

# **Whose Truth, Whose Justice?**

## **Religious and Cultural Traditions in Transitional Justice**

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Transitional justice mechanisms are typically created to aid societies moving from authoritarian rule or as part of a post-conflict reconciliation process. For the most part their construction reflects one of two trends that have developed in the wake of the Second World War. The first is the legacy of the Nuremberg Tribunals, established in order to reassert the rule of law and, to a lesser extent, to legitimize post-Nazi Germany's government as separate from that which prosecuted the war and conducted the Holocaust.<sup>[1]</sup> The second is the rising use of truth commissions, originally used as alternative mechanisms when tribunals proved difficult or impossible to implement, but increasingly seen as valuable in and of themselves as mechanisms for inducing healing and reconciliation.<sup>[2]</sup>

Much has been written about the relative strengths of tribunals versus truth commissions. Which, for instance, delivers more justice? Which provides for more long-term reconciliation? Or how do both mechanisms operate in the same environment?<sup>[3]</sup> One area explored less often is the cultural relevance of each of these mechanisms and whether or not there is a "good fit" between any particular transitional justice mechanism and local cultural and religious traditions. A few studies have examined the role of religion itself—as separate

from culture—focusing largely on the role of religion in the South African Truth and Reconciliation Commission; but to date none has tackled the larger issue of culture.<sup>[4]</sup>

This paper seeks to problematize the role of religious and cultural traditions in transitional justice mechanisms, paying attention to the nature of local traditions, the extent to which they are reflected in the chosen mechanism, and the overall result in terms of meeting the stated goals and satisfying the affected populations. In doing so, we will apply portions of a framework developed by Julie Mertus to examine the effectiveness of international tribunals by matching their functions to interested audiences. Mertus' examination compares six functions common to tribunals with the interests of three broad constituencies: the international community, local power brokers, and survivors, victims and bystanders.<sup>[5]</sup> Our examination uses Mertus' ideas that transitional justice mechanisms have the ability to speak for and to serve different populations. However, since we are extending our examination beyond tribunals to encompass truth commissions and other local mechanisms, we are moving beyond her six functions to focus largely on the extent to which mechanisms receive the approval of different constituencies and whether a high degree of congruency between the mechanism and local religious and cultural traditions results in a higher degree of approval by survivors, victims and bystanders than those mechanisms that seem otherwise to be primarily serving the international community.

Before delving into our selected mechanisms, we will first undertake a brief examination of the impact of cultural and religious influences on legal traditions in order to be better able to extrapolate from each instance.

## **Cultural and Religious Influences on Legal Traditions**

What do we mean when we talk about cultural and religious traditions in the context of transitional justice? Mainly we are examining the cultural and religious influences on legal traditions in various countries that have, either themselves or through international bodies, implemented transitional justice mechanisms. In terms of cultural influences on legal traditions we can see two broad categories for comparison. The first category looks at transitional justice mechanisms influenced by international or formal conceptions of the rule of law, largely based on a universalist view of law and human rights and most often following a path of retributive justice. The second category examines transitional justice

mechanisms influenced by local or folk conceptions of the rule of law as colored by local cultural and religious traditions. Instead of universal values, this perspective looks more often at particulars, such as the relationship between individual rights and social welfare and is quite often expressed in forms of distributive or restorative justice rather than mainly through retributive justice.

Religion has had a strong influence on the shaping of legal traditions, even if, as in the secularized West, religious institutions have been separated from the state. For much of the West and the international criminal justice structures, these legal traditions trace their roots back to the Christian Old Testament—otherwise known as the Jewish Torah—which prescribes punishments for transgressions against the deity, individuals, or the community as a whole.<sup>[6]</sup> When it comes to the urge for vengeance, Susan Jacoby argues that religion has played a contradictory role in the transition from its treatment as a private matter to a public concern, on the one hand helping to shift towards concepts of love and mercy and, on the other, providing a platform for the shift from private to public vengeance by making crimes against individuals crimes against the deity.<sup>[7]</sup> Thus religion's influence on cultural interpretations of legal traditions serves two influences, the first being that of an enabler for state-sponsored retributive justice and the second, depending on circumstance, as a promoter of more restorative and distributive forms of justice derived from humanistic aspects of religious callings to forgive transgressors or promote communal harmony. Some of this is also seen in Islamic law, which stems primarily from the Koran and Sunnah, but also includes four secondary sources, most notably the importance of ensuring the common good.<sup>[8]</sup>

The use of tribunals, particularly the various incarnations of international tribunals following the Nuremberg Tribunal are a clear application of a universalist notion of human rights that emerged to beat out cultural relativism after World War II.<sup>[9]</sup> This application of universal human rights to transitional justice has been legitimized by the argument that peoples of the developing world lack traditions of rationality and reason and that their understanding of justice is enmeshed with religion, unlike states from the North or West.<sup>[10]</sup> Another argument is that transitional states are not capable of reconstructing their nationally fractured communities and are often not strong enough to pursue the path of justice, therefore requiring outside assistance to establish, or re-establish, the rule of law.<sup>[11]</sup>

