Social norms and power dynamics have been affected by war and subsequent postconflict developments in Acholi, but the role of relatives is still strongest and cannot be bypassed or overcome simply by strengthening other actors or by access to justice programs designed to target women as individuals (nor is it at all clear that it would be desirable to do so). In order to maximize the opportunities for greater equality presented by the transitional moment that still characterizes Acholi a decade after the guns fell silent in Uganda, those working on these issues will need to recognize women as part of and not apart from the social orders they inhabit, engaging the role of extended family structures in women's lives and appreciating the deference to relatives that women are likely to continue to show while aiming to transform detrimental gender dynamics within them.

Notes

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1. Interviews were conducted in Acholi. There was a translator on hand for formal interviews to ensure accuracy, and most subsequent interactions were in Acholi.

2. Pascal, *Pensées* (1669), cited in Albert Hirschman, *Shifting Involvements: Private Interest and Public Action* (Princeton: Princeton University Press, 1982), 91. See also John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 3; Ronald Cohen, *Justice: Views from the Social Sciences* (New York: Springer US, 1986).

3. J. Pasquale Crazzolara, *A Study of the Acooli Language: Grammar and Vocabulary* (London: Oxford University Press, 1938), 327; Porter, *After Rape,* 134.

4. For an elaboration of the notion of social harmony, see Porter, *After Rape,* 2–6.

5. Rape is not an uncomplicated category. A full discussion is beyond the scope of the chapter, but in brief, in this study, a situation of rape represents sexual intercourse that was without consent or took place in circumstances that were coercive by a woman's own assessment. It follows and builds on the established practice in feminist literature of privileging a woman's account in understanding sexual violence that she has experienced. See Mary Hawkesorth, "Knowers, Knowing, Known: Feminist Theory and Claims of Truth," *Signs* 14, no. 3 (1989): 533–57.

6. Holly Porter, "Justice and Rape on the Periphery: The Supremacy of Social Harmony in the Space between Local Solutions and Formal Judicial Systems in Northern Uganda," *Journal of Eastern African Studies* 6, no. 1 (2012): 81–97.

7. Lucy Hovil and Moses Crispus Okello, "Confronting the Reality of Gender-Based Violence in Northern Uganda," *International Journal of Transitional Justice* 1, no. 3 (2007): 433–43.

8. In the past, and in some locations today, *rwot kweri* or "chief of the hoe" is a title given to the man in a village who organizes communal farming and is involved in dispute resolution. The origins of the *rwodi kweri* (plural) lie in the colonial period, though they were initiated by Acholi people. See Frank Knowles Girling, *The Acholi of Uganda* (London: Her Majesty's Stationery Office, 1960), 193. Their authority is over residents in a particular geographical location as opposed to a clan or kinship group. See Holly Porter, "After Rape: Justice and Social Harmony in Northern Uganda" (PhD diss., London School of Economics, 2013), 114–16.

9. See for example Civil Society Organizations for Peace in Northern Uganda, *The International Criminal Court Investigation in Northern Uganda* (Kampala: CSOPNU, Kampala, 2005).

10. Holly Porter, "Avoid Bad Touches: Schools, Sexuality, and Sexual Violence in Northern Uganda," *International Journal of Educational Development* 41, no. 1 (2015): 271–81.

11. Susan McKay and Dyan Mazurana, *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone, and Mozambique: Their Lives during and after War* (Montreal: International Centre for Human Rights and Democratic Development, 2004); Khristopher Carlson and Dyan Mazurana, *Forced Marriage within the Lord's Resistance Army, Uganda* (Medoford, MA: Feinstein International Center, Tufts University, 2008).

12. Carolyn Nordstrom, *Girls and Warzones: Troubling Questions* (Ostervala: Life and Peace Institute, 1997).

13. Holly Porter, "After Rape: Comparing Civilian and Combatant Perpetrated Crime in Northern Uganda," *Women's Studies International Forum* 51, no. 1 (2015): 81–90.

14. Susan Estrich, *Real Rape* (Boston: Harvard University Press, 1987); Lorenne Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); Pauline Bart and Patricia O'Brien, *Stopping Rape: Successful Survival Strategies* (New York: Pergamon, 1985).

15. The Supreme Court in Uganda made a landmark decision on August 6, 2015, stipulating that requiring bridewealth to be refunded after a customary marriage fails was unconstitutional (*Daily Monitor,* August 6, 2015). What effect this will have in practice is yet to be seen. The judgment was six to one, and interestingly the dissenting judge was a woman.

16. Likewise, the Survey of War Affected Youth (SWAY) research found that when female youth are physically threatened in the community, less than one percent seek assistance from an NGO or health care worker or a member of the Ugandan armed forces. See Jeannie Annan, Christopher Blatman, Dan Mazurana, and Khristopher Carlson, *The State of Female Youth in Northern Uganda: Findings from the Survey of War Affected Youth (SWAY)* (Boston: Feinstein International Center, 2008), viii.

17. This information is based on conversations with the head of the Trust Fund in Uganda, as well as the then project coordinator of the NGO during the ICC Review Conference in June 2010, a former staff person in January 2013, and the consultant who evaluated the NGO in March 2013.

18. Personal communication with staff of TFV in Uganda at the National War Victims Conference, May 30, 2014, Kampala.

19. Meeting with TFV leadership in The Hague, May 28, 2015.

20. UNOHCHR, *"The Dust Has Not Yet Settled:" Victims' Views on the Right to Remedy and Reparation. A Report from the Greater North of Uganda* (Kampala, Uganda: UNOHCHR, 2011), 81.

21. Sharon Hutchinson, *Nuer Dilemmas* (Berkeley: University of California Press, 1996).

22. Mirrka Henttonen, Charlotte Watts, Bayard Roberts, Felix Kaducu, and Matthias Borchert, "Health Services for Survivors of Gender-Based Violence in Northern Uganda: A Qualitative Study," *Reproductive Health Matters* 16, no. 31 (2008): 122–31.

23. Niamh Reilly, "Seeking Gender Justice in Post-conflict Transitions: Towards a Transformative Women's Human Right Approach," *International Journal of Law in Context* 3, no. 1 (2007): 155–72; Tim Allen, "Bitter Roots: The 'Invention' of Acholi Traditional Justice," in *The Lord's Resistance Army: Myth and Reality,* ed. Tim Allen and Koen Vlassenroot (London: Zed Books, 2010), 242–61.

PART THREE

Resources, Conflict, and Justice

NINE

Out of the Mouths of Babes

Tracing Child Soldiers' Notions of "Justice," ca. 1940–2012

STACEY HYND

> The TRC may be able to make every Liberian child to feel justice. This is my expectation.
>
> —Statement from a child[1]

WITH THE CONVICTION OF CONGOLESE WARLORD THOMAS LUBANGA Dyilo in 2012 at the International Criminal Court (ICC) for the crime of recruiting and using child soldiers, and the ICC's recent arrest and indictment on war crimes charges of Dominic Ongwen, a former child soldier turned senior commander in Joseph Kony's Lord's Resistance Army, the question of child soldiers' place in international justice regimes has become a topic of growing debate. Current legal discussions of African child soldiers have focused on the criminalization in international law of child soldiering as a practice, and on whether child combatants should be considered as "victims" or "perpetrators."[2] The primary aim is to provide justice *for* former child combatants. Children's, and former child combatants', own notions and understandings *of* "justice," however, have been largely ignored, to the detriment of legal and humanitarian interventions. Contemporary discussions focus overwhelmingly on child soldiers as "victims" or "perpetrators because they are victims." The snippets of children's voices that emerge in both legal and humanitarian arenas, however, suggest that the relationship between children and

justice is more engaged and complex. The opening epigraph highlights children's postconflict desire "to feel justice," and yet the Liberian Truth and Reconciliation Commission (TRC) report made no substantive attempt to interrogate what children meant by the phrase "to feel justice." As Graça Machel argues, "Adults can act on behalf of children and in the best interests of children, but unless children themselves are consulted and engaged, we will fall short and undermine the potential to pursue the most relevant and durable solutions."[3] This chapter argues that to facilitate effective rehabilitation, reintegration, and transitional justice, child soldiers' own voices need to be inserted more firmly into processes of justice, and existing representations and mediations of those voices must be critiqued and historically contextualized. This is because the contemporary "child soldier crisis" emerges not simply from new patterns of warfare, but from a new global "politics of age" that has shaped the evolution of international law while, somewhat paradoxically, occluding children's own agency.[4]

Under international humanitarian norms, a child soldier is today defined as "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity."[5] However, this chronological definition runs counter to local understandings of childhood in African communities, which are based more on social, cultural, and physical markers, forming an indeterminate life stage between infancy and adulthood, often overlapping with ideas of youth.[6] In many African cultures, childhood is not socially constructed as a time of innocence or special rights and protection but is rather a crucial stage of socialization on the path toward adulthood, a transition often delineated by marriage, reproduction, and the establishment of a household. Children are expected to provide labor to household economies and to contribute to the support and defense of local communities in times of need. Military service can itself be a key marker of the transition from child to adult. In Sierra Leone, violent youth have been a historically significant social category. Local communities view children as liminal and unformed and therefore as potentially more capable than adults of dangerous, inhuman behavior.[7] The line between childhood and youth is blurry, with youth a "shifter category" that is as much political as biological, but usually youth denotes someone between the ages of fourteen and thirty-five and of subaltern or marginalized social status.[8]

It should be noted that while there has been an explosion in research on youth in Africa, childhood in and of itself remains largely

underresearched; in fact, child soldiering has been one of the few areas of significant academic concern, alongside other major contemporary social ills like child labor and child migration.[9] There has been a recent trend in humanitarian circles against using the term "child soldier," which is held to be stigmatizing and misrepresentative since many children do not have primary roles as fighters. Instead, the term "children associated with armed forces and armed groups" (CAAFAG) is increasingly preferred. Even this term, however, conceals a continuum of experience, as well as legal and moral accountability: how should children who alternate between military training and life in refugee camps, like some of the "Lost Boys" of South Sudan, be classified? Or teenagers who participated in the struggle against apartheid and were regarded as legitimate military targets by the South African state, despite not formally being part of armed opposition group like Umkhonto we Sizwe? As such, and to directly engage with dominant humanitarian and legal discourses, this chapter adopts a broadly "Straight 18" position, whereby all persons under the age of eighteen are classified as children, while remaining sensitive to the varied and contestable categorizations of "child" that emerge. The majority of "child soldiers" discussed herein were teenagers during their war service.

The existing literature on how to provide justice for children recruited into armed forces draws on a range of different conceptions of justice: transitional justice, with its debates on restorative and retributive justice, which are constructed in opposition to the "jungle justice" that communities fear children will bring back with them from the bush; juvenile justice, viewed as too underdeveloped in African criminal justice systems to be widely available; criminal justice, seen as unsuitable owing to its punitive nature; but also therapeutic justice, highlighting how law can aid mental health and healing. Overall, the focus has been on providing social justice and reconciliation through transitional justice mechanisms and demobilization, disarmament, rehabilitation, and reintegration (DDRR) programs.

This chapter emerges from research on the history of child soldiering in Africa, which argues that the presence of children in armed groups is not simply a "new war" phenomenon but is linked to historical structural patterns of childhood, child labor, and "total" warfare, as well as postcolonial state crises and youth revolutions.[10] Contemporary developments in child soldiering and international legal responses are themselves the products of specific historical and cultural contexts, and

it is these developments that this chapter will critique. The first section analyzes memoirs and archival sources in an attempt to ascertain children's understandings of "justice" and the shifting political discourses that frame these accounts. The second section interrogates the problematics of child soldiers' positioning within international humanitarian law, highlighting the clashes between local and global categories of "childhood," the tensions between child soldiers' status in "law" and "justice," and the difficulties of providing both protection and accountability for child soldiers. The final section analyzes pilot fieldwork interviews conducted with twelve former Lord's Resistance Army (LRA) child abductees about their understandings of social and legal "justice." This chapter represents initial steps toward developing a new historicized methodology of analyzing child soldiering and justice for children in Africa.

Tracing a Historical Genealogy of Child Soldiers' Ideas of Justice

Historical archives and memoirs reveal that children have been involved in most of Africa's twentieth-century conflicts. Notably, child soldier testimonies from the colonial to contemporary eras do not routinely mention justice in any detailed, direct sense, instead revealing both the horrors and empowerment that children experienced in conflict: many of these children were not simple "victims" but active agents fighting for causes they believed in, or for their own advancement. Teenage African boys who fought for British forces in the Second World War recount how they were taught it was a necessary, "just" war.[11] In the 1950s to the 1970s, accounts from liberation struggles and civil wars speak mainly of young fighters' pride in contributing to the defense of their peoples and nations; teenage schoolboys who fled Rhodesia into exile to fight against white minority rule argued, "We want our country. . . . We want to rule ourselves and we will choose our own leader," while teenage spies and soldiers in Biafra speak of their desire to avenge the "abominable crime" of Nigerian aggression and of the empowerment they felt in fighting for their people.[12] In the 1980s, child combatants in Marxist-influenced forces in Angola and Eritrea speak in terms of freedom, liberation, and equality—of social justice—but also of how their experiences of war and their treatment within their armed groups belied these ideals, often exposing them to exploitation and abuse.[13]

These accounts are undoubtedly fallible, shaped by adult memory and authorial subjectivities, presenting personal narratives rather than

historical "truths" or legal "facts." They do, however, reveal how child soldier testimonies are shaped by dominant political discourses of the conflicts and times that they emerge from. Ideas of "justice" are absent because it was only in the late 1980s that a critical nexus of globalized discourses of human rights and international law gained both political and cultural prominence. Formal recognition of child soldiering in the sphere of international humanitarian law was established only in the 1977 Additional Protocols to the Geneva Convention, which, for the first time, legislated internationally against the recruitment and use of children under fifteen years in war.[14]

While diplomatic negotiations for the Additional Protocols were underway, a link between justice and children became manifest following the 1976 Soweto uprising in South Africa. That link was sharpened during the 1984–86 state of emergency with the killing of around three hundred children and with the detention without trial or arrest of over twenty-thousand other children under eighteen during the struggle against the apartheid regime. With teenage "comrades" in the vanguard of the struggle, global antiapartheid campaigns drew on legal expertise and emerging human rights discourses to highlight the brutality and illegality of the apartheid state's violence against these children and youths.[15] Following media coverage of child soldiers in Africa, Latin America, the Middle East, and Asia, children's involvement in war became a topic of growing international concern, a concern intensified by developments in child rights.[16] The 1989 United Nation's Convention on the Rights of the Child (UNCRC) created the first universal definition of "the child," expanding this category to include "any person below the age of eighteen years."[17] In the late 1980s to early 1990s, global child rights combined with new liberal humanitarianism to fuel a wide-based campaign by international NGOs against the recruitment and use of child soldiers, culminating in the 1996 Machel Report on Children in Armed Conflict and the establishment of the UN's Office of the Special Representative of the Secretary-General for Children in Armed Conflict.[18] It is in this period that the modern image of the child soldier—the ragged African boy carrying an AK-47, both brutalized and brutalizing—emerged.[19] The child soldier moved from being a heroic minor-citizen fighting to defend family and community to a violent icon of the "new barbarism" of late-twentieth-century warfare, a symbol of Africa's broken modernity that was in need of external salvation. As Jézéquel argues, child soldiers have subsequently become "object[s] of

a new humanitarian crusade" and a central issue in efforts to legitimize Western intervention in Africa.[20]

Human rights and truth and reconciliation commission reports have been key to the discursive construction of this contemporary "child soldier crisis," but while these reports provide valuable data on patterns of child recruitment and utilization in conflict, they problematically often rely on "composite portraits of victimization" and universalizing norms of childhood to engender active and empathetic responses in the reader. They are more useful for analyzing the imposition of global justice norms than for unpacking children's understandings of justice.[21] Child soldier memoirs have emerged as another key genre of evidence. These do not reflect child combatant's experiences through a prism of law and crime but rather focus on the injustices that drove them into armed groups and the abuses they suffered within them, primarily following a humanitarian "victimhood" framing.[22] With children who volunteered rather than being forcibly recruited, there is an additional sense of injustice when their service is not rewarded: "Of all the promises that I was made, not one has been kept. I have never been paid for what I went through. A war without salary. And peace without rewards. Nothing."[23] One might posit that the focus on immediate injustices is because children are not intellectually, socially, or morally developed enough to understand ideas of "law" and "justice," but many accounts from former child combatants highlight that they do recognize that the crimes they committed during war were morally wrong, although most claim diminished responsibility as they were coerced, drugged, or indoctrinated into those actions.[24] It can be argued that the silence surrounding justice in child soldiers' accounts stems from the questions that are (not) being asked and the narratives that are being prioritized rather than a simple lack of understanding or concern about justice from young participants in Africa's conflicts. It also demonstrates that children's perceptions (and adult former child combatants' memories) of conflict are not narrativized within a sociocultural framework where the provision of formal legal justice is viewed as an available option.

Globalized Childhoods, International Humanitarian Law, and Child Soldiers in Contemporary Africa

International legal responses to child soldiering have focused on the criminalization of child recruitment into armed forces in international humanitarian law (IHL). Following the 1977 Additional Protocols, in

1998 the ICC's foundational Rome Statute banned "conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate directly in hostilities" in both national and international conflicts.[25] However, because it adopts the UNCRC's definition of a child, the ICC has no jurisdiction over anyone under the age of eighteen and therefore avoids the issue of criminal responsibility for war crimes for teenagers between fifteen and eighteen years of age. Child soldiers are thereby constructed as deviant products of adult abuse who cannot be held responsible for their alleged war crimes because they hold no legally relevant agency.[26] Humanitarian dissatisfaction with the lower age limit of fifteen years of age for military recruitment led in 2000 to the UNCRC Optional Protocol on the Involvement of Children in Armed Conflicts, which established the "Straight 18" position that today dominates humanitarian policy and developing soft law.[27] This tension in determining the legal status of "child soldiers" between fifteen and eighteen years of age is further complicated by discrepancies between international and domestic norms on criminal responsibility and juvenile justice, norms that can range from seven to eighteen years of age.

The liminality of childhood, whereby young girls and boys can easily move between posing as "innocent civilians" to acting as "armed fighters," facilitates child soldiers' military impact. This very liminality, however, also makes it difficult to categorize child combatants and to attribute legal and moral responsibility to them. A culturally sensitive reading of IHL would argue that not everyone under the age of eighteen should simply be treated as "children"—especially teenagers who regard themselves as adults and are seen as such within their communities—but this runs counter to the desire to protect young persons whom the international community regards as bearing diminished or circumscribed responsibility for their actions in war, either through forcible recruitment, indoctrination, or coercion. It can be argued that children's relationship with justice should be conceived of in terms of their "needs" rather than their "wants." While their needs do require accurate and appropriate assessment, this position problematically conceives of justice as an exclusively adult realm, with only adults having the knowledge, judgment, and rationality to determine the scope and content of "justice." This does not fit with recent evidence on African childhoods and excombatant reintegration. The idea of child soldiers as a "lost generation," whose moral compass and sociability are permanently damaged by war service,

is now being overturned by research showing that many do reintegrate effectively into society.[28] While developmental psychology stresses that juvenile brains are not fully developed and that teenagers are more likely to make risky decisions, child sociology and anthropological research has increasingly acknowledged children's resilience and their social and political agency, both during war and in their navigation of postconflict reintegration.[29] With the acknowledgment of agency, however, comes the question of accountability. The overarching question here is whether child soldiers—of whatever biological age—should be subject to formal criminal justice and held accountable for their actions. And can current international law deliver "justice" for both child soldiers and the victims of their crimes?

Debates over child combatants' legal status passed from treaty to trial arenas when the Special Court for Sierra Leone (SCSL) was formed in 2001 to try offences committed during that country's civil wars.[30] The criminal culpability of child combatants was a subject of intense debate between the UN, which granted the court jurisdiction to try children between fifteen and eighteen at the time of their offences, humanitarian groups that took a "Straight 18" position, and Sierra Leonean authorities and communities, many of whom believed that justice would not be served unless child combatants were held accountable for their participation in many of the worst atrocities of the war.[31] Ultimately, international demands for child protection were placed before local conceptions of justice, and the SCSL chose not to prosecute anyone under the age of eighteen.[32]

The issue of child soldiers' role in IHL arose again in 2006 with the arrest and prosecution of Thomas Lubanga Dyilo by the ICC. Symbolically and significantly, the only charge brought against him for his actions in the Ituri conflict was regarding the conscription and use of children under the age of fifteen in armed hostilities. Kamari Clarke argues that during Lubanga's trial, the ICC discursively mobilized child soldiers as "spectres of international justice," creating legal fictions of their victimhood and negating their responsibility in order to reassign accountability to Lubanga as an individual under the doctrine of command responsibility.[33] The ICC achieved this by constructing child soldiers as "doubly-victimised," as children and as Africans, with Africa being essentially pathologized as a space of violence.[34] The idea of children as objects of justice, as innocent victims, certainly makes for a much clearer prosecutory narrative in terms of criminalizing the recruitment

of children by armed forces, as Prosecutor Moreno-Ocampo's opening statement demonstrates: "The children still suffer the consequences of Lubanga's crimes. They cannot forget what they suffered, what they saw, what they did. . . . Some of them are now using drugs to survive. Some of them became prostitutes and some of them are orphaned and jobless."[35] This victimhood focus stems from a global politics of "childhood"—a modern, Western, middle-class idea of children being a special protected category of consumer rather than productive members of society, as is the case for most African children.[36] Perversely, however, as Pupavac suggests, these globalized norms that suffuse humanitarian structures and discourse negate child agency and can lead to a silencing and appropriation of children's voices, as occurred in the Lubanga trial where only evidence of appropriate victimhood was heard.[37]

There are significant parallels here with international interventions on behalf of African women from colonial times to the present day, with African women frequently being constructed as victims of patriarchal socioeconomic and political norms, lacking in agency but deserving of external salvation (so long as they conform to appropriate gender roles as wives and mothers): these constructions have routinely sidelined African women's agency and engagement in conflict and postconflict reconstruction.[38] As MacKenzie argues in relation to the treatment of female former soldiers in Sierra Leone, "post-conflict policies are largely shaped by patriarchal norms associated with liberal social order rather than by 'local' needs," and highly gendered notions of "conjugal order" at the heart of postconflict securitization and development impose a reversion to (idealized) preconflict gender and familial norms to reestablish social order.[39] This chapter would suggest that there is also a significant generational component to any gendered reordering of postwar societies, and that concepts of "patriarchal" social order need to pay close attention to the intersection between the generational and gendered power structures therein. Patriarchal norms are often taken as synonymous with gender oppression, but male control of generational hierarchies in families (whether real or presumed) should not be ignored in such analyses.

