

# Tradition-based Justice And Reconciliation After Violent Conflict: Learning From African Experiences

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By way of introduction: two caveats.

First, the analysis is based on a study of **only five** countries in **one** continent. Extrapolation to other contexts is not self-evident.

Secondly, the use of the notion '**traditional**' is highly problematic. As one of the authors, Joe Allie, writes: the label has an eurocentric connotation. Also, the practices in focus have never been inert. They change almost continuously. How justified then is that label? You will remark that the report uses 'tradition-based' as an alternative. In addition, each case study has given full attention to the many factors and forces that cause changes.

## 1. The place of tradition-based practices on the TJ map

See figure at the end of the paper

## 2. Five African experiences: a cautious analysis of strengths and weaknesses

I will use two yardsticks in weighing the actual and potential performance of the mechanisms in focus. The first is *legitimacy* -- their degree of credibility. The other is *effectiveness*—their impact in terms of the desired and stated effects.

### 2.1 Partial legitimacy

Being credible, justified and worthy of trust supports the effectiveness of institutions such as tradition-based practices. It also guarantees their survival. The degree of legitimacy is the first benchmark in my evaluation. And I call it partial.

#### With regard to the legitimacy at the domestic level

Our case studies report a considerable diversity in the local perception of tradition-based mechanisms. There is in most political circles in Burundi a clear aversion towards a formal mobilization of the Ubushingantahe in the broader policy of justice after transition. Mozambique is a case of passive tolerance. Official recognition has been the reaction in Sierra Leone. But incorporation of local rituals into the workings of the TRC there has been rather weak. The June 2007 Juba agreement between the Ugandan Government and the LRA plans full integration of the *mato oput* ceremonies in the national policy of justice and reconciliation. Some local NGO's, however, contradict this position. Finally, Rwanda is the only country where a local accountability instrument (the gacaca tribunal) has been wholly part of the official policy, but its legitimacy inside the Hutu community is frail.

#### What about the international community?

Existing lists of the weaknesses of informal justice mechanisms have often been written from the Western perspective of consideration for the rule of law. The general perception is that the rules associated with these local practices are very often imprecise and unwritten and that procedural safeguards are insufficient. This is the procedural aspect of the legitimacy gap that the international community has identified as seriously problematic. In addition, many actors on the international field are convinced that these tools do not respect the duty under international law to prosecute genocide, war crimes and gross violations of human rights.

I want to make three remarks with regard to the last point.

In all countries in focus here tradition-based practices have a dimension of accountability. James Latigo, in the chapter on Northern Uganda, writes that the practice of *mato oput* is predicated on full acceptance of one's

responsibility for the crime that has been committed. Redemption is possible, but only through this voluntary admission of wrongdoing and the acceptance of the consequences. In Mozambique, as the case study demonstrates, acknowledgement of guilt by the offender is a crucial element in the *gamba* spirit scenes. In the reconciliation ceremonies of the Sierra Leone TRC perpetrators were asked to accept responsibility for their crimes. The accountability component is very prominent in the customary dispute settlement sessions of the *bashingantahe* in Burundi. The actual Gacaca in Rwanda is strongly oriented towards retribution.

Secondly, a recent conference on 'Building a Future on Peace and Justice' (Nuremberg, June 2007) has rightly advanced the idea that legitimacy is not only problematic in the case of tradition-based mechanisms. The conference report remarks that for too long 'the International Criminal Tribunal for the former Yugoslavia considered the issue of legitimacy only vis-à-vis the international community and not with respect to the local constituency'. It also notes that the ICC 'must close the legitimacy gap that may exist in respect of affected populations'.

Finally, there are signs that opinions in the international community are changing. In his August 2004 report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* Kofi Annan, the then UN SG writes: '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'.

## 2.2 Partial effectiveness

### Obstacles and shortcomings

Several circumstances limit the effectiveness of tradition-based tools of justice and reconciliation. Problems exist in two critical areas: traditional mechanisms have a limited range of action and effect; and process conditions are tricky.

#### Limited range of action

##### *Ethnicity*

The *Ubushingantahe* in Burundi cover in principle all national ethnic groups. Tradition-based mechanisms in Mozambique, Sierra Leone and northern Uganda, on the other hand, are culture-specific and are, consequently, almost inflexible. The range of tradition-based mechanisms is thus significantly restricted in ethnically diverse countries where each group has developed its own complex systems of dispute resolution.

##### *Religion*

Christian believers reject traditional practices outright, although in countries, like Uganda and Sierra Leone, new techniques have emerged that tend to fuse various religious rituals.

##### *Gender*

Tradition-based systems of dispute resolution are by and large male-dominated. Recently cautious changes have been introduced. In Sierra Leone some provision is made for female representation in dispute settlement cases. Certain truth-seeking mechanisms are actually headed by women. Women have taken up an important role in the Gacaca proceedings in Rwanda. In Burundi more women are invited to become *Bashingantahe*. But, yes, women (and indeed young people also) tend to remain marginalized.

