



Extracted from *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*

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CHAPTER 1

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Introduction: tradition-based approaches in peacemaking, transitional justice and reconciliation policies

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‘Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka* and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.’ This paragraph is article 3.1 of a preliminary pact on accountability and reconciliation, signed in late June 2007 by the government of Uganda and the rebel Lord’s Resistance Army (LRA). It could be a major step towards success in the Juba peace talks that must bring an end to the long and cruel civil war in the northern part of Uganda. The explicit reference to traditional justice instruments in the context of peacemaking and justice is innovative. It is one of the strongest signs of the rapidly increasing interest in the role such mechanisms can play in times of transition.

Almost ten years earlier, Rwandans, battling the heavy legacy of the genocide, began scouting the possibility of mobilizing an informal dispute resolution tool, called Gacaca, for their transitional justice policy. Since then, thousands of such lay tribunals have been set up. They have identified and tried numerous men and women who were suspected of participating in the events of April–June 1994. The Gacaca justice and reconciliation activities have attracted worldwide attention. Academics have written countless articles and books. International non-governmental organizations (NGOs) and donor countries have provided generous funding. Examples of the ritual reintegration of ex-combatants in Mozambique and Sierra Leone were given a similar welcome. A hype was born.

The first part of this chapter examines the rise of traditional techniques in peacemaking, transitional justice and reconciliation policies. It then sets out the difficulties of terminology and methodology in investigating the actual performance of tradition-based instruments. The third part presents a comparative analysis of such practices in the five African countries that are the subject of the case studies in this book.

1. Traditional mechanisms in a broader context

When a civil war, genocide or a brutal dictatorship ends the inevitable question arises of how to deal with those who have committed grave human rights abuses. From the end of the 1940s to the mid-1980s, the answer was to look away from such painful legacies. This policy sometimes took on the appearance of a self-imposed silence, as was the case in post-Khmer Rouge Cambodia. Elsewhere, as in Spain after the demise of the Franco regime, amnesia was the outcome of a negotiated compromise between the successor elites, or impunity was established through formal amnesty legislation: Pinochet's Chile at the end of the 1970s is a striking example. The dominant strategy was to (try to) 'close the books'. This response is quite surprising. In the immediate post-World War II context the emphasis had been on accountability. A legal foundation was laid for the fight against

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impunity in the form of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva conventions of 1949. The tribunals at Nuremberg and Tokyo tried the leaders of the wartime German and Japanese governments. But this trend towards greater accountability for grave human rights crimes was not continued in

the decades that followed. Silence, amnesia and amnesty were the rule, with the trials of the junta leaders in Greece (in 1974) being a notable exception.

A major policy shift, both morally and politically grounded, occurred from the mid-1980s onwards. The global growth of a human rights culture blossomed into a new, now much wider, fight against impunity. International agencies such as the United Nations (UN) and the Inter-American Human Rights Court as well as large human rights NGOs cooperated to develop both the norm and the practice of a duty to prosecute crimes against humanity, genocide and war crimes. This in turn resulted in the establishment of the ad hoc tribunals of The Hague (for the former Yugoslavia) and Arusha (for Rwanda) and of the International Criminal Court (ICC), and in the gradual spread of the principle of universal jurisdiction. Moreover, the choice of retributive justice as a strategy has even been written into internationally brokered peace agreements, as in Guatemala, Sierra Leone and Burundi.

Concurrently, however, questions were asked about the applicability of systematic prosecutions in contexts where regime change is an extremely delicate and/or complex operation. Local political and civil society leaders pointed to the many political, social, economic and cultural contingencies that may make it impossible for their societies to fulfil the duty to prosecute. Doubts about the use of trials led to a search for alternative and/or complementary mechanisms to avoid the dangers of too much and of too little criminal justice. The South African Truth and Reconciliation Commission (TRC), with its principle of 'amnesty for truth', was a turning point. Moreover, the conviction arose that in most circumstances one tool alone would not suffice. A combination of measures and instruments was called for—limited amnesty or temporary immunity, vetting or

lustration, a truth commission, and a few (token) trials. Such a mixture had and has to be innovative because of the uniqueness of each society that emerges from a violent conflict. What we are thus witnessing is the domestic appropriation of previously existing models of dealing with a painful past, with the aim of taking into account the numerous risks that trouble transitional societies. The overall result is the move from a de facto dichotomy (impunity *or* trials) to multiple conceptions of justice and reconciliation—state and non-state instruments; legal, semi-judicial and non-judicial techniques.

As part of this important development some post-conflict societies have now turned their attention to their legacy of indigenous practices of dispute settlement and reconciliation. The argument is that traditional and informal justice systems may be adopted or adapted to develop an appropriate response to a history of civil war and oppression. Kofi Annan,

From the mid-1980s onwards, the global growth of a human rights culture blossomed into a new, much wider, fight against impunity. Concurrently, however, questions were asked about the applicability of systematic prosecutions in contexts where regime change is an extremely delicate and/or complex operation. Political, social, economic and cultural contingencies make it almost impossible for a society to fulfil the duty to prosecute.

the then UN secretary-general, officially acknowledged this evolution in his August 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*: ‘due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition’ (United Nations 2004: 12). This is the societal, political and academic context in which this report must be located.

1.1. An ongoing debate

In the ongoing public debate on transitional justice, political leaders, members of civil society and academics are divided on numerous points. By far the most divisive question is how to balance the demands of justice against the many political constraints.

Those who emphasize the beneficial effects of prosecution bring forward two categories of arguments. One is victim-oriented: a post-conflict society has a moral obligation to prosecute and punish the perpetrators, because retribution is exactly what most victims want. It serves to heal their wounds and to restore their self-confidence because it publicly acknowledges who was right and who was wrong and, hence, clears the victims of any labels of ‘criminal’ that were placed on them by the authorities of the past or, indeed, by rebel groups or the new elites. Only trials, the argument runs, lead to a full recognition of the worth and dignity of those victimized by past abuses.

