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MEDIATED POWER-SHARING AGREEMENTS, RECONCILIATION AND TRANSITIONAL JUSTICE: LIBERIA, BURUNDI AND THE DEMOCRATIC REPUBLIC OF CONGO

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Mediated power-sharing agreements, reconciliation and transitional justice: Liberia, Burundi and the Democratic Republic of Congo

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Most conflicts in Africa over the past few decades have been resolved through externally mediated power sharing agreements. During the mediation process, amnesty and justice are critical concerns. This paper discusses the inclusion of provisions for reconciliation and transitional justice in mediated power sharing agreements, arguing that the poor conceptualization of reconciliation in the political sphere is reflected in its problematic inclusion, and thus ineffective implementation, in mediation processes and peace agreements. While recognizing that reconciliation and transitional justice are negatively affected by a lack of political will on the part of domestic actors, and by differing approaches taken by internal and external actors, this paper focuses more specifically on how reconciliation is conceptualized and formulated in peace agreements. The paper examines the agreements reached in the cases of Liberia, Burundi and the Democratic Republic of Congo.

Most, if not all, mediated peace agreements in Africa pay some attention to the reconciliation process and transitional justice mechanisms that will be implemented after violent conflict is brought to an end. This paper explores the inclusion of provisions for reconciliation and transitional justice in mediated power sharing agreements, considering the cases of Liberia, Burundi and the Democratic Republic of Congo.

The term 'reconciliation' has only recently emerged in post-conflict recovery discourse and remains a contested and poorly defined concept in the political sphere. This paper argues that this is one of the reasons it is problematically included and ineffectively implemented in the mediation process and peace agreement. Some attention has been given in the literature to other reasons why reconciliation remains so contentious in mediation, such as lack of political will on the part of conflicting parties (e.g. Vandeginste 2012) and disagreements between internal and external actors (e.g. Daley 2008). In this paper we take these dynamics into account, but focus particularly on the less explored issue of how reconciliation is conceptualized and included in the negotiation process and formulated in the peace agreement and the effects this has on implementation.

Lederach (1997) describes reconciliation as consisting of four elements: justice, peace, truth and mercy (this last sometimes being termed 'forgiveness' or 'healing'). However, the relationship between reconciliation and these elements remains unclear and insufficient research has been undertaken to determine to what extent each element needs to be present for reconciliation to take place. These elements are central to the discussion in this paper, as the peace agreements in all three cases imply that national reconciliation is necessary for peace and that transitional justice, truth telling, healing and even forgiveness have an important role to play in ensuring that the conflicting parties are reconciled.

This paper contributes to the debate on peace and peacebuilding in Africa. Along with a growing number of scholars, we argue that the concepts, frameworks and models related to peacebuilding on the continent are contested and reflect power struggles between local and external actors (Mamdani 1997; Ake 2003; Albert 2008; Curtis & Dzinesa 2013). In this debate, the issue of reconciliation has received relatively little attention. The little discussion that there is in the literature concerning the inclusion of reconciliation in the mediation process and peace agreements focuses on the lack of political will on the part of the conflicting parties (e.g. Rogier 2004) and the lack of agreement between local and external actors about the forms that transitional justice should take (e.g. Hayner 2007). While these political dynamics are integral to the issue of reconciliation, this paper focuses primarily on the way reconciliation is conceptualized, which affects the way it is included in mediation.

A component of the debate on peace and peacebuilding in Africa is the 'peace versus justice' issue in which the need for accountability for human rights abuses (normally in the form of criminal justice) is weighed against the need to get warring parties engaged in a peace process (Sriram 2009). This concern is particularly pertinent in Africa, where many conflicts are resolved not through a change in regime but through a negotiated power sharing agreement (Bosire 2006, 8). As the demand for accountability for crimes against humanity intensifies, particularly

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from the UN and human rights organizations, so it becomes more difficult for mediators to propose immunity or amnesty as an incentive for warring parties to lay down arms (Bell & O'Rourke 2007; Sriram 2009; Sooka 2009). However, the debate has been oversimplified – it is rarely a case of peace versus justice but more often 'a complex mixture of both' (Sriram 2009, 1).

The justice mechanisms available to countries recovering from violent conflict are truth commissions, domestic trials, international and hybrid tribunals, amnesty and reparations (Sriram 2009, 2; Olsen et al. 2010, 803). But other possibilities may emerge, particularly when drawing on traditional justice mechanisms. During many mediation processes, though, only a few of the options available are considered and there is a tendency to fall back on the South African Truth and Reconciliation Commission (TRC) model. A misconception that has become apparent in mediation processes such as those of Liberia and Burundi is that South Africa's TRC offered a blanket amnesty (Curtis 2007; Hayner 2007; Boraine 2009). What is missed is the complex conditional amnesty approach that South Africa's TRC took, the lengths to which all the negotiating parties went to reveal the truth, the intense investigations that took place, and the multiplicity of national consultations and public debate that accompanied the TRC process (Boraine 2009, 136).

Including transitional justice mechanisms and reconciliation processes in peace agreements is extremely difficult because the relationship between the two is unclear. Some authors argue that the purpose of transitional justice mechanisms is to address human rights violations and combat impunity in order to advance reconciliation (Bosire 2006). Others argue that transitional justice is compromised in the name of national unity and reconciliation, when warring parties want amnesty as a prerequisite to reconciling (Sooka 2009, 21).