An opposing view is held by Nicole Fritz, who contends that all transitional justice efforts are context-specific responses to atrocities committed within a local region. She argues that even though some transitional justice mechanisms depart from the norm of prosecution and punishment for war crimes, “this departure is justified on the basis that the transitional justice initiative speaks to and resonates with the particular cultural and ethnic values” of each community.<sup>[12]</sup> Fritz remains skeptical of many transitional justice initiatives in the developing world, arguing that when those who prefer a universalistic approach to transitional justice instead support alternative mechanisms, it might be “less a validation of difference and diversity” than a “fairly opportunistic attempt to dress up an impoverished response to the period of atrocity and violation.”<sup>[13]</sup> Despite this skepticism there is growing evidence that there is increased acceptance of truth commissions as mechanisms able to deliver something of value in achieving goals of uncovering the truth, promoting reconciliation and, according to some, delivering justice and restoring communities.<sup>[14]</sup>

The argument between those who prefer structures that deliver retributive justice and those who believe structures that encompass restorative and distributive justice can, in fact, achieve more for the affected populations leaves aside the question of whether any individual mechanism can be said to be culturally congruent. For many of the advanced, industrialized societies, particularly those in the West, the use of courts and prosecutions is often the most culturally relevant form of transitional justice.<sup>[15]</sup> Courts and tribunals have wide acceptance through their basis in Western culture and religion and form the bedrock of peoples’ expectations about what should happen after atrocities have taken place. But is this so for all societies? Many African and Confucian traditions place a higher value upon social harmony and group welfare than upon individual rights.<sup>[16]</sup> Additionally, as Daniel Philpott notes, elements within all Abrahamic religions promote communal harmony alongside those elements that call for punishment.<sup>[17]</sup>

This philosophical dichotomy among approaches to transitional justice is our jumping-off point for examining various types of mechanisms and, in particular, their level of cultural and religious congruence with the local constituents, most notably those in Mertus’ third category of victims, survivors and bystanders of human rights abuses.

As outlined by several scholars, transitional justice mechanisms range from purposeful amnesia—or glossing over the past—to full-fledged attempts to prosecute everyone deemed

responsible. For the sake of brevity, as well as organizational clarity, we are unable to survey all methods of transitional justice. Instead we will briefly examine four broad types: international tribunals, hybrid courts, truth commissions and local initiatives.

## **International Criminal Tribunals: Falling short**

The International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) were created with “the purpose of bringing justice to the victims of mass atrocity” based on the perception that these states would be unwilling or unable to prosecute perpetrators in their respective national courts.<sup>[19]</sup> Other goals have been argued as well, including the establishment—or re-establishment—of the rule of law, and, in the case of Rwanda, the need to shine light on the international community for its effort to address the aftermath of the conflict.<sup>[20]</sup> Ostensibly the main goals of the tribunals, in addition to restoring the rule of law, were to prevent the violence from continuing, to contain its effects, to challenge impunity through prosecutions, and to promote national reconciliation.

Some proponents of transitional justice would argue that the aim of international criminal tribunals is to change the post-atrocity reality through retributive justice. But according to Michael Humphrey, the intent of tribunals is to “set benchmarks and establish facts” that would then be taken up in national tribunals in order to consolidate the rule of law and restore communities affected by violence.<sup>[21]</sup> In Bosnia, however, the absence of national trials underlined the absence of a shared political community that could be impacted by an international tribunal. And despite Humphrey’s hope for the rule of law in Rwanda, the ICTR’s decision to not apply the death penalty in that country set the stage for Rwanda’s creation of a national tribunal to contest the jurisdiction of the ICTR and to apply the death penalty to the lower level perpetrators that Rwanda had in its custody.

An additional problem for both tribunals was their location outside of the respective conflict zones. While the reasons for doing so largely had to do with a lack of resources in these war-torn countries, the placement of the tribunals in The Hague and Arusha, Tanzania, increased both the physical and psychological distance of the tribunals from the victims they were ostensibly designed to serve. This geographic disconnect between the tribunals and the victims and survivors of the atrocities in Rwanda and Bosnia greatly reduced their in-country impact in terms of reinvigorating the rule of law and in generating the conditions for reconciliation.<sup>[22]</sup>

n effect the impact of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ICTR has been greatest for the international community, which has insisted most loudly on a response that would punish those responsible. This tactic deflected somewhat the criticism that the international community had failed to stop the atrocities—in time or at all—while they were occurring. Looking at Mertus’ typology of functions and positions, we can see that both tribunals largely served the international community by demonstrating the existence and force of international law. By contrast they largely failed to serve any of their intended functions towards victims, survivors and bystanders except in the punishment of a very few individuals. Finally, in terms of serving local powerbrokers, the ICTY did, to some extent, help to legitimize the post-Milošević government in Serbia, but it can be said with some confidence that Rwanda’s post-genocide leadership benefitted little from the ICTR in terms of absolution for the genocide or establishing legitimacy.<sup>[23]</sup> Additionally, the fact that the ICTR was located in Arusha did little to re-establish the rule of law or rebuild local institutions, leaving these tasks to the government, which was dominated by the Rwandan Patriotic Front (RPF) and other elements within the international community.