A second set of arguments has to do with establishing and upholding peace and

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political stability. Prosecutions will avoid unbridled private revenge, it is said. Otherwise, victims may be tempted to take justice into their own hands. The risks then are vigilante justice, summary executions and spirals of revenge. In addition, such 'self-help justice' can trigger social and political disturbance. Trials also protect against the return of those who were the cause of the miseries of war and repression. The survival of a newly established regime depends on swift and firm judicial action against those who are responsible for the gravest violations of human rights. This is seen as a necessary protection against sabotage 'from within' and as a way of achieving some minimal physical security. In addition, criminal courts establish individual accountability. This is essential to the eradication of the dangerous perception that a whole community (e.g., 'the Hutu', 'the Tutsi') is responsible for violence and atrocities. This idea of collective guilt is often the source of negative stereotypes, which in turn may provoke more violence. Also, prosecutions are seen as the most potent deterrent against future abuses of human rights and the most effective insurance against sustained violence and atrocities. They can successfully break the vicious circle of impunity that causes injustice in many parts of the world. Finally, criminal action against perpetrators of war crimes, genocide and crimes against humanity is a duty under international law.

The survival of a newly established regime depends on swift and firm judicial action against those who are responsible for the gravest violations of human rights. Criminal action against the perpetrators of war crimes, genocide and crimes against humanity is also now a duty under international law.

On the other hand, some question whether outright punishment is the appropriate response in any and every context. The end of a civil war or of a period of violent repression creates an intricate agenda—rebuilding the political machinery and the civil service, guaranteeing a minimum of physical security, disarming rebel movements, reorganizing the army, rebuilding infrastructure, reconstructing the economy, stabilizing the currency, establishing a non-partisan judiciary, organizing elections, healing the victims, repairing the damage inflicted on them and so on. Dealing with the perpetrators, possibly by means of criminal prosecution, is only one of many challenges. More often than not it will be impossible to tackle all tasks simultaneously. Choices have to be made. It is argued that the place of justice in general, and of trials in particular, on the post-conflict agenda depends on the particular conjunction of political, cultural and historical forces. Other problems and needs may be more important and/or more urgent than seeking justice through trials. In addition, prosecutions are ambivalent in certain transitional contexts. They can have highly destabilizing effects on a peace settlement or a fragile shift to democracy. In fact, precisely to avoid such an outcome, Latin American policy makers throughout the 1980s deliberately opted against trials.

Other observers question whether punishment is the appropriate response in any and every context. Prosecutions can have highly destabilizing effects on a peace settlement or a fragile shift to democracy, and have intrinsic limitations. They may contradict the legal culture of a post-conflict society.

Moreover, prosecutions have some intrinsic limitations. They are perpetrator-oriented

and do not give victims the full attention they are entitled to in order to be healed of the injustices they suffered. Trials identify individual guilt, not patterns of atrocities. Moreover, they may contradict the legal culture of a post-conflict society. Desmond Tutu, chair of the South African Truth and Reconciliation Commission, argues that Western-style justice does not fit with traditional African jurisprudence. It is too impersonal. The African view of justice is aimed at ‘the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence’ (Tutu 1999: 51). Finally, there may be a whole range of practical shortcomings and risks. Evidence may have been destroyed. In many cases the criminal law system will be in shock, seriously crippled or perceived as an integral part of the old order. Lack of proof can lead to the acquittal of well-known perpetrators. Such justice, perceived as arbitrary, will seriously damage victims’ trust in the whole system.

More often than not it will be impossible to tackle all the tasks involved in establishing justice and rebuilding a country simultaneously.

1.2. The rise of a cross-cultural perspective

At first sight the debate is a clash between two opposing models. On the one side, full priority is given to prosecution. The tribunal is the gold standard. The international community, through its permanent ICC or via the principle of universal jurisdiction, must act if local authorities willingly or from sheer necessity abstain from retributive action. In all cases, professional judges play the principal part. More attention goes to the suspect than to the victim. The duty to prosecute is a stronger argument than the many contingencies the local context creates. International institutions such as the UN and large NGOs such as Human Rights Watch and Amnesty International deliver the growing-power for this model. At the opposite extreme is the choice of a strategy that tries to avoid the tribunal as much as possible. The centre of gravity moves from the courtroom to the hearing, from the judge to the local civil society leader, from a fixation on individual guilt to the search for societal patterns in atrocities, from legal retaliation to ritual reconciliation, from the internationally driven retributive impulses to the full acknowledgement of the opportunities the local context offers.

Using more analytical language, one can position the two models at the extremes of a continuum. At one end is a strategy that is initiated, organized and controlled by (national or international) state institutions. Its procedures are formal and rational-legalistic. The criminal court is the prototype. At the other end of the continuum are policies that are community-initiated and community-organized. They are predominantly informal and ritualistic-communal. The north Ugandan rite of stepping on the egg, exercised to reintegrate former child soldiers, is a striking demonstration of this type of approach.

There are, good reasons to correct the picture of two ‘pure’ strategies that differ on all

points and are mutually exclusive. First, in real-world situations many transitional justice policies will combine, albeit to different degrees, ingredients of both extremes. The Gacaca, for example, has been highly formalized and can impose prison sentences, yet operates with lay judges. Second, the original approach of reasoning in absolute terms (to prosecute *or* to forgive and forget) has gradually been abandoned. An explanation for this development should run along a variety of lines. One is the relative success of the South African TRC, a creative mix of formal and informal procedures and of international norms and domestically designed techniques. There is also the growing awareness that broadening the scope of local variation is totally justified. That is exactly what Diane Orentlicher, a professor of international law and the United Nations' independent expert on combating impunity, meant when she recently wrote: 'Given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?' (Orentlicher 2007: 18). In addition, planning post-conflict justice and reconciliation has become an intrinsic and unavoidable part of any peace negotiation process. There is therefore a real and major risk that a peace agreement that mandates prosecutions will kill the prospects for peace. The case of northern Uganda is a convincing demonstration of the difficult dilemmas local people and international facilitators then have to tackle.

