African Journal on Conflict Resolution

Volume 7, Number 1, 2007

ACCORD

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Design and layout: Angela Thomas, ACCORD Communications.

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Foreword

Richard Kamidza and Jannie Malan

As we were preparing for this issue, interesting similarities and diversities in geographical contexts of peace, conflict and jurisprudence became apparent. These perspectives have sharpened our understanding and insights on this very thought-provoking subject. We trust that our readers will experience the same analytical perception on peace, conflict and jurisprudence in ways that contribute to our goals of a conflict-free Africa.

Interesting similarities that are reflected in this journal show the pattern of crimes against humanity committed by the former Liberian President, Charles Taylor, in Sierra Leone and Liberia, and the five leaders of the Lord's Resistance Army (LRA) in northern Uganda. Although the crimes perpetu-ated occurred in different geographic contexts and time-frames, the following atrocities were committed in both instances: massive abductions of children and their subsequent conscription into the rebel ranks; forced marriages and wide-spread sexual abuses; the use of children as human shields, porters and labourers; and the forcing of child soldiers to commit inhuman acts such as ritual killings and mutilations of civilians.

Strategically, our readers will find prominence being given to achieving peace and stability before the prosecution for the odious international crimes against humanity and the violation of international humanitarian law. In the case of Charles Taylor, Nigeria granted him safe haven from the jurisdiction of the Special Court in Sierra Leone for three years, in order to realise the immediate goal of regional peace and stability. This move prevented potential retaliation by Taylor's supporters in the region. All regional and global actors

keenly monitored the outcome of balancing the goals of peace and stability on the one hand and the goal of prosecution on the other. The United Nations Security Council did not only appreciate Nigeria's role in preventing conflicts in Liberia and Sierra Leone from spreading to other regional states, but also emphasised the need for prosecution, which implied the apprehension and eventual handing over of Charles Taylor to the Special Court upon his return to Liberia. Indeed, the Nigerian authorities extradited him upon receiving a formal request from their counterparts in Liberia, and now Taylor is facing trial on crimes against humanity at the International Criminal Court in The Hague, Netherlands.

Similarly, the Uganda Government seems to have adopted the same strategy of attaining peace and stability before prosecution. In this context, the indictment of the five leaders of the LRA has the potential of isolating the top leadership of the rebel movement, thereby causing internal divisions within their ranks. As long as the indictment does not take place the rebels may seek amnesty; thereby forcing countries that support the LRA to take concrete steps towards expelling them from their territory, which would bring about more cooperation from other neighbouring countries and the international community. We find the Ugandan conflict thought-provoking and thus remain positive as to the achievement of both goals – peace and prosecution – with the strong tendency to apply traditional conflict resolution strategies and mechanisms.

An equally interesting and intellectually stimulating article is the one on the 'dilemma of restorative justice' in cases where all the parties to the conflict are guilty. The reader will appreciate the context of the conflict in the Niger Delta region, a conflict that has pitted the government, host communities and the oil companies against each other. This has seen successive legislations rendering the communities as spectators to the exploitative nature of the multinational oil companies in their vicinity, with insignificant oil-related benefits trickling down to the people. In this context, the reader is introduced to the dilemma of restorative justice when all the parties have no common agenda. The reader will note that the oil sector in Nigeria has increasingly become more technical, complex and heavily regulated despite the lack of commonly defined agendas, goals and interests of all the parties. Further, our readers will note the challenges

of implementing the plethora of laws – such as anti-sabotage, anti-pollution, and compensation – which have opened a floodgate of litigation, accusations and counter-accusations by all the parties affected.

The reader will find interesting claims and counterclaims made between the parties. Oil firms claim that the communities are damaging their equipment, disrupting their operations and endangering their lives. As a result, they are no longer making profit on their investments, and are accusing the government of shirking its responsibilities to the communities. The communities claim that the oil companies besides confiscating their land are polluting the remaining pieces of land and the environment, making them suffer excessive noise, breathing complications due to air pollution, and loss of livelihoods due to polluted rivers and smaller catches of fish. Secondly, they have no say in the distribution of shared revenue and receive inadequate, sometimes delayed, compensation. Lastly, they accuse government of supporting oil firms at their expense. The government blames communities for breaching public peace, law and order, which fuels higher security expenditure and undermines authorities' use of oil revenues to satisfy other national interests. Further, the government accuses the oil firms of not being transparent in their transactions as well as not fulfilling promises made to the communities. The dilemma of restorative justice therefore relates to relationship building involving both the victim and the offender in ways that transcend the concentration on crimes and punishment.

Our readers will observe that a major weakness of the Niger Delta is the lack of the 'Integrated Development Planning' which the authors of the article on this topic recommend for situations where political and social actors are not yet ready to reconcile their differences in line with the national development agenda. This explains the causes for many conflicts in Africa.

Further intellectual stimuli relate to the recent work of the United Nations' newly established Peacebuilding Commission – a body that seeks to prevent countries from sliding back into conflict despite substantial and sustained international developmental inputs. Our readers will find that valuable synergising actions of government, civic bodies and the private sector are not only missing in the Niger Delta, but also in many conflicts experienced in African countries. Our readers will also learn how South Africa has since 1994 succeeded in its

'Integrated Development Planning' in ways that have allowed different actors from the country to work together towards achieving commonly defined goals and/or outcomes. Lastly, our readers will notice that allowing diverse perspectives and impacts to facilitate optimal solutions to critical issues is the best way of responding to any challenge that might arise.

Another interesting opinion for our readers is the 'Agency Theory' which explains the civil-military relationship as an essential feature of democratic governance and an important element in the prevention of internal armed conflicts. Readers will find this analysis to be significant in the context of the democratisation project in Africa. The author postulates a professional military which is distinct from the civilian but politically aware enough to absorb the values of the society. This in our view may discourage conflicts that are contrary to the interests and will of society.

The same theory fits very well with the 'principal–agent' theory used to explain the 'employer–employee' relationship in the article entitled 'Alternative Dispute Resolution in the Workplace – the South African experience'. This article provides a perspective on labour relations and dispute resolution in an environment of high costs, prolonged legal action and low settlement rates. This entails all dispute resolution mechanisms other than the formal process of adjudication in a court of law, and brings workplace justice to more people at lower cost and with greater speed than conventional government channels. Our readers will find this mediation strategy to be fast, cheap and effective and to produce higher settlement rates. There is no legal representation involved; hence employees at all levels, from the lowest and uneducated, can easily approach this route. The model suits well any economic climate where there is a large percentage of employees who have no or very little schooling; where there are few skills and lack of training in labour relations or labour law; and where the largest proportion of employers are small- to medium-sized businesses.

With the stimulating content in these articles, we strongly recommend our readers to share their thoughts on relevant issues with those in the midst of a conflict as well as those trying to mediate and transform that particular conflict. We are also aware that the thoughts contained in this issue can be applied in other countries experiencing conflicts – in Africa or elsewhere. For instance,

actors in the Niger Delta conflict might benefit from the South African model of 'Integrated Development Planning'. Indeed, it is our hope that this issue can apply to other simmering conflicts, which are due to lack of commonly defined developmental agendas, as well as in situations where antagonists simply refuse to embrace each other's views. We have demonstrated here that diversity of thinking leads to thought-probing, and energises the opportunity to learn and seek more wisdom necessary to solve whatever challenges the country might be experiencing. We can conclude that this edition may remind those who resist converging towards each other for a common national development goal that purging of diverse views only leads to intra-state war and eventually crimes against humanity, which can destroy one's legacy. Many are indeed saying that if Taylor and the five rebel leaders of the LRA had listened to reason, they could have avoided this route. Our humble goal is to assist leaders on both sides of a conflict to avoid the legacies of the Taylors and the leaders who fight under positively sounding banners. That might lead to less causes of conflict, less need for jurisprudence, and more opportunities for peaceful coexistence.

The Case against Taylor's Asylum: A Review of Nigeria's Domestic and International Legal Obligations

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Abstract

The Charles Taylor-led rebellion to oust the then incumbent President of the West African State of Liberia, Mr. Samuel Doe, in 1989 triggered off more than a decade of civil war. This seemed to have been resolved with the special election in 1996 of which Taylor emerged the winner amidst claims of intimidation and corruption. However, in 2000 there was renewed fighting when another rebel group revolted against the Taylor government and once again the seemingly unending catastrophe of brutal proportions was re-ignited. By July 2003, as the Liberian capital was at the verge of being over-run by the rebels, Nigeria finally brokered what appeared to be the final Cease-fire Agreement that all the parties would respect, when it persuaded Mr. Taylor to resign and granted him

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asylum. That decision prompted a plethora of criticism both within Nigeria and internationally. The government of the country maintained that it had the moral and even legal obligation to grant asylum to Mr. Taylor and despite the criticism, it continued to harbour the man indicted by an 'international court' – The Special Court for Sierra Leone.

In November 2005 a domestic court in Nigeria held in a preliminary ruling that it had the jurisdiction to review the grant of asylum to the former Liberian President. Finally, in March 2006 Nigeria eventually handed Mr. Taylor over to Liberia who immediately transferred him to the Special Court.

The purpose of this study is to consider the international and domestic legal issues that arose as a result of the decision to house Taylor and shield him from justice from 2003 to 2006. It attempts to address the question of Nigeria's obligations towards both the international community and its citizens. It argues that though Nigeria's asylum offer to Mr. Taylor was a breach of its international legal obligations (under international humanitarian law), the effect of the breach (if any) is assuaged by such factors as the country's obligations to maintain international peace and to ensure stability in Liberia (these being part of the core purposes of the United Nations). It also argues that the decision to give refuge to Mr. Taylor was not to sustain impunity, as there is no time bar for the prosecution of those accused of international crimes, but to make certain the sub-region is stabilised first before Mr. Taylor could be prosecuted. It concludes that Nigeria was not obligated to hand Taylor over to the Special Court, thereby handing him over to Liberia, when it felt the sub-region was stable enough to handle his trial without erupting into the violence it had exerted so much to stop.

1.   Introduction

The legal dilemma of the grant of asylum by Nigeria to Mr. Charles Taylor, the erstwhile President of Liberia, revolves around his indictment by the Special Court for Sierra Leone (the Court). Mr. Taylor was the guest of the Nigerian government from August 2003 to March 2006. The issue is compounded further by the fact that the Special Court was created by an agreement between the

United Nations (UN) and the government of Sierra Leone.[1] Nigeria, then being a third party to the agreement, did not think it should comply with the Court's directive and hand over Mr. Taylor. Although Nigeria eventually extradited Mr. Taylor to Liberia in 2006, the core question is whether there were any international legal obligations breached by Nigeria for failing to prosecute or arrest Mr. Taylor throughout the period he was in Nigeria.

In this study, the international obligations of Nigeria will be reviewed against its relationship to the UN; its *erga omnes* obligations to the international community (arising from both customary international law and multilateral treaties); and its domestic law duties and the Rule of Law. This study will also examine certain factors that may have mitigating effects on the demand for Nigeria's compliance with its international obligations, factors such as the conflicting issues of peace and post-conflict reconciliation against the demands of justice.

2.   An Examination of Nigeria's International Legal Obligations

Every State, as a member of the international community, may have entered into certain treaties which require the State parties to comply with the principles laid down in those treaties. The International Law Commission (ILC) in its Commentary to the Draft Articles on State Responsibility made it clear that the provisions apply to obligations of States notwithstanding the origin of such an obligation (International Law Commission 2001:126). The Commission further noted that '[i]nternational obligations may be established by a customary rule of international law, by a treaty or by general principles applicable within the international legal order' (International Law Commission 2001:126). It noted that the phrase 'regardless of its origin' in Article 12 of the

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1   See the full text of the agreement at <http://www.sc-sl.org/scsl-agreement.html>; see also the preamble of the Statute of the Court at <http://www.sc-sl.org/scsl-statute.html> (last visited November 14, 2005).

Draft Convention will cover all the various ways of creating legal obligation which are recognised by international law (International Law Commission 2001:126). The Commission went on to explain that 'these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on' (International Law Commission 2001:126-127).

In line with the subject of this study, our examination of Nigeria's international obligations will be restricted to those that may have been affected by the grant of asylum to Mr. Taylor, a man indicted by an international criminal tribunal.[2] To this end, it is fundamental to consider whether Nigeria bears any obligation to the Special Court for Sierra Leone. This section will therefore consider Nigeria's obligation under the UN Charter and its *erga omnes* obligations under the complementing principles of international humanitarian law and international criminal law.

2.1 United Nations Charter obligations

In order to establish whether Nigeria's obligations to the UN have been breached by the decision to shield Taylor from the Special Court's jurisdiction for three years, it is appropriate to first establish the status of the Court in relation to the UN and also with respect to third States (States not party to the international agreement that established the Court).

It will be appropriate to first determine the issue of the status of the Special Court and the obligations (if any) owed to it by third States, especially UN members who are ordinarily bound to comply with the obligations they have accepted under the Charter.[3] Our aim of reviewing the status of the Special Court is to examine whether it is an organ of the world body such as would

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2   In Special Court for Sierra Leone 2003: par 37-42 this court held that it was an international court.

enable it to impose obligations on UN member States. It is arguable to say that the Special Court was established as an independent body by an agreement between the UN and the government of Sierra Leone and was not created as an organ of the UN.[4] On the other hand, it may also be argued that the Court was created pursuant to the powers of the Security Council under Chapter VII of the Charter. The Council in Resolution 1315[5] determined that the situation in Sierra Leone was a threat to peace and also recommended, under Article 39 of the Charter, that the Secretary-General enter into negotiations with the Sierra Leone government to create a court to curb the impunity prevalent at that time. It should be noted that Article 41 of the Charter provides that the Council may decide (after the determination of a threat to peace) what processes not involving the use of armed force may be applied to give effect to its decision. The Council may then choose the process it intends to apply. For instance, in establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which were international tribunals,[6] the Council expressly stated that it was acting under its Chapter VII powers. The effect of this express assertion was that all UN member States were under the obligation to cooperate with the tribunals (Knoops 2003:2-12).[7] However, in the case of the Special Court, the Council did not act under its Chapter VII powers, neither did it call on member States to cooperate with the court (which would have meant requiring them to

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3   See Art. 4 & 25 of the UN Charter: State members are primarily obliged to comply with its objects which are to the furtherance of the purposes of the UN as laid out in Chapter 1.

4   See note 1 above for the text of the agreement; see also the Taylor case, referred to in note 2 above.

5   Accessed at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/605/32/PDF/ N0060532.pdf?OpenElement>.

6   See UN Security Council Resolutions 827(1993) and 955(1994), accessed at <http://www.un.org/Docs/sc/unsc_resolutions.html>.

7   See also Romano & Nollkaemper 2003.

comply with the Special Court's requests).[8] The Court has taken a view that the power of the Security Council, to enter into such an agreement with a State, was derived from the Charter both in regard to the general purpose of the UN and the Council's powers (in Art. 39 and 41).[9] It went on to hold that:

> Article 39 empowers the Security Council to determine the existence of any threat to the peace. In Resolution 1315, the Security Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region. Much issue had been made of the absence of Chapter VII powers in the Special Court. A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define legal status of the special court. It is manifest from the first sentence of article 41, read disjunctively, that (i) The Security Council is empowered to 'decide what measures not involving the use of armed force are to be employed to give effect to its decision;' and (ii) It may (at its discretion) call upon the members of the United Nations to apply such measures. The decisions referred to are decisions pursuant to Article 39. Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such a court as a matter of obligation (Special Court for Sierra Leone 2003: par 37-38).

The Special Court, therefore, having been created by a bilateral agreement between an international organisation and a State, is an independent body and not an organ of the UN. It has its own separate legal personality and does not

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8   Note that the Council in par 1 of Resolution 1315 specifically requested the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent court. See note 1 above, for the full text.

9   Special Court for Sierra Leone 2003: par 37.

derive its existence from any body. Its existence is derived from the bilateral agreement creating it and from its Statute much like any other international organisation.[10] But is it owed any obligation by UN member States? There is some debate on this issue. One commentator has argued that:

> As the Agreement is between the UN and Sierra Leone, its primacy is limited to that State alone…as is the obligation to co-operate with the Special Court. If the Security Council wished to extend the obligation to co-operate to all UN members, it could do so with a Resolution adopted under Chapter VII of the UN Charter (Cryer 2001:440).

Another scholar has supported this view, asserting that:

> The Statute (of the Special Court) contains no provisions imposing an obligation to cooperate upon other States, thus sensibly differing from the ICTY and ICTR Statutes, which contain comprehensive obligations binding all States. This is not surprising, since the Special Court is neither an organ mandated by an international organisation having the power to impose obligations upon States (as are the ICTY and ICTR), nor is it based on a multilateral treaty (as is the ICC [International Criminal Court]). On the contrary, it is established by a bilateral agreement, which cannot bind third parties (*z tertis nec nocent nec prosunt*) (Frulli 2000:861-862).

The Court, on the other hand, proffered a reasoning that takes this debate to another level. In the Taylor case, referred to above, it held that the Security Council may call upon member States of the UN to co-operate with a court established in the efforts to sustain or restore international peace and stability at any time (either before or after setting up the Court) (Special Court for Sierra Leone 2003: par 38). It also went on to pronounce that:

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10   See the preamble of the Statute of the Court, note 1 above.

> It is to be observed that in carrying out its duties under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community (Special Court for Sierra Leone 2003: par 38).[11]

The assertion that the UN was acting on behalf of the international community when it entered into the agreement with Sierra Leone, infers that third States owe certain obligations to the court which is an independent creation of a treaty. This takes us to the issue of the consequences or effects of the attribution of legal personality to an international organisation. While the Agreement creating the Court was clearly within the powers of the UN according to its Charter, it does not impose obligations expressed in the treaty on member States. An organisation which has a separate legal personality would, on its own, therefore stand to enjoy and bear the privileges and responsibilities of any treaty it enters into as a party (Sands & Klein 2001, Akande 2003:269,274). This is in line with the 1986 Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations (Vienna Convention 1986),[12] which codified the customary rule of *pacta tertis nec nocent nec prosunt*. Article 34 of that treaty stipulates that '[a] treaty does not create either obligations or rights for a third State without its consent'. The only way in which such a treaty would be binding on a third State is where that third State expressly consents in writing (Vienna Convention

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11 See also *Prosecutor v. Moinmina Fofana, Case No. SCSL-2004-14-AR72(E),* Decision on Preliminary Motion On the Lack of Jurisdiction Materiae: Illegal Delegation of Powers by The United Nations May 25, 2004, accessed at <http://www.sc-sl.org/Documents/SCSL-04-14-PT-100-6836.pdf>.

12 See the full text of the treaty, accessed at <http://www.un.org/law/ilc/texts/trbtstat.htm>; cf Vienna Convention On The Law of Treaties (1969), 1155 *United Nations Treaty Series* 331, <http://www.un.org/law/ilc/texts/treaties.htm>.

1986: Art. 35), or where the rule so reflected in the treaty is or becomes customary international law (Vienna Convention 1986: Art. 38).

The Special Court being an independent creation of a bilateral agreement between the UN and Sierra Leone does not therefore require any form of cooperation from third States such as Nigeria. Unless, as Robert Cryer opines, where the Security Council wishes to broaden the obligation to cooperate to include all UN members, the Council can easily do so by passing a Resolution adopted under Chapter VII of the Charter (Cryer 2001:440). Therefore, the Special Court is an international judicial body which, like other similar bodies, is set up by an international treaty, governed by international law and whose powers are as set out in its statute. The statute in this case does not require Nigeria or any other third State, not a party to the treaty creating it, to cooperate with it in line with the international customary norm of *pacta tertis nec nocent nec prosunt*. This may have informed the Nigerian President's viewpoint that he would only hand Mr. Taylor over to a duly elected Liberian government (if it so requests) and not to the Special Court (BBC News 2005). Nigeria stood its ground in eventually handing Mr. Taylor over to the Liberian government when the latter requested the former warlord's surrender. In the light of the foregoing argument Nigeria was not obligated to comply with the directive/request of the Special Court as it was not a party to the agreement creating the Court.

2.2 Security Council Resolution 1638 of 2005

The UN Security Council has been publicly appreciative of Nigeria's role in preventing the conflicts in Liberia and Sierra Leone from spreading to other States in the West African sub-region (UN Security Council 2005). Nigeria continued to play that role when trouble flared up again to wrest the fragile peace from the war-weary citizens of Liberia in 2003. The Nigerian Government convinced the then President to resign and take refuge as a guest in Nigeria, even though he had already been indicted by the Special Court. The objective was to achieve lasting peace for that war-torn country. Two years down the line and with a legitimately elected President in Liberia, the Security Council passed another Resolution on Liberia at its 5304th meeting on 11 November 2005 (UN Security Council 2005).

Resolution 1638 was adopted to extend the mandate of the United Nations Mission in Liberia (UNMIL) to include powers 'to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone' (UN Security Council 2005: par 1). It should be noted that UN Security Council 2003b (Resolution 1509), which established UNMIL, did not include such a mandate. Implicit in Resolution 1638 is the objective of maintaining peace and stability in Liberia. This would not be achieved if for any reason, and in the nearest future, Taylor ventures back into that country. The Resolution also commended Nigeria's role and contribution in restoring stability in Liberia and West Africa and acknowledged that 'Nigeria acted with broad international support when it decided to provide for the temporary stay of Mr. Taylor' (UN Security Council 2005: par 3).

The Council did not, in any way, try to compel Nigeria to hand over Taylor to the Special Court, although it noted that Taylor 'constitutes an impediment to stability and a threat to the peace of Liberia and to international peace and security in the region' (UN Security Council 2005: par 4). The Council, however, did not close the door to future Resolutions which may compel Nigeria to hand Taylor over to the Court. The objective of Resolution 1638 was to prevent Taylor from returning to Liberia and destabilising the peace efforts. Moreover, with the election of Mrs. Ellen Johnson-Sirleaf as the President of Liberia in November 2005, an individual with the capacity and history as Charles Taylor could easily capitalise on the fragile situation (Mrs. Johnson-Sirleaf is the first female President in Africa and the country was just recovering from 14 years of conflict). Hence the need for the Council to expand the mandate of UNMIL to include the arrest of Taylor if found on Liberian soil. The Security Council, not having used the Resolution to compel Nigeria to hand over Mr. Taylor to the Court, was in essence recognising that Nigeria would be within its rights to hand over Mr. Taylor to Liberia and not to the Court. Therefore, to facilitate his trial and in the interest of the region's stability, the mandate of UNMIL was extended to provide for Mr. Taylor's arrest and transfer to the Special Court.

2.3 Treaty and customary international law obligations

The next issue in this review of Nigeria's obligations and the Taylor asylum is a question of whether the crimes Charles Taylor is accused of, as reflected in his indictment by the Special Court, have evolved into norms of criminality in customary international law. A further query would be whether the asylum granted to Mr. Taylor could bring Nigeria into any material breach of its treaty obligations. It is recalled that the Special Court indicted Taylor with 'crimes against humanity, violations of Article 3 Common to the Geneva Conventions and Additional Protocol II and other serious violations of international humanitarian law, in violation of Articles 2, 3 and 4 of the Court's Statute'.[13]

> Regarding Nigeria's treaty obligations, our concern here would be in relation to treaties that may have been affected by the asylum and which have not transformed into customary law.[14] The difference between a State's obligations with respect to a treaty and its obligations to customary international law is that the former is owed to another State or group of States while the latter is owed to the entire international community. The International Court of Justice in the *Barcelona Traction case* aptly expressed this when it held that: 'In particular, an essential distinction should be drawn between the obligations of the State towards the international community as a whole, and those arising vis-à-vis another State… By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have legal interest in their protection; they are obligations *erga omnes*'.[15]

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13 See Charles Taylor's indictment, accessed at <http://www.sc-sl.org/Documents/ SCSC-03-01-I-001.html>.

14 The country's obligations with regard to customary rules are discussed below.

15 See Barcelona Traction Light and Power company Limited (Belgium v. Spain), 1970 *International Court of Justice* 32 (2nd Phase Merits Judgment) at par 33.

This study is not the appropriate place to discuss the issue of whether or not all the provisions of the relevant international humanitarian law treaties have evolved into customary international norms. The focus here will be guided by the indictment of Mr. Taylor. Consequently, the question that will be examined is whether the crimes he was indicted for are part of the provisions of the treaties Nigeria has ratified or are part of the provisions of the relevant treaties that have evolved into customary international law. Mr. Taylor was indicted by the Special Court for Sierra Leone for crimes that fall under the core provisions of the Geneva Conventions of 1948 and are also serious violations of international humanitarian law. It should be noted that Nigeria is a party to the Geneva Conventions and its Additional Protocol I, the 1984 Torture Convention and other treaties whose objective is the penal implementation of these norms (for instance the Rome Statute of the International Criminal Court).[16] However, the International Court of Justice (ICJ) had, in the *Nicaragua case*, held that the Geneva Conventions give expression to the general principles of humanitarian law.[17] In other words, the provisions of the Geneva Conventions have crystallised into customary international law. In a later case, the Court (ICJ) seized the opportunity to expressly hold that the fundamental rules enunciated in the Geneva Conventions 'are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.[18] The grant of

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16 For a list of the treaties Nigeria has ratified see <http://www.hri.ca/forthere­cord2003/vol2/nigeriarr.htm> Profile: Nigeria-Treaties: Ratifications and Reservations. The country has even gone ahead to enact into its domestic legal system the implementing legislations for the Geneva Conventions and the ICC Statute. This will be discussed later in this paper.

17 *Military and Paramilitary Activities (Nicar. v. USA,) 1986 International Court of Justice* 14 (June 27) – Merits, par 220 at 114; also accessed at <http://www.icj-cij.org/icjwww/icases/inus/inusframe.htm>.

18 See the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 (1) *International Court of Justice* 35 (July 8) at par 79, accessed at <http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm>.

asylum to Taylor is not in itself a breach of any of the provisions of the treaties concerned, even as it is also in line with Nigeria's obligations to the 1981 African Charter on Human and Peoples' Rights, which is also an international treaty.[19] Article 12(3) of that treaty stipulates that '(e)very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions'.[20] It is arguable that Mr. Taylor was, as at the time of the asylum offer, a man persecuted by LURD (Liberians United for Reconciliation and Democracy) and other rebel groups who were besieging Monrovia with the objective of killing Mr. Taylor or getting him out of power.[21] The foundation for questioning Nigeria's compliance with the international Rule of Law may, however, be based on the country's reluctance to bring Mr. Taylor to trial for the international crimes he committed in Sierra Leone and Liberia.

In response to the question whether the charges against Taylor form part of customary international law, a commentator opined that:

> One of the traits of the unconditional rules of humanitarian law is the intransigent nature of the values protected… and apart from their transformation into customary law, the Geneva Conventions virtually accepted by the entire international community are about to become sources of obligations *erga omnes.* Thus the imperative character of the protection and its universality often show that a mere contractual humanitarian norm is being elevated to *jus cogens* (Kamenov 1989:169,200).

The question that arises from this view is whether the provisions regarding the crimes in issue have been transformed into *jus cogens* norms. In other

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19 Accessed at <http://www.africa-union.org/Official_documents/Treaties_ %20Conventions_%20Protocols/Banjul%20Charter.pdf>.

20 Accessed at <http://www.africa-union.org/Official_documents/Treaties_ %20Conventions_%20Protocols/Banjul%20Charter.pdf>.

21 See BBC News 2003. See also Amnesty International 2003.

words, this section will be reviewing whether Taylor's alleged crimes belong to a category falling under the status of peremptory norms. The term *jus cogens* has been defined as 'a norm of general international law accepted and recognised by the International Community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[22] There is still some debate among scholars on which international provision or humanitarian rule has been elevated to a peremptory norm, and how such a rule or principle may rise to that level.[23] However, there is some consensus among scholars that crimes such as genocide, crimes against humanity, war crimes, piracy, slavery and torture have been transformed to fall under *jus cogens*.[24] The consensus that this set of crimes has been transformed to fall under that hallowed norm may be because they affect the interests of the international community as a whole by threatening the peace and security of mankind (Bassiouni 1996:65). It is recalled, as noted earlier, that the indictment of Mr. Taylor by the Court included crimes against humanity and other serious violations of international humanitarian law.[25]

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22 See Vienna Convention on the Law of Treaties 1969: Art. 53.

23 See for example, Brownlie 2003:488-490, De Hoogh 1996:44-56, Christenson 1988:585, Parker & Neylon 1989:411, Mitchell 2005:219-256, Bassiouni 1996:63-76, May 2005:24-55.

24 See for example Bassiouni 1996:65 – where he asserted that there is abundant legal basis to conclude that all of these crimes are categorised as *jus cogens*. He cited the following to support this view: (1) the ICTY and ICTR Statutes address genocide, crimes against humanity, and war crimes; (2) the 1996 Code of Crimes. (Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eight Session, *UN General Assembly Official Report*, 51st Session, U.N. Doc. A/CN.4L.532 (1996), *revised by* U.N. Doc. A/CN.4L.532/ Corr.1 and U.N. Doc. A/CN.41.532/Corr.3, arts. 16-20). See also Mitchell, 2005:232, Sunga 1997:246, Meron 1989:9.

