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## REPORT OF THE PANEL OF THE WISE

### NON-IMPUNITY, TRUTH, JUSTICE, AND RECONCILIATION IN AFRICA: OPPORTUNITIES AND CONSTRAINTS

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## EXECUTIVE SUMMARY

Justice and reconciliation are antidotes to impunity, the condition where powerful individuals and institutions act as they desire without fear of reprisals, reproach, retribution, and recrimination. As the arbitrary use of power and positions, impunity universally inheres where there is a deficit of democratic strictures and structures of accountability, fairness, impartiality, and the common good. Atrocious and egregious crimes against humanity are outcomes of impunity, hence the momentous global efforts against impunity and its manifestations. Justice and reconciliation, on the other hand, thrive in circumstances of sturdy and stable democratic values and impulses, where the culture of constitutionalism prevails to constrain arbitrariness and abuse of power. Africa has contributed significantly to global ideas and norms that have informed international practices to end impunity and promote justice and reconciliation. Africa has also witnessed efforts to incorporate these norms and ideals into national, regional, and continental structures, but there is need for more energy and effort to domesticate, monitor, and implement them.

The African Union's (AU) Panel of the Wise commissioned this report to highlight the importance of the fight against impunity and enhance justice and reconciliation as part of reversing the deleterious effects of conflicts and intolerance in Africa. Ending impunity and promoting justice and reconciliation in Africa are indistinguishable from the core objectives that underpin international human rights institutions and conventions. The opportunities for deepening these objectives have accrued from the spread of democratic values, promotion of the culture of constitutionalism, and the conclusion of civil conflicts which afflicted most African countries since the early 1990s. Equally vital, the new norms of international justice encapsulated in the principle of Responsibility to Protect (R2P) and institutions such as the International Criminal Court (ICC) have refocused attention on ways to manage impunity. Yet these principles and instruments have also occasioned dissensions in Africa stemming from perception of threats to sovereignty, the inordinate intrusiveness of international legality on weak states, and the fear of the selective application and implementation of these principles, despite the fact that Africa represents a majority of signatory states to the Rome Statute of the ICC and three of the four cases before the ICC were referred to it by three African states. In addition, constraints on ending impunity and forging justice and reconciliation persist where African states have been unable to create meaningful national political frameworks that build the rule of law, restrain the abuse of power, and evolve socioeconomic development policies that work toward reducing profound social inequities.

The recommendations in this report are based on two assumptions. First, there is need for appreciation that impunity is, at heart, a manifestation of the absence of institutions that promote pluralism, participation, impartiality, accountability, and fairness. As Africa has progressed toward building democratic institutions, more countries have paid attention to stopping the prevalence of impunity and enshrining values that underscore the necessity of justice and reconciliation. Opening the spaces for social and political contestation has provided the basis for vibrant discourse on how to end the spates of impunity that have characterized most African countries. While sometimes reconciliation trumps justice in deeply divided societies, the ultimate

objectives of stable and sturdy peace ultimately hinges on finding a judicious balance between the two objectives. Even where deeply divided countries have made short-term pragmatic concessions that privilege reconciliation and peace at the expense of justice, the purpose has ultimately been to strengthen institutions that diminish the persistence of impunity. For countries that are emerging out of civil conflicts, reconciliation and justice have benefitted from wide-ranging and open discussions across communities about the vital nature of institutions of consensus-building and collective problem-solving that confront the scourge of impunity.

Second, the report contends that since Africa is a critical author of, and participant in, the emerging international human rights regime, it is important for African countries to deepen their commitments to these instruments, despite their current flaws, especially the slow and slanted implementation. In the universal search for mechanisms to reverse the patterns and practices of impunity, Africa as a whole benefits from adherence to these norms. In addition, since the AU Constitutive Act of 2000 expressly condemns and rejects impunity and has pledged its determination to take practical measures against it, discordant voices that cast aspersions on the legitimacy of institutions of international justice only serve to weaken these institutions. By the same token, Africa's collective voice on the credibility of international norms and institutions helps to strengthen the case for national, regional, and continental home-grown instruments that meet the broader objectives of mitigating impunity and serving the ends of justice and reconciliation. Africa has legitimate concerns and reservations about the modalities of implementing some provisions of the international criminal justice system but to improve these mechanisms requires the adherence to the core principles that undergird international legality. In the increasingly fragmented and divisive atmosphere that characterizes the current debates on impunity, striking a judicious balance between the extremes of international legality and national sovereignty will be one of the core hallmarks of African statesmanship.

