



# TRANSITIONAL JUSTICE: CUSTOMARY AFRICAN PRACTICES

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*“Given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?” –Diane Orentlicher<sup>1</sup>*

At the turn of the century, The Stockholm International Peace Research Institute stated that “Africa is the most conflict ridden region of the World and the only region in which the number of armed conflicts is on the increase.”<sup>2</sup> In the fifteen years since, the statement remains true – despite an increase the number of in UN interventions to keep the peace and fundamental restructuring of the peacebuilding architecture in an effort to more effectively end conflict in Africa.<sup>3</sup> As a part of the changing UN approach to peacebuilding, increasing emphasis has been put on transitional justice as a tool to bridge peacekeeping and state-building. Stipulations for transitional justice are now often detailed in peace agreements; included as an essential first step of peacekeeping by enshrining the agreed-upon mechanisms in law; and/or emphasized in long-term peacebuilding being used to reinstate the rule of law and end cultures of impunity.

Transitional justice is a complex set of mechanisms and processes that allow post-conflict countries to come to terms with injustices committed during war. Countries emerging from conflict have widely differing histories, values, priorities, needs, and justice-seeking traditions; there is no template that can be formulaically applied to all countries after war. Transitional justice is therefore a somewhat vague term that is defined and adapted by each country, and may include tools such as national criminal trials, international criminal prosecutions, Truth and Reconciliation Commissions or reparations, for example. The job of the international community is to better understand what potential tools are in a country’s toolbox, and how each can be used to increase the chance of successfully transitioning out of conflict. In reality, there may be a multiplicity of methods that can be employed simultaneously or sequentially to meet different needs in society.

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<sup>1</sup> Luc Huyse, *Transitional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* 14 (Luc Huyse & Mark Salter eds., 2008).

<sup>2</sup> Paul Collier & Anke Hoeffler, *On the Incidence of Civil War in Africa*, 46 *The Journal of Conflict Resolution* 13 (2002).

<sup>3</sup> Two major changes were made in the peace architecture at the turn of the century. Security Council Resolution 1327 was adopted in 2000 in response to criticism regarding the ineffectiveness of UN interventions to keep the peace. The resolution set new guidelines for peacekeeping missions including establishing a clear mandate and timeframe, basing actions on verified intelligence and knowledge of the local context, and operating in line with legal requirements for peacekeeping. General Assembly Resolution 60/180 was adopted in 2005 creating the Peacebuilding Architecture which, among other tasks, files reports on programs promoting the Rule of Law through the Working Group on Lessons Learned.

Much can be learned from the various approaches to transitional justice taken by African nations after conflict, which do not fit the western model of transitional justice. These methods range broadly, from “participatory” criminal trials in Rwanda, highly localized cleansing ceremonies in Mozambique, healing customs for reconciliation in northern Uganda and national truth-seeking testimony in South Africa. Although these approaches vary widely, they all rely on “indigenous” (as opposed to western-centric) practices of dispute resolution and employ identity politics as an important justification for their use. While sometimes referred to in transitional justice literature as “traditional” approaches, this does not adequately capture the evolutionary nature of these practices that are not static, but draw upon traditions and adapt them to fit the current context. Instead, this category of transitional justice methods will be referred to in this paper as customary practices, for although this has some inaccurate connotations of being enshrined in customary law, the term more accurately describes the practices’ indigenous origins and the fact that they are currently employed in many communities.

The following paper will seek to understand what customary practices can be used in place of, or in complementarity with, more common classical approaches to transitional justice that will be described. What alternative methods have been used in African countries that drew upon historically indigenous practices of seeking justice? In what situations were they used, and were they adapted in some way to fit the contemporary scenario? What gap were they aiming to fill that classical methods of transitional justice could not satisfy? In what ways do international institutions (de-)legitimize customary practices, using international law? In cases where international and customary definitions of justice conflict, can customary practices survive in the current legal landscape? This paper will explore these questions in depth, referencing policy, cultural and legal works on transitional justice. First, the core principles at the heart of transitional justice efforts are defined, emphasizing the challenge of balancing truth, justice, and reconciliation in the schema of broader post-conflict policy. Second, existing international norms regarding transitional justice are explored, by analyzing international law regarding prosecution of war crimes. Third, we turn to customary practices in Africa, seeking to understand the objective of using customary practices and raise questions of how such approaches can be reconciled with international legal obligations. Finally, we look at several case studies of transitional justice in Africa; these are not representative of customary practices, but are referred to in the literature as cornerstone cases of alternative approaches to justice. Not intending to give an exhaustive review of the conflict or propagating normative praise or criticism of these approaches, these case studies are offered in order to illustrate how customary practices were structured in law and carried out in practice. Ultimately, by looking deeply at African experiences, it becomes clear that the narrow definition of

justice enshrined in international institutions does not adequately capture the complex challenges facing post-conflict societies that transitional justice seeks to redress.

## I. Principles of Transitional Justice

Historically, transitional justice has referred to the prosecution of crimes committed during war, based on principles of retributive justice.<sup>4</sup> Since the 1990s, however, a number of alternative approaches to post-conflict justice have received international recognition and acclaim.<sup>5</sup> These methods have relied upon principles of social reconciliation<sup>6</sup> and restorative justice<sup>7</sup>, and acted either in complementarity or substitution for criminal trials. The emergence of alternative forms of transitional justice has sparked fierce debate within international institutions about what transitional justice aims to achieve, and what international norms must be followed during the transitional process.

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<sup>4</sup> According to the International Center on Transitional Justice, “the investigation and prosecution of international crimes—including genocide, crimes against humanity and war crimes—is a fundamental component of transitional justice. It has roots in international legal obligations that can be traced back to the Nuremberg trials, and continue with the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Investigations and trials of powerful leaders (whether political or military) help strengthen the rule of law and send a strong signal that such crimes will not be tolerated in a rights-respecting society.” See *Transitional Justice Issues: Criminal Justice*, ICTJ.COM, <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited December 15, 2015)

<sup>5</sup> New attitudes towards transitional justice came about in the 1990s due to the changing nature of post-Cold War conflict, the ratification of the Rome Statute and creation of the International Criminal Court (ICC), and emergence of the first Truth and Reconciliation Commission (TRC) in South Africa. See Lydiah Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa*, ICTJ.COM (July 2006), [https://www.ictj.org/sites/default/files/ICTJ-Africa-Overpromised-Underdelivered-2006-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Africa-Overpromised-Underdelivered-2006-English_0.pdf).

<sup>6</sup> Reconciliation has been given varying definitions by different parties. In general, “Through a politics of reconciliation, people reconstitute themselves as citizens of a different society, one in which others matter, and are owed life chances too. It is on this lived commitment to a just and inclusive society that, ultimately, both political stability and the pursuit of justice depend.” See Francois du Bois, *Post-Conflict Justice and the Reconciliatory Paradigm: The South African Experience*, in 289 *Justice and Reconciliation in Post-Apartheid South Africa* (Francois du Bois & Antje du Bois-Pedain eds., 2008).

<sup>7</sup> Restorative justice, like punitive justice, “also focuses on redress, but it does so by viewing transgressions primarily as harm inflicted on human relationships and, secondarily, as violations of the law. Restorative justice seeks to hold offenders accountable to the victim and the community in order to restore harmony.... Situationally-appropriate punishments that could include apology, acknowledgement of the suffering of victims and their families, community service, and monetary compensation.” See Susan Opotow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, in *Post-Conflict Justice* (Cherif Bassiouni ed., 2002).

Transitional justice encompasses a set of mechanisms that a post-conflict country can use in “transforming themselves after a period of pervasive human rights abuse.”<sup>8</sup> Transitional regimes must confront competing needs in rectifying past injustices; balance must be found between punitive justice, social reconciliation, and truth-seeking. In determining what to prioritize, governments must do more than choose the option with the most popular support at home. They must answer to pressure from international bodies, victors and the defeated, criminals and victims, and strike a balance that is inclusive of needs across social and political cleavages. A highly complex decision, “viewing post-conflict choices as ‘punish or pardon’ is unduly narrow and has the potential to omit other situationally-appropriate options that can be utilized simultaneously or sequentially.”<sup>9</sup> Appropriate mechanisms must be identified and prioritized based on consideration of multifaceted needs.

