3 INDIGENOUS AND TRIBAL MECHANISMS OF TRANSITIONAL JUSTICE: FILLING THE GAPS IN FORMAL JUSTICE SYSTEMS?

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> It is our conviction … that the wrongs committed in a particular country are best dealt with by those who are familiar with their root causes and the parties involved – those, in other words, who have suffered directly and have issued pleas for help to political leaders who are not always able to provide answers to the challenges at hand.[1]

Abstract

Transitional justice is resorted to in the framework of transition from armed conflict to peace and from authoritarian regimes to the democratic ones. In order to fill the existing or potential gaps or address the problems of state justice systems, indigenous instruments of justice may be utilised to reach the aims of transitional justice. As such they may be treated as complementary to other transitional justice mechanisms. The aim of the article is to find a new perspective for a better understanding of the complementary role of the indigenous justice in order to address the operational problems and gaps in the state justice systems in the framework of transitional justice. The overall aim of the paper is to answer the question whether such indigenous justice instruments are capable of filling the gaps in state/formal justice systems or addressing the operational problems of formal justice systems.

1 Introduction

The term 'transitional justice' embraces punishment of the perpetrators of serious crimes, revealing the truth about such crimes, compensation for the victims, reform of the oppressive institutions and reconciliation. Transitional justice is resorted to in the framework of transition from armed conflict to peace and from authoritarian regimes to democratic

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1 A Naniwe-Kaburahe 'The institutions of Bashingantahe in Burundi' in L Huyse & M Salter (eds) *Traditional justice and reconciliation after violent conflict: Learning from African experiences* (2008) 174.

ones in order to hold the perpetrators of serious human rights and international humanitarian law violations accountable and to contribute to the reconciliation of divided communities. Societies in transition have two alternatives with regard to human rights violations and international crimes: retributive justice and restorative justice. The former one includes punishing perpetrators by way of criminal trials and the latter extrajudicial (non-penal) attitude emphasising the need for revealing the truth, for example before truth commissions or other appropriate bodies and achieving reconciliation. In each of these options revealing the truth about past crimes is a necessary step to building sustainable peace and reconciliation.[2]

Transitional justice mechanisms include criminal trials before national, international or hybrid criminal courts or tribunals,[3] truth and reconciliation commissions,[4] vetting procedures and reparation schemes. It involves complex strategies that must take into account consequences of the past events but must also be forward-looking in order to prevent armed conflicts from recurring. According to one view, transitional justice is a framework of settling the past human rights violations as an element of broader political transformation. Hence, it is a combination of judicial and extrajudicial strategies such as those enumerated above.[5] Judicial and

2 MJ Mullenbach 'Reconstructing strife-torn societies: Third-party peacebuilding in intrastate disputes' in TD Mason & JD Meernik (eds) *Conflict prevention and peacebuilding in post-war societies: Sustaining the Peace* (2006) 57-59; L Hovil & JR Quinn 'Peace first, justice later: Traditional justice in Northern Uganda' Refugee Law Project Working Paper 17 (2005) 11 https://www.refugeelawproject.org/files/working_papers/RLP.WP17.pdf (accessed 8 August 2019).

3 One can list International Criminal Tribunals for the former Yugoslavia (1993), International Criminal Tribunals for Rwanda (1994), International Criminal Court (1998), Special Court for Sierra Leone (2002), Extraordinary Criminal Chambers in the Courts of Cambodia (2003), Special Panels for Serious Crimes in East Timor (2000), and Special Tribunal for Lebanon (2007).

4 Such as, for example, South Africa's Truth and Reconciliation Commission (1995), Truth Commission for El Salvador (1992-1993), Guatemala's Historical Clarification Commission (1997-1999), Truth and Reconciliation Commission for Sierra Leone (2002-2004), Commission for Reception, Truth and Reconciliation in East Timor (2002-2005), and Truth and Reconciliation Commission for Liberia (2006-2009). Some of the truth commissions deal with violations of indigenous peoples' rights, for example the Guatemalan Commission for Historical Clarification (1997-1999) in its work also concentrated on the sufferings of the Mayan peoples, that was the result of an internal armed conflict from 1960-1996. In its report the Commission concluded that the state committed genocide against the indigenous peoples of Maya (see 'Guatemala: Memory of silence – Tz-Inil Na.Ab-Al: Report of the Commission for Historical Clarification: Conclusions and recommendations' (1999) paras 108-123, https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf (accessed 1 August 2019).

5 M Komosa *Komisja prawdy: Mechanizm odpowiedzialności za naruszenie praw człowieka*

non-judicial processes are interlinked and one does not replace the other;[6] they are rather complementary.

