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Centre for the Study of
Violence and Reconciliation

POLICY BRIEF: TRADITIONAL TRANSITIONAL JUSTICE MECHANISMS – LESSONS FROM AFRICA

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Centre for the Study of Violence and Reconciliation

The Centre for the Study of Violence and Reconciliation (CSVR) is an independent nongovernmental organisation established in South Africa in 1989. We are a multi-disciplinary institute that seeks to understand and prevent violence, heal its effects and build sustainable peace at community, national and regional levels. We do this through collaborating with, and learning from, the lived and diverse experiences of communities affected by violence and conflict. Through our research, interventions and advocacy we seek to enhance state accountability, promote gender equality and build social cohesion, integration and active citizenship. While primarily based in South Africa, we work across the African continent through collaborations with community, civil society, state and international partners.

Comparative Study of Transitional Justice in Africa

This publication is one of the outputs of the Comparative Study of Transitional Justice in Africa. The study presents a comparative analysis of 12 African countries where transitional justice mechanisms have been implemented. Mapping the range of processes in this field, the study pays particular attention to transitional justice mechanisms employed between 1990 and 2011 to deepen understandings of how these processes were developed, and the role of their respective contributions to the prevention or recurrence of war and repression. Specifically, the study examines the factors that shaped state policy decisions in framing the diverse set of responses to dealing with legacies of dictatorship, civil war, and mass human rights abuses, and assesses the consequences of these decisions for achieving sustainable peace and preventing future human rights abuses. <https://www.csvr.org.za/african-transitional-justice-comparative-study>

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Introduction

Transitional justice is widely accepted as a process for countries to employ when transitioning from authoritarian rule or armed conflict to democracy and in their quest to address legacies of systemic violence and human rights violations. As defined by the African Union, transitional justice refers to “the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.”¹ While societies coming out of conflict or authoritarian rule have different histories, priorities and needs, commonly used mechanisms of transitional justice include criminal prosecutions, truth telling, reparations, institutional reforms, memorialisation, traditional justice, and vetting and lustration. The implementation of transitional justice is believed to be more effective, impactful and holistic when a combination of mechanisms is employed either simultaneously or sequentially.²

Traditional justice mechanisms³ are increasingly gaining traction as integral to transitional justice processes. They rely on community-based conflict resolution, reconciliation and healing practices to address past human rights violations. The ability of traditional justice mechanisms to resonate with local communities and therefore ensure a sense of responsibility and local ownership position them as central to the process of repairing fractured societal relations. There are often tensions and competing policy choices, however, between state or formal transitional justice measures and traditional justice measures. These include cultural appropriateness versus adhering to international normative standards and pursuing retributive justice versus restorative justice.

The historic African Union Transitional Justice Policy (AUTJP), which was adopted in 2019, recognises the importance of customary norms and traditional justice mechanisms in addressing legacies of violence on the African continent. The AUTJP advocates for institutional and legal reforms that embrace alternative and indigenous conflict resolution practices that foster accountability, integration and reconciliation.⁴

Drawing on African countries’ experiences, this policy brief examines the progress, prospects and problems in traditional transitional justice processes, particularly regarding their complementarity to state or formal processes in providing holistic justice for victims of past violations. Further, this policy brief draws attention to the reality of traditional justice mechanisms that operate in the absence of a state or formal transitional justice mechanism and in contexts where traditional justice is essentially the ‘only game in town.’

¹ African Union Transitional Justice Policy, 2019, p. 4. Available at <https://au.int/en/documents/20190425/transitional-justice-policy> (accessed on 25 April 2019).

² Haider, H., 2016, “Transitional Justice: Governance and Social Development Resource Centre (GSDRC) Topic Guide,” University of Birmingham. Available at https://gsdrc.org/wp-content/uploads/2016/08/TransitionalJustice_GSDRC.pdf (accessed on 28 August 2019); United Nations, 2008, “What is Transitional Justice? A Background,” Available at https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf (accessed on 28 August 2019).