In making this decision, policy-makers must understand the complex interplay between transitional justice and the broader post-conflict context. Transitional justice policies do not exist independently from other post-conflict recovery efforts, such as constitutional litigation, Demobilization, Disarmament and Reintegration (DDR), and resettlement of refugees and the internally displaced (IDPs), which happen simultaneously and influence the public perceptions of justice. Of most critical concern is the parallel constitution-writing process, which works in tandem with transitional justice policies to create a national narrative and reform institutions to promote peace, respect of human rights, and the rule of law. In some cases, such as the Interim Constitution of South Africa, transitional justice policies are outlined in this process and authority given to new bodies to implement the transitional justice initiatives. DDR policies, which provide incentives for ex-combatants to reintegrate into the peacetime economy and their former communities, may also affect initiatives for accountability, reconciliation, or reparations. In cases where a Truth and Reconciliation Committee (TRC) is established, DDR and the TRC are “basically two sides of the same coin” in dealing with relationships between perpetrators and victims.<sup>10</sup> The two must then be coordinated to reduce overlap and maximize complementarity. In

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<sup>8</sup> For a more complete definition, see *What is Transitional Justice?*, ICTJ.COM, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (last visited December 15, 2015).

<sup>9</sup> Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation in Post-Conflict Justice* (Cherif Bassiouni ed., 2002).

<sup>10</sup> The ICTJ noted the disfunctionality of DDR and Reconciliation in Sierra Leone, where they were not planned in coordination, yet answering similar questions: “Reconciliation is an answer to the question: After truth-telling, what next for the relationship between victims and perpetrators in society? Reintegration is an answer to the question: After demobilization of combatants, what next for the relationship between them and the unarmed who had been victims of their guns? Thus, both reintegration and reconciliation are about postwar relationships

situations where the prosecution of ex-combatants is pursued, however, DDR may be seen as a tool to identify criminals to be charged and undermine both policies if not properly coordinated.<sup>11</sup> And in transitional justice schemes that involve reparations to victims, providing monetary incentives to ex-combatants to disarm damages the reputation of such policies and may even diminish the funds available to victims.<sup>12</sup> The resettlement of refugees and IDPs must also be taken into consideration with transitional justice policies, as their exclusion may undermine efforts at reconciliation.<sup>13</sup> These three examples are telling but by no means an exhaustive list of important post-conflict policy; Security Sector Reform, establishing political parties and elections, new taxation and other economic policies, and yet other post-conflict initiatives have profound impacts on the needs for transitional justice and the effectiveness of agreed-upon mechanisms.

The history of conflict and national political institutions also shape the role and importance of transitional justice. The types of crimes committed during the war is an important consideration; instances involving war crimes and genocide change the needs for justice as compared crimes of systemic injustices under a former regime. The magnitude of the violence, whether isolated to a certain region or group of elites, or widespread across classes and ethnic groups, will also alter the needs for a formal, national policy or localized approach. And the conflict termination type, whether through military victory or negotiated settlement, will shape public perceptions of whether justice is being

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between individuals who were armed and perpetrated atrocities during the war and the individuals who were unarmed and suffered those atrocities.” Mohamed Gibril Sesay and Mohamed Suma, *Transitional Justice and DDR: The Case of Sierra Leone*, ICTJ.COM (June 2009), <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf>.

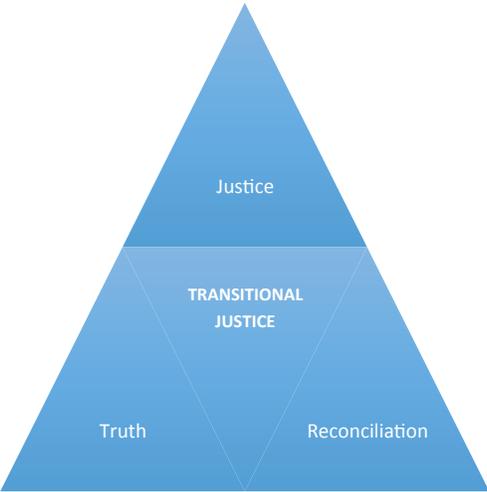
<sup>11</sup> The negative impact of accountability measures on efforts for reintegration are documented in Sierra Leone by the International Center for Transitional Justice: “In Sierra Leone, the disarmament, demobilization and reintegration (DDR) process and transitional justice initiatives occurred in temporal proximity. Disarmament and demobilization were largely successful in Sierra Leone. Some research suggests, however, that accountability measures had a negative impact on the reintegration of certain ex-combatants.” See Sesay, *supra* note 10.

<sup>12</sup> This was a complaint in Rwanda, according to research conducted by the International Center for Transitional Justice. “While Rwanda has gone further than any other post-conflict state in prosecuting lower-level perpetrators for mass atrocity, transitional justice mechanisms were deliberately kept separate from the DDR program. On one hand, DDR largely succeeded despite a firm policy against amnesty. On the other hand, ex-combatants have benefited from quite generous DDR packages; yet, there are no funds available for reparations to their victims.” See Lars Waldorf, *Transitional Justice and DDR: The Case of Rwanda*, ICTJ.COM (June 2009), <https://www.ictj.org/publication/transitional-justice-and-ddr-case-rwanda-case-study>.

<sup>13</sup> For example, community-based policies, such as the *gacaca* courts in Rwanda, must be mindful of the social and logistic implications of the movement of people. In Rwanda, the return of refugees to communities many years later posed a challenge for the courts, as they were not present during many of the atrocities committed; resettlement of the perpetrators to their “original” communities many years later was also a practical challenge.

served after the conflict. The involvement of international actors in ending the conflict as well as the strength of the winning party's political mandate affect the feasibility of implementing difficult or complex policies. Finally, the perception that civil war has a definitive start and end on a national scale is now questioned; in most post-Cold War conflicts, violence may continue in pockets of the country or in lower intensity.<sup>14</sup> Considerations in striking a balance between truth, justice and reconciliation must also now consider the impact that certain measures, particularly criminal trials, may have on fostering peace and democracy, or whether they raise the risk of conflict recurrence. Because peace agreements often stipulate the approach to transitional justice, including the rules regarding criminal prosecution, policy must also account for their impact on whether a ceasefire or peace agreement holds.

Ultimately, making a decision about the approach to transitional justice is a highly political act. It involves agreeing upon a national vision of the future of post-conflict society and who will control its implementation. "The goal has to be to find an appropriate balance between taking action against the abuses committed by the former regime, consolidating the new regime, and achieving reconciliation. At the same time, it must be remembered that there is no uniform or magic formula for deciding when prosecutions are appropriate. There are unique considerations in every country's transition."<sup>15</sup>



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<sup>14</sup> Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War*, 56 *Oxford Economic Papers* 563, 595 (2004) (defining civil war as 1,000 deaths per year).

<sup>15</sup> Jeremy Sarkin, *Carrots and sticks: The TRC and the South African Amnesty Process* (2004).

## II. Transitional Justice in International Law: Punitive Justice and Accountability

International law regarding transitional justice, while not explicitly defined, is deduced by drawing upon principles of punitive justice detailed in numerous conventions.<sup>16</sup> However, many of these principles were agreed upon outside of the post-conflict context, creating a disconnect between the needs of post-conflict countries and the “rules” set out by international bodies.

The classic example of a transitional justice mechanism, that of the Nuremburg trials, helps define what the concept means to many, mostly western, countries.<sup>17</sup> The Nuremburg trials after World War II sought to prosecute the most heinous war crimes at The Hague, using the new post-war international institutions. In retrospect, the trials have been criticized for typifying “victor’s justice”; allied countries also carried out war crimes, including carpet-bombing German cities and dropping the atomic bomb on Japan, yet were never prosecuted. Nevertheless, the philosophy behind post-World War II trials has laid the foundation of transitional justice policy at the United Nations for decades. Current interventions in post-conflict justice “have had a heavily legal character, often focusing more on retributive justice via formal courts and tribunals rather than other forms of justice. This ‘prosecution preference,’ under which anything short of Western-style courtroom justice is often seen as comprised justice, is seemingly hardwired into the DNA of mainstream transitional justice.”<sup>18</sup> The historical roots of western-style transitional justice in the post-World War II tribunals is of critical importance in understanding the motives underlying the ICC, ICTR, and other hybrid tribunals in Africa.

Criminal prosecution can be an important step in transitional administrations. For one, trials may allow for public condemnation of injustices perpetrated under a former regime. This may be

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<sup>16</sup> Sources of international law that can be applied to transitional justice are numerous, and generally have insisted upon criminal prosecution for international crimes. Principle 19 of the Updated Principles to Combat Impunity, the Genocide Convention, the Convention against Torture, the Inter-American Convention on Forced Disappearances of Persons, the Inter-American Convention on Torture, Protocol I of the 1949 Geneva Conventions, the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the ICCPR and the American Convention on Human Rights all include similar language against the deprivation of the right to life and provide right for a hearing before a competent tribunal for violations of rights, and in some cases require investigation leading to determination of guilt or innocence. See Christine Bell, Presentation at Building a Future on Peace and Justice: The ‘New Law’ of Transitional Justice (June 25, 2007).

<sup>17</sup> Bosire, *supra* note 5. Since the 1990s, there has been “an ‘entrenchment of the Nuremberg Model,’ particularly by the creation of the ICC as a permanent court to prosecute genocide, war crimes, and crimes against humanity.”