The South African Truth and Reconciliation Commission was a creative mix of formal and informal procedures and of international norms and domestically designed techniques.

1.3. Traditional justice and reconciliation systems: from a normative approach to a more realistic view

The shift in transitional justice paradigms has opened up ample space to discuss the role of traditional mechanisms. At first, the strengths of the formula (home-grown, locally owned, culturally embedded and so on) received overexposure. Awareness of the many weaknesses was not lacking, but they were too often kept in the shade. The outcome was a great deal of myth making, of discussing 'invented traditions'. The resulting knowledge gap produced decision making that was based on weak data, *ex ante* evaluation and speculation.

The mood changed as soon as the results of empirical studies started to circulate. This was most visible with regard to the Gacaca initiative. The programme ran into a multitude of operational problems. In addition, two dubious effects have been observed of what had been labelled a very promising model. The Gacaca courts were expected to drastically reduce the number of people in prison (*c.* 120,000) and to deal with the backlog of genocide cases. However, as is discussed in the chapter on Rwanda, questionable instrumentalization of the lay tribunals resulted in more than 800,000 men and women being put on the list of suspects. A second unwanted effect is that mutual trust between the two ethnic communities—the Bahutu and the Batutsi—has tended to decrease. However, the most important shift in perception and evaluation is the insight—now commonly accepted—that traditional techniques, in Rwanda and in other African post-

conflict countries, have been greatly altered in form and substance by the impact of colonization, modernization and civil war. Normative approaches are thus gradually giving way to more realistic, empirically based assessments of the potential role of traditional mechanisms within the broader reconciliation and transitional justice policy framework.

The Gacaca initiative in Rwanda ran into a multitude of operational problems.

The ambition of this book is to develop insights, based on case studies by local authors, which will both enlighten the debate and heighten awareness among all involved stakeholders, local and international, of the range of policy instruments and contextual resources available to them in the pursuit of sustainable peace in post-conflict societies.

With the results of empirical studies of traditional justice mechanisms, the most important shift in perception and evaluation is the now commonly accepted insight that traditional techniques have been altered in form and substance by the impact of colonization, modernization and civil war.

The next step now is to tackle the intricate problems that arise in the search for an acceptable terminology and methodology.

2. Investigating tradition-based practices: problems of terminology and methodology

‘The term “traditional” with its Eurocentric connotations tends to suggest the existence of profoundly internalized normative structures.’ It also refers to patterns that are seemingly embedded in static political, economic and social circumstances. But ‘it must be borne in mind that African institutions, whether political, economic or social, have never been inert. They respond to changes resulting from several factors and forces’. Both quotations come from Joe Alie’s case study on Sierra Leone (in chapter 5). They point convincingly to the problems that arise in any study of tradition-based justice and reconciliation instruments. Terminology is problematic. How justified still is the label ‘traditional’ if the mechanism is susceptible to almost continuous change? Are there any satisfactory alternatives? In addition, if the subject of the study is a constantly moving target, where should the focus of the observation be directed? Second, many questions of a methodological nature appear, such as how to avoid ethnocentrism in developing the key notions that will guide the analysis and whether it is at all possible for Western observers to interpret these phenomena in a basically sound way.

These are questions that cannot be avoided. This part of the chapter tackles them, but it cannot be other than an unfinished exercise.

2.1. A tricky terminology

In the section of his chapter on the substance of traditional practices in northern Uganda (chapter 4), James Latigo writes that there is still a need to carry on tracing the processes that led to the development of some of the original practices, to the decay of others and to the appearance of new ones, such as various forms of psychotherapeutic healing. Colonizing authorities and processes of modernization, civil war or genocide have had deeply disturbing effects on the original institutions so, strictly speaking, they are no longer traditional. The problem is that alternative terms also tend to provoke embarrassing questions. ‘Customary’ is too close to ‘traditional’. Some prefer ‘informal’, so as to make the contrast with the formal and formalistic character of state justice institutions, but some of our case studies show that the mechanisms in question acquire formal attributes once they are more or less part of a transitional justice policy. This is firmly demonstrated in the case of the Rwandan Gacaca, as chapter 2 argues. A similar problem arises when ‘non-state’ is used as the adjective. Mobilization of these techniques in the context of a broader transitional justice policy tends to bring them into the sphere of influence of state authorities and institutions. No satisfactory generic term thus seems to exist.

This discussion is more than a purely terminological excursion. It puts a finger on a crucial aspect of traditional instruments today: they are hybrids and move back and forth between their origin and capture by the state.

This book retains the word ‘traditional’ as the key label, for want of a more accurate alternative. But we explicitly acknowledge the dynamic processes that drive the form and content of our subject. Each case study describes the life cycle of tradition-based justice and reconciliation techniques, thus confronting their actual format with prior states of affairs. The analysis in terms of strengths and weaknesses, however, focuses on the present characteristics and performance.

2.2. Methodological pitfalls and choices

Ethnocentrism is like nature: chase it away through the front door and it comes back through a window. It is a major source of misconceptions in viewing the practices of the outside world. This is a specific risk in any study of or report on tradition as a socio-political phenomenon in African societies. A strong tendency to romanticize persists, particularly in European and North American academic and NGO communities. What is more, some of the cultural barriers that block the line of sight are extremely high, as are language barriers. In his book *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, Tim Allen, an expert on northern Uganda, shows how confusing some critical notions in the local idiom may be for external observers: ‘in the Lwo language, “amnesty” and “forgiveness” are not distinct—the same word (*timo-kica*) is used for both. The Christian organizations and the “traditional” leaders were especially prone to confuse the two ideas, even arguing that there is an Acholi system of justice

based on forgiveness which is superior to mere conventional law-making and enforcement. Rather naively, many NGOs have taken this at face value' (Allen 2006: 76–7).

