7 *Gacaca* and *Judiyya* transitional justice: Uncovering the merits of African indigenous justice systems with the help of the receptor approach to human rights

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Abstract

The receptor approach to human rights entails considering the local context in giving effect to human rights. This approach underlines the need to rely on local culture in fostering respect for human rights. Relying on this theory, this chapter shows how African restorative justice mechanisms such as *Gacaca* in Rwanda and *Judiyya* in Darfur, Sudan, have furthered justice in Africa. Ultimately, the chapter finds that the 'African approach' to transitional justice is far better suited than imported templates which are not always responsive to the local context. The approach of African indigenous justice mechanisms is necessary to protect human rights from an African perspective in that it tends to bring the community together, fosters social harmony, and is responsive to the local context.

1 Introduction

At the heart of the Charter of the United Nations is the establishment of a peaceful global society characterised by the enjoyment of human rights, a better standard of living, justice, equality, and peace. Unfortunately, for many these objectives of the United Nations (UN) Charter remain illusory as human rights are violated by tyrants, companies, or during conflicts. At the same time, numerous responses have not always been able to remedy the situation in Africa. Therefore, it has become imperative for Africa to rethink international law with a focus on 'African approaches to international law', the theme of the conference for which this chapter was originally prepared. Given the recent history of Africa characterised by authoritarianism and conflict, African approaches to international law

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cannot be fully covered without a chapter on transitional justice defined as 'initiatives taken by states and societies to re-establish the respect for human rights and the dignity of the victims of violations'.[1] In the African context, under the African Union Transitional Justice Policy transitional justice denotes

> 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.[2]

However, the concept of transitional justice is broad and does not enjoy a universally agreed definition. It is often implemented in post-authoritarian contexts, in situations of socio-economic crisis, or in post-conflict circumstances with every case having its specificities,[3] even though all cases are triggered by massive violations of human rights. Capturing the multidimensional forms of transitional justice, UN Secretary-General Kofi Annan defined it as

> [t]he 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.[4]

While this definition is broad and all-encompassing in that it brings together all facets of transitional justice, the differences highlighted in this notion are not always taken into account by designers of transitional justice mechanisms who often embark on a one-size-fits-all approach.[5] They often

1 Sida 'Transitional justice and reconciliation: Thematic overview' https://www.sida.se/contentassets/69bb013c27e64cfcb8b6c6e05aeb71ab/transitional-justice-and-reconciliation.pdf (accessed 21 September 2022).

2 African Union Transitional Justice Policy para 19 https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf (accessed 21 September 2022).

3 R Duthie 'How context shapes transitional justice in fractured societies' 1 https://ecpr.eu/Filestore/ PaperProposal/15611ada-bd80-4985-80e4-343d4571451d.pdf (accessed 21 September 2022).

4 Report of the UN Secretary-General to the United Nations Security Council (2004) 'The rule of law and transitional justice in conflict and post-conflict societies' S/2004//616 para 8.

5 L Vinjamuri & J Snyder 'Law and politics in transitional justice' (2015) 18 *Annual*

arrive at a template used in different contexts without considering local reality.[6] This then begs the question as to what type of transitional justice should apply in African settings. With special attention to post-conflict circumstances and intra-state wars, this chapter argues that African indigenous justice mechanisms must be relied on in African contexts. The chapter seeks to show that African indigenous justice mechanisms support human rights rather than denying them. This point is made using the receptor approach to human rights which sees local culture as a resource for protecting and promoting human rights.

The chapter proceeds in six sections. Following this introduction and cognisant of the huge diversity of the African continent, section 2 deconstructs the African approach to transitional justice relying on African legal and social constructs. Section 3 sets out the characteristics of this approach in post-conflict situations through two case studies: the *Gacaca* in Rwanda; and *Judiyya* in Sudan. Section 4 considers the receptor approach to human rights, while section 5 explores the suitability of the receptor approach in enforcing human rights in transitional justice in Africa. It uncovers the merits of the African approach to transitional justice. In the discussion, the chapter acknowledges that the lack of homogeneity on the African continent leads to debate on what should be considered African or what 'Africanness' is.[7] This notwithstanding, the controversy should be welcomed as it enables further elaboration of 'Africanness'.[8] Section 6 offers concluding observations.

2 Unpacking the 'African approach' to transitional justice

This section is divided into two parts. The first presents the underpinnings of an 'African approach' to transitional justice; and the second focuses on the differences between African indigenous justice mechanisms and those imported from elsewhere.

2.1 The underpinnings of an 'African approach' to transitional justice

'Although Africanist scholars tend to discuss African cultures as a common body of reality, beliefs and practices, there are as many varieties

Review of Political Science 308.

6 As above.

7 See C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).

8 As above.

and peculiarities of these cultures as are the peoples of Africa.'[9] Despite this well-known diversity, Africa has clear? specificities that cut across the continent and epitomise the communitarian way of life of African people. While this way of life can be found elsewhere in the world, in Africa it is codified in the most important African human rights instrument – the African Charter on Human and Peoples' Rights (African Charter). These specificities include the concept of peoples' rights, the group rights *per se* in the African Charter,[10] and the duties of individuals towards other individuals, the state, and their communities.[11]

Very importantly, these rights are limited if the common interest is in danger. Under article 27(2) of the African Charter, these rights should be enjoyed 'with due regard to the rights of others, collective security, morality, and common interest'.[12] This provision clearly portray the foundation on which the African society is built. While Africa is part of the global village which has changed some of its characteristics, its original identity crafted in communalism cannot be ignored. Based on this communalism, an African indigenous approach to justice differs from imported mechanisms in the form of toolkits.[13] In sum, the African continent subscribes to a communitarian way of life which has been codified in African law. The African way of life as well as African law should therefore inform transitional justice mechanisms on the continent.