<sup>18</sup> Dustin Sharp, Comment, *Addressing Dilemmas of the Global and the Local in Transitional Justice*, 29 Emory International Law Review 72 (2014).

meaningful for victims and their families and give voice to vulnerable groups discriminated against in the past, restoring a part of their dignity through public recognition. Second, trials can contribute to the ending of a culture of impunity and support the re-establishment of the rule of law. National trials in particular can help to rebuild capacity and authority in the judicial sector, and spur the training of new judges and lawyers. By instilling confidence in the new regime to prosecute past crimes, this may in some cases even be a deterrent of future heinous crimes. In some cases, such as the establishment of a Special Court of Sierra Leone, the assistance of international actors in prosecution is requested to provide resources and accountability measures the State cannot provide. Finally, prosecution may be necessary to exclude these criminals from public office in future administrations and remove extremist elements from the political process.<sup>19</sup>

Yet the decision to criminally prosecute crimes committed during war is contentious, and literature in international law has been wary of outright denying post-conflict countries decision-making power in prosecution. This has led to inconsistencies and a lack of clarity when it comes to the legal obligation to prosecute crimes in a courtroom. A 2004 Security Council report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*<sup>20</sup> demonstrates the contradictions that post-conflict countries must navigate. On the one hand, the Security Council defines the concept of transitional justice broadly as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” This would seem to advocate for international support for a post-conflict country to implement any transitional justice regime it sees fit for its particular context, including conditional or blanket amnesty and truth-telling commissions. After all, “[the international community] must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations.”<sup>21</sup>

In the same report, however, the United Nations condemns any transitional justice approach that does not involve punitive justice for crimes committed during war. It is stated that the Security

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<sup>19</sup> U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* U.N. Doc. S/2004/616 (August 23, 2004).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Council should “reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that *no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.*”<sup>22</sup> Consider also the complementarity principle of the Rome Statute, that power is ceded to the ICC in cases where the state is “unwilling or unable” to prosecute under national jurisdictions.<sup>23</sup> In instances where local communities choose amnesty paired with restorative or alternative local practices of justice and reconciliation, would this be considered “unwilling or unable” under the Rome Statute? Is prosecution really the only legally acceptable method of administering justice? In answering in the affirmative, the UN undermines alternative measures of justice taken by African countries, denying them the flexibility that it may require to implement locally-owned solutions.<sup>24</sup>

Moreover, it is stated that the UN must “respect, incorporate by reference and apply international standards for fairness, due process and human rights in the administration of justice.” As will be seen in the case studies later in this paper, such international standards may go against the determined needs of the country in conflict with traditional reconciliation practices. For example, the Gacaca jurisdiction in Rwanda ran counter to many international standards for due process, including denying legal representation to the accused and promulgating verdicts by undertrained judges. By insisting on international standards for trials, the UN would bar traditional mechanisms that may better fit the national context.

It must be recognized that criminal trials may not promote justice in some countries. First, trials may simply not be feasible considering the caseload and the constraints of the judicial infrastructure in post-conflict countries. War also affects the judicial system, by reducing the capacity of the courts, law

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<sup>22</sup> Italics added. Far from a theoretical proclamation, the UN has gone so far as to reject local deals for amnesty in peace negotiations. For example, in Sierra Leone the Lomé peace deal extended “absolute and free pardon” to all armed factions for any crimes committed in the war, and agreed to “ensure that no official or judicial action” will be taken against them. However, “The Special Representative of the Secretary-General noted that the UN would not respect an amnesty given for crimes against humanity and war crimes, opening a way for the Special Court’s mandate to prosecute those who ‘bear the greatest responsibility for serious violations of international humanitarian law.’” See Bosire, *supra* note 5.

<sup>23</sup> Madeline Morris, *Lacking a Leviathan: The Quandaries of Peace and Accountability, in Post-Conflict Justice* (Cherif Bassiouni ed., 2002).

<sup>24</sup> *Id.*, at 140. “The ICC treaty seeks to make important headway in ensuring the accountability of perpetrators of genocide, war crimes, and crimes against humanity but does so at the cost of the democratic accountability of the ICC itself. Two fundamental values are in tension here – the human right to freedom from violent abuse, and the human right to representative government.”

offices, and the police, as well as by destroying correctional facilities or reducing resources available for detaining the accused in humane conditions. Lack of capacity also impacts the system's ability to investigate and collect evidence, which further reduces the probability of conviction in post-conflict trials.<sup>25</sup> International tribunals and hybrid courts, when used in place of weak state judicial institutions, suffer from their own capacity constraints<sup>26</sup>, of finance and local knowledge, and do little to support capacity-building of the national courts which they are used to circumvent.<sup>27</sup> Second, the balance of political power after a civil war may shift public perception around the ability of criminal trials to deliver justice. When a clear victor has emerged through the use of force, trials may be seen as victor's justice and be biased against the political opposition. This runs counter to democratic efforts, allowing the victor to steer public opinion against the losers and be exploited as an opportunity to consolidate power and exclude opposition groups.<sup>28</sup> Third, the public may simply prefer not to dwell on painful historical injustices and instead allocate financial and human resources towards building a future just state. There is little evidence to support the theory that prosecution necessarily deters future violence in the context of a civil war, and other non-judicial mechanisms may do this more effectively in some societies. Fourth, trials are perpetrator-oriented rather than victim-oriented, leaving victims to choose between being passive observers or undergoing character-questioning as a witness on the stand.<sup>29</sup> Fifth, stipulations regarding criminal procedures are often not left freely to the transitional administration, but are determined during the peace negotiation process. Requiring prosecution takes away an important bargaining chip used to end conflict by reducing the peace dividends for ex-combatants.<sup>30</sup>

Finally, individual prosecution may be necessary in some cases, but is an inadequate tool for addressing the societal implications of civil war. Intrastate war is not simply a collection of individual crimes; it is a destructive social movement in which individuals are faced with a choice to kill or be killed and side with one neighbor or another. Bringing criminal charges against an individual neglects the collective reality of war. "While international criminal courts have tended to focus on individual

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<sup>25</sup> Raymond McGrath, *Problems of Investigations into War Crimes and Crimes against Humanity During and After Ethnic Conflicts*, in *Post-Conflict Justice* (Cherif Bassiouni ed., 2002).

<sup>26</sup> The ICTR is largely seen as too expensive to be a solution for international prosecution in other instances, as it cost nearly two billion dollars to convict sixty-one people. See *Rwanda genocide court closes after 20 years and \$2bn*, MAIL & GUARDIAN (December 17, 2014), <http://mg.co.za/article/2014-12-17-rwandan-genocide-court-closes-after-20-years-and-2bn>.

<sup>27</sup> Addressing Dilemmas of the Global and the Local in Transitional Justice.

<sup>28</sup> Bosire, *supra* note 5.

<sup>29</sup> *Id.* For example, Ghana's NRC hearings required a victim to take oath and be cross-examined by the prosecution, who would question their character or dispute their version of events.

<sup>30</sup> *Supra* note 19.

perpetrators of atrocities, mass atrocity is by nature a collective engagement of individuals in behavior that seeks to harm others. Such courts may focus on the circumstances of individual decision-making but massacres and genocide in Africa often have expressed accumulated grievances that have accompanied socio-economic and political change.”<sup>31</sup> The collective nature of war also blurs the division between “victim” and “perpetrator” that courts must necessarily make.<sup>32</sup> For example, surely child soldiers, who have lost their social and familial network of support and must participate in the war economy for survival, can be considered both perpetrators of the acts of violence they committed as well as victims of the collective descent into war.<sup>33</sup>

Declaring that it is an obligation according to international law to prosecute crimes committed during war may do more harm to justice than good. If nothing else, it also feeds fuel to the complaint that the International Criminal Court and ad hoc tribunals are merely an echo of the colonial legacy, imposing western concepts and practices of justice on populations that don’t have the power to disagree.<sup>34</sup>

### III. Adopting Customary Practices: Social Reconciliation and Truth-Telling

Increasingly, the language in transitional justice literature has shifted in favor of including local communities and their customary dispute resolution methods into transitional justice policy, at least in rhetoric. In doing so, policy-makers accede that the African legal context can inform post-conflict policy and potentially improve its chance of success.<sup>35</sup> Specifically, in post-conflict African countries, the legal context of a dual system of common and customary law should inform transitional justice measures. With historical roots in colonialism, common law was written and enforced by the colonial government, while the customary law system allowed traditional leaders to handle local disputes as long as it passed the “repugnancy” test.<sup>36</sup> Since independence, some African constitutions have formally recognized the

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<sup>31</sup> Simeon Sungi, *Dealing with international crimes in Africa: when are indigenous justice systems better than criminal trials?* (2015).

<sup>32</sup> Bosire, *supra* note 5.