Although justice is a necessary part of a reconciliation process, there is no evidence that a retributive or punitive approach to justice enhances reconciliation, or peace for that matter (Forsythe 2011; Nouwen 2013). Forsythe (2011, 557) maintains that although criminal proceedings may be helpful in establishing the rule of law, they have been found to have a 'minuscule impact on national and regional peace and reconciliation'. This makes the relationship between reconciliation and certain forms of transitional justice complicated.

Virtually every article, book and practitioner oriented handbook that discusses 'reconciliation' begins with a commentary on the difficulty of defining this term (Bloomfield et al. 2003). A review of the literature suggests that reconciliation can be understood along a scale from co existence between antagonists to restored relationships. 'Thin' definitions that include co-existence and an end to violent conflict are rarely accepted as sufficient in terms of national reconciliation. However, few approaches seem to embrace the 'thick' definition that Lederach (1997), for example, outlines in his model of reconciliation, namely, people on all sides of the conflict engaging each other as 'humans-in-relationship'.

The term 'reconciliation' has a long history in theology and philosophy, but its inclusion in political discourse is relatively new and it has been difficult to conceptualize in the political arena. Schaap (2003, 1) describes the difference between theological-philosophical and political conceptualizations of reconciliation, arguing that where theology would see reconciliation as a community being restored by admitting guilt and offering forgiveness, 'it is a political mistake to think of reconciliation in these terms, given the starkly opposed narratives in terms of which members of a divided polity typically make sense of past political violence'. He argues that in political terms reconciliation means the ability of a conflicting group of people to collectively imagine a shared identity and future in a nation state, and that the process begins with the negotiation of peace agreements and the writing of the post-conflict constitution.

But few peace agreements conceptualize reconciliation in these political terms and instead conflate political and theological-philosophical conceptualizations. Van der Merwe (1999, 538) describes how the very ambitious, 'flowery' language that was used by South Africa's TRC obscured the more pragmatic approach to reconciliation that was being put into operation and heightened the expectations of communities that participated in national reconciliation initiatives. These expectations were dashed as the limitations of what the TRC and the government were able to do became apparent. Van der Merwe's analysis of this language and the community expectations it aroused illustrates the contradictory intentions and purposes that made implementation difficult:

> Underlying the establishment of the TRC is a problematic assumption regarding the link between programmatic focus (gross human rights violations) and goal (national reconciliation). The stated goal of the TRC was to promote national unity and reconciliation. The specific intervention of the TRC focused on gross human rights abuses. The assumption was that there is a link between addressing gross human rights violations and promoting national reconciliation. (Van der Merwe 1999, 541)

Similarly, in the cases of Liberia, Burundi and the Democratic Republic of Congo, the link between the goal of reconciliation and the specific interventions proposed in the respective peace agreements is not clear. We demonstrate this by examining the peace agreements and the related literature. As the case studies show, a wide range of goals and intentions are described in the agreements but few are related to any specific intervention, and it is not apparent how a particular intervention (e.g. trials) would achieve a particular goal (e.g. forgiveness).

We agree with Schaap (2003, 1) that reconciliation in the political sphere cannot be about remorse and forgiveness but must rather be about the ability of a conflicting group of people to collectively imagine a shared identity and future in a nation state, and we argue that mediation processes and peace agreements should be based on this understanding.

The purpose of a comprehensive peace agreement, according to the UN Peacemaker website, is to 'seek common ground between the interests and needs of the parties to the conflict, resolve the substantive issues in dispute and provide the necessary arrangements for implementing the agreement' (VanderZee et al. 2010, 3). The substantive components of a peace agreement 'attempt to resolve violent conflicts by making specific provisions designed to solve specific problems' (Ouellet 2004). In this general model of a peace agreement, Arnault (2000, 1–2) distinguishes between two distinct mediator approaches, constitutive and instrumental. A constitutive approach 'views the substance of the peace agreement as key to the overall process' and emphasizes, among other factors, 'precision of wording, technical feasibility, international legitimacy, [and] detailed implementation timetable'. An instrumental approach, on the other hand, emphasizes not the details but maintaining the momentum. In this second approach, 'ambiguities, lacunae, even stark impossibilities are acceptable costs' and it is hoped that if the momentum of the process is maintained, these problems will be resolved or even become irrelevant. Arnault argues that the instrumental approach correctly recognizes that the context keeps changing and that a peace agreement needs to reflect this. At the same time, he warns that careful attention does need to be paid to details (particularly those related to the 'vital concerns' of the negotiating parties) that could hinder the implementation of the agreement.

Regarding the inclusion of reconciliation, the three peace agreements analysed in the case studies below tend to be vague and abstract in their understanding of the concept and how it should be achieved. It is a matter of concern that the vague language does not support the development of 'specific provisions designed to solve specific problems' (Ouellet 2004). All these agreements speak of the need to facilitate national reconciliation. They use words like 'truth', 'healing' and 'forgiveness'. But these terms are undefined, and it is unclear how they relate to the proposed interventions and the intended outcomes. This imprecision makes implementation very difficult.

Liberia

Liberia, the first African republic and one of the few African countries that was never colonized, was founded by freed black slaves from the Americas in 1847. The indigenous people were excluded from state power until 1980, when the ruling Americo-Liberians were overthrown in a bloody military coup and Samuel Doe took power. Doe 'ethnicized' the politics of Liberia further in order to hold onto power, exacerbating tensions between Liberia's ethnic groups. Armed conflict erupted in 1989, to some extent along ethnic lines, when the Gio and Mano-dominated National Patriotic Front of Liberia (NPFL), led by Charles Taylor, attacked the Krahn-dominated government which they deemed autocratic (Zounmenou 2008; Call 2010).