3 African indigenous justice mechanisms: The *Gacaca* and the *Judiyya*

Africa is huge and diverse in cultures, beliefs, traditions, and religions. Nevertheless, its approach to justice is generally restorative rather than punitive.[14] The following sections examine the indigenous justice

9 T Falola *Understanding modern Nigeria: Ethnicity, democracy and development* (2020).

10 African Charter arts 20-24.

11 African Charter arts 27, 28 & 29.

12 African Charter art 27.

13 E Oko and others 'Restoring justice (Ubuntu): An African perspective' (2010) 20 *International Criminal Justice Review* 73-85. See also E Oko 'Human rights and the African indigenous justice system', paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, 2004 (on file with the authors).

14 JJ Gabagambi 'A comparative analysis of restorative justice practices in Africa' *Globalex* (2020) https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa1.html (accessed 21 September 2022).

mechanisms of the *Gacaca* and the *Judiyya* used in transitional justice situations in Rwanda and Sudan respectively.

3.1 The Rwandan genocide and the *Gacaca*

This section of the chapter is again divided into two parts: the first presents a brief overview of the *Gacaca;* while the second explores the reliance on this indigenous justice mechanism in the transitional justice in Rwanda.

3.1.1 The Gacaca*: An overview*

The term *Gacaca*, which originates from *Kinyarwanda – umucaca* for 'lawn',[15] means sitting down and discussing an issue,[16] or doing 'justice on the grass'.[17] It is in fact an endogenous Rwandese dispute resolution system which involves people sitting outside on the grass to settle their disputes in the presence of community members.[18] Its core focus is to deal with issues regarding land disputes, family matters such as marriage, and minor robberies.[19] It was used to resolve community and family conflicts in pre-colonial times through the colonial era, when it was relied upon in conjunction with the colonial judicial system.

The *Gacaca* court system operates on three levels. On the bottom level, community and family matters are resolved. The village acts as the second level, while the *Gacaca* Court of Appeal serve as the top level. In 2001 the Court of Appeal was divided into three branches. The *Gacaca* General Assembly, which constitutes the first branch, is mandated to investigate cases by collecting information, establishing the facts, and preparing the list of applicants and defendants.[20] The second branch is the Bench of *Gacaca* court, which comprises nine *Inyanga Mugayo* or judges, recognised for their integrity. These judges are elected by the General Assembly from the cell in which they live. The third branch is the Coordinating Committee, which is mandated to coordinate all national activities of the *Gacaca* system.

15 J Kayigamba 'Rwanda's *Gacaca* courts: A mixed legacy' (2012) https://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy/4 Human Rights Watch Report (accessed 21 September 2022).

16 BBC.com 'Rwanda's *Gacaca* genocide courts finish work' 18 June 2012.

17 M Mutisi '*Gacaca* courts in Rwanda: An endogenous approach to post conflict justice and reconciliation*'* (2009) 2(1) *Africa Peace and Conflict Journal* 17-26.

18 Mutisi (n 17) 19.

19 Kayigamba (n 15).

20 Republic of Rwanda National Service of *Gacaca* Court '*Gacaca* court in Rwanda' (2012), 39. http://cnlg.gov.rw/fileadmin/templates/documents/GACACA_COURTS_IN_RWANDA.pdf (accessed 21 September 2022).

When dispensing justice nine of the *Inyanga Mugayo* preside over the proceedings. These are characterised by the principle of *contradictoire*: the accuser must first be given an opportunity to state his or her claim and the defendant then responds in a public trial in the region where both victims and perpetrators are neighbours. The system affords the perpetrator the opportunity to apologise and pay compensation in the form of a cow or other significant gifts.[21]

The uneven number of *Inyanga Mugayo* is important in guaranteeing that there will always be a majority decision in any given case. Although the judges received no salaries, their families are entitled to free education and healthcare. The presence of a minimum of 100 witnesses and members of the community is required to constitute a *Gacaca* session.[22] The effectiveness of the *Gacaca* is based on its legitimacy which flows from its embeddedness in the local community.

3.1.2 Reliance on the Gacaca *for the transitional justice in Rwanda*

The year 1994 tragically witnessed the genocide in Rwanda which saw hundreds of thousands of people losing their lives. The culprits of this genocide comprised the Hutu dominated government and its army, the national police, gendarmerie, and a well-known militia referred to as the *Interahamwe*. Other Hutu associations, such as the *Impuzamugambi*, were also involved. After this human tragedy, the government had to deal with some 130 000 people suspected of having engaged in violence and killings.[23] It is in this context that in 1996 the Organic Law 08/96 of 30 August 1996 was adopted with the main object of holding perpetrators to account.

However, the genocide had decimated the judiciary as many judges and lawyers had either been killed or had fled into exile.[24] The judiciary lacked the necessary capacity to deal with the huge number of cases. For instance, between 1996 and 2000 only 3 343 cases were dealt with. At this rate it was estimated that the process would take over 200 years to try not only those who had already been imprisoned, but also those who were still

21 N Kok 'The closing of the *Gacaca* courts and the implications for access to justice in Rwanda' (2012) https://www.issafrica.org/iss-today/the-closing-of-the-gacaca-courts-and-the-implications-for-access-to-justice-in-rwanda (accessed 21 September 2022).

22 Mutisi (n 17).

23 Rwanda National Service Commission (n 20).

24 Kayigamba (n 15).

in hiding at home or out of the country.[25] It was therefore impossible to provide justice by relying exclusively on the formal legal system. In fact, the government had three options: to do nothing and allow revenge to run its course; to offer a general amnesty which could lead to increased violence; or to rely on traditional modes of conflict resolution which foster reconciliation and national unity.[26] The government chose the last option, and passed Organic Law No 40/2000 of 2001 which set up the *Gacaca* on all levels throughout Rwanda. Under this law, the *Gacaca* was intended to complement the judiciary but not replace it.

The *Gacaca* operated on three levels: the first involved the ringleaders, masterminds, initiators, architects, and executors, commonly known as the *Akuza*. These were to be arrested and taken to the International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania, established by the UNSC on 8 November 1994 and formally closed on 31 December 2015.[27] The second level was that of the middle man or woman – those who gave effect to the policy designed by the masterminds on the ground, and those who ensured the implementation of the killings. They were brought before the *Gacaca* courts in Rwanda. Finally, the third aspect concentrates on the local actors and neighbours based on ethnic identity. These local players were dealt with by district court throughout Rwanda.