<sup>33</sup> Child soldiers are not persecuted for violence they have committed, which confirms the notion that an actor can be both a perpetrator of violence and a victim of war. For example, See Letter dated 31 January 2001 from the President of the Security Council addressed to the Secretary- General, UN Doc. S/2001/95 (stating that it would be “extremely unlikely that juvenile offenders will in fact come before the Special Court” in Sierra Leone).

<sup>34</sup> Sharp, *supra* note 18.

<sup>35</sup> Success here is referring to the ability of a policy to reduce the probability of conflict recurrence.

<sup>36</sup> This is specifically referring to South Africa, but other, particularly Anglophone, colonies had similar clauses. Repugnancy used to indicate that customary law would not be admitted “if repugnant to justice, morality, or good

contribution of customary law to the national body of law and legal norms, and replaced the repugnancy test with a constitutional review process for the alignment of common and customary law.<sup>37</sup> Yet the reality for citizens in many countries is that there remains a heavy reliance on local authorities, particularly for dispute settlement and issues that fall under family law, with limited access to common law institutions.<sup>38</sup> It is less surprising, then, that customary practices for dispute resolution have continued to thrive and be applied, especially in rural or peripheral regions.

When it comes to common methods of dispute resolution in Sub-Saharan Africa under customary practices, Penal Reform International has identified some shared characteristics including: community or group involvement, emphasis on social harmony and reconciliation, use of traditional authorities as arbitrators, flexible rules of evidence and procedure, a notable lack of legal representation, restorative penalties that are not enforced through state coercion but through social pressure, and ritualized reintegration.<sup>39</sup> Equipped with an understanding of legal culture and history, policy-makers in the transitional administration, if given the freedom to do so, may choose to incorporate these principles into transitional justice. Because transitional justice can contain elements of law, psychology, memory, politics, anthropology, and culture,<sup>40</sup> it is important to recognize that information local authorities may have in these fields can make a valuable contribution to restoring peace and justice in war-torn communities. The alignment of international interventions in transitional justice with local practices can have substantial benefits; as the UN Secretary-General in 2004, Kofi Annan, recognized that “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.”<sup>41</sup>

Reconciliation is a difficult process that, in order to be successful, must have the complete commitment of the local communities it seeks to engage. “Instead of viewing reconciliation as the end

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conscience.” See Marissa Herbst & Willemien du Plessis, *Customary Law v Common Law Marriages: A Hybrid Approach in South Africa*, 12 *Electronic Journal of Comparative Law* (May 2008).

<sup>37</sup> For example, South Africa’s Constitution notes that “the Courts must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law.” See S. Afr. Const., 1996.

<sup>38</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000).

<sup>39</sup> It is recognized that “ritual” is not unique to African legal systems; ritual elements are evident in modern and American courts as well, though to a different extent. Reintegration outside the post-conflict context refers to the reintegration of perpetrators into their communities. *Id.*

<sup>40</sup> Bosire, *supra* note 5.

<sup>41</sup> The question remains concerning what to do when these two things conflict, which will be considered later in this paper. See U.N. Secretary General, *supra* note 19.

of conflict, it is more accurate to view it as part of a conflict process.... Rather than a rosy conflict epilogue, reconciliation needs to be acknowledged as the difficult, elusive, and long-term conflictual and collaborative project that it is.”<sup>42</sup> By allowing local groups, including civil society, to participate in the process of designing and/or implementing reconciliation efforts, communities can take ownership and commit to sustaining the long and difficult process. Reconciliation may incorporate elements of customary dispute resolution such as prolonged discussion to reach communal consensus (*palabra* in many parts of West Africa) and to explore issues of accountability, truth-telling and/or reconciliation with more nuance than a centralized or formal setting could. Customary practices also provide room for non-state actors or informal authorities to be involved, such as religious leaders, cultural leaders, elders and civil society members. These actors have strong ties to local communities; through their engagement, justice initiatives have a chance of being deeply “owned” by the community and taking solid root.<sup>43</sup>

This is not to suggest that there are no drawbacks to local engagement; nor that there is no role for outside actors to reinstate stability and facilitate reconciliation. After all, in a war-torn society there has been a “profound breakdown in local political and normative structures and ordering.”<sup>44</sup> Deeply divided, complete local ownership may produce discriminatory policies or be unable to find peaceful remedies.<sup>45</sup> Yet this does not deny that local leaders have a role to play, and an important one at that. And if customary practices can “provide a reasonable way for some post-conflict societies to deal with the commonly overwhelming number of perpetrators of mass abuses and engender a degree of justice and reconciliation, can these approaches be designed so as to accommodate the international standards? Alternatively, should the international standards – such a valuable achievement – now recognize wider exceptions than currently stated to accommodate the exigencies of post-conflict traditional justice?”<sup>46</sup>

The answer may be both. For one, African countries have increasingly turned to using a number of other mechanisms, including customary practices, in *combination* with measures of punitive justice. The prevailing thought is that mixing techniques recognizes the uniqueness of each society emerging from conflict. By including customary practices, one acknowledges that local communities have an

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<sup>42</sup> Opotow, *supra* note 7.

<sup>43</sup> Sharp, *supra* note 18.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Neil J. Kritz. *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in 80 Post-Conflict Justice (Cherif Bassiouni, 2002).

important contribution to make in the control, process, and substance of transitional justice measures.<sup>47</sup> But rather than pitting global efforts and local practices in binary terms that compete for legitimacy, a combined approach places these two models at the extreme ends of a continuum. On 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”; and on the other end are “policies that are community-initiated and community-organized. They are predominantly informal and ritualistic-communal.”<sup>48</sup> In the middle lies a range of possible tools with opportunity for coordination between local and global parties. This more closely aligns with reality, in that some transitional justice policies may have global and localized elements, where different parties either exert control on the deciding the substance of the approach, directing its implementation, or carrying out the process. For example, the Gacaca courts, as we will see, allowed the state to exert control over a centralized, standardized procedure whose content had been expropriated from a local customary practice.

And second, international law is actually quite ambiguous when it comes to defining accountability and punishment, and what traditional practices are legally permissible. Certainly Article 17 of the Rome Statute frames the admissibility of a case to the ICC in terms of punitive justice, referring cases where “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>49</sup> Yet, “while standards on torture, genocide, and Geneva Conventions talk of ‘prosecution’, the main human rights standards do not mention a need for prosecution, and this seems to leave the investigation-only route open.”<sup>50</sup> Instead, principles of human rights talk of “punishment” and “accountability,” which does not wholly discredit alternative definitions than that of imprisonment. In such domestic contexts as described above that rely heavily on customary practices and definitions of justice, customary dispute resolution does deny impunity and hold perpetrators “accountable,” in different ways. For example, “the status of the Updated Principles on Impunity as principles rather than ‘law’, with their emphasis on the right to know, might also seem to suggest that ‘hard law’ leaves negotiators able to work with a ‘spectrum of accountability’ running from investigation through

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<sup>47</sup> Sharp, *supra* note 18.

<sup>48</sup> Luc Huyse, *Transitional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* 14 (Luc Huyse & Mark Salter eds., 2008).

<sup>49</sup> Rome Statute of the International Criminal Court, art. (X)(paragraph number), U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]

<sup>50</sup> Bell, *supra* note 16.

prosecution to punishment.”<sup>51</sup> This suggests that there is room in international law for customary practices even when punitive justice measures are not included in the transitional justice approach. Ambiguities remain, particularly around the prosecution of international crimes at a “low level” of responsibility or strategic decision-making power.<sup>52</sup>

#### IV. Case Studies of Transitional Justice in Africa

The case studies of South Africa, Rwanda and Mozambique allow us to move away from theoretical discussions of customary transitional justice and analyze the legal structures used to implement transitional justice in African countries. The following cases do not give a history of the conflict or elaborate the post-conflict context such as policies in DDR, reintegration of refugees and IDPs, Security Sector Reform, and others. Where appropriate, particularly in the case of South Africa, the parallel constitution-making process is referenced as transitional justice could not be isolated from constitutional juridical discussions.

Case studies are intended to illustrate the different forms customary practices in transitional justice can take at the national and local level. The legal instruments used (or not) by the national government and international community to legitimize these practices spark an important conversation about the value of non-judicial mechanisms of transitional justice and the “judicialization” of customary language and practices of dispute resolution.

#### SOUTH AFRICA

Following the downfall of the apartheid regime in South Africa, the new transitional government sought to find a “new form” of justice that would build upon indigenous South African values of shared humanity and compassion, and pave the way for an inclusive constitution and unified nation.<sup>53</sup> The Promotion of National Unity and Reconciliation Act of 1995 established the mandate of the Truth and Reconciliation Commission<sup>54</sup> and granted it certain extraordinary powers in order to fulfil its mandate. Broadly speaking, the TRC was established in order to complete four goals.