The insurrection quickly intensified into a civil war that included 10 armed groups and spilled over into neighbouring Sierra Leone (Zounmenou 2008; Gberie 2008). The Economic Community of West African States (ECOWAS) intervened effectively, brought about stability and facilitated elections in which Charles Taylor was elected to power in 1997 (Call 2010). Taylor's election ended the seven-year war that resulted in the death of 150,000 people, displaced 40% of the population, sparked a terrible war in Sierra Leone and caused instability in Côte d'Ivoire and

Guinea (Call 2010). From 1999 until 2003, while Liberia was recovering from this conflict, armed groups went to war with the Taylor regime, leading to Liberia's second civil war (Nilsson & Kovaks 2005; Call 2010). The main rebel groups in this war were Liberians United for Reconciliation and Democracy (LURD), and subsequently the Movement for Democracy in Liberia (MODEL). Call (2010, 348) argues that the recurrence of war was caused by the exclusionary nature of the Taylor regime. In 2003, international pressure on the then president Charles Taylor forced him to fly to Nigeria, and a negotiated settlement ended the war (Aning & Jaye 2011).

In 2003 the Comprehensive Peace Agreement (CPA) was signed in Accra by the Liberian government and rebel groups, the two largest being LURD and MODEL. This led to a national transitional government that ruled the country until Ellen Johnson Sirleaf was elected president in October 2005 (Hayner 2007). The CPA defined a framework for peacebuilding and post-conflict reconstruction that included the establishment of a TRC. This TRC was inaugurated in 2006 and released its final report in 2009. By most accounts, the TRC was a failure, in part because of the way it was conceptualized during the mediation process (Steinberg 2009; Gberie 2010).

The Liberian case reveals the lack of political will, on the part of most of the parties at the negotiating table, to include transitional justice mechanisms that would hold them accountable for crimes committed during the war. It also reveals the conflict between local and external actors over approaches to reconciliation and transitional justice. But here we are concerned particularly with the way the concepts of reconciliation and transitional justice were included in the mediation process and peace agreement, and in particular with the problematic wording related to reconciliation and the negative impact that poorly conceptualized transitional justice mechanisms had on implementation.

After the war began in 1989, some 14 failed peace agreements were signed in Liberia between 1990 and 1996 (Adebajo 2002, 599). Being thus under considerable pressure to succeed, the CPA used an 'instrumental' mediator approach – sketchy on detail and allowing for a high degree of flexibility and interpretation (Arnault, 2000). This may have been because the chief mediator, the former Nigerian president, General Abdul Salami Abubakar, initially gave a slow pace to the negotiations, with a focus on building trust between the parties rather than fixing the details of the Agreement (Hayner 2007, 5; Nilsson 2009, 20). But it may also have been because, towards the end of the negotiating process, agreements were rushed as international donors threatened to end funding, civil society groups exerted increasing pressure, MODEL and LURD armed forces began nearing the capital and the loss of life on the ground was increasing. Nilsson (2009, 25) explains that although the pace of the negotiations had been slow, at the end the parties had only a short time to review the final document and make changes before signing it.

Although the mediation process included civil society groups, they were relatively powerless in comparison with the three warring parties and the array of political parties and external actors (Pajibo 2007, 293; Mehler 2009, 453). Civil society actors strongly supported the suggestion that those who had been directly involved in the war should not hold positions of power in the transitional government (Hayner 2007, 14). This suggestion was quickly dismissed and who would hold what position became instead the central concern of negotiations. Further, civil society actors called for a more careful investigation of transitional justice mechanisms, but little attention was paid to the details of the transitional justice processes that were eventually included in the Agreement (Hayner 2007, 18).

Perhaps the one effect civil society did have was to make it impossible for anyone at the negotiating table to call for a blanket amnesty without making themselves significantly unpopular. The possibility of a blanket amnesty, although favoured by the warring parties, was not publically put on the table due to pressure from international actors and civil society. Although Article 13 of the CPA states that a truth and reconciliation commission should be established to investigate crimes, Article 34 states that, 'The NTGL [National Transitional Government of Liberia] shall give consideration to a recommendation for general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this Agreement'. Hayner (2007, 17) argues that civil society actors assumed that this amnesty would not include war crimes such as rape and other atrocities because they assumed that international law required that war crimes and crimes against humanity had to be prosecuted. But several commentators on the negotiations stress that there was an unofficial understanding between the warring parties that there would be a blanket amnesty even though they could not formally include it in the CPA (Hayner 2007; Nilsson 2009; Steinberg 2009).

The inclusion of a truth and reconciliation commission in the CPA was possibly due to the misconception that a TRC implied a truth-for-amnesty trade (Hayner 2007; Nilsson 2009). The only TRC the delegates interviewed by Hayner (2007) seemed to know about was the one in South Africa. This is difficult to believe, given that neighbouring Sierra Leone's TRC and Special Tribunal were being implemented during the time of Liberia's mediation , offering an alternative model closer to home. But the truth-for-amnesty approach was quickly adopted as the model Liberia would follow. The assumption that a TRC meant amnesty, together with what seems to have been a backroom agreement between warring parties that there would be no prosecutions for crimes committed, resolved the issue of transitional justice.

In Article 13 of the CPA, the TRC is described as having three functions: to address issues of impunity, to give victims and perpetrators of human rights violations the opportunity to 'share their experiences' and to 'get a clear picture of the past to facilitate genuine healing and reconciliation'. The language of this Article is highly problematic and does not reflect the more careful language used in many of the other Articles. It does not explain how a truth commission would address impunity, it uses the term 'genuine reconciliation' without defining what that might be, and it links healing and reconciliation when there is no evidence that national reconciliation processes or truth commissions lead to healing or in fact should lead to healing (Van der Merwe 1999). But most problematic of all, the relationship between Article 13 on the TRC and Article 34 on amnesty is never explained.

