

## **Reconciliation and Traditional Justice:**

### *Learning from African Experiences*

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### **Introduction**

Since the early nineties, the world is witnessing an unprecedented momentum in the development or regeneration of international instruments and mechanisms to tackle gross violations of human rights. There is a proliferation of international tribunals since the creation of the two *ad hoc* tribunals respectively in 1993 and 1994. The Geneva Conventions and their Additional Protocols have never been cited as often as in the last decade. The Genocide Convention adopted since 1948 has only been recently applied to its full extent. The 1984 convention against Torture is equally being referred to by judicial bodies quite often.

The genocides and other gross violations of international humanitarian law in the former Yugoslavia and in Rwanda, at a

moment where the international community was less divided, certainly helped reinforce the fight against impunity and in the process, foster the revival and development of international humanitarian law. Equally relevant was the new reality of a more and more globalized world, along with the emergence of the doctrine of "*devoir d'ingérence*" or "moral obligation to interfere", particularly when human rights protection is at stake.

Africa appears in this particular context as an unfortunate but interesting laboratory. Many of the major conflicts calling for the international community's attention during the last decade have taken (or are taking) place in Africa. The majority of its population live in rural areas, mostly without education and let alone access to or understanding of the international legal tools and the intricacies designed to address the very tragedy they go through, when massive violations of human rights are committed. The question of the relevance of the justice being dispensed in Africa to address gross violations of human rights is therefore particularly ripe for consideration.

IDEA's initiative to launch this pioneering study is to be understood and praised in this context. It is very important indeed to question Africa from within and ask this continent, in its diversity, whether it

possesses the adequate resources to tackle effectively the major problems generated by its children and the mutations it undergoes. IDEA, through this study, has posed the relevant questions to the most relevant parts of Africa. It is now about assessing the responses garnered from the exercise.

The task I am entrusted with in this regard, as one of the keynote speakers, may appear difficult or easy, depending on the perspective taken. It was certainly difficult, in view of the quantity of materials to be reviewed in a short span, with the notes taking and early draft organization it entailed. But once the reading is done, one is left first with the feeling of satisfaction deriving from the enrichment the reading has undoubtedly generated. But this feeling is quickly overtaken by the sense of potential uselessness one may fear, because of the completeness of the reports and the subsequent comments thereon. Thanks to a very well thought general framework, each and every report is a self sufficient piece of work. The description of the traditional system of justice is thorough, and the pertinent remarks to be made in terms of strength, weaknesses and opportunities are to be found in each conclusion. When reading the introduction and final synthesis of Professor Luc Huyse, as well as his general recommendations, one is left with nothing more to add, unless one is not afraid of beating the horse to death.

However, since my invitation to this forum needs to be justified, I will endeavour to account for my review of the reports and then venture some recommendations for future policy decisions regarding transitional justice mechanisms.

Upon review of the five case studies, the first observation to be made across the board is that every society which underwent horrific events, develops the irrepressible need to come to terms, one way or the other, with those events. In the case studies this journey is labeled justice or reconciliation, without necessarily making a difference between the two concepts. In taking stock of the different situations, I will attempt to ascertain whether the label of justice ought not to be used with caution in some cases. Irrespective of the response to that query, I will explore the possible future of the different tradition-based experiences of transitional justice and make some concluding remarks.

### **1. The irrepressible need for justice**

The case studies concern countries largely affected by violent conflicts. Their formal judicial system would be unable to provide full and adequate response to crimes of large scale, precisely because

of the scale of the crimes or the insufficiency of the resources (Rwanda, Burundi, Sierra Leone), the political choice of the leaders (Amnesty granted like in Mozambique, Sierra Leone, Uganda and Burundi) or just because the potential targets for prosecution would not anyway be readily available (Uganda). Despite these hurdles, the common feature displayed in the studies is that the need for justice naturally surfaces in many forms, including through resurgence of ancient practices. The Study in Rwanda tells us that the *Gacaca's* practice naturally reappeared in some hills, and this even before the government decided to reinvent that tradition. Burundians apparently adhere to the institution of *Bashingantahe* as illustrated by opinion polls (73% in 2003) and the rate of confirmation of their findings by the formal justice (over 70%). The *Mato oput* rite of reconciliation in Uganda seemed to have been well accepted, at least in the Acholi society and has even rallied foreign institutions like USAID which according to the report, funded 54 ceremonies between 2004 and 2006. Though there is no available data to show the extent of reliance to traditional justice by the *Kpaa Mende* in Sierra Leone, one may refer to the final report of the Truth and Reconciliation Committee (TRC), cited in the study, and which acknowledges that “mediation, purification, token appeasement and the willingness to show remorse [as being] in harmony with the objectives of the TRC policy and have been sustained by the Commission during its