Another limitation is of a *political* nature—the tendency to protect certain crimes or certain perpetrators from the accountability and reparation dimensions of tradition-based practices. The Rwandan Gacaca tribunals lack the authority to deal with violence committed by the Batutsi-dominated Rwanda Patriotic Front. In northern Uganda, middle- and high-level commanders of the LRA have been beyond the scope of *mato oput* ceremonies. So are most members of the Ugandan Army.

Finally, some of these conflicts have *crossed national* borders or have been fuelled by neighbouring countries. The dynamics of the conflict and its legacy, in Northern Uganda just as in Sierra Leone, go far beyond the territorial and personal reach of domestic tradition-based mechanisms.

## Difficult process conditions

### 1. *The enormous scale of the wrongdoing*

Traditional justice systems are designed to deal with relatively small numbers of cases of minor wrongdoing. Hence they are not well suited to being applied to a legacy of mass violence.

### 2. *They have to be performed in a wounded cultural habitat*

The case studies describe the devastating effects of genocide, civil war and oppression on form and substance, status and potential of tradition-based instruments. The scale and degree of violence and repression vary, but all five countries share the experience of having their traditions deeply injured.

#### 2.a *Material conditions are highly unfavourable*

Large sections of the victimized population and of returned perpetrators have lived or still live in refugee camps—environments that are too artificial for the effective use of cleansing, reintegration and reconciliation ceremonies. The dislocation of families is another handicap. In Sierra Leone, mass migration of young people to the cities makes the traditional practices less effective. In addition, urban settings are not the natural habitat of ritualistic-communal procedures, as the experience with Gacaca courts in Kigali demonstrates. Moreover, the resources that are needed to fulfill the reparation dimension of these rites are lacking because of extreme poverty.

#### 2.b *Erosion of social capital*

Civil war and genocide destroy social capital. Solidarity and mutual trust are gravely damaged. Taboos have been disregarded and sacred places defiled. The legitimacy of traditional leaders has been greatly harmed. They suffered from the general fallout of civil war and oppression. Their position has also been endangered by migration to the cities, and manoeuvring by the national political establishment. How can healers and elders successfully perform justice and reconciliation rituals if their authority is disputed?

## Strengths

We now turn to the positive effects these tools can have in the context of dealing with a legacy of grave human rights violations. I list these strengths, looking at the four dimensions that are crucial in dealing with a past of war and repression: accountability, truth, reconciliation and reparation.

*Accountability.* Systematic prosecutions are the most direct way to establish guilt and punishment. This strategy is, however, highly questionable in contexts where regime change is an extremely delicate and/or complex operation. Criminal courts have 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. 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 opportunities for exploring issues of accountability, innocence and guilt that are integral to the legacy of violent conflict. There is thus a growing belief that local forms of accountability may act as interim, provisional alternatives to trials --in cases thus where an official transitional justice policy is absent, delayed or crippled by political constraints. These practices are also less threatening to the forces that dread prosecutions and may provoke a less fragile peace. Their proximity to the victims and survivors is a further asset, since it becomes possible for people to see that (partial) justice has been done—in distinct contrast to the procedures and outcomes of far-away criminal courts.

*Truth.* Formal truth commissions may not be the most appropriate option in societies where the public revealing of the truth is not strongly rooted in the local culture. The case studies on Burundi, Rwanda and Sierra Leone indicate that this may be a major problem there. Precisely because they are rooted in established local values and traditions, ritualistic-communal practices may be better suited to creating a collective atmosphere that opens the heart and the mind and delivers truth or, at least, parts of the truth.

*Reconciliation.* The chapter on the *gamba* spirit ceremony in central Mozambique is a strong demonstration of the reconciliation such a practice can bring about. (This case will be discussed this afternoon.) Cleansing and reintegration rituals, particularly if they deal with ex-combatants and returning abducted children, have succeeded in reconciling victims and perpetrators.

*The restoration of broken communal relations* is an extremely intricate undertaking after a devastating conflict. The authors of the country studies on Burundi and Mozambique argue convincingly that local mechanisms have the capacity to

renew damaged social capital. Another added value lies in the creation of situations where a natural, spontaneous socialization of people as to norms about good and bad may arise. Finally, some of these instruments are in principle able to deal with the often forgotten fallout of civil war, such as property conflicts when refugees return and an increase in marital violence.