We argue that it was partly the ambiguous formulation of these Articles that was responsible for a poorly executed TRC in 2006. From the start, the TRC faced multiple challenges: how to overcome a skills shortage and lack of funding, how to enforce accountability, whether to prosecute child soldiers, how to make reparations, and how to deal with economic crimes (Pajibo 2007, Steinberg 2009). In addition, leaders of warring parties used the TRC 'to grandstand, to proclaim their innocence, to lie about their misdeeds, and to blame their enemies' and the TRC lacked the capacity or will to hold them accountable to the truth (Steinberg 2009, 140).

The first report that was released was badly written and poorly argued and looked set to compromise the country's fragile peace (Steinberg 2009; Gberie 2010). By virtue of its mandate, the TRC was tasked with making recommendations along the following lines: amnesty, reparations, institutional and legal reforms, and prosecution. The report called for various degrees of punishment for several categories of people responsible for the country's civil war (Aning & Jaye 2011); these people included prominent leaders such as Sirleaf herself[1].

The call for prosecutions was particularly controversial as the legislation that guided the TRC included the instruction that 'all recommendations shall be implemented' (Aning & Jaye 2011). Gberie (2010) argues that the TRC was acting outside of its mandate, although it was under considerable pressure from civil society and international human rights organizations to address the issue of impunity. Many human rights organizations commended the report for its strong stand on justice over amnesty but many also saw the report as an attempt to divide Liberians and undermine the Sirleaf administration (Aning & Jaye 2011). Interestingly, according to Steinberg (2009), ordinary people wanted the report to stand – even with Sirleaf listed in it – not so that all those listed would be prosecuted, but so that those responsible would be named and the names would be on record in the public arena.

Many of the provisions of the CPA were implemented and some authors argue that the mediation was largely successful (Nilsson 2009, 26). Others argue that the relative success had more to do with the high level of military presence from ECOMOG (Economic Community of West African States Monitoring Group) and the UN, which were monitoring the implementation process, than with the guidance provided by the CPA (Mehler 2009, 465). We would argue that what the CPA failed to do in terms of reconciliation and transitional justice was to include 'specific provisions designed to solve specific problems' (Ouellet 2004).

Burundi

Burundi has experienced decades of violent conflict, caused by a complex interplay of ethnic and political factors. Hundreds of thousands of Burundians have died and as many have fled to other countries (Nindorera 2003, 4).

[1] Steinberg (2009) explains that this was for her brief and regretted support of Taylor in 1990, which was not mentioned in the report.

From independence in 1962 until 1993, the ruling Uprona (Union pour le progrès national) became increasingly radically pro-Tutsi. As this party attempted to maintain power over the Hutu majority, repeated incidents of violent conflict occurred, notably what is sometimes referred to as the Burundian genocide in 1972, when a large portion of the educated Hutu were massacred (Prunier 1994). Melchior Ndadaye of Frodebu (Front pour la démocratie au Burundi), the first Hutu president, was in power for a brief period in 1993, but when both he and his predecessor were assassinated, power reverted to Uprona. The more radical Hutu members of Frodebu broke away to form the CNDD (Conseil national pour la défense de la démocratie) and its military wing, the FDD (Forces pour la défense de la démocratie). Violence broke out between the FDD and the government army and the country was plunged into a civil war that lasted 12 years. In 1998, while the war was raging, peace talks in Arusha brought together Uprona, Frodebu and Palipehutu (Parti pour la libération du peuple Hutu) as well as smaller political parties. The military wing of Palipehutu, the FNL (Forces nationales pour la libération), was also engaged in the conflict.

The Arusha Peace and Reconciliation Agreement for Burundi was signed in 2000 between president Buyoya of Uprona, which had been in power almost continuously since independence, Frodebu, and various smaller rebel groups. Significantly, two other rebel movements – the CNDD-FDD and Palipehutu-FNL – were initially not part of the Arusha negotiations (Reyntjens 2001). The Agreement includes a resolution to establish a national TRC, an International Judicial Commission of Inquiry (IJCI) and possibly an international criminal tribunal.

The lack of political will on the part of the conflict parties is clearly evident in the case of Burundi, as is the disagreement between internal and external actors, particularly when it comes to definitions of ‘reconciliation’ and ‘justice’ (Vandeginste 2007; Daley 1997b). The inclusion of a ‘thick’ reconciliation language resulted in vague clauses that made the Agreement difficult to implement (Vandeginste 2012).

The negotiation process in Burundi was prompted by the then OAU, with the support of the UN (Ayebare 2010, 82). However, former Tanzanian president Julius Nyerere was chosen as the first mediator of this process not by these organizations but by the regional heads of state acting under the auspices of the Great Lakes Regional Peace Initiative on Burundi (Ayebare 2010, 82). In 1996 the then South African president Nelson Mandela took over the negotiations (Dupont 1998; Nibigira & Scanlon 2010). Nineteen political and military groups, including the government of Burundi, the National Assembly, 14 political parties and three rebel movements, were involved in the peace process. The mediation , which focused on coming to an agreement about the root causes of the conflict before suggesting any solutions, was long, slow and difficult (Richter 2005; Curtis 2003, 2007).