hearing and beyond.” It is reported that in Mozambique, after the 1992 Peace Agreement traditional chiefs and judges gained an increased importance, well beyond the *Gorongosa* region where the study is focused.

These findings are not however, without a flip side. Other behaviours seem to go against the first trend reported. In Rwanda it has also been noted that some survivors, out of pragmatism or necessity lived with their tormentor in the same hill. Their compelled attendance at *Gacacas*, rather than providing any remedy, may have even disturbed or destroyed the harmony they had already acquired through cohabitation. The *Bashigantahe* perception in Burundi had also its ups and downs, depending on the evolution of the political situation and the ethnic divide. The case studies in Mozambique and Uganda show that adherence to *Mugambo* or *Mato Oput* rituals is not always uniform in a family, particularly when some feel that those rituals may be incompatible with their religious beliefs.

This apparent contrast merely testifies to the dynamics of the societies studied without calling into question the first observation. The resistances to the traditional processes cannot be interpreted to mean complete relinquishment of all forms of justice. On the contrary they merely show some diversity as to the best processes by which

piece of mind can be achieved; that piece of mind being called here justice. This leads me to the second question. What justice is it about?

## **2. What justice?**

There is a great deal of effort of clarification of the concepts being used in this study, particularly regarding the meaning of traditional justice. However the focus has been more on the possible meanings of “tradition” than on the meaning of “justice”. It is certainly because it is assumed that everybody has a sense of what justice entails. When “justice” has been referred to for clarification, it was essentially to distinguish between “retributive justice” which corresponds to the modern fashion of delivering justice, with focus on the criminal offender, and “restorative justice”, which corresponds to the traditional way of delivering justice, with focus on the victim and his or her healing and rehabilitation. Of course the line between the two is not drawn once for all, as the study on *Gacacas* clearly shows, when it features a so-called traditional justice which focuses more on retribution than on restoration. But a question still begging answer is whether there are commonalities between the two processes of justice. Only an accepted definition of the concept of justice would provide a response.

The study on Sierra Leone proposes the definition of some concepts, including one for “justice” which seems to be readily acceptable, irrespective of the type of justice being considered. Without paraphrasing the definition proposed, it can be noted that “justice” would require the search for the truth in a transparent and fair process, while allowing the parties involved therein to express themselves. If we accept this somewhat minimalist definition of justice, it would provide an interesting yardstick against which some of the traditional practices reported would be assessed.

The global setting of *Gacaca* would not certainly pose difficulty to qualify as “justice”, as its main features and mechanisms “mimic” the modern legal systems, to use the same words as the author of the study for Rwanda. The flaws observed in the process would therefore be only shortcomings of a judicial system, which certainly ought to be corrected, if possible. But this would not take away the fact that it is a full fledged system of justice in principle. The *Bashingantahe* in Burundi and some traditional settlement disputes acknowledged by the law in Sierra Leone seem also to satisfy the requirements of justice. In fact the qualities required of a *Bashingantahe* (very similar to those of an *Inyangamugayo*, the judges of *Gacacas*) match perfectly the highest standards for the recruitment of a good judge in any advanced legal system, apart from the requirement of a



law degree. But it would seem that the involvement of those categories in the delivery of justice in Burundi and in Sierra Leone was not really meant for the transitional justice which is the subject of this study. But there seems to be a prospect for the *Bashingantahe* to shift from their traditional small civil cases resolution to a greater role, either in the Truth and Reconciliation Commission, or more generally in the reconciliation of the Burundians. Some traditional settings have also been given some credence by the TRC in Sierra Leone. To that extent the reference to customary justice in Burundi and Sierra Leone may well have some relevance.