In order to fill the existing or potential gaps or address the problems of state justice systems, indigenous (which in this paper is used synonymously with traditional, tribal or customary justice) instruments of justice may be utilised to reach the aims of transitional justice. As such they may be treated as complementary to other transitional justice mechanisms. Indigenous justice mechanisms may also be used to confront the legacy of the colonisation of indigenous peoples. As stated in the 'Study by the Expert Mechanism on the Rights of Indigenous Peoples' of 30 July 2013, transitional justice in the case of indigenous peoples

> includes human rights violations arising in situations of conflict, where indigenous peoples often figure prominently among victimized populations, as well as grievances associated with indigenous peoples' loss of sovereignty, lands, territories and resources and breaches of treaties, agreements and other constructive arrangements between indigenous peoples and States, as well as their collective experiences of colonization.[7]

The paper will concentrate on the issue of transitional justice and indigenous/tribal/traditional mechanisms in this regard. Its aim is to find a new perspective for a better understanding of the complementary role of indigenous justice in order to address the operational problems and gaps in the state or formal justice systems in the framework of transitional justice. I will begin with the rights of indigenous and tribal peoples and then continue with the indigenous transitional justice and its mechanisms. Examples such as Rwandan *gacaca* courts, *mato oput* in Uganda or *bashingantahe* councils in Burundi will be mentioned. Specific features and strengths and weaknesses of those mechanisms will be analysed. The above-mentioned examples fit into the notion of legal pluralism which may be defined as a coexistence of state and non-state forms of adjudication.[8]

(2014) 31.

6 Human Rights Council 'Access to justice in the promotion and protection of the rights of indigenous peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples' 30 July 2013, UN Doc A/HRC/24/50 (2013) para 84.

7 Study by the Expert Mechanism on the Rights of Indigenous Peoples (n 6) 79.

8 L Huyse 'Introduction: Tradition-based approaches in peacemaking, transitional justice and reconciliation policies' in Huyse & Salter (n 1) 8. See also: TW Wourji 'Coexistance between the formal and informal justice systems in Ethiopia: Challenges and prospects' (2012) 5 *African Journal of Legal Studies* 269; S Ciftci & D Howard-Wagner 'Integrating indigenous justice into alternative dispute resolution practices: A case study of the Aboriginal Care Circle Pilot Program in Nowra' (2012) 16 *Australian Indigenous Law Review* 81; and B Baker 'Where formal and informal justice meet: Ethiopia's justice pluralism' (2013) 21 *African Journal of International and*

In this paper I will concentrate only on those instruments that may be applicable to confronting the atrocities committed by authoritarian regimes and in the course of armed conflicts, excluding rituals such as the Acholi rite of *nyono-tong gweno* (stepping on the egg), *moyo kum* (cleansing the body), *moyo piny* (cleansing of an area) or *gomo tong* (bending the spear).[9] The overall aim of the paper is to answer the question whether such traditional justice instruments are capable of filling the gaps in state justice systems or addressing the operational problems of formal justice systems. In what kind of situations and under what conditions may they be used? Can such mechanisms contribute to genuine reconciliation in case of genocide and crimes against humanity? Is their application in conformity with international human rights standards, especially the fair trial guarantees? In the concluding remarks a model of complementarity or hybrid model of transitional justice will be proposed that includes indigenous instruments.

2 The notion of indigenous transitional justice

The UN Declaration on the Rights of Indigenous Peoples (2007) provides in article 5 that

> [i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[10]

Articles 34 and 35 add that indigenous peoples have the right to promote, develop and maintain their juridical systems and customs. This should however happen 'in accordance with international human rights standards'.[11]

Comparative Law 202.

9 JO Latigo 'Northern Uganda: Tradition-based practices in the Acholi region' in Huyse & Salter (n 1) 105-106.

10 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295 http://research.un.org/en/docs/ga/quick/regular/61 (accessed 8 August 2019).

11 UN Declaration on the Rights of Indigenous Peoples (n 10). Art 34 states: 'Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards' and according to Art 35: 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities'.

ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries similarly emphasises the need for indigenous peoples to have the right to maintain their own customs and institutions in compatibility with international human rights standards. In case there is a conflict between a national legal system and indigenous legal system, an appropriate procedure should be established (article 8(2)). In this respect autonomy of indigenous peoples should be constantly taken into account. Article 8(1) prescribes that when applying national laws to the indigenous peoples, to include the latter's customs and customary law. Article 9 is even more explicit when it provides that:

> To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.[12]

All of those rights of indigenous peoples and obligations of states have been reiterated in the 'Study by the Expert Mechanism on the Rights of Indigenous Peoples' where it was stressed that transitional justice 'should be adapted to ensure cultural appropriateness and consistency with customary legal practices and concepts concerning justice and conflict resolution'.[13] The Study rightly claims that the indigenous justice instruments will enrich the transitional justice procedures. Especially when transitional justice has to confront genocide, crimes against humanity or war crimes committed against the indigenous peoples, their customary practices should be included.[14] In the 'Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' of 2004 there was also a significant statement that

> due regard must be given to indigenous and informal traditions for administering justice or settling disputes to help them to continue their often

12 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed 9 August 2019).