The cultural fit for an international tribunal was better matched to the Yugoslavs’ Western-oriented notions of justice. However, in the former Yugoslavia, at least initially, many of the “big fish” were able to freely circulate while their followers were prosecuted, which meant there was little incentive for local institutions to vigorously apprehend war criminals. That, in turn, fed an increased perception in the existence of a culture of impunity.<sup>[24]</sup> For Rwanda, the main cultural disconnect with the ICTR had to do with the latter’s insistence that no death penalty be applied, in keeping with European conventions. While this disagreement first caused Rwanda to institute its own national courts, and later to abandon the death penalty, other considerations led to the creation of a hybrid restorative-retributive justice model based on the traditional gacaca courts, covered in more detail below.

Given that both international tribunals were based on Western notions of the separation of church and state, neither court experienced any significant religious influences apart from those already described above. This was less problematic than one might think, primarily because in Bosnia the divisions between ethnic groups were expressed largely through purported religious affiliation, making it difficult for an international body to effectively use

any religious discourse without offending one group or another. For Rwanda, the lack of religious overtones was less of an issue because of resentments toward churches due to active participation or co-optation of many priests in the genocide.<sup>[25]</sup>

We turn now to Sierra Leone to see whether the combination of local and international efforts allowed for more cultural congruence and consequently more acceptance of its hybrid court by the populace than was the case with the international tribunals.

## **Hybrid Tribunals**

The Special Court for Sierra Leone (SCSL) was “the product of a confluence of circumstances” brought about by the May 2000 collapse of the Lomé Accord. The failure of Lomé increased pressure on the United Nations to create a mechanism that would hold individuals accountable for past atrocities.<sup>[26]</sup> The request by Sierra Leone’s government to create an ad hoc court, however, soon ran into problems, mainly a lack of available funds and unwillingness by the Security Council to support yet another tribunal. Instead the Security Council responded by negotiating with Sierra Leone’s government to create an independent, special court that would prosecute “persons who bear the greatest responsibility” for war crimes and crimes against humanity committed during the civil war.<sup>[27]</sup>

The SCSL is different from the previous attempts at international justice embodied in the ICTY and ICTR in that it lacks the powers outlined in Chapter VII of the UN Charter and could not call on the UN to support the arrest and detention of indicted individuals outside of Sierra Leone. In addition, the structure of this court—as with all hybrid courts—differs from the UN tribunal structure. Unlike UN tribunals, the SCSL consists of a balance of locally-appointed and UN-appointed judges at the trial and appellate levels. Finally, funding for the SCSL also distinguishes it from its predecessors; unlike tribunals in Rwanda and the former Yugoslavia, which were both funded by the UN, the draft statute and subsequent agreement between the parties to the SCSL called for voluntary contributions from the international community.<sup>[28]</sup>

One of the perceived advantages of the hybrid court model used by the SCSL was that its diffuse locations in the country were designed to allow for more impact on both the local institutions of justice and more impact on the local population, who would be able to see justice taking place.<sup>[29]</sup> Despite locating the court in Freetown with a commendable

outreach program to selected places in the interior of the county, the SCSL appears aloof from the general population, which is largely illiterate, and has seemed more concerned with communicating with the foreign press, probably because almost all of its funds come from international sources.<sup>[30]</sup>

One particular public relations problem for the SCSL was the arrest of former defense minister Sam Hinga Norman, who subsequently died from injuries received while in custody. Norman was considered by many to be a national hero for his role in helping to restore exiled Sierra Leonean President Kabbah following a coup. The prosecution of Norman appeared to anger many in the country and dealt what one report called a “hammer blow” to the court, deepening “the fissures in Sierra Leonean society.”<sup>[31]</sup>

Like its international brethren it would seem that the SCSL favored the universalist view of human rights embedded in Western cultural traditions. The impact of this divergence may be somewhat smaller than that of the international tribunals, but it is difficult to ascertain given the fact that the record of the SCSL is mixed. While it has succeeded in prosecuting some of the “worst of the worst,” many have criticized it for being out of touch and either failing to provide enough prosecution or providing so much that reconciliation has been made more difficult.<sup>[32]</sup>

## **Truth Commissions: South Africa and Sierra Leone**

South Africa experienced thirty years of armed resistance against the apartheid regime and during this process the country suffered from massacres, killings, and severe discriminatory policies against its majority non-white population. After the election of Nelson Mandela in 1994, with the considerable input of civil society members, the South African parliament passed the Promotion of National Unity and Reconciliation Act. With the lead of Archbishop Desmond Tutu, the South African Truth and Reconciliation Commission (TRC) was inaugurated in December 1995.<sup>[33]</sup> To assist in meeting these objectives, the legislation established three committees within the TRC: the Human Rights Violations Committee (HRVC), the Amnesty Committee (AC) and the Committee on Reparation and Rehabilitation.<sup>[34]</sup>

The South African TRC was the first truth commission created through a public process. Beyond this, the TRC used restorative justice in dealing with the question of impunity and

encouraged people to forgive rather than demand retribution.