In locating accountability solely within command responsibility, the ICC also reinforces the failure of international law to address the foundational injustices and structural inequalities that drive conflict and children's recruitment. As the conviction of Thomas Lubanga suggests, the moral economy of IHL is driven by the need to justify international intervention and global norms cascades, spreading law rather than

justice.[40] This is not to suggest that child soldiers are not "victims" or should not be treated as such in legal arenas, but rather to argue that their relationship with justice needs to be understood as more nuanced than simple victimhood, particularly for older teens who would face criminal conviction under domestic jurisdictions for crimes of violence in peacetime. A lack of formal criminal accountability for child soldiers' actions during wars can leave a legacy of unaddressed guilt for individuals and communities. Recent research has increasingly acknowledged children's legal roles not just as victims but as witnesses or as "complex political perpetrators" like Dominic Ongwen of the LRA; a "victim" in his abduction as a child, he rose to become commander of the Sinia brigade and was indicted by the ICC in 2005 alongside Joseph Kony and other LRA commanders.[41] With Ongwen currently being tried in The Hague on seventy counts of war crimes and crimes against humanity, including the conscription and use of children under the age of fifteen, the issue of child soldiers' culpability and accountability has become starkly multivalent, both legally and morally. Should his abduction and forcible recruitment as a child create diminished responsibility for his actions, or potentially mitigate his sentencing, as Prosecutor Fatou Bensouda indicated might be possible?[42] Or should the focus remain on convicting Ongwen as a deterrent and to secure justice for his victims? The relationship between individual and communal justice lies at the heart of child soldiers' position within international law.

Justice in War and Peace: Returning LRA Abductees and Transitional Justice in Northern Uganda

Perhaps the most notorious example of children's recruitment into African conflicts is that by Joseph Kony's LRA. The LRA have waged a guerrilla conflict against the Ugandan government since 1987. With a lack of popular support for Kony's rebels among Acholi and Northern Ugandan communities, children like Dominic Ongwen quickly became a prime target for abduction and recruitment, providing the LRA with military manpower and auxiliary support, "bush wives" to raise the next generation of fighters, and a terrifying tactic to punish communities who failed to support them.[43] It is estimated that more than thirty thousand youths under eighteen were abducted for varying lengths of time by the LRA between 1988 and 2004.[44]

There is a wealth of information on returning LRA rebels and their reintegration into local communities, but there has been less focus on

children's roles in justice and reconciliation.[45] Within Uganda, transitional justice frameworks have emphasized reconciliation over retribution, as seen in the 2000 Amnesty Act granting amnesty to all demobilizing LRA rebels.[46] In Northern Uganda, the Acholi community leaders Ker Kwaro Acholi have consistently espoused the cause of amnesty, proclaiming reconciliation and forgiveness as central to Acholi custom.[47] The question, however, is where child abductees fit in local discourses and practices of reconciliation and retribution. A 2011 survey of over seven hundred respondents in Acholi and Lango communities reported that only 31 percent of respondents believed that children should be held responsible for their actions during their time with the LRA, and only 13 percent believed that children should be punished, compared to 50 and 35 percent, respectively, for adults.[48] The majority of respondents stated that individuals should be held accountable or punished only for acts committed from the ages of nineteen to twenty-one years and over: given that twelve is the age of criminal responsibility in Uganda, this could indicate a "vernacularization" of international child rights norms into local contexts, or "sensitization" among local communities as to which answers will generate international support.[49]

Allen argues that the amnesty process in fact underemphasizes adult accountability, with returnees constructed as "innocent children" who deserve forgiveness, even when they have become biological adults.[50] However, while biologically "adult," many of these returnees could still be "youths" or "children" in the eyes of the community, as they had not undergone appropriate socialization or marked normative transitions into adulthood with marriage and establishing their own homestead: the lack of accountability for youths thereby indicates their liminal status. The influence of local cosmologies and moral economies on Acholi ideas of justice must be recognized, as should Christian traditions of forgiveness and childhood innocence.[51] Public transcripts of forgiveness for returnees are often underwritten by private admissions that forgiveness without accountability is difficult, and, suggestively, over 80 percent of interviewees indicated that returning children should both apologize for their actions and do *mato oput* ("drink the bitter root").[52] *Mato oput* is a reconciliation ceremony and process that historically functioned to reconcile two families in the aftermath of a homicide as part of restitutive Acholi customary law frameworks. Since 2000 it has been repurposed, first by local leaders and then by international NGOs, as a transitional justice mechanism to aid the reintegration of

former LRA members into their communities, promoting both community forgiveness and individual healing.[53] The ceremony, presided over by the *rwot* (chief), involves an acknowledgment of wrongdoing and the offering of compensation by the offender, and it culminates in the sharing of the symbolic bitter-root drink. There is, however, disagreement over whether *mato oput* and other reconciliation rituals are applicable to minors, who traditionally would not have borne the same level of culpability for their actions as adults.[54] Evidence also suggests that some youth are less supportive of such traditional reconciliation methods, viewing them as a mechanism for reinforcing unequal generational structures and engaging with them only to appease their parents, thereby calling into question the efficacy of any individual moral suasion and healing.[55]

There is a pressing need for research into the relationship between children and justice, and in particular to explore what children formerly associated with armed groups believe justice is and should be. Significantly, in Northern Uganda, which returned to a state of relative peace following the LRA's relocation to the DRC after 2006, there is also a need for greater investigation of the relationship between the specific context of transitional justice and wider ideas of social and criminal justice—can there be transitional justice without a wider belief in justice itself? This section is based on pilot project interviews with former LRA abductees, mostly in their early twenties, in Lamwo District on the border with South Sudan. Youth interviewees were selected because of ethical concerns over interviewing children. Semistructured interviews were conducted by research assistants in Acholi with individual respondents, with male and female respondents asked what they thought that "justice" and "social justice" meant, what the current state of justice in the community was, and what they thought would be justice for the LRA's crimes.[56] The Acholi term used for "justice" was *ngolo kop,* which translates as "reaching a decision" or "passing a verdict" and is more associated with formal court processes, although it is now used informally among groups trying to reconcile around a specific decision. As one respondent noted, "Justice is helping solve a disagreement amongst different groups of individuals."[57] "Social justice" was translated by the interviewers as *ngolo kop me te gang*—justice in the community, *te gang* meaning "under the home." *Ngolo kop me te gang* was generally understood in terms of punishment more than reconciliation, unlike Western conceptions of social justice as equality.

Asked what they thought that "justice" would be for LRA rebels, most interviewees expressed a desire for lenient treatment for child abductees and others whom they held less responsible, but this was coupled with a strong belief in the need for retributive justice for senior commanders, indicating a level of agreement with the ICC's focus on command responsibility. As one interviewee responded, "I would punish the generals heavily if not by hanging because the kind of trauma and lives lost can never be replaced. But the little ones should be forgiven." Another noted, "I would forgive some actions because some were abducted as children and robbed of their innocence but those who raped women and killed with[out] a conscience should be sentenced to life imprisonment."[58] Another stated that while "deep down I believe forgiveness should be done on these people . . . others say because the lives of their relatives were lost, they should hang for their crimes. And sometimes I agree with them."[59] The possibility of hanging or imprisoning senior rebel commanders for their "guilt" was repeatedly raised.

Key to the attribution of guilt and demand for punishment was a perception of *mens rea:* "Most are not guilty because it's done out of our will and I accepted Jesus as my savior so I would just let go and forgive each and every one of them apart from the generals in the rebel camp who performed every action in their right mind and soul."[60] Those who had been forced to commit atrocities, however, were held deserving of "forgiveness" or "lenient" treatment, as were women and children.[61] Many noted the need for forgiveness and reconciliation of former rebels "to release the flow of grudge in our blood stream," but they felt some actions were beyond the pale, violated social taboos, and deserved punishment. Others identified a particular hierarchy of criminality and abuse, listing the unforgivable crimes as "rape, sexual slavery, human butchering and cannibalism," while both male and female respondents highlighted that sexual slavery should be severely punished.[62] Personal knowledge and experience unsurprisingly inform the value judgments made about particular forms of offence, with ideas of honor and shame supplying a fundamental interpretative framework for understanding moral agency and accountability, as well as Christian notions of forgiveness and innocence.[63] Only one person suggested that everyone should be found "not guilty" because "I want those still left in the bush to return without fear and to spread a forgiveness mentality."[64] Overall these interviews are indicative of a limited reconciliation between former LRA abductees, their communities, and their former captors: the desire for

reconciliation and the recognition of the importance of forgiveness in that process is still weighed against the need to see those designated as responsible for individual and community suffering held accountable for the worst of their actions.

These oral testimonies are inevitably cast through the life experiences and the current sociopolitical contexts of Lamwo and Uganda more broadly. What emerged from these discussions was the need to strengthen and reform existing civil and criminal justice frameworks within Northern Uganda. Returnees unanimously stated that justice was neither functioning nor available for all in Acholi, with money and status viewed as prerequisites for accessing any form of justice, which supports Anna Macdonald's research on Acholi legal structures.[65] Respondents noted that "our justice here is terrible because it's based on money only," that community members tend to avoid attending case proceedings because they think these are "already fixed to suit a particular party with status and money or property," and that "only the rich get justice, we the poor get no justice whatsoever."[66] The concern about money and the commodification of justice seems linked to tensions surrounding the increasing costs of both civil cases and bridewealth, but it also reflects debates on the rising costs of *mato oput* and who should bear the costs of compensation in those ceremonies, which are exacerbated by wider agitation about poverty and social inequality. It is also linked to social and generational tensions surrounding the nature of power and authority in Acholi, as well as concerns about the self-interested actions of chiefs. One young woman simply noted that "I believe I am the wrong person to answer this because I have very little knowledge about this so I prefer you ask me another question, those in power can help you very well," which was indicative of a wider disengagement and sense of legal disenfranchisement among interviewees.[67] Another interviewee suggested that "our justice system needs to be revised and the right uncorrupted people need to be in these positions, otherwise I have no trust in our justice system."[68] As this evidence from Lamwo indicates, the injustices and inequalities that can push children into conflict, or drive the conflicts into which they are recruited, need to be addressed for any truly successful transitional justice to be delivered.

The treatment of child soldiers highlights the tensions in transitional justice between local and global norms, justice for individuals and

communities, and the difficulties of categorizing individuals and their actions. An historical survey highlights that child combatants are often acutely aware of the injustices that drive conflict but have not expected the law to provide justice for themselves or their communities. It also highlights that the modern "child soldier crisis" is a product of international humanitarian action and child rights norms, which have in turn shaped the development of children's positions within IHL. The universalized definition of childhood embedded in global humanitarian law and politics is, however, "too blunt an instrument" to address the complexities of children's involvement in war; a more nuanced, historicized, and ethnographically contextualized understanding of "childhood" is needed.[69] Future research will hopefully delineate the multiple social meanings of childhoods within different African environments from the twentieth to twenty-first centuries, researching childhoods not just as a life stage leading to adulthood but reclaiming children's subjectivity and their ability to be reflexive about their lives and identities. That is, it will investigate children as "beings" rather than just "becomings."[70] The identities of child soldiers in particular need to be understood as processes of strategic self-representation, shifting according to context and audience and formed at the intersection of local and global models of childhood and rehabilitation.[71]

There is a parallel need for ethical and sensitively conducted interdisciplinary research into children's understandings of law and justice, in both war and peace. If transitional and traditional justice are ultimately about restoring social equilibrium between communities, and if youth under eighteen are regarded as active members of those communities, some form of accountability seems necessary for the actions of child soldiers. Restorative justice lessons drawn from juvenile justice have more recently been promoted as effective for children in transitional justice frameworks. Those lessons focusing on informal and flexible procedures that emphasize future welfare and community relations rather than individual punishment for past offences should be supported because those procedures promote a child's ability to contribute to the community rather than isolating them from it.[72] There will always be tensions between the right of an individual child soldier to protection and rehabilitation, on the one hand, and a community's right to justice, on the other. But we need to understand the child's ideas of justice—what it is, and what it should be—to facilitate their contribution to community reconciliation. A balance needs to be struck between a former child

soldier's right to protection and their right to agency and consequent accountability, between their limitations and their capabilities for functioning within the realms of justice.

Academic and policy research has recently stressed the need for gendered justices; the argument of this chapter is that generation and age also need to be taken more seriously as a vector of and for justice. More research is needed into African children's ideas of law and justice, both in peace and in war. As Dorothy Hodgson has noted, there is a particular moral authority of motherhood owned by and accorded to African women.[73] Perhaps we should also be talking about the moral potentiality of childhood. Children's roles in the political and moral economies of justice need to be acknowledged and engaged with: we need to listen to, rather than simply speak for, children in arenas of international and domestic law.

Notes

1. Statement from a child who participated in the TRC Raising Awareness Workshop, Madina, November 16–18, 2007. Quoted from Republic of Liberia, *Truth and Reconciliation Commission Final Report*, vol. 3, title 2, "Children, the Conflict and the TRC Children Agenda" (Monrovia, Liberia: Truth and Reconciliation Commission of Liberia, 2009), 104.

2. See Guy S. Goodwin-Gill, "The Challenge of Child Soldiers," in *The Changing Character of War,* ed. Hew Strachan and Sibylle Schiepers (Oxford: Oxford University Press, 2011), 410–29; Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford: Oxford University Press, 2012); Julie MacBride, *The War Crime of Child Soldier Recruitment* (The Hague: T.M.C. Asser Press, 2014).

3. Graça Machel, foreword to *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation,* ed. Sharanjeet Parmar, Mindy Jane Roseman, Saudamini Siegrist, and Theo Sowa (Cambridge, MA: Human Rights Program at Harvard Law School, 2010), x–xi.

4. David M. Rosen, "Child Soldiers, International Humanitarian Law and the Globalization of Childhood," *American Anthropologist* 109, no. 2 (2007): 296.

5. UNICEF, "Cape Town Principles and Best Practices," Adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, South Africa, April 27–30, 1997, http://www.unicef.org/emerg/files/Cape_Town_Principles%281%29.pdf.

6. See Afua Twum-Danso, "The Political Child," in *Invisible Stakeholders: The Impact of Children on War,* ed. Angela MacIntyre (Pretoria: Institute of Security Studies, 2004), 7–14; Alcinda Honwana, *Child Soldiers in Africa* (Philadelphia: University of Pennsylvania Press, 2005), 40–45.

7. Susan Shepler, *Childhood Deployed: Remaking Child Soldiers in Sierra Leone* (New York: New York University Press, 2015), 25–45.

8. See Deborah Durham, "Youth and the Social Imagination in Africa: Introduction to Parts 1 and 2," *Anthropological Quarterly* 73, no. 3 (2000): 113–20; Jon Abbink and Ineke van Kessel, eds., *Vandals or Vanguards: Youth, Politics and Conflict in Africa* (Leiden: Brill, 2005); Alcinda Honwana and Filip de Boeck, *Makers and Breakers: Children and Youth in Africa* (Oxford: James Currey, 2005).

9. See Gerd Spittler and Michael Bourdillon, *African Children at Work: Working and Learning in Growing up for Life* (Berlin: Lit Verlag, 2012); Marie Rodet and Elodie Razy, eds., *African Migrations in Childhood: Historical Roots, Contemporary Challenges* (Oxford: James Currey, 2016). On new histories of African childhood, see Abosede A. George, *Making Modern Girls: A History of Girlhood, Labor, and Social Development in Colonial Lagos* (Athens: Ohio University Press, 2014); Jack Lord, "The History of Childhood in Colonial Ghana, c.1900–57" (PhD diss., SOAS University of London, 2012).

10. See Honwana, *Child Soldiers in Africa;* Michael Wessells, *Child Soldiers: From Violence to Protection* (Cambridge, MA: Harvard University Press, 2009).

11. See Mario Kolk, *Can You Tell Me Why I Went to War? A Story of a Young King's African Rifle Reverend Father John E A Mandambwe* (Zomba: Kachere Books, 2007).

12. "The Children of Manama: The School as Battle Ground in Rhodesia/Zimbabwe," unpublished paper, 1977, Terence Ranger Papers, Rhodes House Library, University of Oxford; Chioma Mundy-Castle, *A Mother's Debt: The True Story of An African Orphan* (Bloomington: Author House, 2012); Alfred Obiora Uzokwe, *Surviving in Biafra: The Story of the Nigerian Civil War* (Lincoln, NE: Writer's Advantage, 2003), 43.

13. See Angela Veale, *From Child Soldier to Ex-Fighter* (Pretoria: Institute for Security Studies, 2003); Vivi Stavrou, "Breaking the Silence: Girls Forcibly Involved in the Armed Struggle in Angola," *Christ Children's Fund Angola Research Project* (2006).

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38. See chapters by Patrick Hoenig and Holly Porter in this volume for African women's engagements with justice systems. On African women's agency and international rights interventions, see Dorothy L. Hodgson, ed., *Gender and Culture at the Limit of Rights* (Philadelphia: University of Philadelphia Press, 2011), and Balghis Badri and Aili Mari Tripp, eds., *Women's Activism in Africa: Struggles for Rights and Representations* (London: Zed Books, 2017).

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54. Prudence Acirokop, "The Potential and Limits of *Mato Oput* as a Tool for Reconciliation and Justice," in Parmar, Roseman, Siegrist, and Sowa, *Children and Transitional Justice,* 267–92. There is a pressing need for research into the historical development of customary law in Acholiland to better contextualize contemporary legal developments, and indeed into shifting notions of Acholi "childhood."

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56. Many thanks to my research assistants Elizabeth Laruni, from MISR, and Wilson Kambel.

57. Interview 8, ca. 30-year-old male, Lamwo District, week of February 2, 2015.

58. Interview 5, ca. 23-year-old female; Interview 2, ca. 34-year-old male, Lamwo District, week of February 2, 2015.

59. Interview 6, ca. 25-year-old male, Lamwo District, week of February 2, 2015.

60. Interview 1, ca. 30-year-old male, Lamwo District, week of February 2, 2015.

61. Interview 11, ca. 24-year-old male, Lamwo District, week of February 2, 2015.

62. Interview 7, ca. 24-year-old male, Lamwo District, week of February 2, 2015.

63. Bård Mæland, "Constrained but Not Choiceless: On Moral Agency among Child Soldiers," in *Culture, Religion and the Reintegration of Female Child Soldiers in Northern Uganda,* ed. Bård Mæland (New York: Peter Lang, 2009), 5.

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65. Anna Macdonald, "From the Ground Up: What Does the Evidence Tell Us about Local Experiences of Transitional Justice?," *Transitional Justice Review* 1, no. 3 (2015): 75–121.

66. Interview 1, ca. 30-year-old male; Interview 5, ca. 23-year-old female; Interview 4, ca. 20-year-old female, Lamwo District, week of February 2, 2015.

67. Interview 3, ca. 20-year-old female, Lamwo District, week of February 2, 2015.

68. Interview 1, ca. 30-year-old male, Lamwo District, week of February 2, 2015.

69. Rosen, "Child Soldiers," 304.

70. Allison James, "Life Times: Children's Perspectives on Age, Agency and Memory across the Life Course," in *Studies in Modern Childhood: Society, Agency and Culture,* ed. Jens Qvortrup (London: Palgrave Macmillan, 2005), 248–66; Emma Uprichard, "Children as 'Beings and Becomings': Children, Childhood and Temporality," *Children & Society* 22, no. 4 (2008): 303–13.

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TEN

Good and Bad Muslims

Conflict, Justice, and Religion among Somalis at Dagahaley Refugee Camp in Kenya

FRED NYONGESA IKANDA

I WAS ALERTED TO THE UBIQUITOUS INFLUENCE OF *MASLAHA* (AN Islamic concept that connotes public weal) on the lives of Somalis soon after commencing fieldwork in a village lying adjacent to Dagahaley refugee camp in northeastern Kenya when villagers ousted the food committee chairman for alleged misappropriation of foodstuffs. In quick succession, a female pupil from the deposed chairman's lineage fought and injured a male pupil from the village chairman's lineage. Because blood had been spilt, village elders asked the girl's parents to pay the village chairman's lineage 1,500 Kenyan shillings (KSh)[1] as a *maslaha* settlement. The following day, the same girl fought with a girl from the chief's lineage. Subsequently, ten men escorted her to the police station where they lodged an assault case against the chief's lineage. This occasioned another round of *maslaha* talks, and the parents of the girl from the deposed chairman's lineage were paid KSh 1,000 before they withdrew the police case.

When the same girl got into another gratuitous school fight three days later, it became apparent that her lineage was seeking revenge against the two village leaders for having ratified changes to the food committee. A teacher asked her to go and fetch one of her parents. Instead, a group of fifteen parents dramatically stormed the school

and withdrew their children from class, claiming that the teacher was siding with their rivals to unfairly punish "one family." Following a *maslaha* meeting, the girl's lineage agreed to return their children to school after being promised a position on a newly formed committee. This vignette illuminates a wider reality of how *maslaha* and kinship were foregrounded in the justice-seeking process among Somalis in the course of my fieldwork. As shown above, the Somali notion of *maslaha* was basically a kin-based form of justice that was typically undertaken by lineage elders who usually assembled under an acacia tree for reconciliation discussions whenever a conflict erupted. Although *maslaha* connotes peace, it often epitomized revenge because it was the possibility of retribution and the concomitant fear of avoiding it that drove the reconciliation process.

In this chapter, I analyze the disputation process among Somali locals and refugees based on ethnographic research I conducted using a mixture of Swahili and Somali languages[2] between August 2011 and August 2012. Dagahaley, together with four other camps (Ifo, Ifo 2, Hagadera, and Kambioos), are commonly referred to as the Dadaab Complex because they are closely clustered around the town of Dadaab, which has hosted Somali refugees since the 1991 outbreak of civil war in Somalia.