25 See note 13 above. Note that Articles 3 & 4 of the Court's Statute which provide for violations of Article 3 common to the Geneva conventions and other serious viola-tions of international humanitarian law are made up of categories of crimes that

The consequence of a norm being categorised as *jus cogens* goes to the enforcement of that norm (De Hoogh 1996:91). Therefore the international community seriously requires a broader and weightier compliance from States, as the obligation is owed to the international community as a whole and not just to other State parties to a treaty.[26] According to Professor Bassiouni (1996:64):

> The term *erga omnes* means 'flowing to all', and so obligations deriving from *jus cogens* are presumably *erga omnes*. Indeed, legal logic supports the proposition that what is 'compelling law' must necessarily engender an obligation 'flowing to all'.

He went further to argue that the consequences of recognising an international crime as *jus cogens* places *erga omnes* obligations upon States and does not merely give them certain rights to prosecute the perpetrators of such crimes (Bassiouni 1996:64). He asserted further that the effect of a *jus cogens* norm on States is that it does not give them optional rights from which they may choose to act or not to act. On the contrary it requires from them a duty to act (Bassiouni 1996:64).

Nigeria, therefore, owed the international community as a whole the *erga omnes* obligation to arrest Mr. Taylor and either prosecute him or hand him over to another State or body with a superior jurisdictional claim, in this case, Liberia or the Special Court.[27] Goodwin-Gill (1999:220), in voicing his support for this view, said:

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have been accepted as war crimes. (See a codification of international customary law on the extent of war crimes in Article 8 of the Rome Statute of the International Criminal Court, accessed at <www.un.org/law/icc/statute/romefra.htm>).

26   See Jorgensen 2000:97, Randall 1988:785, Reydams 1996:18.

27   See Articles 49, 50, 129 & 146 respectively of Geneva Conventions I, II, III & IV of 1949, accessed at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>. See also Articles 5(2) & 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), accessed at <http://www.un.org/documents/ga/res/39/a39r046.htm>.

> International crimes, 'by their very nature', produce an obligation *erga omnes* to extradite to another competent State, prosecute locally, or surrender the person concerned to the jurisdiction of a competent international tribunal; it is the *jus cogens/erga omnes* combination that makes prosecution (somewhere) unavoidable as a matter of duty.[28]

In other words, Nigeria's obligation under the principle of *aut dedere aut judicare*, found in multilateral treaties such as the Geneva Conventions, was to either extradite or prosecute Mr. Taylor in Nigeria and this is not invalidated by any other norm of international law. The Nigerian government had acknowledged that it had such an obligation to extradite Mr. Taylor to Liberia; it also maintained that it would not hand him over to Liberia until the Liberian government expressly requests for Taylor's extradition.[29]

3.   Nigeria's Obligation under its Domestic Rule of Law

Though Nigeria's grant of asylum to a person indicted by an international criminal tribunal is an act governed by international law, it may also have direct effects on the rights of some its citizens. Therefore it has certain domestic legal implications. It is then fundamental to examine the domestic legal questions on the asylum granted to Mr. Taylor.[30]

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28 For further reading on the obligation to extradite or prosecute see Bassiouni 1996:64, Cassese 2003:277-300, Orentlicher 1991:2551-2592.

29 Nigeria was not obligated to surrender Taylor to the Special Court, but it did eventually hand him to the Liberian government when that government made the request. Further to the argument, and as would be elaborated later in this paper, international law has set no time frame for a State to apply this principle of *aut dedere aut punire*. Hence a State such as Nigeria can wait for an appropriate political and factual atmosphere before effecting the requirements of the principle. In this case the stability of the region was more important than the immediate trial of Mr. Taylor, which on its own had the potential of destabilising the fragile peace in Liberia and Sierra Leone.

Nigeria owes its citizens the duty to protect and preserve their rights, whether such rights evolved from international or domestic norms. Where the State is negligent on its duty, the injured citizen can apply to the courts of law to compel the State to comply with its duties. However, as rightly asserted by Professor Cassese:

> National courts do not usually undertake proceedings for international crimes only on the basis of international customary law, that is, if the crime is only provided for in that body of law. They instead tend to require either a national statute defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing* legislation enabling the courts to fully apply the relevant treaty provisions (Cassese 2003:303).

Professor Denza, in clarifying the relationship between international law and its application by domestic courts noted that international law used to be concerned mainly with the relationship between States (Denza 2003:415). She went further to state that:

> Now, however, it permeates and radically conditions national legal orders, its rules are applied and enforced by national authorities, and national courts are often asked to resolve its most fundamental uncertainties. Yet international law does not itself prescribe how it should be applied or enforced at the national level. It asserts its own primacy over national laws, but without invalidating those laws or intruding into national legal systems. National constitutions are therefore free to choose how they give effect to treaties and to customary international law (Denza 2003:415-416).

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30 Note that in the context of this essay, the legal issues to be examined are issues concerning Nigeria's legal obligations.

Scholars have over the years set out various theories regarding the relationship between international and domestic law, monism and dualism being the most persistent of the theories.[31] Nigeria takes the dualist approach in implementing the effects of international law in its domestic legal system. The constitution of Nigeria accords no special status to treaties, the rights and obligations created by them having no legal effect in its domestic arrangement unless legislation is in force to give effect to them. Article 12(1) of the country's 1999 Constitution expressly provides that '(n)o treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly' (Constitution of the Federal Republic of Nigeria 1999). However, when a legislation is specifically enacted for this purpose, the rights and obligations are then said to be 'incorporated' into Nigeria's domestic law (Aust 2000:150).

The treaties in issue have been ratified by Nigeria, one of which has also been 'incorporated' into domestic law by the Geneva Convention Act (Laws of the Federation of Nigeria 1990: chap 162). Hence the rights and obligations of the Convention therefore have effect in the domestic legal system of Nigeria. Nigeria will only be responsible in international law and not municipal law for any breach of its treaty obligations as a result of a later amendment to the legislation or its repeal (Aust 2000:151). But if there is no later amendment or repeal of the legislation and the government still fails to uphold the rights of the convention or breaches it (as in this case), the domestic legal institutions can be triggered by anyone who has the *locus standi* (locus in this case will be a proof that the failure by the State to comply with its treaty obligations have directly affected the rights of the aggrieved person, such rights having been given effect by the Act). This failure to comply with treaty obligations is currently being challenged by two Nigerian businessmen who had their limbs amputated by the

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31 See especially Brownlie 2003:31-34. See also Denza 2003:421, Gardiner 2003:130, Fitzmaurice 1957:92, *Hague Recueil* 5, in Cases and Materials on International Law 68-71 (5th ed.), (D.J. Harris ed. 1998).

rebel forces in Sierra Leone.[32] The two men initiated proceedings against the Federal government, Mr. Taylor and four other government institutions (the Federal Commission for Refugees, the National Commission for Refugees, the President of the Federal Republic of Nigeria, and the Attorney-General of the Federal Republic of Nigeria).[33] They urged the court to review the government's decision to grant Taylor asylum in Nigeria. The applicants had challenged the asylum on the grounds that their rights were affected and that Nigeria ought to prosecute or extradite Taylor rather than shield him from justice.

The government countered by raising a preliminary objection arguing that the Court did not have jurisdiction due to the applicants' lack of *locus standi*, that the question in issue was a political non-justiciable question, and that the action was barred by the Statute of Limitations. The applicants, on the other hand, argued that they challenged an administrative act of granting refugee status to Mr. Taylor and that this was not a political issue. Regarding the government's objection on grounds of statute of limitations, the applicants submitted that 'a well known exception to the limitation period is where it can be shown that a public officer has breached or abused his office'.[34] It is remarkable that both the arguments of the applicants and the respondents were based on domestic law concepts. This is because, as noted earlier, the whole issue of the rights of the Geneva Conventions can now be directly applicable to individuals in Nigeria as a consequence of the implementing legislation.

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32 Charles Taylor's indictment was for acts carried out in Sierra Leone. He is accused of giving financial support, military training, personnel, arms, ammunitions etc to the rebels throughout the duration of the conflict in that country. See Charles Taylor's indictment, accessed at <http://www.sc-sl.org/Documents/SCSC-03-01-I-001.html>.

33 See the Case of *Emmanuel Egbuna & Another v. Charles Ghankay Taylor & 5 Others (Unreported) Suit No. FHC/ABJ/216/2004*, Ruling on Preliminary Objection of November 1, 2005, accessed at <http://www.justiceinitiative.org/db/resource2?res_id=103008> Profile: Taylor: Court Dismisses FG's Preliminary Objection (last visited November 20, 2005). See also International Law in Brief (15 November, 2005), accessed at <http://www.asil.org/ilib/2005/11/ilib051115.html>.

34 See the Justice Initiative Report in the Egbuna v. Taylor case (note 33 above).

The court, however, rightly ruled in favour of the applicants, holding that the statute of limitations had not run out, because Taylor's asylum in Nigeria was a continuing damage or injury to the applicants' rights. Consequently, their statutory right of action would not have come to an end as they had personal rights that were being violated by the continued asylum. The court, therefore, held it had the jurisdiction to hear the matter.[35]

The ruling by the Nigerian domestic court does not mean that it would rule on the breach of treaty or customary international law obligations. It only has the jurisdiction to order the Nigerian government to desist from continuing any act which is affecting the right of a citizen. Such right may have, as in this case, emanated from an international treaty. It remains to be seen what the court would have decided in its final judgment. However, it was spared the rigours of deliberating further on the issue when the Nigerian government handed over Taylor to Liberia in March 2006 as there was no more ground for continuing the hearing before the domestic court (BBC News 2006).

Prior to Nigeria extraditing Taylor, there was yet another international legal obligation which it had implemented into its domestic legal norms by enacting the Geneva Convention Act (Laws of the Federation of Nigeria 1990: chap 162): the principle of *aut dedere aut punire*. As noted earlier, Nigeria had implemented the Geneva Conventions Act, therefore the onus was on it to implement the principle as provided in all the four Geneva Conventions.[36] Each of which provides that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the

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35 See the Justice Initiative Report in the Egbuna v. Taylor case (note 33 above).

36 See Articles 49, 50, 129 & 146 respectively of Geneva Conventions I, II, III & IV of 1949, accessed at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[37]

This principle has also been reflected in the Statute of the International Criminal Court, which provides that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[38] This obligation is owed to the international community, which requires a general obligation of international cooperation from States for the prevention and punishment of the most odious international crimes (Cassese 2003:302). Nigeria, in line with its obligations, helped prevent the commission of more crimes in the region by persuading Mr. Taylor to leave Liberia. The question is whether it failed to carry out its obligations under international law by ensuring that Mr. Taylor was prosecuted.[39] As stated earlier, there is no time limit within which this principle should be applied, therefore Nigeria's intent to keep Taylor out of Liberia, thereby aiding the restoration of the sub-region's peace and stability, is worthy of commendation. Furthermore, being unwilling to prosecute Taylor, the country eventually handed him over to Liberia, ensuring that it complied with its obligations.

4.   Mitigating Factors

In the three years that Taylor was shielded from appearing before the Special Court by Nigeria, the international community did not publicly

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37   See Articles 49, 50, 129 & 146 respectively of Geneva Conventions I, II, III & IV of 1949, accessed at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

38   See par 6 of the preamble of the Rome Statute of the International Criminal Court, accessed at <www.un.org/law/icc/statute/romefra.htm>.

39   Note that Mr. Taylor was not prosecuted in Nigeria between 2003 and 2006 when he was granted asylum and was free in the coastal Nigerian city of Calabar.

condemn Nigeria for breaching its obligations. The question could then be asked whether there were mitigating factors which may have held the international community back from demanding that Nigeria comply with its international obligations. If not, why did the international community and the UN Security Council overlook the obvious breach of such peremptory international norms between 2003 and March 2006 when Taylor was Nigeria's guest? The Security Council, in Resolution 1638, even went as far as commending Nigeria's efforts in both Liberia and Sierra Leone without directing it to hand Mr. Taylor over to the Special Court (UN Security Council 2005).

The reason for this may not be due to the international community's lack of interest in Nigeria's evident breach of its obligations. On the contrary, it may be as a result of a conflict of two international interests and principles. The principle of accountability for the violations of international humanitarian law (which developed from the efforts of The Hague and Geneva Conventions to control how wars were fought and curb the brutality of war on protected persons) and the concept of the maintenance of international peace and stability (which evolved from the efforts of the 1928 Kellogg-Briand Pact[40] to prohibit war and was given much weight and greater acceptance by the 1945 UN Charter). It is important to note that the underlying purpose of the UN and the present-day international legal paradigm is the maintenance of international peace.[41] In this case there seems to be a conflict between the two principles – the need for the stability of Liberia, Sierra Leone and the whole of the West African sub-region against the need for accountability for violations of international humanitarian laws (the prosecution of Charles Taylor for crimes committed in the course of the conflicts in the two West African States). Within the chain of events in the West African State of Liberia, Mr. Taylor was the principal reason

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40   Accessed at <http://www.yale.edu/lawweb/avalon/kbpact/kbmenu.htm>.

41   See Article 1 of the UN Charter for the Purposes of the United Nations, accessed at <http://www.un.org/aboutun/charter/>. See also pars. 3 & 7 of the Preamble of the Rome Statute of the International Criminal Court, accessed at <www.un.org/law/icc/statute/romefra.htm>.

for the instability and conflict. It is recalled that Mr. Taylor started the insurgency against the administration of Samuel Doe in December 1989 and was instrumental in prolonging the war by opposing the ECOMOG (Economic Community of West African States Monitoring Group) peace-keeping efforts.[42] And in 2003, after 14 years of war, there was a dire need to restore peace and stability to that country. The chance came through the Nigerian-led ECOWAS (Economic Community of West African States) efforts to mediate between the parties. However, the rebels insisted on Mr. Taylor resigning from the Office of the President of Liberia. Mr. Taylor accepted Nigeria's offer of asylum, resigned and left the country. Arguably, Mr. Taylor, who had just then been indicted by the Special Court, would not have agreed to resign unless he was assured of some sort of amnesty from prosecution which in turn would have prolonged the crisis. Nigeria, while leading the negotiations, opted to grant him a safe haven from the Court so as to realise the more immediate goal of regional peace and stability. It should be appreciated that Nigeria's act (the asylum offer) prevented much bloodshed in Liberia. Furthermore, it was essential to keep Mr. Taylor out of Liberia, and crucial not to prosecute him until such a time when the stability of the two States (Liberia and Sierra Leone) was ensured. The object was to prevent a fresh outbreak of fighting by Mr. Taylor's supporters. In 2006, after the election of a new government in Liberia and after both States had regained some measure of stability, Nigeria extradited Taylor to Liberia where he was arrested by UNMIL and transferred to the Special Court (BBC News 2006).

It may also be observed that the efforts of Nigeria towards the stability of the West African coast have been noted by the world body in several of its Resolutions on the situation.[43] In view of the urgent quest for international peace and stability in the sub-region at that time, the Council in Resolution 1638 expressed 'its appreciation to Nigeria and its president, Olusegun Obasanjo,

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42   Weller 1994:33. See also Wipman 1993:157,160.

43   See for example UN Security Council 2003: pars. 8 & 15, UN Security Council 2003a: par 6.

for their contributions to restoring stability in Liberia and the West African sub-region'.[44]

Though Mr. Taylor was granted asylum in Nigeria, and was thus shielded from the reach of the Special Court whose jurisdiction did not empower it to force Nigeria to transfer Taylor to its custody,[45] he was nevertheless not free from the arms of the law and was still subject to the jurisdiction of the Court as there is no time bar for the prosecution of an international crime; this principle has been codified by the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[46] In paragraph 7 of its preamble, the Convention provides that '…it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application'.[47] Even upon the termination of the temporal jurisdiction of the Special Court,[48] Mr. Taylor could have still been tried by any State upon establishing its jurisdiction to prosecute him, under the principle of universal jurisdiction or under any of the treaties that expressly permit it.[49]

The international community was pragmatic in its handling of the conflict or struggle for hierarchy between the two norms. By supporting Nigeria's efforts to first deal with the more momentous and pressing issue of peace and stability,

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44   UN Security Council 2005: par 3.

45   See section on Nigeria's international obligations above.

46   Accessed at <http://www.unhchr.ch/html/menu3/b/p_limit.htm>.

47   See also Art. 29 of the Rome Statute of the International Criminal Court, accessed at <www.un.org/law/icc/statute/romefra.htm>, which provides that: 'The crimes within the jurisdiction of the court shall not be subject to any statute of limitation'.

48   Note that the court's temporal jurisdiction is not expressly stated. However, the agreement establishing the court provides in Art. 23 that 'the agreement shall be terminated by the agreement of the parties upon the termination of judicial activities'.

49   Such as the relevant provisions of the Geneva and Torture Conventions (see note 27 above).

the international community did not set out a hierarchy between the norms. But practically handled the situation based on necessity – it was necessary and urgent to achieve peace but not immediately urgent to prosecute Mr. Taylor.

The conflict of principles between accountability and international peace and stability cropped up again when Mr. Taylor was eventually arraigned before the Special Court. The Liberian government (fearing a backlash from Taylor's remaining loyalists in Liberia) and the Court (not willing to provoke another round of conflicts) negotiated with the Security Council, the ICC and the government of the Netherlands to have the Court sit at The Hague, using the facilities of the ICC. There are grave implications in moving the trial outside Sierra Leone where most of the victims and witnesses are located.[50] This time the Court, in many ways bearing the dual responsibility of ensuring that individuals account for their acts in breach of international humanitarian law on one hand and maintaining international peace on the other hand,[51] acted with both principles in mind by deciding to sit at The Hague for Mr. Taylor's trial. By so doing, the Court was ensuring that Mr. Taylor is tried and that the peace and stability of the region is not compromised.

5.   Concluding Remarks

The question of whether Nigeria was in breach of its legal obligations by granting asylum to Charles Taylor is not so clear cut. The *erga omnes* obligations the country owes to the international community must be discharged appropriately. However, the country seems to have deliberately breached these legal requirements and, to make it worse, the international community and its

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50 This is not the appropriate platform for the analysis of the implications of moving Taylor's trial to The Hague. For an excellent account and analysis, see Sesay 2006, Amnesty International 2006, Human Rights Watch 2006, Sieh 2006.

51 See the preambles of the statutes of the various international criminal courts and tribunals for further clarification on the twin responsibilities of the courts.

watchdog – the UN and its Security Council – were silent on the issue. However, it can be seen from the above that Nigeria did not blatantly decide to play the rogue State, as it had justifications for acting (granting asylum to Taylor) or not acting (failing to prosecute him) from 2003 to 2006. The international community seemingly did not respond to the situation by triggering the mechanism of State Responsibility to coerce Nigeria to hand over Taylor to the Special Court in those three years that the country shielded him from justice. A core consideration that drove Nigeria's action or inaction was to preserve the foundation of the contemporary international system. The same motivation drove the world body, thus the UN desisted from compelling Nigeria to hand over Taylor throughout the period.

The core purpose of the contemporary international system is to ensure and maintain international peace and stability. Though Taylor was indicted for violating the norms of international humanitarian law which are deemed to be *jus cogens*, the dilemma was that had he been arrested and prosecuted in 2003, the West African sub-region would have erupted once again into violence. Therefore, the practical importance of maintaining the stability in the war-torn State(s) was ranked higher in importance and urgency at that time than holding him accountable for his crimes during the war. It is understood that there is no time limit within which to prosecute a person accused of crimes prohibited by international law, and so Nigeria and the international community opted to preserve the peace and stability of the two States involved. This does not condone the violations of international humanitarian laws but rather gives peace a chance. It is also a way of giving the Liberian community the opportunity to stabilise in order to effectively see that justice is done. Without a peaceful and stable community, the problem of accountability and justice cannot be achieved. Moreover, the pursuit of peace and stability in Liberia and the region as a whole will inevitably lead to the effective implemen-tation of the rules of international humanitarian law, a crucial part of which is international criminal law. It is commendable that Nigeria endeavoured to ensure that the nascent and fragile peace of Liberia and Sierra Leone, which took more than a decade to achieve, was nurtured until such a time that these States would be strong enough to deal with Taylor's past. Significantly, this has

proved to be in the right direction. The events after the arrest of Taylor show that the leaders of the two countries involved and the Court are also of this view, hence the subsequent transfer of the trial to The Hague.[52] Therefore, Nigeria's attempt to first ensure the stability of Liberia and the West African sub-region can be deemed to have mitigating effects on Nigeria's breach of its international humanitarian law obligations.

On the other hand, it does not seem that the domestic legal obligations would in any way be diminished by a factor such as the pursuit of peace in the sub-region. This position was not seriously maintained in the preliminary hearing of the Nigerian Federal High Court when the government argued that the issue was a political act of the State and so non-justiciable.[53] The Court's rejection of this view may be because an international obligation (such as the UN purposes as laid down by the Charter) would not have domestic legal effects in a State with a dualist ideology, unless such an obligation is 'incorporated' by legislation into that State's domestic laws thereby giving direct rights to the individual citizens of that State (Aust 2000:150).

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52 The Special Court will be sitting at The Hague for the trial using the facilities of the International Criminal Court. The Special Court can choose to sit away from Freetown if it considers it necessary for the efficient exercise of its functions (Article 10 of the Agreement, see note 1 above).

53 See the Egbuna v. Taylor case, note 33 above.

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Taking Stock of the First Arrest Warrants of the International Criminal Court

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Abstract

For the last twenty years the Government of Uganda and the rebels of the Lord's Resistance Army (LRA) have battled each other in Northern Uganda. In 2004, President Yoweri Museveni referred the situation in Northern Uganda to the nascent International Criminal Court (ICC). In October 2005, the ICC Prosecutor unsealed the warrants of arrest for the top five leaders of the LRA. This paper assesses the first indictments issued by the ICC. It argues that whereas the indicted LRA leaders have not been arrested yet, the warrants have put pressure on the LRA to talk peace with the government.

1. Introduction

It is now more than one year since the Chief Prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, unsealed the warrants of arrest for the five leaders of the Lord's Resistance Army (LRA), which had been issued and sealed by Pre-Trial Chamber II[1] of the ICC on 8 July 2005. The five were named as: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.[2] The warrants had been issued and sealed 'to ensure the safety or physical or psychological well being of and to prevent the disclosure of the identity or whereabouts of any victims, potential witnesses and their families' (ICC 14 October 2005). In issuing the warrants, Pre-Trial Chamber II concluded that 'there are reasonable grounds to believe that they [the five LRA leaders] ordered the commission of crimes within the jurisdiction of the court' (ICC 14 October 2005).

It should be remembered that in December 2003, the Government of Uganda referred the situation in Northern Uganda to the ICC. Subsequently, in January 2004, President Yoweri Museveni reached an agreement with the Office of Prosecutor of the ICC (ICC 29 January 2004),[3] to start investigating the activities of the LRA,[4] with a view to indicting and bringing to trial all those who have wrought untold suffering to the civilian population of Northern Uganda.[5]

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1   Pre-Trial Chamber II was constituted as follows: Judge Tuiloma Neroni Slade (Presiding Judge), Judge Mauro Politi and Judge Fatoumata Dembele Diarra.

2   Raska Lukwiya is reported to have been killed by the Uganda army in Kitgum district (*The New Vision* 12 August 2006).

3   See story, 'President of Uganda refers situation concerning the Lord's Resistance Army to the ICC.' On January 29, 2004, President Museveni and the Prosecutor of the ICC, Luis Moreno Ocampo, met at Hotel Intercontinental, Hyde Park, London, where the formal referral agreement was announced.

4   In accordance with Articles 13(a), and 14(1) of the Rome Statute.

5   According to the government of Uganda, the indictments were meant to serve the following purposes: isolate the top leadership and cause internal divisions within the LRA ranks forcing those not yet indicted to take the path of amnesty; force countries

This article assesses the situation regarding the warrants more than a year after they were made public. Whilst they have not been executed, the warrants of arrest have served to put pressure on the leadership of the LRA to talk peace with the Government of Uganda. In addition, the warrants have brought the ICC and traditional justice into focus. Whilst the ICC is insisting that the indicted LRA leaders must be arrested and punished, the view in Northern Uganda is that they should be dealt with under traditional justice mechanisms.

2.   The Conflict in Northern Uganda

As Museveni's National Resistance Army (NRA, later renamed the Uganda People's Defence Forces, UPDF) seized power in Kampala in January 1986, the bulk of the former Uganda army, the Uganda National Liberation Army (UNLA), predominantly made up of people from Lango and Acholi districts of Uganda, retreated north. When the NRA reached these northern areas, the defeated UNLA attempted to stage a come-back. Their hope was that the people of the north would rise up against the invading southerners who predominantly made up the NRA. By late 1988, the NRA had already been able to defeat a number of rebel groups that had risen to fight against it in the north of the country. Prominent among the groups were the Uganda People's Defence Army (UPDA) of Odong Latek, the Holy Spirit Movement (HSM) I and II of Severino Lukoya and Alice Lakwena, respectively. By the early 1990s the rebellion in Teso region led by the Uganda People's Army (UPA) of Peter Otai, had all but petered out. However, from the ashes of the UPDA and HSM I and II the LRA arose.

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that are used by the LRA to cause mayhem in Uganda to take more concrete steps towards expelling the LRA from their territory; get more cooperation from neighbouring countries and the international community in searching for the LRA; the trials of those accused will enable victims of the crimes prosecuted to obtain justice and apply for reparation; and they will ensure more cooperation from neighbouring countries, such as Sudan, where the rebels have operated from. See Ministry of Finance 2005:77.

The LRA was started by Joseph Kony, a former altar boy, after the defeat by the NRA of Alice Lakwena's HSM II at Maga Maga in Jinja district in 1988. Kony is a nephew of Alice Lakwena,[6] who herself is a daughter of Severino Lukoya. Kony proclaimed himself a messianic prophet (IRIN 28 January 2004),[7] and stated that he aimed to overthrow the Museveni government and rule Uganda according to the Biblical Ten Commandments. However, the rebellion lost popular support among the people of the region and under pressure from both the UPDF and local resistance, the LRA and Kony fled to Southern Sudan (IRIN 28 January 2004). Kony found a fertile ground to operate in Southern Sudan because the area has been wracked by war since the Sudanese People's Liberation Army (SPLA) of John Garang had been fighting the Khartoum government since May 1983. The Sudanese government found an ally in Kony as the government of Uganda openly supported the SPLA. Kony was able to get bases and the much needed supplies of weapons to continue fighting the Uganda army. The LRA's tactic, throughout its insurgency, has been to attack and terrorise civilians, through killings, mutilations and abductions. The LRA has been able to keep its ranks swelled through child abductions and forceful recruitments.

In March 2002, the UPDF launched what it called 'Operation Iron Fist I (OIF I)', aimed at routing the LRA from its bases in Southern Sudan. This operation followed an agreement reached by the governments of Uganda and Sudan, allowing the former to send her troops onto the territory of Sudan below the 4th parallel, in order to deal with the LRA insurgents. The results of the operation have been mixed. Whereas the government and the UPDF have claimed success by the fact that Kony no longer has permanent bases in the areas of Southern Sudan near the Uganda border where he can launch attacks onto the territory of Uganda, civil society groups like the Acholi Religious

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6   See Dunn (2004:140), who argues that it is often incorrectly suggested that Kony's LRA was the continuation of Alice Lakwena's Holy Spirit Mobile Forces, or that Kony claims to be a cousin of Alice.

7   See story, Uganda: The 18 year old that refuses to go away.

Leaders' Peace Initiative (ARLPI) – a group that has been seeking peaceful ways to end the conflict – has noted that 'the operation was the biggest mistake of the government as it has doubled the numbers of the displaced and [has made the] security [situation] worse than ever' (IRIN 28 January 2004).

The effects of OIF I, initially among others, was the expansion of the LRA's operational area from its traditional bastions of Gulu, Pader and Kitgum districts to the districts of Lira, Apach and the two districts of Katakwi and Soroti in Teso region. As a result of the LRA's invasion into Teso, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) has estimated that the number of internally displaced persons (IDPs) fleeing LRA terror rose from 800 000 to at least 1.2 million (IRIN 28 Jan 2004).[8] The IDPs, who are largely composed of malnourished children, live in squalid make-shift camps called 'protected villages'. These camps are devoid of food or clean water, and sanitation and medicine are nonexistent (IRIN 28 Jan 2004). The concentration of people in IDP camps gives the LRA a chance to attack, kill and abduct many people. This is in spite of these camps being protected by local militias. The United Nations International Children's Emergency Fund (UNICEF) has estimated that in the year 2003, a staggering 8 500 children were abducted by rebels (IRIN 28 Jan 2004). Many of these children, once abducted, are never seen again. The abductions are aimed at accomplishing a number of things. The abducted boys and girls are forcibly recruited into the LRA ranks.[9] But also, the girls are married to the LRA rank and file. It is reported that Kony himself maintains a number of these abducted girls as his wives. In addition, the LRA uses the children as human shields, porters and labourers. The children are forced

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8   See note 7 above.