This has a lot to do with the concept of Ubuntu, which is part of the fabric of the South African culture. In this culture, amnesty becomes an act of mercy, a gift toward our common humanity. Herein, lies the empowerment of the victim. The victim alone can give or withhold mercy; the perpetrator is a moral supplicant.<sup>[35]</sup>

Christoph Marx argues that Ubuntu encompasses a vision of national reconciliation that promotes community conformity over individual rights. The use of the African community model stands in opposition to apartheid by standing for victims as people with human rights, but by making these victims representative of the nation, they again become anonymous.<sup>[36]</sup>

Paul van Zyl argues from the realist perspective that the TRC was instituted because the government lacked the resources to prosecute thousands of individuals guilty of human rights abuses. The negotiated nature of South Africa's transition, combined with the inability of its criminal justice system to successfully prosecute those responsible for human rights violations made it necessary to develop a more creative approach to deal with the past; thus, the creation of the TRC.<sup>[37]</sup>

One of the main components of the TRC was its amnesty process. Hamber notes that while justice through the courts remained elusive and nebulous, the amnesties granted by the TRC were concrete.<sup>[38]</sup> While some praised the usefulness of the amnesty process in garnering truth, others recognized its two-edged nature, indicating that “[a]mnesty often feels very unfair to the victims,” and “[m]any victims feel revictimized when perpetrators are not only set free but are allowed to have positions of power while many of the victims still live in poverty.”<sup>[39]</sup> Eileen Borris maintains the essential point that the TRC was created to assist in the political transition from minority rule to democracy, so the granting of amnesty was the price that South Africa needed to pay in order to successfully implement the negotiated settlement.<sup>[40]</sup> This realist argument is somewhat undercut, however, as Marx points out, by the use of Ubuntu to grant immediate amnesty for perpetrators and merely recommend reparations and rehabilitation for victims, which means that while perpetrators received immediate security, victims were left at the mercy of political pressures and bureaucratic delays.<sup>[41]</sup> James Gibson argues that since granting amnesty reflects anything but a commitment to equal treatment before criminal law, the truth and reconciliation process has undermined support for universalism in the application of the law.<sup>[42]</sup>

In assessing amnesty, Brandon Hamber argues that it was “ostensibly a political necessity for underpinning a new social order founded on human rights principles.” However, he notes, “the linking of amnesty into the ... TRC process has meant that human rights as a concept has become associated with the language of pragmatic political compromise. The language of principle and accountability were undermined, and this association remains one of the obstacles to the popular acceptance of human rights as a new ideology in South Africa.”<sup>[43]</sup> Although the TRC was billed as victim-centered—and it certainly was to the degree that victims were encouraged to tell their stories—victims’ rights, like human rights, were primarily dealt with through the prism of political compromise. This reflects the view that victims’ rights are often seen as an obstacle to achieving political change rather than the opposite, as is generally held in traditional debates about transitional justice.<sup>[44]</sup>

As far as the cultural content of the TRC there are a number of interesting phenomena at work. Foremost among these is the Christian nature of the victims’ testimonies. Some authors have noted that the TRC was not originally designed to be a primarily Christian vehicle but that the appointment of Archbishop Desmond Tutu as the chair of the commission created a space within which he could influence the nature of the proceedings. From opening prayers to exhortations and other comments, Tutu “intentionally created an environment that fostered practices that bore a resemblance to recognizable ceremonial practices.”<sup>[45]</sup> In fact, the proceedings of the HRVC—the committee that Tutu chaired—differed greatly from the Amnesty Committee (AC), with the former adhering to a “religious, redemptive” formulation of truth while the latter concentrated on what is known as a “legal-forensic” definition of truth.<sup>[46]</sup> Megan Shore and Scott Kline note that the overt use of religious language and symbols in the HRVC was, in fact, comforting to many of the victims and survivors. The role of religion in South Africa—whether the black churches or the white Dutch Reformed Church—has never been private nor solely concerned with the salvation and spiritual well being of just individuals.<sup>[47]</sup> This gives some cultural credibility and fit to the use of religious language and symbolism by Archbishop Tutu and other members of the HRVC, building on the religious nature of South African society and black society in particular. While the TRC was not set up to be a religious endeavor, Tutu noted that it was “interesting” that he and Alex Borrairie were appointed as chair and deputy chair instead of judges, given the fact that the TRC was, at least partially, a quasi-legal body.<sup>[48]</sup>