³ Traditional transitional justice mechanisms are also referred to as community-based, customary, indigenous, informal and local justice.

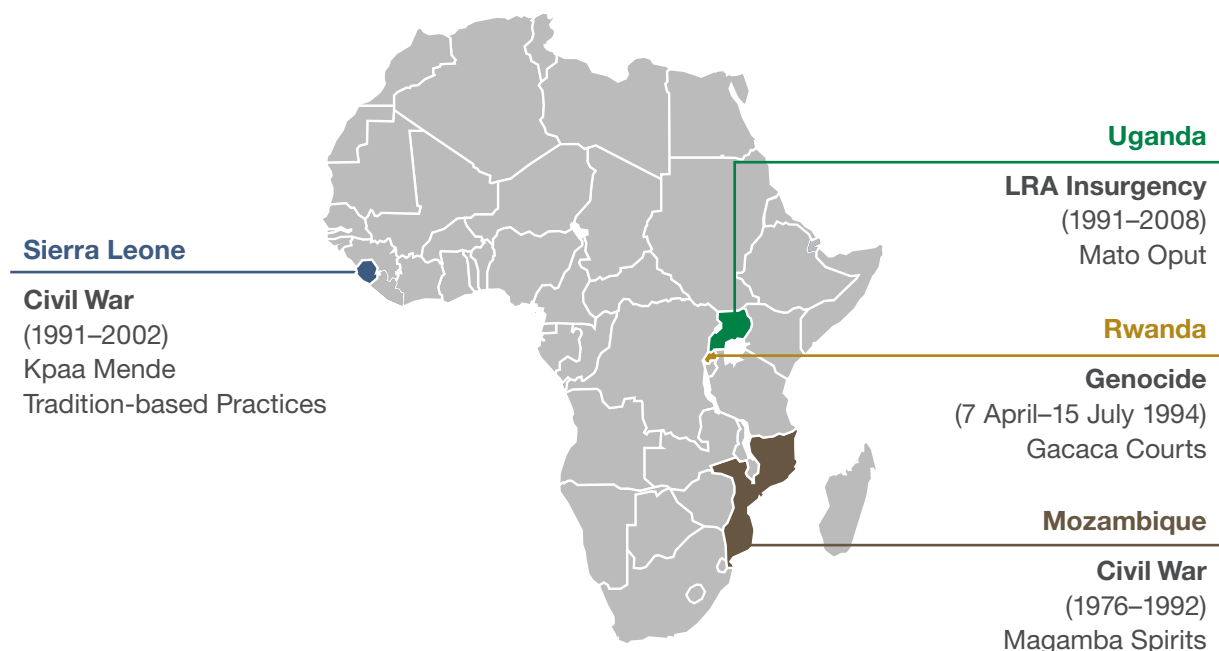
⁴ African Union Transitional Justice Policy, 2019, p. 20.

African Traditional Transitional Justice Measures: A Decolonial Project

The point of departure in trying to understand African transitional justice mechanisms lies in the African continent’s colonial history. Traditional mechanisms to resolve conflict and disputes existed in precolonial African societies, long before the term ‘transitional justice’ was coined in the post-Cold War period. African ways of being were interrupted at best and destroyed at worst by the colonial project. Indeed, as noted by Pwiti and Ndoro, African peoples have been alienated from their heritage and “African cultural values suffered and continue to suffer as the colonising powers forced Africans to abandon their religious beliefs, government systems, and a host of other traditional ways of doing things.”⁵ As such, the decolonisation project in Africa has focused on revising traditional governance systems as a means to restore lost cultural values and pride.

In line with this, there has been some acknowledgement of the contribution of positive traditional practices that are useful, complement formal transitional justice processes and promote peace, justice, healing and reconciliation. At the same time, caution has been suggested regarding the romanticisation of traditional justice mechanisms. A balanced assessment of such mechanisms is necessary which allows for their offerings and limitations to be recognised and/or mitigated. Both as a normative and as a pragmatic proposition, the potential of traditional justice practices to address legacies of past violence and human rights violations abounds. This potential needs to be given due regard and to inform broader transitional justice processes.