First, the Commission sought to document the “causes, nature and extent” of gross violations of human rights that occurred between March 1960 and May 1994. These violations are defined in the Act

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Andrea Lollini, *Constitutionalism and Transitional Justice in South Africa* 97 (Alexandra Tatiana Pollard trans., Berghahn Books, 2011).

<sup>54</sup> Hereinafter the Amnesty Law or the Commission.

as “the killing, abduction, torture or severe ill-treatment of any person” or “any attempt, conspiracy, incitement, instigation, command or procurement” to do so for political motives. By covering an extensive time horizon, the TRC sought to reach out to victims of systemic apartheid and begin to deal with the former regime’s atrocities more broadly than has historically been done. Within the TRC, the Human Rights Violations Committee (HRVC) was responsible for investigating gross violations, and compiled evidence and testimony in a National Data Base that could be cross-checked with other Committee’s work and establish connections between crimes. Certain evidence procured could be made available to the State for use in trial or other measures necessary for bringing justice.<sup>55</sup>

Second, the Commission facilitated the granting of conditional amnesty to those who voluntarily applied to the Committee on Amnesty (AC), which was established to review applications and approve or reject them. The use of public confessions was seen as a more effective way to glean facts about the past than a courtroom procedure; it was also used to symbolically denote a fresh beginning under a new democratic regime, as perpetrators had to choose to participate in the truth-telling process in order to be forgiven.<sup>56</sup> The confessions had to meet just two conditions to be granted: truthfulness, and full recognition of guilt. The second clause was the primary reason for rejecting an application, as many applicants would qualify their transgressions, claiming they acted in self-defense or placing larger blame on another entity.<sup>57</sup> The Amnesty Committee received approximately 7,000 applications for amnesty and granted just 1,160 of them.<sup>58</sup> The remaining rejected applicants are vulnerable to prosecution. It is also important to note that the applications were not representative of the demographics of the perpetrators. Just 293 applications were from former government security forces, none of them from high-level commanders. Among the rebel groups, SADF and IFP were the least represented, with 31 and 109 applications respectively, due to hostility in the upper echelons of the idea of “freedom fighters” admitting guilt to crimes they saw as necessary for their political achievements.<sup>59</sup> Conditional amnesty is a highly controversial policy, and was much debated in South Africa. In 1996, the Azanian People’s Organization brought a case forward to the Constitutional Court<sup>60</sup> challenging section 20(7) of the National Unity and Reconciliation Act, that which prevents criminal or civil liability of those granted

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<sup>55</sup> With the exception of self-incriminating and other AC testimony. See Sarkin, *supra* note 15.

<sup>56</sup> Lollini, *supra* note 53.

<sup>57</sup> *Id.* at p. 102.

<sup>58</sup> *Id.*

<sup>59</sup> Tyler Giannini, Susan Farbstain, Samantha Bent & Miles Jackson, Prosecuting Apartheid-Era Crimes?: A South African Dialogue on Justice (2009).

<sup>60</sup> *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC).

amnesty. The Court upheld this section, noting that reconciliation is a crucial component of reconstruction and was part of the negotiated settlement that brought the Constitution into being.<sup>61</sup>

Third, the TRC sought to “restore the human and civil dignity” of victims by engaging them in the process of truth-telling and by granting them reparations. As such, the Committee on Reparation and Rehabilitation (CRR) was established in the Act. This aimed to involve victims and family of the victims in a manner that trials could not; for them to bear witness to their persecutor’s confession and grant forgiveness for his acts. The TRC took testimony over the course of three years from over 21,000 victims, two thousand of which were broadcast publicly on television as an open invitation to communities to take part in the process and share in their suffering.<sup>62</sup> The CRR identified the stated victims and sought their involvement, distributed a small sum as interim reparations, and finally announced a lump sum amount that would be given to each of 19,000 identified victims. It also supported victims holistically through support services, such as access to psychological services and the erection of monuments and historical sites. In the end, each victim received \$3,400 in a one-time payment, which was considered by many to be insufficient to meet their needs of recurrent health expenses, job loss, and/or suffering from permanent disabilities as the result of acts of gross human rights violations.<sup>63</sup>

In order to carry out these functions, the TRC was given certain powers that set it apart from previous transitional justice systems. Investigation Units (IUs) used information gathered through the HRVC from victims and the AC from perpetrators for their investigations. They adopted some police powers, conducting searches, demanding documentation, and gaining special clearances. The Commission had the power to order a stay for pending criminal proceedings,<sup>64</sup> as well as power to subpoena, for which refusal to comply could lead to fine or imprisonment.<sup>65</sup> The purpose of the IUs was to gather evidence that could be used to substantiate amnesty claims and be used to convict perpetrators in criminal trials. The TRC was designed to operate in complementarity with a criminal judicial process, acting as an incentive for perpetrators to confess. In this sense, punitive powers of the

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<sup>61</sup> The judgment cites S. Afr. (Interim) Const., 1993. Disputes may be settled in the courts or an “other independent or impartial forum” and refers to the National Unity and Reconciliation Act as the “epilogue” to the Constitution to which this section is referring.

<sup>62</sup> Giannini, *supra* note 56.

<sup>63</sup> *Id.*

<sup>64</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 § 19(5) and (6) (S.Afr.).

<sup>65</sup> *Id.* at § 29.

state were not suspended but *postponed*, creating a temporary opportunity during the transitional period to renounce the former regime and its crimes.<sup>66</sup>

Fourth, the final report of the Commission was to provide detailed recommendations for the prevention of future violations and other necessary actions to complete goals one through three. The Final Report, published in 1998,<sup>67</sup> produced an extensive list of recommendations including steps for social unification and reconciliation, consolidation of democracy, and serving of justice. More specifically, the Final Report urges that prosecution should be pursued and “the granting of general amnesty in whatever guise should be resisted.”<sup>68</sup>

The Truth and Reconciliation Commission emerged from a unique South African context, and was a part of a process of reconstructing a new national narrative; it was but one piece of a larger political movement to codify the national myth into law and popular thought. The creation of this body was also a component of nation-building, and the principles underlying the TRC are also reflected in the interim and final constitutions. In these documents, the idea of the “Rainbow Nation,” played a prominent role; this phrase embodied the principles of the 1955 Freedom Charter, in which citizens of all colors would be granted equal rights, and referenced the historicity of the struggle for inclusive democracy. But the tenets of the Rainbow Nation needed to be rooted in law under the new regime, not just allegory. “The construction of the Rainbow Nation sprang from the need to symbolically define the post-apartheid political body and required clear legal and constitutional structures, which would become a characteristic of post-apartheid constitutionalism. There were numerous intricate constitutional rules and supervising bodies that endeavored to make the Rainbow Nation a legal reality... [Transitional justice] was extremely important to the post-apartheid political and constitutional order, and it appears to be a fundamental part of the constitution-making process in all countries that were formerly criminal states.”<sup>69</sup> While drafting the interim Constitution, during the Multi-Party Negotiation Process, the need for an “official version of the past” became clear; there needed to be a means to tie

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<sup>66</sup> Lollini, *supra* note 53.

<sup>67</sup> Two more volumes were produced in 2003 releasing public testimony and findings from each of the Commissions, but the 1998 report is still referred to as “the Final Report.” Regardless, the 2003 report reiterates this point, stating “it has always been understood that, where amnesty has not been applied for, it is incumbent upon the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law.” See 6 Truth and Reconciliation Commission of South Africa (TRC). 1998. *Truth and Reconciliation Commission of South Africa Report*. Oxford: Macmillan Reference, at 595.

<sup>68</sup> 5 Truth and Reconciliation Commission of South Africa (TRC). 1998. *Truth and Reconciliation Commission of South Africa Report*. Oxford: Macmillan Reference, at 305.

<sup>69</sup> Lollini, *supra* note 53.

together a heterogeneous society in common memory of past abuses. Without this foundation, it was thought that the new legal order would have no rational basis.<sup>70</sup>

The TRC was offered as a way to create this national myth and put the core principles of the new order into practice immediately. On principle, it demonstrated commitment to integration by granting conditional amnesty, or forgiveness, rather than rejecting and excluding criminals from the new society. Moreover, the TRC embodied the new democratic nature of the regime, in that amnesty was not automatically granted but rather must be solicited by a citizen engaging with the government and actively participating in reconciliation process.<sup>71</sup> And most importantly, the Constitution as well as the TRC specifically point to the concept of *Ubuntu* as a common value underpinning the Republic, making the TRC “another kind of justice” unique to Africa and rooted in indigenous culture and values. *Ubuntu* is a South African concept meaning a shared humanity, which is used to emphasize “a basic respect and compassion for others.”<sup>72</sup> According to Desmond Tutu, the TRC’s “central concern is not retribution or punishment but, in the spirit of *Ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships.”<sup>73</sup> In this sense, conditional amnesty facilitates *Ubuntu* in acknowledging the humanity in all South Africans, even in criminals, and emphasizing a common ground between victims and perpetrators on which they can communicate and reconcile. In the Final Report of the TRC, the importance of this process was emphasized: “This too is restorative justice. This too is the spirit of *Ubuntu*. The challenge to our society is to receive the successful amnesty applicants joyously as an integral and healthy part of our society. It is also to acknowledge the (former) victims as healthy individuals with their own roles and the capacity to manage themselves.” In doing so, the TRC seeks justice in a human form by restoring accountability to *society* rather than to the *state* for the crime.<sup>74</sup> By referencing *Ubuntu*, the South African approach to post-conflict justice claims to be uniquely African and an alternative traditional approach to transitional justice in start contrast to Western, retributive methods.