The second cultural phenomenon was the use of *ubuntu* as a vehicle for African reconciliation. The meaning of ubuntu comes from the root of a Zulu-Xhosa word or proverb and has come to mean that “a human being is a human being only through its relationship to other human beings.”<sup>[49]</sup> Essentially it is a description of humans as belonging to a community and defining individual good within community good. Christoph Marx is skeptical about the origins of ubuntu and whether it does actually represent a truly African way of being, as opposed to what he describes as its original meaning, which entails a sense of hospitality and the welcoming and integration of strangers.<sup>[50]</sup> Regardless of its etymology, the fact remains that Ubuntu has been presented as an African mode of thought that places community harmony above individual self-interest based on the notion—whether real or mythologized—that citizens of the New South Africa should think of the nation as a larger community. The downside, as Marx sees it, is that by focusing on communal good over individual good, Ubuntu enforces conformity, legitimizing the policies of addressing reparations through structural changes to society rather than through help to individual victims.<sup>[51]</sup>

So the question remains as to the use of ubuntu. Was it a way to engender real reconciliation from an African perspective (transforming local traditions to suit the needs of transitional justice), or was it merely a way to get the population to accept the realist’s need to accommodate a negotiated end of apartheid by abandoning retributive justice in favor of amnesty? In the end, if it was accepted by the population and society is reshaped to address the structural ills left by Apartheid, the question whether ubuntu is natural or forced is less important than its effect on the outcome of South Africa’s transitional justice project. Thus it can be argued that despite the TRC’s mixed record in addressing victim-centered transitional justice, it did manage to create a mechanism that was flexible enough to import local religious and cultural values. These characteristics may have proven to be the most successful aspects in assuring a measure of success for the TRC.

## **Sierra Leone: A “Hybrid” Truth Commission**

Before the Lomé Peace Accord failed, Sierra Leone’s Truth and Reconciliation Commission (SLTRC) was created to address past abuses that occurred during civil war. With the conflict deemed essentially “unwinnable” by the government or rebels, negotiators of the accord proposed the establishment of a commission that would help promote national

reconciliation and healing rather than institute a criminal tribunal to prosecute past wrongdoing. In February 2000, Sierra Leone's Parliament passed The Truth and Reconciliation Commission Act of 2000. Part of its work was to create "an impartial record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone" dating back to 1991. Different than many other TRCs, the SLTRC had the power "to issue subpoenas and compel individuals to obey its orders. ... Failing to comply with these orders may result in severe penalties, including imprisonment."<sup>[52]</sup> This approach risked the commission's credibility and made the truth-seeking process more difficult. Perpetrators were afraid of appearing before the SLTRC for fear of incriminating themselves. They believed their testimony provided to the SLTRC would be used against them in criminal proceedings of the SCSL.

Similar to other post-South African TRCs, Sierra Leone attempted to incorporate many of the lessons learned from that model. Despite these learnings, the SLTRC suffered from a general lack of local support because the truth that it sought—"the forensic, legal-positivist, or cathartic, emotional-confessional variety"—was not easy to elicit given that these types of truths were "not part of the cultural mainstream."<sup>[53]</sup> Rosalind Shaw argues that in order to be successful, truth commissions should build upon local practices and be sensitive to the local cultural context in which they operate rather than marginalizing such practices.<sup>[54]</sup> As Tim Kelsall notes, the SLTRC "acted as a lightning rod for a set of anxieties surrounding several perpetrators, who stood outside of traditional reintegration procedures."<sup>[55]</sup>

Shaw continues her argument by indicating that even though the SLTRC attempted to sensitize Sierra Leone's war-torn population to the value of "redemptive verbal memory," they did so in a top-down manner with little regard for local customs. She indicates that the SLTRC "was rooted in a perceived incommensurability between alternative projects of memory that many believed to have divergent implications for processes of personal and national reconstruction."<sup>[56]</sup> A 2003 report by the International Crisis Group indicated that despite the willingness of victims to testify, the hearings in Freetown "drew smaller crowds than anticipated" and that "even more disturbing than the lack of popular participation has been the lack of active government support," with governmental ministers failing to appear to give testimony unless threatened with subpoenas.<sup>[57]</sup>

According to Shaw, the main problem with the SLTRC has been its disconnect with "local

techniques of forgetting,” instead privileging a narrative that implored people to speak in order to heal. Shaw is not altogether pessimistic, however, as she asserts that individuals who did testify before the SLTRC diverged from the simple application of the SLTRC’s ideals, using truth-telling as “a new technique of forgetting.”<sup>[58]</sup>

Regardless of whether Shaw is correct in suggesting that the Sierra Leonean culture of forgetting had to be coaxed to create “friction” when the TRC exhorted them to talk about the horrors of war in order to heal, it seems clear that, given the low participation by the general populace, the cultural approach of the SLTRC may have been out of step with the population. Additionally, it appears that the confessional aspects of Christian discourse embedded within the SLTRC were “marginal, or even inimical to cultural imperatives in Sierra Leone.”<sup>[59]</sup> At the very least, the process certainly wasn’t as well-coordinated as that of South Africa’s.