### 3. Conclusions

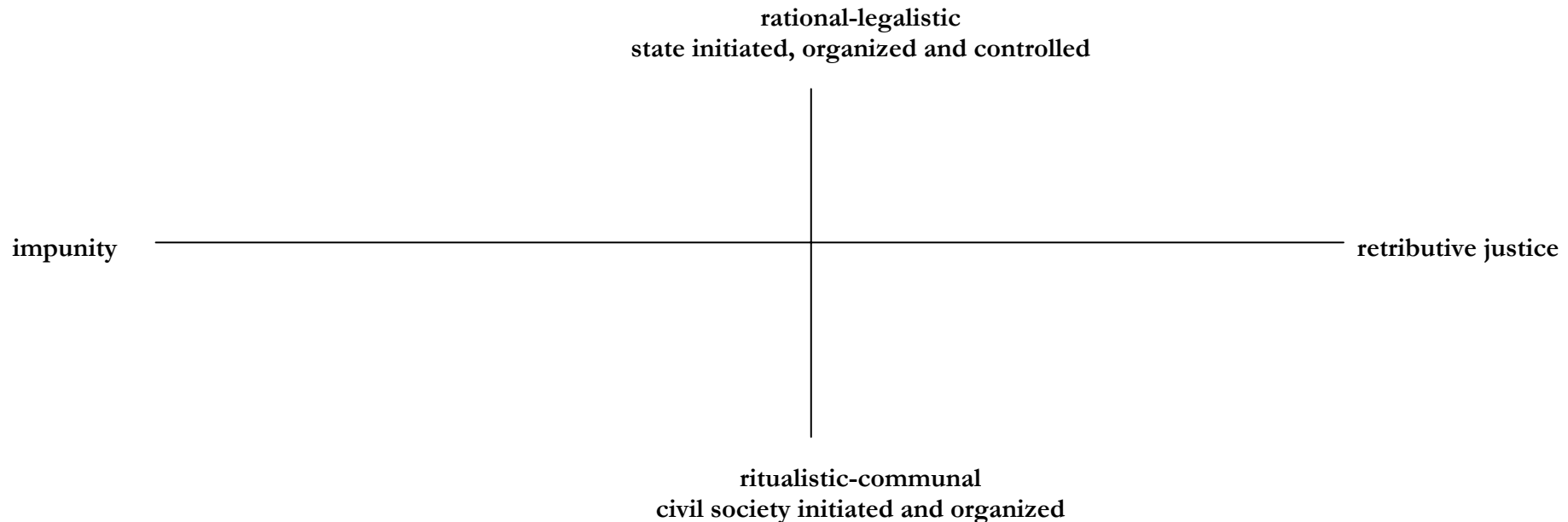
Transitional justice paradigms have moved from a de facto dichotomy (amnesty versus trials) to multiple conceptions of justice after transition. Diane Orentlicher, the United Nations' independent expert on combating impunity, recently wrote: 'Given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?' This shift has opened up ample space to discuss the role of tradition-based justice and reconciliation practices. At first, there was a great deal of myth making, of discussing 'invented traditions'. The mood changed as soon as the results of empirical studies started to circulate. Normative approaches are now gradually giving way to more realistic, empirically-based assessments of the current and potential role of these mechanisms within the broader policy framework of justice after transition. The ambition of this study was to develop even more realistic insights.

Do indigenous conflict resolution tools have an added value in times of transition? The answer is a cautious 'yes'. They are not sufficiently effective, and their legitimacy locally and internationally is not assured. The case studies have, however, demonstrated that tradition-based practices have the potential to produce a dividend in terms of the much-needed post-conflict accountability, truth telling and reconciliation that is not negligible. Some of the rituals, such as the cleansing ceremonies in Sierra Leone and northern Uganda, seem to be successful in reintegrating and reconciling surviving victims and ex-combatants, particularly former child soldiers. In Mozambique victims and offenders have used old models of healing and reconciliation to develop new rituals that are better suited to the actual post-conflict circumstances. Removing tradition-based practices from the transitional justice toolkit is thus not an option.

This view reminds us of the many challenges that await if local and international stakeholders in earnest want to adopt and adapt tradition-based practices in their dealing with the legacy of civil war, genocide and oppression. One of the challenges is the blending of various strategies of justice after transition. 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?

Let me summarize our findings by quoting one of the authors, James Latigo. He writes: 'Neither glorifying these local practices as the only cure nor relegating them to the realm of the devilish is helpful to people seeking assistance in their suffering. It is only prudent to acknowledge the positive potential of traditional rituals and beliefs, not as contradictory to or competing with other approaches but as complementary to them. To ignore or discard traditional ways that have been seen to work in the past makes no sense. On the other hand, they cannot provide the cure for all ills'.

## Mapping strategies in dealing with a legacy of war crimes, crimes against humanity, and genocide



This map creates an opportunity to localize transitional justice strategies in general, tradition-based justice and reconciliation practices in particular.

The **horizontal** axis deals with **substance**: namely, the relative presence of impunity/retributive justice.

**The vertical axis deals with form.** On the upper end are policies that are initiated, organized and controlled by (national or international) state institutions. The procedures are formal and rational-legalistic. The criminal court is the prototype the gold standard. At the lower end of the continuum are policies that are civil society-initiated and community-organized. They are predominantly informal and ritualistic. In the real world, however, post-conflict countries develop policies that are combinations of the various characteristics.

Transitional justice choices have, from the 1980's on, moved in a variety of ways. First, from state organized impunity to state organized trials. At the same time, there have been growing doubts about the use of strict, formal punishment and of state-dominated procedures. The centre of gravity has shifted from the courtroom to the hearing, from the judge to the local civil society leader or traditional healer, from a fixation on individual guilt to the search for societal patterns in atrocities, from legal retaliation to ritual reconciliation, from internationally driven retributive impulses to the full acknowledgement of the opportunities the local context offers. The current growing interest in tradition-based practices is a product of this shifts.