The South African TRC sought to fill a gap that punitive justice could not fill, a gap that existed because of the post-conflict context. South African lawmakers constantly referenced the different challenges that a post-conflict country faces, in needing to rebuild the fabric of social trust and the

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<sup>70</sup> *Id.*

<sup>71</sup> Du Bois, *supra* note 6.

<sup>72</sup> Dirk Louw, *The African Concept of Ubuntu and Restorative Justice in Handbook of Restorative Justice: A Global Perspective* (Dennis Sullivan et al. eds., 2006).

<sup>73</sup> *Id.*

<sup>74</sup> Opotow, *supra* note 9.

integrity of institutions. In the triangle of transitional justice, the TRC sought to emphasize balance between truth, justice, and reconciliation and postpone punitive justice until society would be able to accept and embrace a court's judgment. However, twenty years after the end of the apartheid regime, many South Africans are concerned that trials have not yet materialized. Several high-profile cases have come to Court, but the most widely followed trials were unable to convict the perpetrators.<sup>75</sup> Nevertheless, many still call for a renewed effort to try perpetrators, for justice to be brought to victims and to attempt to rectify structural inequalities under apartheid.<sup>76</sup> Moreover, trials must still take place as stated in the Constitution. "The Constitution and Constitutional Court decisions make clear that the State is still required to uphold its obligations under customary international law and to take all reasonable steps to prosecute perpetrators who did not receive amnesty... [otherwise it would] violate not only South Africa's international legal obligations but also the legacy of the TRC."<sup>77</sup> In this way, the South African approach did not reject international obligations for punitive justice, but sought to find a complementary mechanism for reconciliation that was rooted in customary principles and implemented on a national scale.

## RWANDA

Rwanda in 1994 faced a vastly different post-conflict context than South Africa, and established its own unique mechanism in response. Without going into the details of the conflict, which are well-recorded and beyond the scope of this paper, the Rwandan genocide tore apart the country along ethnic lines, obliterated political structures and the rule of law, and drained the country of qualified legal professionals. The challenge facing the new transitional government, under the wartime victor Paul Kagame, was enormous. Rwandan society largely agreed upon the need to end impunity in order to

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<sup>75</sup> Jeremy Sarkin & Howard Varney, *Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial*, 10 South African Journal of Criminal Justice 141 (1997) (In one trial, Magnus Malan, the former Minister of Defense, was accused of murdering thirteen people in the KwaMakhutha massacre in 1987. His seven-month trial in 1995-96 raised racial tensions, and his eventual acquittal is seen as a failure of the trial process.).

John Ryan, *Apartheid's Legal Legacy*, 12 Law Dragon 38 (2011) (In a separate case, Dr. Wouter Basson was brought to court on sixty-seven charges for his involvement in a chemical weapons program that was allegedly used against anti-apartheid activists, with charges including 229 murders. After a thirty-month trial ending in 2002 in which the only witness Basson called was himself, all charges were dismissed. This was a great source of frustration, as illustrated by Desmond Tutu, who pointed to the case to show "how inadequate the criminal justice system can be in exposing the full truth" and "how unsuccessful prosecutions lead to bitterness and frustration within the community.").

<sup>76</sup> Giannini, *supra* note 56.

<sup>77</sup> *Supra* note 65.

restore security and the rule of law, and this meant strict punitive justice for any individual who committed a crime during the war. It was feared that failure to try criminals, who had committed gruesome atrocities against their own neighbors and communities, would do nothing to change the genocidal mentality that had gripped the country or to restore dignity to the families of the victims. Moreover, it was believed that trials would individualize the responsibility for the crimes that were committed, avoiding the demonization of an entire ethnic group and holding members from both Tutsi and Hutu ethnic groups equally accountable for the same crimes. As a result, Rwandan society strongly believed in the need for retributive justice in the transition before reconciliation and reconstruction could occur.<sup>78</sup>

However, the capacity of the judicial system could not meet the needs of society. While the scale of crimes was vast, the judicial infrastructure was completely dismantled during the war.<sup>79</sup> Despite this, Rwanda began trying its 100,000 detainees in the courts. Between 1994 and 2003, the courts delivered judgments for just nine thousand cases, meaning that statistically it would have taken over one hundred years to try all of the detained criminals. In the meantime, those arrested remained incarcerated without trial in deplorable prison conditions.<sup>80</sup> The dramatic human rights consequences of this situation threatened to negate the very principles that trials were intended to restore. But how could the new transitional government deliver justice after the genocide, if the courts were unable to do so?

In searching for a solution, Rwanda turned to a traditional mechanism of adjudication to fill the gap that the courts could not meet. *Gacaca* had previously referred to a traditional practice of dispute settlement at a village level, usually for issues of a customary nature such as family or marriage disputes. In the traditional *gacaca*, a village leader would bring together the disputing parties and attempt to reconcile their differences in an informal manner in which both parties and other community members

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<sup>78</sup> Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 *Journal of African Law* 143, 143-172 (2001).

<sup>79</sup> Brain drain was so extreme that only five judges could be identified nationwide after the war, and offices of the prosecution and the courts were looted of all their administrative materials. See Elvis B. Mbembe, *Rwanda's Gacaca Courts: How to Deal with Widespread and Massive Crimes*, 62 *Ars Aequi* 198 (2013).

<sup>80</sup> Reports from the Organization of African Unity, the United Nations High Commissioner for Refugees and Amnesty International detail the extent of human rights violations in the detention of the accused, including evidence of torture, ill-treatment, overcrowding, and insufficient food and medical care, leading to the death of an estimated 3,300 prisoners. See Sarkin, *supra* note 78 at p. 156 for excerpts from these reports.

could speak and share their side of the story.<sup>81</sup> The transitional government then co-opted this traditional concept in 2001 and adapted it to the post-conflict need to try perpetrators of the genocide. Devolving trials to the community level was justified by citing the community-based nature of the genocide, in which multiple individuals teamed up to commit atrocities, often against neighbors. The cited offenses “were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators.”<sup>82</sup> Therefore the new Gacaca Jurisdiction aimed to find a populist solution to a populist war, and to instill trust in a decentralized process that would be less subject to government bias and corruption.<sup>83</sup> Under Law 40 of Rwanda, an elaborate system transformed the traditional *gacaca* forum into a state-led, highly structured, formal mechanism for trying crimes committed between October 1990 and December 1994.<sup>84</sup>

The rules for the Gacaca Tribunals were a far cry from the traditional system, which had many localized versions and alternative histories. Divided along existing administrative boundaries, each community elected judges (*inyangamugayo*<sup>85</sup>) to the lowest cell-level, amounting to 255,000 individuals, who then received limited training. These judges needed no formal legal background, assuming instead that justice could be “based on the wisdom of basic principles of social justice.”<sup>86</sup> Elected judges had to meet very few requirements, of which literacy was not one of them.<sup>87</sup> These judges at the cell level had jurisdiction over “category four” crimes, and selected representatives among them to join at the sector level for “category three” crimes and the district level for “category two” crimes.<sup>88</sup> The general assembly at the cell level involved all the adult inhabitants of the community, who

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<sup>81</sup> Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. Int'l L. & Pol. 355 (2002).

<sup>82</sup> Organic Law 40, 26 January 2001, Setting Up “Gacaca Jurisdictions” and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between October 1, 1990 and December 31, 1994 (Rwa.).

<sup>83</sup> Daly, *supra* note 81.

<sup>84</sup> *Supra* note 82.

<sup>85</sup> Sarkin, *supra* note 78.

<sup>86</sup> *Supra* note 82.