The Dadaab camps' long-term existence has largely been sustained by relationships that go beyond it, especially because the majority of refugees and locals belong to the same ethnic group, speak the same language, and share cultural and historical ties.[3] The two groups' practice of nomadic pastoralism, kinship relationships, and centuries-old interactions, indeed, suggest that the establishment of the camps about seventy-five kilometers from the porous Kenya-Somalia border merely intensified their previous relations. The attempt by bureaucratic actors to draw an indelible line across the lives of Somali "locals" and "refugees," therefore, tended to map imperfectly onto the way people managed their daily lives. Bureaucratic distinctions were particularly rendered partial in disputes, which, like elsewhere, acted as a major terrain for negotiating social life.[4] Fights and arbitrations often transcended local-refugee categories inasmuch as relatives often aligned themselves against nonrelatives across the camps, local villages, surrounding bushes where Somali nomads[5] operated, and in neighboring countries where ethnic Somalis reside.[6]

Somalis are a patrilineal, Islamic people who are divided into clans, subclans, and lineages. The majority of local inhabitants at the Dadaab

camps belong to the Darod clan family, who are the largest and the most widely distributed among the Somali clans.[7] Dafa[8]—a village named after its founding chief where I conducted my fieldwork—is inhabited by the Aulian sub-subclan of the Ogaden subclan that is part of the larger Darod clan confederacy. The Aulian have a big presence in Somalia and Ethiopia's Ogaden region. They are subdivided into nine lineages or "doors" as they themselves commonly proclaim—following Aulian's two sons who are the founding ancestors of the nine Aulian lineages. The village contains five of these lineages. They correspond to distinct homelands in Kenya that are within a one-hundred-kilometer radius: the Songat, who traditionally inhabit Dadaab; the Haus from Kulan and the border town of Liboi; the Afwar from Shantabaq and Korofani; the Rer Ali from Modogashe; and the Rer-adhankher from Kumahumato. They were drawn to camp areas by the flourishing aid economy and have typically organized themselves into lineage-based clusters. The remaining four lineages coalesced under a different chief in a neighboring village.

Because of the fact that refugee flight patterns were generally influenced by kinship considerations in the context of the Somalia war that was often waged along clan lines, the majority of Dadaab's earliest arrivals also belonged to the Darod clan. During my fieldwork, however, the area was experiencing one of the worst droughts in the Horn of Africa, which resulted in a huge influx of mostly non-Darod refugees from Somalia. Many were fleeing territories held by al-Shabaab[9] militants who had banned relief assistance and instituted a terror campaign against those whose Islamic credentials did not measure up to the ideal of what the group ostensibly described as "good Muslims."

An enduring aftermath of these dynamics was the emergence of "new" and "old" refugee distinctions that were largely inspired by earlier arrivals' (who defined themselves as "old" refugees or locals) attempts to link the then prevailing insecurity to later arrivals, whom they labeled as "new" refugees. This insecurity was characterized by guerrilla-like attacks by suspected al-Shabaab militia, who mainly targeted police convoys using a range of explosive devises (bombings) in retaliation for the 2011 Kenyan military incursion into Somalia. A common complaint among "old" refugees and locals was that "new" arrivals had been socialized in "al-Shabaab culture," which supposedly "believed in guns" as opposed to religion. Accordingly, the bombings were increasingly seen as an extension of al-Shabaab's distinctive violence that was particularly

hallmarked by its harsh brand of punishment (beheadings, amputations, stoning, and flogging), which allegedly was routinely meted out to their relatives in Somalia.

Somalis have been described in conventional ethnography as organized according to a segmentary lineage model whose "pastoral democracy" is ostensibly governed by the philosophy of consent and lengthy discussions where every male has a say in council.[10] The segmentary model is, in fact, generally construed as a channel for creating or resolving conflicts.[11] The idiom of nomadism as a concern with feud and anarchy,[12] moreover, suggests that Somalis are unwilling or unable to operate within relief agency and government bureaucracy. Contrary to these suggestions, the chapter highlights how state and international justice (in the form of police and other agencies), as well as al-Shabaab-induced practices, have increasingly altered traditional channels for seeking justice among Somali people.[13] Opposition to characterizing Somali society as egalitarian has recently gathered pace, most notably in works that interrogate functionalist reifications of the Somali war.[14] Certainly, the idea of an ever-present potential for conflict that is at the core of segmentary lineage analysis is essentialist, especially because camp and noncamp contexts are too different to be easily discussed in the same terms. I am not, however, concerned with furthering the critique of functionalist analysis of Somali society per se. Instead, I seek to demonstrate that, although ideas about justice were intricately linked to *maslaha,* external influences have widened disputation options and that Somalis flexibly utilize these channels in their quest for justice.

I first frame the chapter within the concept of legal pluralism before showing the importance of *maslaha* in resolving conflicts among Somalis. I then focus on contested ideas of Islam based on al-Shabaab's attempts to purify Islam.

New Forms of Legal Pluralism

While disagreements exist on what constitutes law,[15] legal anthropologists generally concur that all societies have recourse to a repertoire of norms that constitute a form of "legal pluralism."[16] In many African societies, the establishment of structured hierarchies of formal courts accompanied the process of colonization. Colonial law was often superimposed on customary law—as long as the latter was deemed as not being repugnant.[17] These plural systems continued to serve as official channels of justice after independence.[18] In Kenya, *kadhi* courts

adjudicated most disputes between Muslims during the colonial period. Susan Hirsch has documented the prominent role that these courts have continued to perform in hearing claims of marriage, divorce, and inheritance among Muslims following their official recognition at Kenya's independence.[19] Although their influence has waned somewhat owing to state supervision that is perceived as having a diluting impact on the application of Islamic law, these courts are often preferred over secular courts because they are renowned for preserving Islamic ideals.[20] Many Muslims have, therefore, tended to use formal secular courts only when litigants want state-enforceable judgments.[21]

Discussions of legal pluralism often place state laws on top of the hierarchy of norms.[22] State law ostensibly displaces prevailing local regimes because of its coercive power.[23] Commentators even suggest that state law has achieved unprecedented importance in the present era of declining religious influence.[24] Historical circumstances in the larger northeastern part of Kenya have, however, undermined the effectiveness of state law in the region. Before the advent of the camps, for example, the area was remote and inaccessible because of the systematic marginalization it endured at the hands of colonial and postcolonial governments. Some scholars have even concluded that Kenyan Somalis are second-rate citizens who are inside the state's orbit only when it comes to security concerns but are otherwise outside its purview in developmental matters.[25]

The absence of government influence in the lives of Kenyan Somalis was particularly amplified by their nomadic culture, which elevated the role of religion and kinship in organizing social life and resolving conflicts. As the opening vignette underlines, the closeness and trust with which Somalis perceive their relatives is reflected in the fact that the word "*reer*" (family) is applied (equally it seems) to both members of a household and those of the entire lineage.[26] It was hard to discern finely drawn distinctions in the way people treated lineage and household members during my fieldwork insofar as individual problems were perceived to affect the entire lineage. Thus, the disputation process—as described elsewhere[27]—was largely dictated by collective allocation of liability where payments and distribution of compensation was done by the entire lineage. Throughout my fieldwork, adult male lineage members assembled almost daily—often in homesteads of respected lineage elders—where they would chew *miraa*[28] together for the better part of the night. It was in such gatherings that decisions about retaliation or

compensation were mostly made whenever one of the lineage members was involved in a dispute. And although payment or receiving of compensation was often deemed to be a lineage responsibility, offenders or aggrieved individuals generally paid or received the largest share of the compensation. In the village and camp where I worked, this communal approach to resolving conflicts also obligated people to resolve conflicts "religiously" through the process of *maslaha.*

At the Dadaab camps, state power was most visibly demonstrated by the heavy police presence. Because of the al-Shabaab-induced insecurity, the camp was literally sandwiched between two police posts. In addition, a magistrate came to hear criminal cases involving both refugees and locals for the last week of every month. The office of the United Nations High Commissioner for Refugees (UNHCR) and its humanitarian partners had the responsibility of establishing policing mechanisms in the camps. But as mentioned above, state and international justice[29] procedures were largely ineffective at Dadaab and were often subordinated to kin-based *maslaha,* which enjoyed greater legitimacy in the eyes of locals and refugees. For example, although the Lutheran World Federation was charged with overseeing camp security and administration, it did not have a physical presence inside the camp. Instead, it carried out its core mandate through elected refugees who performed the role of community policing.

Still, state and international actors wielded considerable power within the camps. They could occasionally deploy the threat of *refoulement* (forceful return to the country of origin) or suspension of essential services as levers for ensuring compliance with local and international norms. When two agency workers were abducted at Ifo 2 camp in October 2011 by suspected al-Shabaab militants, for example, basic refugee provisions were suspended almost immediately. Soon afterward, government and agency officials organized a series of "peace meetings" that turned into avenues for brazen threats that refugees would be expelled if they did not reveal the culprits. It was not until refugees organized a peaceful demonstration four weeks later—displaying posters lauding government and agency "peace efforts"—that essential services were restored.[30]

State and international justice, moreover, expanded the range of disputation options for Somalis. Throughout my fieldwork, for example, the police station proved a popular alternative to *maslaha.* Similarly, UNHCR commonly accommodated people who were expelled from the village or camp for engaging in acts that were deemed *haram* (illegal).

These different forms of legal pluralism also gave people a chance to reflect on the appropriateness of the various methods in relation to religious moralities and cultural ideals. For example, external disputation mechanisms tended to ignite moral deliberations over what consititutes good or bad Muslims inasmuch as they challenged conventional ideology. In a nutshell, external influences had increasingly resulted in the erosion of trust. This forced those disillusioned with the traditional channel of resolving conflicts to pursue their grievances in a serial fashion. I use the case of Kassim to illustrate this point.

Kassim—a close informant—operated a retail shop in the town of Dagahaley. Most of his customers took goods on credit and paid for them at the end of the month after earning their wages or selling their food rations. He kept a record of his credit transactions in an exercise book and would always remind his customers of their accumulated debt whenever they came for more supplies. Surprisingly, none of his customers ever verified Kassim's figures, an act he attributed to kinship ties: "Most of them are my relatives who know that I can't steal from them," he explained. Following the long drought, Kassim claimed to have lent foodstuffs worth KSh 150,000 to a family of distant relatives on the strength of the fact that the head of the household's sister had succeeded in getting third-country resettlement in the United States. The debt accumulated gradually because he was repeatedly told that the woman in the United States was still settling down and needed time to look for work before starting to remit money to her brother. This did not worry Kassim. He had operated on this basis before and was happy to let the debt grow since, at the time, this also seemed like a way of saving for the future.

Eventually, however, he grew impatient because it was taking a long time and the family's promises were not being fulfilled. When he sought the intervention of lineage elders, the family in question acknowledged having been supplied with foodstuffs but differed on what they owed Kassim. "They claimed I had given them goods only worth KSh 80,000 instead of the KSh 150,000 and at this point, I knew they were looking for ways to steal my money," he explained when I met him at the police station where he had come to report the case. The elders had simply asked the debtor to swear by the name of God that he had borrowed goods worth KSh 80,000 and instead of losing everything, Kassim agreed to the sum of KSh 80, 000 and a promise that the family would pay in four monthly instalments of

KSh 20,000. He was then paid KSh 20,000 as first instalment and only KSh 8,000 the following month. That is why he had decided to seek police intervention. Kassim had to pay a KSh 2,000 bribe before police arrested the male family head, who was released shortly afterward when the man's close relatives paid Kassim a further KSh 10,000. By the time I was exiting the field, Kassim was still owed KSh 42,000 and kept insisting that he would find a way to recover his money: "I have to recover all my KSh 150,000 even if I have to rob them to get it," he would swear furiously.

The move by elders to invoke religion as part of their conflict resolution procedure is not unique to Somalis. In another Islamic context in Kenya, for example, the morality of choosing the police over a religious disputing option was deemed inappropriate.[31] But as opposed to the fear of exposing family matters to public scrutiny in the Kenyan coastal context, Somalis generally asserted that good Muslims should follow the dictates of their religion by resolving all conflicts through the channel of *maslaha*. Kassim's case shows that the "traditional" method of disputation was preferred over other forms, notwithstanding the competing interests of disputants. This was largely due to strong kinship ties and the pressure that was often exerted on individuals to show conformity with Somali customs. Many people underlined their commitment and capacity to defend Islamic ideals through acting communally against *haram* conduct. In cases where women conceived out of wedlock, for example, community members would routinely hurl stones at their homes at night until the women's families relocated away from the camp. The government's capacity to prosecute those perpetuating violence against others appeared all but nonexistent. However, the state and the UNHCR did routinely intervene in protecting victims who were expelled from the community by relocating them to a "safe haven" inside the UNHCR compound at Dagahaley. Thus, police and safe haven options significantly altered the social and religious contours of the camps. Contrary to Islamic prescriptions of gendered space,[32] for instance, women and men residing at the safe haven mixed freely and often took alcohol, to the apparent chagrin of other community members.

As the case of Kassim has shown, Somalis, like other nomads elsewhere,[33] did not regard the police as having the authority to resolve internal feuds. In the opening vignette, for example, people approached police officers merely to remind opponents about the need to initiate

or comply with *maslaha.* Thus, new options for legal redress have reconfigured long-standing ties of kinship and mutual assistance. Still, *maslaha* was the most ubiquitous concept in disputation. It is to the predominance of the concept's role that I now turn.

The Working of *Maslaha*

According to conventional ethnography, *diya*—a group of related lineages who collaborate in fighting together and in paying and receiving bloodwealth through social contract—is a critical Somali institution that helps reduce incidents of open conflict.[34] However, people rarely made reference to *diya* at my field site, perhaps because its interpretation had evolved following the setting up of camps and villages. This illustrates the fact that "traditions" are not the timeless abstractions that colonial ethnographers often portrayed them to be. Rather than *diya,* the most ubiquitous concept at the village and camp settings was the notion of *maslaha.*

The idea of *maslaha* gained currency as a universal general principle that permeated all commands especially after the eleventh century and is today the most flexible and rational method of Islamic legal reasoning.[35] This is because it is more context friendly, links the good in the world to the hereafter without limiting the common good to material utility, and its application supposedly inoculates the law against abuse.[36] For these reasons, one earlier Islamic scholar "unambiguously declared *maslaha* to be the overriding principle of shari'a, and as such superior even to scripture and consensus."[37]

As an Islamic concept, *maslaha* resonated with both locals and refugees at Dadaab. The concept's popularity stemmed from its primacy in mediating conflicts and in ordering relations, and it was particularly entrenched by clan and subclan affiliations and antagonisms that have historically ordered the political field among Somalis.[38] However, the Somali *maslaha* notion was loaded with various cultural aspects. For example, reference to *maslaha* in the camp areas seemed only to be made in relation to fights. As many of my interlocutors explained, *maslaha* was primarily concerned with reconciliation, as spelled out in the Holy Qur'an's *hadith,* where every crime has a prescribed remedy, mostly in the form of fines. However, they were also keen to point out that the person to be compensated could decide to waive or accept a lesser fine if he did not wish to unnecessarily ignite an endless sense of ill-feeling or believed that what had happened was accidental.

However, the alternative to *maslaha* was often *aargutsi* (revenge). Revenge was, in fact, so normal in the camp and village settings that it almost seemed to be synonymous with *maslaha.* Still, reconciliation was the antithesis of revenge. The striking resonance of these concepts merely depicted them as two sides of the same coin, both contained in the Somali disputation process. Still, *maslaha* denoted peace. There might be a vicious revenge cycle following fights or perceived incidents of wrongdoing, but as I was repeatedly told, in the end *maslaha* would bring peace. Many people also pointed out that there should ideally be a twenty-four-hour window before revenge is taken. Those who have caused serious injury or death have an obligation to alert one of their close relatives within this time frame. If this time limit expires without initiation of *maslaha,* it would be assumed that offenders had chosen to "disrespect" the wronged party.

An understanding of clan, subclan, and lineage alignments is necessary for comprehending how the concept of *maslaha* is perceived and applied among Somalis at Dadaab. Because strong kinship ties pervade Somali sociality, individuals' actions were often tied to their larger lineage in the village, camp, and other places where kinsmen resided. If someone committed a crime in any of these places, his or her relatives in the larger social network would be obligated to negotiate a peaceful settlement. Otherwise, revenge—which is largely perceived as a moral imperative—could be taken against anyone associated with the larger group. Similarly, the decision of lineage elders is binding for all members of the social group in different places. Once a settlement is reached through *maslaha,* all members of the lineage are informed and should abide by the elders' decision. If they do not, they risk touching off an endless cycle of feuds, and elders—who act on behalf of their respective lineages or clans—would be blamed for the actions of their lineage members. That, I was told, is why elders are respected in Somali society.

The Application of *Maslaha*

What happened in practice was often at variance with the ideal *maslaha* prescription outlined above. It was this ideal, however, that provided the general framework that guided the reconciliation process. In other words, the first step to reconciling warring parties was to attempt to impress on them the importance of adhering to religious and cultural requirements by reminding each party about what should have been done to avoid the current situation and what needed to be done now

that injury or death had occurred. This became evident only a few weeks after the beginning of my fieldwork. One Saturday morning, I saw my host father, who was also the village chairman, loading his donkey cart with building material. He explained that he was going to the recently established Ifo 2 camp where "new" refugees were hosted. The local councillor had allocated him a plot at the proposed market center next to the camp, and he wanted to construct a restaurant in readiness for the widely anticipated business boom that would accompany the creation of a food distribution center.[39] At that time, refugees at the new camp were still getting their food and nonfood items from Dagahaley because food stores had not been set up at their camp.

I also noticed that our neighbors—mindful of the stakes—were similarly loading their donkeys, and it soon became apparent that almost every household had been allocated a plot at the new camp. While chatting with friends at the police canteen where I usually had drinks later that afternoon, two men who were bleeding profusely from head injuries came to report that they had been attacked by "people we know" over a plot dispute at the new camp. The police officer on duty advised them to get treatment at the nearby hospital and have a doctor fill in a P_3 form[40] before they could arrest the suspects. As soon as the men had left, the police officer commented that he did not expect them to return because "Somalis always prefer *maslaha*." Indeed, the men never did return to the police station again, and when I mentioned the incident to my host father that evening, he explained that the Afwar and Songat "families" had been fighting over some plots at Ifo 2 because the councillor, who was from the Afwar lineage, and the chief, who was a Songat, had separately allocated the same plots to their friends and relatives. Fighting had erupted when one of the chief's relatives accused his competitor of seeking to benefit from the locals' land, even though he was a refugee. He added that the injured men were from the Afwar lineage and that elders had already attempted to initiate *maslaha* even though the Afwar members had indicated they wanted to treat the injured before talks could begin.

At four o'clock the following morning, I was awoken by frantic screams of distress from around the chief's home. Three hours later, my host father came to tell me what had happened. Two of the chief's brothers (fifty and fifty-five years old), his twenty-two-year-old nephew, and the nephew's wife, who had tried to shield her husband from a machete attack, had sustained life-threatening injuries following a dawn raid by

a group of around twenty men who were suspected to be members of the Afwar lineage. The chief had not been affected since he was at his second wife's home at Dadaab when the attack occurred. My host father then assured me I need not worry, as the *vitina* (witch hunt) did not involve us. Meanwhile, the chief's home, which was a short distance away, was steadily filling with people. When I went there, I found two parallel meetings in progress. Around fifteen Songat lineage elders—mainly from Dadaab—were engaged in an animated discussion with the chief on one side of the compound. A group of about twenty male youth, roughly between fifteen and twenty years old, were holding another meeting on the opposite side of the compound. Unlike the elders who were seated, the youth were standing facing the elders' direction and seemed to be anxiously awaiting instructions as to what to do next.

It was this second group that I joined to inquire what had happened. A young man in the group told me that the injured had been taken to the Garissa provincial hospital. Like everybody else, he was convinced that the Afwar were behind the attack. "No wonder that their family name translates to big mouth. That is why they cause endless trouble here in the village," he angrily remarked. Everybody knew the land between Liboi and Dadaab belonged to Songat, he added, and he expressed surprise at how the Afwar had decided to wage war on them considering that the people who had ignited the conflict were village outsiders—one came from Liboi and the other was a Somali refugee from Kismayo. At the police station where I had gone to seek assurances about my own safety, I was told nobody had been arrested. A police friend assured me that I would be safe and pointed out that Somalis would not dare to attack a non-Somali Kenyan who would not consent to *maslaha* negotiations. He added that he would not be surprised if the incident was never formally reported, even if one of those attacked succumbed to their injuries. "Here, it is all about *maslaha.* We can't arrest anyone without a complainant. All we did upon arriving in the village was to take the injured to hospital," he remarked. He then narrated how the chief and a group of elders had earlier approached the police station as if they intended to lodge a formal complaint but instead held a lengthy discussion at the police station's gate before turning back.

This incident reverberated across the region as evidenced by the composition of elders involved in *maslaha* negotiations who were drawn from the various homelands occupied by the five village lineages, as well as the camps and even Somalia. Although *maslaha* talks had duly

been initiated, people worried that Songat might secretly be organizing a revenge attack and that Afwar must surely be mobilizing members across the village, camps, and beyond in anticipation of this possibility. To compound the problem, there was uncertainty as to whether the injuries would result in death, which complicated compensation negotiations. It was not until one and a half months later that a compromise was reached when the injured were finally discharged from hospital with several permanent injuries. My host father, who had been heavily involved in the marathon negotiation meetings that had been ongoing at Dadaab, arrived one evening and announced the good news about a *maslaha* settlement that we had been eagerly awaiting: Songat had paid Afwar KSh 21,000 for the earlier day fight, while Afwar had paid KSh 39,000 to Songat for the injuries sustained during the dawn attack. During various informal discussions with lineage elders, it emerged that the twenty-four-hour waiting period before revenge is taken was a mere guiding principle that was not binding. This argument is well illustrated by Schlee, who writes, "Like in all bargaining situations, the parties may have different bargaining power. . . . The logic of compensation is based on that of retaliation. The only purpose of compensation is to avoid retaliation. If the aggrieved party prefers to retaliate, negotiations about compensation will not even be initiated. The group of the perpetrator may ask for them in vain."[41]

The chief's reputation was sullied considerably as many villagers blamed the incident on his perceived corruption. He was also publicly humiliated during *Jamhuri*[42] celebrations one month later at Dadaab when the Liboi councillor asked the district commissioner (DC) to address the Dagahaley issue before "people finish each other." In response, the DC threatened to sack the visibly distraught chief and announced that he had nullified the plot allocation. When I was exiting the field nearly a year later, villagers had not yet erected structures on the plots at Ifo 2 because refugees were still getting their food rations from the Dagahaley distribution center. In what follows, I consider how al-Shabaab-inspired practices led to the questioning of *maslaha* and other conventional procedures.