Table 1. Examples of Traditional Transitional Justice Mechanisms in Africa



⁵ Pwiti, G., and Ndoro, W., 1999, “The Legacy of Colonialism: Perceptions of Cultural Heritage in Southern Africa, with Special Reference to Zimbabwe,” *African Archaeological Review* 16, no. 3, pp. 143–153.

Rwanda

An estimated 800,000 people were killed and 350,000 women raped during Rwanda's 1994 genocide.⁶ Characterised as one of the biggest massacres in the 20th century, the Rwandan genocide lasted three months (7 April–15 July 1994) and forced approximately two million Rwandans to flee the country.⁷

In the aftermath of the genocide, a system of community justice, the *Gacaca* courts, was used to address the human rights violations that took place. This was after the new government, led by the Rwandan Patriotic Front (RPF) party, opted for a largely retributive approach to justice. This resulted in a large number of arrests, which overcrowded the prisons and overwhelmed the country's criminal justice system, leading to further human rights abuses in prisons. In order to address the strain that was placed on the justice system, the *Gacaca* courts were established as the most viable route for administering justice. The primary justification for the courts was to end impunity, promote reconciliation and establish the truth about what happened during the genocide.⁸ Loosely translated as 'justice amongst the grass,' *Gacaca* courts combined a traditional conflict resolution mechanism with the modern punitive legal system to deliver justice for victims of the genocide.

The *Gacaca* courts were supported and welcomed by Rwandans because of the familiarity and proximity of the courts to the people, compared to the distant trials of the International Criminal Tribunal for Rwanda (ICTR) and Rwandan national courts. This support waned, however, as the shortcomings of the *Gacaca* courts became apparent.⁹ Critics have argued that genocide is too serious a crime to go before 'village courts' and that the *Gacaca* process resulted in impunity for some groups of perpetrators and no justice for many victims. Similarly, the failure of the *Gacaca* courts to prosecute members of the RPF for revenge killings has led some to conclude that the process was an enforcement of the RPF government's account of the genocide (a case of victor's justice). Other limitations included impartiality and lack of legal training among judges, coupled with no legal representation for the accused or protection for victims.

While the *Gacaca* courts may not have achieved full national healing and reconciliation, they contributed to the pursuit of that goal. Similar to other forms of justice, including international criminal justice, traditional justice mechanisms are not a panacea for all transitional justice challenges. They are subject to local power politics that can also be seen in dominant international justice power politics. Traditional justice in the case of Rwanda should be assessed as part of a larger transitional justice project that operated alongside and complemented the work of the ICTR and Rwandan national courts.

⁶ Bijleveld, C., Morssinkhof, A., and Smeulers, A., 2009, "Counting the Countless: Rape Victimization during the Rwandan Genocide," *International Criminal Justice Review* 19, no. 2, pp. 208–224.

⁷ Hodler, R., 2019, "The Economic Effects of Genocide: Evidence from Rwanda," *Journal of African Economies* 28, no. 1, pp. 1–17.

⁸ Burnet, J.E., 2008, "The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda," *Genocide Studies and Prevention: An International Journal* 3, no. 2, article 4.

⁹ Sharp, D., 2017, "Transitional Justice and 'Local' Justice," in Lawther, C., Moffett, L., and Jacobs, D. (eds.), *Research Handbook on Transitional Justice*, Cheltenham: Edward Elgar.

Uganda

Northern Uganda experienced two decades of civil war and insurgency involving the Lord's Resistance Army (LRA) and the armed forces of Uganda. Gross human rights violations were committed against civilians during the course of the war, including massacres, the abduction of civilians, the use of child soldiers, sexual enslavement of women and girls, torture and pillaging. Since the return to peace in 2006, Uganda has been in the process of putting in place a National Transitional Justice Policy. This policy, which is still in draft form, is intended to serve as the overarching framework to address violations that took place during the conflict. While the process of finalising the formal framework has been drawn out, local justice mechanisms such as *Mato Oput* have taken centre stage.