9   According to reports, over 85% of the LRA forces are made up of children. As part of initiation into the rebel movement, abducted children are forced into committing inhuman acts, including ritual killing and mutilations. In order to evade capture, thousands of children have become 'night dwellers', walking large numbers of kilometres to regroup in centres run by non-governmental organisations, on the streets, on shop verandas, on church grounds, and in local factories, heading back to their villages at dawn.

to fight, kill civilians and abduct other children. Those who fail to comply with LRA orders are murdered, often by other children who are forced to kill them.

As the ferocity of the LRA attacks and the government's counter-insurgency operations increased in intensity, domestic and international calls to end the conflict peacefully also increased. As a result, the two sides have engaged in talks a number of times, *but all the efforts have come to nothing*. In 1994, the then Minister for the Pacification of Northern Uganda, Betty Bigombe, brought the LRA to the negotiating table. She nearly clinched a peace deal, but the effort was scuttled at the eleventh hour by President Museveni. The latter gave the LRA seven days in which to surrender upon which the rebels abandoned the negotiations. Bigombe again tried to negotiate with the LRA at the end of 2004. Her efforts were supported by the President who appointed a Presidential Peace Team (PPT) to bolster her own team.[10] However, the talks hit a dead end when the rebels failed to agree to a draft cease-fire agreement. The latest attempt at peace talks in Juba is the umpteenth time that the two sides are engaging in talks.

3.   The Arrest Warrants

The unsealing of the arrest warrants coincided with the LRA's relocating from Southern Sudan to Garamba National Park in the Democratic Republic of the Congo (DRC). Operation Iron Fist had the effect of forcing the LRA from its traditional areas of operation in Southern Sudan. The signing of the

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10 When Operation Iron Fist was underway in August 2002, the President pitched camp in the district of Gulu. In meetings with the community leaders, he was prevailed upon to give a clear signal to the LRA of his willingness to engage in peace dialogue. He responded to these calls by appointing the Presidential Peace Team led by the then Minister of Internal Affairs, Eriya Kategaya. See Human Rights and Peace Centre (HURIPEC), *Listen to the People! A Call for and Inclusive Approach to the Peace Process in Northern Uganda, Report on the Study on Peace and Reconciliation in Northern Uganda*, Makerere University, (Undated), p. 38.

Comprehensive Peace Agreement in January 2005 between the Khartoum government and the rebel Sudanese People's Liberation Army/Movement (SPLA/M) had the effect of diminishing the LRA's area of operation further. This is because the Comprehensive Peace Agreement placed Southern Sudan under an autonomous administration of the Government of Southern Sudan, led by the SPLA/M. In addition, the Comprehensive Peace Agreement had the effect of lessening the Khartoum government's support for the LRA. From 1994, the Khartoum government had supported the LRA to counter the SPLA.

With the Government of Southern Sudan in place and under pressure from the Uganda army (the UPDF), the LRA had no choice but to run to the DRC. It must be remembered that the DRC has been in a state of conflict since the war that removed dictator Mobutu in 1996-7.[11] The territory where the LRA ran to has for long not been controlled by the DRC government. Thus, it was easy for the LRA to cross from unfettered Sudan and establish itself there. The Comprehensive Peace Agreement between the Government of Sudan and the rebels of the SPLA/M gave the latter the authority to administer Southern Sudan under an autonomous government. As a result, the LRA which used to roam the areas in Southern Sudan at will, discovered that they could no longer do that. They were therefore forced to find a safe haven in Garamba National Park in the DRC.

Whilst Uganda and the DRC are state parties to the Rome Statute, Sudan is not a state party. The ICC Prosecutor has been calling on the countries in the region to execute the arrest warrants. As I have argued in my paper, 'The International Criminal Court's (ICC's) Arrest Warrants for the Lord's Resistance Army (LRA) Leaders and the Peace Prospects for Northern Uganda' and

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11   In 2002, the different warring parties signed an agreement in Sun City, South Africa, which ended the conflict. An all inclusive interim government was subsequently established with Joseph Kabila as President. Elections were held in October 2006 which were won by the incumbent Joseph Kabila. However, numerous rebel groups continue operating in several provinces in the east of the country including where the LRA rebels are holed up.

elsewhere, the government of the DRC is too weak to arrest the indicted LRA leaders.[12] The Government of Uganda is not in a position to effect the arrests either. This is because the indicted LRA leaders are beyond its jurisdiction and I do not think the UPDF has the capacity and support to enter the DRC to arrest them. Sudan could easily have executed the warrants because firstly, the LRA operated from its territory. Secondly, and even more importantly, even if the LRA is now based in Garamba National Park in the DRC, they easily cross back into Sudanese territory. The reluctance of Sudan to execute the warrants could possibly stem from two reasons. Firstly, the historical cordial ties between the Khartoum government and the LRA. Secondly, the fact that Sudan was not a state party to the Rome Statute. However it should be noted that Sudan and the ICC have concluded a Memorandum of Understanding to cooperate. Sudan could easily execute the arrests but it is reluctant to do so. Possibly this is because of the historical cordial ties between the LRA and some elements of the leadership of Sudan.

When elements of the United Nations Mission in Congo (MONUC) attempted to engage the LRA militarily in Garamba National Park in January 2006, eight Guatemalan peacekeepers lay dead at the end of the skirmish (*The New Vision*, 8 June 2006). As a result, MONUC has been reluctant to engage the LRA again. The ICC Prosecutor is in a quandary. Since the ICC has no police force of its own, the arrest warrants have gone un-effected. However, the execution of the arrest warrants has become complicated due to the on-going peace talks between the LRA and the Government of Unity in the Southern Sudanese town of Juba. Section 4 of this paper deals with this issue in more detail.

4.   The Juba Talks

At the beginning of May 2006, the Government of Southern Sudan announced that the LRA was ready to start peace talks with the Government

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12   See generally, Kasaija 2006:179-187.

of Unity with a view to ending the Northern Uganda conflict. As I have already observed above, since the signing of the Comprehensive Peace Agreement the LRA's area of operation had been tremendously diminished. The rebels used to have bases in Southern Sudan from where they could launch attacks on Uganda. However, the combination of the signing of the Comprehensive Peace Agreement and launching of OIF by the government forces of Uganda, caused the LRA to become hard pressed to find an area where they could operate in an unfettered manner. Garamba National Park in the DRC where the LRA ran to is very far from Uganda. Thus the LRA has not been able to infiltrate Northern Uganda as it used to when it had bases in Southern Sudan.[13] But even Garamba National Park has not been very safe for the LRA. When it first moved in there, the DRC government sent its 'elite' troops of the *Forces Armées de la République du Congo* (FARDC) to push them out. However, up to now FARDC has not been able to dislodge the rebels. The reason for this could be that the FARDC is still a weak army as the DRC is just recovering from civil war.

Peace talks between the Government of Unity and the LRA opened in July 2006 under the mediation of the Vice-President of Southern Sudan, Riek Machar. The two sides agreed on five agenda items. These are: cessation of hostilities, comprehensive solutions to the conflict, accountability and recon-ciliation, formal cease-fire, and disarmament, demobilisation and reintegration (DDR). Towards the end of August 2006, the two sides signed a Cessation of Hostilities Agreement (*The Sunday Monitor*, 27 August 2006). The Cessation of Hostilities Agreement committed the LRA and the government forces to cease all hostile actions against each other. In addition, it committed the LRA to move from its hide-outs in Northern Uganda, Southern Sudan and the DRC to designated places in Southern Sudan at Ri-Kwangba and Owiny-Ki-bul, where they were supposed to camp and wait for the final outcome of the talks. Under the

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13 Reports indicate that the LRA has been trying to forge a united front with other rebel groups, such as the Allied Democratic Forces (ADF) and the People's Redemption Army (PRA) both operating out of parts of Eastern DRC, to attack Uganda. See International Crisis Group 26 April 2007.

agreement, the Government of Uganda committed itself to provide safe passages to all LRA fighters scattered in Northern Uganda, so that they could move to the assembly points. In this regard, the Cessation of Hostilities Agreement gave the LRA rebels three weeks to move to the assembly points. Although the safe passages were provided, the LRA failed to assemble at the designated points. At the time of this writing, the Cessation of Hostilities Agreement has been amended/extended twice. First in November 2006 a revision was made to accommodate the fact that the LRA had failed to assemble at the two designated places as had been stipulated by the Cessation of Hostilities Agreement. The amended/renewed Cessation of Hostilities Agreement gave the LRA up to the end of February 2007 to assemble. Again, the LRA failed to assemble within the stipulated time. The LRA cited security reasons for failing to assemble. The Cessation of Hostilities Agreement was renewed for the third time on 13 April 2007, and the LRA was given seven days to assemble at Ri-Kwangba (*The New Vision*, 9 May 2007).[14] Both the SPLA and the UPDF committed themselves to provide safe passages for the LRA to the assembly point. However, the LRA has protested against the one week deadline in which to assemble (*The Daily Monitor*, 11 May 2007). It argues that it is unrealistic to expect the rebels to assemble in one week. Thus, as we write, the rebels have not started assembling.

One of the biggest sticking points for the LRA however, is their demand that the ICC must first withdraw the arrest warrants for its indicted leaders before a comprehensive peace agreement is signed. According to the LRA's Number Two, Vincent Otti, 'the rebels will not sign any peace deal until the noose around their necks is loosened by a withdrawal of the arrest warrants' (*The Daily Monitor*, 13 October 2006:2).[15] He is reported to have added, 'The ICC is the greatest obstacle … Unless the warrants are withdrawn, we shall not leave

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14   Note that in the renewed Cessation of Hostilities Agreement of 13 April 2007, the LRA is supposed to assemble in one place, Ri-Kwangba.

15   The Spokesman of the LRA at the Juba talks, Godfrey Ayoo, is reported to have averred that, 'Our leaders will not sign the peace agreement if the warrants for the four indicted still stands. We are saying that the withdrawal of the indictments

for anywhere' (*The New Vision*, 12 October 2006:1-2). Otti in fact has threatened to kill whoever attempts to arrest him and his indicted colleagues. The position of the Government of Unity is that a comprehensive peace agreement must first be signed before it can appeal to the ICC to withdraw the arrest warrants. According to the Chief Government of Unity mediator Ruhakana Rugunda, 'the Government of Unity has no authority to go to the ICC and withdraw the indictment. The indictments are court procedures. [The] LRA should be advised that they are taking an erroneous line to give ICC conditions. They should drop it' (*The New Vision*, 12 October 2006:1). Elsewhere, Rugunda is also reported to have emphasised that 'the indictments will remain in place until there is clear evidence that peace has been achieved …' (*The Sunday Monitor*, 15 October 2006:10). When the issue of the warrants was debated in the Uganda parliament, the majority of the members who hail from Northern Uganda were of the view that the ICC should step back (*Uganda Parliament Hansard*, 7 September 2006). They argued that the traditional justice initiatives should be supported to deal with the problem.

While maintaining that the indictments will stay, the Government of Unity has written to the ICC reiterating the fact that it wants the four surviving indicted LRA leaders to be arrested. In a letter to the ICC, the Government of Unity reaffirmed its commitment 'to cooperate with and support the [ICC regarding the arrest and prosecution of the indicted LRA leaders]' (*The Daily Monitor*, 11 October 2006:1-2). With the two sides not compromising on what to do with the warrants, it seems the Juba talks are in trouble.

In January 2007, the LRA announced that it was withdrawing from the Juba talks. It cited a number of reasons for withdrawing.[16] It argued among others that Juba was no longer a safe venue for its delegation. It also argued that the chief mediator, Riek Machar, was not impartial. The sum total of the LRA argument

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should be a pre-condition. Withdraw the case and our leaders will come out in the open and sign' (*The New Vision*, 12 October 2006:1-2).

16   See note 13 above.

was that the talks should be shifted to another place and that the chief mediator should be replaced. But at the back of the mind of the LRA delegation were the arrest warrants. As long as the warrants are not withdrawn, the LRA is not safe. Nevertheless, with the appointment of former Mozambique President Joachim Chissano as the United Nations Secretary-General's Representative for Northern Uganda, the LRA has been convinced to go back to Juba. Chissano has been in Southern Sudan and has been able to convince the two sides to resume the talks (*The New Vision*, 8 May 2007:10). As I write now, the talks are set to resume.

Meanwhile, the ICC has taken the regional governments to task over their failure to execute the arrest warrants. While addressing the UN General Assembly in October 2006, the President of the ICC, Judge Philippe Kirsch, mourned of the inability of the Court to execute the arrest warrants.[17] He averred that 'the Court does not have the power to arrest [the indicted] persons. That is the responsibility of the states and other actors. Without arrests there can be no trials' (*The Daily Monitor*, 11 October 2006:2). So the waiting goes on for the ICC to make its first arrests regarding the situation in Northern Uganda.

5. Traditional versus ICC Justice

5.1 Theoretical issues

The ICC involvement in Northern Uganda 'has brought to the fore an important debate on seemingly oppositional approaches to justice: local restorative approaches versus international retributive approaches' (Baines 2007:96). The argument has centred on whether the LRA should be dealt with by western liberal judicial institutions which emphasise retribution, or whether the traditional mechanisms which emphasise restoration and reconciliation should be used. In retributive justice,

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17 See Kirsch 2006.

punishment is aimed not at repairing the harm the offenders did to their victims, nor at repairing offenders or their relationship to the victims and their community... Punishment seems to be geared to try to break and rupture their connection to the larger society – not by just putting up all manner of physical, social and emotional barriers, but by making offenders think that the only consequences of their acts they need to think about, are the punitive consequences for themselves. They do not have to confront the consequences [resulting to] the victims and the community (Spelman 2002:56).

The desire for retribution is the desire for vengeance; getting even, putting the world back in balance (Robert 1990:41). Retributionists simply consider it morally fitting that criminal offenders are punished (Berns 1988:85). This is the kind of justice that the ICC is seeking to implement in Northern Uganda. However, for the people who have been affected by this conflict, acknowledgement, reconciliation and restoration (compensation) is what they want.[18] Communitarian restorative justice is where justice is implemented in and by local communities, and draws on restorative justice principles to promote reconciliation (Harrell 2003:60). Instead of centralised state-administered courts meting out formal justice, less formal local committees must take control of justice, encourage broad participation in the process, promote reconciliation between victims and wrongdoers and prepare communities to welcome back wrongdoers after they complete their sentence (Harrell 2003:60). Punishments should include community service, restitution and shame – potent tools for moral re-education and reconciliation – as well as traditional penal confinement (Harrell 2003:60).

The traditional African sense of justice is not simply about applying the retributive aspects of justice in isolation, as it is in the Western model. Retribution is but one part of the overarching process that also encompasses rehabilitation, reconciliation, compensation and restoration (Refugee Law Project 2005:12).

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18   See generally Refugee Law Project 2005.

In other words, it is not just that retribution equals justice. Indeed, justice itself is one component of restoring perpetrators back into harmony with the values of a community.

Restorative justice sees greater value in educating and rehabilitating an offender than in simply incarcerating him and forgetting about him (Refugee Law Project 2005:12). A cultural leader in Northern Uganda when asked about how Kony should be dealt with opined:

> Kony being convicted and taking him to the Hague, that is taking him to heaven. His cell will have air-conditioning, a TV, he will be eating chicken beef etc. He will be given a chance to work in the jail and earn something. I'd rather he be here and see what he has done. Let him talk to the person he has ordered his lips to be cut off. Let him talk and hear. The Acholi mechanism must be allowed to run their course first, so that peace can be brought about. Only if at that stage there is a complainant who wants to take Kony to court should legal action be taken.

This kind of sentiment is echoed by many people in Northern Uganda. The LRA should be made to see and acknowledge the harm that it has brought to its own people. Only after this acknowledgement has been done, forgiveness asked, reconciliation sought and compensation paid to its victims, will its elements be re-integrated back into the community.

5.2 *Mato oput*

As a way to boost the Juba talks to succeed, the Government of Unity, local civic and traditional leaders from Northern Uganda and civil society groups have called for the adoption of traditional justice mechanisms to deal with the returning LRA's rank and file. In this regard, they have called for the revival of the Acholi traditional reconciliation mechanism of *Mato oput*.[19] In Acholi tradition

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19 *Mato oput* seems to be thrown around as a magic wand that will solve the problem of accountability and reconciliation in Northern Uganda. However, I would like to note

(the community from whom the majority of the rebels are drawn), many offences such as homicides, are mediated and resolved by traditional chiefs with a view to promoting reconciliation within the community (Afako 2002:67).[20] Whenever a homicide takes place, the chief (called *Rwot*) intervenes in the situation to cool down the temperature and to offer mediation (Afako 2002:67).

The *Mato oput* rite is a clan- and family-centred reconciliation ceremony, which incorporates the acknowledgement of wrongdoing, the offering of compensation by the offender and then culminates in the sharing of a symbolic drink (Afako 2002:67). In addition, the guilty party crushes a raw egg to symbolise a new beginning and then steps over an 'opobo' (bamboo stick) to represent the leap from the past to the present. At the climax of the rite, both the guilty and the wronged parties drink a brew made from the herbs of the oput tree, to show that they accept the bitterness of the past and promise never to taste such bitterness again.

Since the *Mato oput* 'justice' is not retributive, it has been suggested that it should be adopted rather than the ICC justice, to encourage the rebels to come

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that *Mato oput* might not be the answer. The Northern Uganda problem has local, national and regional dimensions. Whilst *Mato oput* might help to heal the wounds between the LRA and the local Acholi population who have borne the brunt of its work, the national and regional dimensions of the conflict will not be solved by it. For example, will President Museveni also undergo the ritual? Remember that the LRA has been fighting the UPDF of which Museveni is the Commander in Chief. What about areas like Teso and Lango regions where the LRA has also operated? Will they also have to undergo the ritual? Nevertheless, there are other Acholi rituals such as *Gomo tong* (bending of spear). Under this, a deep pit like a grave would be dug. Both the LRA and government representatives would be brought together. They would then vow never to fight again as they bend the guns, spears, grenades etc. These would then be thrown into the pit and buried. The celebrants would curse and say, '*wang ceng oter, cioter*', meaning 'let it go with the setting sun'. Anybody who carries a gun again would bear the consequences. For a discussion of the different traditional techniques of conflict management and resolution in Acholi see Latigo 2006:1-15.

20 See also Finnström 2003:291 (noting that compensation and reconciliation rather than revenge or blood vengeance is the institutionalized Acholi way of handling disputes, homicides and unnatural deaths).

out of the bush so that they can be re-integrated into their community. The Government of Unity has also come out to support the *Mato oput* rite. In fact, it has stated that the indicted LRA commanders must first come out of the bush and go through the ceremony, before it can request the ICC to drop the charges against them. To encourage the rebels to talk peace with it, the Government of Unity has granted the indicted rebels total amnesty whilst arguing that this is in the interest of peace and that there are no allies in the region to implement the ICC indictments. The position of the government, therefore, seems to be combining the 'carrot' – total amnesty[21] and *Mato oput* – while at the same time wielding the stick of the ICC indictments. It is yet to be seen whether the rebels will take up the offer. However, it seems that as long as the indictments are in place, the LRA leadership will neither take up the amnesty offer nor go through the *Mato oput* rite.[22]

6. Possible Outcomes of the Juba Talks

The Juba talks present, for the first time in twenty one years, one of the greatest opportunities to end the conflict in Northern Uganda. As the International Crisis Group (ICG) has observed, 'the present process is more structured and inclusive than the previous efforts…'.[23] The talks, which are in their eleventh month (as we write), have progressed very slowly. Of the five agenda items, the two sides have reached agreement on only two. Nevertheless, we must note that it will take more than structuring and inclusion for the talks to yield a final comprehensive peace agreement. The talks continue to be dogged with problems.

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21 For a discussion on amnesty in Northern Uganda see Kasaija 2005:33-61.

22 In fact it is reported that Vincent Otti has even doubted the *Mato oput* mechanism. He is reported to have rejected the version of *Mato oput* being discussed as an alternative because he said, 'It is not the traditional alternative'. See International Crisis Group (ICG) 2007:5.

23 See International Crisis Group (ICG) 2007:i.

The first major problem facing the talks is the ICC warrants of arrest. The warrants are supposed to be discussed under agenda item number three, which covers accountability and reconciliation. However, as at the time of writing, reports are emerging out of Juba that 'negotiations have stalled because of disagreement [between the two sides] over how to handle issues of account-ability and reconciliation' (*The Daily Monitor*, 15 May 2007:5). An LRA delegate to the talks, one Justin Labeja, warned that 'the ICC stance on the talks would weigh on the process if the indictments remained in place' (*The Daily Monitor*, 15 May 2007:5). Ominously, Dr Rugunda has warned that 'the LRA must understand that the issue of impunity must be addressed. The warrants cannot be lifted, suspended or set aside if the question of impunity is not addressed' (*The East African*, 7-13 May 2007:8). The two sides are yet to come to an agreement on the warrants. What is clear, however, is that an agreement or disagreement on the warrants will make or break the talks.

The second reason why the talks might fail is the make up of the LRA delegation. According to the ICG, 'the LRA delegation, mainly Diaspora Acholi detached from conflict, lacks competency, credibility and cohesiveness'.[24] There are no senior LRA commanders on the LRA delegation who can take decisions on issues like DDR and cease-fire terms. In fact, doubts abound as to whether the LRA delegation in Juba is actually in touch with the top leadership of the LRA who are holed up in Garamba National Park. For the talks to succeed, therefore, it is crucial for either Kony or Otti to get directly involved in negotiations. Either of them will be able to make binding decisions as the two are clearly in control of the LRA. However, this cannot happen unless an agreement is reached on the ICC warrants. The last time Riek Machar suggested that Otti travel to Juba to join the negotiations, the latter declined, citing the warrants.[25]

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24 See International Crisis Group (ICG) 2007:i.

25 See Baines 2007:102 (noting that the LRA High Command refuses to attend the talks in Juba, pointing out that the indictments threaten their security).

7.   Conclusion

As we write, the talks are about to resume in Juba after a hiatus of four months. So far, only two agenda items have been covered despite the talks taking eleven months. The two sides are yet to reach agreement on the ICC warrants of arrest. The debate on whether the ICC or *Mato oput* is the best mechanism of accountability for the Northern Uganda atrocities also continues. The LRA is also yet to assemble at Ri-Kwangba, the designated assembly point in accordance with the renewed Cessation of Hostilities Agreement. Suspicions remain between the two sides. What is clear, however, is that the issue of the warrants will make or break the talks. For the ICC, every day that passes without the warrants being executed creates an impression that it is an impotent institution. Nevertheless it must be conceded, as Payam Akhavan has noted, '[the warrants have] significantly weakened the LRA by pressuring Sudan to stop harbouring rebel camps' (Akhavan 2005:403). He adds, 'the new-found LRA willingness to negotiate with the government is a mark of desperation resulting from this new reality' (Akhavan 2005:403). In the final analysis, no one knows what the end game of the Juba talks will be. What appears clear, however, is that peace for Northern Uganda is still a very elusive dream.

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The Dilemma of Restorative Justice when 'All Are Guilty': A Case Study of the Conflicts in the Niger Delta Region of Nigeria

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Abstract

Conflicts in the oil-rich Niger Delta of Nigeria have received considerable attention – from academics, policy makers and practitioners. In this article the possible application of restorative justice principles to the conflicts in the oil-producing regions of Nigeria is examined. After a survey of the background to

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the conflicts in the area, possible applications of restorative justice principles are analysed, and the various assumptions and considerations that may underlie and inform this application are outlined. In conclusion a step by step approach is suggested: how restorative justice principles may be applied, how the challenges therein may be considered, and how the challenges may be overcome.

Introduction

In 1998, Shell Petroleum Development Company (SPDC) Nigeria had about 500 cases pending in Nigeria law courts. About 350 or 70% of these cases were related to oil spill compensation claims. During the same year, Chevron was involved in 200 cases in the courts. About 180 of these cases were related to oil spill compensation claims (Frynas 2000). In 2003, SPDC had 221 oil spills and paid out US$3.2m as compensation (Shell Petroleum Development Company 2003). Between 1999 and 2003, SPDC alone had 1426 oil spills.

The upsurge in conflicts (especially compensation claims) in the oil-bearing Niger Delta of Nigeria has once again called to question the effectiveness of the present legal system. The oil industry, because of its technical and complex nature, is one of the most regulated economic activities in the world. This regulation is mainly in the form of laws. Unfortunately this plethora of laws has opened a floodgate of litigation and has proved ineffective in addressing the conflicts arising from oil exploration activities. Against this background there have been calls for a rethink of the modes and models of conflict resolution in the Niger Delta. In this essay, I intend to explore the possible application of restorative justice to conflicts in the Niger Delta. This study aims to look at the dilemma of implementing restorative justice models of dispute resolution in a situation where 'all are guilty'. This study will start with a brief overview of the conflicts in the Niger Delta. The emphasis will be on assessing the effectiveness of the present judicial system in resolving conflicts in the Niger Delta. The second section will identify the various kinds of conflicts in the Niger Delta and describe how the parties in the area have responded to these conflicts – especially within the criminal justice framework. The third section will explore the application of restorative justice and its

implications for conflicts in the Niger Delta. I shall conclude by suggesting possible ways of introducing restorative justice programs in the Niger Delta.

Background

Northern and southern protectorates were amalgamated by the British on 1 January 1914. This marked the birth of the modern state of Nigeria as we know it today. Before this amalgamation, Nigeria was made up of different ethnic groups with different kingdoms and different political systems. In the southwest, the Yorubas were the dominant ethnic group with the peoples of the western Niger Delta constituting various minorities. These minority groups include the Ijaw, Itsekiri, Urhobo, Isoko and Bini. The Igbos are the dominant group in the southeast. The minorities of the southeast include the Ijaw, Andoni, Ogoni, Ndoni, Ibibio, Ikwerre, Etche and others. The Hausa/Fulani are the dominant group in the north and the Bachama, Angas, Birom, Tiv, Idoma, Jukun and others constitute the minorities (Falola 1999).

Southern Nigeria is predominantly Christian, while northern Nigeria is predominantly Muslim. The minorities in the north are mainly Christian. The essence of this will be seen when we discuss the application of restorative justice in the conflicts in the Niger Delta region. For instance, religion plays into and reinforces identity and culture and this is usually taken into consideration in the use and application of restorative justice (Zehr 2001).

However, before the amalgamation many of these ethnic groups interacted through trade, war, inter-marriage, commerce and diplomacy. Many kingdoms had a centralised form of administration while others were what Evans Pritchard (1940) referred to as stateless societies. But with the amalgamation, the British introduced indirect rule as a system of administration. This made use of local elites and/or traditional institutions in order to govern (Dike 1956, Ikime 1982).

Nigeria was granted independence in 1960. By 1966, Nigeria experienced her first coup d'état and in 1967 the Nigerian Civil War started. The war ended in 1970 with the defeat of Biafra. Out of 44 years of independence, the military has ruled Nigeria for 35 years. Nigeria has experienced five coups. Over the

years, conflicts in Nigeria have taken a regional tone. In the north there are the religious clashes between Christians and Muslims. In the middle-belt, there are the indigeneship conflicts. In the southeast, there has been the resurgence of ethnic militias clamouring for secession and communal/land conflicts. In the southwest, there is the rise of ethnic militias claiming to be protecting the interests of the area. In the Niger Delta, the issue has mainly been the conflicts between the oil companies and the host communities (Onuoha 2005).

The Nigerian Bitumen Corporation was the first company to explore for oil in Nigeria between 1907 and 1914. They withdrew at the beginning of the First World War in 1914 because the Nigerian Bitumen Corporation was a subsidiary of a German company. In 1938, a British firm, Shell-BP, was granted an exclusive license to explore for oil in Nigeria. In 1951, Shell-BP began full-scale drilling operations. Oil was found in Oloibiri in the present-day Niger Delta in 1956. In 1958, Shell-BP commenced drilling activities in Ogoniland (Okonta & Douglas 2001).

Today, the Niger Delta is made up of nine states and they are: Abia, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States. However, in Nigeria's peculiar political parlance, there are core and periphery Niger Delta states. This categorisation has more to do with the quantity of oil produced by each state. The core Niger Delta states are Bayelsa, Delta and Rivers States. These three states produce 86% of Nigerian crude oil. They are also reputed to have almost 20 billion barrels of crude oil reserves (Olorode 2000).

Theoretical Framework and Literature Review

Maiese (2003) has identified six types of justice: distributive justice, proce-dural justice, retributive justice, restorative justice, political justice and economic justice. Recently, there is also transitional justice (Neil 1995) which deals with the management of justice during transitions. These categorisations are not mutually exclusive, but reinforce each other. For instance, without procedural justice there may not be distributive justice, and without political justice it might be difficult to attain economic justice.