Purifying Islam: Al-Shabaab and the Reconfiguration of Social Life

The Dadaab camps are diversely linked to spaces that go beyond international borders.[43] During my fieldwork, the difficulty of delineating

"refugees" from "locals" was always complicated by kinship ties and nomadic pastoralism that problematized the idea of "home" since many families had members scattered across camps, local villages, and among herders in Kenya and Somalia. The back-and-forth refugee movements across the porous border, moreover, corresponded with the ever-fluid political situation in lawless Somalia. Camp patterns often changed as refugees moved in and out of the camps depending on how they perceived the shifting political landscape and balance of power back home.

Consequently, the transformative impact of al-Shabaab's dominance in Somalia was closely felt in the camps and surrounding areas. Al-Shabaab rejected the moderate Sunni form of Islam practiced by Somalis insofar as some of its top leadership was comprised of non-Somalis aligned to Al-Qaeda—the global militant Islamist group—who advocated a radical Sunni Islamic movement. These varying strands are informed by the fact that many Islamic societies interpret shari'a differently.[44] They then apply *adat* (customary law) whenever they deem it to be compatible with shari'a. Thus, different *adat* versions (based on different local customs) abound in the Islamic world.[45] The Somali *adat* version (*xeer*) is so firmly ingrained in Somali sociality that the boundary between customs and Islamic practices is often blurred.[46] Indeed, many Somalis make no distinction between *xeer* and shari'a, believing their *xeer* to be divine law.[47]

Predictably, the al-Shabaab group dismissed *xeer* as soon as it entrenched itself in Somalia. It accused those practicing *xeer* of being "bad Muslims" and embarked on a campaign of purifying Islam by imposing a strict version of shari'a. The al-Shabaab group was easily accepted when it first emerged because it convinced many people fatigued by fighting and clannism that it was capable of creating unity and lasting stability in Somalia. Its promise to rule through shari'a was particularly well received, given that there was little else on the ground in the form of organized secular discourse. Gradually, however, it started to deviate from its original nationalist aims—notably when foreign fighters started to swell its ranks in response to a call to arms by diaspora al-Shabaab militants, as well as a sustained American campaign of drone attacks in Pakistan and Afghanistan against Al-Qaeda targets that drove some jihadists to lawless Somalia.[48] By deploying their superior financial resources, these foreigners assumed leading roles and used their positions to impose a harsh brand of Islam

that was unfamiliar to most people in Somalia. The initial zeal, therefore, slowly gave way to a sense of disenchantment when the group enforced a ban on many Somali customs that it deemed as having eroded the Islamic character of social life.

One of the areas most affected by this drastic reconfiguration was al-Shabaab's attempt to deemphasize the role of kinship and elders in disputation. The process of *maslaha,* as discussed above, pivoted on the respect accorded to elders who acted on behalf of lineages in reconciliation deliberations. According to Gure, a refugee clan elder who came to Kenya in 2008, people were ordered to stop relying on elders and to abandon long-standing practices in favor of a new and more violent form of Islam. "They introduced new rules and condemned our religion, saying what we were practicing was not genuine Islam. They then accused elders of lies and declared that they were the ones who were practicing true Islam. Their strategy was to divide people based on their age and they cheated young people whom they recruited that they would become martyrs upon death for being true Muslims. Those of us who refused to join them fled to avoid slaughter."

Following Gure, it is plausible that many Somalis perceived al-Shabaab's mission as a concern with purifying Islam from Somali culture. The distinction that Gure makes between those who refused to join al-Shabaab (who opted to go to exile) and those who remained behind (construed as having accepted the group's ideology) was often deployed in informal discussions as a temporal benchmark for differentiating good and bad refugees. Good refugees had ostensibly been driven into exile by war, whereas bad ones had come only recently because of the drought. This view gained wider currency in the middle of my fieldwork when police arrested a suspected al-Shabaab operative following a tip-off from a man who claimed that the suspect had chopped off his left foot as part of al-Shabaab's disputation process in Somalia. This was followed by another incident where unknown assailants killed three refugee leaders. Locals blamed "new" refugees in both cases, saying they had been socialized into the "al-Shabaab culture" of resolving differences through guns as opposed to *maslaha.* For many people, *maslaha* was anathema to "new" refugees precisely because the timing of their arrival endorsed a convergence with al-Shabaab's practices.[49] *Maslaha* was compatible with violence and revenge, but it was not considered arbitrary. On the contrary, al-Shabaab's quest to purify Islam was seen as unreasoned, formalistic, and arbitrary.

Central to al-Shabaab's agenda of identifying bad Muslims (whom they branded as infidels or unbelievers) was the notion of accusing those who were deemed to be acting contrary to Islam. For the first time in Somali history, the importance of kinship was contested. As many people put it, your own brother or son could accuse you of theft or any other arbitrary crime and have your limb chopped off as long as he had two witnesses to back his claims. For people like Gure, it created an unstable sense of justice and was, therefore, the antithesis of Somali disputation where religious and clan elders played a central role in relation to *maslaha.*

The significance of kinship in Somali sociality largely draws on the segmentary principle of aligning oneself to close kinsmen as a means of governance and resource access.[50] This is well illustrated by their practice of continuously scattering people and livestock among close relatives across international borders, towns, villages, and camps to maximize on resources in multiple places.[51] For some authors, the Somali kinship supremacy has created a setting where it is "impossible, or at least extremely difficult, for one who is not a kinsman to be trusted."[52] It is the sustainability of this kinship support model that was at issue when al-Shabaab's challenge of its legitimacy in Somalia started to be felt at the camp areas during my fieldwork because of the closeness that existed between "old" arrivals and their relatives back in Somalia. Indeed, the group's influence transcended the international border as demonstrated by the fact that almost every refugee or local family I knew had been affected in some way by its actions. Moulid, a nephew of my host father, told me, for example, that he had been a *miraa* trader "in all forty-two years of my life." He would coordinate *miraa* supply from Kenya and oversee its distribution in Kismayo, Somalia. In March 2011, al-Shabaab arrested him without warning and detained him for seven days for trafficking *haram* substances. Some "brave" elders rescued him when they testified that he was a good person whom they had known for twenty-seven years. He was then released and warned never to sell *miraa.* Soon afterward, he fled to Kenya and was briefly hosted by his uncles in the village before founding his own home. "They were initially good but started being animals in 2008 when they intensified their slaughter campaigns," he explained.

The case of Fawzia, a forty-two-year-old woman whom I had come to know well through the course of my fieldwork, was particularly

remarkable for the way her daily life highlighted the nexus between the camps and regions in Somalia controlled by al-Shabaab. She had been driven out of Somalia by al-Shabaab-induced violence, but the group's ideologies had continued to haunt her long after her exile. On one of my visits to her home, I found two of her brother's sickly children who had recently been brought by some relatives who were fleeing the violence. She explained that her brother was unwilling to come into exile, but he feared for the children's safety and had, therefore, requested that she look after them. On another occasion, she was raising money from relatives to facilitate the release of her seventy-four-year-old father, who had been arrested by al-Shabaab officials. When I went to bid her farewell at the end of my fieldwork, she told me that her husband had been forced to travel back to Kismayo to take care of the family business following the arrest of his brother, who had apparently been accused of shaving his beard. When I visited her eighteen months after exiting the field, she tearfully informed me that her husband had never returned. He had been killed following al-Shabaab's accusation that he was a bad Muslim.

For many locals and "old" refugees, therefore, al-Shabaab—and by extension new refugees—were *shetani* (devils) who did not appreciate that Islam was a peaceful religion that does not condone killings. Indeed, the sense of injustice associated with al-Shabaab's rule was often directed at "new" refugees who lacked kinship connections to integrate in the area's community. Accusations against this group, in particular, dominated proceedings during *barazas* (public meetings for disseminating government policy). In one such *baraza,* my host father framed the group's threat in the following terms when he was invited to speak as the village chairman: "al-Shabaab started throwing bombs around when this camp hosting new refugees was opened. That camp is full of *shetani*."

Despite the harsh anti-al-Shabaab rhetoric in public encounters, however, younger people occasionally supported the group's activities in private conversations. This was particularly highlighted by the experiences of a twenty-year-old village friend, whose previous work as a minibus driver plying the Liboi–Kismayo route had entailed "cooperation" with the group. When I told him I was looking for a cheap electric generator, he offered to get me a tax-free one from Kismayo, where he was "known and respected." He then explained how he had helped some Kenyans to get rich after connecting them to the group,

saying they were good people who were misunderstood by many people. These varying perceptions aptly illustrate how external influences have increasingly reconfigured the traditional mechanisms of disputation that largely revolved around the notion of *maslaha.*

External influences have expanded channels for pursuing justice at the Dadaab Complex, contrary to earlier suggestions that Somalis are too anarchic to accommodate external institutions. Bureaucratic actors altered public space permanently, not only by deploying the threat of *refoulement* and suspension of essential services as levers for ensuring compliance with local and international norms, but also by providing protection mechanisms for minorities and those unwilling to live according to the established moral order. Police authority was, moreover, increasingly invoked by locals and refugees to remind opponents about the need to initiate *maslaha.* Still, kin-based *maslaha* exercised considerable power over locals and refugees because state and international structures often depended on local institutions. This created specific room for kinship and revenge to do their work. However, the seepage of al-Shabaab-inspired practices into Dadaab's landscape resulted in the questioning of the legitimacy of kinship in the disputation process. The discourse on good and bad Muslims, as well as new-old distinctions, indeed, illustrated contested ideas about Islam that reflected many people's anxieties about the growing influence of al-Shabaab on justice and other social issues.

The interaction of multiple disputation mechanisms in the changing political landscape prompted people to reflect on proper ways of pursuing justice. What elevated *maslaha*'s prominence was the belief held by many Somalis that good Muslims ought to pursue justice in ways that conformed to religious moralities and cultural ideals. However, this intersected with social realities in a setting characterized by an increasing erosion of trust. This forced people to pursue grievances in a serial fashion, often in opposition to idealized ways of pursuing justice.

The ubiquity of *maslaha* at the Dadaab camps is an indictment of the view that states are universally the most dominant dispensers of justice.[53] Indeed, the popularity of such local mechanisms illustrates the usefulness of legal pluralism as a heuristic disputation concept in nomadic societies.

Notes

1. During my fieldwork, one US dollar was exchanging for about eighty-five Kenya shillings. Agencies paid their refugee employees an "incentive" that mostly ranged between fifty and one hundred dollars per month.

2. Because I was not completely fluent in Somali, I commonly switched between Swahili and Somali languages while communicating with villagers.

3. Somali minority groups that don't speak Somali, such as Somali Bantus, have a considerable presence inside the Dadaab camps.

4. See Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998).

5. Villagers commonly referred to herders as people "who follow camels" and sometimes as "those staying in the bush."

6. Colonial borders scattered Somalis in five distinct regions, including Ethiopia, Djibouti, British Somaliland, Italian Somalia, and northeastern Kenya.

7. Lee V. Cassanelli, *The Shaping of Somali Society: Reconstructing the History of a Pastoral People, 1600–1900* (Philadelphia: University of Pennsylvania Press, 1982). See also Ioan M. Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa* (New Brunswick, NJ: Transaction Publishers, 1999).

8. I use pseudonyms for villages and people's names to protect the identity of my informants

9. Al-Shabaab means "the youth." The group emerged in Somalia as a radical youth wing of the Islamic Courts Union militia to battle Ethiopian forces who were backing the interim government.

10. Lewis, *Pastoral Democracy.*

11. Ibid.

12. Ernest Gellner, *Saints of the Atlas* (Chicago: University of Chicago Press, 1969).

13. Following Thomas Spear ("Neo-traditionalism and the Limits of Invention in British Colonial Africa," *Journal of African History* 44, no. 1 [2003]: 3–27), I perceive tradition not as something that is timeless but rather as a dynamic process of improvisation that uses past heritage to meet present needs.

14. For example, Catherine Besteman, *Unraveling Somalia: Race, Violence, and the Legacy of Slavery* (Philadelphia: University of Pennsylvania Press, 1999), and Lidwien Kapteijns, "I. M. Lewis and Somali Clanship: A Critique," *Northeast African Studies* 11, no. 1 (2011): 1–23.

15. See Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain," *Journal of Legal Pluralism and Unofficial Law* 42 (1998): 95–106, and Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192–217.

16. Legal pluralism is a situation in which two or more legal systems coexist in the same social field. See John Griffiths, "What is Legal Pluralism?" *Journal*

of Legal Pluralism and Unofficial Law 24 (1986): 1–55; Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (1988): 869–96; Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978); Gordon R. Woodman, "Ideological Combat and Social Observation," *Journal of Legal Pluralism and Unofficial Law* 30 no. 42 (1998): 21–59.

17. Merry, "Legal Pluralism."

18. Shamil Jeppie, Ebrahim Moosa, and Richard Roberts, "Introduction: Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges," in *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-colonial Challenges,* ed. Shamil Jeppie, Ebrahim Moosa, and Richard Roberts (Amsterdam: Amsterdam University, 2010), 13–62.

19. Susan F. Hirsch, "State Intervention in Muslim Family Law in Kenya and Tanzania: Applications of the Gender Concept," in Jeppie, Moosa, and Roberts, *Muslim Family Law in Sub-Saharan Africa*; Susan F. Hirsch, *Pronouncing and Preserving: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: University of Chicago Press, 1998).

20. Hirsch, *Pronouncing and Preserving.*

21. This is especially the case in contexts where one of the litigants is a non-Muslim. See Jeppie, Moosa, and Roberts, "Introduction."

22. See Merry, "Legal Pluralism"; Roberts, "Against Legal Pluralism"; Tamanaha, "Folly."

23. Merry, "Legal Pluralism"; Roberts, "Against Legal Pluralism."

24. E.g., Tamanaha, "Folly."

25. E.g., Emma Lochery, "Rendering Difference Visible: The Kenyan State and Its Somali Citizens," *African Affairs* 111, no. 445 (2012): 615–39.

26. Songat and Afwar were the majority, followed by Haus, Rer-adhankher, and Rer Ali (lineages had between twenty to sixty households each). Large Somali clans such as Darod contain subclans and lineages that might themselves be larger than smaller clans.

27. Lewis, *Pastoral Democracy;* Gunther Schlee, "Customary Law and the Joys of Statelessness: Idealised Traditions versus Somali Realities," *Journal of Eastern African Studies* 7, no. 2 (2013): 258–71.

28. *Miraa* is a narcotic shrub whose bark is widely chewed by Somali males as a mild stimulant, also called *khat.*

29. I use "international justice" here to signify adjudication efforts by international organizations at the camps, as opposed to how the phrase is commonly deployed to reference international tribunals.

30. The abduction of these Spanish aid workers was one of the incidents that spurred Kenya to send troops and tanks into Somalia to fight the al-Shabaab militia. Their employer, Médecins sans Frontières (MSF), announced in July 2013 that they had finally been freed but gave no further details. It is possible that a ransom was paid to secure their freedom.

31. Hirsch, *Pronouncing and Preserving.*

32. As in other Muslim contexts, Somalis relate the issue of gendering space to upholding morality. See Hirsch, *Pronouncing and Preserving.*

33. For example, Fernanda Pirie, "Legal Complexity on the Tibetan Plateau," *Journal of Legal Pluralism and Unofficial Law* 38, no. 53–54 (2006): 77–100.

34. Lewis, *Pastoral Democracy*.

35. Armondo Salvatore, *The Public Sphere: Liberal Modernity, Catholicism, Islam* (New York: Palgrave Macmillan, 2007).

36. Ibid.

37. Ibid, 160.

38. Lewis, *Pastoral Democracy.*

39. Refugees often had some money to spend after selling part of their rations at food distribution centers.

40. A medical report stating the nature of injury. The report was often used as court evidence in assault-related cases.

41. Schlee, "Customary Law and the Joys of Statelessness."

42. This is a public holiday that commemorates the day (12th December) when Kenya became a republic.

43. Cindy Horst, *Transnational Nomads: How Somalis Cope with Refugee Life in the Dadaab Camps of Kenya* (Oxford: Berghahn Books, 2006).

44. Etin Anwar, *Gender and the Self in Islam* (New York: Routledge, 2006); Nahda Shehada, "Flexibility versus Rigidity in the Practice of Islamic Family Law," *Political and Legal Anthropology Review* 32, no. 1 (2009): 28–46.

45. Schlee, "Customary Law and the Joys of Statelessness"

46. Lewis, *Pastoral Democracy*.

47. Schlee, "Customary Law and the Joys of Statelessness."

48. Murithi Mutiga, "How Al-Shabaab Plotted Its Own Slow but Sure Downfall," *Sunday Nation,* March 11, 2012.

49. The view that al-Shabaab had diluted kinship ideals was seemingly linked to the fact that the refugee wave that was triggered by the group's entrenchment in Somalia between 2006 and 2008 was, unlike the earlier 1990s one, less marked by kinship affiliation.

50. E. Gellner and H. Munson, Jr., "Segmentation: Reality or Myth?" *Journal of the Royal Anthropological Institute* 1, no. 4 (1995): 821–32.

51. Fred N. Ikanda, "Kinship, Hospitality and Humanitarianism: 'Locals' and 'Refugees' in Northeastern Kenya" (PhD diss., University of Cambridge, 2014).

52. Lewis, *Pastoral Democracy*, 30.

53. For example, Tamanaha, "Folly."

ELEVEN

Land Restitution (Old and New), Neotraditionalism, and the Contested Values of Land Justice in South Africa

OLAF ZENKER

AS APARTHEID DREW TO A CLOSE IN THE EARLY 1990S, THE PROPERTY clause—as ultimately enshrined in section 25 of the constitution of 1996—emerged as a matter of strategic compromise. While in principle protecting property rights to be expropriated only for "a public purpose or in the public interest" and subject to "just and equitable" compensation, public interest was explicitly defined to include "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (section 25[4][a]). In its subsections 25(4–9), the property clause further provided for the separate demands of land redistribution, tenure reform, and land restitution, which have constituted the three legs of South African land reform up to today.

In this chapter, I explore the shifting values that have been associated with the "land justice" to be achieved through this ambitious land reform program in South Africa.[1] I hereby consciously refrain from studying this process in terms of a normative theory of justice. Instead, and in line with the overall approach of this volume, my focus is exclusively on justice as it is emically understood and constructed by the actors themselves.[2] "Land justice" is thus interpreted descriptively as a continuous coproduction involving various actors engaged in negotiating

and putting into practice the morally rightful distribution of land and landed rights (i.e., rights derived from belonging to particular lands).

Restricting my discussion to the ongoing land restitution process, I deal in the first section with the legal and institutional particularities and problems that have characterized land restitution since its inception in 1994 and that form the backdrop to the recent reopening of restitution in 2014, which had been brought to a halt by a constitutional court order in July 2016. Apart from presenting reasons for being skeptical regarding this reopened process, I critique the restitution process's conceptualization of land primarily as a means of production. This productionist bias within the echelons of the state, which envisions rural residents primarily as would-be smallholder or commercial farmers, has played itself out in a wider political context that has experienced a marked shift toward neotraditionalist policies and legislation since the late 1990s. This process, in which potential farmers in the making have increasingly been transformed, in law, from rights-bearing citizens into lease-holding subjects in perpetuity, constitutes the topic of the following section. The shift in conceptions of restitution beneficiaries can be profitably analyzed with regard to land justice, as I subsequently argue, in terms of competing notions of autochthony. Autochthony here refers to actors' own conceptions of a rightful link between an individual, territory, and group, often self-styling itself as profoundly "authentic," "natural," or "evidently legitimate." Framing the restitution process in terms of autochthony has the advantage of making visible the way that restitution is embedded within much broader competitive moral economies of identity, each variant with its own postulated set of land(ed) rights that transcend narrow concerns with production. This reveals how subtle changes in restitution law, as well as broader shifts toward neotraditionalist legislation, produce complex and transformative conditions for rightful belonging, relatedness, and coresidence, with important consequences for the type of justice that can be achieved with regard to, and through, the land.

Taking inspiration from James Ferguson's observation that "the land question" in South Africa (and elsewhere) is far too often reduced to "the agrarian question," the next section fuses the discussion of autochthony's proclaimed land(ed) rights with Ferguson's notion of "a rightful share": the emic idea that group membership based, for instance, on kinship, locality, indigeneity, ethnicity, or citizenship entails, or should entail, a rightful claim to ownership of, or a share in, the respective

group's wealth.[3] Seen in this light, *belonging* at various scales to multiple groups and their respective territories may be used by actors to press demands on the distribution of these groups' *belongings*. In this way, restitution beneficiaries may share in the "productive values" of restored land, the "consumptive values" of reclaimed land in the form of financial compensation or the profit made from renting or selling it, and the "distributive values" of land as a means for tapping into multiple networks of resource distribution (e.g., wages, remittances, social grants, care, knowledge, contacts, etc.). In other words, land justice is shown to be about both a rightful share *of* the land itself and a rightful share *through* the land, where the former operates as the precondition for the latter. The chapter concludes with a reflection on the possible futures of land justice in South Africa under conditions of an ever-growing scarcity of wage labor and a rise in neotraditionalist politics.

South African Land Restitution and Its Recent Reopening: Transforming Anew the Rural Economy through Productionism?

Mandated through the constitution of 1996, the legal and institutional particularities of the restitution process were laid down in the Restitution of Land Rights Act of 1994. This act provides several criteria according to which claimants are entitled to restitution in the form of either restoration of a right in land or equitable redress (usually financial compensation). The claimant can be an individual (or a direct descendant) or a community. The claimant has to have been dispossessed after June 19, 1913, on the basis of racially discriminatory laws and practices. Finally, claimants must not have received just and equitable compensation and initially had to lodge their claim before December 31, 1998. Significantly, restitution is not limited to former freehold ownership but includes a whole array of registered and unregistered land rights derived from labor tenancy, sharecropping, customary law, and beneficial occupation, among other things. The Restitution Act further established the Commission on Restitution of Land Rights as well as the Land Claims Court (LCC) as its key players. Subsequently, about eighty thousand claims (the official figures have shifted) were validated as legitimate and in need of resolution.[4]

In a media statement by the chief land claims commissioner, dated September 8, 2016, the commission presents the relatively small number of 7,419 claims lodged before the 1998 cutoff date as still requiring

settlement.[5] Yet this statement does not provide an overall figure for the substantial backlog of those claims that were previously "settled" through a formal agreement but still require finalization through transfer of either land or financial compensation. According to the Commission's *Annual Performance Plan 2016/17,* as of November 31, 2015, only 59,758 claims out of the then settled 78,483 claims had also been finalized.[6] The backlog thus still consisted of a total of 18,725 claims. In other words, about 22 percent of all claims lodged before the 1998 deadline were not yet finalized by the end of November 2015.