## **Local Initiatives: Gacaca and Nahe Biti**

Violence between Hutu and Tutsi groups peaked in 1994 with a genocide of Tutsis in Rwanda that left over 800,000 people dead and over 130,000 in prison on suspicion of committing acts of genocide. Even though there is a desire to bring justice to the victims and hold the perpetrators accountable, impunity persists in Rwanda. “With [its] judicial infrastructure destroyed and most prosecutors and judges killed in 1994, there was no chance that [Rwanda’s] national court system could prosecute all those responsible for such crimes.”<sup>[60]</sup> *Gacaca* courts were established as a response to the ineffectiveness of the ICTR and national court system and to a backlog of untried genocide cases. In 2001, Rwandans elected approximately 255,000 people to act as judges in these courts. “The process of Gacaca is derived from traditional Rwandan community courts in which the elders would sit on the grass—*Gacaca* is Kinyarwandan for grass—and resolve community conflicts.”<sup>[61]</sup> Village elders and community members gather together on a patch of grass to discuss civil disputes and render a resolution to the issue in an effort to salvage social peace and cohesion in the village. The primary aim of traditional gacaca was to restore social harmony and secondarily to mete out punishments.<sup>[62]</sup> Traditional uses were for resolving personal, land, marital and inheritance disputes.<sup>[63]</sup> Kasaija Apuuli notes that the type of justice practiced in traditional gacaca was an unmediated folk or popular justice that depended upon a “common sense understanding rather than upon law.” Modern gacaca represents a mediated

form of this type of justice wherein the participants are more constrained by the apparatus of the state.<sup>[64]</sup>

According to Erin Tiemessen,

Gacaca is a model of restorative justice because it focuses on the healing of victims and perpetrators, confessions, plea-bargains, and reintegration. It is these characteristics that render it a radically different approach from the retributive and punitive nature of justice at the ICTR and national courts.<sup>[65]</sup>

She puts forth two prominent concerns with regard to justice and reconciliation in a post-genocide society. The first is the danger of recurring violence if institutions lack the capability of ensuring peaceful coexistence. The second is the risk that punishment for past violence might incite future violence. These two elements argue for a moderation in punitive measures and the elevation of restorative over retributive justice. The moderation of retributive justice took the form of modern Gacaca, which “aims to repair the harm and heal the victims” by restoring offenders’ relationships with the community, thus mitigating the failures of the ICTR.<sup>[66]</sup>

Another argument in favor of gacaca stems from its mix of retributive and restorative elements. While heavily in favor of the latter, the “trial” aspect of retributive justice serves several beneficial functions, especially in terms of punishments for those who confess their crimes. The first, as intimated by Mertus, is that it individualizes responsibility for genocidal actions with the corollary of expiating the guilt for all Hutus as a general class. The second is that because many of the “punishments” handed down by gacaca courts emphasize restitution—through labor, house-building, and the like—it combines justice and community rebuilding, arguably strengthening local communities. The third, which has the most relevance for this study is that modern gacaca’s grounding in local traditions sends a strong signal to the populace that they have the tools necessary to rebuild society in their own indigenous culture—a function that has an impact on the acceptability of the process for victims and perpetrators alike.<sup>[67]</sup>

There are some criticisms of gacaca that are worth considering. These include the fact that, despite its prominence on the local level, it is still a state-sponsored process and is seen by some as a form of victor’s justice, especially when one considers that Tutsi members of the RPF accused of massacres are excluded from the process.<sup>[68]</sup> In addition to this danger,

Peter Uvin and Charles Mironko argue that many genocide survivors do not testify for fear of revenge; rape victims refuse to testify because such issues are not made public in Rwandan culture; and, where there are few available survivors, people give false testimony without fear of being exposed by other witnesses.<sup>[69]</sup> Other critiques of gacaca stem largely from the international perspective and the expectation that any trial system should provide justice based upon Western standards, such as the right to representation, a speedy trial, reasonable detention times and conditions. Uvin contends that these conditions violate human rights for the defendants, although he observes that “many people among the general population seem ... in favor of the Gacaca system.”<sup>[70]</sup>

Daly notes that, at least in 2002, there was widespread support for gacaca, with a number of independent surveys reporting support as high as 80 percent and higher in Rwanda’s prison population.<sup>[71]</sup>