There are three basic understandings of justice. First, justice could be conceived as what the law says (Maiese 2003). This raises the question of just and unjust laws. It also brings into the fore the legitimacy of the institutions promulgating the law and the mechanisms for implementation. The second understanding is the perspective that whatever society conceives as justice is what justice is. This school, which is also known as the evolutionist school, believes that justice is defined by the collective will of society. They are also known as the moral school. The third school is the naturalist school. This school argues that human beings are God's creations, and that because of this, creation should not be violated. The conception of human rights drew a lot from this school. On the whole, the issue of justice should draw from the three schools. This is because human beings are entitled to human dignity. This dignity ought to be protected under the law through legitimate institutions, but as society changes these laws must also change to meet these new challenges.

In the Niger Delta this dilemma of what constitutes justice is at the heart of the conflicts between the oil companies and the communities. There are many laws regulating the oil industry as we shall see later. But, firstly, the people of the Niger Delta do not recognise the institutions that made these laws (Okonta & Douglas 2001). They also have issues with the process of making these laws. For instance, Ihonvbere has argued that, 'In essence the process that culminated in the 1999 constitution represented a deliberate perpetration of "political 419"[1] on the Nigerian people and a betrayal of their yearnings for a transparent, accountable, just, and democratic political culture' (Olorode 2000:16).

Apart from the process of making the constitution,[2] the people of the Niger Delta also have an issue with the provisions of the constitution. For instance, in

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1   Section 419 of the Criminal Code of Nigeria, has to do with sanctions pertaining to 'obtaining under false pretence'. In Nigeria 'political 419' means political deceit aimed at cheating the people.

2   For a comprehensive report of the response of the people of the Niger Delta to the 1999 constitution, see the report titled 'The Emperor has No Clothes': Proceedings of the Conference on the Peoples of the Niger Delta and the 1999 Constitution. Port Harcourt: Environmental Rights Action, 2000.

section 55 of the Federal Constitution of Nigeria 1999, no Niger Delta language was accorded recognition for use in official business. Again, the people of the Niger Delta consider the 13% provision for the oil producing areas as too small (Federal Constitution of Nigeria 1999: section 163(2)). The people of the Niger Delta also have issues with the institutions that managed the making of the various Nigerian constitutions (ERA/FoEN 1999).

Laws Regulating the Oil Industry

Extractive industries are by nature inherently conflictual (Ross 2000). This has not been lost on those managing the industry. Because of this the industry is heavily regulated through legislation. The discussion here will centre more on the laws regulating relationship between the oil companies and their host communities. Much of legislation may not be relevant to our discussion. And the emphasis here will be on those laws that deal with the issues of compensation over land and oil spill and other related damages.

After the amalgamation of 1914, the colonial government passed the Mineral Oil Ordinance of 1914. This law reserved the monopoly of oil licenses for British oil firms only. Though not directly related to the relationship between the oil companies and the communities, this piece of legislation has far reaching implications for the oil-bearing communities, the government and the oil companies. First, this law was a signal that the communities have no say in choosing by whom and how oil is exploited. Second, it provided a blanket cover for oil companies thereby assuring them of always receiving government protection. Third, it meant that the communities will be mere watchers as to what happens in the oil industry. Finally, it makes oil companies responsible to government alone. In other words, oil companies are only accountable to the government, thereby ignoring the needs, interests and concerns of their host communities. As Frynas (2000) noted, whenever there is a misunderstanding between oil companies and communities, government is almost always on the side of the companies.

Because of this protection, even though the legislation was amended to accommodate oil companies from other countries in 1958, Shell-BP became

the dominant oil company in Nigeria. For instance, as at May 1999, Shell was producing almost 40% of total Nigerian crude oil and that mostly onshore (that is on land). This legislation also accounts for the reason why Shell seems to have been more involved in conflicts with the oil bearing communities (Frynas 2000).

In 1937, another ordinance was passed which granted Shell the monopoly of exploiting oil in Nigeria. A year later in 1938, Shell was granted license to prospect for oil all over Nigeria. And by 1957 the colonial government promulgated the Petroleum Profit Tax law which allowed the oil company (Shell) and the government to share oil revenue on a fifty-fifty basis (CDHR 2000).

By that time, the minorities who constitute the majority of the population of the Niger Delta had expressed discomfort with the structure of the Nigerian federation. They called for the creation of more regions to protect them from the hegemony of the major ethnic groups (Osaghae 1998b). In response, the government set up the Willink Commission in 1958 to address the fears of minorities. The commission did not recommend the creation of new regions, but instead acknowledged that the fears of minorities were genuine and recommended constitutional guarantees to protect them within the Nigerian federation. The commission also recommended the establishment of the Niger Delta Development Board which was to cater for the development needs of the Niger Delta area.

In 1969, as part of the response of the Nigerian government to the war, two things happened simultaneously. First, the government enacted the Oil Minerals Decree which gave the government total control of oil revenue and the oil industry. Second, the government under General Yakubu Gowon created twelve states out of the four regions. It will be recalled that by 1963 the civilian administration of Sir Abubakar Tafawa Balewa had created the Midwest region out of the Western Region (Falola 1999).

The Nigerian National Oil Corporation (NNOC) was created in 1971, ostensibly to enhance government control of the oil industry. And by 1977 the NNOC was merged with the Ministry of Petroleum Resources and renamed the Nigerian National Petroleum Corporation (NNPC). The implication of this development for conflicts in the Niger Delta was that the government

would now directly explore oil in the communities. Hitherto, that had been an exclusive activity of foreign oil firms.

Legislation about oil did not deal only with industry regulation; it also dealt with revenue allocation. The independence constitution of 1960 allowed each region to retain 50% of the revenue collected in its area. This was reduced by the military in 1970 to 45% and to 20% by 1975 (Suberu 1996:29-31). This principle of derivation was abolished in 1982 under the Shehu Shagari regime which reserved 1.5% of total oil revenue for the oil producing areas. This meant less money for the Niger Delta communities (Suberu 1996:29-31).

In 1999, under the new democratic constitution, 13% of total oil revenue was reserved for oil producing areas. But under the former military regimes government established some agencies, ostensibly to develop the Niger Delta. For instance, in 1992, the government promulgated the Oil Minerals Producing Areas Development Commission Decree 23 of 1992. The Petroleum Special Trust Fund was also established in 1994, and in 1999 the Niger Delta Development Commission was established by an act of parliament.

The Land Use Act 1978 may be the most profound legislation that has affected the oil-bearing communities. Section one of the act seems to be the most important provision of all. It reads 'Subject to the provisions of this decree, all land comprised in the territory of each state in the federation are hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this decree'.[3] It is important to underscore the fact that before this time, land tenure in Nigeria was individual, family and communal. Customary land rights were prevalent. Traditional rulers, elders and family heads presided over the sharing of land and the resolution of land disputes. The provisions of this decree will to a large extent form the fulcrum of the discussions in this article.

The Petroleum Act 1969 and the Pipeline Act 1956 all made provisions for

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3   Land use Act 1978, section 1.

preventing disruptions of oil production activities. For instance the Petroleum Act, section 12 (1) reads: 'any person who interferes with or obstructs the holder of a license or lease granted under section 2 of this decree (or his servants or agents) in the exercise of any rights, power or liberty conferred by the license or lease shall be guilty of an offence and on conviction shall be liable to a fine not exceeding 100 pounds or to imprisonment for a period not exceeding six months or both'.[4]

The military government was to build upon these legislations through the Petroleum Production and Distribution Anti-Sabotage Decree No. 35 of 1975. This decree made an offence of 'sabotage in respect of willful acts calculated to prevent, disrupt or interfere with the production or distribution of petroleum products punishable' (Frynas 2000:83). This law provided for trial under a military tribunal with possible death sentence or imprisonment of up to 21 years. The Miscellaneous Offences Decree No. 20 of 1984 also provided the death penalty for the sabotage of oil installations. This decree was amended in 1986 and the death sentence was changed to life imprisonment. Apart from anti-sabotage legislations, there were also environmental laws. In 1988, the government promulgated the Federal Environmental Protection Agency (FEPA) Act 1988. This was amended by decree No. 59 of 1992. Apart from creating the Federal Environmental Protection Agency which is responsible for the protection of the Nigerian environment, in section 23, the decree specifically was given the responsibility for oil-related environmental pollution. The section provided that 'the agency shall co-operate with the ministry of petroleum resources for the removal of oil-related pollutants discharged into the Nigerian environment and play such supportive role as the ministry of petroleum resources may from time to time request from the agency'.

As a follow-up to the issue of environmental pollution, there are also laws dealing with the payment of compensation for losses arising from oil prospecting and production activities. The Oil Pipelines Act 1956, sections 19-23, provides

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4   The Petroleum Act 1969, section 12 (1).

that 'the court shall award such compensation as it considers just in respect of any damage done to any buildings, lion crops[5] or profitable trees by the holder of the permit in the exercise of his rights thereunder and in addition may award such sum in respect of disturbance (if any) as it may consider just'.

The important point in the law is that provision was made for the payment of compensation. But the Petroleum Act 1969, in paragraph 36 schedule 1, made provision for 'fair and adequate compensation'. And as if to clarify the interpretation of this law, the Petroleum Drilling and Production Regulation 1969 listed all the items for compensation. They include food crops and economic trees, developments on land such as structures, fishing rights, as well as injurious infections and disturbances.

Section 40 of the 1979 Federal Constitution also provided for adequate compensation for the compulsory acquisition of property. For any discerning observer of the Nigeria political landscape, it is obvious that this law was aimed at mitigating the barrage of criticisms levied against the land use decree of 1978. But the law also fell short of defining what is meant by adequate compensation. Moreover, the law did not make any provision for environmental damage.

This was taken care of in 1983 with the domiciling of the African Charter on Human and People's Rights. This Charter, in articles 21 and 24, provided for adequate compensation for environmental damage. But as Frynas (2000) observed, 'adequate compensation is subjective and vague' and it is subject to negotiation or for a judge to decide.

To get around this subjectivism, there have been many suggestions as to how to arrive at adequate compensation. Open market value has been called the 'yardstick for compensation'. Government has also produced some official rates as guidelines for calculating compensations. The Oil Producers Trade Section of the Lagos Chamber of Commerce periodically releases a list of compensation rates. However, in spite of all these the World Bank (1995, Vol. II, Annex M, 75) says that the compensation rate is too low in Nigeria. This shall not worry us at

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5   'Lion crops' are food and economic crops such as yams, water yams and coco yams cultivated mainly by the men.

this juncture since that is not the focus of this paper. The focus is on why it is that in spite of so many regulations and guidelines on the payment of compensation for damages from oil production operations, the court system seems incapable of satisfactorily adjudicating the issue. Let us see how the application of restorative justice could help in this regard.

Applying Restorative Justice Principles

Restorative justice does not have a universally accepted or precise definition. Many scholars and theorists have shied away from pronouncing 'the' definition of restorative justice. However, Zehr (1990:181) uses the metaphor of a lens to capture the meaning of restorative justice, and says that 'crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.' But twelve years later, after his initial hesitation, Zehr (2002:37) suggests that 'restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible'. Two operative words in Zehr's definition are important for this discourse. They are 'process' and 'collectively'. They are important because these two key words encapsulate the values of restorative justice.

Marshall (1998) was a little bit more daring; and declared that 'restorative justice is a problem-solving approach to crime which involves the parties them-selves and the community generally, in an active relationship with statutory agencies'. This definition is interesting because it raises the question of the role of statutory agencies. In other words, restorative justice is not an alternative for or a replacement of the present criminal justice but a system of justice that offers a new way of looking at justice.

Cayley (1998), unlike Marshall, shies away from a definition but argues that the question of justice must involve both the victim and the offender. This process of involvement was developed further with real life cases by Ross (1996).

Other restorative advocates like Bazemore and Schiff (2001) have also tried to distance themselves from the definition but concentrated on what one could refer to as the core values and principle of restorative justice. Along that line they argue that 'the emerging common vision is one that suggests that the outcome of justice intervention – whether formal or informal – should be a solution that aims toward repairing what is harmed by crime and in doing so, strengthens the ability of participants in the justice process' (Bazemore & Schiff 2001:33).

Johnstone (2002:161) makes the case for a systemic shift that 'would affect the goals, techniques, procedures and values of criminal justice'. From the foregoing a key issue that needs further consideration is the assumptions behind this systemic shift that restorative justice enthusiasts are advocating.

To understand restorative justice we need to look at its basic assumptions and principles. Marshall (1998:2) identifies six basic assumptions that inform the restorative justice movement. First, 'that crime has its origins in social conditions and relationships in the community'. Second, 'that crime prevention is dependent on communities taking responsibility for remedying those conditions that cause crime'. Third, 'that for crime to be addressed, victims, offenders and community must be involved'. Fourth, 'that the justice system must be flexible and creative in its response to crime'. Fifth, 'that partnership between justice agencies and community is important for addressing crimes'. And sixth, 'that justice must incorporate multiple objectives of the parties involved in or affected by crime'.

The six assumptions captured above all reflect the dynamics of conflicts in the Niger Delta. I had argued in another forum (Onuoha 2005) that the conflicts in the Niger Delta are embedded in the relationships between the parties and that resolution or management would be based on the triangle of the government, the host communities and the oil companies. This coming together would be based on an atmosphere of mutual respect and recognition of the issues raised by each of the parties. This has not been the case up till this time. But I think that restorative justice encapsulates these values and may be useful in addressing these conflicts in the future.

Zehr (2002:38) draws attention to these assumptions using five different questions. The questions are: Who has been hurt? What are their needs? Whose

obligations are these? Who has a stake in this situation? And, what is the appropriate process to involve stakeholders in an effort to put things right? Maybe, as part of this interrogation process we should ask, what does justice mean or look like for the oil-bearing communities and the oil companies? Or put in another way, how does the government of Nigeria conceive of justice at least within the context of oil production?

Restorative justice does not focus on crime or law that is breached. It focuses on harms that are done to individuals and communities. Restorative justice empowers both the victim and the offender to address these harms with a view to rebuilding relationships and healing communities. Restorative justice argues that the main aim of justice should be to restore the victim to his or her former state before that crime is committed. Though this is almost impossible, physically and materially, individuals could be assisted to transcend violations of crime (Zehr 2001).

In the Niger Delta, what would 'transcend' mean for the oil companies and the communities? To my mind it will involve an acknowledgement by the oil companies that through acts of omission or commission they have failed in their duty to their host communities. This acknowledgement will be followed by a commitment (obligation) to make it right and become good guests again of their communities. That is my understanding of restoring both the victim and the offender to their former state before the offending behaviour.

Restorative justice insists that the victim also needs rehabilitation. And restorative justice posits that justice systems need not be adversarial if the aim is to undo harms. But more importantly, restorative justice argues that the retributive criminal justice system merely looks at the symptoms of a deeper infection in the offender. So instead of simply punishing the offender, mechanisms should be put in place to address the root causes of offending (Zehr 1990 and 2002, Marshall 1998, Cayley 1998, Bazemore & Schiff 2001). The legislations on compensations have failed to take into account the social interaction process and the relationship that exists between the oil companies and the host communities. Litigations on compensation are part of the limited mindset of the criminal justice system. It is not intended to rebuild and restore but to humiliate and punish.

Since many advocates of restorative justice use a series of questions to clarify the understanding of the movement, I shall also employ the same methodology to illustrate the application of restorative justice principles to the issue of compensation in the Niger Delta. My main reason for this is that it will help us to focus our thinking especially on the issues that are raised.

Restorative justice has many models through which it could be applied to either conflict situations or offending behaviour. This creativity is lacking in the present court system. Every case goes through the judge in a court setting and probably with the same arguments for and against. The most prominent model of restorative justice is the 'victim-offender mediation' (Amstutz & Zehr 1998, Umbreit & Greenwood 2000). The name has undergone some evolution over time for reasons that may not be included here due to constraints of space. Suffice to say that it is the same thing as victim-offender conferencing. There is also the family group conferencing (Macrae & Zehr 2003). Finally we have the circle process (South St. Paul Restorative Justice Council 1996). There are many other models of restorative justice but the above three are basic. The selection of a model of restorative justice intervention is dependent on the kind of offence, the parties and the cultural context. As Zehr (2002:49) observed, 'One of the goals of the process is to be culturally appropriate, and the form of the conference is supposed to be adapted to the needs and cultures of the victims and families involved.' The employment of a model of restorative justice does not necessarily lead to a restorative outcome. In applying restorative justice to the Niger Delta, we must bear in mind that restorative justice is a process, a philosophy, a set of principles, a set of core values that leads to a restorative outcome.

The Restorative Justice Approach as opposed to the Criminal Justice Approach

Guiding questions

With the above brief overview, let us see how restorative justice can be applied to the Niger Delta, especially to the issues of compensation. The discussion

here will be guided by the following questions: (1) Who is the offender? (2) Who is the victim? (3) Who is the community of concern/care? (4) What harm was done? (5) What can be done to rectify this harm? (6) What roles shall the offender, victim, and community play in rectifying this harm? (7) How can both the offender and the victim be empowered to play their roles? (8) How can the harm done to the victim be acknowledged and redressed? (9) How can the offender be rehabilitated? (10) How can the relationship be restored? (11) How can the underlying causes of the conflict between the oil companies and the host communities be addressed?

These eleven questions will be addressed using a restorative justice lens.

Offenders?

The offender in the context of the Niger Delta depends on who is asking and who is answering. The oil companies believe that their role is to obey the laws of the land. They believe that they have accomplished this by getting the proper license, paying compensation according to the law, using the government guideline for calculating compensation, and even developing their own guideline which they consider generous (Frynas 2000). They also accuse the government of shirking their responsibility to the people.[6]

On the other hand, the oil-bearing communities argue that the oil companies are the offender, that they have polluted their land, damaged their households and farms and denied them their sources of livelihood. And that they refuse to pay compensations, or when they reluctantly agree to pay it is usually not paid on time and is inadequate (Shell Petroleum Development Company 2003:10). They accuse the government of being co-conspirators with the oil companies for neglecting and marginalising them from their God-given resource (Delta Force, documentary by Channel 4 Dublin, Ireland, October 2001).

The government counters by accusing the communities of breaching the law on public peace and order. They also accuse the oil-bearing communities

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6   They do not say this openly for fear of government reprisals, but in several interviews and interventions oil company staff restated this position.

of not wanting the government to use revenues from oil to develop the entire nation. The government goes ahead to accuse the oil companies of breaking the promises which they make to the oil-producing communities (Governor Odili's remarks after a visit by an ECCR[7] delegation).

Harm done and victims affected?

In the scenario above, all the parties involved in the conflict in the Niger Delta are guilty. How then can restorative justice handle this apparent quagmire? This question is a very simple one to address within the restorative justice framework. Restorative justice will ask, what harm has been done? And who has been affected?

This will be addressed from three different perspectives since restorative justice is not in search of someone to punish.

From the perspective of the oil companies, their equipment is damaged, their operations disrupted and their lives endangered. And after investing so much money, they are not making profit for their stakeholders. They also claim that they have been meeting their obligation of paying taxes and rents to the government but that their operations are jeopardised.

The oil-bearing communities list their own harms. Their land has been taken away, and the remaining land is polluted so they cannot farm, their rivers are polluted so they cannot fish, and the air they breathe is polluted. They suffer noise and all sorts of inconveniences from oil production activities. They do not have any say as to how oil revenue is shared. They are considered a minority within the Nigerian nation even though they are the proverbial goose that lays the golden egg (Osaghae 1991, 1995, 1998b). In fact, if oil exploration continues, they are on the brink of extinction.

The government catalogues its own list of harms. They include the breach

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7   The Ecumenical Council on Corporate Responsibility is a group of SPDC share-holders based in London. I was a member of the delegation that paid a courtesy visit to Governor Peter Odili of Rivers State in July 2002. His remarks were broadcast the following day on the state radio.

of public peace which is making them spend more money on security. They want to use the little resources available to distribute development projects equitably but the communities are disrupting the revenue flow and setting a bad precedent for other ethnic groups to follow. They accuse the communities of destabilising and overheating the polity. The government also accuses the oil companies of not being transparent in their transactions.[8]

As overwhelming as the whole catalogue of harms may seem, the interesting thing is that in the adversarial criminal justice system, these issues had not surfaced. Even when and where they do surface, the court will probably plead that that is not the charge. More often than not the result of the charge is a court order to pay compensation and the question is about what constitutes adequate compensation. The courts base their decisions on compensation claims on the principles of law of torts. Kodilinye (1982) defines tort as

> a civil wrong involving a breach of duty fixed by the law, such duty being owed to persons generally and its breach being redressible primarily by an action for damages. The essential aim of the law of torts is to compensate persons harmed by the wrongful conduct of others, and the substantive law of torts consists of the rules and principles which have been developed to determine when the law will and when it will not grant redress for damage suffered. Such damage takes several different forms, such as physical injury to persons, physical damage to property, injury to reputation and damage to economic interests. The law of torts requires every person not to cause harm to others in certain situations, and if harm is caused, the victim is entitled to sue the wrongdoer for damages by way of compensation.

The punishment in the case of tort is usually monetary compensation. But it is not as simple as it seems on the surface. The application of the law of torts

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8   The Federal House of Representatives of Nigeria have conducted at least four different probes of oil company transactions since 1999, and they all came out with a verdict of 'guilty'.

is anchored around certain legal principles. In other words, before one could get compensated for a breach of the law of tort, negligence must be established. What this means is that the person claiming damage must prove that the other party acted negligently. This is usually difficult in an industry as technical and complex as the oil industry.

The second principle is nuisance. This means that for instance the complainant must prove that something like noise from oil operations is really causing harm. In an interview at Asa I was informed that on the day that the pipelines were laid to Ikot Abasi, 'the noise was so much that many of our elderly people died' (an informant). Let us assume for instance that the people of Asa decide to go to court to seek redress for this noise, their chances of success are as good as of failure.

Another principle is that of strict liability. In this instance, the defendant is held responsible for his/her activities whether the action was negligent or not. The next principle is that of statute limitation, which simply means a law that prevents someone from suing after a certain period of time. For instance, the NNPC Act of 1977 bars any action against the NNPC if the act committed is more than one year old. There is also the issue of admissibility of scientific evidence. It costs money and time to conduct scientific researches on some of the issues in the Niger Delta. Moreover, some of the effects only manifest after some time.

Another principle or rule is that of a misjoinder of parties and causes of action. For a claim to be successful, the law stipulates those to be sued and the kind of case. There is also the issue of locus standi. That is another way of determining whether the complainant has a direct interest in the case or whether the case really affected the complainant. Evidence rules and the quantity of compensation awards are some other impediments that may inhibit a successful claim.

From the analysis of the harms and the impediments above, one thing that is clear is that most of the harms are fall-outs or after-effects of other harms. For instance, when oil spills occur and the affected communities are not compensated, they protest, thereby hampering oil operations, breaching public peace etc. So the first harm to be addressed is that of the communities, because its ripple effects reverberate across all other spectrums.

Rectifying the harm?

The fifth question is the real meat of this discourse. The criminal justice system insists that to rectify the harm, compensation must be paid. But before it is paid the complainant must prove that the damage is from oil operations. Second, to prove this requires all kinds of professionals. In a particular case cited in Frynas (2000:201), the community required the services of a juju worship specialist to prove that the oil company really damaged their shrine.

Paying compensation does not solve the problem, however. If the compensation claim is successful, the oil company complains that they are spending too much money on their business. If it is not, the community goes home to prepare how to sabotage oil company operations. And in most cases, during the hearing which generally lasts a very long time, the relationship between the communities and the oil companies deteriorates badly. The government is now left to manage the responses and outcomes of this unhealthy relationship.

Now let us see how restorative justice principles could have been applied to rectify the situation. First, *restorative justice insists that the offender acknowledges that harm has been done to the victim by the offender*. In the criminal justice system, this was not done. It is usually the lawyers and the judge that ascertain that harm has been done to the victim. The implication of this is that the offender does not feel any need to be part of restoring the victim. More importantly, the offender lives in denial of the harm and may even try to rationalise or justify it. In many cases oil company lawyers try to manoeuvre their ways out of this compensation claims litigation.

Second, *outsiders (lawyers) would not have been brought in to argue the case in an adversarial atmosphere*. In the legal profession the winning or losing of cases is regarded as very important. If you do not win your case, you are not a good lawyer. This is more so in this instance where the lawyers are in the paid employment of the oil companies. The lawyers representing the oil companies insist that the oil companies have done no wrong and therefore should not pay any compensation, while the lawyers representing the communities argue the contrary insisting that harms have been done through oil operations. This has become meaningless and in conflict resolution, this is known as debating positions instead of taking interests or needs into account. These lawyers are

appraised annually by the number of cases they win or lose. A similar situation applies to the oil company workers. For instance, if every time an oil company worker makes a recommendation for non-payment of compensation and a judge turns it down, it calls the competence of the worker into question.

This is not the situation with a restorative justice approach, where the offender, in this case the oil company, acknowledges the harm and becomes part of the process of repairing the harm. The overriding aim is not to declare winners and losers. This restorative justice approach incorporates such values as participation, inclusiveness, respect and empowerment. In fact, respondents in this project specifically mentioned lack of respect for members of the communities as one of the reasons that may account for the disrepair of the system.[9]

Roles in rectifying harm?

A follow-up question is: how do you make an offender acknowledge that harm has been done? Ross (1996:40-45) suggests story-telling. This is unlike the criminal justice system that does not allow victims and offenders to tell their stories. Even when they are allowed to tell their stories, it is not with an intention of acknowledging the harm but to defend, justify and rationalise the offending behaviour.

Our sixth question has already been answered in discussing question five. The role of the offender would have been two-fold. First is to acknowledge that harm has been done. Second is to suggest how that harm could be repaired. The role of the victim would be to either agree or modify what should be done to repair the harm. In this case the question will be whether the community can in all fairness decide what to do to rectify the harm. My reply would be yes and no. Yes if the relationship has existed over time, and no if trust and confidence is broken. But that is where the role of the government as community of concern/care would be crucial. This was also what Marshall (1998)

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9   I interviewed Oronto Douglas, deputy director of Environmental Rights Action/ Friends of the Earth Nigeria for this project in 2002, and he restated this position.

meant when he mentioned the role of statutory agencies in the application of restorative justice.

One may argue that this is the gap that the judges, non-governmental organisations (NGOs) and lawyers are filling. But the point is that the offenders, in this case the oil companies, are using their enormous resources to leverage the justice system in their favour through the hiring of good lawyers and the commissioning of superb scientific evidence.[10] But in the restorative justice paradigm this will not be so. Not only that, the communities will deliberately be empowered to actively participate in the process. That re-humanises them and imposes on them the responsibility to make things right again.

The most critical strategy here is to ensure that power is balanced between the victim and offender. But in the retributive justice system this is not the case. The system portrays the parties as winners/losers. This minimises the impact of the experiences of the parties. Restorative justice recognises the fact that the offender may also have been a victim. For instance, in negotiating the oil license, the oil company may have felt unfairly treated by the government. The Pipelines Act of 1956 and Oil Licenses regulation of 1959, indeed, complicate issues for the oil companies. Ross (1996) alludes to this cycle of abuse on an individual level. What restorative justice does is to recognise this chain of abuse with a view to empowering the offender to break it. And this is done through support and not condemnation.

Acknowledging and redressing harm?

The number eight question is in two parts. First is how harms can be acknowledged. From my findings, many oil companies do not agree that by their behaviour they have harmed the communities. Many are in denial either to save face or to reinforce the arguments of their defence attorneys. On the other hand, the acknowledgement of harm in the restorative justice paradigm is a voluntary part of the process of doing justice. This is done though a trained

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10   Maire Dugan has discussed the role of power inequality in conflicts, see
      <www.intractability.org>.

and skilled facilitator by asking a very simple question: *What will justice mean in the present instance?* In answering this question let us also be mindful that there is a need for a kind of consensus on the conception of justice. If one of the parties conceives justice as being the provisions of the law, then the application of restorative justice will make very little difference.

Harms can be addressed in several ways. Once harm is acknowledged, the second thing is how to address it. If the offender (the oil company) acknowledges that harm has been done, the next question is how does the company redress the harm? In the restorative justice process, this is still left to the offender to decide, but with support from the community of concern/care. Marshall (1998) foresees a role for statutory agencies in this instance. This is because if the initiative is coming from the offender, it will no longer seem as a punishment imposed from outside. Therefore implementation will not be difficult.

Compare this with my findings which indicate that oil companies do all in their power to deny that harm has been done. I am sure that if a less adversarial atmosphere is created, the oil companies and communities may be able to find a common ground for rebuilding their relationships. But because their relation-ship is 'managed by experts' (euphemism for 'imposed'), it has met with little success. My respondents told me that many oil companies and communities merely go through the motions of these court cases without learning anything. In fact, one respondent said that the parties go through the traditional court system for lack of a better alternative. The timeframe of the cases also calls into question their efficacy and usefulness. The cases take a long time to resolve.