Mato Oput is a traditional restorative justice mechanism among the Acholi people in Northern Uganda, which promotes forgiveness, healing, trust-building and reconciliation between communities and individuals in conflict. *Mato Oput* is founded on the notion that justice entails the restoration of social relations.¹⁰ Traditional leaders and elders, victims and survivors, perpetrators and the community come together to 'bury the hatchet.' Acknowledged as a restorative justice tool in the Juba Peace Agreement, this traditional justice mechanism is both a process and a customary ritual. *Mato Oput* commences at the end of a peace agreement and is followed by a ritual which varies across different clans. Typically, the ceremony entails the slaughtering of a sheep provided by the perpetrator, as well as a goat provided by the relatives of the victim. The animals are cut in half and exchanged by the two parties, and a bitter herb, *Oput*, is drunk by both to 'wash away bitterness.' By drinking the bitter herb, the two conflicting parties agree that the bitterness of the past will never be experienced again. Compensation typically follows the ritual, whereby the victim is provided with redress (in the form of cattle or money) for the damage and harm inflicted.

One of the greatest tensions around *Mato Oput* pertains to the difficulties in finding a balance between local priorities and global demands. The tension is around the roles the International Criminal Court (ICC) and *Mato Oput* ought to play in bringing about justice for victims of the LRA conflict and ensuring that LRA commanders are held to account for war crimes. The question is whether justice should be delivered through the retributive approach of the ICC or the restorative approach of *Mato Oput*, which is supported by Acholi elders and religious leaders. The answer is complex, particularly as the LRA's activities have not been limited to Ugandan borders but rather spread across the region and claimed victims in several countries. Where human rights abuses have crossed borders, the applicability of one ethnic group's traditional justice mechanisms becomes uncertain.

Critics of *Mato Oput* have argued that the practice was not designed to address large-scale human rights abuses, similar to *Gacaca*. This challenge is compounded by the cross-border nature of the LRA's

¹⁰ Tom, P., 2006, "The Acholi Traditional Approach to Justice and the War in Northern Uganda," *Beyond Intractability*. Available at <http://www.beyondintractability.org/casestudy/tom-acholi> (accessed on 12 September 2019).

crimes and the fact that, at present, there is no formal transitional justice mechanism to address the violations. In addition, it has been noted that *Mato Oput* has not been sensitive or successful in dealing with sexual violence. Owing to the nature of sexual violence (physical invasion of a sexual nature) and its psychological implications, *Mato Oput* has the potential to produce secondary victimisation for women and girls who would have to drink from the same calabash as their perpetrators. In this regard, the process may not foster healing and reconciliation but rather victimise women and girls who, in addition to dealing with the past traumatic experience, have to confront ongoing stigmatisation as a result of sexual violence.

Sierra Leone

Between 1991 and 2002, Sierra Leone faced a civil war between government forces and the Revolutionary United Front, a rebel group aided by Liberia. Well over 50,000 civilians were killed and maimed, women raped and children conscripted to be soldiers.¹¹ More than 48,000 of the soldiers in Sierra Leone were children, including over 12,000 girls.¹² Marked by extreme brutality and gross human rights violations, the conflict also led to the exploitation and looting of the country's mineral resources, diamonds in particular. The conflict officially ended in January 2002 with a symbolic burning of weapons collected during the country's disarmament, demobilisation and reintegration process.

The Lomé Peace Agreement and Abuja Protocols laid the foundation for the establishment of the Sierra Leonean Truth and Reconciliation Commission (TRC). The commission was intended to record human rights abuses from both sides of the conflict, address impunity and promote national reconciliation. It was given powers to “seek assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation.”¹³ Among other stakeholders, the TRC involved traditional elders in its truth-seeking and reconciliation activities, which included traditional practices, particularly in rural areas. In collaboration with local leaders and elders, the commission supported local reconciliation ceremonies such as the pouring of libations and cleansing rituals.