The recommendations, which draw both from the authors' analysis and from the recommendations arrived at during the May 2009 Experts' Workshop in Monrovia, Liberia are in two parts: advocacy role for the Panel of the Wise; and African initiatives and responses to strengthen instruments for justice and reconciliation. The Panel is well-placed as a new institution in Africa's leadership structures to promote the wider acceptance of common values and rules that enshrine rule of law, respect of human rights, and gradual domestication of these norms. Such advocacy for implementation of international and AU agreements played a large role in the Monrovia Workshop's recommendations. The Experts envisioned the Panel using its influence to help in enforcing these agreements and monitor the progress of transitional justice mechanisms. Looking beyond international agreements, the report recommends that the Panel of the Wise, alongside other prominent Africans and institutions, begin to define the potential parameters of a transitional justice policy framework for the AU that is based on Africa's rich and diverse experiences. Panel members can also play a critical role in helping countries set up home-grown transitional justice mechanisms. Popularizing the importance of credible indigenous justice institutions to deal with impunity and enhance reconciliation consistent with acceptable international standards maybe one way of sidestepping the polarizing debates about the legitimacy of international justice instruments.

With regard to African initiatives and responses, the report recommends the need to draw lessons from the various experiences across Africa in the articulation of a set of common concepts and

principles that would guide consensus on continental and sub-regional instruments. These efforts could culminate in a continental strategic policy framework on transitional justice that balances the imperatives of peace and justice in conflict and post-conflict contexts. Such a policy would provide the AU with the occasion to respond judiciously to the difficult dilemmas of balancing the immediate need to secure peace with the longer term importance of establishing the rule of law and preventing future conflicts. More vital, it would send an unambiguous message to opponents of justice that the pursuit of justice is an inevitable and necessary element to achieve reconciliation and stability in Africa. In addition, the AU needs to revisit its core guiding principles and underscore its commitments to those principles by urging member states to ratify and implement instruments such as: African Charter on Human and Peoples' Rights; the protocol on the Rights of Women in Africa; and the new African Court of Human and Peoples' Rights. Working with civil society organizations, particularly legal institutions, the AU should guarantee that transitional justice questions are at the center of the new continental legal architecture. Finally, an AU liaison office at the ICC would help to harmonize policies to reduce the emerging schisms on questions of peace, justice, and reconciliation.

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## 1.0 INTRODUCTION

1. Sound national and international laws have been the universal instruments for managing impunity and promoting justice and reconciliation. Nationally, states have attempted to evolve constitutional structures with provisions for respect of human rights and dignity, political and economic inclusiveness as the first lines of defense against the widespread abuses of power. Internationally, the United Nations Charter, the Geneva Conventions, and multiple instruments on human rights served to underwrite international human rights order. Since the end of the second world war, the universality of rights-based strictures against impunity proceeded from the assumption that national actors with sovereign responsibilities would be the principal defenders of these rights, with international actors only playing secondary and supplementary roles.
2. Throughout post-colonial Africa, most African states built on these universal norms and enshrined them in domestic legislation and practices as they strove to reconcile the imperatives of national independence with the adherence to international law. But Africa also witnessed the prevalence of undemocratic and dictatorial regimes that were characterized by gross violations of human rights, extra-judicial executions, and violent change of power. Undemocratic regimes wavered on the domestication of rights-based conventions, barely building institutions that would respect international consensus on impunity and justice. Most of these regimes institutionalized impunity, borrowing from the previous colonial regimes where repression, dispossession, and oppression were standard practices. During the era of the cold war, the invocation of sovereignty and blanket support by various external actors strengthened dictatorial regimes that were oblivious of the rule of law. For the most part, these regimes successfully manipulated ethnic diversity and economic underdevelopment to maintain power. As a consequence, generalized impunity by governments fostered the conditions for state weakness and civil wars that engulfed Africa in the 1990s.

3. The pressures for democratization in the post-cold war context of the 1990s generated momentous change in African governance structures that had implications for strategies to manage impunity and foster justice. The majority of countries made tentative steps to build participatory institutions by expanding the space for multiple actors to coalesce about national concerns and effecting peaceful leadership changes. In these instances, questions of impunity, justice, and reconciliation were, for the most part, addressed through national conventions and other internal constitutional processes that sought to legitimate the new political order. Much more difficult, though, were countries that were convulsed in civil strife before or after the onset of the democratization process. As both causes and consequences of impunity, African civil wars saddled local and international actors with challenges of achieving peace, justice, and reconciliation on the basis of weak and dysfunctional institutions and in the absence of national consensus on how to find enduring solutions to these conflicts.