Restoring relationships?

The rebuilding of relationships between the offender and victim is a duty for all. However, the offender must again agree that something is wrong and show the willingness to participate in the process. In restorative justice practice, the offender is supposed to make inputs into the system. The role of statutory agencies is to provide an enabling environment for the process and to ensure reconciliation at the end. This could also be done by ensuring that the offender is not stigmatised.

Restoration of relationships is not a legislated affair. In the traditional

justice system, what happens is that reconciliation is dependent on outside imposition. This is mostly subject to the provisions of the law. But in restorative justice, restoring relationships involves some reconciliation rituals. This is manifested in the behaviour of the offender. It also involves the ability of the offender to engage the victim in a process of healing the harm. A critical factor which the traditional justice system tends to lose sight of is that doing justice is both a collective endeavour and a process (Zehr 2002).

Addressing underlying causes?

Finally, how would restorative justice address the underlying causes of the offending behaviour? One of the first steps is to remove the offence from the offender. In the Niger Delta, the oil companies are seen as devils incarnate. If the offender and victim are made to realise, understand and appreciate that the offence is external to their intrinsic good nature, but embedded in their interaction process, then we have started the process. Second, by allowing the process of open communication between victim and offender the underlying causes could surface. This process is not only purgative but affirming. A recurring complaint of the communities is that no one listens to them. A mechanism of prevention should also be put in place to address issues like this. Education is also a key process of addressing the underlying causes. Trauma healing is very important to uncover underlying causes and addressing them.

Incorporating restorative justice mechanisms?

The next issue is how can these restorative justice mechanisms be incorporated into the present traditional court system? Zehr, a pioneer in this field, has agonised over the co-optation of restorative justice into the present justice system. His argument is that before long, it would have been polluted just like most other reforms of the justice system.

Zehr's fears are not unfounded. This is because the court-mandated

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11 Howard Zehr expressed these views in a forum we had in 2003 at the Little Grill Restaurant in Harrisonburg, Virginia, USA.

mediation process, which was seen as redemptive of the adversarial judicial system has suffered the same. To my mind, since the NGOs have been in the forefront of advocating a better deal for the people of the Niger Delta, a new window of opportunity has been opened for a restorative justice lens. One of the enduring strengths of the restorative justice movement is to learn and adapt from other areas. A good place to test this might be the Niger Delta.

Conclusion

Restorative justice principles and their application is not a kind of open sesame that fixes all problems. In this paper I have argued that it provides an alternative way of addressing some of the issues affecting the relationship between the oil companies and the host communities. I recommended restorative justice because it provides a mechanism for addressing the increasing intractability of the conflicts in the Niger Delta.

It is important to note, however, that the mere application of restorative justice principles does not necessarily lead to a restorative outcome. For outcomes that are restorative, there must be a pool of committed facilitators, advocates and restorative justice enthusiasts. The communities will also need to be made aware of what restorative justice represents.

For every intervention, we must also be ready with tools to deal with spoilers. One of the likely spoilers in the introduction and subsequent implementation of restorative justice in the Niger Delta will be the lawyers themselves. It is therefore important to design methodologies of carrying them along. This is important because many lawyers have made money, name and fame from engaging in court room drama, especially as it relates to the issues in the Niger Delta.

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Integrated Development Planning in South Africa: Lessons for International Peacebuilding?

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Abstract

South Africa is a post-conflict society unlike many others: its transition from conflict to peace during the 1990s was marked by unrivalled levels of political and social reconciliation; and, during this critical time, government institutions were quickly transformed to promote 'true' development and democracy. Unfortunately, the same picture cannot be painted of other African states emerging from conflict. Indeed, a number of challenges have caused, and keep on causing, several post-conflict countries in Africa (and elsewhere) to slide back into violent conflict. One key challenge often cited by policy-makers and academics alike is the lack of coordination between the world's major peacebuilding actors. The United Nations Peacebuilding Commission,

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unveiled in 2005, was specifically established to address this problem. In essence, the Commission's key organisational function will be to reduce the inherent complexity of the UN peacebuilding architecture and move towards a single, more 'integrated' post-conflict development planning process. But despite its laudable aims, the founding resolutions establishing the Peacebuilding Commission are imprecise as to exactly how the body will function and what it will be able to deliver. This uncertainty is based, in part, on the fact that the United Nations still lacks an integrated system of planning for peacebuilding. Among several encouraging methodologies, this paper proposes that South Africa's self-styled 'integrated development planning' approach, implemented after 1994 to overcome Apartheid's violent history, deserves closer scrutiny by international peacebuilding experts. This is because South Africa's approach to development – although not perfect – is centred on integrated governance and has, to some extent, played an important role in accelerating service delivery in previously disadvantaged and conflicting communities. The paper argues, therefore, that South Africa's post-Apartheid development project may reveal some important lessons for the design of integrated peacebuilding strategies in countries emerging from conflict, as the Peacebuilding Commission intends to do.

> Development initiatives must meet...people's problems as they perceive them, not as distant policymakers imagine them – Andrew Natsios[1]

Introduction

South Africa is a post-conflict society unlike many others: its transition from conflict to peace during the 1990s was marked by unrivalled levels of

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1   Comment made by Andrew Natsios, the current administrator of the United States Agency for International Development. See Natsios 2005:7.

political and social reconciliation; and, during this critical time, government institutions were quickly transformed to promote 'true' development and democracy. Unfortunately, the same picture cannot be painted of other African states emerging from conflict. Direct war damage to critical infrastructure has left several governments with little capacity to provide security, health, power, and jobs – essential ingredients for any post-conflict setting (Binnendijk & Johnson 2004:27). In addition to this, the international community has struggled with its ongoing commitment to rebuild war-crippled countries. Typically, in the immediate aftermath of war, development aid can take months to arrive, internationally-imposed peace agreements are fragile, and the momentum needed to sustain post-conflict reconstruction is wanting. These and other post-conflict challenges have caused, and keep on causing, a number of countries – particularly in Africa – to slide back into violent conflict.

To overcome these problems, the United Nations (UN) recently established the Peacebuilding Commission, a 'new advisory body aiming to shore up wobbly peace agreements...and to help prevent war-ravaged countries from lapsing back into deadly conflict'.[2] The Commission's key organisational function will be to reduce the inherent complexity of the UN peacebuilding architecture and move towards a single, more 'integrated' post-conflict development planning process. In short, the new UN body is expected to serve as a platform for joint planning for the world's major peacebuilding actors.

But despite its laudable aims, the founding resolutions[3] establishing the Peacebuilding Commission are imprecise as to exactly how the body will function and what it will be able to deliver (Deller 2006:12). This uncertainty is based, in part, on the fact that the UN still lacks an integrated system of

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2   Opening address by the UN Secretary-General, Kofi Annan, at the Inaugural Session of the Peacebuilding Commission, 23 June 2006. For more information on the Peacebuilding Commission, visit the Commission's official website at <http://www.un.org/peace/peacebuilding/index.html>.

3   In December 2005, the UN General Assembly and Security Council passed corresponding resolutions, A/RES/60/80 and S/RES/1645 respectively, to establish the Peacebuilding Commission as an intergovernmental advisory body in the UN.

planning for peacebuilding.[4] As one study explains, 'experience in integration has been gained in a range of different UN missions, but there has been no clearly defined model for integration...[instead] a variety of practices have emerged based on different actors' and different missions' own interpretations of the concept [of integration], some more successful than others' (Eide et al 2005:3, 21). This begs the question: what planning approach(es) will the Peacebuilding Commission utilise to design integrated, or at least closely coordinated, peacebuilding strategies?

Presumably, what the UN requires is a well-designed and enforced planning system for post-conflict development, explicit on the distribution of roles and responsibilities of different actors working under different budget regimes and planning procedures. Among several encouraging methodologies, this paper proposes that South Africa's self-styled 'integrated development planning' approach, implemented after 1994 to overcome Apartheid's violent and unjust history, deserves closer scrutiny by international peacebuilding experts. Underpinning this argument is that South Africa is addressing, with some degree of success, many of the same developmental challenges that other post-conflict countries in Africa are battling with today, above all, the lack of service delivery; and while the post-Apartheid development doctrine is not perfect, it is placing a great deal of emphasis on how different spheres of government and other sectors can work together to promote socio-economic development.

Integrated Planning: Initial UN Attempts

What is 'integrated planning'? Broadly speaking, integrated planning is about different actors and sectors working together under a commonly-designed

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4   Another serious problem with peacebuilding in general relates to the fact that, to this day, there is surprisingly little clarity or consensus about what needs to be done to rebuild war-torn countries, not least because a standard theory on peacebuilding/post-conflict reconstruction is *missing* – a problem which needs to be sorted out sooner than later.

agenda and re-aligning individual supply-chains to produce a commonly-defined objective or product. Good planning is *integrated*, since it takes into account diverse perspectives and impacts, allowing decision makers to find optimal solutions to critical issues, as well as effective ways to respond to those issues (Litman 2006). Why is integrated planning important for the UN? In essence – and this point has been reiterated a number of times by UN officials – the lack of coordination between diverse civilian and military actors has prevented otherwise sound peacebuilding strategies from being converted into concrete achievements.[5]

Some progress was made in the area of civil-military coordination following the recommendations of the *Brahimi Report* in 2001, which suggested that new specialised units be created in New York and in the field to facilitate joint planning and decision-making across UN departments and between non-UN agencies (United Nations 2001). This paved the way for the establishment of Integrated Mission Task Forces (IMTFs) and Civil-Military Coordination (CIMIC) teams in a number of new missions. It is worthwhile to briefly explore these two concepts in more detail.

Integrated Mission Task Forces (IMTFs)

The UN mission in Sierra Leone (UNAMSIL) was one of the first UN missions to employ the IMTF concept in which humanitarian aid and development agencies were subsumed in the peacekeeping mission from the outset, including in the early stages of planning. The concept has also found some implementation in Afghanistan (UNAMA), Liberia (UNMIL), and Sudan (UNMIS). In practice, however, IMTFs have proceeded so far with mixed results: in some cases, as in Afghanistan, IMTFs were prematurely disbanded well before missions were fully deployed; in other cases, IMTFs performed below expectations, as acknowledged by the former UN Secretary-General, Kofi Annan, in a recent report: 'While the mechanism has functioned well as a forum

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5   Other problems include, as always, sustained international funding and commitment
     (Wiharta 2006:141).

for information exchange, it has been less successful at providing strategic planning and management' (United Nations 2005c:9). The same report reveals that mission planning has remained far from being 'integrated' because IMTFs have lacked the authority to make decisions – more precisely, the UN has failed to second staff with decision-making authority to IMTF structures.

Civil-Military Coordination (CIMIC)

Attempts to institutionalise high-levels of civil-military coordination among UN and non-UN actors have also resulted in all current UN peace-keeping operations establishing CIMIC branches. Broadly speaking, CIMIC's main purpose is to ensure that there is a continuous process of information sharing and joint planning among and between diverse mission actors, including UN agencies, development aid organisations, non-governmental organisations (NGOs), and local representatives.[6]

Overall, CIMIC activities seem to have enjoyed more success than the IMTF concept. This is evidenced, for example, by the introduction of 'Quick-Impact-Projects' – short-term, small-scale infrastructure and development projects – in some peacekeeping operations, the implementation of which CIMIC teams usually oversee.[7] But, as the following section will show, increased civil-military cooperation through CIMIC structures has not automatically translated into integrated planning *per se*, not least because soldiers and civilians have differed widely in terms of priority settings, resource allocation, and time-horizons when preparing for operations. This has meant that CIMIC teams, like IMTFs, have served less as instruments for integrated planning and more as forums for comparing notes – which, by itself, is not a bad thing but is insufficient to arrive at real integrated planning.

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6   For a more detailed analysis of CIMIC in peacebuilding, see, for example, De Coning 2005.

7   Quick Impact Projects (QIPs) are short-term, small-scale infrastructure and development projects – rebuilding strategic roads and bridges, restoring electricity and water supply, and so forth – aimed at making early improvements in a local population's quality of life.

Integrated Planning Problems

Since Brahimi, integration has become, at least on paper, the overarching principle for both peacekeeping and peacebuilding operations. However, UN efforts to improve system coordination in peacebuilding through IMTF and CIMIC structures have usually fallen short of needs and expectations. Even worse, there is as yet no common agreement on what exactly constitutes an integrated mission. These and other problems were raised by the *Report on Integrated Missions* (Eide et al 2005:41), which revealed that:

- Most representatives of UN agencies in the field have been involved in programme design and implementation, but few have been exposed to proper integrated planning methodologies;
- Mission planning does not reflect an overall strategic vision of what the UN is supposed to achieve in terms of durable peacebuilding;
- Senior officials from different UN departments rarely join forces to discuss the overriding imperatives of a given situation;
- Planning has consistently lacked anything that approaches adequate dialogue and exchange with national and local authorities, as well as with civil society groups and local non-governmental organisations; and
- Operational plans are rarely subjected to systematic and rigorous reviews to update and adjust overall strategies and operational objectives (Eide et al 2005:20-21).

These findings were instructive because they clearly revealed the need for the UN to create a dedicated institutional home for peacebuilding, endowed with enough muscle to coordinate activities for post-conflict reconstruction and development to which the entire UN system can work. This insight, coupled with the UN's experiences in the last decade of failing to stabilise societies after an initial period of military peacekeeping, largely informed the decision by the UN to establish the Peacebuilding Commission.

Enter the Peacebuilding Commission

The Peacebuilding Commission, or PBC, was unveiled in December 2005 to strengthen UN capacity for peacebuilding where peacekeeping missions have been deployed, and to develop integrated responses for post-conflict reconstruction and development. The concept of a 'Peacebuilding Commission' was first introduced in December 2004 in a UN High-Level Panel Report (United Nations 2004), and later gained momentum in March 2005 when Kofi Annan released his report, entitled *In Larger Freedom* (United Nations 2005a). In this report, Annan noted a 'gaping hole' in the UN's effort to assist countries recovering from war to make the transition from war to lasting peace. The PBC was specifically established to fill this institutional gap, and 'will, for the first time, bring together all the major actors in a given situation [and this means] that money will be better spent and that there will be a real link between immediate post-conflict efforts on one hand and long-term recovery and development on the other'.[8] UN Security Council Resolution 1645 (United Nations 2005b:2 par 2(a)-(c)) outlines the PBC's work in greater detail:

- To serve as a central node to bring together different international actors, marshal resources, and propose integrated strategies and overall priorities for post-conflict peacebuilding in general terms and in specific country situations;
- To focus attention on the reconstruction and institution-building efforts necessary for the functioning of a state; and
- To develop expertise and best practices, with a view to ensuring predictable and sustained financing, as well as sustained international attention to peacebuilding activities.

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8   United Nations, United Nations Peacebuilding Commission – Questions and Answers, accessed at <http://www.un.org/peace/peacebuilding/questions.htm>.

The PBC is not planned to be operational on the ground; its purpose, rather, is to *propose* post-conflict recovery strategies to the UN Security Council and other key institutional players. As Ponzio (2007:8) explains, 'the PBC is only a *consensus-based advisory body*. Its influence...stems entirely from the quality of its recommendations, the relevancy of information it shares, and its ability to generate additional resources for a conflict-affected state'. Although the PBC's advisory status may seem inadequate to 'serve as a central node' for peacebuilding, the Commission is unique in the sense that it will bring together a membership drawn from the three principle organs of the UN – the General Assembly, the Security Council, and the Economic and Social Council – as well as major financial donors, troop-contributing countries, international financial institutions (like the World Bank and the International Monetary Fund), and local representatives from the country on the UN agenda.

The PBC will consist of two configurations, namely the Organisational Committee and the Country-Specific Meetings. The Organisational Committee, made-up of 31 member countries,[9] will be responsible for, *inter alia*, setting the PBC's agenda, issuing invitations for country-level meetings, and reviewing annual reports. The Committee is expected to meet at regular intervals. Most of the PBC's work, according to the UN, will be conducted in the Country-Specific Meetings 'where [the PBC's] participation will be tailored to each [post-conflict] case – to involve country representatives as well as all the relevant contributors such as regional organizations, regional banks and international financial institutions'.[10] Country-level meetings will be convened as necessary.

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9   These include: seven from the Security Council (including permanent members); seven from the Economic and Social Council; five from the top-10 financial contributors to the UN budgets; five from the top-10 troop contributors to UN missions; and seven additional members to redress remaining geographical imbalances, to be elected by the General Assembly.

10 United Nations, United Nations Peacebuilding Commission – Questions and Answers, accessed at <http://www.un.org/peace/peacebuilding/questions.htm>.

While the founding resolutions of the PBC do not provide a formal seat for civil society at the country-level meetings, they nonetheless acknowledge the importance of ensuring local buy-in and the need to promote the principle of local ownership (Deller 2006:10). This point was stressed by the Minister for Foreign Affairs of Denmark, Per Stig Møller, at the inaugural session of the PBC in June 2006 when he remarked, 'the aim [of the PBC] should not be to create an additional layer of coordination at [UN] Headquarters level, but rather to support and reinforce local coordination at the country-level... without the strong cooperation of the country on the agenda, the [PBC's] efforts risk failure'.[11]

In Search of an Integrated System of Planning for Peacebuilding

Another important structure of the PBC is the Peacebuilding Support Office (PBSO), which is expected, *inter alia*, to gather and analyse information relating to development planning and reviewing best practices in peacebuilding (Ponzio 2007). In this regard, the PBSO plans to develop 'Integrated Peace-building Strategies' for countries on its agenda that 'would provide an agreed framework [to] support peacebuilding activities, ensure greater coherence and coordination and address identified [peacebuilding] gaps'.[12] In this way, the Commission hopes to 'find its niche'[13] within the complex UN architecture by developing strategies that can guide the activities of all UN departments and agencies.

This effort will not be easy for two reasons. First, within the UN system, the plethora of departments, funds, programs and agencies involved in peace-

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11 Address by the Security Council President, the Minister for Foreign Affairs of Denmark, Per Stig Møller, at the Inaugural Session of the Peacebuilding Commission, 23 June 2006.

12 Peacebuilding Support Office, Draft Concept Note on the Design of Integrated Peacebuilding Strategies (IPBS), 27 February 2007, accessed at <http://www.reformtheun.org>.

13 A main concern about the efficacy of the PBC is that it will duplicate UN efforts already underway in a variety of post-conflict countries.

building has been a perpetual challenge to integration.[14] Second, documenting best practices from post-conflict situations will be tricky since good examples of peacebuilding are in short-supply – in fact, the overall impact of peacebuilding worldwide, especially in Africa, is reported to be weak and ineffectual, this despite substantial development inputs from seasoned aid agencies.[15] Of course, there are cases where UN peacebuilding has made a difference – e.g. in East Timor, Kosovo, El-Salvador – but few practical lessons on integration have been collected thus far since the concept of integration itself is relatively new to the UN.

That said, the UN is not the only actor in search of better post-conflict solutions. There are examples at the national level in which integrated planning has been used to promote sustainable development in post-conflict settings, long before the UN decided that integration was important for peacebuilding. South Africa's post-Apartheid development project is a case in point – even though it must be noted that few, if any, development agencies have paid serious attention to their successes (or failures). This is surprising for a number of reasons: first, South Africa is a nation which faces similar service delivery issues to other post-conflict states in Africa; second, since 1994 South Africa has institutionalised integrated planning principles in government to reach its developmental objectives; and third, South Africa's approach has been specifically designed to enable multi-agency and stakeholder coordination, with an eye to accelerate service delivery in poor, previously conflicting communities.

With this in mind, the next section will look more closely at South Africa's

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14 This particular point was made at the Seminar on Integrated Peacebuilding Strategies, 1 March 2007, New York, co-organised by the International Peace Academy and the Centre on International Cooperation, accessed at <http://www.ipacademy.org/news/2007/04/16/integrated-peacebuilding-strategies/>.

15 The UN reported in 2004 that around fifty percent of countries emerging from war fall back into violent conflict within the first five years of signing a comprehensive peace agreement. This figure is stated to be even higher in Africa. See United Nations Development Group (UNDG)/Executive Committee on Humanitarian Assistance (ECHA) Working Group 2004:14.

post-Apartheid 'peacebuilding' experiences. Particular attention will be given to a key product of South Africa's inter-governmental planning approach, termed an Integrated Development Plan, which aims to bring about coordinated action among different spheres of government – national, provincial and municipal[16] – and other major players to maximise development impact at sub-regional level, i.e. at municipal level.

Planning for Development in Post-Apartheid South Africa: A Brief Overview

Over the last number of years, it has become increasingly evident that development interventions with a strong sectoral emphasis are not sufficient to deal with the complexity of the developmental *problematique* (Escobar 1995:64-76). Instead, there has been a gradual shift toward the simultaneous – rather than sequential – pursuit of diverse objectives, such as poverty eradication, gender empowerment, provision of basic human needs, governmental transparency and accountability, and environmental sustainability. This thinking was formalised by the UN's Agenda 21 programme in 1991, which called on countries to adopt national strategies for sustainable development that should 'harmonize the various sectoral economic, social and environmental policies and plans that are operating in the country'.[17] Of the many countries that have repeatedly reiterated their commitment to Agenda 21, South Africa is one country that has actually made an effort to concretise the link between sustainability and integrated planning, in a manner tailor-made, of course, for the post-Apartheid policy context.

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16   South Africa is a unitary state consisting of three spheres of government. It currently comprises nine provinces and two hundred and eighty three municipalities.

17   United Nations Department of Economic and Social Affairs, Agenda 21: Chapter 8, accessed at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter8.htm>.

South Africa's integrated planning approach was launched after 1994 as a platform for previously marginalised municipalities to: directly partake in service delivery planning; reform old and build new institutions; and to identify and prioritise strategic development interventions with both short- and long-term impact. This process has provided an opportunity for municipal, provincial, and national representatives, as well as other major players, to debate and agree on long-term development strategies (over a 25-year period) and on more immediate ones (over a 5-year period) for a given municipality.

Much like post-conflict peacebuilding, the main focus in South Africa was, and still is, to increase the rate of service delivery, challenge the dualistic nature of its economy, and generate sustainable economic growth. To achieve these goals, the planning process has specifically addressed the following key issues:

- Restructuring the Apartheid spatial form;
- Transforming local government structures to ensure that they promote human-centred development;
- Establishing democratic, legitimate and transparent planning processes; and
- Fostering a culture of cooperative governance and developing multi-sector development plans (Oranje 2002).

Several pieces of legislation and policies influence the nature of planning in South Africa, all of which focus on improving integration.[18] Central to this are Integrated Development Plans (IDPs), which are strategic planning instruments that inform all planning, budgeting, management and decision making of local municipalities. In essence, IDPs were intended to assist municipalities in achieving their developmental mandates and to guide the activities of any institution or agency operating in the municipal area (Oranje et al 2000:19).

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18   See Republic of South Africa 1996, 2000, and 2003; South African Department of Provincial and Local Government 1998; and The Presidency 2006.

The Integrated Development Plan: Key Principles

The IDP process, managed by the relevant local government structure, normally begins by defining the vision of a municipality (i.e. the desired end-state); then moves on to identifying key developmental objectives; and proposing various strategies to address these objectives; after which these strategies are translated into programmes and projects, which are budgeted for, and ultimately implemented and monitored. Significantly, IDPs are not only structured to inform municipal management for development, but also planned to guide the activities of any institution or agency operating in the municipal area.

Three core principles underpin the IDP process. Firstly, as *consultative* process, the IDP approach stresses that appropriate forums should be established where local residents, government representatives, NGOs, civil society, and external sector specialists can come together to:

- Analyse problems affecting service delivery;
- Prioritise issues in order of urgency and long-term importance;
- Develop a shared vision/end-state and common strategic framework;
- Formulate relevant project proposals;
- Compile an inventory of proposals and integrate proposals; and
- Assess, align, and approve IDP plans.

Secondly, as a *strategic* process, the IDP approach aims to ensure that:

- Local knowledge is combined with the knowledge of technical experts;
- Service delivery delays are overcome through consensus building within given time periods;
- Both the underlying causes and symptoms of service delivery problems are addressed;
- Most effective and efficient use is made of scarce resources; and
- IDPs are not planned and budgeted in isolation, but rather integrated from the start with other complementary sectors.

Lastly, as an *implementation-orientated process*, the IDP aims to become a tool for better and faster service delivery by ensuring that:

- Concrete, technically-sound project proposals are designed;
- Planning-budget links are created with feasibility in mind; and
- Sufficient consensus among key stakeholders on the planned projects is reached.

It is important to mention that IDP strategies, programmes and projects are not typically cast in stone, but are subject to continual change as conditions in either the internal or external environment fluctuate. Accordingly, IDPs are reviewed annually in line with broader national planning and budgetary process, and evaluated every five years to understand their true impact on the ground. In this regard, while it has been acknowledged that IDPs, and the supporting inter-governmental planning system, have not been effective in meeting all their intended objectives, Oranje (2002) suggests that they have, in some measure, enhanced inter-governmental planning and improved the capacity of some district municipalities to deliver on their developmental mandates. Patel (2005:9) concludes his examination of the IDP process with the sobering remark that 'there are remarkable stories of IDP success…but the challenge is still huge'.

There are indeed many issues that are limiting the impact of IDPs, among these that national departments have not always managed to participate in municipal integrated development planning processes in meaningful and sustainable ways.[19] For that reason, the need for better inter-governmental interaction has become increasingly important for South Africa to realise the level of integration that it seeks.

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19   See Oranje 2002 and South African Department of Provincial and Local Government 2005.

Three Ways to Ensure Integration

In recent years, several studies[20] have been commissioned in South Africa to outline better strategies to support integrated development planning. Although differing in several respects, these studies have proposed that multi-agency planning for development requires three basic ingredients: structured and systematic interaction; alignment of different planning instruments; and targeted interventions. These three ingredients are summarised below:

Essential Ingredients for Integrated Planning in South Africa

Structured and systematic dialogue
- Because local needs are often inconsistent with national priorities and interests, outside actors should engage directly and regularly with local representatives in the field to: deliberate issues on service delivery; develop a shared understanding on which objectives to focus on; and to determine the best strategies to reach those objectives.
- Local participation should happen during all phases of the planning process and not be applied exclusively for initial assessments and prioritisation of needs.
- Both municipal officials and external agents should have a say in, and are responsible for, the development of the area in question.

Alignment of planning instruments
- Three types of inter-governmental planning instruments should be aligned to ensure unity of effort, namely: planning processes, monitoring mechanisms, and budgeting cycles.
- Area-specific programmes should be aligned with provincial and national

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20   See Oranje 2002; Rauch 2002; and Oranje & Van Huyssteen 2004.

ones. While local authorities should develop their own development plans, provided that these are consistent with overall national goals and policies, they should also make inputs into national plans.[21]

·   Diverse monitoring and evaluation mechanisms should be aligned to jointly measure whether actions are taking place in accordance with set outcomes and resource allocations, in the right amount and at the right time, and to take corrective measures when and where necessary.[22]

·   The sequences of budget cycles in different spheres of government and the implementation of local projects should be aligned with the time-frames of national development spending programmes.

Targeted interventions

·   Investment decisions should be informed by the concept of 'potential' and planners should distinguish between two types of regions:[23] regions with development potential (i.e. the best areas for economic growth, job creation, and poverty alleviation) and those with limited potential.[24]

·   Regions with development potential (commonly referred to as 'areas of impact' in IDP parlance) should become the primary focus areas for

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21   This form of planning is known as the 'counter-current principle' i.e. each planning level must take account of the objectives of higher-level plans, whilst every lower-level authority must be allowed to participate in the preparation of higher-level plans.

22   With regard to monitoring and evaluation, South African development planners rely extensively on Geographic Information System (GIS) technology to assess the rate of service delivery. In other words, spatial analysis forms an integral part of the planning process.

23   What is meant by a 'region' means different things to different people; in South Africa's case, the concept is understood to mean a distinct spatial entity comprising a wider set of economic connections and institutional obligations.

24   The following assumptions underpin this thinking in South Africa: dynamic qualities of areas are developed historically and culturally over a long period of time; globally, socio-economic development is distributed unequally, and spatial variations in the incidence of poverty differ widely; and some regions develop more effectively and efficiently than others. See Mohamed 2006.

government spending and infrastructure development over the short to medium term; ultimately, these regions should serve as pivotal sites or building blocks for longer-term development processes.

- High potential areas should also serve as basic units that drive multi-sectoral planning and budgeting between various spheres and sectors. Thus, different role players should jointly prioritise and concentrate developmental actions and resources in the context of a *shared* 'area of impact'.

It should be borne in mind that South Africa has yet to fully implement the above-mentioned policy recommendations. As Padarath (2006:11) explains, 'a lot has been accomplished [but] key tasks lie ahead in improving, consolidating and sustaining the changes that have been made thus far'. That said, South Africa's desire to create a seamless inter-governmental policy environment for development is unquestionable and also noteworthy with respect to current international attempts to develop integrated peacebuilding policies.