Traditional justice practices of the Kpaa Mende ethnic subgroup have been utilised to varying degrees in truth-telling processes in Sierra Leone because the Kpaa Mende people are said to have maintained their cultural practices. These practices seek to repair and restore fractured societal relations through restorative justice. Some form of punishment may be given to the offending party during the process. These traditional justice practices tend to be contingent upon an admission of guilt by the perpetrator, an apology to the person who was harmed and a sincere demonstration of remorse. In some instances it is required that the perpetrator provide compensation of some kind to the victim or the victim's family.¹⁴

¹¹ Sesay, M., and Suma, M., 2009, “Transitional Justice and DDR: The Case of Sierra Leone,” International Center for Transitional Justice. Available at <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> (accessed on 13 September 2019).

¹² Wessells, M., 2006, *Child Soldiers: From Violence to Protection*, Cambridge, MA: Harvard University Press; McKay, S., and Mazurana, D., 2004, “Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War,” International Center for Human Rights and Democratic Development.

¹³ Sierra Leone Truth and Reconciliation Commission, 2004, “Reconciliation,” in *Final Report*, vol. 3B, ch. 7, para. 7.2.

One of the tensions that have emanated from the Sierra Leonean transitional justice process is that it is believed not to have given sufficient regard to traditional justice practices. The country's TRC could have incorporated more traditional methods of reconciliation, drawing on local community-based beliefs and practices.¹⁵ Critics have argued that since the government failed to implement some of the TRC's recommendations and the Special Court of Sierra Leone (SCSL) failed to prosecute perpetrators of war crimes, traditional justice practices, which resonate with a number of cultural practices in Sierra Leone, should have been prioritised. In addition, while the TRC and the SCSL attempted to highlight gendered experiences of the conflict, the impact of this is yet to be realised and the gender-responsive recommendations of the TRC have not been implemented. Given the dearth of prosecutions, contentious issues relating to command responsibility¹⁶ and the rate of gender-based violence in the country after the conflict, the commission is generally perceived to have failed in providing gender justice. A lesson that can be drawn from the Sierra Leonean case is that substantial interaction should have occurred between the formal and the traditional mechanisms in a complementary and mutually reinforcing way to ensure holistic justice for victims.

Mozambique

Mozambique's civil war, which lasted from 1976 to 1992, is regarded as one of the most horrific humanitarian crises in sub-Saharan Africa in the 1980s. This is owing to the fact that the civil war overlapped with periods of severe drought and famine in the country. The war was fought between Mozambique's ruling Marxist Front for the Liberation of Mozambique (Frelimo) and the anti-communist insurgent forces of the Mozambican National Resistance (Renamo). It is to be noted, however, that political violence in the country can be traced back to the anticolonial war of 1964–1974, meaning that the country experienced nearly three decades of war.¹⁷ Upon gaining independence from Portugal in 1975, Mozambique became, in effect, a one-party state. Renamo opposed Frelimo's attempts to establish a socialist state and conflict ensued. The South African apartheid state and colonial Rhodesia (present-day Zimbabwe) supported Renamo with arms and funds, respectively. They sought to destabilise the Frelimo government, which supported liberation movements in their countries—South Africa's African National Congress (ANC) and the Zimbabwe African National Union–Patriotic Front (ZANU-PF). The conflict resulted in the deaths of approximately one million people, mass displacement, injury and gross human rights violations.¹⁸

In October 1992, Frelimo and Renamo signed a Peace Agreement in Rome that resulted in an amnesty law. No formal transitional justice mechanism was employed to come to terms with the legacies of systemic violence in the country. The plight of victims was disregarded as the political elite took no responsibility for past abuses.¹⁹ As argued by Hayner, “In Mozambique the accepted, though largely unstated, belief was ‘the less we dwell on the past, the more likely reconciliation will be’. There has been almost no focus in Mozambique on accountability for past crimes ... there have been virtually no calls at the national level for justice, accountability, punishment, or banishment from public office.”²⁰

¹⁷ Igreja, V., 2018, “Relationships in Transition in Mozambique 1990–2011,” African Comparative Transitional Justice Project, Centre for the Study of Violence and Reconciliation. Available at <https://www.csvr.org.za/project-reports/Mozambican-Case-Victor-Igreja.pdf> (accessed on 16 September 2019).