The benefits of the *Gacaca* courts were twofold. First, they alleviated the burden on the judiciary. In this respect, from March 2005 to June 2012, relying on the *Gacaca* system, the Rwandan judiciary finalised two million cases, 65 per cent of which resulted in convictions.[28] Second, the system was instrumental in calming tensions in the communities as people were directly involved in the administration of justice. Reliance could be placed on local knowledge and culture and justice was in the hands of individuals whom they trusted. The system had the benefit of being driven by grassroots while seeking to reveal the truth about the genocide; to speed up the cases of genocide and other crimes against humanity; to eradicate the culture of impunity; to strengthen unity and reconciliation among Rwandans; and to prove Rwandans' capacity to solve their own problems.[29]

25 As above.

26 'Rwanda closes "*Gacaca*" genocide courts - Grassroots tribunals tried some two million people accused in 1994 genocide, earning praise for ethnic reconciliation' *Al Jazeera* http://www.aljazeera.com/news/africa/2012/06/201261951733409260.html (accessed 21 September 2022).

27 Mutisi (n 17) 20.

28 'Rwanda closes "*Gacaca*" genocide courts' *Al Jazeera News* 19 June 2012; BBC.com (n 16).

29 Rwanda National Service Commission Report 2012.

Gacaca served as a platform that enabled victims and perpetrators to seek solutions for healing and reconciliation within their cultural context.

In support of this type of approach, Lederach argues that 'understanding conflict and developing appropriate models of handling ... will necessarily be rooted in, and must respect and draw from, the cultural knowledge of a people'.[30] The *Gacaca* were thus instrumental in rebuilding the country after the genocide. An important lesson learned is that to 'forgive and forget' or to 'forgive and march on' without unearthing the truth will not result in reconciliation or harmony.[31] In other words, a failure to investigate the killings committed and to give perpetrators a real opportunity to apologise and pay the necessary reparation, will not achieve peace.

The *Gacaca* system was not perfect. It was reported that the *Inyanga Mugayo* or elders were pressurised by the government and, consequently, lost their independence.[32] Another critic suggests that the government was not only silencing those who rejected the idea of *Gacaca*, but was reluctant to enter into dialogue with opponents and intimidated them.[33] In addition, truth-telling does not always lead to peace-building or appeasement,[34] but is prone to give rise to still further problems such as hatred and revenge.[35] According to Kayigamba,[36] 'by removing RPF [governmental] crimes from their jurisdiction, the government limited the potential of the *Gacaca* courts to foster long-term reconciliation in Rwanda,' and as such the *Gacaca* was a travesty of justice.

Numerous other commentators have criticised the *Gacaca* system. According to Human Rights Watch,[37] the speed of the trial robbed an accused person of the opportunity to prove his or her innocence or to rely on legal representation to do so. In fact, legal representation had no

30 JP Lederach *Preparing for peace: Conflict transformation across cultures* (1995) 10.

31 A El-Tom 'From war to peace and reconciliation in Darfur, Sudan: Prospects for the *Judiyya*' in M Mutisi & K Sansculotte-Greenidge (eds) *Integrating traditional and modern conflict resolution: Experiences from selected cases in Eastern and the Horn of Africa,* Africa Dialogue Monograph Series (No 2/2012) 102.

32 'Rwanda closes "*Gacaca*" genocide courts' (n 26).

33 M Mann *Dark side of democracy: Explaining ethnic cleansing* (2005).

34 M Minow *Between vengeance and forgiveness: Facing history after genocide and mass violence* (1998).

35 B Hamber 'Masculinity and transitional justice: An exploratory essay' (2007) 1(1) *International Journal of Transitional Justice* 375-90.

36 Kayigamba (n 15).

37 Human Rights Watch 'Rwanda. Justice compromised: The legacy of Rwanda's community based *Gacaca* courts' (2011).

place in the *Gacaca* system. Human Rights Watch also complained about the use of untrained judges and reliance of eyewitness which could be problematic.[38]

Despite these criticisms viewed through the lens of legalistic justice reflected in imported toolkits, it is important to note that the achievements of the *Gacaca*, when measured against those of the ICTR, prove the need for such an endogenous mechanism. Kayigamba writes: [39]

> While the Rwandan grassroots courts have tackled as many as two million cases, the ICTR has only managed to complete 69 trials. *Gacaca* trials have cost $40 million, whereas the ICTR trials have cost a staggering $1 billion.

In fact, the *Gacaca* system was cost effective and significant in rebuilding and reconciling broken communities. Although perhaps reconciliation did not foster human rights per se, the process was legitimate in that it originated from the masses. In addition, the template which advocated the ICTR could also not deliver human rights. This is to say that the country was faced with a crisis and had to choose an approach to deal with it and the indigenous approach was suitable under the circumstances.

Perhaps another of style justice or transplanted justice would not have been able to deal with genocide as it lacks *Gacaca's* local context perspective. In other words, an approach to justice must be responsive to the local reality. Uvin writes that it is important to craft transitional justice in a 'locally appropriate form' for it to be significant.[40]

3.2 *Judiyya*

This section unpacks the concept of *Judiyya* in the context of Darfur, Sudan and explains its application in transitional justice in Darfur where it was instrumental in securing peace and nation building.

3.2.1 The Judiyya *traditional system and the crisis in Darfur*

Judiyya is an Arabic term referring to a method of mediation by a third party to resolve a conflict.[41] It is also described as 'a grassroots system

38 As above.

39 Kayigamba (n 15).

40 P Uvin 'Case study: The *Gacaca* tribunals in Rwanda' in D Bloomfield, T Barnes & L Huyse (eds) *Reconciliation after violent conflict* (2003) 116 (on file with authors).