The cases which may raise more questions as to their suitability to be designated as “justice”, according to the definition proposed, would be those requiring resort to the supernatural forces, divination, forced confessions and the like. The study on *Mangamba* tells us that one of the key features of the *Gamba* spirit is “its randomized dimension”. It seems that the roaming spirits of dead soldiers yearning for justice may possess anyone in the community. Such possession brings pain and suffering to the person who appears then as a victim (without necessarily being a victim of the conflict plaguing the country). The whole exercise of the *Magamba* would be about healing that victim, through a divinatory discovery of what happened in the past (alcohol and marijuana may be of use to go into trance). The spirit invading

the victim would be taken away by the *madzoca* healer, provided that the past wrongdoings are acknowledged. The *Magamba* rituals are not without recalling the process of exorcism, at least in some of its aspects. It may unquestionably stand as a social therapy. This leads to the question regarding the main character of *Magamba*. Is it therapy or justice? Justice and particularly restorative justice, provides therapy to the victims through the truth telling healing process. But does this mean that a social therapy not involving truth discovery through normal means should still be seen as a justice process? The question remains open.

The *Mato oput* ritual seems to be more complex to qualify. Though the ritual is meant to remove a supernatural barrier between the clan of the killer and that of the victim, the process takes care in passing of the truth telling and subsequent remedy for the victim, all of which may well qualify for justice. The case study does not specify how uncertainty as to the identity of the offender would be addressed. This would certainly be an important factor to determine if the truth telling exercise comports with the requirements of justice, as defined.

The *Ngele gbaa* curse in Sierra Leone, is not without recalling the ordeals by water or fire practiced in the middle age. When an offense is committed, the unknown offender is invited to come forward and

confess, short of which he will be cursed by the *ngele gbaa*. Not only the justice process involved in the *ngele gbaa* seems to be very limited, the practice does not seem anyway to be relevant to the scope of the study, for it does not address the transitional justice where mass violations of human rights are at stake.

This quick overview shows that there is not a uniform way of going about the healing process in African countries that have experienced violence in a large scale. Traumatized people may resort to different expedients to survive, including resurrecting or inventing practices of other ages that ought to be proscribed at all costs. This is particularly so when they are left to fend for themselves, with no real solutions or alternatives offered. Recently a Belgian TV reported in the DRC a very moving expanding practice whereby parents, out of desperation, banished their own young children because the latter were suspected of harbouring evil spirits in their bodies. Thus the question whether any makeshift social arrangements or conflict management in Africa to deal with a painful past should be valued, given credence and even preferred to modern solutions, should the latter be available? The answer is not easy. It would require first a thorough evaluation of the practice in question so as to determine its acceptability, in view of some universal or other local overriding values to uphold.

Africans leaders (I mean leaders in a large sense) should play a prominent role in this endeavour, particularly when European experts may be too friendly, thus too accommodating or too shy to be critical, for fear to appear as Eurocentric. Taking the lead would also require observing some critical distance, despite the possible belonging to a community which may have a stake on the ongoing issues to be settled. With this prerequisite, it would be possible to sift through numerous practices which are running their course in every corner of Africa and validate (at least intellectually) those which are relevant to the local people without conflicting with the core values of every human being of the modern times. Then one could envisage a real future for some traditional justice.

### **3. What future for traditional justice?**

Traditional justice is called upon mostly as an alternative to a lacking or deficient formal justice. The study in Uganda makes however a point in taking exception to any form of legitimacy of the international justice, nay any formal justice, in dealing with the *Acholi* community in Uganda. Not only because of its potential to derail the peace process, but also because it is argued that “it is morally and politically wrong to create new institutions that [allegedly] carry

forward the inequities of the past and impose them on marginalized communities such as the *Acholi* in incomplete disregard of their norms and institutions". One may wonder whether this statement, if it follows suit, would not lead to a stalemate, if one understands it as a claim for the application of a specific tradition as an exclusive way of addressing not only the grievances of that community but also the torts that community has possibly caused. One of the main difficulties would be that such community is not the only stakeholder in the process. Besides, the crimes of large scale being experienced now are not necessarily part of the experience of past generations in relatively small communities. Therefore one may well question whether any of the African communities, subject of the present study, has ever had the opportunity to forge tools to tackle major issues it may have never been confronted with.