At the start of the mediation five committees were formed. These committees produced protocols on the nature of the conflict, problems of genocide and exclusion and their solutions, democracy and good governance, peace and security for all, reconstruction and development, and guarantees on the implementation of the Agreement (Daley 2008, 212). The Arusha Agreement, significantly more detailed than the Liberian one, includes an extensive overview of Burundi’s pre-colonial, colonial and post-colonial history. However, Arnault (2000, 2) categorizes this Agreement as ‘instrumental’, suggesting that the mediators were fully aware of the ‘extensive ambiguities’ present in the Agreement and that they saw these as acceptable and even constructive in order for the transition process to move forward. The major flaw in the process, he argues, was that the methods of implementation were not set out clearly in the Agreement. The resulting implementation problems have not been dealt with successfully, and in particular the proposed transitional justice mechanisms remain under dispute.

Mandela’s mediation approach to the Arusha peace talks has been described as more forceful than that of Nyerere (Ayebare 2010). Thanks to his reputation as the head of a regional superpower, Mandela succeeded in attracting the international community’s attention to the process (Curtis 2007; Ayebare 2010). However, Mandela was easily swayed by external actors (Daley 2007, 213). When the draft agreement was first released, he had said that no changes were to be made to the document, but at the request of the Belgian government contingent at the talks he removed two paragraphs from the section describing the historical roots of the conflict, in which the Belgian colonial power was implicated in the murder of Burundi’s Prince Rwagasore in 1961. The Burundians at the table did not want these paragraphs removed, but Mandela, apparently arguing that Burundi needed Belgium’s aid, unilaterally removed them – an action that Daley (2008, 213) maintains undermined the legitimacy of the document and led local actors, such as Buyoya, to bypass the Arusha negotiations and negotiate with Mandela directly.

Two commentators, Daley (2006) and Curtis (2007), have criticized the South African mediators for framing the conflict in Burundi as similar to apartheid (i.e. a small minority holding power over a large, oppressed majority), but according to Bentley and Southall (2005, 75) Mandela was cautious about 'forcing the South African example down Burundian throats'. The Agreement asserts that the cause of the conflict is first and foremost political and only then ethnic. However, the solutions offered seem to treat the conflict less as political than ethnic, with a focus on developing an ethnic quota system for the government and the army, and a transitional justice and reconciliation process to reconcile the ethnic groups.

Solutions to the causes of conflict as outlined in Protocol I are an IJCI and a national Truth and Reconciliation Commission (Protocol I, Chapter 1, Article 3). The Agreement provides that the transitional government will request the establishment of the IJCI by the UN Security Council (UNSC). The inquiry will investigate the period from independence to the date the Agreement was signed and produce a report for the UNSC. This is followed by an Article stating that the Government of Burundi will then request the UNSC to establish an international criminal tribunal to try those responsible for acts of genocide, war crimes and other crimes against humanity and impose punishments (Protocol I, Chapter 1, Article 6). What is surprising is the inclusion of the period to be investigated (by both the IJCI and TRC), as this remains a contentious issue not only for parties that were at the negotiating table but also for Burundians throughout the country (CENAP 2010).

Vandeginste (2007, 9) argues that the issue of transitional justice was put off 'time and again' during the mediation process for the sake of short-term stability but that there was no indication that the Burundian negotiating parties wanted to avoid dealing with the past. Vandeginste (2007) also argues that the Burundian actors strongly supported retributive justice mechanisms throughout the mediation in order to secure international legitimacy for the process but not necessarily because they agreed with that approach to justice. If this is true, it supports the contention by Daley (2007, 333) that 'the resulting peace agreement is not necessarily consensual or reflective of a compromise for the sake of peace; it marks, essentially, a temporary stalemate in the power play between international, regional and local actors'.

With regard to reconciliation, the Arusha Agreement is somewhat more precise in its language than the Liberian CPA. In the preamble, mention is made of national reconciliation in the same sentence as 'peace, stability, justice, the rule of law, unity and development'. Reconciliation is often related to unity, never to healing and only once to forgiveness. Protocol V, on the implementation of the Agreement, contains the clause 'desirous that peace and reconciliation should be based on an agreement that is clear, precise, specific, unequivocal, comprehensive and implementable'. Although the wording of the Agreement is largely (though not consistently) clear, precise, etc., no explicit link is made between reconciliation as unity and the proposed interventions. The stated purpose of the TRC, for example, is to 'promote reconciliation and forgiveness' (Protocol I, Chapter 2, Article 8.b; authors' emphasis), whereas the stated purpose of the IJCI was to investigate crimes and that of the criminal tribunal to punish crimes. No mention is made of how these interventions address the stated understanding of reconciliation as primarily about national unity.

The Arusha Agreement describes the functions and structure of the TRC in some detail and distinguishes the jurisdiction of the TRC from that of the IJCI (the TRC is to deal with serious acts of violence and the IJCI with war crimes and crimes against humanity). However, the areas that the TRC and IJCI would be investigating overlap, which could result in 'contradictory findings and a waste of resources' (Vandeginste 2007, 15). The functions of the TRC as outlined in the Agreement are therefore relatively contained: they are to deal with serious acts of violence, arbitration and reconciliation, and clarification of history (Nibigira & Scanlon 2010). This is a reasonable and manageable mandate for a TRC, unlike the TRC that was planned for the Democratic Republic of Congo , described in the section below.