13 Study by the Expert Mechanism on the Rights of Indigenous Peoples (n 6) para 85.

14 As above.

vital role and to do so in conformity with both international standards and local tradition.[15]

An indigenous/tribal justice system may be defined as 'an accumulation of historical practices, locally defined and applied by the whole community, guided by a distinct world vision and holistically organized (rather than atomized into isolated subject areas)', in other words 'non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas'.[16]

Similar terms to indigenous justice include traditional, customary, informal, non-state justice. In this paper they will be treated as synonymous due to their many similarities that will be mentioned below (such as flexibility, informality, and easy accessibility).[17] Usually at the other end of the spectrum is state justice, also classified as formal or official justice. The latter is organised and controlled by the state. Within this model one can also localise the international justice instruments such as international criminal tribunals and courts which are created by states or international organisations being a forum for cooperation of states (for example the ICTR, ICTY, and ICC).[18]

Indigenous and tribal communities have since time immemorial governed themselves in their own way, different from the Western (American-European) approach. They have their own practices, customs, institutions, including justice systems. Indigenous peoples maintained their own social and political order that governed their relationships, also with other nations, and social control that was sufficient to keep the society together. As will be evidenced by the forthcoming examples, the characteristic features of indigenous justice include:

- Disputes are resolved by political, hereditary or spiritual entities who act as arbitrators or mediators and are appointed by and from within the indigenous community and not by the state organs (the elders);

15 The UN Secretary General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, UN Doc S/2004/616 (2004) para 36.

16 Penal Reform International *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems* (2000) 11. See also: B Connolly 'No-State justice systems and the state: Proposals for a recognition typology' (2005-2006) 38 *Connecticut Law Review* 241; Huyse (n 8) 7.

17 Authors of the *Traditional justice and reconciliation after violent conflict: Learning from African experiences* in Conclusions use the terms 'indigenous' and 'traditional' interchangeably.

18 For more details on terminology see Penal Reform International (n 16) 11-12.

- Disputes and crimes are treated as a community issue which means that they pertain to the whole community and cannot be considered only at a bilateral level. They are very often treated differently compared to the Western justice systems as 'a misbehaviour which requires teaching or an illness which requires healing'.[19] For those reasons restorative results are emphasised.
- Decisions are made after discussions, consultations and establishing the truth;
- There is a high degree of public participation;
- The aim of the indigenous justice instruments is not only to punish the perpetrator but to bring back peace and harmony (social order) to the individual and social relationships as well as to achieve reconciliation.
- The process is – as a rule[20] – voluntary, however the decisions are usually enforced by social pressure.[21] Their enforcement is strengthened by the rituals and ceremonies aimed at reintegration and reconciliation which should be regarded as a complementary element of the traditional justice system.[22]
- The indigenous process is informal, there are no positive written rules (except for *gacaca* courts) and no legal representation. The rules of procedure are flexible.[23]

With reference to the definition of indigenous justice one may notice that by some, indigenous justice systems were dismissed as primitive, but by others they were praised as a centuries-old expression of the collective communal wisdom.[24] This issue is developed in the section on weaknesses of indigenous justice mechanisms below.

Some of indigenous justice instruments were preserved although they naturally evolved through the interactions with the European and colonial states' culture and as a result were modified, partly also, to meet the new challenges and circumstances.[25] For those reasons some commentators

19 Hovil & Quinn (n 2) 12; Huyse (n 8) 14.

20 For example, in the *gacaca* courts public participation was initially voluntary but later on the procedure was modified and state control and forced public participation was introduced: Huyse (n 8) 16.

21 See also: Penal Reform International (n 16) 33.

22 Latigo (n 9) 117-118.

23 P McAuliffe 'Romanticization versus integration? Indigenous justice in rule of law reconstruction and transitional justice discourse' (2013) 5 *Goettingen Journal of International Law* 41 at 49-50. See also Connolly (n 16) 241-242.

24 Connolly (n 16) 245.

25 MLM Fletcher 'The Supreme Court's legal culture war against tribal law' (2007) 2 *Intercultural Human Rights Law Review* 93 at 94; 'Chapter 2: Indigenous law – Truth, reconciliation, and access to justice' in *The Final Report of the Truth and*

question the indigenous or traditional character of some instruments like the *gacaca* courts called – due to its changed character – new *gacaca*. But one should remember that tradition is the result of a

> historical process of superimposition and mixing of components. What is often referred to as the customary layer is usually made of a large plurality of customs that have been interacting with each other in the course of historical events as experienced by the local population[26].

This statement confirms that such practices evolve and are shaped by the changing political, social and cultural circumstances in order to meet the modern challenges. Even though one calls the indigenous justice mechanisms like *gacaca* 'an invented tradition … loosely modeled on an existing institution'[27] one must still keep in mind their roots and remember that they are clearly indigenous but evolved with time. In other words, their underlying principles have not been much affected.[28] I believe that – despite all of those modifications – *gacaca* courts may still be termed an indigenous/traditional (community-based) or hybrid mechanism rooted in indigenous customs, a mechanism that is dynamic and still evolving (it cannot be frozen in time), capable of meeting the extraordinary challenges of confronting genocide committed on such a massive scale as in Rwanda. Extraordinary problems require extraordinary solutions. Naturally not all traditional mechanisms are indigenous unless one claims that for example all Rwandans are in fact indigenous peoples.[29]

Apart from the transition from authoritarian regime or from war the need to use indigenous justice instruments in the context of transition may arise in the case of confronting the legacy of colonialism and in order to repair the harm done to the indigenous peoples. Indigenous legal instruments may be used in the framework of transitional justice to heal the relations with indigenous peoples. Indigenous justice mechanisms

Reconciliation Commission of Canada: Canada's Residential Schools – Reconciliation, Volume 6 (2015) 45 http://www.trc.ca/websites/trcinstitution/index.php?p=890 (accessed 9 August 2019); T Nhlapo 'Indigenous law and gender in South Africa: Taking human rights and cultural diversity seriously' (1995) 13 *Third World Legal Studies* 49 at 53.