Post-Apartheid Development: Policy Implications for Post-conflict Peacebuilding?

In his 2006 Budget Speech, the Minister of Provincial and Local Government, Mr Fholisani Sydney Mufamadi, remarked that, although IDPs were originally conceived as strategic plans for local government, their potential impact for other developmental processes has become increasingly important.[25] Likewise, CSIR Project Manager, André Brits, noted on one occasion that '[i]nformation generated and maintained as part of the IDP process is a national, strategic resource of exceptional value, yet many potential users are not aware of this valuable resource...'.[26] Ostensibly, the operative principles

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25 South African Government, Minister for Provincial and Local Government, Mr Fholisani Sydney Mufamadi's Budget Vote Speech to the National Assembly, 24 May 2006.

that inform South Africa's integrated development planning approach – from conceptualisation to formulation, through to execution and evaluation – do seem relevant with respect to the international peacebuilding discipline. This is especially true if one considers, for example, how the principles that underpin the IDP process echo a set of peacebuilding guidelines identified in a study by the current Administrator of the United States Agency for International Development (USAID), Andrew Natsios.[27]

On the basis of South Africa's philosophy on integrated planning, it is possible to identify a number of policy implications for international peace-building, in particular for the work of the PBC:

- The PBC's attempts to document and analyse lessons learnt and best practices from post-conflict situations could be enriched by understanding the principles that underpin South Africa's IDP approach (consultation, strategic planning, and action-orientated), and the planning methods used to ensure that these principles are adhered to.
- The PBC's country-level configurations should ensure a more balanced platform for deliberation and decision-making around development and service delivery to enable systematic and structured local inputs into peacebuilding policies.
- The participation of local representatives in developing integrated peace-building strategies should not be regarded as a *compliance* issue, but rather as a *consultative* process to ensure that residents of the country in question are mobilised as partners in delivery.

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26 CSIR, Helping South Africa's Municipalities to plan for the future, March 2002, accessed at <http://www.csir.co.za/plsql/pTl0002/PTL0002_PGE038_ARTICLE?ARTICLE_NO=7012117>.

27 The 'Nine Principles of Reconstruction and Development' as identified by Natsios are: (1) local ownership; (2) capacity building; (3) sustainability; (4) selectivity; (5) assessment, (6) results, (7) partnership; (8) flexibility; and (9) accountability. See Natsios 2005:7-18.

- Initial peacebuilding assessments and plans cannot be prepared from New York. Rather, international staff should be given the opportunity to engage directly with locals on the ground to develop a *shared analysis* of the root causes of conflict; this analysis should find concrete expression in agreed development goals underscored by the unique values under-pinning the country and/or community in question; this process, in turn, should provide a basic starting point for the PBC to develop *strategically-focused* peacebuilding policies for the UN Security Council.
- Institutionalising a well-designed and enforced planning system for peacebuilding may be possible if the PBC is given the authority to align and synchronise different planning processes, monitoring mechanisms, and budgeting cycles of different UN departments and other major peace-building actors and the post-conflict country in question.
- The PBC should explore the advantages of incorporating the concept of 'shared areas of impact' into its strategic plans. Invariably, some areas of a post-conflict country will be easier to develop than others. Thus, in order to create the momentum needed to jumpstart development, it may be useful – at least in the short to medium term – for the PBC and its local partners to prioritise investment and focus spending in areas with greater development potential.
- Integrated peacebuilding strategies should aim to reverse the time-honoured, but questionable, international practice of post-war programmes serving the interests and priorities of foreign actors (not least, the financial requirements of international contractors and service providers). More emphasis should be placed on catalysing indigenous capabilities in peacebuilding; if not, local support for peacebuilding, and development in general, is likely to be jeopardised from the very start.

Conclusion

No amount of integration will win the peace. Ultimately, the transfer of power, resources and capacities to local actors will define the effectiveness

of international peacebuilding. In other words, real peacebuilding means building – not replacing – local capacities.

That said, it is widely acknowledged that unity of effort between the world's major peacebuilding players is an important ingredient for successful peacebuilding. However, this realisation has not in itself resolved the issue of conducting more 'integrated missions', in so far as peacebuilding experts have lacked meaningful and effective interfaces for joint planning. To address these problems, the UN recently established the Peacebuilding Commission (PBC), an inter-governmental body designed to improve international and local coordination of peacebuilding activities and funds. Although the PBC will provide UN actors with a framework for inter-governmental and inter-agency relations, the new UN body still lacks a well-designed and systems-wide planning methodology for peacebuilding.

The search for best practices that will improve planning for peacebuilding is therefore important for the PBC. In this regard, this study has proposed that UN officials should take a closer look at South Africa's integrated development planning approach as it may shed some light on the question of how best to enhance joint planning in post-conflict conditions. At the very least, the arguments presented in the discussion do justify additional research in exploring in greater detail the potential implications of South Africa's inter-governmental planning system for the international peacebuilding discipline.

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Agency Theory: A New Model of Civil-Military Relations for Africa?

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Abstract

In this paper I assess a new approach to Civil-Military relations, Peter Feaver's 'Agency Theory'. After demonstrating that this theory offers important advances against the standard approaches to the topic exemplified by Huntington and Janowitz, I then turn to a consideration of the applicability of the theory in the African context. Feaver himself is pessimistic about the value of his theory in a context where there is not an established culture of submission to civilian rule among military forces, and where coups are a real danger. I argue, however, that even under these conditions Agency Theory remains extremely valuable as an analytic tool. I argue further that Feaver has not recognised the potential benefits that regional organisations offer to civilian principals in their goal of ensuring military obedience, even where a tradition of military professionalism does not exist.

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Introduction

Despite trendy and dramatic academic pronouncements of the decline and fall of the state as the key player on the global stage, states continue doggedly on. In those few countries where the structures of the state have, in fact, collapsed (such as Somalia), the state has not been replaced by some novel new system, but has instead regressed to chaos and anarchy. States, then, remain important.

Perhaps the defining feature of the state is that of its monopoly over the legitimate use of force, as famously expressed by Max Weber in his landmark 1918 speech *Politik als Beruf*.[1] In contemporary times, with the rise of notions such as the doctrine of humanitarian intervention, it has also been increasingly asserted that the legitimacy of the state's use of force is dependent on responsible civilian oversight of those state arms (such as the police and the military) that exercise that monopoly on behalf of the state. This is not the place to debate the legitimacy of undemocratic states in the international system. What can be confidently asserted is that the democratic control of armed forces, usually described in terms of 'civil-military relations', is an essential feature of democratic governance and an important element in the prevention of internal armed conflict. In a democratic state it is the people, through their properly elected representatives, who are to rule over every aspect of the public life of the nation, including (perhaps especially) the application of force. Military leaders and institutions must therefore be the servants, not the rulers, of the state. This feature of democratic states, however, contains within it a fundamental paradox – the very institution that is created to protect the state, the military, has the power to become its greatest threat. As Richard Kohn points out, 'The military is, by necessity, among the least democratic institutions in human experience; martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies' (Kohn 1997:141).

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1   'Politics as a Vocation'. An English translation can be found online at
    <http://www.ne.jp/asahi/moriyuki/abukuma/weber/lecture/politics_vocation.html>
    (accessed 7 June 2006).

In today's world, the challenge of civilian control over the military has two distinct, though interconnected, aspects. At the most basic level, the challenge is that of preventing military forces from taking control of the nation's political life, whether by means of a coup d'état or by way of less obvious, but no less pernicious, pressures on civilian government. This is made all the more difficult by the fact that it must be achieved without weakening the military to the extent that it faces serious defeat on the battlefield, thereby placing the state and its citizens at considerable risk. This fundamental challenge is the one that is felt most keenly by the young democracies of the world. In the older democracies, where civilian control of the military is an established feature of the political terrain, the challenge is less dramatic, but no less difficult to address. Here, as Kohn puts it, 'the test is whether civilians can exercise supremacy in military policy and decision making – that is, frame the alternatives and define the discussion, as well as make the final choice. When the military enjoys great prestige, possesses advanced bureaucratic skills, believes that its ability to fulfil its mission may be at risk, or comes to doubt the civilian leadership, civilians can face great obstacles in exercising their authority' (Kohn 1997:141).

Despite the importance of civil-military relations, theoretical under-standings of this question have advanced surprisingly slowly in recent decades. Most academics and practitioners whose work touches on this issue still take as given the theory of Samuel P. Huntington, published nearly fifty years ago as *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Huntington 1957). The only other academic figure to achieve a significant profile in this regard during the preceding fifty years is the late Morris Janowitz, whose landmark book, *The Professional Soldier: A Social and Political Portrait* (Janowitz 1960), explored the sociological connections between the mili-tary and the society it serves. Recently, however, a number of new works have emerged on the question of civil-military relations, that threaten (or promise) to break the near-monopoly that Huntington and Janowitz have long held on this field. One of those important recent works is Michael Desch's 1999 book, *Civilian Control of the Military: The Changing Security Environment* (Desch 1999), which expounds the thesis that civil-military relations are deeply affected by the level of threat in the security environment, and that civilian control is

at its weakest when the threat is at its lowest. More recently, we have seen the emergence of an impressive new theory, 'agency theory', which has been developed by Peter D. Feaver of Duke University, and which is comprehensively laid out in his recent book *Armed Servants: Agency, Oversight, and Civil-Military Relations* (Feaver 2003).

The purpose of this paper is to assess whether Feaver's agency theory offers any important advances over the traditional Huntington/Janowitz 'professionalism' approach, and, in particular, whether agency theory shows potential for the specific circumstances of Africa's new democracies. That this is important is made clear by Jakkie Cilliers (1995:39) when he writes that:

> Few states in southern Africa have 'mature' military forces or an indigenous professional military culture that accepts the supremacy of civilian and parliamentary authority over the military. Developing a military culture that can coexist with civilian supremacy and representative government is a task that should focus the minds of both Africans and their friends from the industrialized countries, and which should lead to joint and realistic strategies.

> Of course, sound civil-military relations and a salutary professional military culture will not by themselves secure national or regional stability across southern Africa, but they do represent crucial building blocks for the future. Thus the nature of armed forces and civil-military relations in southern Africa merits careful attention.

In what follows I shall begin by giving a brief account of the traditional view, whereafter I shall present a comprehensive account of agency theory. I will then offer an assessment of the general advantages or disadvantages of agency theory over its older competitors, followed by an analysis of its performance in the specific context of democracy in Africa. As we will see, Feaver himself raises questions as to the applicability of his theory to states where a real threat of a coup d'état exists. I will argue, however, that agency theory is able to deal with this issue.

Huntington and Janowitz

At the heart of both Huntington's and Janowitz's analysis of the military and its relationship to the polity, is the notion of professionalism. For both, a profession is defined in a fairly conventional manner, as an occupation which has highly specialised characteristics in the areas of expertise, responsibility and corporateness. Both also restrict the membership of the society of military professionals to those who belong to the officer corps. In terms of civil-military relations, Huntington takes the notion of professionalism to be at the heart of what he calls 'objective civilian control' of the military (Huntington 1957:83–85 and passim). In more recent times Huntington (1995:9-10) helpfully summarises the features of objective civilian control as follows:

> This involves: 1) a high level of military professionalism and recognition by military officers of the limits of their professional competence; 2) the effective subordination of the military to the civilian political leaders who make the basic decisions on foreign and military policy; 3) the recognition and acceptance by that leadership of an area of professional competence and autonomy for the military; and 4) as a result, the minimization of military intervention in politics and of political intervention in the military.

The key consequence of this professionalism-driven model is, in Huntington's account, that it provides a way to weaken the military politically (by keeping it out of political matters) while at the same time allowing it to be strong militarily, thereby ensuring both civilian control and military effectiveness (Huntington 1957:83-85).

Because his focus is more sociological than political, in many respects Janowitz's approach is not a competitor but rather a complement to Huntington's theory. Perhaps the main difference between these theorists' views regarding civilian control of the military relates to their views of professional autonomy. Huntington argued for a strict separation between the values of the military profession and those of liberal civil society, and believed that the imposition or infusion of liberal values into the military would undermine its military

effectiveness. Writing as he was in the context of the US participation in the Cold War, and with this belief about liberal values in mind, Huntington saw a real crisis looming on the horizon. He believed that in a time of war the only way a liberal society can meet a serious threat is by suspending its liberal values for the period of that war. In the case of the Cold War, however, which he recognised as being likely to be a long-term feature of international relations, he believed the only hope for survival was for liberal values to be jettisoned altogether, and for the US to become a conservative republic: 'The requisite for military security is a shift in basic American values from liberalism to conservatism. Only an environment which is sympathetically conservative will permit American military leaders to combine the political power which society thrusts upon them with the military professionalism without which society cannot endure' (Huntington 1957:464).

In contrast to this view Janowitz (1960) argued that the distinction between war and peace was becoming increasingly difficult to draw in the modern world, and that military forces were increasingly becoming 'constabulary forces' rather than the traditional warfighters of old. As a result, he argued, the professional soldier, while remaining in important ways distinct from his civilian counter-parts, must become politically aware, and must of essence therefore absorb many of the values of the society he serves. This is sometimes described as 'subjective' civilian control (see for example Williams 1995). He also described how the rise of bureaucratisation and the increasing dependence on technology in the military produced additional constraints on the autonomy of the military professional.

What is common to Huntington and Janowitz is that for both of them civilian control of the military is assured by the military's professionalism, defined in terms of voluntary submission to civilian authorities – in Hunting-ton's case, submission based on the incentive of civilian non-interference in the military realm; and in Janowitz' case, submission based on shared values. In this respect, then, Peter Feaver seems correct when he writes that 'The tradition inspired by Morris Janowitz provides an important counterweight to Huntington, but on the crucial question of how civilian institutions control military institutions on a day-to-day basis the Janowitzean school does not

represent a significant alternative to Huntington' (Feaver 2003:2). In what follows I will outline Feaver's own theory, which does indeed offer a refreshingly significant alternative to Huntington's approach.

Feaver's Agency Theory

Feaver makes it very clear from the start of his book that of the two aspects of civil-military relations outlined at the beginning of this paper – the fundamental issue of establishing and maintaining civilian control over the might of the military, on the one hand, and the day-to-day control over policy decisions on the other – it is the latter at which his agency theory is directed. To reiterate, this is not the issue of preventing the military from taking control of all the affairs of the state, but rather the question of ensuring civilian control over those affairs of the state that directly or indirectly affect the military, such as, for example, the defence budget. This remains, however, a central problem for the democratic state. For though it is not its physical coercive power that causes the military to be a challenge in this regard, the military nonetheless also wields power in other forms – its claim to special expertise in military matters, the general prestige of the military, and so on. The practical dangers of the military exercising too much power in this respect include the possibility that the military may drain the state of its resources, even to the point of collapse, or that it might seek out wars that are contrary to the interests and will of the society it serves (Feaver 2003:5). Perhaps more important than these practical considerations is the principle of democratic governance – that in a democracy the citizenry by definition retains the right to decide, through their elected representatives, on all matters of state, even on matters in which experts (such as the military[2]) may have greater expertise. As Feaver neatly puts it, 'In a democracy, civilians have the right to be wrong' (Feaver 2003:65).

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2   As Feaver (2003:300) points out, there is some evidence that the general presumption that the military is more likely to be correct than civilians on questions of national

Feaver's model of civil-military relations is explicitly developed as an alternative to Huntington's approach, which he considers to be the dominant paradigm. Janowitz is set aside because, 'when it comes to understanding the day-to-day political management of the military, the Janowitzean approach does not differ from the Huntingtonian on any fundamental issue' (Feaver 2003:9). The central difference between Feaver and Huntington is that, while not declaring these irrelevant, Feaver's focus is not on nonmaterial determinants of behaviour (such as beliefs, norms and identity), but on material factors. For Huntington (and Janowitz for that matter) the central variable in civil-military relations is one of *identity*, the identity of the military officer as a professional.

Against this, Feaver builds a model that draws on principal-agent theory, a framework widely used in economic and political analysis. Its goal, as the name suggests, is to address problems of agency, particularly between actors in a position of superiority or authority (principals) and their subordinates (agents). The classic case is perhaps the employer-employee relationship. In such cases the goal of principal-agent theory is to address the problem of how the employer ensures that the employee does what is required of her, or in other terms, how the employer ensures that the employee is 'working' rather than 'shirking'. Feaver argues that the principal-agent relationship can be easily applied to the issue of civil-military relations, and that this can be viewed as 'an interesting special case of the general problem of agency' (Feaver 2003:12-13). Because this 'special case' has features that are unique and not broadly applicable to other principal-agent relationships, Feaver coins the term 'agency theory' to describe it (Feaver 2003:55).

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security is not necessarily the case. In this, Feaver points particularly to Eliot A. Cohen's important work *Supreme Command* (Cohen 2002). Feaver (2003:302) comments as follows: 'History shows that the military is not as "right" in civil-military disputes as the military triumphalists might suppose. But even when the military is right, democratic theory intervenes and insists that it submit to the civilian leadership that the polity has chosen. Let civilian voters punish civilian leaders for wrong decisions. Let the military advise against foolish adventures, even advising strenuously when circumstances demand. But let the military execute those orders faithfully. The republic would be better served even by foolish working than by enlightened shirking.'

At the heart of agency theory is the idea that civil-military relations is essentially a form of strategic interaction between civilian masters (principals) and their military servants (agents). In that strategic interaction civilians choose methods by which to monitor the military. What methods are chosen depends on what expectations the civilians have about the degree to which the military will submit to their authority. Submission or obedience is, in Feaver's terminology, 'working', while rebellion or refusal to obey is 'shirking'. 'The military decides whether to obey in this way, based on military expectations of whether shirking will be detected and, if so, whether civilians will punish them for it. These expectations are a function of overlap between the preferences of the civilian and the military players, and the political strength of the actors' (Feaver 2003:3).

It's worth pausing here to consider more closely what Feaver means by the terms 'working' and 'shirking'. 'Working' is relatively unproblematic – an agent is working when she is diligently pursuing the tasks assigned to her by her superior. In the case of the military, the military is working when it diligently seeks to fulfil the wishes of its civilian overseers. 'Shirking', on the other hand, requires more exploration. In the everyday sense, shirking is simply failing to work, and is often associated with laziness and general inactivity. While this may well sometimes apply to the military, it is not however the central meaning of the term as used in agency theory. For the military may be vigorously pursuing military and/or policy goals, but it will still be shirking if those goals do not correspond with the desires of the civilian principal.

'What civilians want' is of course a complex and multidimensional issue in the context of civil-military relations, far more so than in the traditional economic applications of principal-agent theory. Feaver points out that, in structural terms, the desires of the civilian principal can be viewed as two-fold: firstly, civilians want to be protected from external enemies, and, secondly, they want to retain political control over the military. This two-fold distinction can be unpacked further as follows:

The functional goal includes the following:

1. whether the military is doing what civilians asked it to do, to include

instances when civilians have expressed a preference on both the 'what' and the 'how' of any given action;

2. whether the military is working to the fullest extent of its duty to do what the civilians asked it to do;

3. whether the military is competent (measured by some reasonableness standard) to do what civilians asked it to do.

The relational goal can be broken down into the following:

1. whether the civilian is the one who is making key policy decisions (i.e. no de facto or de jure coup) and whether those decisions are substantive rather than nominal;

2. whether the civilian is the one who decides which decisions civilians should make and which decisions can be left to the military;

3. whether the military is avoiding any behaviour that undermines civilian supremacy in the long run even if it is fulfilling civilian functional orders (Feaver 2003:61).

In the civil-military context the concept of shirking is further complicated by the fact that one of the essential roles the military plays is that of advisor to the civilian principal. Here the problem is akin to the familiar one of taking advice from one's mechanic about what repairs are necessary to one's car. Given that the average person lacks the expertise to know what is wrong with his car when it breaks down, he is dependent on the mechanic to advise him on the best course of action. However, the mechanic has a strong pecuniary interest in suggesting the most expensive course of action, regardless of whether that is in the car-owner's (the principal's) interests. It is thus generally believed that an honest mechanic is hard to find. In the same way there is an incentive for the military to exaggerate threat levels and the cost of operations in cases where they wish to avoid carrying out missions desired by the civilian principal, or where there is a desire to minimise the risks inherent in the operation by applying overwhelming force.

In principal-agent theory terms, the above-described problem of getting

the agent to work in the desired manner is called the 'moral hazard problem'. Feaver points out that in the general literature on principal-agent theory, there are two distinct opinions in this regard. On the one hand, there are those who contend that the best way to ensure that the agent is working is by applying the best available monitoring system, whether that includes intrusive or non-intrusive instruments, or both. On the other hand, there are those who believe that monitoring is inefficient, and that the superior approach is to implement measures aimed at adjusting the agent's preferences to increasingly coincide with those of the principal. Feaver's own agency theory takes neither side in this regard, but instead draws on insights from both. Importantly, Feaver (2003:56) adds 'a further consideration that is surprisingly absent from existing principal-agent treatments: how agent behavior is a function of their expectation that they will be punished if their failure to work is discovered; traditional principal-agent treatments assume punishment is automatic but...I argue...that assumption must be relaxed when analyzing civil-military relations'.

Envisaged in this way, civil-military relations are viewed as a game of strategic interaction in which each side attempts to achieve outcomes that maximally promote that side's interests. This is clearly a significantly different approach to that favoured by Huntington and Janowitz, where nonmaterial factors such as identity and moral commitments arguably play the central role. These factors are not, however, irrelevant to agency theory. Instead, Feaver argues, agency theory provides a framework of analysis against which the influence of these factors may be measured and assessed. In particular they can be understood in terms of the attempt to seek convergence between the preferences of the civilian principal and the military agents. Thus Feaver points out that the military honour ethic 'can work to mute the impulse to shirk for military agents, even when other factors...indicate they should. Traditional civil-military relations theory relies extensively on honor (also called the "ethic of subordination" and "professionalism") to explain civilian control. It can be incorporated in a principal-agent framework, but is recognized as just one of the factors shaping the military's preferences' (Feaver 2003:64).

The preference for honour is one of three preferences that the military agent is assumed to hold by agency theory. Another is the preference for specific

policy outcomes. This is different to the usual principal-agent relationship, where the agent generally has no interest in which economic policy is pursued by the principal. The military agent, on the other hand, has a preference for policies that do not needlessly risk his life. In addition, the military agent has a preference for policies that give overwhelming supremacy on the battle-field (Feaver 2003:63). The last basic military preference is one for maximal autonomy, which translates in large part into a desire for the minimisation of civilian interference in military affairs (Feaver 2003:64). All of these preferences can lead the military to attempt to influence policy in ways that undermine civilian control. In terms of democratic governance, this is pernicious even when such interference leads to better security arrangements than would otherwise have been achieved. Dealing with this is made all the more difficult by the fact that the military agent carries a particular moral status – her willingness to make the ultimate sacrifice for her country acts in some sense as a moral counterweight to the civilian principal's political competence. As a consequence, 'the moral ambiguity of the relationship bolsters the hand of a military agent should he choose to resist civilian direction' (Feaver 2003:71-72).

The other central problem for civil-military relations, in terms of Feaver's principal-agent derived theory, is the 'adverse selection problem'. This is the problem facing the principal in selecting which agent to contract with to undertake the required task. The agent has a strong incentive to portray herself as being far more diligent than she is, in order to ensure that she is contracted, which complicates the principal's task of selecting the best possible agent for the job. Of course in civil-military terms the issue here is not generally one of deciding whether to contract the military to undertake some activity, say offensive combat operations, rather than contracting some other body to fulfil the task.[3] Instead, the task here is one of leadership selection – which potential senior officers are most likely to lead the military to work rather than to shirk?

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3   I say that this is not 'generally' the question at hand. It strikes me, however, that this
     is precisely the relevant question when decisions are made by civilian governments
     whether to employ military forces or so-called 'private military companies' to

The special nature of the military context gives this problem a unique twist. Feaver seems right to point out, for example, that it is 'at least plausible' that the sort of personality that is advantageous on the battlefield is by nature problematic in terms of the principal-agent relationship (Feaver 2003:72). Indeed, as we have seen, this is one of the central reasons that Huntington stresses a sharp differentiation of the civilian and military spheres.

So described, Feaver's agency theory offers a very useful descriptive framework by which to understand civil-military relations. In the next section we turn to a consideration of the main advantages that arise from the application of agency theory.

Agency Theory: General Advantages

At its most basic, the notion of professionalism as Huntington uses it raises questions of circularity. For the defining feature of military professionalism, in Huntington's account, is that of voluntary submission to civilian authority: 'A highly professional officer corps stands ready to carry out the wishes of any civilian group which secures legitimate authority within the state' (Huntington 1957:74). This obviously raises questions about definitional circularity – objective civilian control is defined in terms of military professionalism, while military professionalism is defined as voluntary submission by the military to civilian control. Perhaps, however, this circularity is avoided when one takes into account that the voluntariness of military submission to civilian control is incentive-driven – in exchange the military is given near free reign in its own arena of professional expertise (see Huntington's point 4 above). Following this reading, this aspect of Huntington's theory approximates agency theory, as we shall see below. Another problem with Huntington's approach, as Kohn points

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undertake a particular task. Agency theory seems to offer a very useful framework with which to assess the legitimacy or otherwise of state employment of private military companies. I will address this issue in a forthcoming paper.

out, is that 'while "objective" civilian control might minimize military involvement in politics, it also decreases civilian control over military affairs' (Kohn 1997:143).

The most obvious advantage of agency theory is that it introduces material factors into the account, something that is clearly missing from the theories proffered by Huntington and Janowitz, while at the same time not excluding the nonmaterial factors (like identity and moral commitments) highlighted by these theorists. These matters are demonstrated convincingly by Feaver in the central chapters of Armed Servants, where he shows that agency theory fits far more closely with real-world civil-military relations – the cases of Cold War and post-Cold War civil-military relations – than its main rival, Huntington's theory of 'objective civilian control'. There is little benefit in rehashing Feaver's entire analysis here. One example will suffice to illustrate this point. Huntington's prediction, writing as he was in 1957, was that the only way for the US to 'win' the Cold War would be for US society to move closer to the conservative values of the military, and become a conservative republic. History, of course, shows that this is not what happened. 'On the contrary, the evidence shows that American society as a whole almost certainly became ever more individualistic and more antistatist than it was when Huntington warned of the dangers of liberalism in 1957. The Cold War coincided with the flowering of the civil rights movement, the expansion of the New Deal social welfare system, and a dramatic enlargement in court-protected individual rights, all extraordinary extensions of classical liberalism's reach in American society' (Feaver 2003:26-28).

By contrast, agency theory offers both a means of accurately measuring civilian control of the military, and mechanisms for addressing the constantly-threatened imbalance in the civil-military relationship. These control and monitoring mechanisms address the issue that is at the heart of both the moral hazard and the adverse selection problems – information – by providing means whereby the principal can cause the agent to reveal the necessary information, or else by adjusting the incentives on offer to the agent in ways that can give the principal confidence that the agents' preferences are in line with those held by the principal.

Among the central means of monitoring singled out by Feaver are the following (Feaver 2003:76-85):

1. **Restricting the scope of delegation to the military**. Devising strategy, drawing up operational plans, directing the equipping and provisioning of the military, and setting rules of engagement are among the means civilians can employ to achieve this.

2. **Contractual incentives**. This less intrusive approach 'builds in' incentives to the contract between the principal and the agent. In economic terms profit sharing is an obvious example. Obviously no direct equivalent to economic profit exists in the civil-military relationship.[4] Feaver points out, however, that the military's desire for autonomy might well fit here. 'Since monitoring mechanisms vary in their degree of intrusiveness, and assuming that the military prefers less intrusive means, civilians have a powerful incentive with which to influence military behavior: offer to use less intrusive means to monitor military agents. Indeed, this is how traditional civil-military relations theory treats autonomy' (Feaver 2003:78).

3. **Screening and selection mechanisms**. Such mechanisms (referred to as 'accession policy', in the military context) enable civilians to address the adverse selection problem, and also provides (in a relatively non-intrusive manner) information that can help the civilian in predicting the future behaviour of the military agents thereby selected.

4. **'Fire alarms'**. These are third parties who have an interest in the behaviour of the agent in question, and who therefore monitor the agent. In the civil-military context it is primarily defence-orientated think tanks and the media that play this role, but other less formal groups (such as

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4   At least, not if corruption is disallowed. Some commentators have argued that something like this 'profit-sharing' relationship between the military and the state is a major factor in some African contexts, such as recent interventions in the DRC by countries such as Angola and Zimbabwe (see, for example, Howe 2001:88-92).

draftees in a conscription-based military) can play the same role. Inter-service rivalry can also function in this way.