The Arusha Agreement also reflects a better understanding of what is involved in a reconciliation process than is the case with Liberia's CPA. However, although it generally formulates reconciliation language carefully, it includes the term 'forgiveness' in conjunction with 'reconciliation' in the Articles relating to the TRC. Most problematic is the section where it describes how the Commission, on completion of the investigations, should propose any institutions and measures likely to promote 'reconciliation and forgiveness'. What is worrying about this is the ambiguity about what measures the TRC will or will not have the power to propose (Vandeginste 2007, 14). It is notable that the term 'forgiveness' is used only in relation to the TRC and that the central purpose of the TRC is stated to be forgiveness, when the remainder of the Agreement seems concerned not with forgiveness but with

unity. This indicates a disconnect between the way reconciliation has been conceptualized and the interventions proposed to contribute to reconciliation. We suspect that this points to a careless adoption of the South African TRC model rather than a careful consideration of interventions that would specifically address the Burundian context, and it does not reflect the chosen conceptualization of reconciliation as set out in the Agreement.

Further undermining the implementability of the Agreement is the provision, in Article 8, that 'the transitional National Assembly may pass a law or laws providing a framework for granting an amnesty consistent with international law for such political crimes as it or the National Truth and Reconciliation Commission may find appropriate'. Although this political amnesty was offered so that politicians could participate in the transitional government, the negotiating parties confused it with impunity for war crimes and crimes against humanity (Daley 2008, 217; Vandeginste 2007, 14).

The Arusha Agreement states that the transitional government will have the power to appoint the members of the TRC. This is surprising considering the influence this gives the transitional government in steering the direction of the TRC. The statement has become particularly problematic as the TRC was not established while the transitional government was in office and the debate continues as to whether the current government has the power to appoint the commissioners (Vandeginste 2012, 10). It was intended that the TRC would take two years to conduct its work and would complete it while the transitional government was in office. To date neither the TRC nor the IJCI has been established and this has caused much tension between the Burundian government, the UN, the EU and donor countries (Taylor 2013).

When the Arusha Agreement was signed in 2000 it did not end the war, primarily because the CNDD-FDD and the FNL had not signed it. In 2002 Jacob Zuma, then South African deputy-president, succeeded Mandela as the third mediator of the Arusha peace process. Zuma's mandate was to broker a cease-fire agreement between the Burundi transitional government and the two remaining armed groups, the CNDD-FDD and the FNL, with the aim of ending the war and obtaining a Global and All-Inclusive Agreement (Daley 2008; Ayebare 2010).

The Arusha peace process is seen by several authors (e.g. Bentley & Southall 2005) as an African initiative that succeeded thanks to the joint efforts of the International Conference for the Great Lakes Region and the AU, combined with the political and financial support of the international community. But although the Agreement brought relative peace and stability to Burundi, the transitional justice mechanisms have not been implemented. Conflicts have arisen about the period that the TRC should be investigating, who the judges should be, who should appoint the judges and what the consequences of testifying would be (Gahama 2006). Disagreements have also arisen between the Burundian government and the UN over the proposed sequence of the TRC and IJCI processes (Ndikumana 2005; Hatungimana et al. 2007; Nibigira & Scanlon, 2010). It has become increasingly apparent that although the Burundian government supported the establishment of the TRC, it did not support the IJCI or the criminal tribunal and only included them in the Agreement at the insistence of the UN and the EU. What is further clear is that some of the most fundamental issues to do with the implementation of the TRC were not resolved during the negotiations, nor were mechanisms put in place to help resolve them after the Agreement had been signed.

The Democratic Republic of Congo

Since its independence in 1960 the DRC has been torn by violent conflicts, from the Katangese and Kasai secessions in the early 1960s to the M23 rebellion in 2012/13. Between 1996 and 2003 some four million people died. Violence erupted when the Mobutu regime, which was in power from 1965 to 1997, was brought to an end by the Alliance of the Democratic Forces for the Liberation of Congo (AFDL), under the leadership of Laurent Kabila, and with the assistance of Rwanda, Burundi, Angola, Burundi and Eritrea. The governments of these countries justified the military support they gave the AFDL by claiming that the Mobutu regime was a threat to peace and security in their respective countries. They accused Mobutu of supporting foreign rebel groups such as the National Union for the Total Liberation of Angola (UNITA), the CNDD-FDD from Burundi, and the Lord's Resistance Army (LRA) from Uganda (Rogier 2004). This conflict ended in 1997 with the defeat of the Mobutu dictatorship and the establishment of a new regime under Laurent Kabila (Ntalaja-Nzongola 2004).

Despite Mobutu's defeat, security concerns remained a pretext for repeated Rwandan and Ugandan military interventions on the side of Congolese rebel groups during the 1998–2003 armed conflict against the Congolese

government. Laurent Kabila was accused by his former allies of supporting foreign rebel groups, thus supplying a reason for the Rwandan and Ugandan militaries to join forces with the Rally of Congolese Democrats based in Goma (RCD-Goma) and the Movement for the Liberation of Congo (MLC) in their 1998 rebellion against the Congolese government (Dagne 2011). This conflict has been the most deadly African war since the end of the Cold War, involving nine countries of the region fighting on the side of either the DRC government or the rebel groups (Rogier 2004; Ntalaja-Nzongola 2004). Although negotiations for peace started in 1999, armed conflicts continued in various parts of the country, particularly in the eastern DRC and were exacerbated by Laurent Kabila's assassination in 2001.

The lengthy peace process in the DRC included a difficult mediation. It started with the Lusaka Ceasefire Agreement in 1999, which outlined the terms for the Inter-Congolese Dialogue (ICD) (Rogier 2004). The ICD included dialogues in Addis Ababa in October in 2001, at Sun City in South Africa from February to April 2002, resulting in the Sun City Accord, and in July and December 2002 in Pretoria (known as Pretoria I and II), resulting in the Global and All-Inclusive Agreement. The Final Act was signed in Sun City in April 2003. These documents build on one another with regard to the agreements on reconciliation and transitional justice.