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4. Civil wars added a new layer of complexity to the existing culture of impunity, creating new opportunities for the wanton plunder of national resources, recruitment of child soldiers, mass rapes and sexual violence, as well as reprisals against defenseless populations by rebel groups. The problems of impunity were heightened in civil war contexts because, in addition to the widespread violations and abuses of human rights, the fragmentation of state power wrought multiple actors, particularly rebel armies and militias that destroyed Africa's socioeconomic fabrics and compromised the search for justice and reconciliation. Civil wars unleashed the cycles of violent confrontation and revenge that legitimated armed mobilization as the means to redress grievances. By decimating the previous communal and ethnic bonds that held societies together, the conflicts of the 1990s laid the foundations for the crimes against humanity perpetrated by diverse actors contesting assorted grievances.

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5. The devastating effects of civil wars on African institutions in the mid-1990s meant that regional and international actors would assume disproportionate roles in national reconstruction and invariably, in momentous decisions about impunity, reconciliation, and justice. In the absence of functional states and coherent leaderships with elaborate programs for national reconstruction, the international community has become a critical player in shaping the parameters of ending these wars and building durable post-conflict institutions, including justice and reconciliation systems. The search for durable solutions to civil conflicts has also occasioned widespread discussions about whether there is a trade-off between justice and reconciliation in national reconstruction. As this report shows, national, regional, and international actors striving to help parties end wars have agonized over whether crimes committed during conflicts ought to be de-emphasized to expedite political reconciliation or whether justice and reconciliation need to be pursued together to preempt the consolidation of impunity. Underlying these concerns are the various state interests at play which often impact on these issues. Weighing the benefits of peace against the costs of impunity is at the core of the transitional justice debates and institutions, as the report demonstrates. In addition, the report argues that the recent global yearning to reinvigorate the instruments that undergird the Universal Declaration of Human Rights has furnished new impetus in the

fight against impunity and promotion of justice and reconciliation. New global institutions such as the ICC have emerged to lend teeth to efforts aimed at ending the culture of impunity and hoping to force national actors to be more responsive to international norms and structures. The report concludes that the new international norms are a two-edged sword: creating vistas for underwriting international human rights while also potentially redefining the principles and practices of national sovereignty.

## 2.0 RECOMMENDATIONS

6. Ending impunity has become a collective international enterprise to promote justice, reduce human suffering, and foster amity within and across societies. Yet, as this report has shown, international instruments to deal with impunity have evolved alongside the gradual diminution of sovereign rights of states, raising profound questions about the locus of action and responsibility that have blurred the traditional division of labor between national and the international actors. Thus, the consensus on fighting impunity has, in part, been stymied by the competing claims about the boundaries between national and international legality, morality, and rights. Despite these tensions, there is a growing realization that solid institutions that undergird justice and reconciliation within the broader framework of democracy and the rule of law are the weapons against impunity across nations. International instruments against impunity have become blunt because of the escalation of atrocities and in circumstances where civil wars have ravaged the institutions of justice and reconciliation.
7. Afflicted for a long time with wars and violence, Africa has made strident attempts to remedy the culture of impunity at the national, regional, and continental levels. As one of the cornerstones of the AU's principles of democracy, human rights, and the rule of law, the battle against impunity has been enshrined in the Charter to give moral and political weight to Africa's collective efforts. For the most part, the AU's human rights crusade captured in the war on impunity and the quest for justice and reconciliation seeks to legitimate various national efforts that have grappled with building democracies, the rule of law, and functional judicial systems with a semblance of impartiality. Equally vital, the AU has embraced declarations against impunity to propagate this norm within its multiple institutions and sub-regional bodies such as RECs.
8. African experiences of managing impunity via justice and reconciliation reveal the importance of institutional innovations that give prominence to participation, impartiality, and the search for truth and healing. National transitional justice institutions such as truth and reconciliation commissions have worked where there is a decisive departure from institutions and practices that underwrite impunity and criminalize organized dissent. Impunity that stems from the absence of the rule of law often impedes reconciliation in the long run precisely by reproducing the conditions that breed violence and injustice. The challenge in Africa has been to create stable institutions that balance reconciliation with justice in the context of broadening political, social, and economic freedoms. African attempts to deal with justice and reconciliation have reinforced significant principles and norms, in particular the importance of public participation, the right to the

truth for victims, the importance of public hearings, the right to reparations and restoration of civic trust, and the centrality institutional reforms. Furthermore, these experiences have established some important precedents for the international justice regime. These include the recognition of rape as an instrument of war punishable under international law; the recruitment and use of child soldiers as a criminal offence, “forced marriages,” as a crime against humanity, and attacks against peacekeepers as a war crime. If the experiences of Latin America in the 1980s provided the groundwork for the field of transitional justice, Africa’s vast experiences have considerably advanced the field into the twenty-first century.