However, as with other criticisms of gacaca, there is some concern that opponents would not be willing to express their opposition. In a public statement issued on January 23, 2006, Amnesty International criticized the Rwandan government and expressed concerns over the intimidation and harassment of Bonaventure Bizumuremyi, editor of the independent newspaper *Umuco*, who had used his paper to criticize the government for tightly controlling the judiciary. A colleague of Bizumuremyi’s, Jean Léonard Rugambage, was arrested and accused of being a *génocidaire* after he authored an article alleging that gacaca judges had used their positions for personal gain and to “settle personal feuds.” In addition, while gacaca seemed to have high levels of initial support, recent studies have shown that forced attendance and information campaigns are now required to increase participation.<sup>[72]</sup>

In Longman’s eyes one potentially serious problem with the gacaca procedure is the dual role played by judges at the Category Four level who serve as both judges and investigating prosecutors. This is most serious during the pre-trial phase when the investigating judges have technical assistance from the state that the defendant does not.<sup>[73]</sup> However, he counters that there are two factors that mitigate against this. The first is that, like the defendant, the judges are not legal experts, meaning the court could be tipped in the defendant’s favor, especially if he or she is allowed to hire an attorney while no one else had access to one. The second mitigating factor is the inclusion of the entire community in the process where, presumably, supporters of the defendant and family members would be able to speak on his or her behalf.<sup>[74]</sup> And finally we note that although gacaca draws heavily

from Rwandan cultural traditions, it does not draw from Christian traditions, despite Rwanda's pre-war status as an overwhelmingly Catholic nation. This is largely because of the complicity of many Catholic and some Anglican priests in the genocide, resulting in a massive loss of Church credibility.<sup>[75]</sup>

### **Timor-Lesté: *Nahe Biti***

East Timor used or modified several existing conflict management mechanisms in order to address the problems of its post-conflict situation and to promote healing and reconciliation. The most prominent of these is *nahe biti*. Dionisio Babo-Soares describes *nahe biti* (“stretching the mat”) as “a local East Timorese equivalent of reconciliation which embraces the notion of meeting, discussion and agreement in order to reach a consensus among opposing factions.”<sup>[76]</sup> Piers Pigou mentions that while approaches and definitions differ from community to community, versions of *nahe biti* can be found among all linguistic groups on Timor. In addition, while *nahe biti* is about reconciliation, it also promotes notions of accountability with the requirements of apology and forgiveness built into the process.<sup>[77]</sup> In this manner *nahe biti* is similar to notions of ubuntu as it too stresses the need to achieve a stable social order through the use of restorative justice and reconciliation. Indeed, Pigou notes that “[n]otions of reconciliation therefore lie at the heart of customary law and practice in Timor, and embrace local concepts of justice, in terms of accountability, reciprocity and compensation.”<sup>[78]</sup>

In the context of transitional justice *nahe biti* has most often been used to facilitate bringing refugees back from West Timor. These individuals—and in some cases whole communities—fled from fighting leading up to and following the 1999 referendum. In this process the refugees are often initially stigmatized as having been on the wrong side, but through initial family contacts, they agree to meet in a neutral area to give their confessions and accept judgment (including a sentence, such as paying a fine or completing voluntary work in the community). Afterward they are accepted back into the community through a ceremony sometimes sealed by drinking sacrificial blood and chewing betel nuts. Additionally, although *nahe biti* rituals are not religious in nature, Catholic priests are often invited to officiate at these ceremonies “to encourage participants to speak the truth” and to act as witnesses.<sup>[79]</sup> It is interesting to note that, unlike *gacaca*, if an individual is found to have been guilty of a serious crime, murder or rape for instance, he or she is handed over to the

police.<sup>[80]</sup>

The use of *nahe biti*, and especially its inclusion into the panoply of transitional justice mechanisms authorized by the state, is somewhat similar to *gacaca* courts. Like *gacaca*, *mahe biti* represents an existing, indigenous conflict resolution mechanism that has been adapted for use in transitional justice. The fact that this mechanism does not deal with serious crimes (as *gacaca* does) is in part due to two factors. The first is the presence of the United Nations Transitional Administration in East Timor (UNTAET) as the overriding authority in East Timor following independence. United Nations administrators were unlikely to allow *nahe biti* to be used for serious crime, as that would undermine their efforts to build, or rebuild, Western-style mechanisms for the rule of law. In addition, the dissatisfaction of the populace with the lack of tribunals for high ranking officials—especially Indonesian officers—may have precluded support for using *nahe biti* in serious cases.

## **Speaking and Serving**

Returning to Mertus' lens we can begin to compare how these mechanisms speak to different constituencies and gauge which constituencies are best served by which mechanisms. In Mertus' analysis there are several communities that are supposed to benefit from having international tribunals. These include the international community, international and regional organizations, states and individual actors outside of the affected community, local power brokers within the community, and the local community, including victims, survivors and bystanders.<sup>[81]</sup> Her thesis is that of all the groups that benefit from international tribunals, the international community benefits the most and the local population, including those who fled the fighting, benefits the least.