To avoid these and other pitfalls, International IDEA has chosen to engage local authors for this project. The only exception is the chapter on the Rwandan Gacaca. Its author is a Belgian scholar who has spent lengthy periods of field research in the rural areas of that Great Lakes country. (The Rwandan experts who were originally involved in the project pulled out.) The other case studies have been written by Africans with an intimate knowledge of their own societies. The outcome, as their contributions demonstrate, is a set of well-informed and highly relevant country studies. These authors are in various degrees themselves actors in their society, not far-away observers who read and write from the comfort of a university or an NGO or a newspaper. A few have even been insiders to the conflict in focus. This results in firm, even provocative, opinions on the causes of the war that ravaged their country. They also have outspoken views on the role of traditional justice and reconciliation mechanisms. Some readers may find that, as a consequence, balance and neutrality have suffered. Our approach, however, has the advantage of injecting clarity into the debate on transitional justice policy choices. To further stimulate the dialogue, International IDEA will open its Reconciliation Resource Network website (<http://www.idea.int/rnn>) for discussions related to this book.

A case study depends to a great extent on the analytical frameworks that guide research and observation, especially if the ambition is to make the output as comparative as possible. To this end the team (the lead researcher, the other authors and the project leader) worked with a common checklist of issues and topics that was meant to cover the subject matter of the project. A draft of the list was presented and revised extensively at a meeting with the authors in Pretoria on 25–26 September 2006. It was agreed, however, that the list was not intended to be an operational straitjacket, since that would lead to so-called observation blindness. Society constantly shapes new forms and expressions of existing patterns. Only research instruments that are fully flexible will register novel appearances of, for instance, informal justice mechanisms. Victor Igreja and Beatrice Dias-Lambranca deliver a convincing example in their case study. Victims and offenders in Gorongosa, Mozambique, have used old models of healing and reconciliation to develop new rituals that are better suited to the actual post-conflict circumstances.

Two factors explain the choice of the five countries that are part of the project. They are sufficiently similar for comparison to be possible. All have a legacy of extremely violent conflict. At the same time, they represent a wide diversity in terms of the type and status of the domestic conflict (ongoing in northern Uganda, close to peace in Burundi, ended in the three other countries in focus), kind of transition, and degree of involvement of indigenous instruments in the transitional justice programmes of the country (formally integrated in Rwanda, officially linked to a truth commission, as in Sierra Leone, planned incorporation in Uganda, no explicit inclusion in Burundi and Mozambique). The choice of cases was also based in part on consultations with staff of the Belgian Ministry of Foreign Affairs, the project's funders.

3. Five African experiences

Traditional justice in general, particularly as it functioned in pre-colonial and colonial times, has been the subject of an abundant literature. The approach was and is anthropological or has its focus on the phenomenon of legal pluralism, that is, the coexistence of state and non-state forms of adjudication. Reconciliation rituals have also received a great deal of attention. The specificity of the International IDEA project, however, lies in its analysis of *the role such mechanisms play or might play in dealing with the legacies of widespread human rights abuses*.

3.1. The ambitions of justice after transition

Mention is made above of the complexity of the political agenda once a civil war or a repressive regime has ended. Dealing with the fate of victims and per-petrators is one of the huge tasks the successor elite and civil society have to tackle. They may enact amnesty legislation, prosecute offenders, establish a truth commission, seek reconciliation through local rituals, build memorials or develop a combination of these measures. Academics and practitioners have coined the term ‘transitional justice’ to cover the various policies for challenging a grisly past. This section examines the extent to which traditional techniques of dispute resolution fall within the range of that key notion.

Which should come first after violent conflict—justice or the restoration of social peace?

To enable such an exercise, we first need a brief description of the goals of justice after transition.

3.1.1. General goals

The study of how post-conflict societies handle a legacy of grave human rights violations is relatively young. As a consequence, views on its core subject still differ. However, gradually a prudent consensus has appeared with regard to the minimum goals of transitional justice policies.

Two general objectives lie at the level of individuals and local communities. Healing the wounds of victims and survivors is the first. The second is aimed at social repair—restoring broken relationships between members of a group and between communities. The second general objective operates at the level of a society or of a nation as a whole. The main aim here is to prevent the recurrence of deadly conflict, not least by strengthening and/or creating institutions and processes tailored to the purpose.

Do these general ambitions feature in the traditional techniques that are the focus of this book? The answer is that they mostly do. Victor Igreja and Beatrice Dias-Lambranca see healing, addressing war-related conflicts and avoiding new aggression as inherently

connected to local practices in Mozambique (chapter 3): ‘By making use of available and accessible endogenous resources, war survivors were able to begin the paramount task of repairing their individual and collective lives’; and, elsewhere in this case study, ‘In the social spaces that are thus created, the violence of the past is re-enacted: the grudges, bitterness and discontentment in the hearts of the survivors can be conveyed without the risk of starting fresh cycles of abuse and violence’. According to Joe Alie, in the chapter on Sierra Leone: ‘Societal resources such as indigenous accountability mechanisms are very useful in peace building, especially after a violent conflict. They have the potential to facilitate the reintegration and healing processes, since the community members can easily associate with them’. Writing on the rich body of traditional practices of the Acholi people of northern Uganda (chapter 4), James Latigo shows how they can lead to the remaking of relations of trust, the restoration of social cohesion, and the prevention of gruesome new crimes.

The general goals of justice after transition are healing the wounds of the victims and survivors, repairing the social fabric and preventing the recurrence of deadly conflict.

There is a growing conviction in political and academic circles that the general goals (healing the victims, repairing the social fabric and protecting the peace) are best pursued through a search for reconciliation, accountability, truth telling and restitution for the damage that was inflicted. These can be called the four *instrumental* objectives that all transitional justice policies must ideally have. Our report also sees them as the critical dimensions of tradition-based forms of conflict resolution after civil war and genocide.

3.1.2. Four instrumental objectives

The notions of reconciliation, accountability, truth, and reparation are discussed below will be used here as the main gateways to a comparative review of tradition-based techniques in the countries that are part of the project.

The four instrumental objectives all transitional justice policies must ideally have are reconciliation, accountability, truth and reparation.