26 Connolly (n 16) 245.

27 B Ingelaere 'The *Gacaca* courts in Rwanda' in Huyse & Salter (n 1) 32.

28 In the same way B Ingelaere & D Kohlhagen 'Situating social imaginaries in transitional justice: The Bushingantahe in Burundi' (2012) 6 *International Journal of Transitional Justice* 40 at 42.

29 See for example 'The forest peoples of Africa: Land rights in context' C Kidd & J Kenrick who in their publication *Land rights and the forest peoples of Africa: Historical, legal and anthropological perspectives* (2009) 4 claim that: 'All Africans are clearly indigenous'.

should be exercised in the transitional justice framework especially when the crimes or breaches affected the indigenous communities. For example, in the case of Canada, where the Truth and Reconciliation Commission in its Final Report concluded that totality of policies towards indigenous peoples, including the residential schools (which amounted to cultural genocide), forced sterilisations of indigenous women and killings comprised not only cultural but also physical genocide.[30]

The most known indigenous or traditional instrument is *gacaca* in Rwanda. *Gacaca* is centuries old African tradition inherent in the indigenous culture. As will be shown below, it evolved but is still rooted in the indigenous justice mechanisms.[31] *Gacaca* literally means courts on the grass as they were held outdoors.[32] This is still one of the distinct features of *gacaca* that hearings are conducted in the communal places and the level of public participation is high (even though at some point it was enforced under the threat of punishment). *Gacaca* courts were created on the basis of the Organic Law on the Organisation of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed since 1 October 1990 issued in 1996 and the Organic Law Setting Up *Gacaca* Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between 1 October 1993 and 31 December 1994, issued in 2000.[33] After some changes introduced to the original Organic Law of 1996 finally the suspects were divided into three categories depending on the seriousness of their crimes.[34] The motives for resorting to the *gacaca*

30 *Summary of the Final Report of the Final Report of the Truth and Reconciliation Commission of Canada: Honouring the truth, reconciling for the future* (2015) 1-5 http://www.trc.ca/websites/trcinstitution/index.php?p=890 (accessed 9 August 2019); P Palmater 'Canada 150 is a celebration of Indigenous genocide' (2017) https://nowtoronto.com/news/canada-s-150th-a-celebration-of-indigenous-genocide/ (accessed 8 August 2019).

31 E Daly 'Between punitive and reconstructive justice: The *Gacaca* Courts in Rwanda' (2002) 34 *New York University Journal of International Law and Politics* 355 at 378.

32 P Clark 'Hybridity, holism, and "traditional" justice: The case of the *Gacaca* courts in post-genocide Rwanda' (2007) 39 *George Washington International Law Review* 765 at 779.

33 Clark (n 32) 781 & 783.

34 Category 1 comprised persons who were planners, organisers, inciters, supervisors and ringleaders of the genocide and crimes against humanity and their accomplices as well as persons that acted with the zeal or excessive cruelty or committed sexual crimes such as rape or acts of sexual torture or who desecrated/dehumanised dead bodies. Category 2 covered persons who were the killers or who committed other acts that caused death, injuries and their accomplices. Finally, category 3 included persons who committed offences against property. Category 2 and 3 were to be adjudicated by the *gacaca* courts and category 1 by the national courts. It is worth mentioning that the picture was made up by another instrument namely ICTR that tried the persons

courts comprised an extraordinary situation when after the 1994 genocide in Rwanda around 120 000 suspects were held in prisons intended to house only around 45 000 inmates and Rwandan judicial system totally collapsed – the courts infrastructure was destroyed and many lawyers and judges killed or suspected of acts of genocide or other crimes. As Erin Daly noted there were only five judges in the entire Rwanda and only 50 practicing lawyers.[35] As a result, *gacaca* courts were given a task of trying the lower-level suspects and in this way also contributing to reducing the population of the prisons by fast processing of the genocide cases (reducing the backlog of cases).[36] Other more important tasks included establishing the truth, eradicating the culture of impunity and reconciliation.[37] For those reasons, one of the commentators described *gacaca* as 'the search for internal solutions to internal problems'.[38]

Initially *gacaca* was not designed to address such complex issues as genocide and other atrocities. This was rather a traditional civil justice (dispute settlement) form modified and extended to criminal justice.[39] The punishments meted out by the *gacaca* courts depended on the severity of the act, the fact of cooperation of the suspect with the *gacaca* court and the plea bargaining (confessions of the suspects resulted in lighter penalties). Punishment embraced prison sentences (with the highest possible sentence of 30 years' imprisonment), community service and compensation. It was also possible to commute prison terms to community service.[40] Prison sentences are clear evidence of the retributive approach of *gacaca*, whereas the community service and compensation indicate its restorative role (their aim is to bring the perpetrators back to the community). Prison sentences are often regarded as contrary to indigenous customs as 'only the Government will benefit from putting the man to some labour [in prison]. There is no benefit to his [the injured man's] wife and children, let alone the rest of us who are his relations'.[41] Due to the plea-bargaining and community service perpetrators were able to reintegrate with the community on a larger and faster scale.[42]

responsible for the most serious international crimes: Clark (n 32) 790-791.