41 ZMB Gado 'Conflict resolution and reconciliation in Sudan: Inter-tribal reconciliation conferences in South Darfur state up to 2009' PhD thesis, University of Bradford 2013.

of arbitration that focuses on reconciliation and the restoration of social relationships in the community'.[42] The cornerstone of this system is collective compensation known as *Diya*. The latter is practised throughout Sudan and in other African countries including Chad and Somalia.[43] Generally, the payment of *Diya* is limited to unintentional homicide, injuries, and damage to property, but is also extended to crimes of collective goals that are intentionally committed.

The kingship's intervention is necessary when the compensation to be paid is too big for a single household to handle. In this context, the involvement of the kingship exemplifies collective responsibility for individual wrongdoing. The ultimate aim is to achieve harmony based on group solidarity through participatory and collective action. In this regard, the payment of *Diya* is determined by dividing the aggregate of the reparation imposed between the number of contributing families. Consequently, payments are relatively small as they are spread over many contributors who see it as 'an honourable deed, symbolic of belonging to the group'.[44] In fact, failure to contribute is deemed shameful.

To resolve ethnical conflicts where premeditated massacres are committed, the government also resorts to the *Diya* rather than formal justice based on the national legal code. Thus, *Diya* is vital for conflict resolution.

Compensation under *Diya* is determined by the *Judiyya* or the traditional mediation council. This council, which has been a local reality in Sudan since pre-colonial times, operates at grassroots level. It is mandated to secure peace and reconciliation in and between communities affected by conflict. The members of this council, who are not permanent, are appointed on the basis of their integrity and knowledge of customary law.[45] Generally, the *Judiyya* sessions, which take place under a tree, start with at least five adjudicators. The resulting decision should be respected, while the disputant who refuses to do so is considered 'anti-social, uncooperative and a threat to community harmony'.[46] The strength of the *Judiyya* is its embeddedness in moral and community values.

42 M Mutisi 'Introduction' in Mutisi & Sansculotte-Greenidge (eds) (n 31) 11.

43 El-Tom (n 31) 107.

44 As above.

45 Gado (n 41).

46 El-Tom (n 31) 108-109.

According to Gado, several factors contribute to the strength of *Judiyya*.[47] Thus, it is important that the mediators are all volunteers and that their involvement must be voluntarily accepted by all parties to the conflict before they can play a role in the mediation-arbitration process. The parties to the conflict decide on the agenda to be discussed without intervention from any other party. As customary law is the reference for adjudication, the mediators are expected to be knowledgeable in this field. Parties to the conflict must voluntarily accept to participate in the *Judiyya*, but this acceptance also implies an obligation to abide by the outcome. The implementation of the agreement reached in the *Judiyya* is a shared responsibility of the parties to the conflict and the mediators. Higher-level tribal leaders serve as guarantors for the implementation of the agreement in good faith, while the mediators act as witnesses in case of dispute over interpretation of the outcome.

3.2.2 The suitability of the **Judiyya** *for conflict resolution in Darfur*

The African Union High-Level Panel on Darfur (AUPD) is of the view that the crisis or genocide that occurred in Darfur resulted from the historical marginalisation of the Darfurians by the elites of Sudan.[48] The situation escalated into a fully-fledged crisis when thousands of people were killed and raped, villages destroyed, people displaced, and lives shattered.[49] The massacres were of a great magnitude and far exceeded the capacity of the formal legal system.[50]

The incapacity of the formal justice system was noted by the former President of South Africa, Thabo Mbeki, who led the AUPD. Mbeki called for reliance on hybrid courts as well as the revamping of the national justice system through the involvement of foreign judges.[51]

Applying the Rwandan analogy, while leaders such as former President Al-Bashir are dealt with by the ICC (indicted by the ICC on 20 July 2010), executors and medium role players can be dealt with by national courts and those in the communities can be handled through the *Judiyya.* The

47 Gado (n 41) 221.

48 AUPD 'Darfur: The quest for peace, justice and reconciliation' Report of the African Union High-Level Panel on Darfur (AUPD) African Union, 29 October 2009 https://reliefweb.int/report/sudan/sudan-darfur-quest-peace-justice-and-reconciliation-report-african-union-high-level (accessed 21 September 2022).

49 A El-Tom 'Darfur movements: Vision and blueprint for change' (2007) *TINABANTU: Journal of African International Affairs* 37-49.

50 El-Tom (n 31) 101.

51 AUPD (n 48) para 25 (b).

ultimate goal should be the reconstruction of the social fabric. Although there will inevitably be problems or challenges, it is important to note that the solutions ultimately reached should enable the country to move forward in unity once reconciliation has been achieved.

In agreement with El-Tom, it is submitted that 'the use of *Judiyya* in post-war Darfur is dictated by necessity'.[52] *Judiyya* constitutes the best avenue for generating ownership of justice, achieving reconciliation, and avoiding the undesirable dilemma of keeping detainees, many of whom are innocent, in jail for prolonged periods. As correctly highlighted by the AUPD: 'Justice and reconciliation are mutually reinforcing values and both are needed in Darfur.'[53] So relying solely on a legalist approach echoed in templates may bring criminal accountability, but will not bring the reconciliation needed for the reconstruction of the social fabric by restoring trust among Darfurians.

At the local level, community-based practices can also provide a framework for responding to human rights violations, particularly in conflict-affected settings. In the 1990s, according to Denney and Domingo, international actors began giving greater consideration to legal pluralism as a way to legitimate security and justice reforms by grounding them in the local context.[54]

4 The receptor approach

The debate on human rights has been dominated by a supposed conflict between human rights and culture. On the one hand are those who believe that human rights should be applied without regard to national or local context. They see culture as potentially undermining human rights and therefore seek to downplay its role.[55] They stress that culture is dynamic, contested, and non-monolithic and should not be romanticised or reified.[56] Proponents of these views are inclined to design a template for global implementation of human rights whether the violation occurs in Africa or elsewhere, or originates from states, business, or conflicts.