For a long time, the ANC government strictly opposed accepting any new claims, although both the 1998 deadline for lodging claims and the 1913 cutoff date have been strongly contested. Yet during his 2013 state of the nation address, President Jacob Zuma announced that the government would reopen the process of registering land claims. On June 29, 2014, he signed the Restitution of Land Rights Amendment Act of 2014, which reopened the lodgment period and extended it until June 30, 2019. However, on July 28, 2016, the constitutional court declared the Restitution of Land Rights Amendment Act as entirely invalid from the date of the judgment because of its improper procedural enactment. While prohibiting the acceptance of any new claims after that date, the constitutional court also maintained the validity of those new claims already lodged since 2014. However, these were put on hold and the commission interdicted from processing them until all claims lodged before 1998 have been processed or new legislation has been enacted by Parliament. According to the above-mentioned media statement by the chief land claims commissioner, the reopening of the claims process remains a concern of the government, which is already preparing for a new bill reopening restitution.[7]

In the light of the experience of twenty years of first-wave restitution, many observers (myself included) have been highly skeptical about the reopening of land restitution: given the vast number of new claims under budgetary conditions very unlikely to increase proportionately, restitution would take many decades. Although old claims, according to the constitutional-court ruling, have to be settled before new claims regarding the same land can be processed, the question of how this will be done and how the land rights of older claimants will be protected remains unclear. Furthermore, the commission has been accused of using new counterclaims to justify its refusal to honor transfer agreements and restitution awards that they would otherwise be legally

bound to respect. This mainly relates to recent attempts by the commission to sideline elected communal property associations (CPAs) in the context of reempowering traditional authorities.[8] Even if these new claims cannot, for now, be used for this purpose, there are still doubts about whether all land will now be transferred to legally entitled CPAs in those cases in which traditional authorities also make claims to the same land.

In fact, critics claim that the reopening of land restitution has been motivated by a different calculation, namely, to please the traditional leaders lobby, enabling them to make restitution claims on vast areas of land.[9] President Zuma, speaking before the National House of Traditional Leaders in February 2014, explicitly advised traditional leaders to get "good lawyers" to file restitution claims on behalf of their people. Yet, any individual or community is entitled to lodge a claim; traditional authorities are not accorded any special role in the restitution process. This has not prevented many traditional leaders from expressing their intention to lodge massive land claims—like King Goodwill Zwelithini, who has expressed the intention to lodge a claim for the entire province of KwaZulu-Natal as well as sections of the Eastern Cape, Mpumalanga, and the Free State. The aim is to claim land taken from the Zulu Kingdom during the colonial period—from 1838 onward—first by the Voortrekkers and then the British. However, the restitution act provides for dispossession only after 1913.[10]

Apart from these problems, what is striking is that the reopening of restitution has been justified on the basis of the contribution it is projected to make to the elimination of poverty and the reduction of inequality through a transformation of the rural economy.[11] This transformation seemingly remains firmly based on the vision of restitution beneficiaries making use of their restored lands as new smallholder or commercial farmers. That the restitution process should envision land primarily as a means of production is hardly surprising, given that restitution forms part of the overarching land reform program of the Department of Rural Development and Land Reform (DRDLR) and is meant to contribute to the "agrarian transformation" informing the department's 2009 *Comprehensive Rural Development Programme* and the 2012 *National Development Plan*.[12] Yet, as many studies from South Africa and beyond show, smallholder agriculture generally seems to be on the decline, both in terms of crop farming and livestock rearing, even among those who do have land.[13] In other words, land seems to be

cherished far less for its "productive value" than is commonly assumed within state echelons.

Such a productionist bias seems even more inappropriate in the peculiar case of the restitution process, which—unlike land redistribution and tenure reform—is about redressing historical dispossession through various means rather than about an exclusive focus on land. In fact, in 2013, out of the total of 77,334 claims reported as "settled," 92 percent (71,292 claims) had been resolved through financial compensation rather than by the transfer of land.[14] Even when claimants opted for land, they have not exclusively or even primarily put it to agrarian use or utilized it for production. In fact, land is sometimes being valued as a means of production, yet often also as a means of consumption ("eating the land" through financial compensation, renting or selling it) or a means of distribution. Before focusing on these various usages, I will first address the wider and increasingly neotraditionalist context in which these various values of land have been reconfigured over the past twenty years.

Neotraditionalizing the State of Restitution: From Rights-Bearing Citizens to Lease-Holding Subjects in Perpetuity

Despite the structural incorporation of chiefs into the mechanisms of colonial oppression and the growing popular opposition to the chiefs during the 1980s, section 211 of the 1996 constitution explicitly recognizes "traditional leadership" and "customary law," subject, however, to the constitution and any applicable legislation. Whereas "tribal" authorities have continued to exercise the right, obtained under colonialism, to allocate land in the former "homelands," the impact of "customary law" *within* state law pertaining to land restitution proved rather limited throughout the 1990s. Statutory provisions affecting land restitution at the time strongly emphasized individual rights, structurally bypassing chiefs in the control and allocation of land.[15]

Thus, the Communal Property Associations Act of 1996, in its preamble, enables "communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution." Apart from similar entities like trusts, such communal property associations (CPAs) have constituted the main form in which land restored through restitution has been communally held. According to section 9(1) of the act, CPA constitutions must accommodate fair and inclusive decision-making processes, equality of membership,

democratic processes, and fair access to the property of the association. While traditional authorities are not legally prevented from holding key positions within CPAs and trusts, and often do so, by law they must be democratically elected onto the committee like any other member.[16] Common templates for such CPA constitutions even explicitly restrict the permitted proportional representation of traditional leaders on the committee.[17]

However, under President Thabo Mbeki, the political tide began to turn toward a "African Renaissance" from 1999. In line with a general trend toward neotraditionalism, the Parliament passed the Traditional Leadership and Governance Framework Act of 2003, recognizing traditional leaders and traditional councils and giving these councils broad but largely unspecified functions in the field of development and the administration of their communities in accordance with "custom" and tradition. The act thereby effectively endorsed the tribal authorities set up under the Bantu Authorities Act of 1951 as a legitimate foundation for a post-1994 "traditional" order.[18]

The subsequent Communal Land Rights Act of 2004 envisioned traditional councils as having the authority to administer and allocate land in so-called communal lands, including land in former homelands, but also land already restituted or redistributed to CPAs. In 2010, the constitutional court declared the act invalid because of its improper procedural enactment.[19] Despite this fiasco, another neotraditional bill—the Traditional Courts Bill—was reintroduced into the legislative process in 2011 after its intermittent withdrawal. In the context of renewed substantial opposition from civil society and legal activists fearing this new legislation would give chiefs even more judicial powers than they had under apartheid, "the bill was allowed to 'lapse' in the National Council of Provinces (the second House of Parliament) just before the 2014 elections, when it became clear that the required majority of five out of the nine provinces would not support it."[20] However, in January 2017, a revised version of the Traditional Courts Bill was published once again.

Additional neotraditional legislation was also tabled. The Traditional and Khoi-San Leadership Bill, which is meant to replace the Traditional Leadership and Governance Framework Act of 2003, further entrenches the power of traditional authorities—for instance, regarding their capacity to strike mining deals without consultation with the affected community. While a bottom-up model for Khoi-San leadership is newly introduced, requiring proof of choice by each individual to be

associated with that specific leader, the traditional leadership model reinforces top-down jurisdiction within superimposed apartheid tribal boundaries without any need for prior consent by the affected.[21]

Given the longstanding opposition from traditional leaders toward CPAs within "their" territories, the DRDLR has also increasingly sidelined CPAs by discouraging their establishment wherever there is a traditional council, by refusing to transfer land to them, and by proposing corresponding amendments to existing legislation.[22] What is more, the DRDLR has reversed its earlier emphasis in the 1997 *White Paper on South African Land Policy* on established occupants as "rightful owners" of communal land.[23] In its 2013 *Rural Development Framework,* the DRDLR projects the transfer of title deeds for the "outer boundaries" of communal land to traditional councils, wherever they exist, with merely derived "institutionalised use rights" for ordinary people subject to the overarching ownership of traditional councils.[24]

This effectively means that potential land reform beneficiaries have increasingly shifted from rights-bearing citizens to lease-holding subjects in perpetuity, more and more dependent on traditional authorities. This dependence applies both when they reside in the former homelands and when they are demanding rights in land outside communal areas, to which chiefs also lay claim (see below). This has substantially transformed the conditions under which restitution beneficiaries can imagine their own places in the world, their rightful senses of belonging and relatedness, and the specific forms of land justice they might pursue based on such ways of being and belonging.

Proliferating Autochthonies and the Land Justice of Restitution

While starting from a conception of "rights in land" that is much broader than mere freehold ownership of land, once in motion the restitution process usually narrows its focus to questions of property rights. Yet such a narrow approach arguably prevents an appreciation of the full extent to which the land justice of restitution is enmeshed in a more complex web of proliferating "autochthonies" concerned with questions of where, how, and why (and with what consequences) people rightfully belong.

As I develop in more detail elsewhere,[25] and as mentioned above, autochthony (literally meaning "sprung from the earth" in Greek) refers to an asserted rightful link between an individual, a territory, and a group, often depicting itself as profoundly "authentic," "natural," or

"evidently legitimate." Compared to other analytical notions such as ethnicity, autochthony has the advantage of highlighting the fact that, in many contexts, actors struggle not only with the question of how to imagine collective identities—that is, interconnections between individuals and groups—but also with conceptualizing the interrelations between such identities and specific pieces of land (their territories).

I propose to distinguish two ideal types of autochthony based on the causal direction of connecting individual, territory, and group: in the mode of "individualized autochthony," the place of birth or residence or both first links an individual to his or her territory, which, through land(ed) rights embedded in membership titles, is connected to a group, which, in turn, is likely to link up again with the individual through the possible, though not necessary, connection of a shared culture or descent. This autochthony is "individualized" in that the pronounced rightful link between an individual, territory, and group is essentially produced through the copresence of individuals, that is, through their individual place of birth or residence in their respective presents.

By contrast, "collectivized autochthony" refers to an autochthonous mode in which an individual, through allegedly shared culture or descent or both, first connects to a group that at some point in its proclaimed past rooted itself through the establishment of land(ed) rights for its members in a territory, which is likely to link up again with the individual through the possible, though not necessary, connection of placing the birth or residence of this individual within its own borders. This autochthony is "collectivized" since the asserted rightful link between an individual, territory, and group is essentially established through the past of groups, distinguishing between "earlier-comers" and "later-comers" to that territory based on alleged collective pasts.

These two ideal types of autochthony allow for multiple empirical instantiations, varying in terms of causal direction and scale as well as in the specific meanings and concrete delineations attached to "place of birth," "residence," "territory," "land(ed) rights," "group," "descent," and "culture." In fact, modern citizenship makes use of exactly the same elements and hence can be described as enforcing different versions of "state autochthony." Yet even within a thus-constituted citizenry, additional layers of autochthonous contestation live on regarding more specific questions of land justice—namely, who rightfully belongs (or should belong) where, how and why, and with what consequences for his or her landed entitlements?

Seen within this framework, restitution law has provided unstable templates for imagining forms of autochthonous belonging, with substantial consequences for the land justice that potential beneficiaries have been able to seek, and achieve, through restitution. Take for instance the land claim on the farm "Kafferskraal" situated on the edge of the highveld escarpment to the northeast of Pretoria outside the former homelands, which I investigated as one of several cases during the course of intermittent multisited fieldwork between 2010 and 2016.[26] Known to local Africans as "KwaMaquze," the pejorative farm name "Kafferskraal" has appeared on successive title deeds since it was first granted in private white ownership by the then Zuid-Afrikaansche Republiek (ZAR) in 1872. However, the community of claimants, whose ancestors were forcibly removed in the 1930s, recently used this fact to positive effect, arguing in the Land Claims Court that, as the name indicates, black people had long settled the land and that this fact, and related land rights, survived the superimposition of white registered title. This argument was put forward when the former white landowners unsuccessfully opposed the validity of the land claims that various former African residents had lodged after the end of apartheid.

Thus, the state restored KwaMaquze to the overall group of beneficiaries, consisting of descendants of the original Ndzundza Ndebele that had been deported in the 1930s from the farm, and, in accordance with the Communal Property Association Act, handed over the management of the land to an elected committee, the KwaMaquze Trust. However, local conflicts subsequently erupted, as the traditional council (themselves royal descendants of those deported) started insisting that it is the chief who owns the land in Ndebele culture and hence only he is entitled to manage it. This illustrates that even in a seemingly straightforward restitution case such as KwaMaquze, in which an African community was dispossessed and displaced and now wants to return, the underlying autochthonous logic underpinning local senses of land justice is far from self-evident. Officials settling this claim argued at the time, as did representatives of the elected KwaMaquze committee, that it had been Ndebele individuals and nuclear families residing on KwaMaquze who thereby acquired beneficial occupation rights, of which they were subsequently dispossessed.[27] In other words, they evoked the land justice of small-scale individualized autochthony (as well as a derivative form of small-scale collectivized autochthony based on individual family inheritance), aggregating today into a larger circle of beneficiaries. By contrast,

the chief and his traditional council claimed to have been dispossessed of land rights based on Ndebele "customary law" and culture and belonging to *all* Ndzundza Ndebele, to which individuals were connected through shared culture and descent. In other words, their sense of land justice was rooted in a form of large-scale collectivized autochthony extending beyond the confines of KwaMaquze (correspondingly, the chief had claimed the larger Mahlungulu area comprising a total of seventeen farms).

A rather different case is presented by two communities residing on Kalkfontein farm situated just inside the former KwaNdebele homeland, near the town of settlers to the north of Pretoria.[28] These communities consist of descendants of individuals that came together during the 1920s in order to buy farmland. However, the Natives Land Act of 1913 only allowed for the acquisition of land by blacks within the 7 percent of land specifically scheduled for that purpose. The farm Kalkfontein fell outside these scheduled areas but was part of those areas to be further released for black occupation. Therefore, the governor-general approved exemption, registering the land in the name of the Minister of Native Affairs, who held it in trust on behalf of the copurchasers.

While both communities originally consisted of ethnically mixed groupings with Ndzundza Ndebele, Pedi, and Tswana origins, the situation on portion A of Kalkfontein was rather different from that on portions B and C. For Kalkfontein B and C, thirty copurchasers seemingly came together from different backgrounds to acquire the land unambiguously as private communal landowners. By contrast, a considerable majority of the original buyers of portion A were Ndzundza Ndebele (104 out of 126), who wanted to buy "tribal land" under their chief Januarie Mahlangu.[29] But the former white landowner wanted to make sure that his farm workers, who were not Ndzundza Ndebele, could stay on the farm. He thus sold the land only as communal land under a committee rather than as tribal land under a chief. The Ndzundza Ndebele officially agreed. However, supporters of the royal family have claimed to this day that it had been clear from the start that the ethnically mixed group would accept the leadership of Chief Januarie Mahlangu. Thus, considerable tensions existed from the start between two competing visions of land justice—one advancing the management of the land by an elected committee (as officially written into the title deed), and the other promoting a local chief's rule over Ndebele lands.

The following decades saw a recurrence of conflicts rooted in this basic difference. These became further entrenched when, toward the late

1970s, the South African government created an Ndebele homeland in that very area. Without the proper involvement or democratic consent of the copurchasers, both Kalkfontein communities were constituted as a single "tribe" under the chiefly descendant Daniel Mahlangu in terms of the Native Administration Act of 1927 and subsequently incorporated into the wider homeland, KwaNdebele. This made possible chiefly excesses that antagonized many of his former followers.

For years, members from both communities used various political and legal means to resist this chiefly despotism. Finally, in 2008, the community of Kalkfontein B and C succeeded in using the restitution process to get a court order ensuring the transfer of the land to the elected "Kalkfontein Community Trust." The descendants of the copurchasers of portion A, using the African name of the place, had formed the "Katjebane CPA"; yet at the time of my fieldwork, the official title deed had still not been transferred to the CPA.

Thus, to this day, two conflicting logics of collectivized autochthony have continued to orient local senses of land justice about who belongs to whom, where, and with what kind of rights. In one version of collectivized autochthony, today's right holders are linked through descent to a group of people who were united in the past by the intention to buy Kalkfontein as private communal property, albeit managed collectively through male democracy, in order to have a place for both residence and agricultural production. In the other version of collectivized autochthony, a logic similar to the ethnicized imagination in KwaMaquze can be identified: shared culture and shared descent are seen as linking individuals to the local Ndzundza Ndebele "tribe," which established a rightful claim to the land of Kalkfontein by buying the land as future tribal land.

These and other competing forms of autochthonous belonging (such as smaller-scale individualized autochthony of community members based on household property established through residence) have coexisted for a long time, informing constructions of land justice within restitution as much as conflicting with them. Broader political shifts toward increasingly neotraditionalist policies and laws have recently strengthened the position of traditional authorities in making their own ethnicized versions of autochthony prevail at the expense of more individualized, or alternatively collectivized, imaginations. Yet, however such individual-territory-group triads are being construed, the idea of group membership typically entails rightful claims to land(ed) rights—or in

James Ferguson's recent terminology, a "rightful share" in the group's property that far exceeds the mere right to use land for production.

Rightful Shares or Distributing Belongings through Distributed Belonging

In a number of publications, culminating in the recent book *Give a Man a Fish: Reflections on the New Politics of Distribution,* Ferguson provokes us to rethink the productionist bias common to both development discourse and Marxist orthodoxy, which have seen production as far more profound and "structural" than mere distribution of material goods. In this vein, Ferguson argues, the land question in Southern Africa—"who has what rights to land, what do they do with it and with what implications"—is often unduly reduced to the agrarian question concerning "how farming is, or ought to be, organized, and with what role for peasants or other small agricultural producers."[30]

Yet, under global conditions of jobless growth and increasing concentrations of production at quasi-monopolistic sites (e.g., Canada's dominance in wheat production), Ferguson suggests that land in southern Africa might increasingly become more relevant as a means of distribution rather than as a means of production. In other words, sustaining livelihoods in southern Africa and beyond might increasingly be maintained not only, or even primarily, through productive, but rather distributive, uses of land. Ferguson coins the terms "distributive labour" in order to emphasize the hard work invested every day in tapping into different circuits of resource flows and successfully pressing demands, at different places and with different sets of people, on the resources of others in order to secure one's share.[31]

Ferguson proposes exploring the notion of a "rightful share," descriptively, in order to make better sense of people's claims to be included in distributive flows, "where the rightfulness of the share is reckoned to derive from . . . a kind of membership or ownership-claim based on citizenship, indigeneity or ethnicity."[32] Put differently, rightful shares are rooted in conceptions of land justice based on autochthonous belonging. Ferguson further suggests exploring the normative potential of "the rightful share" in rehabilitating the value of distributive labor and in propagating a new politics of distribution that might be the future for many under global conditions of expansive structural unemployment.[33]

At least with regard to South Africa, Ferguson's suggestions seem to capture an important dynamic. As many academic and public observers

have noted, and often decried, much of the land is used below its potential for production. Yet as Derick Fay and Leslie Bank show in complementary ways with regard to rural land tenure in the Eastern Cape, land may be materially "unproductive" but still have considerable "attractive value" in persuading migrants to maintain their rural ties under conditions in which out- and back-migration have become more unstable and insecure.[34]

This highlights the multifarious ways in which South Africans distribute their multiple senses of belonging to different peoples and pieces of land in order to keep open potential avenues for revenue. Land restitution adds another layer to these dynamics of distributed *belonging* through which people may press demands for distributing, and sharing, their groups' various *belongings*. And the recent trend toward neotraditionalist reempowerment has reconfigured the balance between divergent autochthonous claims to belonging(s) (in the dual sense of the term), putting more and more weight on the traditional land justice of chiefs.

This can be illustrated with regard to the two case studies. A superficial look at the case of KwaMaquze might create the impression that the difference between the two autochthonous logics—small-scale individualized autochthony based on family property versus large-scale collectivized autochthony based on Ndebele ethnicity—might not ultimately be that relevant, in that a more or less similar set of people (descendants of Ndzundza Ndebele deported from the farm in the 1930s) ends up having the same rights to the farm anyway. Yet, depending on the evoked mode, very different understandings of land justice follow: equal individual rights for men and women to be exercised democratically and inherited by all family members in the first case, versus ethnicized hierarchical rights based on patrilineality, seniority, and royalty to be exercised by a traditional council in the latter case.

This has direct consequences for the specific usages to which the land can be put. During my fieldwork, only a few committee members of the KwaMaquze Trust lived permanently on the farm. Many people had built small huts on the farm, for the occasional visit and as a fallback option if things became difficult elsewhere. The land was primarily used for cattle grazing, and alongside a collectively owned herd provided by postsettlement support, several beneficiaries grazed their own cattle there. However, this is already where troubles arose since members of the traditional council expected the committee members to herd their

cattle for free, as this was the prerogative of the chief as the "owner" of the land. Furthermore, the traditional council expected to be asked if someone wanted to graze cattle there or make any other use of the land. By contrast, within the logic of individualized autochthony (officially recognized by the state), every beneficiary would be responsible for his or her own cattle and have an equal say in the usage of the land. In fact, the chairperson had silently engaged in mineral prospecting on the farm, hoping for a future extractive business, and also tried to secure funding from foreign development agencies, so far without much success. Yet had there been prospects for additional revenues, it was evident that debates about "rightful shares" based on the legitimate form of autochthonous belonging would have surfaced with renewed vigor.

The specific contestations around land justice were somewhat different in the case of Kalkfontein, yet the underlying dynamics of *distributing belongings through distributed belonging*—that is, of diversifying senses of autochthonous belonging to different peoples and pieces of land in order to potentially benefit from resource flows within these collectives—were comparable. In this case, the actual set of people legitimately belonging to Kalkfontein differed considerably, depending on which autochthonous logic was evoked. In the collectivized logic of referring back to a multiethnic group of private property holders, only their descendants could claim a rightful share of the collective property. Yet under the second collectivized logic of ethnicized autochthony, the Ndebele chief had made use of his proclaimed prerogative during the 1980s and "sold" residential slots to over one thousand outsider families after they literally paid allegiance to him, allocating residential sites on the ploughing lands of the original owners in Kalkfontein and even neighboring farms. Within ethnicized autochthony, these people, by far outnumbering the descendants of the original buyers, now legitimately belonged to Kalkfontein.