The agreements that were signed between the DRC government and rebel movements after the outbreak of the 1998 war managed to get the armed groups to stop fighting for short periods of time, but failed to address the root causes of the various conflicts (Dagne 2011). Consequently, it often happened that a group would resume violence under another name and with a new leader, either at the same place or elsewhere. Other weaknesses of these peace agreements were insufficient inclusiveness and failure to hold perpetrators accountable for their crimes (Davis & Hayner 2009; Carayannis 2009, 12).

Perhaps because the previous failed agreements had not been sufficiently inclusive, the Pretoria I and II periods of the mediation involved a broad diversity of actors, including the warring parties, Mai-Mai militias, political parties, civil society, delegations from the countries that had been directly involved in the conflict, and other external actors (Rogier 2003; Carayannis 2009). The key participants in the peace process were the Congolese government, led first by Laurent Kabila and then Joseph Kabila; the Kabila state allies, namely the Angolan, Namibian and Zimbabwean governments; rebel groups, including the RCD-Goma, the Rally of Congolese Democrats and Nationalists, and the Movement for the Liberation of the Congo; and state allies of the rebels, namely the Rwandan, Ugandan and Burundian governments (Malan & Boshoff 2002). The mediators were former Botswana president Ketumile Masire, the UN Secretary-General's Special Envoy Mustafa Nyasse, and South African president Thabo Mbeki (Rogier 2003, 2004; Carayannis 2009). The UN Secretary-General, Kofi Annan, played a crucial role in continually bringing parties back to the table when they threatened to give up on the process (Whitman 2003).

The Sun City Accord in 2002 made provision for the establishment of a Truth and Reconciliation Commission and the possibility of establishing an international criminal court for the DRC (Chapter I.4 and Chapter II.2 of the Sun City Accord); this was included in the Final Act. Although established by law in 2004, the TRC was never implemented (Davis & Hayner 2009, 22). As with Liberia and Burundi, the negotiations focused primarily on power sharing; issues of justice and accountability were not central to the discussion (Rogier 2003, 2004; Carayannis 2009). Davis and Hayner (2009, 16) say the DRC government was, surprisingly, not opposed to criminal justice but suggest that this may have been because the government felt confident that no one would prosecute high ranking members of the armed forces or government.

Reconciliation, in the Global and All-Inclusive Agreement, is referred to regularly but without much detail. In section III, it is stated that in order to achieve national reconciliation 'amnesty shall be granted for acts of war, political and opinion [sic] breaches of the law, with the exception of war crimes, genocide and crimes against humanity', indicating the explicit link that was made between reconciliation and amnesty. This document makes no further attempt to define 'reconciliation' or, apart from through an amnesty law, explain how it would be realized. This may be because the Sun City Accord that preceded this, and was eventually included in the Final Act, had covered the reconciliation and transitional justice mechanisms in more detail.

In the Final Act reconciliation (usually described as 'national reconciliation') is generally related to peace, and sometimes to national unity and security. At one place in the document it is linked to 'inclusive national dialogue' and the reestablishment of the rule of law and at another place to human rights. This reflects a greater emphasis

on the legal and judicial aspects of reconciliation, and is arguably more pragmatic than an approach that stresses remorse and forgiveness.

This approach changes significantly in the section of the document that describes the establishment of the TRC. The language shifts dramatically, now stating that national reconciliation requires 'knowledge and acknowledgement of the facts', 'sincere pleas for forgiveness', an end to lies and impunity, the need to 'come to terms with the memory of our past' and the need to compensate victims and restore their rights and dignity (Resolution No. DIC/CPR/04). The establishment of the TRC is described in much detail, with the language strongly reflecting that of the South African TRC.

The problem with this, as Van der Merwe (1999, 561) points out, is that the South African TRC was developed in a particularly Christian context, strongly influenced by Archbishop Desmond Tutu, where the term 'forgiveness' had a distinct meaning, and was couched in vague, 'flowery' and ambitious language, leading South African victims of apartheid to expect more than the government was going to provide (Van der Merwe 1999, 538). When the expectations of healing, sincere expressions of remorse, forgiveness and restoration of dignity were not fulfilled, many people reported feeling that they had participated under false premises and been 'duped' by the TRC (Van der Merwe 1999; Hamber et al. 2000). We would argue that the imprecise, emotive, and at times distinctly religious, language of the TRC clauses in the DRC peace agreements, modelled on the language of the TRC in South Africa (where the conflict was arguably much less complex), set this TRC up for failure.

The clauses related to the TRC also describe an ambitious mandate: re-establishing the truth, and promoting peace, justice, forgiveness and national reconciliation. The Final Act describes the TRC as an independent commission that would operate at national, provincial and local levels. It was tasked to investigate all political crimes and large-scale violations of human rights committed in the DRC since independence. As if this was not a sufficiently mammoth task, the Act declares that 'political crimes and large-scale violations of human rights committed outside the national territory but related to the political conflicts within the DRC will also fall under the jurisdiction of the Commission'. How a DRC commission would investigate crimes committed outside its territory is not explained. Although a requirement is included for all commissioners to be 'Congolese of great moral and intellectual probity', how the commissioners would be elected is not stipulated.