5. **'Police patrols'**. This describes principal-initiated investigations of the agent, and is a significantly more intrusive form of monitoring than those already mentioned. 'Police patrols include regularized audits and intrusive reporting requirements designed to turn up evidence of agent wrong-doing and, through regularized inspection, to deter moral hazard. Public investigative hearings and specific mandated reports are staples of congressional oversight and represent one of the more visible avenues of political control' (Feaver 2003:84).

6. **Revocation of delegated authority**. Where necessary, civilian principals retain the option of withdrawing authority that has previously been delegated to the military. This can either be a complete withdrawal (by, for example, re-delegating a particular area of responsibility to a competing arm of the state, such as the police or intelligence community), or a partial withdrawal, in which the civilian agency involved takes on greater powers over, for example, the planning of military operations. This is the most intrusive form of monitoring.

These monitoring mechanisms are general features of most accounts of the principal-agent relationship, though obviously their specific application to the civil-military context is new. What sets agency theory apart from other principal-agent theories, however, is the close attention that is given to punishment mechanisms. Perhaps not surprisingly, the general principal-agent literature tends to take punishment more or less for granted. But this is clearly significantly more difficult in the context of civil-military relations, due to the unique coercive power that is incumbent in military forces. As Feaver points out, history is replete with examples of *coups* that have been triggered by an attempt to punish the military for some or other indiscretion. Thus, the first question here is whether or not civilian principals can in fact punish the military. Feaver expressly sidesteps this question, arguing that it is not relevant in a discussion of agency theory, which takes as given a relationship in which the military understands itself in the role of the agent, subservient to its

civilian masters (Feaver 2003:89). Nonetheless, Feaver makes his own view of the prerequisites for punishment mechanisms in the civil-military context very clear, when he writes that 'the power to punish rests on a normative foundation – that is, the willingness of the military to be punished – and this normative foundation is thus a prerequisite for democratic civil-military relations. It exists in the United States and other advanced democracies but not necessarily in all countries. As discussed in the concluding chapter, this may limit the applicability of the agency model to other countries' (Feaver 2003:90). This is an important qualification of agency theory, one to which we shall return in the next section.

Where punishment is a possibility, there are, Feaver argues, a wide range of punishment options available to civilians, which generally fall into the following five categories (Feaver 2003:90-93):

1. **Intrusive monitoring**. As described above.
2. **Budget cuts and withdrawal of privileges**. Given that one of the most likely forms of shirking involves offering inflated estimates of threats and costs in order to boost the military's share of the national budget, this is often a particularly appropriate punishment mechanism.
3. **'Forced detachment from the military'**. This is the military equivalent of 'firing' a shirking agent. The US military's 'up-or-out' career path system, in which military personnel who do not achieve promotion within a set time-limit are discharged from the service (and thereby lose out on the considerable financial rewards of continuing on in the military), is one mechanism of this kind. Another option available in the US military system is that of forcing a disgraced officer to retire at a rank lower than that achieved, which again results in a significant financial loss.[5]
4. **Military justice**. Military law, such as that encapsulated in the Uniform Code of Military Justice, provides for a range of punishments (including

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5   A recent example of this is the case of Janis Karpinski, who was the Brigadier-General in command of the Abu Ghraib prison, but who was demoted and dismissed from the service at the rank of Colonel.

dismissal and imprisonment) that can be applied to transgressing military agents.

5. **Extralegal civilian action**. 'This is a miscellaneous category of actions ranging in severity from private oral rebukes all the way to the infamous Stalinist purges against the Soviet military in the 1930s in which thousands of officers were shot for suspected disloyalty to the Soviet regime. An intermediate form might be a situation in which the military advisor is publicly reprimanded or denied access to the civilian leader because that leader has lost confidence in him' (Feaver 2003:93).

In addition to these five categories of punishment, Feaver muses that, under some circumstances, war itself might be understood as a form of punishment: 'War, of course, inflicts hardships on the military, including the possibility of the ultimate sanction, loss of life, and one might consider war as a form of punishment. If war performance is itself a function of civil-military relations, then battlefield defeat could be a form of punishment experienced by the military (and, less directly, by the civilians as well) for adopting sub-optimal civil-military arrangements' (Feaver 2003:94). He concludes, however, that war is too rare an occurrence for this to be considered a meaningful punishment mechanism.

These mechanisms for monitoring and punishment represent a clear advantage for agency theory over its rivals, which offer no framework of this kind. In terms of analysis, the practical value of agency theory is clear. Feaver is correct when he writes that '[a]gency theory cues us to look for certain things and to ask certain questions in a case study and thereby illuminates the give and take of day-to-day civil-military relations in ways that a straightforward journalistic account might miss' (Feaver 2003:234). Furthermore, agency theory offers a way of understanding civil-military relations that extends beyond the traditional concern with coups to the everyday strategic interactions between the military agent and the civilian principal. The presumption that the military will desire to shirk – where this is understood as more than simply disobeying orders – is an important one, and emphasises the need for civilians to be constantly vigilant. In addition, agency theory offers a means of systematically

analysing historical examples of civil-military relations, which Feaver himself does very thoroughly in his analysis of Cold War and Post-Cold War US civil-military relations.

It is also clear that agency theory, as outlined by Feaver, offers scope for further development, and can incorporate insights from other theories (such as Huntington's) without changing its basic structure. This flexibility is important in the context of today's rapidly changing security environment, in which military forces are increasingly deployed in unfamiliar roles, with potentially unexpected results for civil-military relations. Related to this is another advantage of agency theory, namely that it 'preserves the civilian-military distinction – the sine qua non of all civil-military theory – but without reliance on an ideal-type division of labor. And it preserves the military subordination conception essential to democratic theory, without assuming military obedience' (Feaver 2003:10).

Clearly then, there are good reasons for considering agency theory to be among the most useful frameworks for the analysis of civil-military relations – at least in the day-to-day strategic interactions between the military agent and the civilian principal – currently in existence. An important question remains however. Given Feaver's own restrictions of the scope of agency theory to mature democracies where there is a normative presumption of civil control of the military, how applicable is it to the more fragile democracies of the world? It is to this question we now turn.

Agency Theory and the African Context

Because Feaver's focus is on US civil-military relations, he is careful to emphasise that his conclusions regarding the applicability of agency theory can only be seen as applicable in mature democracies like the US, where the submission of the military to civilian authority is a normative presumption. That disclaimer in place, Feaver also recognises that the obvious next step for agency theory research is to examine whether it is applicable in less stable democracies, where the threat of coups is a real one. Although Feaver doesn't

attempt any kind of systematic answer to this question, it seems that his intuitions lead him in different directions. On the one hand, he stresses the connection between agency theory and the normative presumption of civilian oversight mentioned above (Feaver 2003:90). On the other hand, despite his laudable conservatism in not extrapolating results beyond the scope of his investigation, he is unable to completely restrain a cautious optimism on this point: 'Agency theory may even make some contributions to the study of civil-military relations in countries where the threat of coups is real. After all, a coup represents the ultimate in shirking – reversing the principal-agent relationship so that the old agent (the military) becomes the new principal (the dictator). Pathological civil-military interactions within the agency framework could end up in a coup' (Feaver 2003:293).

Despite this flash of optimism, Feaver immediately expresses his belief that if agency theory were to be applied to 'coup-ridden' states it would require significant modification. It is on this point that I find myself for the first time in disagreement with Feaver. For the essence of the principal-agent relationship is that it is a 'game' of strategic interaction between two parties, where each party is presumed to be seeking dominance. Thus, as long as both parties exist (i.e. where civilian government is real rather than just a front for the military), then there will be the 'game' of strategic interaction between the two, and therefore there is a good prima facie reason to believe that agency theory will be applicable. The central question is whether, under such conditions, civilian monitoring and punishment is possible. Even where it is not, measuring such cases against agency theory enables a clear and objective judgement about civil-military relations in that particular state to be made.

It is also arguable that, even in states where there is no presumption that the military will submit to civilian oversight, and where civilian governments have few resources with which to apply coercive power over military agents, these civilian governments can still put into place both monitoring and punishment mechanisms, *by means of its involvement in regional organisations*. In the African context organisations like the African Union (AU) and the Southern African Development Community (SADC) offer a prime example. Such organisations include principles and commitments that have a direct

impact on military subservience to civilian governments. Take for example Operation Boleas, the 1998 SADC intervention in Lesotho, which was a response to a suspected coup. The justification for that intervention was explicitly an appeal to a clear SADC principle rejecting the military overthrow of civilian governments. The AU has shown a similar commitment to this principle – in recent times, for example, Mauritania has had its membership of the AU revoked as a result of a military coup in 2005. Furthermore, the AU has in its toolbox the African Peer Review Mechanism which seems to give ample scope for the monitoring of civil-military relations. Punishments available to address transgressions of accepted norms of military submission to civilian authority could range in severity from military intervention to oust the coup plotters (as in the case of Lesotho), sanctions, and diplomatic censure – where coups have actually taken place – to more limited measures that affect only the military directly, for less serious forms of shirking. Examples of these limited measures could include ejection from prestigious regional military arrangements such as the AU standby battalions, withdrawal of training and other assistance, expulsion of officers of the offending military from military colleges in other countries, and the like.

Admittedly, the action by the AU against Mauritania did not lead to the reversal of the coup, and the voluntary status of the African Peer Review Mechanism means that it has relatively little weight. But focusing on the lack of impact of such measures in recent history in Africa misses the point. The point is that such actions are *conceptually possible*, and in some cases have been actualised. Punishing coups can be done, but how much punishment results, and how much of a deterrent there is against coups as a result, depends on how seriously civilian principals take the threat and how much they are prepared to invest in the deterrent.

Thus there seems good reason to reject Feaver's claim that 'agency theory is only applicable in those settings where the military conceives of itself as the agent of the civilian; crucial to that conception is a recognition of the civilian's right to sanction, and hence an explicit commitment to submit to sanctions' (Feaver 2003:89). More important than this is the possibility of monitoring and punishment mechanisms, even in cases where the military's commitment to

principles of civilian oversight are limited or even non-existent, and as we have seen this is a real possibility.

A further advantage of agency theory in the context of weak democracies like those common in Africa lies in its value with regard to attempts to 'democratise' military forces that have traditionally existed as part of totalitarian regimes. Democratisation programmes, given the Huntingtonian orthodoxy, have tended to focus on inculcating a professional ethos among the officers of the military in question. While there is undoubtedly value in such training (which, as we have seen above, can be incorporated into the theoretical matrix of agency theory), this can only be seen as a long-term strategy, for such values take time to become embedded into the ethos of a military force. In the shorter term, a clear grasp of the monitoring/punishment relationship described by agency theory can allow for immediate implementation of practical mechanisms for the oversight of the military. The presumption that the military will desire to shirk is a particularly useful one in such contexts.

It seems, therefore, that there are good reasons to believe that a more comprehensive investigation than can be attempted here will show that agency theory is just as applicable in the context of the new and emerging democracies of Africa as it is in more established democracies. It is clear, also, that the agency theory represents a major advance over the Huntingtonian orthodoxy in understanding and managing civil-military relations.

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Alternative Dispute Resolution (ADR) in the Workplace – The South African Experience**

Hanneli Bendeman *

Abstract

Alternative dispute resolution (ADR), for instance conciliation and arbitration, is often regarded as a better option than the more conventional mechanisms for the settlement of labour disputes, because of the lower cost and greater speed involved. Because it normally requires the consent, and thus the commitment, of the parties involved, it has the potential of presenting a more successful and sustainable solution to labour disputes.

In South Africa, ADR has not only been formalised, but has also been made compulsory as part of the transformation of the South African labour

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relations system after 1994. The Commission for Conciliation, Mediation and Arbitration (CCMA) is one institution that was created with high expectations and is specifically tasked with ADR-type processes.

However, the dispute resolution system of the CCMA is currently under strain due to a very legalistic approach, long delays, and declining settlement rates.

The study considers whether the compulsory conciliation and arbitration processes – as offered by, for instance, the CCMA – are effective in creating a less adversarial labour relationship, and whether there are more appropriate methods to reconcile employer requirements and worker aspirations. This also presents important lessons for dispute resolution in other countries, especially in an African context, where most countries are searching for inexpensive dispute resolution options.

Background

The system of dispute resolution in South Africa has evolved from the shortcomings and problems experienced with the old system of labour relations and dispute resolution before the advent of democracy in 1994 (Grogan 1999:1). This system was characterised by high costs, prolonged legal action and low settlement rates. There was a pressing need for procedures and institutions to effectively deal with disputes in a cheap and expeditious manner (Mischke 1997:19).

In particular, the official structures only managed to achieve a 30% settlement rate against the 70% settlement rate of the erstwhile Independent Mediation Services of South Africa (IMSSA) (Du Toit et al 1999:25). IMSSA was one of the first organisations in South Africa to use ADR mechanisms such as conciliation and arbitration (Pretorius 1992:103). Trained persons drawn from its panel conducted these processes (Anstey 1991:252).

Even before the introduction of the Labour Relations Act (66/95) (hereafter referred to as LRA), the use of ADR had increased significantly. Pretorius (1992:104) concluded that the increase in active trade unions within the

COSATU (Congress of South African Trade Unions) and NACTU (National Council of Trade Unions) federations had led to an increase in the use of private dispute resolution mechanisms due to the fact that the statutory system had no credibility among the big, sophisticated trade unions and employers. It should be borne in mind that private ADR mechanisms require the consent of both parties for initiation. This could also be an indication that the role players in the labour relations system joined forces in an attempt not so much to change the system, but to overcome the shortcomings of the system existing at the time. The lack of credibility and the ineffectiveness of the dispute resolution system before 1995, when the LRA established the CCMA, caused structural strain, which compelled the system to change in order to maintain stability and move back to a state of equilibrium in a changed environment.

Alternative Dispute Resolution

The concept of alternative dispute resolution (ADR) includes all dispute resolution mechanisms other than the formal process of adjudication in a court of law (Pretorius 1991:264). According to Zack (1997:95), ADR offers a means of bringing workplace justice to more people, at lower cost and with greater speed than conventional government channels. It also helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively. Wittenberg et al (1997:155) mentioned that more and more disputants, courts, public agencies and legislatures in the USA are embracing the use of ADR in employment disputes. Slate (1998:1) indicated that the American Arbitration Association is dedicated to the promotion of specifically the mediation process for dispute settlement. Mediation is seen as a fast, cheap and effective way to resolve disputes. The settlement rate achieved through mediation was as high as 85% in the USA.

Negotiation should also be included in any discussion as a dispute resolution process. However, it is specifically excluded from this discussion because the focus of this paper is on individual unfair dismissal cases, whereas

negotiation in the broader sense has more to do with the collective labour relationship. Collective bargaining between trade unions and employers is accepted as the primary method of dispute resolution in collective labour law.

Another form of ADR is described by Le Roux (2002:29) as 'opting out of the CCMA' through collective agreements. This option, however, is also mentioned in the context of collective labour relations and is of little relevance to small employers and individual employees.

Problem Statement

If the definition of ADR includes all processes outside of the Labour Court, then nearly the whole system of labour dispute resolution in South Africa can be viewed as 'alternative'. The processes previously referred to as 'alternative' have now been institutionalised within the framework of the CCMA. The main aim of ADR, which according to Zack (1997:69) is bringing workplace justice to more people, at lower cost and with greater speed, has been encapsulated in the objectives of the CCMA. The problem is, however, that in practice the arbitration process has assumed a very legalistic and technical character, the process to finalise a dispute has become very time consuming and with the increasing role of labour lawyers, it has also become an expensive system. The low settlement rate at the CCMA is also an indication that something might have gone wrong with the implementation of an ADR strategy in the labour relations system and that there is a need to have a new look at alternatives. Although the ADR concepts are applied in the system of dispute resolution, it seems as if the benefits of such an ADR approach are not being reaped.

The paper therefore considers whether the compulsory conciliation and arbitration processes as offered by bodies such as the CCMA are effective in creating a less adversarial labour relationship, and whether there are more appropriate methods to reconcile employer requirements and worker aspirations. This also presents important lessons for dispute resolution in other countries, especially in an African context, where most countries are searching for speedy and inexpensive dispute resolution options.

Statutory ADR – A Contradiction in Terms

The Independent Mediation Service of South Africa (IMSSA), as one of the role players in the old system of dispute resolution, raised a number of concerns when the negotiations around the development of a new dispute resolution system took place (Robertson 1995:67). In hindsight, it seems as if most of the problems foreseen by IMSSA have become a reality.

IMSSA raised concerns about the fact that the new system of dispute resolution was the result of a tough negotiation process between the social partners involved in the National Economic Development and Labour Council (NEDLAC). This inevitably resulted in trade-offs between various interests resulting in legislation that reflects a compromise, at the expense of overall coherency. IMSSA suggested a participative dispute system design process facilitated by experts in this field. IMSSA was also concerned about the very prescriptive nature of the proposed Act, where processes were defined and the boundaries of processes were fixed. They foresaw serious capacity and cost constraints and they also predicted that particular processes and forums might not work smoothly in the South African context (they referred specifically to the proposed workplace forums). According to Robertson (1995:68), they were also concerned that a relatively sophisticated and complex dispute resolution system will be incorporated in the new LRA. It would have been more desirable for such a system to evolve over time via a negotiation process than to be imposed by legislation. Cost to government was seen as a further problem because the CCMA system's budget far exceeded the budget that was available to the old dispute resolution system under conciliation boards and the industrial court.

Alongside the concerns of IMSSA that the system would be too prescriptive and fixed, Wittenberg et al (1997:155-159) contended that parties to a dispute need to be flexible in considering approaches for resolving their disputes. At the moment, however, the employer and employee parties in the South African labour relations system are still concentrating on the fixed system of rules as created by the LRA. The focus is mostly on the dispute resolution processes as provided by the CCMA and it is only the bigger and more sophisticated employers and unions that might make use of possible alternatives. The Arbitration Foundation

of Southern Africa (AFSA) includes in their services provision for disputes which cannot be neatly dealt with in terms of existing sets of rules and also makes provision for the need to mend broken labour relationships after disputes (Arbitration Foundation of South Africa, no date:5). The CCMA does not have a good track record of reinstating individual employees after dismissal. ADR offered by private dispute resolution institutions comes at a cost, which most individual employees and small employers cannot afford.

The CCMA and ADR

The CCMA was established as a statutory dispute resolution body, which could deal with disputes brought by individuals at no cost and without the necessity of legal expertise or assistance. The process of conciliation, which is not new to labour relations, was however made compulsory as first step before going to an adjudicative process such as arbitration or labour court, and also before allowing parties to exercise power tactics such as strikes or lockouts.

ADR refers to a broader spectrum of processes, other than litigation, that can be used to resolve disputes (Zack, 1997:1). Although the LRA implies that there are more alternatives than only conciliation, the dispute resolution processes that form the basis of dispute resolution in the CCMA, are mostly conciliation and arbitration.

The inherent nature of ADR is to provide dispute resolution to the labour community at no cost and without the involvement of legal representation. Although a system was created in South Africa where anybody could pursue a labour dispute at no cost and without the necessity of legal representation, the question should, however, be asked whether the system is really achieving the objective of expeditiousness. The tendency has also developed that most disputes at the arbitration stage require the intervention of lawyers, which raises the question whether the objective of affordability has been achieved (Healy 2002:4) and whether the essence of ADR can be found in CCMA processes.

The fact that even the lowest level or uneducated employees can now approach the CCMA at no cost does not mean that the processes involved are

simple. The conciliation process has been refined to a highly technical process where legal practitioners and labour lawyers have become involved on behalf of employer as well as employee parties. The involvement of legal representatives inevitably brought about formalised and technical arguments and procedures. This was, however, not the intention of the new Act. The idea was to have only the disputing parties involved in the conciliation process, thereby keeping proceedings informal by virtue of their lack of legal training.

The internal procedures to deal with conflict have become very technical, with clear rules (contrary to the intention of the LRA) as to how different types of conflict and disputes should be dealt with. Such inflexible rules also appear to be contrary to the principles of ADR, which in its very nature is flexible to address the needs of the parties. There is also the danger that if other methods of resolving disputes were to be explored, these might not be recognised by the formalised system (for instance, if taken on review to the Labour Court).

Theoretical explanation why Compulsory ADR – as offered by the CCMA – does not work

The theoretical background of this study uses the systems approach to labour relations to identify the internal and external dispute resolution mechanisms, institutions and processes. How the conflict is managed internally in the organisation has an influence on the external process and ultimately the outcome of the dispute. The current dispute resolution system in South Africa is based on the management of conflict on a case-by-case basis. This is confirmed by the fact that the CCMA is currently swamped by excessive referrals of individual unfair dismissal cases. Lynch (2001:207) proposed a new approach to conflict management where managing conflict should move beyond the case-by-case settlement of individual disputes.

Traditionally organisations introduced dispute resolution methods as stand-alone processes in three distinct phases based on the driving principles of power, rights and interests. Lynch (2001:207) goes on to describe yet another phase, namely the 'integrated conflict management' phase where the focus is on

conflict competence. Figure 1 contains a summary of these four approaches, and as will be pointed out, each of these phases has implications for the type of management style and the type of relationship in the organisation.

In the *power* phase, the first phase, a senior person with authority, such as a manager in the company, deals with conflict. This refers to an authoritarian way of dealing with disputes, which is characteristic of a market-orientated capitalist system where all the power to make decisions is lodged in the hands of the employer.

Figure 1: Four Phases in the Approach to Conflict Resolution

	Management Style	**Type of Relationship**
Phase 1 Power	Authoritarian management style Managerial prerogative, task oriented	Adversarial relationship, latent conflict
Phase 2 Rights	Relies on legislation, procedures, codes, contracts Substantive and procedural fairness	Uncertainty, distrust, incapacity, use of outsiders, hostile environment
Phase 3 Interests	Alternative dispute resolution, mediation, arbitration	Distrust of processes, legalistic, overuse of arbitration
Phase 4 Integrated conflict management system	People-oriented management style Managing conflict Conflict prevention	Employee relations, culture of conflict competence

Source: Adapted from Lynch 2001:207-208.

Many South African organisations still have this task-orientated management style, which is based on managerial prerogative, and which has probably been strengthened by the ideology of Apartheid. This approach is commonly found in a labour relationship that is highly adversarial and unpredictable (Nupen & Cheadle 2001:116).

The second phase that normally develops, is the *rights* phase, where dispute resolution and management of conflict rely mainly on legislation, rules, policies and contracts. This is to some extent characteristic of the current dispute resolution system that South African employers and employees find themselves in, where grievance procedures, disciplinary codes, rules and guidelines and substantive and procedural fairness determine the nature of the relationship.

Nupen and Cheadle (2001:117) agreed that the dispute resolution system established by the LRA, created a hugely increased respect for procedure. The fact that the CCMA is dealing with more or less 120 000 cases per annum is a victory for procedure. However, it exposes a pathology of conflict in the South African society and specifically in the labour relationship. Management styles are forced to focus on people, but in a negative sense of making sure that the rules and procedures are followed, and if not, penalties have to be enforced. The workplace relationship is characterised by distrust and uncertainty, and training that focuses on the mechanistic aspects of substantive and procedural fairness. The high caseload places the system of dispute resolution under strain, the system becomes gradually more and more ineffective and people are looking to alternative methods of resolving their disputes. This usually happens in private institutions for whose services the parties need to pay.

However, many big companies in industrialised countries have moved on to the third phase that provides *interest*-based processes such as mediation, facilitation and arbitration. In this phase the focus is on ADR in the true sense of the word. The original intention of the dispute resolution system in South Africa was probably to progress in this direction, with the incorporation of ADR in the CCMA. However, the low settlement rate during the conciliation phase at the CCMA could be an indication to the contrary and it seems as if there are problems with the implementation of a system of ADR, however good the intentions of the legislator might have been.

Many South African organisations find themselves in between the rights and interest phases. They have come to rely so much on the fact that they have followed the proper internal procedures that they see no point in attempting conciliation. This could be the reason why employers do not attend conciliations, and if they do, they have no mandate to settle. This could therefore be the reason for the low settlement rate.

Lynch (2001:208) proposed a fourth phase where people are offered a choice of all the available inter-connected options and functions to assist organisations to create a cultural transformation to 'conflict competency'. This fourth phase is referred to as the *integrated conflict management approach*. This phase involves a comprehensive approach to conflict, requiring the organisation to change the company philosophy and in many cases the terminology of organisational life. Nupen and Cheadle (2001:121) drew attention to the fact that the common law had developed in a very negative way. It did not state what employees 'should' do to prevent disputes, but rather what will happen if they do not do it – for instance, breach of contract. The traditional approach to rules is also based on the criminal law model and terms are used such as 'breach' of 'rules' that constitutes grounds for 'sanctions' such as 'discipline' and 'dismissal'.

The disciplinary hearing is also characterised by criminal law phrases such as 'charges' against the employee and the employer 'defending' himself or herself. The enquiry establishes 'guilt', and 'aggravating' and 'mitigating' circumstances should be taken into account.

This fourth phase introduces a new approach where more emphasis is placed on a more people-centred management approach and a healthy work environment where the causes and not the symptoms of conflict are treated. The aim is to create a culture of conflict competency. The integrated conflict management system requires organisations to go beyond ADR to a systems approach to conflict management (Lynch 2001:211).

In order to move towards such an integrated conflict management approach, it is necessary to understand how conflict transforms with the progression of time. This is discussed in the next section.

The Transformation of Conflict in the Workplace

Conflict is inherent in any organisation. If not managed properly, such conflict will become more manifest by tending to escalate from so-called tolerable conflict, to a more formal grievance, and finally to a dispute. Figure 2 gives an indication of how conflict escalates. The only mechanisms to deal with conflict within the organisation are currently the disciplinary and grievance procedures. If these mechanisms do not exist – or if they fail – the conflict escalates, becomes a dispute and needs to be resolved through compulsory conciliation and arbitration processes.

Figure 2: The Transformation of Conflict

Source: Adapted from Mischke 1997:10-13.

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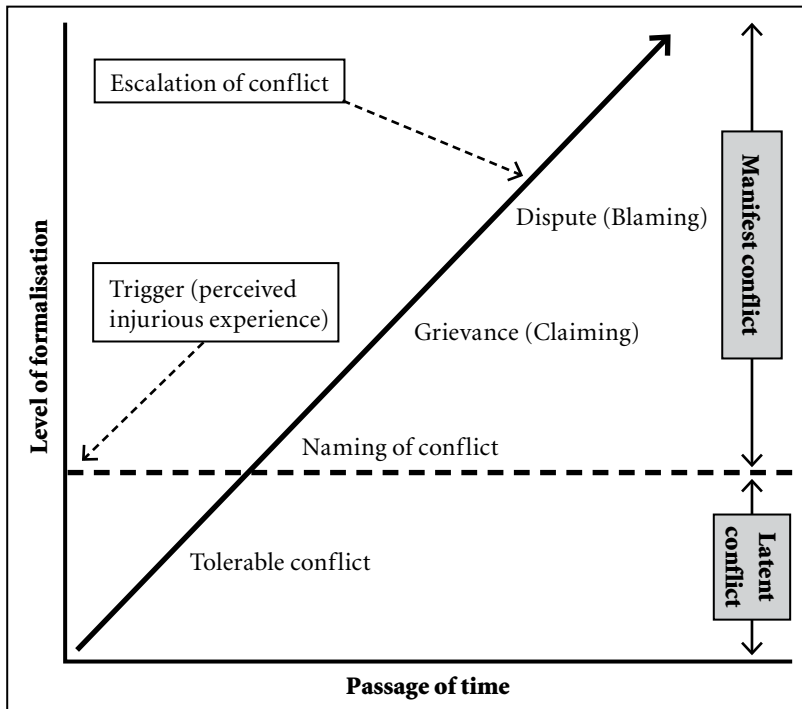
A distinction should be made between the concepts **conflict** and **dispute**. There is also an important difference between measures that can be used internal to the organisation and measures outside of the organisation. While conflict is still confined within the organisation, it is merely referred to as 'conflict', and processes to manage conflict are used. However, conflict that has remained unresolved, has escalated and has become formalised to a level where it needs to be referred outside of the organisation for resolution, is referred to as a 'dispute'.

If conflict in an organisation has escalated to a point where it has to be referred outside of the organisation to a dispute resolution body, it is an indication that there is an inability in the organisation to resolve the conflict internally.

In line with the contention that conflict escalates and becomes more formalised over time if it is not managed properly within the organisation, Lynch (2001: 212) proposed a system in which managers are expected to prevent, manage, contain and resolve all conflict at the earliest time and lowest level possible. It could be viewed as the implementation of alternative conflict resolution internal to the organisation and not waiting for the dispute to be formulated and referred to bodies such as the CCMA.

In the current system of dispute resolution, emphasis is placed on the grievance and disciplinary procedures as instruments to managing conflict. In terms of the **integrated conflict management approach** of Lynch (2001: 108) and as outlined above, the picture should look different. The emphasis in the organisation should be on 'conflict' and not 'disputes' and on offering assistance and not decision making.