Reconciliation

‘The ultimate goal of traditional justice systems among the Kpaa Mende (and indeed among most African communities) is reconciliation.’ This is one of Joe Alie’s conclusions in the Sierra Leone case study. Local reconciliation activities are very often focused on the return of ex-combatants. *Curandeiros*, traditional healers, in Mozambique conducted reintegration rituals for ex-soldiers. Another example is the *moyo kum* (‘cleansing the body’) ritual in northern Uganda. During a meeting of the elders, men and women who have come back from captivity have their guilt washed away and may begin living together in harmony again. Caritas Makeni, an NGO working in Sierra Leone, ‘successfully reunified child ex-combatants with their families. The latter sought

to “change the hearts” of their children through a combination of care, support and ritual action. Usually, the eldest member of the family prayed over a cup of water and rubbed it over the child’s body (particularly the head, feet, and chest), asking God and the ancestors to give the child a “cool heart,” a state of reconciliation and stability in which the child is settled in the home, has a proper relationship with family and community’ (Shaw 2002: 6).

The Liberia TRC Act of June 2005 has provisions for the employment of traditional mechanisms of conflict management. In Sierra Leone, too, TRC commissioners were able to ‘seek assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation’ (Sierra Leone, TRC Act, article 7.2). According to Tim Kelsall, a lecturer in African politics who observed hearings of this commission, it is clear that the addition of a carefully staged reconciliation ceremony to the proceedings was extremely significant. He writes that the ritual ‘created an emotionally charged atmosphere that succeeded in moving many of the participants and spectators, not least the present author, and which arguably opened an avenue for reconciliation and lasting peace’ (Kelsall 2005: 363). The *mato oput* ceremony in northern Uganda has the reconciling of victims and perpetrators as its central purpose. In Mozambique the *magamba* spirits create a socio-cultural context that allows individuals and communities to refrain from violence and re-establish broken relationships. In 1993, after a most gruesome period in the ‘undeclared civil war’ in Burundi, members of the Ubushingantahe—a local dispute resolution institution—tried to develop processes of reconciliation. They succeeded in several communities, but failed in the majority of the others. Reconciliation, although mainly seen as a way to national unity, was one of the stated objectives when the Gacaca tribunals in Rwanda became part of a broader transitional justice policy. Their actual experience, however, raises serious doubts about whether the outcome can be called successful.

Accountability

James Latigo writes in chapter 4 that the practice of *mato oput* ‘is predicated on full acceptance of one’s responsibility for the crime that has been committed or the breaking of a taboo. In its practice, redemption is possible, but only through this voluntary admission of wrongdoing, the acceptance of responsibility’. Similar principles apply in reconciliation rites that are performed in neighbouring regions of Uganda. In Mozambique, as the case study demonstrates, acknowledgement of guilt by the offender is a crucial element in the *gamba* spirit scenes. The reconciliation ceremonies of the Sierra Leone TRC were oriented explicitly towards the perpetrators accepting their wrongdoing. The *bashingantaha* in Burundi are not today dealing with the legacy of grave human rights violations, but the accountability component is very prominent in their customary dispute settlement sessions. The Gacaca mechanism in Rwanda originally had a certain tendency to record blame, although the restoration of social harmony was the first goal. The actual Gacaca is strongly oriented towards retribution.

The extent to which these rites require full accountability has become a key element in

the discussion on the international law-based duty to prosecute. The argument is that a tendency to reconcile and even to forgive does not exclude the search for acknowledgement, responsibility and restitution. This is, at the moment, a core element in the debate on the role of the ICC in northern Uganda. It has also been invoked in the June 2007 Juba agreement between the Ugandan Government and the leaders of the Lord's Resistance Army.

A tendency to reconcile and even to forgive does not exclude the search for acknowledgement, responsibility and restitution.

Truth telling

Truth telling is an integral part of local dispute resolution practices in many African countries. This is clearly the case in the Mende society in Sierra Leone, as chapter 5 demonstrates. James Latigo's description of traditional systems of justice in northern Uganda shows how one of their objectives is to establish a common view of the violent collective history. Lars Waldorf, who ran Human Rights Watch's field office in Kigali from 2002 to 2004, notes that, when the idea of incorporating the Gacaca into the genocide trials was first discussed, local scholars proposed using the institution instead as a Rwandan version of a truth commission because its original version had the capacities to develop such a role (Waldorf 2006: 49). Truth seeking through ritual public narratives is extremely important in the case of Mozambique. After the civil war ended the political response was to bury the past and impose a curfew of silence. This culture of denial has prevented victims evoking their suffering and restoring their dignity. The *gamba* spirit ceremonies create opportunities for both victims and perpetrators to engage with the past. In Burundi, members of the Ubushingantahe are expected to develop conditions that are conducive to the establishment of the real facts in a dispute. However, while truth telling may be integral to many traditional mechanisms, the actual form it takes is not necessarily the 'Western' public/confessional model of the South African TRC.

Reparation

All the authors of our case studies indicate that traditional mechanisms in their countries require the performance of reparation for the victims. It is not, however, clear whether such reparation has sufficiently materialized in the context of dealing with mass violence. *Magamba* healers in Mozambique assert that to deal successfully with the legacy of the civil war offenders must repair the damage they inflicted. In Rwanda, the actual Gacaca legislation provides for two types of reparation. A fund has been set up to compensate individuals, their family or their clan, but it has not become operational. The other form is of a collective nature. It prescribes community labour (*travaux d'intérêt général*). This measure too has run into problems.

3.2. Two salient features

In 2002 Penal Reform International (PRI), an NGO, published a report on the role informal justice systems play in Sub-Saharan Africa—but without the focus on a post-

conflict context. It contains a long list of ideal-typical attributes of such systems (see box 1). This list is highly instructive. The first two items refer to reconciliation and accountability and, via the term ‘restorative’, to elements of truth seeking and reparation—the instrumental objectives which were discussed in section 3.1.2. Next are six traits that give a concrete expression of their ritualistic-communal character, an aspect that marks a crucial difference with rational-legalistic instruments such as criminal courts. The remaining points on the list express yet another dominant attribute, namely that most processes are initiated and run by civil society actors—in distinct contrast with state-based models of conflict resolution.