35 Clark (n 32) 776-777; Daly (n 31) 367-368.

36 See also: Daly (n 31) 356; Ingelaere (n 27) 34. At that rate, it would take more than 200 years to process all the genocide cases through the national courts system: Daly (n 31) at 370.

37 Ingelaere (n 27) 38.

38 Clark (n 32) 817.

39 Daly (n 31) 371.

40 Clark (n 32) 794.

41 Penal Reform International (n 16) 9.

42 Clark (n 32) 833.

What is of importance, the *gacaca* courts pursued not only legal objectives, but also non-legal combining a retributive approach with a restorative one, among the latter reconciliation and truth seeking.[43] As Phil Clark wrote, 'reconciliation involves rebuilding fractured individual and common relationships after the conflict, with a view toward encouraging meaningful interaction and cooperation among former antagonists'.[44] For reconciliation to be achieved the truth about the past events and atrocities must be revealed and the fate of the victims come to light. Hence, the reconciliation is backward and forward-oriented. It permits building a bridge from the violent past to the peaceful and harmonious, although not necessarily easy, future. Right to the truth is envisioned in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2005,[45] where it is construed as an element of the satisfaction, and in the International Convention for the Protection of All Persons from Enforced Disappearance (the latter being legally binding).[46] This right means that all the people (the community) have the right to know about past abuses, human rights violations and international crimes, as well as the reasons or motives of such violations. Especially, the victims and their families are entitled to know the circumstances of such acts, and in the case of the death a relative or a loved person or his/her disappearance, the family members have a right to know the details of the death or the fate of the disappeared persons and of the identity of the perpetrator. In order to achieve that effect every state has to have an independent and effective judicial system or some non-judicial instrument such as a truth commission.[47] The latter are especially fit for that task as they identify patterns of crimes and not only the individual guilt as is done during the trial.[48] The right to the truth

43 Clark (n 32) 768.

44 Clark (n 32) 770.

45 Arts 22(b) and 24 of the UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, UN Doc A/RES/60/147 (2006) http://research.un.org/en/docs/ga/quick/regular/60 (accessed 8 August 2019).

46 UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006. Art 24 of the Convention provides: 'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard' http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx (accessed 8 August 2019).

47 Study by the Expert Mechanism on the Rights of Indigenous Peoples (n 6) para 83.

48 Huyse (n 8) 5.

is reflected in all the indigenous justice mechanisms that are designed for truth-seeking.

The *gacaca* process is significant for another reason – it may be classified as a hybrid justice model (internal hybridity), including elements of a state justice system and so called 'negotiated justice model'. The former embraces most of all the criminal hearings and trials conducted according to a prescribed procedure, and the latter is achieved mostly through communal discussions of the acts of the perpetrators and evidence of their crimes. The *gacaca* proceedings may be construed as a dialogue during which all the community members publicly discuss their experiences. The issue of guilt and punishment becomes in this way a communal issue.[49] *Gacaca* clearly combines those two aspects, especially that *gacaca* courts have been officially authorised by the state and incorporated into the official state justice system. As already mentioned some commentators raise arguments that as such *gacaca* is no longer an indigenous or traditional justice mechanism but one must remember that indigenous customs, traditions, practices or institutions are not static, but dynamic, constantly evolving and in a way adapting to changing circumstances. All this in order to meet the specific needs of the post-genocide justice.[50] Such a proposal still expressly indicates the indigenous or traditional roots of the *gacaca* which cannot be wiped out by the evolution or modernisation of the concept. For similar reasons Erin Daly and Brynna Connolly use the term 'new *gacaca*'.[51] *Gacaca* courts are simply dynamic and evolving hybrid indigenous transitional justice instruments joining traditional and modern elements.[52]

Another mechanism of indigenous justice is that of Burundian *bashingantahe* councils that are based on the *ubushingantahe* concept, the latter term meaning 'the traditional authority structure by which Burundian society sought to resolve local conflicts and disputes'.[53] The latter requires 'a set of personal virtues, including a sense of equity and justice, a concern for truth, a righteous self-esteem. A hard-working character, [in other words] integrity'.[54] *Bashingantahe* councils (understood as an institution

49 Clark (n 32) 774 & 811.

50 Clark (n 32) 776.

51 Daly (n 31) 356; Connolly (n 16) 269.

52 Clark (n 32) 787-788.

53 E Scheye *Local justice and security development in Burundi: Workplace associations as a pathway ahead* (2011) 16.

54 A Nindorera 'Ubushingantahe as a base for political transformation in Burundi' Working Paper 102, Consortium on Gender, Security, and Human Rights (2003) 1.