9. For Africa, questions of impunity, justice, and reconciliation have been increasingly mediated by international actors and institutions, some of which are not perceived to be fair, impartial, and just. The emergence of the ICC as the epitome of international legality on impunity has occasioned deep debates about the prosecution of crimes and atrocities by individuals, irrespective of status and standing. Thirty African states are signatories to the Rome Statute that created the ICC and some have made efforts to establish enabling legislation to implement its provisions. Although the concerns of some African states about the selective application of international justice will not diminish, there is widespread consensus, especially among the citizens of the continent, on the core underpinnings in the fight against impunity. The results of the ICC’s judicial intervention – both positive and negative– are reverberating across Africa. The impact of the ICC, under its complementarity clause, has propelled some innovative domestic judicial and non-judicial approaches to deal with impunity. In the same vein, it is apparent that international justice is at the cross roads in Africa. The coalition against the ICC whittles down the principles established through international instruments and those enshrined in the AU such as the Constitutive Act which commits the organisation to intervene in member states to protect civilians from war crimes and other mass atrocities.
10. The recommendations in this report are based on two assumptions. First, there is need for appreciation that impunity is, at heart, a manifestation of the absence of institutions that promote pluralism, participation, impartiality, accountability, and fairness. Second, since Africa has contributed immensely to the articulation and elaboration of the emerging international human rights norms and principles, it is important for African countries to deepen their commitments to these instruments, despite their current flaws and the slow pace of implementation. In the universal search for mechanisms to reverse the patterns and practices of impunity, Africa as a whole benefits from adherence to these norms. By the same token, Africa’s collective voice on the credibility of international norms and institutions helps to strengthen the case for national, regional, and continental home-grown instruments that meet the broader objectives of mitigating impunity and serving the ends of justice and reconciliation. Africa’s case against the selective application of international standards stands on firmer and more legitimate grounds when there is respect for international law. In this respect, some factions within the anti-ICC coalition in Africa miss a great opportunity to be credible advocates for fundamental reforms in the modalities and administration of prevailing international justice mechanisms when they roundly denounce the Court. Finding a functional middle ground between adherence to international provisions on non-impunity and justice and

campaigns for reforms in the implementing of these provisions is one way to bolster Africa's case against selective justice. Probably after the intense criticisms from the AU about the way it handled the al-Bashir case, the ICC and the UN Security Council may now be more amenable to addressing genuine African concerns.

11. There are two sets of recommendations. These recommendations are based both on the analysis of the authors, and on the recommendations developed at the Experts' Workshop on Non-Impunity, Truth, Justice, and Reconciliation in Africa, which took place in Monrovia, Liberia on the 28-29 May 2009. The first relates to the advocacy for the Panel of the Wise and the second to African initiatives and responses to strengthen instruments for justice and reconciliation.

### **Advocacy Role for the Panel of the Wise**

12. As a new institution in Africa's leadership structures, the Panel of the Wise has a critical advocacy role in the promotion of the wider acceptance of common values and rules that enshrine rule of law, respect for human rights, and the dissemination and domestication of these norms. This advocacy role was emphasized in several of the recommendations arrived at during the Monrovia workshop. The workshop envisioned that the panel would dedicate itself to the ratification and implementation of AU and international agreements that could help bring justice to Africa. A further recommendation was that the Panel should ensure mediators and peace makers throughout Africa are aware of relevant norms and institutions as they set up transitional justice mechanisms. Additionally, the experts recommended that the Panel of the Wise advocate for full implementation of existing transitional justice mechanisms on the continent, many of which have yet to have their intended effect. Advocating for implementation will be an ongoing process. The Monrovia workshop recommended that the Panel continually monitor transitional justice initiatives across Africa, including tracking the implementation recommendations from truth commissions and ensuring decisions by courts and tribunals are enforced. The Panel's advocacy role should not stop at promoting international norms and agreements. Alongside other prominent Africans and institutions, the report recommends that the Panel of the Wise to begin to define the potential contours of a transitional justice policy framework for the AU that is based on Africa's rich experiences. Panel members can also help the continent and individual countries elaborate mechanisms and modalities of home-grown transitional justice mechanisms and institutions. Popularizing the importance of credible indigenous justice institutions to deal with impunity and enhance reconciliation in line with acceptable international standards may be one way of sidestepping the polarizing debates about the legitimacy of international justice instruments. A similar recommendation on the synthesis of traditional and international justice mechanisms was arrived at by the experts' workshop. The Thabo Mbeki AUPD is an instructive model that would be emulated by the Panel of the Wise in finding functional compromises between international and national legal instruments for managing impunity. Broadening the Panel's judicious intervention in other problem cases would be appropriate, particularly since the Panel has the moral authority to intercede in delicate diplomatic engagements.