Whereas most of these new residents lived on portion A, the situation was somewhat different on portions B and C. There, as mentioned before, the descendants of the original buyers finally succeeded in acquiring title deeds through the restitution process, and hence they have some state backing regarding their insistence that they themselves can decide how to make use of their land. Nevertheless, the traditional authority ruling over Katjebane and Kalkfontein in its entirety is still in place. Any new piece of neotraditionalist legislation is thus scrutinized with much concern and anxiety by the members of Kalkfontein B and C. In fact,

members of this community have been prominently involved in several legal proceedings against such new statutory laws (e.g., in the successful constitutional challenge in 2010 of the Communal Land Rights Act).

With regard to the actual usage of the land in Kalkfontein B and C, a set of strategies much more diverse than in KwaMaquze can be observed. All (male) descendants of the original buyers have been able to use their family land for cultivation, and they also use the commonly held grazing land for their livestock. There is still sufficient land left to provide additional residential slots, each with their own garden for cultivation. In the past, daughters were expected to move to live with their husbands, typically outside Kalkfontein, which ensured that land was primarily inherited patrilineally. However, recently an explicit community resolution was taken to give women equal rights in land, partly because of the reality of locally increased female-headed households, but also, as I was told, because of the changing political climate of constitutional gender equality in the new South Africa.

While local residents in B and C thus have easy access to both cultivating and grazing land, as well as to their own sufficient water supply (namely, the local limy fountain, giving "Kalkfontein" its name), cultivation land is visibly "underutilized" in terms of its potential for full-time intensive agriculture. Some locals told me that they lack seeds and equipment and therefore cannot farm. Yet the state does offer help in providing tractors and, to some extent, seeds, and some locals make use of these provisions. The following statement by another local resident may be more to the point: "people, nowadays, don't want to work on the land in the hot sun," but rather prefer an urban lifestyle. In fact a considerable number of people who rightfully belong to B and C commute on a daily or weekly basis to nearby Pretoria, where they engage in wage labor and the informal economy. Echoing South African migrant workers elsewhere, many aspire to build a homestead on Kalkfontein in order to retire there, and many in fact do so. They also periodically return to Kalkfontein when unemployed or to look after relatives, both young and old. Multiple cash flows connect Kalkfontein with workplaces near and far, resulting from wages and the sale of agricultural products, as well as from social payments such as old age pensions, child care grants, and disability payments.

In this way, descendants of the original buyers of Kalkfontein B and C, whether residing on the farm or elsewhere, have evoked their collectivized logic of autochthonous belonging to Kalkfontein in order to

maintain and make use of flows of resources and thereby engage in the sharing and distribution of Kalkfontein's wealth. Belonging to Kalkfontein constitutes one among several autochthonous modes for joining networks of production, distribution, and consumption, with comparable logics existing, for instance, within migrant communities in Pretoria and elsewhere. The restitution process has played only a partial role in giving relative weight, and only for some residents on the Kalkfontein farm, to their specific version of autochthonous belonging. Focusing only on the specific property rights in land that follow from restitution with regard to production risks missing a much broader dynamic in which people distribute their sense of belonging in order to partake in different distributive circuits of belongings, and thereby diversify the risk of making ends meet.

Contested Values of Land Justice in South Africa

As Cherryl Walker has recently pointed out, South Africa is no longer the agrarian country it was at the beginning of the twentieth century, "but how to factor this commonplace into thinking about contemporary livelihoods and aspirations for a more promising future continues to baffle restitution policy-makers."[35] Although the land reform policies of the South African government are still dominated by a productionist bias, the "productive value" of land might actually be on the decline for people on the ground. Especially with regard to land restitution, most claimants have clearly preferred the "consumptive value" of land (i.e., financial compensation) to its future potential for production. And even where people have chosen land, the multiple usages to which they have put it have gone considerably beyond production. The future of land in South Africa and beyond might indeed lie more in its "distributive value," allowing people to root their claims of belonging to specific other people in particular pieces of land from which claims to a rightful share can be made.

Seen in this light, the land justice of South African land reform might be more concerned with allowing renewed imaginations of autochthonous belonging, and possibilities for pressing demands for distribution through them, than simply handing over land to would-be farmers. Under global conditions of diminishing wage labor, more and more work is likely to be invested in distributing and diverting, slicing up and subdividing, the meagre resources that people in their interrelatedness manage to secure. Against this backdrop, it seems irresponsible to spend

public resources to the extent envisioned under reopened restitution on the protracted and very long-term perspective of restoring rights in land to farmers that, very likely, will never be. These resources might be better spent in direct forms of distribution, be that through social grants or public spending on services such as housing, healthcare, and education, but also through land redistribution to those who actually do want to farm.

Yet the government is not only *not* doing this. By potentially allowing a further explosion of restitution claims across extensive areas of the country, enormous uncertainties about the de facto distribution of land and landed rights (let alone the moral rightness of such distribution) may well prevail for many decades to come. At the same time, the recent wave of neotraditionalist legislation is likely to shift power balances on the ground toward chiefly definitions of belonging and land justice, establishing traditional authorities as crucial nodes in networks of distribution that might be more and more difficult to circumvent. Within this very South Africa–specific scenario of reshuffled and confused land justice through reopened restitution, more and more people might be forced to share the various values of their land with superimposed "traditional authorities," irrespective of whether these enjoy "basic legitimacy" on the ground.[36] It is doubtful that the authors of the constitution had such a set-up in mind when they demanded reforms to bring about land justice in the form of equitable access to South Africa's natural resources.

Notes

1. Conceived in the context of the conference *Pursuing Justice in Africa* at the University of Cambridge (March 27–28, 2015), this chapter benefitted further from critical engagements at the workshop Transforming Africa—Africa Transforming? at the Stellenbosch Institute for Advanced Study (STIAS) (November 25–27, 2015), the Brown Bag Seminar of the Land and Accountability Centre (LARC) at the University of Cape Town (March 11, 2016), the workshop Indelible Footprints and Unstable Futures: Anthropology and Resource Politics at the EASA 2016 Conference (July 20–23, 2016), the research seminar at the Law and Society Institute Berlin at Humboldt Universität zu Berlin (December 14, 2016), and the seminar series Sovereignty and Social Contestation in Complex Societies at the University of Utrecht (December 15, 2016). I am particularly grateful for the constructive comments offered by Michael Bollig, Aninka Claassens, Philipp Dann, James Ferguson, Jessica Johnson, George Karekwaivanane, Kees Koonings, Mario Krämer, Andrea Muehlebach, Patrick Neveling, Dinah Rajak, Ulrike Wesch, and Thomas Widlok.

2. See the introductory chapter to this volume by Jessica Johnson and George Karekwaivanane; for a similar approach, see also Gerhard Anders and Olaf Zenker, eds., *Transition and Justice: Negotiating the Terms of New Beginnings in Afric*a (Malden: Wiley-Blackwell, 2015).

3. James Ferguson, "How to Do Things with Land: A Distributive Perspective on Rural Livelihoods in Southern Africa," *Journal of Agrarian Change* 13, no. 1 (2013): 166–74, and Ferguson, *Give a Man a Fish: Reflections on the New Politics of Distribution* (Durham, NC: Duke University Press, 2015).

4. For a detailed discussion of restitution statistics, see Olaf Zenker, "Failure by the Numbers? Settlement Statistics as Indicators of State Performance in South African Land Restitution," in *A World of Indicators: The Making of Governmental Knowledge through Quantification,* ed. Richard Rottenburg et al. (Cambridge: Cambridge University Press, 2015), 102–26.

5. Commission on Restitution of Land Rights, *Media Statement by the Chief Land Claims Commissioner: The Implications of the Constitutional Court Ruling on the Restitution of Land Rights Amendment Act, 2014 on the Operations of the Commission* (Pretoria: Department of Rural Development and Land Reform, 2016).

6. Commission on Restitution of Land Rights, *Annual Performance Plan 2016/17* (Pretoria: Department of Rural Development and Land Reform, 2016), 8.

7. However, at the time of writing (April 2017), no new bill had been tabled in Parliament yet.

8. Aninka Claassens, "Denying Ownership and Equal Citizenship: Continuities in the State's Use of Law and 'Custom,' 1913–2013," *Journal of Southern African Studies* 40, no. 4 (2014): 770.

9. Ibid., 773.

10. Centre for Law and Society, "Restitution of Land Rights Amendment Act," February 2015, http://www.cls.uct.ac.za/usr/lrg/downloads/Restitution-Act_Factsheet_Feb2015_FINAL.pdf.

11. See Cherryl Walker, "Sketch Map to the Future: Restitution Unbound," in *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century,* ed. Ben Cousins and Cherryl Walker (Auckland Park: Jacana, 2015), 232.

12. See Commission on Restitution of Land Rights, *Policy on the Application of the Rural Economic Transformation Model in the Settlement of Land Claims* (Pretoria: Department of Rural Development and Land Reform, 2016).

13. See for example Michael Aliber et al., *Trends and Policy Challenges in the Rural Economy: Four Provincial Case Studies* (Cape Town: HSRC Press, 2005); Leslie Bank, "City Slums, Rural Homesteads: Migrant Culture, Displaced Urbanism and the Citizenship of the Serviced House," *Journal of Southern African Studies* 41, no. 5 (2015): 1067–81; Derick A. Fay, "'Keeping Land for Their Children': Generation, Migration and Land in South Africa's Transkei," *Journal of Southern African Studies* 41, no. 5 (2015): 1083–97; Matthew de la Hey and William Beinart, "Why Have South African Smallholders Largely Abandoned Arable Production in Fields? A Case Study," *Journal of Southern African Studies* 43, no. 4 (2017): 753–70.

14. Commission on Restitution of Land Rights, *Annual Report 2012/13* (Pretoria: Department of Rural Development and Land Reform, 2013), 6.

15. Andrew Ainslie and Thembela Kepe, "Understanding the Resurgence of Traditional Authorities in Post-apartheid South Africa," *Journal of Southern African Studies* 42, no. 1 (2016): 19–33: 30.

16. Bill Derman, Edward Lahiff, and Espen Sjaastad, "Strategic Questions about Strategic Partners: Challenges and Pitfalls in South Africa's New Model of Land Restitution," in *Land, Memory, Reconstruction, and Justice: Perspectives on Land Claims in South Africa,* ed. Cherryl Walker et al. (Athens: Ohio University Press, 2010), 310.

17. Heinz Klug, "Community, Property and Security in Rural South Africa: Emancipatory Opportunities or Marginalized Survival Strategies?" in *Another Production Is Possible: Beyond the Capitalist Canon,* ed. Boaventura de Sousa Santos (London: Verso, 2006), 131–42.

18. Lungisile Ntsebeza, *Democracy Compromised: Chiefs and the Politics of the Land in South Africa* (Leiden: Brill, 2005), 14.

19. Aninka Claassens and Ben Cousins, eds., *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Athens: Ohio University Press, 2008); Olaf Zenker, "The Juridification of Political Protest and the Politicisation of Legalism in South African Land Restitution," in *Law against the State: Ethnographic Forays into Law's Transformations*, ed. Julia Eckert et al. (Cambridge: Cambridge University Press, 2012), 118–46.

20. Claassens, "Denying Ownership," 766–67.

21. Aninka Claassens, "Democracy Loses Out as New Bill Tightens Chief's Iron Grip," September 23, 2015, http://www.customcontested.co.za/democracy-loses-out-as-new-bill-tightens-chiefs-iron-grip/.

22. Department of Rural Development and Land Reform, *Restructured Draft Policy Paper: Communal Property Associations and the Rural Economy Transformation Model* (Pretoria: Department of Rural Development and Land Reform, 2014).

23. Department of Land Affairs, *White Paper on South African Land Policy* (Pretoria: Government Printers, 1997), section 3.17.3.

24. Department of Rural Development and Land Reform, *Rural Development Framework* (Pretoria: Department of Rural Development and Land Reform, 2013), 16–17.

25. Olaf Zenker, "Autochthony, Ethnicity, Indigeneity and Nationalism: Time-Honouring and State-Oriented Modes of Rooting Individual-Territory-Group-Triads in a Globalising World," *Critique of Anthropology* 31, no. 1 (2011): 63–81.

26. For a detailed discussion see Olaf Zenker, "New Law against an Old State: Land Restitution as a Transition to Justice in Post-Apartheid South Africa?" *Development and Change* 45, no. 3 (2014): 502–23, and Olaf Zenker, "Bush-Level Bureaucrats in South African Land Restitution: Implementing State Law under Chiefly Rule," in *The State and the Paradox of Customary Law in Africa*, ed. Olaf Zenker and Markus Virgil Hoehne (London: Routledge, 2018), 41–63.

27. Zenker, "Bush-Level Bureaucrats," 46–50.

28. For a detailed discussion, see Zenker, "Juridification of Political Protest."

29. "Tribal land" here does not (yet) refer to a legal category but to a regime of chiefly rule, as envisioned by the Ndzundza Ndebele majority of copurchasers. However, in subsequent years, colonial officials made ownership of land *as a tribe* increasingly a condition of approval for purchases by Africans. This culminated in the so-called six-native rule, when section 11(2) of the Native Trust and Land Act of 1936 explicitly provided that, in principle, no land could be acquired or held by a group of "more than six natives other than a recognized tribe." As section 11(3) of this act explained, "A recognized tribe means a tribe or a portion thereof which the Governor-General may from time to time constitute or declare to be such under any law."

30. Ferguson, "How to Do Things with Land," 166.

31. Ferguson, *Give a Man a Fish,* 94–106.

32. Ferguson, "How to Do Things with Land," 170.

33. Ferguson, *Give a Man a Fish,* 191–216.

34. Fay, "'Keeping Land for Their Children'"; Bank, "City Slums, Rural Homesteads."

35. Walker, "Sketch Map," 233.

36. Mario Krämer, "Neither Despotic nor Civil: The Legitimacy of Chieftaincy in Its Relationship with the ANC and the State in KwaZulu-Natal (South Africa)," *Journal of Modern African Studies* 54, no. 1 (2016): 117–43.

TWELVE

Transitional Justice and Ordinary Justice in Postconflict Acholiland

ANNA MACDONALD

TODAY, IF YOU WERE TO GO TO GULU—ACHOLILAND'S MUNICIPAL center—you would find it hard to believe that the region so recently experienced a devastating twenty-year war between the government of Uganda (GoU) and the Lord's Resistance Army (LRA). There is a supermarket in Gulu, as well as numerous coffee shops, a pizza parlor, and even a cocktail bar. Much of this caters to the now-dwindling numbers of expatriate NGO and aid-agency staff based in the region, as well as the scores of foreign researchers and North American religious missionaries that come through every year. This is not exclusively the case though, and prosperous, entrepreneurial Acholi residents talk enthusiastically about their hopes for the future of this "northern city."[1] Across the region more broadly, now that the "guns are silent," relative peace has returned. In 2010 it was estimated that the vast majority of the 1.8 million people displaced into camps at the peak of the crisis had returned to their areas of origin, or resettled elsewhere.[2] Homesteads are functioning, people are farming, and life goes on. In the towns, trading centers, and rural areas, things—on the surface of it—seem peaceful, and people generally reject the idea that the war should define them. It does not take long, though, to scratch beneath the surface to uncover the often-devastating legacy that the conflict has inflicted on people's lives.[3]

Today, as in many postconflict places, that legacy is the subject of external interventions centered on global discourses of transitional justice, despite the fact that there has been no substantive political transition in Uganda since the war ended. Since the early 2000s, transitional justice has been embraced by the UN as a key postconflict intervention, often linked to broader liberal peacebuilding packages, and yet scholars and practitioners accept there is very little evidence to demonstrate whether it actually achieves its intended effects.[4] Transitional justice is defined by the UN as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[5] It is associated with a set of processes—including criminal trials, truth commissions, amnesties, community-based dispute mechanisms, and reparations—and a set of institutional structures and regimes, including the International Criminal Court (ICC) and international humanitarian, human rights, and criminal law.[6] While "transitional justice" was originally designed to address justice dilemmas specific to contexts such as those in Latin America, where countries were transitioning from authoritarianism to, it was hoped, democracy,[7] today, it operates across a vast range of contexts, sometimes even in "illiberal states with little pretension to democratic transition."[8]

While each transitional justice process should be seen as a "particularized" and heavily politicized "bargain on the past,"[9] proponents coat such practices in highly normative language. The notion of the transition is not simply "descriptive of a process of change"; rather it tends to be "positively oversignified."[10] Thus, transitional justice is said to deliver widespread benefits in any given context, including accountability, truth, peace, reconciliation, rule-of-law strengthening, and democracy consolidation. During a PowerPoint presentation in March 2014, the UN assistant secretary general for peacebuilding had an acronym for current approaches: "SCHLEP."[11] Transitional justice came under the "H," which stood for "healing," and was placed there alongside an inventory of other public goods: "reconciliation, mediation, protection, psychosocial therapy, IDPs/Returnees, SGBV, reparations." The connections between intentions and outcomes were expressed as self-evident, but the reality is that such assumptions are value driven; they are not based on evidence about the role of transitional justice in achieving these ends.[12]

This chapter explores the relationship between international and domestically driven "transitional justice agendas" and the plurality of

ways in which communities across Acholiland, affected by violence, (re) construct social and economic relationships in the context of their everyday lives.[13] As Anders and Zenker have argued, despite the growth of transitional justice across postconflict contexts, there are "other sites in countries and regions affected by violence and armed conflict where ideas about justice, reconciliation, retribution and political participation are being instantiated and contested."[14] I argue that one such "site," the local resolution of land disputes, can tell us a great deal about broader notions of justice and "order-making" in Acholiland.[15] This, in turn, allows for a more nuanced understanding of how transitional justice, as an external project, is understood and experienced in this context. I am motivated by three concerns: the first is to critique oversimplistic depictions of Acholi "perceptions" of transitional justice that continue to dominate debate; the second is to uncover the stark dissonances between normative ideals linked to transitional justice efforts in Acholiland and local realities of "postconflict" life; and the third—given that transitional justice is rarely experienced in daily lives—is to explore and explain these dissonances more fully through an examination of "actually existing" justice provision in the current Acholi context.

Findings below are based on eleven months of field research in both Kampala and Acholiland in the period between 2012 and 2014. The majority of time was spent in Acholiland, which was at the epicenter of the twenty-year war (1987–2008) between the government of Uganda (GoU) and the Lord's Resistance Army (LRA). Fieldwork was conducted in four rural sites (in Agago District, Gulu District, Nwoya District, and Pader District) and one urban site (in the town of Gulu). Data was gathered using a range of qualitative methods. This involved over one hundred semistructured interviews with individuals across the Ugandan political spectrum, from donors and cabinet ministers in Kampala to local traditional and council leaders in Acholiland. In addition, twenty-five informal discussion groups were conducted in the five research sites. These were held at the village level and explored broad questions about life since the end of the conflict and how people are moving on with their lives. Interviews and focus groups were conducted in both Acholi and English, and where Acholi was used an interpreter provided translation. The third strand of data collection involved participant observation. Ethnographic methods were deemed particularly useful because they explore the subjects' "frames of reference" while remaining as open as possible to different understandings and interpretations of the

world.[16] This generates data that provides insight into the "inherently relational" and "inherently contested" nature of the sociolegal dynamics under study.[17] Below, where quotes are given, it is because they are representative of broader opinion and dominant themes.

Transitional Justice, Ordinary Justice, and "Terrible Simplifiers"

The LRA was formed in 1987 by Joseph Kony, not long after Yoweri Museveni's National Resistance Movement (NRM) had captured Kampala the previous year. Kony is an Acholi from northern Uganda who sees himself as a spirit medium and "spokesperson of God."[18] The war between the NRM government and the LRA lasted from 1987 to 2008 and was characterized by the brutal suffering of northern Ugandan civilians who bore the brunt of both LRA and government violence. In late 2003, the GoU issued a "referral of the situation concerning the Lord's Resistance Army" to the newly formed International Criminal Court (ICC). Early the following year, at a press conference in London, the ICC chief prosecutor, Luis Moreno Ocampo, and the president of Uganda, Yoweri Museveni, made public a legal process that placed the ongoing conflict in northern Uganda at the heart of debates about the relationship between peace and justice. In October 2005, the ICC unsealed its first ever arrest warrants, charging five Lord's Resistance Army (LRA) commanders with war crimes and crimes against humanity. Payam Akhavan, a former legal adviser to the International Criminal Tribunal for Yugoslavia (ICTY), boldly suggested that because of the ICC intervention, "the prospect of sustained national peace may finally be within Uganda's reach for the first time since its independence in 1962."[19] A year later, in 2006, peace talks between the LRA and the GoU began in Juba, the capital of the then semiautonomous government of South Sudan (GoSS).[20] For some, Akhavan's position remained credible; for others, precisely the opposite was now the case: the ICC arrest warrants were a direct impediment to the successful completion of the most promising peace process in twenty years.

From the outset, the ICC faced significant controversy in Uganda. This centered on two particularly delicate issues. First, commentators questioned the wisdom of attempting to render justice prior to the settlement of the conflict; and second, they questioned the appropriateness of an international body intervening in a local space.[21] Many Ugandans, particularly the Acholi in the north, who had suffered at the hands of both the LRA *and* the Ugandan People's Defence Force (UPDF), were

angry that only one side was being held to account. Then, as it became clear that the ICC would under no circumstances withdraw its warrants, the court came to be seen by many as the ultimate peace spoiler, an institution whose inflexibility would prolong a devastating conflict and thus determine the fate of millions of northern Ugandans.[22] A "victim" discourse developed, amplified through Uganda-based NGOs, sympathetic scholars, and Acholi religious, traditional, and political leaders. The narrative was damning: the very people in whose interests the ICC should have been acting—the victims of mass atrocities—viewed the court as biased, counterproductive, and recklessly irresponsible.[23] These charges were compounded by another: not only was the ICC dangerous, it was an expression of Western judicial neoimperialism that sought to privilege foreign concepts of retributive justice over traditional "Acholi values" of reconciliation and forgiveness.[24]

These contentions created a highly charged atmosphere at the Juba peace talks and sparked a vociferous debate among researchers, international donors, and civil society and local leaders about "*what the Acholi truly want* in terms of justice [italics added]" and how that might be achieved in the context of ongoing negotiations.[25] At Juba, an Agreement on Accountability and Reconciliation and an implementing protocol (from here on the AAR accords) were signed by both parties and purported to address and resolve justice and accountability dilemmas linked to the conflict, including the ICC impasse. The accords proposed a national procedure for dealing with LRA and UPDF crimes, including a special international crimes division of the Ugandan High Court, support for traditional justice, a "body" to "inquire into the past," and reparations for victims.[26] And to ensure that the amnesty act that had been in place since 2000 did not jeopardize the "principles" of the agreement, the accords also contained a clause advising the government to amend the act. Regardless of the eventual failure of the talks, the GoU committed itself to implementing the AAR framework as part of a national transitional justice policy.