– a council) have their roots in pre-colonial Burundi.[55] Their main task is to prevent conflicts and mediate between people in conflicts. Actually, their tasks are threefold: mediation, reconciliation and arbitration (in this last regard the decision is binding; there is a possibility of appeal to courts). Any decision of a *bashingantahe* council is made after hearing the parties to the dispute and establishing the truth. All the decisions are made in the shared feeling of reconciliation and arbitration. Hence, this mechanism fits into the restorative justice rather than retributive one.[56] Here, the parties to the dispute also encompass the victims and the accused in a criminal case since indigenous justice generally does not clearly distinguish between civil and criminal cases and respective procedures applicable.[57] Despite the *Arusha Accords* of the 2000's attempts to revitalise the *bashingantahe* councils by incorporating them into the judicial system, in 2005 the government of Burundi finally eliminated them from the judicial system. Their jurisdiction and prerogatives were systematically degraded. The status of *bashingantahe* councils today is that of a non-state actors whose role is to be an 'instrument of peace and social cohesion'[58] and their role to achieve that may still be termed as 'fundamental'.[59] This shows that 'the *bashingantahe* institution has not yet been accepted as a vital component of dealing with the legacy of an almost continuous and brutal conflict',[60] although mostly by political elites. There are today about 100 000 *bashingantahe* (men and women) in Burundi.[61]

An indigenous or tribal mechanism that may be used in transitional justice also debated in the literature is that of *mato oput* in Uganda. *Mato oput* is an indigenous Acholi justice instrument that is based on forgiveness and reconciliation, and as such of a restorative nature.[62] *Mato oput* literally means 'drinking the bitter herb' and in a nutshell it is a clan- and family-centered ceremony aimed at reconciliation that is conducted in the following phases: acknowledgment of the wrong done and responsibility for that, compensation by the wrongdoer and in the end sharing a

55 Nindorera (n 54) 12; Ingelaere & Kohlhagen (n 28) 43.

56 Nindorera (n 54) 16; Naniwe-Kaburahe (n 1) 156.

57 Penal Reform International (n 16) 12.

58 Nindorera (n 54) 17; Ingelaere & Kohlhagen (n 28) 40-41, 46.

59 Ingelaere & Kohlhagen (n 28) 46; S Vandeginste 'Transitional justice for Burundi: A long and winding road' in K Ambos, J Large & M Wierda (eds) *Building a future on peace and justice: Studies on transitional justice, peace and development – The Nuremberg Declaration on Peace and Justice* (2008) 418.

60 Naniwe-Kaburahe (n 1) 18.

61 Naniwe-Kaburahe (n 1) 162.

62 P Tom 'The Acholi traditional approach to justice and the war in Northern Uganda' (2006) http://www.beyondintractability.org/casestudy/tom-acholi (accessed 8 August 2019).

drink symbolising a bitter past and peace between the offender and the victims(s).[63] *Mato oput* is popular among the Acholi people as the majority of them are aware of the fact that very often perpetrators of the crimes in Uganda that fought, for example, for the Lord's Resistance Army, were forcibly abducted and forced to participate in combat and commit heinous international crimes. In this case perpetrators were at the same time victims which especially pertains to the child soldiers.[64] Barney Afako, writing about the underlying reasons for resort to *mato oput*, points out circumstances such as complexities of the armed conflict in Uganda, the massive amount of victims and the lack of formal justice system capable of dealing with violence committed in the course of the conflict which

> [c]ombined with a profound weariness with the war and the suffering it has caused … create[d] a moral empathy with the perpetrators and an acknowledgement that the formal justice system is not sufficiently nuanced to make the necessary distinctions between legal and moral guilt.[65]

It is worth stressing that in its original shape *mato oput* was not designed to adjudicate over war crimes or crimes against humanity but over intentional or accidental killings of individuals.[66] But with extending its scope of application it could be able to meet the new challenges although not without difficulties. Examples of *mato oput* and Uganda as well as of *gacaca* and Rwandan genocide present the opportunity to rediscover and revitalise the indigenous transitional justice instruments.[67] Such a revival or modernisation combining traditional features with some modern positive elements constitutes condition for the preservation of indigenous justice mechanisms.[68] What is important, *mato oput* was envisaged

63 B Afako 'Reconciliation and justice: "Mato oput" and the Amnesty Act' (2002) 67 http://www.c-r.org/accord-article/reconciliation-and-justice-%E2%80%98mato-oput%E2%80%99-and-amnesty-act-2002 (accessed 8 August 2019). For more details on the course of *mato oput*, see Tom (n 62). See also: Latigo (n 9) 106. However, the unprecedented scale of the conflict and killings makes the use of indigenous traditional instruments like *mato oput* problematic. The clan/family of the perpetrator is unable to compensate the victim as very often the victim does not know the perpetrator. See also *mato oput* in photos, Justice and Reconciliation Project '*Mato oput* ceremony' 10 May 2010 http://www.justiceandreconciliation.org/media/photos/2010/701/ (accessed 9 August 2019).

64 Afako (n 63).

65 Afako (n 63) 67. See also Hovil & Quinn (n 2) 24. On the strengths and weakness of *mato oput* see Latigo (n 9) 112-114.