52 El-Tom (n 31) 115.

53 AUPD (n 48) para 21.

54 L Denney & P Domingo 'Local transitional justice: How changes in conflict, political settlements, and institutional development are changing transitional justice' in *Justice Mosaics* (2017) 209-210.

55 EM Zechenter 'In the name of culture: Cultural relativism and the abuse of the individual' (1997) 53 *Journal of Anthropological Research* 319-347.

56 J Donnelly *Universal human rights in theory & practice* (2003) 100-103.

On the other hand, are those who regard human rights as a threat to their culture.[57] For them human rights are a Trojan horse filled with alien values intended to undermine their way of life.[58] Supporters of these views are likely to call for context-specific solutions to human rights and transitional justice.

This perceived opposition between human rights and culture seriously undermines the future of human rights. The stand-off allows rulers who are not keen on human rights to dilute or abandon their obligations under the guise of culture. On the other hand, it is necessary that states are willing to put their eggs in the human rights regime basket if is to flourish. Therefore, a way around this impasse, which joins the universality of human rights to genuine respect for national and local culture, must be found.

This is exactly what the drafters of the Universal Declaration of Human Rights (Universal Declaration) had in mind. The delegates were drawn from a wide variety of ideological and philosophical backgrounds, such as Judeo-Christianity, Marxism, Confucianism, Buddhism, and Islam, and they did not think that the rights in the Universal Declaration were the prerogative of any particular philosophy. In addition, they felt that the Declaration should appeal to people from different backgrounds.

The delegates were therefore intent on and succeeded in drafting a document which does justice to all civilisations and has the potential of touching the soul of every human being. They went out of their way to turn the Universal Declaration into a 'big tent' to ensure that the rights it contained would be applied, first and foremost, by people in their relationships with others. To emphasise this, during the final stages of the drafting process the title of the Declaration was changed from 'international' to 'universal' to shift its focus to the ordinary men, women, and children to whom it was primarily addressed.[59] Perhaps paradoxically, for human rights to be universal, recognition will have to be given to the diverse cultures within which the rights will be realised.

57 H Musawa 'Same-sex marriage contrary to our culture and religion' *Leadership*, 22 January 2014 (on file with authors).

58 The Trojan horse metaphor has been taken from R Panikkar 'Is the notion of human rights a Western concept?' (1982) 30 *Diogenes* 101.

59 J Morsink *The Universal Declaration of Human Rights: Origins, drafting & intent* (1999).

The so-called 'receptor' approach to human rights was advanced to meet this objective.[60] There can be no doubt that human rights are a Euro-American concept originating from the Enlightenment.[61] However, underlying the receptor approach is the idea that many human rights have been part and parcel of all societies, including those of the South, for centuries or even millennia, in the shape of values and social institutions. Social institutions are sets of patterned strategies, consisting of norms, values, and role expectations, which people develop and pass on to succeeding generations for dealing with important social needs. By relying on ethnographic research, we are able to identify those social institutions and cultural values which match international human rights obligations. Where these institutions and values fall short of the obligations they can be amplified with the help of home-grown remedies. Where possible, therefore, the receptor approach relies on the remedial force of local culture and the agency of the people rather than on Eurocentric solutions often presented in legal frameworks.

The receptor approach builds on the important distinction in public international law between subscribing to standards and implementing them. While states are required unreservedly to meet the international obligations they have signed up to, it is left to their discretion to translate them at the national level. Consequently, while state parties are not permitted to invoke cultural reasons for failing to live up to their international human rights obligations, they are entitled to take the cultural, social, and political context into account when implementing them. This should be equally applicable in a context of transitional justice where human rights are always at stake.

The receptor approach is based on the idea that the inner motivation of the people should serve as the main engine for human rights promotion and protection. This calls for human rights which are embedded, that is, which match the values and norms of the people on the ground. This is also the object and purpose of the Universal Declaration, which in the concluding recital of the Preamble, describes the promotion and observance of the rights contained therein by every individual and every organ of society as its end. Therefore, the receptor approach is bottom-up rather than top-down. To take on the human rights challenges in a given society, one should rely on the building blocks at hand, rather than on templates or transplants which are alien to the prevailing culture. One

60 T Zwart 'Using local culture to further the implementation of international human rights: The receptor approach' (2012) 34 *Human Rights Quarterly* 546.

61 L Hunt *Inventing human rights: A history* (2007).

should uncover the rationale and meaning of existing social institutions and amplify them with the help of home-grown remedies if necessary.

Those who prefer to rely on 'global' templates to address human rights believe that since human rights emanate from the Enlightenment, underlying them are liberal values like personal autonomy, choice, freedom, secularity, rationality, and a scientific approach. Commentators who argue for the paramountcy of local context beg to differ.[62] Members of societies which revolve around the family and the community often express the view that individuals should not only serve their own interests by claiming rights, but should also contribute to the commonwealth by fulfilling duties and by discharging responsibility. This approach is rooted in the Confucianism that marks many Asian societies,[63] and in notions like ubuntu which characterise African societies.[64] Both of these views on human rights are equally legitimate.

However, some commentators believe that liberal-modernist human rights values, which they regard as universal or cosmopolitan, should guide not only Northerners, but also the other members of the world community.[65] Thus, Merry believes that the human rights regime articulates a 'cultural system rooted in secular transnational modernity'.[66] Consequently, when commentators describe human rights as universal, they sometimes not only mean that everybody should be able to enjoy them, but also that the value system underlying the Northern view on human rights should be preferred. Under those circumstances, the universalist ambition becomes a push for uniformity translated into templates for all initiatives, including transitional justice.

Such claims of Northern exclusivity presented as universal in the form of toolkits have lost their significance as a result of the emergence of the legal international human rights regime after World War II. Under this regime, international human rights obligations are binding on states not because they flow from a particular philosophy, but because they are rooted in positive law. In other words, the obligations of states in the area

62 M Makau *Human rights: A political and cultural critique* (2002); T Nhlapo 'The African customary law of marriage and the rights conundrum' in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000).