The Resolution pertaining to the establishment of the TRC (Resolution No: DIC/CPR/04) includes an additional list of objectives the TRC is to achieve, including 're establishing the truth of political and socio-economic events', reconciling political role players and the Congolese people as a whole, consolidating the rule of law in the DRC, instilling a new national and patriotic consciousness, re establishing a 'climate of mutual trust between the different communities' in the DRC, acknowledging crimes committed, formulating recommendations that will ensure such crimes would never occur again, and establishing national unity and cohesion.

The TRC would need to achieve all these objectives while being 'empowered to grant amnesty to any person who accepts to confess and completely denounce, on pain of perjury, all the facts that he/she knows and which have a bearing on the crimes and large-scale violations of human rights in which he/she was involved, and whose primary motivation is of a political nature', except war crimes and crimes against humanity. This strongly reflects South Africa's conditional truth-for-amnesty approach (Ngoma-Bindi & Vuidi 2007). What it does not reflect are the national and regional realities that the DRC faced and the impossibility of such an ambitious TRC agenda ever being implemented.

The final Resolution included in the 2003 Final Act is on the establishment of an international criminal court, which was not mentioned in the 2002 Sun City Accord or the Global and All-Inclusive Agreement but did form part of the Lusaka Agreement in 1999. This short Resolution simply states that the transitional government resolves to request the UNSC to establish an International Criminal Court 'to take cognisance of crimes of genocide, crimes against humanity, war crimes and mass violations of human rights committed or presumed committed since 30 June 1960 as well as those committed or presumed committed during the two wars of 1996 and 1998' (Resolution No. DIC/CPR/05). Although a criminal court for the DRC has not been established, in 2004 the DRC government made a referral to the International Criminal Court at The Hague and warrants of arrest have been issued for six leaders of rebel groups (Dagne 2011).

The fact that the proposal to establish the Congolese TRC was influenced to a large extent by the South African TRC may have predicted its failure (Ngoma-Binda & Vuidi 2007; Curtis 2007). Notably absent from the proposals for the establishment of this TRC were national consultation and public debate (Davis & Hayner 2009, 21). Several criticisms of the proposed TRC were raised, ranging from its composition to its implementation. The selection process for commissioners was criticized for being weak, not transparent, and lacking in strong leadership. Former belligerents were included on the commission as a result, according to David and Hayner (2009, 22), of a fault in the wording of the Sun City Accord, which listed the TRC as one of the transitional institutions that would be led by the signatories of the Agreement. The citizenry were never consulted on its objectives, principles and working methods: the reconciliation process lacked popular support from the start and ended in June 2006, having failed to investigate a single case (Davis & Hayner 2009, 22).

Conclusion

The literature on reconciliation in mediation processes and peace agreements notes the lack of political will on the part of the conflicting parties and the lack of agreement between local and external actors about the forms transitional justice should take. Our case studies of these processes and agreements in Liberia, Burundi and the DRC show that these are indeed central concerns. We argue that the language of the agreements reflects the uneasy compromises that were made between the negotiating parties or even deliberate fudging to avoid accountability for crimes. But more than this, we argue that there are clear examples where the language related to reconciliation reflects the problematic ways it was conceptualized. A more explicit and consistent indication of how reconciliation is understood by the signatories, and what interventions are proposed in the light of that particular understanding, might improve the likelihood of implementation.

We would argue that reconciliation in the political sphere cannot be about remorse and forgiveness. Rather, it is about the ability of a conflicting group of people to collectively imagine a shared identity and future in a nation state (Schaap 2003, 1). Terms such as ‘forgiveness’ and ‘healing’ refer to activities that take place on the interpersonal level but are not the work of governments (Van der Merwe 1999). If the intention of a peace agreement is to ‘make specific provisions designed to solve specific problems’ (Ouellet 2004), then more specific reconciliation language needs to be adopted.

Van der Merwe (1999, 158) argues that in South Africa the TRC ‘started off with an over-ambitious agenda to deal with all levels of reconciliation: national, local and individual. It created expectations and made promises that it could not fulfil’ and he suggests that the TRC needed to be ‘clearer about what they could deliver and what they could not’. We argue that this same mistake is being imported by other peace processes and that in Liberia, Burundi and the DRC over-ambitious agendas that were not appropriate to the circumstances made implementation difficult, if not impossible. Arnault (2000, 2) argues that, regardless of the approach taken, what seems to hold out most hope for a peace agreement resulting in a durable peace is a clear resolution of problems that surface during the implementation phase. If the meaning of reconciliation is unclear, the outcomes of the proposed interventions are not considered and the myriad details of the interventions are contradictory, problems are certain to crop up during implementation. And if the very foundations of the agreement with regard to ‘reconciliation’ are imprecisely worded, and understood differently by different parties at the table, resolving the implementation problems as they arise will be extremely difficult.

A final problem with the way the concepts of transitional justice and reconciliation are included in all the documents we studied is the assumption that the root cause of the conflict is essentially clashes between ethnic groups within a nation-state rather political and regional conflict. Only the DRC Final Act (2003) takes a regional approach: it mandates the TRC (rather unrealistically) to investigate crimes outside its own territory, and includes a Resolution to ‘revive the request for an International Conference to be organised on issues of peace, security, stability and development in the Great Lakes region and Central Africa, under the auspices of the UN, the AU, the SADC and the EU’ (Resolution No: ICD/CPR/06). This is an important Resolution that has received little attention. Although this falls outside of the scope of this paper, we suggest that more thought be given to the possibility of regional reconciliation and transitional justice mechanisms that address a conflict as a political one. Reconciliation will then be not just between conflicting ethnic groups but between people living in the same region, who need, in Schaap’s words (2003), to ‘imagine a shared future’.

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