Nearly ten years since the signing of the AAR accords at Juba in 2007/8, there exists a mixture of international, governmental, NGO, private, and hybrid initiatives aimed at transitional justice and broader social repair in northern Uganda, but these do not fall within a single policy framework or set of guiding principles. At the state level, transitional justice discussions, research, policy development, and programming has been based on implementation of the AAR accords. This has

been coordinated by the Justice Law and Order Sector (JLOS) secretariat, which oversees the work of seventeen government departments and is funded mostly by European donors. Linked to transitional justice objectives but not explicitly framed as such is the government's Peace, Recovery and Development Programme for Northern Uganda (PRDP), launched in September 2007. This program has been administered by the Office of the Prime Minister (OPM) and contains four strategic objectives, one of which was "peace-building and reconciliation." This objective is predominantly donor funded.

In mid-2013, JLOS circulated a draft transitional justice policy amongst "key stakeholders" for comment, but it was widely criticized as "incoherent" and incomplete.[27] Numerous drafts have followed, and in mid-2017, a "final draft" of the policy was publicized. It has not yet been put before cabinet and has therefore not yet been approved for debate before Parliament. The future of the policy remains unclear, and proponents are concerned about a serious lack of political will and "waning momentum."[28] Of all the accountability and reconciliation "modalities" agreed upon in the AAR, only the establishment of a special division of the Ugandan High Court—later named the International Crimes Division (ICD)—has been implemented.[29] The GoU also passed the International Criminal Court Act (ICC Act) of 2010, which provided for domestic jurisdiction over ICC statute crimes.[30] There has been no significant progress on initiatives aimed at reparations or truth seeking. "Traditional" justice processes, meanwhile, still remain the subject of policy discussion.[31] Outside of the central government framework there have been numerous interventions in Acholiland that explicitly use the term "transitional justice." There exists, for example, a plethora of donor-funded and civil-society initiatives aimed at encouraging dialogue around reconciliation and forgiveness for wrongs committed during the conflict.

Two dominant stories continue to shape the way in which "the Acholi" are portrayed in relation to postconflict justice and accountability issues, both of which involve some "terrible simplifiers" about particular "ways," "traditions," and "needs" of a heterogeneous and diverse ethnic group.[32] On the one hand, advocates of a more "local" form of postconflict justice emphasize the restorative possibilities of both Christian forgiveness and Acholi reconciliation techniques, placing emphasis on a particular ritual called *mato oput,* which proponents said had been used before the war to reconcile clans after a murder had taken place. In a landmark report produced by International Alert and authored by Denis Pain, Oxfam's

Uganda country representative in the mid-1980s, it was claimed that "Acholi traditional resolution of conflict and violence stands among the highest practices anywhere in the world."[33] After the ICC warrants were announced, the Canada-based Liu Institute for Global Issues in association with the Gulu NGO Forum produced a report expressing concern that the ICC might "damage cultural identity and beliefs."[34] NGO reports were buoyed up by calls from local religious, traditional, and political leaders who stressed the cultural proclivity of the Acholi toward forgiveness and reconciliation.[35] Branch has argued that such arguments comprise a pernicious and mendacious "ethno-justice" agenda, which implies the existence of "a single, coherent positive system that is presented as being universally, consensually and spontaneously adhered to by all members of that culture."[36] Armstrong, meanwhile, points out that this narrative comprises a set of deliberately "culturist claims," reliant on "strategic essentialism."[37] In other words, the Acholi leadership, along with sympathetic scholars and activists, have made claims that quite evidently "essentialised" something that was in fact "fluid and contradictory" but did so "in order that their claims be heard."[38] With international judicial intervention believed to represent a serious threat to peacebuilding and reconciliation across the region, oversimplified cultural depictions of the Acholi as having a unique ability to forgive and move on were also an appeal to advocates of prosecutorial criminal accountability to do no harm.

The second story is different. It is the one promoted by international human rights activists and donors engaged in rule-of-law promotion and access to justice initiatives in Uganda. In his book *Trial Justice,* Allen concludes that "most Acholis want those responsible for terrible crimes to be held to account, and in northern Uganda, as in Europe, it is possible for trials to contribute to peace-building."[39] This sentiment is reflected in the approach of justice sector donors and Uganda's Justice Law and Order Sector (JLOS) secretariat, responsible for devising a national transitional justice policy based on the AAR accords signed at Juba. Based on conventional liberal peacebuilding logic, the central interpretation of the AAR accords appears to be the need to strengthen the rule of law across the country through "institution building" and bureaucratic skills development. The JLOS strategic plan on transitional justice, drafted in coordination with European justice-sector donors, sets out a long list of reforms based on a preapproved donor template.[40] The technocratic logic is that if a transitional justice policy can manage and

promote legal "capacity building" and contribute to broader programs designed to strengthen the rule of law, then the chances of a return to conflict will diminish.

Both transitional justice stories objectify "Acholi" justice needs around false dichotomies of the local versus the international and restorative approaches versus retributive approaches, positing the notion of a "non-Western local order" against a "Western liberal order."[41] This has led to what Hinton calls identity "shrinkage."[42] On the one hand, ethnojustice conceptions of transitional justice are clear examples of cultural essentialism: the argument is that the Acholi should both follow and be defined by a circumscribed "culture." On the other hand, the liberal transitional justice paradigm implies a single, fundamental human identity in which people exist as "autonomous," liberal subjects: they have the capacity to achieve and enjoy "freedom," "equality," and "rights," and they have the chance to take part in democratic and juridical processes as soon as the moment is right.[43] Both identity categories are idealized, obscuring the "ambivalent, dual and ambiguous" choices that people make and the actions they take in the context of their everyday lives.[44] Although there are important epistemological and ontological distinctions between different transitional justice agendas in Uganda, both the "ethnojustice" category and the more universalist liberal conception represent heavily mediated and sometimes coercive "ideal type" responses to mass atrocity and the reconstruction of social relations in northern Uganda. They emphasize forms of justice, social repair, and peacebuilding as they *should* be, rather than as they *are*.

What has been missing from the debate so far is a real understanding of what Richmond calls the "local-local," which is what represents the local beyond the "artifice" of socially constructed identities and is much harder for researchers to capture.[45] Below, I argue that a closer, more microlevel examination of how people negotiate "ordinary" justice in postconflict Acholiland highlights the hybrid nature of the public authorities that people draw on and the highly contingent nature of their justice decisions. These are not based on the norms espoused in transitional justice debates but rather on the most pragmatic and effective means by which to restore balance and meaning to postconflict social relations.[46] Such an approach cannot be translated neatly into "rights discourses . . . legal certainties and political objectivity" in the way that the liberal transitional justice paradigm presupposes, nor can it be understood through cultural essentialism.[47]

Stark Dissonances: Transitional Justice Norms and Local Priorities

In late 2012, a group of practitioners and academics working on justice- and security-related issues in developing countries met at a prominent think tank in central London. The focus was on how to make existing policy in conflict affected areas more "context sensitive." During one session, discussion centered on accountability for past human rights abuses in such places. A senior official from the UNDP Bureau for Crisis Prevention and Recovery spoke up: "what does a state need to get over a legacy of violence?" she asked rhetorically, before declaring, "the answer is transitional justice."[48] In a session in which participants were encouraged to "think outside of the box" and transcend conventional policy prescriptions, this assertion fell somewhat flat. Earlier that year, I had been living in northern Uganda, carrying out field research. As I heard the UNDP representative make her argument with such confidence, my mind cast back to a hot and rainy July day in Nwoya District, western Acholiland. I had accompanied a locally based, internationally funded NGO to the district capital of Anaka to observe a "public dialogue" meeting with a group of thirty or so local councilors, ranging in seniority from village to district level. Such "public dialogues" or "stakeholder consultations" are a frequent occurrence across postconflict Acholiland, satisfying as they do the "popular participation" imperative of aid agencies and international donors.

This meeting proposed to cover "the issues affecting your community today," but the NGO in charge was mainly interested in transitional justice policy and particularly keen to gather views about the recent decision by the government to lapse an Amnesty Act that had been in place since 2000 and that had ostensibly benefitted thousands of returning LRA members and their communities.[49] The problem was that the issue in what was supposed to be a local-led discussion did not come up spontaneously. So, during testimony about local land disputes, elephants escaping from the nearby Murchison Falls National Park and destroying crops, and fears about international oil conglomerates dumping poisonous waste around recently discovered crude deposits, meeting organizers introduced a non sequitur by raising the fact that the Amnesty Act had recently been axed and requesting opinions from the audience. The resident district commissioner (RDC), the president's representative in the district and the person responsible for local security matters, looked confused: he had no idea that the act had been suspended.

In fact, twelve years on from the passing into law of the Amnesty Act, not one person in that meeting hall was aware that it had lapsed. This was a law designed and championed in Acholiland. It had been passed in 2000 and had survived International Criminal Court (ICC) investigations and arrest warrants, the failed Juba peace talks between the GoU and the LRA, and the setting up of a war-crimes division in Uganda's high court. This was a piece of legislation that, from the beginning, has been heralded by its loud and proud supporters (including the NGO chairing the meeting) as the key to successful peacebuilding in northern Uganda.[50] The rationale behind the act—and continued support for it locally—was fairly straightforward: it is estimated that roughly sixty-six thousand people were abducted by the LRA during the period that it was operational in northern Uganda, the "bulk" of whom were under eighteen.[51] Many of those who carried out violent acts as members of the LRA could not, therefore, be pigeonholed into definite "victim" or "perpetrator" categories.[52] Dominic Ongwen is a personification of this dilemma: in early 2015 he was the first LRA commander to actually be transferred to the ICC in The Hague. Ongwen was a senior LRA commander for many years and allegedly committed unspeakable crimes, but he was also abducted by the rebel movement and forcibly conscripted at the age of ten, on his way to school. The ICC has charged him, in part, with the same crimes that were initially perpetrated against him, including the forcible conscription of child soldiers.[53]

On hearing the news, local leaders in Nwoya protested the lapsing of the Amnesty Act, raising concerns about lack of consultation and the fact that there were still people out there in the bush, with the remnants of the LRA, who might now be scared to come back home. The assuredness and clarity with which participants had been talking about land disputes, distrust of oil companies, and conflicts with the Uganda Wildlife Authority over national park boundaries, however, was absent. As much as the NGO wanted the lapsing of the act to represent a key advocacy issue, it simply was not, not according to these local representatives anyway. Experiences of coping with the effects of war and moving through postconflict life were largely articulated without reference to what Das calls "grand gestures" or the metanarratives of transitional justice.[54]

The first scholars to really engage with the "local" in transitional justice expressed concern that "many assumptions about the effects that justice has on individuals and societies have gone unexamined and unchallenged for too long."[55] This is an area of inquiry that remains in its

infancy, but edited collections and journal issues have been published recently that engage closely with how transitional justice is viewed from the bottom up, across cases. A shared finding is that local experiences and attitudes rarely fit with the normative assumptions and values widely ascribed to orthodox transitional justice efforts.[56]

In what follows, I build on this line of inquiry through an interrogation of the lived relationship between transitional justice and the local provision of what will be termed "ordinary justice" in Acholiland, with a particular focus on the resolution of local level land disputes. As a policy intervention, transitional justice falls within the existing legal realm and broader notions of social order. However battered by war, conflict, or poverty these concepts may be, and however much they are subject to continuous renegotiation and mutation, they have in some form existed in the past, have continued into the present, and will shape the future. Criticism of such an approach may be that transitional justice is "qualitatively different" from ordinary justice: it carries a different set of objectives and a different set of processes.[57] Posner and Vermule, however, argue that analysts of transitional justice have "gone wrong through insufficient appreciation of ordinary law."[58] Bearing in mind E. P. Thompson's maxim that law does not "keep politely to a level" but is imbricated "at every bloody level," this argument can be stretched further to encourage a better appreciation of "ordinary life."[59] Given that transitional justice is contiguous with "ordinary" justice and with the existing political settlement and social order in any given place, it is quite perplexing that so little attention is given to "ordinary justice" in discussions about "transitional justice" in the Acholi context.

Practical Justice Provision and Attitudes toward Transitional Justice

From the mid-1990s onward, the GoU began moving civilians, often forcibly, from rural areas and into camps where the Uganda People's Defence Force (UPDF) could "protect" them.[60] By the late 1990s the majority of people living in the Acholi subregion were kept in wretched conditions likened to "rural prisons," subjected to what Dolan would later term "social torture."[61] Many people spent years on end in the camps, and in Acholiland today, people talk of a "lost generation" of young men and women who came of age under these circumstances.

Mass displacement into camps had an overwhelmingly unsettling impact across northern Uganda, where, as Okot explains, "land means

more than real estate . . . land equates to history, heritage, identity, belonging, rights and relationships."[62] Camp life was impoverishing and unproductive, and on people's return to the villages, access to customary, communal land was the only "productive asset" most people could rely on.[63] The securing of this access has been subject, however, to many pressures and difficulties, ranging from confusion and disagreement over predisplacement land boundaries between households to controversial attempts by the government to open up Acholi land to investors for large-scale commercial farming.[64] Given that land is the "epicenter"[65] of social, economic, and cosmological life, disputes related to access, boundaries, and ownership affect the "rest of life" profoundly. As one man explained, "if you really want to mess with the Acholi, you play with their land."[66] In northern Uganda this represents a huge transitional dilemma that people are actively seeking to resolve on a daily basis. As a senior Acholi donor staff member explained, off the record, "resolving transitional issues is a priority for people, but not the way donors understand it. In Acholi a lot of time is spent on resolving tensions and conflict, especially over land. This is a key framework through which people are negotiating life. But that is not the transitional justice which is discussed in public forums in Kampala and Gulu, and if you are looking for that you are missing something."[67]

His point was that transitional justice—as a set of prearticulated conceptions—was not the right entry point through which to explore, let alone understand, the dynamics of postconflict justice and social repair in Acholiland. Equally, as is argued below, an examination of the way in which such war-related disputes are being resolved on a daily basis elucidates and complicates assumptions inherent in prevailing transitional justice conceptions.

In Acholiland, there is no word for "justice." The translation most commonly used is "*ngol matir,*" which literally means to "cut straight" and is used to describe the process by which fair judgment has been made.[68] People are rarely familiar with the term "transitional justice." The starting point during my fieldwork with communities in Acholiland was therefore to start from an examination of people's understandings of *injustice*. Thus, during individual conversations and broader discussions, people were asked to reflect on instances since and during the war when they, or people they knew, were *tero I yoo matir,* which is a locally recognized way of saying "not being treated the right way." They were then asked what forms of redress or resolution were sought (if at all) to deal with

such situations. It is important to note that, as Porter has explained in her extensive study of Acholi responses to rape and sexual violence, "social harmony" rather than "justice" (conceived as judicial avenues of redress or individual justice for the victim) is often the "paramount imperative" of communities when dealing with wrongdoing or settling disputes.[69] She understands social harmony as "a state of normal relations among the living and the dead, linked to an idea of cosmological equilibrium and a social balance of power and moral order."[70] This means that in the aftermath of wrongdoing, the restoration of social and economic relationships is regularly given priority over individual redress for the alleged victim.

An examination of who the "principal providers" of redress and settlement are in land cases gives important insight into how dispute resolution acquires meaning in the Acholi context.[71] Across research sites the vast majority of people who made reference to land-related disputes were referring to land grabbing and boundary disputes, usually between households at the village rather than the parish level. As Hopwood has pointed out, "the law is largely silent on matters of customary land," and "decision making authority is vested in clan, sub-clan or extended family leaders."[72] In such land cases, people overwhelming said that they would first consult clan elders who were familiar with the old, preconflict boundaries, and if the elders could not resolve the issue or were no longer alive, either the *rwot kweri* or the local councilor I (LC1) would be consulted. The *rwot kweri* is a "chief of the hoe," an elected or appointed local customary leader who provides leadership and arbitrates over issues of land, farming, and agriculture in subdivisions of villages. The LC1, on the other hand, was originally an elected political representative at the village level, the lowest level of the decentralized governance system.[73] Elders, *rwodi kweri,* and LC1s derive their authority from different sources and have contrasting relationships with the Ugandan state, yet they share a perceived ability to arbitrate on cases based on unwritten customary law. This was usually because of physical presence and deep knowledge of the area rather than kinship affinities or authority status.

Thus the highly local order of Acholi society creates a sliding scale of legitimacy in justice institutions. The choice of who to turn to depended on the proximity of the authority to the location of the dispute, the perceived integrity of the individual, his (almost always "his") range of relevant knowledge, and the degree to which he is both trusted by the community and nested within it.[74] What was striking was that situations

resolved at this very local level (elders, *rwot kweri,* or LC1) were rarely contested openly. As one informant in Lukodi explained, "if the dispute starts at a small level we normally go to the nearby elders. Sometimes we cannot even involve the LC1. If it is big you will go to the LC1. Others might raise it at the subcounty but mostly we have been handling issues that stop at the level of the LC1. People get satisfied with the rulings. I have never heard of anyone going to the level of the magistrates."[75]

This did not necessarily mean that decisions were universally accepted, but it did support the argument put forward by Hopwood and Atkinson that the overall number of discrete rural land disputes has been "declining significantly" owing to "high resolution rates" arbitrated by elders and lower-level councilors and courts.[76]

What people frequently emphasized was the great asymmetry of information that existed between those authorities who were closely acquainted with the geographical area under dispute and those authorities whose role and function transcended the immediate context. Indeed preferences were not so much "culture bound" as they were "context bound," so that any authority outside of the immediate locus of the dispute was viewed with some trepidation.[77] Even the LCII, the local parish chief, was talked about as coming "from a far distance" and "not knowing the history of the area."[78] As an authority figure he may be a member of the broader community, but he is also more tangential to the symbiosis of village life and therefore more prone to misinterpretation, misinformation, and corruption.

The distinction people made between the knowing and the unknowing, the legitimate and the illegitimate, complicates understandings of Acholi attitudes toward the state authorities, which arguably amounts to more than an abstract lack of trust. Respondents did not express a cultural aversion to formal legal institutions (which begin at the level of the magistrates' court) inasmuch as they expressed qualified concern about any form of public authority that was not equipped to act in their interests. This could be a corrupt elder or a distant chief just as much as it might be an incompetent local magistrate. It was the issue of efficiency and positive outcomes that people raised most emphatically, what Baker and Scheye call "performance accountability."[79] In Odek subcounty, during a discussion group about local disputes and their resolution (or not), people were asked whether they would like to have their cases heard in magistrates' courts, if the opportunity were there. A typical response was as follows:

> "No, we would not like to go to a magistrates court, even if it was here, right here and we had the money."
>
> "Is it because you do not trust the courts to rule fairly?"
>
> "Not because of trust, no. It is because it is pointless. It is because the people who know the boundaries are already here, among us. It is a local thing."[80]

The word "pointless" is interesting here, and it reflected a more general sentiment about the superfluity of rules and practices that were not rooted in the relevant context. This was hardly surprising as the disputes arise in situations where, as Scheele notes, people "rarely deal with abstract things or with abstract people, but rather with neighbours, family members and in-laws."[81] This is particularly the case with land, where validity of claims depends "less on universal truth than on neighbour's opinion"[82] but is also relevant for other disputes arising from acts of wrongdoing, as Porter has shown in her study of responses to rape and gender violence in Acholiland.[83] People grapple with the "generality" of the law and its universality because these properties stand in tension with the highly place- and circumstance-specific way in which rightful order is maintained. The risk in conceptualizing justice as "context bound" is the suggestion that modes of resolution are deeply parochial. People appear, however, to embed their justice decisions in a logic that is cognizant of the wider world, giving meaning to the sort of actions that will allow or threaten what Lon Fuller called a "programme for living together."[84] The resolution of disputes and wrongdoing is a practical and consequentialist process in which wrongdoing and punishment are defined and determined by context and circumstance.

As an aside here, it is important to note that—depending on whom you talk to—such processes are more aptly described as locally present than as locally *desirable*. There is debate about whether customary justice provision is best seen as an interim measure that exists in the absence of a functioning state or as a viable, long-term formula for contextually relevant accountability and reconciliation.[85] What I describe above is not a "utopian" form of self-regulation; rather, these are the means by which family, kin, traditional social structures, and the most local-level public authorities negotiate life in a highly strained postconflict environment, and such processes inevitably involve unequal power relations.[86] How this plays out, however, is not always predictable. So, for example, in a recent study, Hopwood has shown that women are not disproportionately marginalized in current land disputes.[87] On the other hand, there is evidence

that groups—particularly LRA returnees—who feel dislocated and marginalized in their home communities prefer external organizations, particularly NGOs, to help them mediate local disputes. The International Organisation of Migration (IOM), for example, has reported that 50 percent of all succession and inheritance land cases it dealt with between August 2003 and October 2009 were filed by young adults between the ages of eighteen and thirty who no longer felt protected by the customary rights arbitrated by elders in their own communities.[88]

In the case of local land disputes, the decision to refer a dispute and seek redress seems to be premised on three key considerations: (1) available information, (2) a realistic assessment of the likelihood of a tolerable outcome, and (3) the implications of that outcome on moral, social, and cosmological stability. Below, I argue that it is the *uncertainty* relating to these three premises that make peoples' attitudes toward prearticulated, ideal-type transitional justice initiatives so ambivalent. Whether or not amnesty, criminal trials, truth telling, or external funding for *mato oput* are preferable options or not remains largely unresolved in the minds of most people. In fact, when asked, most people today stress the deeply complex implications of such processes on "local coexistence situations" and emphasize their lack of power in the ability to shape their direction.[89] As I argue below, this ambivalence applies as much to the formal processes of criminal justice promoted in the AAR accords as it does to the less institutionalized processes of forgiveness and reconciliation promoted by NGOs and religious leaders in the region.