63 X Yao *An introduction to Confucianism* (2000).

64 V Khapoya *The African experience: An introduction* (2010).

65 Donnelly (n 56).

66 SE Merry *Human rights and gender violence: Translating international law into local justice* (2006).

of human rights are legal commitments which arise from the treaties they have signed up to, rather than moral commitments.

All contracting state parties, regardless of their philosophical views on human rights, have decided to put their eggs in the treaty-mechanism basket. They have moved from philosophy to positive law as the source of the binding nature of human rights.[67] By signing up to these treaties, Northern states, too, have accepted that law, rather than the accomplishments of the Enlightenment, serve as the basis of human rights obligations.

Under the receptor approach and to the extent the legal regime allows, states may remain loyal to their own philosophical convictions. Nowhere in the treaties does it say that human rights are the prerogative of modern states and, therefore, that signatory states with traditional societies should modernise by embracing rational secularism. Such a conclusion would be difficult to reconcile with the importance attached by the human rights instruments to traditional institutions like the family as the 'natural and fundamental group unit of society', religion, and marriage.

The concept of modernity was introduced during the nineteenth century to make sense of the fact that there were so many differences between societies. Modernity situates societies on a timeline: societies are different because they are at different stages of development. Through social change a society can move from one developmental stage to another.[68] This analytical tool was subsequently turned into an ideology.[69] All societies are naturally moving upwards in this timescale, from poverty, barbarism, despotism, and ignorance at the bottom, to riches, civilisation, democracy, and rationality at the top.[70]

Modernity, which is considered the end stage in the process, is to be sought, while tradition, which is the initial stage, should be left behind.[71] This shows that modernity theory is based on Northern ethnocentrism.[72] It is an ideology which portrays the adoption of value-orientations which are dominant in the North as essential for positive change and progress

67 JJ Shestack 'The philosophical foundations of human rights' (1998) 20 *Human Rights Quarterly* 201-234.

68 T Shanin 'The idea of progress' in M Rahnema & V Bawtree (eds) *The post-development reader* (1997) 66-67.

69 A Portes 'Modernity and development: A critique' (1973) 9 *Studies in Comparative International Development* 247-279.

70 Shanin (n 68).

71 Portes (n 69).

72 As above.

in every society. Modernity enjoys evolutionary superiority over all other value orientations which are cast aside as 'traditional'.[73] The modes of behaviour embodied in modernity lead to the structural transformations associated with progress and development.[74]

This concept of modernity needs to be distinguished from modernisation. Modernity is a subjective, psycho-social notion, consisting of a set of value-orientations which are similar to behavioural patterns which one would expect to be dominant in modern, ie urban-industrial societies. These include individualism, secularism, respect for science, a rejection of non-authoritarian structures, and a preference for urban life.[75] Modernisation, on the other hand, has an objective, structural meaning. It amounts to a convergence of a number of societal processes such as urbanisation, literacy, social mobility, mass media communication, industrialisation, and democratisation, into a stable whole.[76]

Although the North has served as the cradle of human rights as a concept, human rights as such have always been and are still part of every tradition. Social institutions such as kinship, education, resilience, reciprocity, community, religion, and self-help serve as indigenous human rights, which were offering protection in the South long before the emergence of Enlightenment. Becoming modern in the technological sense can, therefore, go hand-in-hand with attachment to these indigenous human rights conceptions.

However, the challenge facing the receptor approach is the 'mutability of cultures, norms, traditions and practices' which may need adjustment over the course of time with the 'prevailing social inventions and circumstances'. This suggests that with generational changes and the possible evolution or transformation of cultures, it may become necessary completely to revise the substance and transitional mechanisms that can become controversial if culture comes up against persistent objections by certain member of the community – although the will of the majority is likely to be adopted.

73 As above.

74 As above.

75 As above.

76 As above.

5 The advantages of an African indigenous justice system from a receptor perspective

5.1 Human rights Africa-style

As was discussed in section four, the receptor approach is aimed at providing an ethnography of the social institutions which are in place in any given society to achieve fairness and human dignity, such as kinship, education, community, or self-help. As part of an ethnological exercise, those social institutions will then be related to the international human rights requirements. Where there is a full match, the state is living up to its international human rights obligations despite it not necessarily relying on law or rights. If there is no match, or only a partial one, the state must improve existing social arrangements to meet its international obligations.

In order to identify the institutions in African society which can serve as receptors, one should keep in mind that human rights relations on the continent are different from those in other societies. Since in Africa power radiates outward from the core political areas and tends to diminish over distance, the state plays only a limited role in the daily lives of many Africans.[77] Therefore, the individual/state paradigm, which determines human-rights relations in the West, is less relevant in some African settings. Instead, Africans tend to rely on and invest in their local community, in particular their extended family. Rather than pursuing individual self-interest, the African approach is focused on collective survival, and therefore relies on cooperation, interdependence, and collective responsibility.[78] Individual rights exist within the context of the group and must therefore always be balanced against the collective interest.[79]

In Africa, entitlements and obligations form the very basis of the kinship system. Each member is supposed to assist the family in operating as an economic and social unit. This assistance is embedded in a framework of interconnected rights and duties.[80] Inherent in the membership of the

77 J Herbst *States and power in Africa: Comparative lessons in authority and control* (2000).

78 JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 320-324.

79 L Marasinghe 'Traditional conceptions of human rights in Africa' in CE Welch, Jr & RI Meltzer (eds) *Human rights and development in Africa* (1984); also Cobbah (n 78).

80 Cobbah (n 78).

extended family are certain rights.[81] These rights are complemented by the duties one has towards the members of one's family and community.

In Northern societies, for example, it is up to the state to assist the infirm and the vulnerable, such as the elderly, widows, and orphans, through social welfare. Within the African context, by contrast, such assistance is deemed a family matter.[82] It is the responsibility of the family to help out those who have fallen victim to a bad harvest, fire, or theft, to settle disputes between its members, including husbands and wives engaged in domestic battles, and to invest in the education and advancement of its members.[83] In Africa, therefore, duties are not owed to a distant and anonymous state entity, but to relatives who are close and on whose support one depends in order to survive. Consequently, human rights relations in Africa are more direct, personal, and reciprocal, and consequently more horizontal, than in the North.