In addition, despite the festering conflicts in many parts of Africa, there have been a number of choices (or legacies) which seem to be irreversible, although they may not be as effectively implemented as it would be desirable. In every country of Africa, including in Somalia, there is a more or less continuing effort to build a modern state, meaning a state of the western model, with its corollary institutions. This entails having a constitution and making laws supposed to be applied throughout the country. Those laws are not

necessarily meant to ratify or condone ancient practices. New laws driving a country to modernity may even forbid certain traditions deemed ill-advised, according to the new orientations of the society.

International agreements are also entered into, and as a result, treaties become part of the domestic law. Even the international forum carries its own dynamism, irrespective of whether a particular state is part or not of the process. Some international legal standards would apply anyway to all countries, because they are part of customary international law or they are recognized as norms of *jus cogens*. Universality is not always a hollow word and certain values must be shared by all mankind. Those lagging behind must be encouraged to catch up with those values or even forced in some circumstances to do so. But there can be no question to bow to the right to be different when it comes to uphold those core values. The respect for life is among those values. The respect for the fundamental rights of the individual, of women and children, the proscription of genocide, torture and sexual violence are among the set of common legal standards to be observed or at least promoted. The extent of the implementation of those rights may vary from country to country, because of many factors, but the dynamic towards their full respect should at least be set in motion everywhere.

It is not about denying any right for the tradition to be upheld. But the applicability of the principles recalled earlier cannot and should not be a matter of local convenience.

The effectiveness of the official norm is a major problem in Africa in general and particularly in countries experiencing violence of large scale. Some of the fundamental functions of the State are not fulfilled and of course, as the saying goes, “nature abhors a vacuum”. Traditional practices may re-appear as a handy tool to help mend ties. But one should distinguish between traditional practices that only are resorted to as a stop gap and those really worthy to be part of any lasting solution.

Paradoxically we often justify resort to some traditional practices for want of an effective formal system of justice. Yet the traditional practice may face the same problem of acceptance by all the stakeholders. The case studies in Mozambique and Uganda provide ample illustrations to that effect. In one case out of the two cited in Mozambique, the *Magambo* healing process could not go through because the uncle of the victim, Zeca was against the process deemed to be against his religious beliefs. Amazingly, the reluctant Zeca has been referred to the formal justice in order to bolster the traditional healing and help it follow through.

The idea which, fortunately seems to be shared by all reporters, despite variations in the tone, would be to find a way for a compromise between the formal justice and traditional settings which would provide a close, cheap and legitimate response to the needs of desperate populations. A system like *Gacaca*, if it were gotten rid of its main shortcomings, as reported in the study, would certainly be a perfect form of compromise between the formal justice and the tradition reinvented, to tackle a problem which the initial formal justice alone would have never been able to address totally. The reinvention of tradition may be unavoidable, in view of the gender bias and other major flaws reported in most of the traditions object of the study. Just to name a few of those flaws, children's rights are not acknowledged, individuals are ignored or only recognized as part of a community, the truth is available only through magic means and requires subsequent compelled confessions etc.

#### **4. Conclusion**

I would not repeat the recommendations already made in the individual reports or in the synthesis of Professor Luc Huyse. This means that there is nothing left for me to say. I will just share with the public an anecdote which is part of my past experience as an



African activist on human rights. In the early eighties I advocated in my country, Senegal, and around West African French speaking countries the rehabilitation of some traditional forms of amicable conflict settlements, in order not only to alleviate the burden of very congested tribunals, but also to foster the legitimacy and proximity of the justice. Little heed, if any, was then paid to my plea. Years later, the concept of "*médiation pénale*" came into vogue in France. Institutions called "*Maisons de justice et du droit*" were erected to enable parties referred to it directly by the Prosecutor of a *Tribunal de Grande instance*, to amicably settle their dispute, thereby avoiding a trial.

All of a sudden, a growing interest for this form of conflict resolution started surfacing in my country and in some of those very countries I tried to rally to that idea earlier. That sudden interest was however not so much about digging deep into the local culture and coming up with some original adaptation of traditional practices to suit the present needs. The idea was to set up institutions of mediation just like in France.

I would leave each of us draw his or her own conclusion from that experience. My personal thought was not so much to focus on my frustration which could have been legitimate. I was just reassured

that great treasures lie hidden in the African continent. It is up to us to undertake the journey for their discovery and subsequent use.

Thank you for your kind attention