In discussions with people about the role that the state can play in criminal accountability for war crimes, for example, one gets a strong sense of the inner tension that such questions pose. People shifted about, sometimes they sighed or laughed, other times they became agitated. Their spoken and physical reactions expressed a sense of what Campbell has called the "trauma of the law": the torment of an incorporeal "justice" that is mediated in faraway places by people who cannot be trusted and that brings no immediate material benefit. The "trauma of the law," writes Campbell, "is that it cannot represent justice. The trauma of justice is that it is a juridical impossibility. . . . [J]ustice requires a fundamental change to the social order which made possible the originary trauma of crimes against humanity. In this sense, justice remains an event to come."[90]

The long-term nature of this realization informs a sense of uncertainty about whether or not criminal justice for war crimes can be appropriate in the Acholi context. Indeed, people talked frequently about

there not being enough "time" to push transitional justice. Acholiland, said one elderly man, has been like "stagnant" water for twenty years.[91] People, younger people included, worried that their lives were being wasted; they were getting older and could not sacrifice any more of their resources on broad political questions or projects. People's attitudes toward the state that had been complicit in war crimes but was now in charge of implementing a transitional justice policy were complex. There was a desire to castigate, but also a recoiling force rooted in people's own marginality.[92] As Salwa Ismail noted in her work on Egypt, citizens "come to experience the state in the ways in which it does not exist for them, and not just the ways that it does."[93] It was not the state as a concept that was criticized but its failure to function well in people's everyday lives. In the absence of political transition, if the state was going to function at all, people wanted it to deliver services and material compensation for what they lost during the war. Other processes, including talk of criminal trials and truth commissions, were viewed with deep suspicion. This was not because of a cultural aversion to "formal" or "retributive" justice, nor was it fatalistic. It was pragmatic and based on a clear understanding of the hegemony of the NRM and its narrative about the LRA war. It was not considered practical or wise to separate the processes themselves from the deeply unequal political environment in which they would operate. To equate transitional justice with peace, accountability, reconciliation, and healing is to "implicitly assume effective and equitable governance," and people in northern Uganda, understandably, rarely make that assumption.[94]

Similarly, in discussions with people about the role that forgiveness and reconciliation might play in a transitional justice policy for northern Uganda, answers tended to relate back to the exigent and highly place- and context-specific "political economies of survival" that shape postconflict life.[95] The relationship people described with the forgiveness that they enacted was ambiguous. While there was often an acknowledgment that claims for revenge and "bitterness" must be surrendered, this did not equate to "absolution" for the wrongdoing that had been perpetrated.[96] Religious doctrine was often mentioned in relation to forgiveness, but it tended to be ideas about judgment and divine retribution that were emphasized.[97] A young man who had witnessed a massacre in which two of his own brothers were killed and dismembered insisted that what happened "does not affect me now . . . it cannot"; when asked why, he explained that "God will judge Kony and

those people."[98] In other instances, the decision to forgive was captured well by Rosalind Shaw's use of Begona Aretxaga's term "choiceless decisions," whose logic is located in "everyday requirements of living."[99] In one village in Amuru District, a group of women explained that "one of the things we have to do is to just pray and forgive these people, you cannot retaliate or there will be more war"; far away in another village, in Agago District, a group explained that "if you are not for forgiveness then there would be no government structures here or government presence because there would still be war."[100] Forgiveness was described here as a social act—it is a way of "restoring civic life" but is not necessarily a complete change in feeling toward the wrongdoer or the wrongdoing.[101]

In late 2013 I had coffee with a lawyer friend in Kampala who had been closely involved in the drafting of the AAR agreements. He lamented how transitional justice initiatives in the Ugandan context existed in "cyberspace," exogenous to the everyday realities of postconflict life in Acholiland. Just a week earlier, an expat NGO worker who had been living in the region for nearly ten years explained how, from the very outset, transitional justice agendas had been "wildly out of sync" with local needs. As Prieto has found in Colombia, this does not mean that transitional justice concepts of accountability, truth, and reconciliation are "meaningless" or "irrelevant"; "on the contrary," he argues, "they are highly relevant, but on a different level."[102] As in Uganda, that is the level of the abstract, and it is hard to envisage how the transitional justice repertory—the "grand gestures," the shiny institutions, the UN manuals—might be anchored to everyday realities in a way that will help people in their immediate contexts. One of the great fallacies of contemporary transitional justice discourse is the assumption that postconflict spaces exist as blank justice slates. The reality is that systems are in place across the region, linked to exigent political economies of survival so that, as Finnström notes, "life can go on."[103] There exists a range of customs, practices, knowledge, and public authorities that people deploy and turn to on a daily basis to ensure the basic functioning of meaningful and productive social and economic relations as well as cosmological and spiritual balance. These systems and the intersubjectivities that shape them should not be romanticized, but they must be understood.

In cases of land-related disputes, for example, the location, the crime (or dispute), and the identity of the alleged perpetrator and victim are

key, as are questions like "what is available?" "what works and what will the consequences be?" and "what can I afford?"[104] These considerations are, as was argued earlier, "context bound" rather than "culture bound." The same questions apply in response to war crimes and tell us a lot about people's attitudes toward the kind of redress they see as legitimate and feasible. Perceptions of the best way forward depend on the precise set of issues at hand and the implications for the "rest of life." The protean approach people adopt toward justice is "law in action," and it is something that makes international agencies and donors feel very uncomfortable.[105] It rubs up against their own subjective understanding of law and justice as a set of "more of less formalized rules" and instead presents the prospect of "improvised responses to circumstances."[106] Arguably all legal systems, including the ICC, are prone to this. What we have not managed to come to terms with is what to do when this is the premise of the system rather than its perversion. What is clear is that past and current transitional justice approaches tend to analyze any given situation too myopically, using a set of binaries—for example, local versus international justice or retributive versus restorative justice—that quickly collapse under empirical scrutiny. In Acholiland, these conceptual divisions do not adequately take into account the substantive complexity of the justice choices that people make or the hybrid nature of the authorities that are called on to adjudicate. To paraphrase Badiou, transitional justice can never be an "uninherited reality": it should never be viewed as a straightforward problem of "norm-construction" but rather as unavoidably "inscribed into the context of political struggle" in any given place.[107]

Notes

Sections of this chapter appear in Anna Macdonald, "Transitional Justice and Political Economies of Survival in Post-conflict Northern Uganda," *Development and Change* 48, no. 2 (2017): 286–311 and Anna Macdonald, "In the Interests of Justice? The International Criminal Court, Peace Talks and the Failed Quest for War Crimes Accountability in Northern Uganda," *Journal of Eastern African Studies* 11, no.4 (2017): 628–48. Funds supporting the research and writing of this chapter were generously provided by King's College London (PhD Studentship) and the Arts and Humanities Research Council (grant AH/P005454/1).

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2. UNHCR Country Operations Profile, Uganda, http://www.unhcr.org/pages/49e483c06.html.

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4. Two studies interrogating the gap between transitional justice norms and the transitional justice evidence base are Oskar Thoms, James Ron, and Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?" *International Journal of Transitional Justice* 4, no. 3 (2010): 329–54, and Anna Macdonald, "From the Ground Up: What Does the Evidence Tell Us about Local Experiences of Transitional Justice?" *Transitional Justice Review* 1, no. 3 (2015): 72–121.

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24. See Pierre Hazan, *Judging War, Judging History: Behind Truth and Reconciliation* (Stanford: Stanford University Press, 2010), 128; Branch, *Displacing Human Rights,* chap. 6.

25. See the debates in the literature referenced in note 21; Branch, *Displacing Human Rights*, 208.

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27. National Transitional Justice Policy, 3rd draft, May 2013 (on file with author); Refugee Law Project, "A Renewed Promise for Peace and Justice: The Reinstatement of Uganda's Amnesty Act," news release, May 29, 2013.

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30. International Criminal Court (ICC) Act, Uganda, March 2010.

31. In July 2012, JLOS released its long-awaited study report, *Traditional Justice and Truth Telling and National Reconciliation*. But with the delay on the National Transitional Policy, nothing has been implemented.

32. The term "terrible simplifiers" was first used by the Swiss historian Jacob Burckhardt in 1889. For a fascinating account see Branch, *Displacing Human Rights,* chaps. 5–6.

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38. Ibid., quoting Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, introduction to *Culture and Rights: Anthropological Perspectives,* ed. Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson (Cambridge: Cambridge University Press, 2001), 10.

39. Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006), 181.

40. See Justice Law and Order Sector (JLOS), "The Third JLOS Strategic Investment Plan (SIPIII), 2012/13–2016/17," http://www.jlos.go.ug/index.php/document-centre/strategic-investment-plans/228-the-jlos-third-strategic-investment-plan-sip-iii.

41. Louise Moe, "Hybrid and 'Everyday' Political Ordering: Constructing and Contesting Legitimacy in Somaliland," *Journal of Legal Pluralism and Unofficial Law* 43, no. 63 (2011): 151.

42. Hinton, *Transitional Justice,* 7–8.

43. Ibid.

44. Ibid.

45. Oliver Richmond, "Becoming Liberal, Unbecoming Liberalism: Liberal-Local Hybridity via the Everyday as a Response to the Paradoxes of Liberal Peacebuilding," *Journal of Intervention and Statebuilding* 3, no. 3 (2009): 331.

46. An interesting concept in this regard and in the Acholi context is that of "social harmony"; see Holly Porter, *After Rape: Violence, Justice and Social Harmony in Uganda* (Cambridge: Cambridge University Press, 2017); see also Anna Macdonald and Holly Porter, "The Trial of Thomas Kwoyelo: Opportunity or Spectre? Reflections from the Ground on the First LRA Prosecution," *Africa* 86, no. 4 (2016): 698–722.

47. Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34 (2007): 419.

48. This meeting took place in London on November 7, 2012.

49. For more information about the amnesty act, see Hovil and Quinn, "Peace First, Justice Later." For a critique of the act from the local perspective, see Allen, *Trial Justice.* For a critique of its lapsing, see Barney Afako, "Undermining the LRA: Role of Uganda's Amnesty Act," *Conciliation Resources,* August 2012, http://www.c-r.org/news-and-views/comment/undermining-lra-role-ugandas-amnesty-act. The amnesty act ended up being fully reinstated by the government of Uganda in May 2013.

50. Ibid.

51. Chris Blattman and Jeannie Annan, "On the Nature and Causes of LRA Abduction: What the Abductees Say," in Allen and Vlassenroot, *Lord's Resistance Army*, 132–56.

52. Ibid; Erin Baines, "Complex Political Perpetrators: Reflections on Dominic Ongwen," *Journal of Modern African Studies* 47, no. 20 (2009): 163–91.

53. Baines, "Complex Political Perpetrators."

54. Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (Berkeley: University of California Press, 2007). See also Alcala and Baines, "Editorial Note."

55. See Eric Stover and Harvey Weinstein, *My Enemy, My Neighbour: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2006), 3.

56. See for example Hinton, *Transitional Justice,* and Rosalind Shaw and Lars Waldorf, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010).

57. Jens Ohlin, "On the Very Idea of Transitional Justice," *Whitehead Journal of Diplomacy and International Relations* 54, no. 8 (Spring 2007): 51–68.

58. Eric Posner and Adrian Vermule, "Transitional Justice as Ordinary Justice," *Public Law and Legal Theory* 40 (2003): 3.

59. E. P. Thompson, *The Poverty of Theory and Other Essays* (London: Monthly Review Press, 1978), 96.

60. For documentation of UPDF (as well as LRA) war crimes committed during the conflict, see Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (Washington, DC: Human Rights Watch, 2005).

61. Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986–2006* (New York: Berghahn Books, 2011).

62. Betty Okot, "Uganda: Breaking the Links between the Land and the People," International Institute for Environment and Development blogpost, March 11, 2013, https://www.iied.org/uganda-breaking-links-between-land-people.

63. Julian Hopwood and Ronald R. Atkinson, "Land Conflict Monitoring and Mapping Tool for the Acholi Sub-region," United Nations Peacebuilding Programme in Uganda and Human Rights Focus (2013), 17, http://www.lcmt.org/pdf/final_report.pdf.

64. For an excellent account of the range of current land disputes and discussion of their causes, see ibid.

65. Gareth McKibben and James Bean, *Land or Else: Land-Based Conflict, Vulnerability and Disintegration in Northern Uganda* (Gulu: International Organization for Migration, 2010), 7.

66. Author interview with former subcounty chief, Gulu District, July 25, 2012.

67. Author interview, Kampala, May 22, 2012.

68. Holly Porter, *After Rape: Violence, Justice and Social Harmony in Uganda* (Cambridge: Cambridge University Press, 2017), 120, 134–40.

69. Ibid.

70. Ibid.

71. "Principal providers" is a term used in Bruce Baker and Eric Scheye, "Multi-layered Justice and Security Delivery in Post-conflict and Fragile States," *Conflict, Security and Development* 7, no. 4 (2007): 503–28.

72. Julian Hopwood, "Elephants Abroad and in the Room: Explicit and Implicit Security, Justice and Protection Issues on the Uganda/S. Sudan Border," *Justice and Security Research Programme,* Paper 22 (February 2015), 12.

73. There have not been LC1 elections in Uganda since 2001, but the position still exists and plays an important role in the arbitration of disputes at the village level. For more information on local governance structures in Acholiland, see Porter, *After Rape,* 144–47 and Hopwood, "Elephants."

74. See Julian Hopwood, "Women's Land Claims in the Acholi Region of Northern Uganda: What Can Be Learned from What Is Contested," *International Journal on Minority and Group Rights* 22, no. 3 (2015): 387–409.

75. Author-led discussion, Gulu District, July 25, 2012.

76. Hopwood and Atkinson, "Land Conflict," i.

77. Mahmood Mamdani described colonial ideas relating to law being "culture" and "context" bound; although the argument I put forward is different here, see Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Cambridge: University of Harvard Press, 2012), 19–20.

78. Author-led discussion, Agago District, August 2, 2012.

79. Baker and Scheye, "Multi-Layered," 508.

80. Author-led group discussion, Gulu District, July 27, 2012.

81. Judith Scheele, "Rightful Measures: Irrigation, Land and the Shariah in the Algerian Touat," in *Legalism: Anthropology and History,* ed. Paul Dresch and Hannah Skoda (Oxford: Oxford University Press, 2012), 201.

82. Ibid., 197.

83. Porter, *After Rape*.

84. Cf. Paul Dresch, "Legalism, Anthropology and History: A View from Part of Anthropology," in Dresch and Skoda, *Legalism*, 12; see also 37.

85. See, for example, Anna Macdonald and Tim Allen, "Social Accountability in War Zones: Confronting Local Realities of Law and Justice," *International Journal on Minority and Group Rights* 22, no. 3 (2015): 279–308.

86. See Kate Meagher, "The Strength of Weak States? Non-state Security Forces and Hybrid Governance in Africa," *Development and Change* 43, no. 5 (2012): 1073–1101, and David Roberts, "Post-conflict Peacebuilding, Liberal Irrelevance and the Locus of Legitimacy," *International Peacebuilding* 18, no. 4 (2011): 410–24, 413–17.

87. Hopwood, "Women's Land Claims."

88. McKibben and Bean, *Land or Else*, 19.

89. The term "local coexistence situation" is borrowed from Juan Diego Prieto, "Together after War While the War Goes On: Victims, Ex-Combatants and Communities in Three Colombian Cities," *International Journal of Transitional Justice* 6, no. 3 (2012): 525–46.

90. Kirsten Campbell, "The Trauma of Justice: Sexual Violence, Crimes against Humanity and the International Criminal Tribunal for the Former Yugoslavia," *Social and Legal Studies* 13, no. 3 (2004): 329–50. Cf. Harvey M. Weinstein et al., "Stay the Hand of Justice: Whose Priorities Take Priority?," in Shaw and Waldorf, *Localizing Transitional Justice,* 37.

91. Author-led discussion group, Agago District, August 2, 2012.

92. The idea of people locating their thoughts in their own marginality is borrowed from Rosalind Shaw, "The Production of 'Forgiveness': God, Justice and State Failure in Postwar Sierra Leone," in *Mirrors of Justice: Law and Power in the Post–Cold War Era,* ed. Kamari Maxine Clarke and Mark Goodale (Cambridge: Cambridge University Press, 2010), 220.

93. Quoted in Sarah-Jane Cooper-Knock, "Policing in Intimate Crowds: Moving beyond 'the Mob' in South Africa," *African Affairs* 113, no. 453 (2014): 563–82.

94. This point is made in relation to the land titling debate in northern Uganda but is also relevant here; see Hopwood and Atkinson, "Land Conflict," 7.

95. Macdonald, "Transitional Justice."

96. Shaw, "Production of 'Forgiveness,'" 213.

97. Shaw finds something similar in the Sierra Leone context; see ibid., 219.

98. Author interview, Agago District, August 2, 2012.

99. Shaw, "Production of 'Forgiveness,'" 222.

100. Author-led group discussion, Agago District, August 2, 2012; author-led group discussion, Amuru District, August 8, 2012.

101. See Renee Jeffrey, "Forgiveness, Amnesty and Justice: The Case of the Lord's Resistance Army in Northern Uganda," *Cooperation and Conflict* 46, no. 78 (2011): 81.

102. Prieto, "Together after the War," 544. Cf. Alcala and Baines, "Editorial Note," 391.

103. Sverker Finnstrom, "Reconciliation Grown Bitter? War, Retribution, and Ritual Action in Northern Uganda," in Shaw and Waldorf, *Localizing Transitional Justice*, 135–57.

104. Baker and Scheye, "Multi-layered," 515.

105. Hannah Skoda, "A Historian's Perspective on the Present Volume," in Dresch and Skoda, *Legalism*, 43–44.

106. Ibid.

107. Hannah Franski and Maria Carolina Olarte, "Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective," in *Transitional Justice Theories,* ed. Susanne Buckley-Zistel et al. (Abingdon: Routledge, 2014), 201.

Afterword

KAMARI MAXINE CLARKE

THE SCOPE AND IMPORT OF THIS VOLUME IS TREMENDOUS, AND ITS significance lies in the work of a new generation of scholars who refuse to take discussions of universalist or relativist approaches to justice as a point of departure. Rather, they are engaged in critical and contextually grounded senses of justice that move us to justice as aspirational—as what should and ought to be, as that which we strive toward. Of course, the essays in the volume recognize that justice represents spaces of practice, of embattlement. They are rich and illustrative of a new field of Africanist sociolegal studies as they tack between pieces concerned with notions of "justice" understood widely and diversely and those uses of justice that are deployed to manage conflict in African landscapes. The essays are broad and varied, addressing case studies from Malawi to Uganda, from Kenya to the Democratic Republic of the Congo, from Tanzania to South Africa and beyond. They compel us to rethink the terrain on which transitional justice and classic legal questions concerning reasonableness, rights, and duties have been debated. Yet, central to the volume's themes are the rhetorical and practical efforts being deployed in Africa to deal with injustice, as well as the significance of historical research on justice in African contexts. What we see through this work is how futures are and were imagined and what that tells us about the aspirational aspects of justice. In this light, it is the aspirational possibilities of justice that distinguishes this work, and that sets a standard for future work on justice in Africa and beyond. And, by extension, what we see is that such forms of justice as aspirational are deeply affective.

Over the past decade, research on sentimental affects have spanned a range of domains, and the study of emotional affects has been central to understanding the way that people learn to express feelings. We see that, when combined with feelings about justice, justice is deeply affective and a product of structures of the past, learned practices, and future imaginaries. When considered through the empirically driven case studies in this volume, the contextual aspect of justice is infolded in its aspirational content. For making sense of justice in a wide range of regions throughout Africa is also about considering how bodies infold contexts, and in doing so, they are enmeshed in particular ways in various histories and hopes for the future.[1] This is where the aspirational content of justice comes into clear focus in these essays.

Pursuing Justice opens the doors conceptually to discussions about justice in Africa being bound up with sociopolitical affects when propelled by particular emotional commitments, which make senses of justice possible. These modalities of justice *sense making* are embedded in particular domains of feelings about justice and emerge through particular emotionally charged rights discourses that are shaping new international imaginaries, disrupting other conceptions of justice, and propelling new forms of social action through which people express their anguish or regulate and self-regulate their behavior within a politically charged environment such as violence, loss, fear, and so forth.[2] As the essays in this volume demonstrate, various stakeholders—survivors, defendants, witnesses, civil-society organizations (CSOs), governments, and everyday citizens—are engaged in the explicit aspirational pursuit of justice. That is, through their hopes for a different future, through their expectations and actions, they contribute to how justice is imagined and played out in daily life. These affective expressions are not just peripheral. They perform a particular type of discursive work that takes shape through widespread actions, including legal actions, that compel other constituencies to act. These actions not only shape the vocabularies for concepts like guilt and innocence, "victim" and perpetrator; they also contribute to the regimentation of justice imaginaries that shape which justice expressions are deemed legitimate, appropriate, or unacceptable to particular audiences.

The examination of justice affects and their social regulation provides critical possibilities for understanding the ways that inequality, history, and perception are linked to emotional responses to injustice, yet sociocultural analyses of these affective developments have been minimal. In

studies of justice in Africa—especially in relation to violence—often it is normative conceptions of justice that are articulated, and aspirational conceptions are deemed secondary. Yet, in reality declarations, threats, and calls for protection and for ending violence are shaped by significant emotional force. The affective sentiments expressed in support of or against the International Criminal Court's release of arrest warrants in Uganda at the risk of failed peace talks reflects just that—the interrelationships between violence, legality, and aspirations in shaping justice in African contexts.

These affective spaces highlight the reality that, in the midst of and despite legal technocratic knowledge procured in the interest of justice, senses of justice are foundational in shaping justice through emotional affects. These emotional expressions and "aspirations for justice" lead the editors, Jessica Johnson and George Karekwaivanane, to assert that "justice exists on a plane with hope." Thus, the key contribution of the volume returns us to the conviction that justice is varied and negotiated not just because of its cultural contexts and specificities, but also because of the sociocontextual spheres that inspire feelings of justice and accompany how relations come to be perceived as just. For this is where the complexities between justice and conflict in Africa become even more profound and clearly highlighted. The volume returns us to these very critical realizations about the forces of hope that sustain the human condition. Therein lies the book's profound significance now and in the years to come.

Notes

1. Brian Massumi, "The Autonomy of Affect," *Cultural Critique* 31 (1995): 90.

2. Giovanna Colombetti, *The Feeling Body: Affective Science Meets the Enactive Mind* (Cambridge, MA: MIT Press, 2014). See also Susan Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999); Susan Bandes and J. A. Blumenthal, "Emotion and Law," *Annual Review of Law and Social Science* 8, no. 1 (2012): 161–81; Terry A. Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field," *Law and Human Behavior* 30, no. 2 (2006): 119–42; Vesselin Popovski, "Emotions and International Law," in *Emotions in International Politics: Beyond Mainstream International Relations,* ed. V. Popovski, Y. Ariffin, and J. M. Coicaud (Cambridge: Cambridge University Press, 2016).

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