Within this peculiar African context, several social institutions may serve as human rights receptors, in particular the support generated by membership of an extended family; the performance of duties by others; religious charity; and the stimulation of self-help. These institutions are widely accepted and should be tapped into in a situation of transitional justice.

Membership of the extended family provides a number of human rights, for example, the communal right of succession to family property; the right to be supported in times of scarcity; the right to claim social and psychological help at moments of need;[84] and the right to social welfare, including benefits, social security, and old age pensions.[85] Membership in an extended family is itself regarded as a fundamental human right.[86] The control of membership of the group and the power to exclude are powerful means of coercion in the hands of its members.[87] This understanding of people ethnography is essential to the protection of human rights in a context of transitional justice.

Renteln makes the important point that moral systems which are duty-based can accommodate human rights, because rights often correlate

81 Marasinghe (n 79).
82 As above.
83 As above.
84 As above.
85 Nhlapo (n 62).
86 Marasinghe (n 79).
87 As above.

with duties performed by others.[88] Thus, in Africa parents are supposed to take care of their children, while grown children are expected to provide for their parents. Mothers with young children may call on the entire community for support, while the aged and the infirm can fall back on the network of security offered by the family.[89] The younger family members in particular are expected to show respect for parents, for elders belonging to the same extended family, and for the head of the whole family.[90] This 'principle of respect' serves the honour and reputation of those who are hierarchically superior, but may also limit the exercise of certain rights by younger family members – for example, freedom of expression. This is part of the belief that all freedoms are ultimately limited by the need to preserve the traditional society.[91]

In Africa, religion serves as an important receptor for human rights. This is exemplified by the study undertaken by Baah into the human rights culture of the Akan in Ghana.[92] In Akan the society's religion is very much a part of everyday life and has a major impact on human relations. Like many other people in Africa, the Akan are motivated to be good to each other because they believe that this is the best way to translate the will of God into daily practice. Therefore, within Akan society the human rights culture has a strong religious foundation. As Baah[93] and Kaplan[94] have noted, the importance of religion as a conduit for human rights is often overlooked or avoided by Northerners because of their attachment to secularism and the notion that human rights ought to support a modernisation agenda. Kaplan has convincingly demonstrated, however, that improvements in the area of human rights can be achieved by building on faith and religion.[95]

That self-help can act as a receptor for human rights is exemplified by the strategies developed by Malawian women in the fight against HIV/AIDS.[96] They often discuss with their husbands the risk of contracting HIV as a result of extramarital relations; they confront their husbands'

88 AD Renteln *International human rights: Universalism versus relativism* (1990).

89 Cobbah (n 78); Nhlapo (n 62).

90 Marasinghe (n 79).

91 As above.

92 RA Baah *Human rights in Africa: The conflict of implementation* (2000).

93 As above.

94 S Kaplan 'Faith and fragile states: Why the development community needs religion' (2009) 31(1) *Harvard International Review* 22.

95 S Kaplan *Fixing fragile states: A new paradigm for development* (2008).

96 E Schatz 'Take your mat and go: Rural Malawian women's strategies in the HIV/AIDS era' (2005) 7 *Culture, Health & Sexuality* 479.

girlfriends about this risk; and they threaten their husbands with divorce if they do not adjust their behaviour.

Women who have been the victim of domestic abuse are often reluctant to lodge a criminal complaint against their husbands or to testify against them, because the mothers and their children will suffer if the breadwinner ends up behind bars. Therefore, as Green has noted, in order to tackle domestic violence, women's organisations in Africa are increasingly replacing legal strategies with economic ones.[97] They focus on housing, employment, and economic alternatives to allow women to leave abusive relationships.[98]

5.2 The added value of indigenous justice using a receptor lens

While the 'global template' of transitional justice is often characterised by legalism and prosecution with emphasis on retributive justice based on punishment, the restorative justice model relied upon in Africa focuses on restoring harmony. This may not make much sense to 'globalists'. Why should a person who has committed a murder be allowed to get away with it by apologising to the family of the victim and by drinking a bitter drink or stepping on an egg? This explains why 'a universal template' of transitional justice is often aimed at replacing these time-honoured social justice mechanisms with top-down de-contextual procedures. However, because of their intrinsic value[99] these mechanisms need to be saved and not sacrificed. With the help of the receptor approach to human rights, the merits of these local justice procedures, which for centuries have been part of African civilisation, can be highlighted.

Thus, there is a very convincing explanation for why Africans, especially in rural areas, attach so much value to this form of social justice.[100] Communities in Africa are multiplex societies in which economic, social, and family relations are intertwined. Consequently, one comes across the same people in multiple social settings – the person one works with on the land may at the same time be a member of one's family, the traditional healer who takes care of the sick, and a member of the family council which takes important decisions affecting everyday life. Therefore, tensions in one area of social life may spill over into other areas. A conflict with the fellow labourer on the land may easily spill over into the

97 D Green *Gender violence in Africa: African women's responses* (1999).

98 As above.

99 FK Camara *Pouvoir et justice dans la tradition des peuples noirs* (2004).

100 M Glucksman 'Natural justice in Africa' (1964) *Natural Law Forum* 25-44.

provision of healthcare and the conduct of politics, which may poison the atmosphere in the community and paralyse its social life. Administering restorative justice will help to resolve the conflict and restore harmony quickly. This will not be immediately obvious to someone who is used to living in a simplex society characterised by a clear division of labour and with less overlap between roles. These dynamics should inform the search for justice in such contexts.

The rationale of traditional justice, therefore, is to restore broken relations rapidly and to bring peace in the interests of the community. The rights of the defendant and the victim are ancillary to this collective interest. The rituals involved in the proceedings, such as stepping on an egg or sharing a drink, symbolise that the defendant is accepted back into the community and that the broken fences have been mended. The process focuses on finding equitable solutions to a conflict, rather than applying rules strictly and consistently.