13. The Panel will also have a strategic role in mediating between African interests and those of the international community, particularly the ICC on justice and reconciliation issues. This role will become significant as more cases of impunity and gross violations of human rights are brought before the ICC. The Panel will be well-placed to intercede because of its moral latitude to reduce the existing gaps and tensions between Africa and the ICC.

14. In other roles identified at the Monrovia Workshop, the Panel was urged to:

- Work with Regional Economic Communities (RECs) to sensitize them on the need to provide support to their member states efforts in combating all forms of impunity;
  - Be involved in the selection mechanism involving the participation of Non-Governmental Organizations and civil society at large in the process of transitional justice;
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- Establish mechanisms of consultation with victim groups;
  - Recommend measures to enhance post conflict reconstruction and development activities to better the lives of victims;
  - Recommend measures for the strengthening of the capacity of national judicial systems to complement the activities of both traditional and international processes;
  - Help in the articulation of early warning mechanisms at the continental level and among Regional Economic Communities (RECs). Such early warning mechanisms would identify vulnerabilities in weak states and bring these vulnerabilities to the attention of the AU and relevant authorities in such member states.

#### **African Initiatives and Responses to Strengthen Instruments for Justice and Reconciliation**

15. The AU Constitutive Act pledges to fight impunity, but there is need to draw lessons from the various experiences across Africa in the articulation of a set of common concepts and principles that would guide consensus on continental and sub-regional instruments. Part of these initiatives would entail exploration of measures to develop and deepen its capacity for assessing the goals and limitations of various accountability measures to respond to impunity. These efforts could culminate in a continental strategic policy framework on transitional justice that balances the imperatives of peace and justice in conflict and post-conflict contexts. Such a policy, which was also discussed during the Experts' Workshop, would provide the AU with the occasion to respond judiciously to the difficult dilemmas of balancing the immediate need to secure peace with the longer term importance of establishing the rule of law and preventing future conflicts. More vital, it would send an unambiguous message to opponents of justice that the pursuit of justice is an inevitable and necessary element to achieve reconciliation and stability in Africa. Since Africa has been at forefront of innovative experiments around

accountability and reconciliation, documentation of these practices is critical to the accumulation of knowledge about these experiences. Equally vital, the AU needs to revisit its core guiding principles and underscore its commitments to those principles. This is particularly important to reverse the perception that AU is often inclined to shield perpetrators of abuses, or wavers too often in standing up justice. In this respect, consistent with existing principles and declaration of the AU, African institutions at all levels (national, RECs, continental) have a role in the ratification and implementation of existing charters and protocols of wide ranging human rights instruments such as: African Charter on Human and Peoples' Rights; the protocol on the Rights of Women in Africa; and the new African Court of Human and Peoples' Rights. Working with civil society organizations, particularly legal institutions, the AU should guarantee that transitional justice questions are at center of the new continental legal architecture. Finally, an AU liaison office at the ICC would help to harmonize policies to reduce the emerging schisms on questions of peace, justice, and reconciliation.

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16. On this latter point, it is noteworthy that the review conference of the Rome Statute of the ICC will take place in Kampala from 31 May to 12 June 2010. The meeting represents an unparalleled gathering of states, meeting on the continent, to discuss international criminal justice. The conference will thus provide a unique and timely occasion for African governments to express their views on the importance of the ICC. The primary focus of the review conference is to consider a limited number of amendments to the Rome Statute. However, it will also dedicate two days to substantive discussions (a "Stocktaking exercise") to address a range of issues aimed at making the ICC more effective. These two days will focus on four themes that are of concern to the AU: complementarity between the ICC and domestic judicial systems; cooperation; the impact on affected communities; and the interaction between peace and justice. It is important in the lead-up to the review meeting that African state parties to the ICC, working in concert with the AU, consider how to make the ICC more effective as part of the transitional justice measures to deal with impunity in Africa.
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