<sup>87</sup> “They must be people of integrity, honesty, and good conduct who have never been sentenced to more than six months in prison and are above suspicion of involvement in genocide or crimes against humanity. They must be ‘free of sectarian and discriminatory attitudes’ and known for a spirit of encouraging dialogue.” *Id.*

<sup>88</sup> “Category 1 offenders, who are not subject to gacaca jurisdiction, are the planners, organizers, instigators, supervisors, and leaders of the crime of genocide or of a crime against humanity; persons who acted in positions of authority at the national, Prefectorial, Communal, Sector or Cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes; notorious murderers who by virtue of

faced mandatory attendance.<sup>89</sup> These attendees were then called upon to testify as witnesses, after the defendant presented his or her own defense without the support of legal representation.<sup>90</sup> The judge and any community members could also pose questions to the defendant, who was obliged to respond.<sup>91</sup> Sentencing rules were then delivered, with minimums and maximums set by the central government for each set of crimes, with admission of guilt lowering the sentencing requirements.<sup>92</sup> When the gacaca courts closed in 2012, they had heard and tried nearly two million cases, with only fourteen percent of the accused being acquitted.<sup>93</sup>

In addition to the gacaca courts, the international community established the International Criminal Tribunal of Rwanda (ICTR) in Arusha, Tanzania in 1994.<sup>94</sup> With jurisdiction over genocide, war crimes, and crimes against humanity,<sup>95</sup> the ICTR was intended to ensure that those who had committed the worst atrocities, Category 1 crimes, would be held accountable under international standards, and relieve pressure on the Rwandan government to prosecute these war criminals. However, this process was incredibly slow; as of the end of 2014 just ninety-five individuals had been indicted, and only fifty-five were convicted and are serving (or have served) prison sentences.<sup>96</sup> It was also perceived by Rwandan society to be too far removed from local realities and victims' needs for prosecution. Although ringleaders were responsible for manipulating the population at large into committing war crimes, the ICTR did not prosecute the individuals responsible for carrying out the crimes, and therefore did not fully address issues of impunity.<sup>97</sup> Moreover, the ICTR was held outside of Rwanda and many Rwandans did not know about or approve of the trials, far from their communities. Despite an outreach effort by the ICTR, this did not change the fact that "this judgment takes place in an international tribunal that has

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the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; and Persons who committed acts of sexual torture or violence." Those who committed murder or acts that lead to death are in category 2 (Id. art.2), and are subject to life imprisonment (Id. art. 14b). Category 3 covers those who caused non-fatal bodily injury; and category 4 relates to those who committed crimes against property. *Id.*

<sup>89</sup> "The duty to testify is a moral obligation, nobody having the right to get out of it for whatever reason it may be... Any person who omits or refuses to testify on what he/she has seen or on what he/she knows, or who makes a false or slanderous denunciation, is prosecuted by the "Gacaca Jurisdiction" which makes a statement on it." *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Mbembe, *supra* note 78.

<sup>94</sup> S.C. Res. 955 (Nov. 8, 1994).

<sup>95</sup> Defined as violations of Common Article Three and Additional Protocol II of the Geneva Conventions.

<sup>96</sup> Mbembe, *supra* note 78.

<sup>97</sup> *Id.*

primacy over national proceedings within Rwanda, the very creation of which was opposed by the Rwandan government in the first place. It also does not change the fact that defendants found guilty by the ICTR will serve their sentences outside of Rwanda in conditions far superior to that of anyone found guilty on similar charges by Rwanda's national courts."<sup>98</sup>

The principles underpinning the gacaca courts – individual responsibility, community participation, the role of pre-colonial traditions, and the rule of law, among others – were also enshrined in the 2003 Constitution of Rwanda, and immediately stated in the preamble. The first line of the preamble recognizes the 1994 genocide as the core common history of the Banyarwanda people and vilifies the perpetrators.<sup>99</sup> Re-establishment of the law and respect of human rights appears in section six.<sup>100</sup> Recognition of Rwandan tradition and history as the basis for future nation-building is proclaimed in section eight.<sup>101</sup> Principles of communal civic engagement that characterized the gacaca courts are also found in the section twelve, whereby Rwanda shall be governed by laws “comprising ideas expressed by Rwandans themselves.” Moreover, rather than taking a tone of inclusivity and reconciliation that characterized the South African constitution, the Rwandan contract explicitly denies the any propagation of racial or ethnic language, asserting it may further divide Rwandan society, whether it is in a political party or otherwise, and such conduct is punishable by law.<sup>102</sup> In this sense, perpetrators are officially condemned, and excluded from the future political process and Rwandan society.

The gacaca courts have been subject to sharp criticism from many western academics for the lack of procedural justice as the West defines it. The implementation of the gacaca courts was certainly problematic, and involved a somewhat hackneyed imitation of traditional *gacaca*; the formal and centralized rules, forced “villagization” (*imidugudu*) of rural communities for the purposes of the gacaca trials, disengagement over time of participants obliged to attend, exclusion of returned refugees from the process, and relative impunity of RPF politicians in power all warrant close scrutiny.<sup>103</sup> More

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<sup>98</sup> Sharp, *supra* note 18.

<sup>99</sup> Constitution May 16, 2003, art. 1 (Rwanda). “We the People of Rwanda, in the wake of the genocide that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda.”

<sup>100</sup> “Resolved to build a State governed by the rule of law, based on respect for fundamental human rights, pluralistic democracy, equitable power sharing, tolerance and resolution of issues through dialogue.” *Id.* at art. 6.

<sup>101</sup> “Considering that it is necessary to draw from our centuries-old history the positive values which characterized our ancestors that must be the basis for the existence and flourishing of our Nation.” *Id.* at art. 7.

<sup>102</sup> *Id.* at art. 1 & 54.

<sup>103</sup> Daly, *supra* note 81.

compelling on a higher theoretical level is the criticism that the gacaca approach placed too much emphasis on punitive justice and underemphasized truth and reconciliation in such a sensitive post-conflict environment.<sup>104</sup> Gacaca trials may inhibit the revelation of truth; perhaps they may be too easily manipulated by a zealous audience or quieted by a restrained one. Moreover, the gacaca made no pretense of intending to facilitate reconciliation, even possibly furthering hostility within communities by decentralizing the trials to such a great extent. Instead, reconciliation was delayed and dealt with by separate institutional bodies. The National Unity and Reconciliation Commission was established in 1999<sup>105</sup> and reaffirmed in Article 178 of the Rwandan Constitution. The Commission proposed legislation, adopted in May 2007, for Unity and Reconciliation that aims to take preliminary steps to understand appropriate measures for reconciliation. For example, the National Policy promotes civic education for peace and conflict management, and strives to create a culture of peace, rule of law, and respect for human rights.<sup>106</sup> Law 9 of 2007 established the National Commission for the Fight Against Genocide, which annually reports to Parliament on such actions as advocacy for survivors, maintenance of memorial sites and budget issues.<sup>107</sup> And finally, the National Commission for Human Rights was established in the Constitution and given powers for the protection of human rights. Such powers include receiving testimony of violations, to collect evidence in pursuing any allegations, and to request the appropriate institution to bring violators to justice.<sup>108</sup> Therefore although gacaca courts did not themselves attempt to address issues of reconciliation, instead focusing on punitive justice, other mechanisms were used sequentially to confront rehabilitation.

## MOZAMBIQUE

Mozambique offers yet another, vastly different, example of ways that customary practices can be adopted and integrated into transitional justice strategies. The methods employed by communities in the Gorongosa region of central Mozambique indeed raise interesting questions about the role of local populations in the transitional justice process and ways that socio-cultural studies can influence transitional justice in a way that legal processes cannot.

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<sup>104</sup> Sarkin, *supra* note 78.

<sup>105</sup> Law 3, 12 March 1999, Establishing the National Unity and Reconciliation Commission (Rwanda).

<sup>106</sup> National Unity and Reconciliation Commission, *Monitoring Strategies and Tools of Unity and Reconciliation within Institutions Based in Rwanda* (2015).

<sup>107</sup> Law 9, 16 February 2007, Loi portant attributions, organisation et fonctionnement de la Commission Nationale de Lutte contre le Génocide (Rwanda).

<sup>108</sup> Constitution May 16, 2003, art. 177 (Rwanda). Law 19, 25 March 2013, Determining Mission, Organization and Functioning of the National Commission for Human Rights.

The government of Mozambique concluded peace negotiations following a decades-long civil war on October 4, 1994.<sup>109</sup> The General Peace Agreement, however, did not provide any clarity on critical political issues, including the approach to transitional justice. No provisions were stipulated for a truth commission, criminal trials, or other means of bringing justice to the thousands of victims affected by the civil war.<sup>110</sup> No debate occurred in government, nor by leading journalists, intellectuals, and civil society leaders, about the best way forward for justice and reconciliation.<sup>111</sup> Just ten days after signing the agreement, the national legislature passed an Amnesty Law in the middle of the night, behind closed doors.<sup>112</sup> Following the passage of the Amnesty Law, one Member of Parliament stated that it simply “erases the past so that we can move a step ahead.”<sup>113</sup> Again, no public demands for apology were made, and no statement acknowledging the suffering of the victims was made by the President in announcing the law.<sup>114</sup> Over the next few years, while issues dealing with instruments of political power were openly dealt with, including drafting of a constitution and establishing a new legal system, opportunities for post-conflict justice for war-torn communities in Mozambique was ignored.<sup>115</sup> One of the few studies during this time stated that “fair trials in Mozambique would be very difficult... the crimes were too numerous to count... It would be simply impossible to fairly document the totality of what happened... If people started pointing fingers, they would be pointing too close to home... There was a palpable sense that if you talked about the war... it might come back.”<sup>116</sup>

Upon deeper analysis, however, initiation of the social reconciliation process *was* taking place, in different ways at the national and local levels. In national government, the two sides of the conflict, transformed into political parties, engaged in heated debates over questions of legitimacy of participation in government and responsibility for the violence perpetrated in the war. While such discussion may foster the back-and-forth debate that is necessary for a healthy democracy, the arguments at times took on a tone of blame and aggression. Victor Igreja conducted an analysis of political debates immediately after the passage of the Amnesty Law and found that, “The problem was

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<sup>109</sup> Victor Igreja, *Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique*, 9 *International Journal of Transitional Justice* 239, 239-258 (2015).