Much of the reason for this difference lies in the fact that the local populace is often the most disconnected from tribunal proceedings, particularly in the case of the ICTY and ICTR, both of which were conducted outside the countries in which the crimes and violence took place. The other main reason is that in a trial situation the narratives that emerge are those that are driven by the needs of the prosecution to make their cases and find the defendants guilty. Elements of victim or survivor stories that do not contribute to these narrow narratives are not aired in the tribunal and, thus, are lost to the overall historical

narrative of what happened.

The SCSL suffered from many of the same shortcomings as the international tribunals, and although it was held in Sierra Leone, it was often cut off from the interior of the country, instead directing much of its efforts towards an international audience. In addition, the tribunal relied wholly upon Western-derived legal-forensic narratives that narrowly address the minimum required to achieve a successful prosecution. In some instances this orientation towards retributive justice, alongside local participation and a measure of control, may provide substantial satisfaction to the local population. However, given the scale of many of these mass acts of violence and the inability of even hybrid courts to prosecute more than a handful of perpetrators, it seems unlikely that more than a small proportion of the local population will gain much more than minimal satisfaction from the punishment of perpetrators.<sup>[82]</sup>

If we follow Mertus' argument that the legal-forensic narratives used in tribunals primarily serve the aims of the prosecution, then we can extrapolate that victim-centered narratives of truth commissions are designed to partially address the need of victims and society to know that not only is the past being brought out, it is being put firmly into the past. While it is true that in the South African TRC, victim and survivor narratives were given a prominent place, much of the literature critiquing the process indicates there was a degree of selectivity in choosing sensational narratives for inclusion in the televised trials.<sup>[83]</sup> As noted above, the Sierra Leonean TRC may have been less selective and fairly well welcomed by those who told their stories, but there were concerns that society at large—and elites in particular—felt disconnected from the process, possibly for different reasons. In this case, the poor fit between the therapeutic nature of the narratives sought by the SLTRC and the cultural predilection for forgetting may have impeded the ability of the commission to speak to and for the general populace.

It appears that South Africa's TRC came closest to speaking to and for the larger South African community. Although not without flaws, the TRC engendered substantial support from the local community, at least some participation by local elites, and a good deal of interest from the international community. It also appeared to integrate and adapt religious and cultural traditions into the process—at least with moderate success. By contrast it appears that the SLTRC was more of a top-down initiative that did little to address local concerns or to find culturally appropriate methods for persuading more people to come

forward to testify. It is also worth noting that part of the SLTRC's difficulties stemmed from the confusion regarding shared jurisdiction between it and the SCSL, resulting in an unwillingness by perpetrators to come forth due to a fear of being prosecuted based on their truth commission testimony.

In contrast with many of the “larger” mechanisms, the two local initiatives studied here were wholesale adaptations of indigenous traditions to suit the needs—both in terms of narratives and restorative justice—of the local populations. The adaptations of gacaca and nahe biti were easily the best fit with the local culture, having been largely derived from it. Both served in some manner to address the issues of reconciliation and, at times, the need for retributive justice. Gacaca courts did this by recommending that anyone who did not fully take responsibility for their actions during the genocide be assigned to “Category One” status and transported to Kigali for prosecution by the national court system—a prosecution that could include the death penalty. Nahe biti mechanisms had a more limited jurisdiction and were required to inform the court system and the authorities about anyone found to have committed a serious crime.

To be sure, neither of these mechanisms is a complete success and there are particular concerns that gacaca has been largely subsumed to the benefit of the Rwandan government; but from current reports—as scant as they may be—it appears that both Gacaca and Nahe Bite are proving more successful certainly than their respective tribunals, and, in East Timor's case, nahe biti has certainly been more accepted than its truth commission.

## **Conclusion**

It seems clear that a “one size fits all” approach to transitional justice does not best serve the needs of the local community. At most, the use of international tribunals—and perhaps the ICC—sends a signal that the international community considers the crimes that have taken place to be serious. That signal, unfortunately, is usually lost to the local population and is, as Mertus describes it, a signal primarily to the international community rather than to the victims and survivors of these atrocities.

As we conclude we would like to return to our original question about the role of culture in determining the success, or lack thereof, of various mechanisms currently in use to promote transitional justice. If we take a universalist stance, that is if culture is not important to the

process of transitional justice, why is it nearly impossible to use the same mechanism in each case? Is it because the dynamics and root causes of these conflicts are different, or is it, as we think likely, that the role of culture does matter in popular acceptance of specific transitional justice mechanisms. Experience shows that the more a mechanism is accepted by the people involved, the more likely it will prove successful in meeting the needs of the affected populations, and those mechanisms people accept most often are the mechanisms based on local culture. Best of all, these mechanisms are perhaps most effective at engendering the conditions for future reconciliation.

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