66 Latigo (n 9) 114; Naniwe-Kaburahe (n 1) 185.

67 For more on the Acholi traditional justice system, see Huyse (n 8) 102-119.

68 Naniwe-Kaburahe (n 1) 173. For more examples of indigenous justice mechanisms that may be used in the transitional justice framework see the Navajos' custom *of naat'aanii* (a traditional leader that presides over peacemaker courts): Hovil & Quinn (n 2) 7;

in the Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army (Juba, Sudan, 29 June 2007).[69]

As the above examples show, indigenous justice mechanisms are capable of performing different tasks within the transitional justice framework. They may be used to deal with conflicts at the group, community and regional level and may serve various functions such as adjudication, arbitration, mediation, reconciliation and compensation. What is characteristic for indigenous justice is the blurring of boundaries between restorative and retributive justice.[70] State justice systems are hierarchical: an entity with power and authority makes the decisions on the basis of established legal rules and in conformity with certain procedure. In indigenous justice systems the parties to a dispute or a case are in more equal positions. This system is rather horizontal based on and aimed at preserving the social relationships and cultural values. This rather resembles the mechanism of Western mediation or arbitration.[71]

3 Strengths and weaknesses of indigenous justice mechanisms

What is common to all indigenous and tribal peoples is their understanding of justice. They believe that the aim of justice is to restore peace and harmony within the community by achieving reconciliation of the perpetrator of a crime or a harm with the victim and community at large.

B Tobin *Indigenous peoples, customary law and human rights: Why living law matters* (2015) 66-68; LK Gaines & R LeRoy Miller *Criminal justice in action: The core* (2008) 265; and East Timorese indigenous justice instruments such as that of *uma lisan:* M Tilman 'Customary social order and authority in the contemporary East Timorese village: Persistence and transformation' (2012) 11 *Local-Global: Identity, Security, Community* 192 at 192-199.

69 Article 3.1 states that: 'Traditional justice mechanisms, such as … *Mato Oput, as* practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation' Letter dated 16 July 2007 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council, S/2007/435. On *mato oput* see also: C Baguma 'When the traditional justice system is the best suited approach to conflict management: The Acholi Mato Oput, Joseph Kony, and the Lord's Resistance Army (LRA) In Uganda' (2012) 7 *Journal of Global Initiatives: Policy, Pedagogy, Perspective* 31; MO Ensor 'Drinking the bitter roots: Gendered youth, transitional justice and reconciliation across the South Sudan-Uganda Border' (2013) 3 *African Conflict and Peacebuilding Review* 171; D-N Tshimba 'Beyond the *Mato Oput* Tradition: Embedded contestations in transitional justice for postmassacre Pajong, Northern Uganda' (2015) 2 *Journal of African Conflicts and Peace Studies* 62.

70 Hovil & Quinn (n 2) 38.

71 As above.

According to the Western approach, justice is aimed at controlling actions that violate legal rules and are considered harmful to the society.[72] The aim of Western justice is to in a way validate the broken rules and to repair the broken human and social relationships. The emphasis is placed on the breached legal norm rather than the welfare of the victim and individual/social relations. In the indigenous justice systems victims are at the centre of decision making and final solution cannot be settled unless the victim, as well as the offender, agree to it. In the formal justice systems the victim is usually only a witness in the criminal case.[73] Keeping in mind the above examined examples and considerations one may attempt to point to the strengths and weaknesses of resorting to the indigenous/tribal justice mechanisms in the context of transitional justice.

3.1 Strengths

There are the following strengths or advantages of resorting to indigenous justice mechanisms:

- A high level of public participation (sometimes regarded as a weakness when treated as a form of mob justice or justice administered by the traumatised and divided population).[74] As Erin Daly rightly claimed in 2002: 'Rwandans of all stations will literally be defining justice for the post-genocide society rather than having it defined for and imposed on them'.[75] This, in turn, is linked to another strength of communal ownership – resorting to the traditional instruments allows the community to have the sense of communal ownership, real influence on doing justice.[76] The participatory character of such proceedings also contributes to the education of the whole community.[77]
- It helps to discover the truth, and as a consequence, it helps the survivors or the relatives of the deceased victims to handle their emotions of anger and loss and to understand what happened, in the end contributing to reconciliation.[78] Apart from establishment of truth, reconciliation, retribution and compensation, indigenous transitional justice instruments also have such benefits as strengthening of the communities and

72 HS Laforme 'The justice system in Canada: Does it work for Aboriginal people?' (2005) 4 *Indigenous Law Journal* 4.

73 Penal Reform International (n 16) 23.

74 Clark (n 32) 795-796, 808; Huyse (n 8) 37.

75 Daly (n 31) 376.

76 Connolly (n 16) 243.

77 Connolly (n 16) 244.

78 Clark (n 32) 797.

empowering the populations, thus giving them an (already-mentioned) sense of communal ownership and promotion of the democratic values.[79]

- Indigenous justice mechanisms may contribute to reconciliation and communal stability as the perpetrators – after revealing the truth, acknowledging their crimes, expressing remorse and apology and compensating the victim – may return to the community and their own families. This also prevents the families of the perpetrator from falling apart. Still as Padraig McAuliffe warns, search for communal stability may favour the interests of the community over the interests of the victims.[80] On the other hand as Brynna Connolly adds, indigenous or tribal justice systems may be 'the most appropriate option for local communities whose members must continue to live closely with their neighbors, particularly when the infraction is relatively minor'.[81] Yet, in the case of transitional justice the infractions are usually serious, still this does not undermine this argument.
- Indigenous justice systems may benefit from a higher degree of legitimacy as they reflect the norms and values recognised for ages by the communities affected by the atrocities that are being confronted in the transitional justice framework.[82]
- It is relatively cheap (judges or persons taking part in indigenous processes are not paid, there is no need for the expensive services of lawyers); and more accessible because of its proximity, informality, flexibility and lower costs, which is also linked to public participation.[83] Such indigenous justice proceedings are accessible even in highly rural areas and they are conducted in local languages,[84] which additionally contributes to their accessibility.[85]

3.2 Weaknesses

With regard to the weaknesses perhaps one should begin with a statement that lists of such weaknesses are usually formulated from the Western

79 Daly (n 31) 376; A Wierczyńska 'Consolidating democracy through transitional justice: Rwanda's *Gacaca* courts' (2004) 79 *New York University Law Review* 1934 at 1962.