<sup>110</sup> *Id.*

<sup>111</sup> Huyse, *supra* note 48, at p. 63.

<sup>112</sup> *Id.* Law 15, October 14, 1992 (Moz.). hereinafter The Amnesty Law.

<sup>113</sup> Sergio Vieira, 10 October 1992, Library of National Parliament (Moz.).

<sup>114</sup> Igreja, *supra* note 109.

<sup>115</sup> Vicotr Igreja, *Multiple Temporalities in Indigenous Justice and Healing Practices in Mozambique*, 1 *International Journal of Transitional Justice* 1, 1-19 (2012).

<sup>116</sup> Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 189 (2001).

not the form but the content of the debates, whereby both parties considered abhorrent the idea of mutual attribution of legitimacy and the right to be in the parliament deciding on the country's future... Political relations featured Frelimo and Renamo members of parliament hurling haunting accusations of human rights violations and crimes committed in the civil war, as well as the continuing use of violence to enforce political legitimacy."<sup>117</sup> Without an appropriate forum for meaningful discussion, Parliament was largely paralyzed in its governing capacity for the years to come.<sup>118</sup> Yet this is not to suggest that provisions for amnesty had the same affect among elites and local communities, or that amnesty would necessarily produce the same effects in other country contexts.

Local communities experienced very different consequences resulting from the Amnesty Law. The immediate result of the law was the release of about five hundred prisoners, and dropping of charges of many more.<sup>119</sup> These perpetrators then returned to their communities, where they had to live side by side with their victims and families of victims, in the same villages where egregious crimes were committed.<sup>120</sup> In order to cope with this reality, new local rituals emerged that drew upon an historical tradition of "healers" that channeled spirits of the dead from the war and allowed them to confront past crimes. "Social forces in the country dealt with war experiences in more dynamic ways by moving backwards and forwards in time through spirits, as well as involving new dimensions of time and experience that escaped rigid notions of transitions and enabled local forms of peace and justice."<sup>121</sup>

The use of local healers, or *magamba* healers referring to the name of the new spirits emerging from the casualties of war, was widely accepted; reports have even been made of community courts that enjoined claimants to *magamba* healers by referring cases to the Mozambican Association of Traditional Medical Practitioners.<sup>122</sup> Moreover, the healers in delivering their instructions did not use the traditional rhetoric for healing but used legalized terms in the local language such as to "judge," "interrogate," and "confess" to demonstrate the authority in their judgments.<sup>123</sup>

The ritual associated with *magamba* healing was a collective ceremony that facilitated reconciliation and reintegration for communities affected by the civil war. In a typical ceremony, the healer would come during the night to the "patient's" home beating a drum and drawing neighbors to

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<sup>117</sup> Igreja, *supra* note 109.

<sup>118</sup> *Id.*

<sup>119</sup> Huyse, *supra* note 48, at p. 63.

<sup>120</sup> *Id.*

<sup>121</sup> Igreja, *supra* note 115.

<sup>122</sup> Huyse, *supra* note 48, at p. 63.

<sup>123</sup> *Id.*

join; the families of the victim and the accused himself would be pressured to attend. The participants would then sing songs from the war while the healer violently reenacted events from the civil war using a bayonet, triggering an emotional reaction in the victim who would enter a state of “possession.” The patient, then possessed, would recount his story from the perspective of the spirit possessing him, who was often a perpetrator of a violent act during the war. Following his telling, the *magamba* healer would close the session by giving strict instructions to the patient and anyone involved in the crime recounted in the spirit’s story.<sup>124</sup>

The *magamba* healing rituals opened up public space for grappling with the everyday realities of wartime in local Gorongosa communities in Mozambique, and mobilized social reconciliation on a local level. Addressing gray areas that are typically ignored in formalized state procedures allowed communities to process the horrors they took part in. For example, that the spirit was typically a *perpetrator* of violence coming back as a victim illustrates the inaccuracy of labeling people either one or the other in the context of war. This duality reflects “the profound contradictions of surviving a civil war at the very epicentre of where the war was fought. These contradictions bespeak that actions for post-war reparation cannot be driven by fixed categories— ‘perpetrator’, ‘victim’, ‘bystander’, ‘coward’ and so on. Surviving a protracted war compels the survivors to acknowledge the extreme plasticity of personal identities at the time of the war and the consequent recognition of the need for flexibility in post-war conceptualizations.”<sup>125</sup> To bring such perpetrator into the court of law, then, and judged for his deeds, may not fit with some Mozambique communities’ conceptualization of justice after war.

The case of Mozambique calls to question what the role of transitional justice is on a local, human level for the people involved in wartime atrocities. After all, very few “low level” actors will ever be taken to trial, nor will all victim’s experiences be dealt with in a formalized TRC. And while it would not be feasible for these localized practices to be scaled up to a national level, or for practices such as *magamba* to be applied to other contexts, they still played a meaningful role in the lives of victims in those communities. In what ways can national government and international actors support localized processes of reconciliation, without coopting or disrupting them? What value can be placed on local reconciliation in broader transitional justice policy? What value can be placed on other symbolic rituals associated with collective memory and experience, such as memorialization?

The Mozambique case has also been frequently cited in contemporary literature on transitional justice, in which a new wave of theory is emerging. Increasingly, researchers and academics have

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<sup>124</sup> *Id.* For more detailed examples of *magamba* healing sessions, see Igreja, *supra* note 115.

<sup>125</sup> *Id.*

pointed out the lack of empirical evidence of a positive impact of classic transitional justice schemes on either individual beliefs that justice has been delivered, or on national peace and stability in the long-term.<sup>126</sup> In response, a growing body of scholarship has emerged on the potential for local practices to foster a culture of peace in post-conflict communities, predicated on the belief that “people possess the social tools to correct the moral disintegration caused by the war and, what is more, actively strive to recreate moral order.”<sup>127</sup> Scholars in this school of thought call into question the universality of justice, and note the contribution of social and cultural factors in shaping a society’s accepted definition of a just response:

“It is not the state (or international community) that ‘brings’ justice to people, but people that shape the process of state formation and legitimacy with respect to justice issues. If the goals of transitional justice are peace, democracy, and reconciliation, then the study of social processes that order morality and relationships among persons located in the day-to-day is warranted. Justice is not a thing in and of itself, delivered by specific institutional mechanisms at the international, national, or local level.... Rather, justice is a social project among many others, and the study of justice should include the various strategies employed by the war-affected population to deal with the legacies of mass violence.”<sup>128</sup>

Yet transitional justice approaches still largely neglect the sociological, cultural, and political aspects of justice, instead concerned with “legally bound conceptions of justice: punishment and prevention by ending impunity and satisfying the victim’s need for justice.”<sup>129</sup> If justice is not a universalism, a strict definition of justice as punitive in post-conflict contexts will continue to fail in places where this does not align with local reality. Can the international community reimagine the definition of justice as a locally-owned concept, and not one that imitates western institutions, such as courtrooms? Is there room for relativism in international norms of transitional justice?

## CONCLUSION

In exploring issues of truth, justice and reconciliation in transitional justice at the international, national, and local levels, practitioners have much to learn from African customary practices. The judicial

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<sup>126</sup> Lauren M. Balasco, *The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice*, 12 J. of Human Rts. 198, 198-216 (2013).

<sup>127</sup> Erin Baines, *Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice*, 109 African Affairs 409, 209-430 (2010).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

and non-judicial mechanisms employed in these various contexts all drew upon identity politics by referencing the “African” values represented in the chosen customary practices. This reinforces a new body of transitional justice theory that questions the ability of the international community to enforce universal conditions for justice and accountability. Many ambiguities remain concerning the legality of customary practices of transitional justice when they do not involve investigation and prosecution or do not follow international norms for due process. These questions should be more deeply examined by international legal scholars, as well as researchers in the field of sociology, ethnography, and comparative political theory to more appropriately define concepts such as justice, reconciliation, and accountability.