¹⁸ Honwana, A.M., 1997, “Healing for Peace: Traditional Healers and Post-war Reconstruction in Southern Mozambique,” *Peace and Conflict: Journal of Peace Psychology* 3, no. 3, pp. 293–305.

¹⁹ Igreja, V., 2010, “The Politics of Peace, Justice and Healing in Post-War Mozambique: ‘Practices of Rupture’ by Magamba Spirits and Healers in Gorongosa,” in Sriram, C.L., and Pillay, S. (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, Woodbridge: James Currey.

²⁰ Hayner, P., 2001, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York: Routledge, p. 197.

Traditional justice mechanisms were utilised, however, to come to terms with the ghosts of the past, as seen in the *Magamba* spirits. It was this process that sought to ‘un-silence’ Mozambicans’ experiences of the civil war. The *Magamba* spirits provided a channel for restorative justice, healing and reconciliation. The community in Gorongozo, Mozambique, where the *Magamba* spirits are said to have healing powers, believe that the traumatic or violent death of a human being is an offence that requires immediate redress and atonement rituals. It is believed that if wrongdoing is not acknowledged, the spirit of the victim will return to the physical world and seek justice. In this context, purification rituals are used to reintegrate victims and perpetrators into the local community and rebuild amicable relationships between the living and the spirits. Similar to *Mato Oput* in Uganda and the Kpaa Mende traditional practices in Sierra Leone, the perpetrator confesses, acknowledges wrongdoing and may be liable to provide compensation to the victim or the victim’s family.

The Mozambican experience with transitional justice provides fascinating terrain for understanding how traditional justice functions in the absence of a state or formal transitional justice mechanism, again similar to the Ugandan case. It pushes home the point that there is value and utility in traditional justice processes, not only as appendages to formal processes but also as stand-alone measures that can be the only avenue for justice, healing and reconciliation. With that said, this should not preclude formal transitional justice processes and the role they could play in administering holistic justice for victims of past human rights violations.

Key Lessons and Challenges

Integration

- The integration of different transitional justice mechanisms—both mainstream and traditional justice—is key to maximising complementarity. This is important given that there are very limited solutions to the monumental and complex challenge of social reconstruction, which includes building social cohesion and reconciliation.

Local ownership and oversight

- Community ownership at local level, alongside state oversight and support, is crucial. However, it is important to manage the risk of the state manipulating or inventing traditions to serve narrow political interests.

Innovation

- The importance of innovation that draws on tradition but adjusts it to the particular nature or scope of conflict challenges and shifting social norms needs to be appreciated. In instances where traditional mechanisms do more harm for victims, innovation requires that they are adapted to serve the interests of justice and healing for victims.

Community consultation

- Consultations with communities and victim groups is important in order to assess their needs, priorities and concerns regarding traditional justice mechanisms, particularly when some groups were not treated equally by traditional structures.

Recommendations

- It is important to strike a balance between the local and formal/global dilemmas that accompany transitional justice processes. Traditional justice ought to be implemented in a manner that complements, rather than competes with, the formal process. Ultimately, a sense of holistic justice should be the outcome of transitional justice processes.
- Policymakers need to engage more seriously with traditional transitional justice practices and give them due regard. They ought to be viewed in certain contexts as a more appropriate and legitimate means of administering justice, healing and reconciliation and integrated into the design and implementation of transitional justice processes.
- It is important to highlight and capitalise on what is positive and useful within traditional justice practices, which assist in bringing about the same results that formal transitional justice processes seek to achieve.
- Similarly, the limitations and/or regressive elements of traditional justice mechanisms must be acknowledged and, where possible, mitigated so as to avoid the romanticisation of indigenous practices and ensure that community engagements are inclusive. In this way, patriarchal and ageist practices that marginalise and disempower women and youth from the processes need to be averted. In addition, the question of gender justice needs to be addressed in traditional justice processes.



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