This approach is outlined in Figure 3. If the conflict escalates, it should be contained, meaning it should be resolved at the lowest possible level by offering the widest possible range of interventions and mostly enabling people to help themselves. Conflict is thus contained, managed and resolved in a manner that prevents it from escalating to the level of a 'dispute' that needs to be referred to an outside agency for resolution. This is brought about by people-oriented management providing support structures through sincere and visible championship by management, management training for all in leadership positions and comprehensive education and awareness programmes.

Figure 3:   Integrated Conflict Management Approach
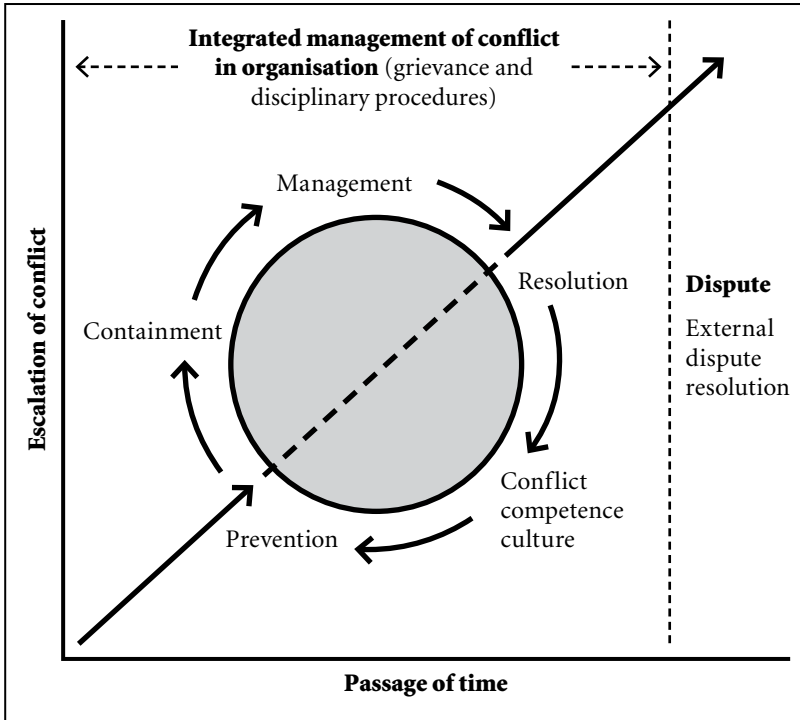
Source: Adapted from Mischke 1997: 10-13 and Lynch 2001:209.

If the conflict is resolved, it strengthens the conflict competent culture and trust in the organisation. If there is no internal resolution of the conflict, a dispute is declared and both parties should work together to dispose of the dispute through the available (statutory or private) dispute resolution mechanisms.

The rationale for implementing the integrated conflict management approach is that a positive work environment that produces great results attracts and retains high performing employees. Tensions and misunderstandings are common and normal, but once resolved, understanding and cooperation grow, along with trust and good relationships. If conflict remains unresolved, it leads

to stress, hostility, mistrust, wasted resources and ultimately to legal consequences. Unresolved tension and misunderstandings also have a negative affect on performance, culture, teamwork, employment relationships and quality of products and services (Simon 2004:5).

Simon (2004:5) also states that for a company to reduce the cost of unresolved conflict it must become 'dispute wise'. This means that there should be an understanding that resolving conflict early is not a cost but a saving – not a luxury but an essential part of running a business. However, workplace conflicts are often ignored or attempts are made to resolve them in an ineffective manner. The conflict is continuously pushed into the latent phase of conflict, as explained in Figure 2, if the employer is constantly compromising, or using a heavy-handed approach. A heavy-handed approach, such as the '...my way or the highway...' approach, is characteristic of the first phase of dispute resolution as proposed by Lynch (2001:207). On the surface it then might appear that the conflict has been resolved, but the feelings still fester and the dispute goes underground only to erupt later and often more vigorously. Given a company's reluctance to acknowledge the conflict and manage it through more effective means, the employee may turn to the only option available, namely litigation. The company's reluctance to deal with conflict in the most appropriate manner forces the conflict into the legal system where it becomes a costly dispute.

In the study on which this article is based (Bendeman 2004), it was established that employers often found themselves in a situation where they were forced to prepare themselves to deal with conflict in this highly formalised and costly manner. They had to go to great lengths and incur great costs to deal with conflict in the workplace by involving labour lawyers in the internal processes, forcing the internal disciplinary and grievance enquiries to be conducted in a quasi-judicial manner similar to an arbitration hearing. This explains the very visible presence of labour consultants and labour lawyers in the dispute resolution process. It is unfortunate that the dispute resolution system created by the LRA, and as executed by the CCMA, has evolved into this highly adversarial, legalised and costly process.

The question that now arises, is whether the current system helps or hinders the development of such integrated conflict management systems within

organisations, and if conflict does escalate into a dispute, how the current system of dispute settlement and ADR can be improved. The perceptions of the people most closely involved with disputes, namely the commissioners of the CCMA, are thus explored in the next section.

Perceptions of CCMA Commissioners Regarding ADR

The views of CCMA commissioners can assist in exploring 'alternative' alternative dispute resolution methods under the LRA. This will help to determine if changes need to be effected by legislation (from the outside) or if the system will change from the inside and adapt to the needs and perceptions of the parties involved in dispute resolution. The perceptions of the commissioners regarding the nature and definition of ADR in the current system of dispute resolution thus need to be determined. This might provide some insight into the possibility of predicting future changes to the system arising because of the current problems experienced by commissioners.

This section contains only a very brief summary of the views of the commissioners, and more detail is provided in the original study on which this paper is based (Bendeman 2004).

The responses of the commissioners are categorised into five groups, namely:

- The nature and definition of ADR,
- The alternatives just before dismissal,
- Assistance with the technicalities of current dispute and grievance procedures,
- Alternatives to the grievance and disciplinary phase, and
- Private dispute resolution options as the only real ADR.

The nature and definition of ADR

Some of the commissioners emphasised that the definition of ADR has not changed in the current system, and it is in essence any conciliatory process

outside of the judicial system. ADR is also more than conciliation, mediation and arbitration. It includes processes such as facilitation and third party intervention in problem solving. Most were of the view that the prerequisites are that it should be voluntary and the third party must be seen as impartial and credible.

Other commissioners, however, were of the opinion that CCMA arbitration is a misnomer for state adjudication without a right to appeal. Arbitration is in essence a voluntary process, '... *but at the CCMA the employers are forced into arbitration and they will do anything in their power to get out of it. The incidence of review for private arbitration is less than 1% but for CCMA arbitrations it is more than 30%...*'. One commissioner was not supportive of the term 'alternative' dispute resolution and preferred the term 'appropriate' dispute resolution. There was also a perception that unions and bigger employers are uncertain themselves as to what ADR is and if true ADR will be recognised by the courts.

Alternatives just before dismissal

Some of the commissioners suggested the establishment of a '... *review committee...*' or a '... *review panel...*' in the organisation, consisting of management and trade union representatives. This committee evaluates a case, even after appeal, and the dismissal would only be effected if the committee agrees. If the credibility of this committee is acknowledged by the workers and the union informs the employee that they will not represent him or her at the CCMA – because they are satisfied that justice had been done – then the chances of this employee referring the case to the CCMA are less. '... *Such a committee can actually bring management and the union closer together...*'. This alternative applies mostly to bigger organisations where there is an established relationship between the employers and the union. One suggestion was that big companies and sectors such as the mining industry could develop their own system of '*peer review*' or '*sector ombudsman*' that fulfils the same role as these internal committees.

Assistance with the technicalities of the internal procedures

A pre-dismissal arbitration process was viewed as a possible alternative to assist with the technicalities of the internal procedures. This process has become

available with the recent changes to the LRA and entails that a CCMA commissioner does the arbitration as part of the internal processes of the organisation. This, however, has not taken off so far, because '... *big companies invest a lot of money in training and developing their personnel to do the internal processes 100% correctly and are not prepared to spend an additional R 3 000,00 per day on a CCMA arbitrator to come and do something that they can do themselves...*'.

Replacing the grievance and disciplinary procedures

A suggestion was made for a process called 'conflict resolution facilitation': '... *People are scared to deal with conflict and need a facilitator to assist them...*'. This process requires management to arrange a meeting between the parties, on neutral ground, with a 'conflict resolution facilitator' who should be a highly skilled person to assist parties to work through the issues and emotions underlying the conflict. '... *At the CCMA there is no time to deal with emotions and if this could be handled internally the chances are firstly that conflict will not escalate to become disputes, and if it does, there will be a better chance of settling in conciliation. If not, the issues will be much clearer at arbitration, making the commissioner's work much easier...*'. One of the commissioners suggested that the professional boards for psychologists and social workers should be approached to train their students in the field of workplace conflict facilitation and to allow them to do their practical courses at the CCMA or in companies.

Private dispute resolution – the only real ADR

An opinion was raised that the only true ADR is found in private dispute resolution. '... *Employers think it is too expensive but after four or five appearances at the CCMA they begin to think differently...*'. According to one commissioner, 'alternative' only means going the non-CCMA route, namely private dispute resolution. If the parties are sophisticated enough, such as professional and high-level workers as well as unionised sectors of the economy, disputes should be dealt with through private dispute resolution. If the parties are unsophisticated and highly adversarial, such as in the majority of individual unfair dismissal cases involving small to medium sized employers, then it might have to be compulsory.

Alternatives to external processes at CCMA

One of the commissioners mentioned the newly introduced con-arb process for probationers as alternative to the conciliation process. Con-arb is simply a process in terms of which a third person attempts to get settlement through conciliation, but if not successful, proceeds immediately with arbitration. Most of the commissioners in this study had been very positive about this process as a cure for non-attendance, low settlement rate and tedious time delays. However, it was pointed out that the con-arb process is not very popular in private dispute resolution. The reason for this could be that the process of conciliation only comes to fruition in a voluntary system. A compulsory system eventually forces out the conciliation phase as a means of resolving disputes.

Other possibilities were also raised by some commissioners, and these are explored below.

### Conclusion on views of commissioners

The findings in this section have an important impact on the theory of conflict escalation and conflict management as discussed in Figure 2. It is also an indication of how the dispute resolution system changes and adapts to the strain experienced in the changing labour relations environment. It became clear that the internal mechanisms for dealing with conflict is problematic and there are various attempts to deal with this problem such as involving consultants and lawyers, making use of the proposed peer review or review committees or using the pre-dismissal arbitration. The external mechanisms are also problematic and the commissioners in this study indicated that there is not only a need for more use of the con-arb process due to the fact that employers do not attend the conciliation hearings, but also a need for a new look at other alternatives.

The latter issue, alternative ways of dealing with workplace conflict, is now dealt with.

Alternative Ways of Dealing with Workplace Conflict

This section deals specifically with possible changes required by the dispute resolution system and ways in which the system adapts – or should adapt – to the environment. Taking account of the views of the commissioners and of the available literature in this regard, the process of conflict management and dispute resolution should be changed as indicated in the shaded areas of Figure 4.

Figure 4: ADR and Proposed Changes to the Conflict Management and Dispute Resolution System
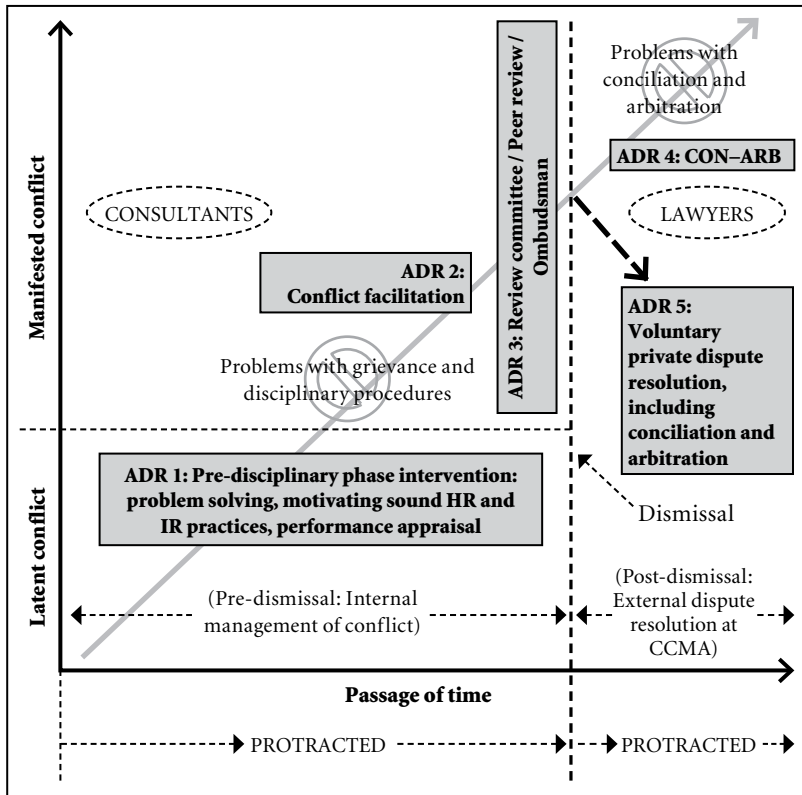
Source: Bendeman 2004.

Figure 4 is a representation of conflict management and dispute resolution, and elaborates on the understanding of the escalation of conflict as indicated in Figure 2.

The point needs to be emphasised again that the internal mechanisms for the management of conflict have become very technical and problematic. It has become so to the extent that the legislator had to intervene and provide an option where a CCMA commissioner could come to the assistance of the employers to enable them to properly deal with internal processes (in the form of the pre-dismissal arbitration). This is also the area of dispute resolution where the consultants have become involved in the dispute resolution system and could be playing an increasingly important role in the future, due to the need for their services in the organisation. This is confirmation of the fact that the South African system of dispute resolution is in the 'rights phase' of dispute resolution in terms of the model proposed by Lynch (2001:207), and as discussed above. The rights phase is characterised by emphasis on, for instance, the grievance and disciplinary procedures, and arbitration.

Figure 4 incorporates one of the most important ADR options that was mentioned previously as part of an integrated conflict management approach, which is good human resource practices (see shaded area ADR1). One of the commissioners suggested that ADR can be applied even before the employer takes the decision to go the disciplinary route. This suggests that the conflict resolution alternatives to the grievance and disciplinary procedure are confined to a very narrow line between conflict manifestation and the grievance phase. The focus in this approach is on good human resource and labour relations practices such as motivation, performance appraisal and skills development.

Another possibility is that the current, rights-based approach to internal conflict resolution should be replaced with a conflict facilitation process, as indicated in the shaded area marked 'ADR2' in Figure 4. Lynch (2001:208) described dispute resolution based on processes such as facilitation and mediation as an 'interest phase' in dispute resolution and suggested that an 'integrated conflict management phase' needs to be reached, which focuses on a choice of methods and which is not predetermined by legislation. This is in line with the suggestion of one commissioner that one should not refer to 'alternative' dispute

resolution but to 'appropriate' dispute resolution. This can only be reached in a culture of 'conflict competency' that focuses on how people treat each other and manage disputes in a constructive manner, as discussed above. According to the commissioners in this study, the current system of dispute resolution creates the opposite, namely animosity in the labour relationship.

Another ADR initiative mentioned by the commissioners, namely the pre-dismissal initiative, is also indicated in Figure 4 (shaded area ADR3). These 'before-dismissal ADR' options include 'peer review', 'review committees', 'review panels' and the ombudsman system. If these processes are analysed, two conclusions can be drawn. On the one hand it could be seen as a move towards co-operation and building trust in organisations where employers and trade unions have better relationships and can work together, seeing that these alternatives will only bear fruit if the employees regard them as credible. However, on the other hand it could simply be a way of making doubly sure that proper legal procedures are followed. If the case does go to arbitration, employers would be completely sure that they had been following the very technical prerequisites of the legislation. In the latter case, this alternative might simply be regarded as an attempt to deal with the shortcomings of the system, rather than moving towards an integrated conflict management approach.

More confirmation for the assertion that South Africa is in the rights phase, as identified by Lynch (2001:208), was received from commissioners who indicated that the internal mechanisms and processes are characterised by power play in that employers prefer to go to arbitration because they need to reaffirm their power. The use of the grievance procedure is seen as a challenge to management's power, which needs to be corrected in the subsequent processes. In such an environment, these pre-dismissal procedures are unlikely to bear much fruit.

As already stated, the external mechanisms have been under strain because of the high referral rate, the high rate of non-attendance and the low settlement rate. It seems as if the conciliation phase as implemented by the CCMA has become obsolete. There seems to be much support among the commissioners that con-arb (see shaded area ADR4) should replace the conciliation-then-

arbitration system. However, the fact that the con-arb process is not popular in private processes could be an indication that con-arb is not necessarily a better process but is simply a short-term solution to address the problems that commissioners and parties currently experience.

Private dispute resolution (see ADR5 in Figure 4) is an alternative to the statutory dispute resolution system, but its utilisation is probably limited to bigger and more sophisticated role players.

Not only is it clear from the responses that the internal procedures have become very technical, but it has also been emphasised that there is a need for alternative methods of conflict handling and dispute resolution. There is, however, uncertainty over whether these alternatives will be recognised by the formalised system (for instance the Labour Court in reviews).

Conclusion

It has become common practice amongst many South African ADR practitioners to prefer the term 'appropriate dispute resolution' as opposed to the term 'alternative dispute resolution'. This would include not only the application of new or different methods to resolve disputes, but also the selection – or the design – of a process which is best suited to the particular dispute and to the needs and capacity of the parties to the dispute. However, this option is mostly available only to the bigger and more sophisticated employers. The design of an appropriate dispute resolution system relies firstly on the maturity of the role players in the company. This maturity refers to an acceptance of the fact that conflict is inherent in the labour relationship and that it should be dealt with in the most appropriate manner as soon as it has manifested. An appropriate dispute resolution system secondly relies on a basic knowledge of industrial relations concepts and principles as well as technical knowledge of the judicial system and the legal requirements to deal with disputes.

However, the realities of the South African labour market – as the case could be in many African countries – are that a large percentage of employees

has no, or very little schooling and that the largest proportion of employers are in small to medium-sized businesses with little skills or training in labour relations and labour law. The mechanisms in the workplace to deal with conflict are primarily the grievance and disciplinary procedures. These procedures are not effectively used and many small and medium-sized employers do not have these procedures in place. The result is that more disputes land up at the CCMA and when they do, one of the parties is usually penalised for not following the proper procedures for internal conflict resolution.

The fact that the majority of South African employees and employers are 'unsophisticated' with regard to their rights and duties in terms of labour legislation (Landman 2001:76) is in contrast with the very sophisticated system of rules and procedures that forms the basis of the dispute resolution system. The majority of the role players who have to operate within the system do not have the ability to effectively deal with the system and they are the parties who are feeling the consequences of the unfair dismissal regime and the short-comings of the CCMA.

Cognisance should be taken of the capacity and the needs of the parties in the labour relationship when designing a national dispute resolution system. The benefits of ADR processes can only be reaped if it focuses on the appropriateness of the system relative to the needs and capacities of the parties.

Overall, therefore, the conclusion is that once conflict has escalated to become a dispute, and needs to be referred to an outside agency (either with or without the involvement of some review committee or similar process), there is not much that can be done structurally to address the shortcomings of the dispute resolution system. Obviously this does not exclude the possibility of ensuring more effective processes, proper funding, and so forth, but these are not considered as structural changes.

This means internal conflict resolution processes should receive signifi-cantly more attention from the parties involved, but also from government and bodies such as the CCMA. Some pointers for improving such systems have been provided in this paper.

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Book Reviews

Cadastral Politics: Countermapping and Cartographical Conflicts
From Enslavement to Environmentalism: Politics on a Southern African Frontier

Hughes, David McDermott 2006

Seattle and London: University of Washington Press in association with Weaver Press, Harare. 285 pp.

Reviewed by Annie Derges
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The politics of land dispossession and repossession in Zimbabwe are much in the news, and much written of, invariably in oversimplified terms. This eminently clear and readable account of the complexities of land disputes provides a different conceptualisation of territory and geography from an anthropological point of view. The author, on field expeditions to two small habitations in Zimbabwe and Mozambique, encountered vastly different concepts of territory and geography. How has it come about that a people, divided arbitrarily by a colonial border, view the landscape and the politics of land so differently?

To answer this question, the book explores the past hundred-odd years of the region's history – a period in which British-ruled Vhimba became

'territorialised' and its Mozambican counterpart, Gogoi, did not. White settlement around Vhimba and wildly different forms of administration, development and conservation caused Vhimba and Gogoi to diverge from one another. In effect, the wider colonial state systems – and local reactions to them – created two distinct cultures. Thus, for almost the entire twentieth century, the Zimbabwe-Mozambique border marked a deep disjuncture in the politics of land, chiefly leadership, farming, timber and labour.

In the late 1990s, however, power in Gogoi began to move into line with Vhimba. White South Africans sought to establish timber plantations in and around Gogoi. These loggers – as well as 'countermappers' – reoriented the relations between strong and weak parties so that land emerged as the pre-eminent political object. In large measure, these processes in Mozambique recapitulate the dynamics of white settlement on earlier hinterlands.

The 'land question' is not a finite dispute; it ebbs and flows like a chess game, with power gained and surrendered backwards and forwards between players. And the game is far from over. In Zimbabwe the land is being taken from the big landowners; in Mozambique these same big players are taking it.

The book also shows that land has not always been the only source of conflict. In Gogoi, the currency of people, 'ambulatory enslavement' as it is termed by the author, took precedence over conflicts of land. In Vhimba, too, it is people who created the 'hornet's nest' of turf battles that it is today.

A factor often overlooked in accounts of land conflict is that of 'environmentalism', and how environmentalists promote enclosure, and remap space and nature.

The book proceeds in three parts: firstly, colonisation, which is described in terms of 'frontiersmen', a concept which resonates of the 'wild west' rather than the Raj. Enclosure has always been the preferred tool of dispossession, and this phenomenon extends to the national parks and other tourist enclaves.

Whereas Rhodesia concentrated its energies on taking and keeping the region's land, Portugal opted to subordinate people by means of *chibaro*, or forced labour.

Part two examines how the border, though arbitrary and artificial, in fact deeply affected relations between the communities of Vhimba and Gogoi.

The effects of the timber industry on both habitations are also examined. The civil war in Mozambique affected the communities on both sides of the border: through the ebb and flow of refugees, the use of enforced labour in Mozambique, and the allocation of land to refugees in Zimbabwe.

In 1997, in Mozambique, a second 'great trek' took place – that of the expatriate logging companies. This later land expropriation also expressed itself in cadastral conflict, with differing units of land measurement.

Part three is entitled 'native questions'. It leads to the book's conclusion, which questions how, in the age of black rule, the people of Mozambique and Zimbabwe could continue to be considered as 'natives' (though described as 'communities', as opposed to 'investors', or, 'the private sector'). How could people in agencies committed to the betterment of rural life ultimately endorse programmes that dispossessed rural people? The author describes the widely-praised Campfire project in Zimbabwe which, in fact, undermined smallholders' entitlement to farmland and, as tourism receipts evaporated, lost any and all benefits to the people. Mozambique also embraced the concept of 'community', and the Campfire concept there served to balkanise the rural community and remove from the people any possibility of wielding power over their lives. As the author states: this, and the much-vaunted transfrontier conservation parks – so-called 'sustainable development' – revive and reform earlier modes of colonisation.

The book concludes that the communal areas, native reserves or black lowlands provide a better answer to the 'native question' than does settler-led development – of either the trekkers' or Campfire's variety. These reserves provide minimal guarantees against dispossession by colonists, plantations and well-meaning ecologists. For the people themselves have a right to reserve land. There are spaces where colonisation should not enfold.

Making Choices for Peace: Aid Agencies in Field Diplomacy

Opongo, Elias 2006

Kenya: Pauline Publications Africa. 192 pp.

Reviewed by Raymond Aina, MSP*

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Peace is a journey, starting from the interior of the persons involved, but aimed towards a re-creation of the community for the sake of justice and well-

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being after disasters. So, in (proactive) intervention during a humanitarian crisis, 'aid delivery' is not enough. Aid agencies need to embrace comprehensive peace-building. That is the principal thesis of Opongo in his *Making Choices for Peace*. So, he proposes 'field diplomacy', a vital tool in post-conflict peace-building, as integral to aid agencies' activities.

Opongo's thesis is argued in eight chapters ranging from the background to the proposal, and culminating in the kind of efforts, as well as structural and spiritual supports that are imperative for the proposal to work. Chapter one identifies what Opongo calls the gaps in the way contemporary humanitarian assistance is carried out, particularly as they result from the ethical dilemmas that aid workers constantly face. In the second chapter, Opongo deals with challenges that sustainable peace-building poses to field diplomats. The principal challenge is for aid agencies to move beyond their traditional neutrality because in the face of suffering and injustice one cannot be uncommitted to reaching the root causes.

Pacific spiritualities and commitments to non-violence without a strategy of engagement for peace are useless. This strategic engagement is the focus of chapter three. If aid agencies are adopting an effective hermeneutics through the strategic engagement outlined in chapter three, then they are inevitably adopting a broadly inclusive approach to conflict intervention. This is what Opongo, in the fourth chapter, calls 'participatory advocacy'. Part of that advocacy is peace education. What he proposes as 'integrative peace education' in chapter five is multi-dimensional because it focuses on systematic analysis of various public structures and the transmission of values that improve interpersonal relations and structural reforms.

Field diplomats are human beings, with needs and experiences that require attention. While the sixth chapter focuses on psychosocial tasks, chapter seven is about kinds of spirituality that help spiritually-challenged field workers. The eighth, and final, chapter is exceptional because of the 'voices' that speak in this chapter. This chapter shows Opongo's daring approach – combining profession-alism (Prendergast, Asefa) with interpersonal (Lederach) and liberative-praxis (Gutierrez) approaches.

Together with my appreciation of Opongo's effort, I also offer some critical

comments, however. First, I am, as an ethicist, drawn to Opongo's ethical evaluation of the moral dilemmas facing aid workers (see pp. 37-45). He expresses his reservations about casuistry crippling aid agencies. I join issue with him by offering that human agents – in this case aid agency workers – need to fulfil six primary conditions for actions based on proportioned reasoning towards the required end in conflictual circumstances. (1) They must pay attention to the foreseeable social implications of the choice they are about to make. (2) They must ensure that the choice is universally tenable, or, in other words, that it can bring harmony and human flourishing if practised everywhere. (3) They must determine whether contextual conditions are in favour or not in favour of the envisaged action. (4) They must pay attention to the wisdom gained from past occurrences. (5) There must be widespread consultation for input on experiences and discernment. (6) They must make sure that there is room for religion-informed contributions. The bottom-line is a dialectical relationship between personal and communal discernment and intellectual contributions.

Second, it is intriguing for me that Opongo spent twenty-nine pages on 'psychosocial support' but a paltry ten pages on 'spiritual support' for aid workers (see chapters six and seven). It leaves one with the question: where does Opongo's priority lie? I think Opongo could have enriched us more, in chapter seven, if he – as a priest who is actively involved in the field – had offered us some suggestions on how to approach the pastoral (spiritual) care of aid workers.

Third, I admire Opongo for allowing the voices in the final chapter to speak freely, because the first 'voice' (Prendergast) in my opinion is highly critical of Opongo's vision of 'Aid agencies in field diplomacy' (sub-title of his work). Anyway, he does not need Prendergast's endorsement. Let the readers and the aid agencies with their field workers make up their minds on what aid agencies are: needs-based do-gooders or active agents of change? I agree with Opongo on his vision for agencies – just as Asefa does, I surmise – although with a caveat: they must tread with caution, and 'do no harm'. For those desiring some practical way of coping with the spiritual effects of death/suffering and the stress of those in the field, the interview with Gutierrez is it! It should be read, I suggest, as a continuation of the short chapter seven. I highly favour this interview because it presents the 'spirituality of peace', which Opongo notes in

his general conclusion as one that is inspired by our common capacity to resist and overcome evil – even if the prognosis is not optimistic (p. 185).

Opongo has added his voice, as a professional and 'field diplomat', to the notion that peace is possible in Africa and other parts of the world. What is clear from Opongo's work is that there is no sustainable peace-building without the heart. Time and again, we are reminded: there cannot be just peace without empathy and vulnerability.

Finally, central to the proposal of Opongo, though unmentioned, is the metaphor of 'covenant'. Opongo is calling on aid agencies and their workers to enter into a deep relationship with those they are 'caring' for. Hence, it is crucial, as Opongo offers and I concur, that there must be holistic preparation of agency workers that consider this, because people do not enter into any 'covenant' without prior preparation of the whole person. 'If you cannot stand the heat, you have no business in the kitchen', is an English saying. Perhaps, we need to recover this in the contemporary search for peace. A commitment to common values based on respect and acceptance of religious, cultural and political differences can assure a more reconciled African continent, and, indeed, world. Such values, as conceived by Opongo, should be promoted by aid agencies.