As many atrocities committed on African soil have structural social causes, community justice mechanisms which involve the population as a whole are generally better suited to tackling and preventing problems than the international criminal justice systems based on individual responsibility – community solutions should be used to resolve community problems.

Compared to the imported mechanisms through tribunals set up in the capital of the country, in the region, or even in The Hague, the advantage is that proceedings are held in proximity of the victims and the location where crimes have been perpetrated. Consequently, evidence can be collected on the spot and victims and witnesses need not travel to distant shores. The outcomes of the proceedings are also felt in the geographical area where they matter most: there is a local nexus.

Furthermore, the proceedings are conducted in a language spoken by all stakeholders and within a setting which is respectful of their culture. The judges will have the factual knowledge and the cultural sensitivity necessary to conduct the proceedings in a fair manner. As Combs has shown, regrettably this factual knowledge and cultural sensitivity is often absent at the international level,[101] or rather in imported and non-responsive templates.

Moreover, local restorative justice mechanisms are open to the social, historical, political, and cultural context in which the atrocities

101 N Combs *Fact-finding without facts: The uncertain evidentiary foundations of international criminal convictions* (2010).

were committed. These dimensions are often not visible to the culturally untrained eye of international judges. The decisions rendered by these local tribunals therefore tend to have a more positive impact on the peace and reconciliation process than the judgments of international tribunals often crafted in templates.

Additionally, proceedings conducted before community tribunals are characterised by their accessibility and their low threshold or informality They are not subject to legalised rules and can therefore be easily understood by victims and defendants alike. This too contributes to the fairness of the trial. Local community trials are open to participation by the entire community and so create no barriers to those who are interested in taking part.

The participation of all victims is guaranteed in community proceedings, while only some of them may play a role in proceedings at the international level. Although the importance of the victims has been recognised in more formal proceedings at the national and the international level, they still play only a minor role.

Finally, local courts resort, in the main, to compensation for the victims, while requiring community work, requests for forgiveness, and expressions of remorse from the offenders. From a 'global template' perspective, these outcomes may seem 'soft' or trivial and as having little deterrent effect. However, from an indigenous justice point of view, these sanctions will contribute to the healing process of the community and to the reintegration of the offenders.

As Oko has rightly pointed out, indigenous justice systems are far better in serving human rights from the African perspective than formal or non-African systems.[102] The judgments are fair and just because they consider a wider range of facts and interests, including those of the community. Although they focus on the victim, they also support the offenders by persuading them to place themselves in their victims' shoes and to accept responsibility for their actions. Justice is being done through collaboration with and reintegration of the offenders rather through coercion and isolation. African justice is negotiative and democratic. It empowers victims, offenders, their families, and the entire community to participate in the identification of harm and the search for restoration and healing. It offers ample opportunity for dialogue between the victim, the offender, their families and friends, and the wider community. Since everybody is encouraged to speak his or her mind in a welcoming environment, there

102 Oko (n 13).

will be peace instead of bitterness. And as everybody is a stakeholder, the resolution of the conflict is far more likely to be accepted and abided by.

Even if a local justice system were to fall short of African human rights standards, amplification rather than social engineering should be the answer. The system should be repaired with the help of home-grown remedies rather than foreign legal transplants. The receptor approach is based on the idea that reforms should add to but not replace the existing social arrangements. This calls for remedies which fit into existing social relations rather than *Fremdkörper*.[103] Changes that add to the existing arrangements stand a far better chance of being supported and applied by the community than those which are enforced top-down.

This approach draws inspiration from the views expressed by An-Na'im and Ibhawoh. An-Na'im argues that as people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the improvement of the cultural legitimacy of those standards.[104] Ibhawoh pleads for the adoption of a sensitive approach that seeks to understand the social basis of cultural traditions and how cultural attitudes may be changed and adapted to complement human rights. According to Ibhawoh, these changes require local involvement and must be undertaken in a way that does not compromise the cultural integrity of the people.[105] As Ibhawoh rightly argues, local people must feel a sense of ownership in the process of change and adaptation if it is to succeed.[106]

This notwithstanding, it could be argued that the receptor approach has its shortcomings such as the lack of harmony or synchronization for the protection of human rights. But this apparent shortcoming enables the homegrown or grassroots respect for human rights. Perhaps the seeming social harmony often produced by the restorative mechanism does not always lead to justice despite reconciliation in the society.

The receptor approach is not perfect – it may well raise concerns of due process especially as it is often designed by the most powerful in

103 *Fremdkörper* is a German expression which denotes something that originates from a foreign body; something that does not originate from the local context.

104 A An-Na'im 'Towards a cross-cultural approach to defining international standards of human rights: The meaning of cruel, inhuman, or degrading treatment or punishment' in A An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (1992) 19-43.

105 B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838.

106 As above.

the community.[107] Nonetheless, while this deficiency cannot be ignored, the imported ready-made frameworks are no less problematic – their prosecutorial approaches are not always relevant to the society in which they are applied. In other words, the receptor approach cannot be rejected merely because it raises some problems. In fact, the positives outweigh the negatives in that its autochthonous origins ensure its legitimacy within the community. In reality, the legitimate approach accepted by communities is likely to bring greater satisfaction and a sense of justice to the populations who are the ultimate beneficiaries.

6 Conclusion

This chapter makes a case for relying on African indigenous justice rather than imported toolkits to promote and protect human rights in transitional justice circumstances. It does so with the help of the receptor approach to human rights which considers local culture a building block rather than a stumbling block for human rights protection.

Through the case studies of Rwanda and Darfur, the chapter shows the benefits of local restorative justice from a receptor perspective. It was found that this form of restorative justice is crucial for the restoration of harmony in multiplex communities. It has a strong consideration for the social, historical, political, and cultural context in which the atrocities were committed; has a positive impact on peace and reconciliation processes; is easily accessible to both victims and perpetrators; is bottom-up rather than top-down; and is very responsive to the needs of communities in which it is applied.

107 Denney & Domingo (n 54) 221-22.