Box 1: The ideal-typical attributes of informal justice systems in Sub-Saharan Africa

1. The focus is on reconciliation and restoring social harmony.
2. There is an emphasis on restorative penalties.
3. The problem is viewed as that of the whole community or group.
4. The enforcement of decisions is secured through social pressure.
5. There is no professional legal representation.
6. Decisions are confirmed through rituals aimed at reintegration.
7. The rules of evidence and procedure are flexible.
8. The process is voluntary and decisions are based on agreement.
9. Traditional arbitrators are appointed from within the community on the basis of status or lineage.
10. There is a high degree of public participation.

Source: Penal Reform International (PRI), *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London: PRI, 2002), p. 112, by kind permission.

3.2.1. Ritualistic-communal procedures

Western justice systems claim to encompass the principles of accountability, reparation and, albeit to a lesser degree, truth and the restoration of broken relationships. Modern and indigenous dispute resolution institutions thus pursue the same objectives. However, they differ, mainly with regard to the procedures they develop to reach these goals. The specificity of the *mato oput* ceremonies in northern Uganda and of the efforts to reintegrate former child soldiers in Sierra Leone is the use of ritualistic ingredients—stepping on an egg, washing away the evil past with holy water or oil, drinking the juice of a plant or a tree, evoking ancestors, provoking trance. Spirits dominate the scenario in Mozambique. As Victor Igreja and Beatrice Dias-Lambranca write,

People in Gorongosa, as in many other parts of Africa, live in a social world that traditionally practises the belief that the death of individuals through traumatic acts, or the breaking of taboos such as the killing of human beings without metaphysical and/or social legitimization, is an offence that requires immediate redress through atonement rituals. If wrongdoing is not acknowledged, the spirit of the innocent victim will return to the realm of the living to fight for justice.

Ritual elements are not completely absent in modern courts. Look at the solemn language, the robes and wigs of judges and advocates. But the dominant tone there is rational. Another critical difference lies in the absence of legalistic tools in almost all traditional justice practices. There is no professional representation and the rules of evidence and procedure are flexible. In addition, the logic of criminal law is different. It has to generate 'yes or no' decisions. The outcome of a trial must be 'guilty' or 'not guilty'. To arrive at such clear verdicts, criminal courts must have strict rules. They also limit the amount of information that is processed. However, during violent conflict the behaviour of perpetrators often falls into a grey area in which different forms of guilt and innocence are mixed. Child soldiers, forcibly abducted from their families and compelled to commit horrendous crimes in the course of the conflicts in Sierra Leone, Uganda and elsewhere, are a clear case in point. Courtrooms are not usually capable of the subtlety needed to deal with such complexities. A combination of palavers, the African way of prolonging discussions, and ritual events creates in principle more opportunities for exploring issues of accountability, innocence and guilt that are integral to the legacy of violent conflict. The actual Gacaca institution, however, is more ambiguous. Bert Ingelaere, the author of the case study in this book, notes: 'it is the repeated act of coming together in the Gacaca sessions, irrespective of what is done there in the sense of content, that seems to have a transformative influence on social relations with those encountered in those meetings. But the substance of the encounters is handled according to the purely prosecutorial logic which limits the discursive aspects normally connected with ritual doings or the dialogical and healing dimension of truth-telling processes'.

Even more important, perhaps, is the communal dimension. Guilt and punishment, victimhood and reparation are viewed as collective in most African societies. A community will be incited to accept responsibility for the deeds of a perpetrator or to engage in the healing of a victim. Modern justice systems are designed to identify individual responsibility. Moreover, trials only recognize criminal guilt, not political or moral responsibility.

Modern justice systems are designed to identify individual responsibility, but guilt and punishment, victimhood and reparation are viewed as collective in most African societies. Moreover, trials only recognize criminal guilt, not political or moral responsibility.

3.2.2. *Civil society as the main stakeholder*

Sizeable components of transitional justice policies are initiated and organized by state authorities. Criminal prosecutions are the prototype. Even truth commissions often operate in the shadow of the state. The case studies in this book show that the centre of gravity is different in the case of almost all indigenous practices. Civil society in its various forms (traditional, cultural and religious leaders; elders; local NGOs and the media) normally sets the rules, appoints the key personnel (mediators, arbitrators, lay judges) and watches over the implementation of the decisions that are taken. In addition,

there is in principle a high degree of public participation. Gacaca sessions at the level of the Rwandan hills are intended to attract large parts of the population (presence there is compulsory). Such broad sharing of experiences also typifies the other cases. Criminal courts, on the other hand, are much more distanced from those who were involved as victims or as offenders. This has led to complaints, particularly with regard to the ad hoc tribunals in The Hague (for the former Yugoslavia) and Arusha (for Rwanda), and to the permanent International Criminal Court. The perception of the distance of internationally instigated tribunals from the victim populations and the lack of direct access to these courts is sometimes framed in terms of questioning the basic legitimacy of such 'international' institutions for dealing with 'local' war crimes.

3.3. An impressive diversity

Up to this point in the comparative analysis the accent has been on the many similarities between the traditional mechanisms in the five countries. There is, however, considerable variation in content and form.

All indigenous justice and reconciliation practices are, strictly speaking, no longer traditional. But some are newer than others. The *gamba* spirit ceremony is an instance of a newly invented mechanism, based on existing ingredients. It was needed to fill the vacuum created by the culture of denial in Mozambique. War survivors in the Gorongosa area managed to develop their own socio-cultural mechanisms to attain justice and reconciliation in the aftermath of the civil war. The Juba agreement between the Ugandan Government and the rebel LRA stipulates that local justice instruments shall be promoted, 'with necessary modifications' (emphasis added). This will change *mato oput* and other existing practices in northern Uganda. But the most radical transformation has hit the Rwandan Gacaca. Lars Waldorf writes: 'In fact, *gacaca* has always been an uneasy mix of restorative and retributive justice: confessions and accusations, plea-bargains and trials, forgiveness and punishment, community service and incarceration'. But its modernization by the actual regime has made it 'increasingly retributive, both in design and in practice' (Waldorf 2005: 422). Legislation has introduced legalistic procedures, state control and forced participation for the population. The Gacaca court of today is unquestionably an outsider in the context of this project.

Practices also differ in the way the objectives of reconciliation, accountability, truth seeking and reparation are ranked. Reintegration and cleansing rituals in Sierra Leone (as in Liberia) fully prioritize bringing together returning rebels, their families and their victims. In the *gamba* spirit case the emphasis is on truth telling, although the other goals are not absent. Accountability is the main intention in the Gacaca proceedings. The Ubushingantahe in Burundi involves a more or less balanced mixture of the four components.

Finally, substantial variety is caused by the broader context in which traditional mechanisms have to function. The Mozambican amnesty law creates an environment

that is completely different from that in Sierra Leone, with the presence of a special court and a TRC. The next section explores this source of diversity.

3.4. Tradition-based mechanisms: from aversion to full integration

Publications on transitional justice have often tended to study amnesty legislation, trials, truth commissions and other strategies as if they operated in a societal vacuum. But, as a recent report notes, ‘Strategic interventions or planned change in one part of a system affect all parts in reverberating pathways’ (Baines, Stover and Wierda 2006: 3). Preference should indeed be given to a more comprehensive approach.

3.4.1. The need for a comprehensive approach

All regimes coming out of a devastating conflict are confronted with a formidable transition agenda. This raises intricate problems of prioritizing and sequencing. When to address a legacy of mass violence if basic needs in the areas of physical security, housing and so on remain unanswered? Or if the conflict has not ended yet, as in northern Uganda, will it be peace first or justice instead?

Given the volatility of an immediate post-conflict context, timing and sequencing in particular represent an extremely important but difficult dimension. Policies must not come too soon or too late. Questions and challenges abound. *When* to develop justice and reconciliation activities? Decisions will inevitably impact seriously on the final outcome. To get the time as right as possible, policy makers must ‘understand the times’, that is, make an adequate reading of the forces that influence the transition agenda; be conscious of the importance of measures for the long term; and be aware that the mere passage of time will not ultimately heal all individual and collective wounds. Then, once the decision to tackle the crimes of the past is taken, what is the *proper timing*? Any policy needs a ‘flight plan’ to control the right sequencing of the steps and dimensions of the process. What should come first—healing initiatives, locking up leading offenders, starting cleansing and reintegration rituals, or saving vital documents for the future search for truth? Wrong sequencing may have undesirable effects. The threat of trials may incite suspects to destroy evidence. To give priority to truth telling may frustrate victims who are in urgent need of healing. Finally, what is the *appropriate pace*? Experience suggests that a rushed approach, as regularly advocated by national and international peacemakers and facilitators, will almost certainly be counterproductive. In the immediate aftermath of a

When to develop justice and reconciliation activities? What should come first—healing initiatives, locking up leading offenders, starting cleansing and reintegration rituals, or saving vital documents? What is the appropriate pace? Experience suggests that a rushed approach will almost certainly be counterproductive.

civil war or of an inhuman regime, victims are too preoccupied with their own distress to develop firm views on how to reach justice and reconciliation.

The particular conjunction of political and cultural forces in and around the post-conflict country weighs heavily on prioritizing and time management.

Politics

A political system has a variety of relevant actors. Official authorities are crucial. The many groups and organizations that populate civil society form another important category. Both operate on the national, the local and the international level.

State authorities

The case study on Burundi clearly shows that the *bashingantabe* institution has not yet been accepted as a vital component of dealing with the legacy of an almost continuous and brutal conflict. There is no reference to that effect in the 2000 Arusha Peace and Reconciliation Agreement, it has no place in the law on the proposed national truth and reconciliation commission (commission nationale vérité réconciliation) and it is absent in the current negotiations between the government and the UN regarding the mandate and composition of the Burundian commission. This is partly due to an aversion that exists in the Bahutu-controlled government, where the *bashingantabe* are viewed as still in the hands of the Batutsi. Opposition also exists at the local level. Traditional leaders clash with those who received their authority through elections. The former mostly have to yield. The international community, in its role as a facilitator in the peace negotiations, has apparently not felt the need to counter these sources of resistance.

How to understand this outcome? Justice after transition is part of a broader objective a new regime has to pursue, namely to consolidate its authority and legitimacy, internally and vis-à-vis the outside world. This is a question of nation and state building. New or renewed control over the justice sector is a vital factor in these processes. In countries like Rwanda political leaders have formalized informal justice mechanisms, bringing them under closer scrutiny. Non-state actors and traditional authority structures (elders, lay judges and so on) are also important targets of 'state capture'. The politicization of the traditional leadership is often one of the consequences, resulting in problems of weakened credibility, inefficiency and corruption. This, in its turn, may considerably reduce the

potential of the traditional institutions of conflict regulation, since they rest on these local leaders. In some instances the legitimacy of these tools has been compromised by the role that traditional leaders played (albeit often under duress) during the conflict.

Traditional leaders clash with those who received their authority through elections. The former mostly have to yield. New or renewed control over the justice sector is a vital factor in nation and state building after conflict. Non-state actors and traditional authority structures (elders, lay judges and so on) are important targets of 'state capture'.

International instances

Where a brutal conflict has crossed borders the odds are that transitional justice policy will also have international ramifications. Charles Taylor, a Liberian and key perpetrator in the Sierra Leone civil war, had to stand trial in Freetown. (He was transferred to a tribunal in The Hague, the Netherlands, for security reasons.) In other cases a legacy of violence is internationalized because foreign countries or the UN have taken up the role of peacemaking facilitator. This happened in Burundi. As a consequence national justice and reconciliation strategies were developed according to internationally inspired models. Finally, there is the influence of international law. Its insistence on the duty to prosecute may restrict the policy choices national authorities can make. This is currently a major point of discussion in northern Uganda. Such pressure has been growing over time. When the civil war in Mozambique came to an end in 1992 an amnesty act passed without international protest. That would no longer be the case today.

In some instances the legitimacy of the traditional institutions of conflict regulation, which rest on local leaders, has been compromised by the role traditional leaders played (albeit often under duress) during the conflict.

Civil society

All the authors of the case studies in this book put clear emphasis on the important part civil society has had, still has or might have in dealing with the grisly fallout from their country's wars. Local NGOs, separately and/or through networking, try to influence the decision-making processes of national and international authorities. The majority of the churches in Gorongosa (Mozambique) totally discouraged ideas about achieving retributive justice. The Inter-Religious Council of Sierra Leone was involved in some of the hearings of the TRC. The National Council of Bashingantahe in Burundi has lobbied for inclusion and involvement in the post-war policies of the government. Victims' associations in Rwanda pressure the authorities in questions of accountability and reparation. The Northern Uganda Peace Initiative (NUPI), a network of associations, has strongly supported the use of *mato oput* and cleansing ceremonies. Other local NGOs in the region, however, are fighting for criminal prosecutions. Opinions thus diverge. Such variety in viewpoints is not an exception. It is an important feature of civil society in most post-conflict countries.

International NGOs such as Amnesty International and Human Rights Watch are not absent in the debate on transitional justice policies. In the course of their vigorous lobbying for an effective ICC and for the extension of universal jurisdiction they have tended to put a robust emphasis on retributive justice. Doubts about the justification of traditional practices abound.

Culture

No Future Without Forgiveness is the title of Desmond Tutu's personal memoir of chairing the South African Truth and Reconciliation Commission. He argues that the conditional amnesty the TRC could grant was 'consistent with a central feature of the African *Weltanschauung* (or world-view)—what we know as *ubuntu* in the Nguni group of

languages, or *botho* in the Sotho languages. ... A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole' (Tutu 1999: 34–5). It is this fundamental attitude that opens the heart for forgiveness. This is mostly closely related to religious convictions. In their case study on Mozambique, Victor Igreja and Beatrice Dias-Lambranca write: 'Christian religious groups in Gorongosa rely entirely on unilateral forgiveness since God is considered to be the most important figure in the resolution of conflicts'. On the other hand, the practice of forgiving and forgetting may be widespread in Africa but it is not a general cultural given. The results of two surveys on peace and justice in northern Uganda were released in August 2007. One was conducted by the Office of the High Commissioner for Human Rights (OHCHR), with the participation of 1,725 victims of the conflict in 69 focus groups in the Acholiland, Lango and Teso sub-regions, and with 39 key informants to provide a degree of cultural interpretation of responses from the focus groups. The report concludes that perceptions on the virtues of amnesty, domestic prosecution, the ICC and local or traditional practices are very mixed (United Nations, Office of the High Commissioner for Human Rights 2007). The other survey, conducted by researchers from the Berkeley–Tulane Initiative on Vulnerable Populations and the International Center for Transitional Justice (ICTJ), produced similar results: there are high levels of support for a traditional approach, but a majority of interviewees wanted the perpetrators of grave human rights violations to be held accountable (forthcoming publication).

Cultural attitudes also have an influence on views on truth commissions. In his report on the TRC in Sierra Leone, Tim Kelsall argues that, in the absence of strong ritual inducement, the public telling of the truth 'lacks deep roots in the local cultures' of that country (Kelsall 2005: 363). A similar situation exists in Burundi and Rwanda.

3.4.2. How to merge different strategies?

Most of the countries studied as part of this project combine traditional justice and reconciliation instruments with other strategies for dealing with the legacy of civil war and genocide: in Mozambique with an amnesty act; in northern Uganda with an amnesty act and the intervention of the ICC; in Rwanda with the Arusha court, national tribunals and Gacaca meetings; in Sierra Leone with a special court and a truth commission. (Burundi is an exception to that rule. Its Ubushingantahe is neither formally nor informally involved in the actual programming of transitional justice.) How do these strategies interrelate? How can interpersonal and community-based practices live side by side with state-organized and/or internationally sponsored forms of retributive justice and truth telling?

(This is not a problem that is unique for Third World countries in general, or African post-conflict societies in particular. The search in Western Europe and North America for a justice mechanism that can complement a purely punitive approach has generated renewed interest in traditional non-state systems of dealing with crime. In Australia,

New Zealand, Canada and the United States traditional justice systems belong to the aboriginal heritage and have recently been revived. Interest in restorative justice programmes is on the rise in other Western countries but this is based more on progressive contemporary philosophies of justice than on a forgotten local tradition. One example is victim–offender reconciliation programmes. That formula has been used predominantly to handle fairly minor crimes, although initiatives in conflict contexts such as Northern Ireland have tried to extend the concept.)

Our case studies report a considerable diversity in the reception of traditional mechanisms. There is a clear aversion in most political circles in Burundi. Mozambique is a case of passive tolerance. It is, however, useful to remember that in such contexts certain dangers may emerge. Victor Igreja and Beatrice Dias-Lambranca write that ‘*magamba* and other similar post-war phenomena run the risk of being wrongly used by the national political elites. For instance, political elites can use the success of *magamba* spirits and healers as arguments to justify their option for post-war amnesties, impunity and silence’. Official recognition of the value of reconciliation and cleansing rituals has been the reaction in Sierra Leone. But their incorporation into the workings of the TRC has been rather weak. The June 2007 Juba agreement between the Ugandan Government and the LRA plans full integration of the *mato oput* ceremonies into the national policy on the war crimes of the past. Rwanda is the only country where a local accountability instrument has been wholly part of the official policy. This chapter has already mentioned the problems that arise in such situation.

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This chapter has collected information on the similarities and differences between the tradition-based justice and reconciliation mechanisms in the countries in focus. An evaluation of their real or potential role after violent conflict is the subject of the concluding chapter.

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