80 McAuliffe (n 23) 69.

81 Connolly (n 16) 243-244.

82 Connolly (n 16) 244; Scheye (n 56) 18.

83 McAuliffe (n 23) 24.

84 Connolly (n 16) 243.

85 For more details on the strengths of the indigenous justice systems see Penal Reform International (n 17) 126-127. See also: Human Rights Council, Study by the Expert Mechanism on the Rights of Indigenous Peoples: Access to justice in the promotion and protection of the rights of indigenous peoples – Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and

point of view on the rule of law.[86] The UN General Assembly in numerous resolutions also recognised 'the importance of restoring confidence in the rule of law as a key element of transitional justice'.[87] In Resolution 67/1 it acknowledged that informal justice mechanisms play a positive role in dispute resolution but only when they are used in accordance with international human rights law. It also stressed that 'everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms' (paragraph 15). In paragraph 21 of the same resolution the General Assembly stressed the

> importance of a comprehensive approach to transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law.[88]

Despite my Western origins, which I will do my best to put aside, I humbly agree with the statement that it is impossible to describe and sometimes understand indigenous (customary) legal systems by using Western concepts.[89] This article, however, constitutes an attempt to understand indigenous justice better and deeper. Keeping this in mind the most common and harshest weaknesses listed are the following:

- Such mechanisms are regarded as a form of 'mob justice' where the rights of the accused are sacrificed at the altar of expeditious and cheap prosecution of the perpetrators.[90]

persons with disabilities, 7 August 2014, UN Doc A/HRC/27/65 (2014) para 20.

86 L Huyse 'Conclusions and recommendations' in L Huyse & M Salter (n 1) 191.

87 See for example: UN General Assembly, Resolution 66/102: The rule of law at the national and international levels, 13 January 2012, UN Doc A/RES/66/102 (2012) para 10; UN General Assembly, Resolution 67/97: The rule of law at the national and international levels, 14 January 2013, UN Doc A/RES/67/97 (2013) para 12; UN General Assembly, Resolution 68/116: The rule of law at the national and international levels, 18 December 2013, UN Doc A/RES/68/116 (2013) para 12; UN General Assembly, Resolution 69/123: The rule of law at the national and international levels, 18 December 2104, UN Doc A/RES/69/123 (2014) para 13.

88 UN General Assembly, Resolution 67/1: Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, 30 November 2012, UN Doc A/RES/67/1 (2012).

89 D Bunikowski & P Dillon 'Arguments from cultural ecology and legal pluralism for recognising indigenous customary law in the Arctic' in L Heinämäki & TM Herrmann (eds) *Experiencing and protecting sacred natural sites of Sámi and other indigenous peoples: The Sacred Arctic* (2017) 42.

90 Clark (n 32) 767.

- They may violate individual rights such as fair trial guarantees or women's rights. For example, in the *gacaca* courts, which are the most formalised of the above-mentioned mechanisms, there is no legal assistance available. This was the result of the above-mentioned lack of lawyers participating in the proceedings. The legal resources were scarce and this in turn would lead to the unequal access to legal advice.[91] On the other hand there is usually a right of appeal from the decisions of such informal mechanisms, for example in the case of the *gacaca* courts there is an appeal to the higher jurisdiction within *gacaca*.[92] There were also doubts whether the plea-bargaining would encourage false confessions in order to reduce the severity of the penalty.[93] The right to appeal to the state system may also be one of the possible forms of oversight with regard to the decisions of the indigenous mechanisms, the other being some form of incorporation or recognition of the indigenous justice systems into the state justice system to which I will return below.[94] But as Brynna Connolly rightly noted, '[n]umerous [state] justice systems suffer from many of the same problems of gender or ethnic bias of which the [non-state justice systems] are accused. [Naturally, there are differences between state and non-state justice systems but] these differences are of degree rather than kind'.[95]
- Some of those mechanisms are selective, for example *gacaca* courts did not try cases of crimes committed by the Rwandan Patriotic Front.[96] But nor did the ICTR.

91 Daly (n 31) 368.

92 Clark (n 32) 795, 821; McAuliffe (n 23) 53; Amnesty International 'Rwanda: *Gacaca* – A Question of Justice' (2002) 34-40 https://www.amnesty.org/en/documents/afr47/007/2002/en/ (accessed 8 August 2019); K Roth, A Des Forges & H Cobban 'Justice or therapy' (2002) *Boston Review* http://bostonreview.net/archives/BR27.3/rothdesForges.html (accessed 8 August 2019).

93 Daly (n 31) 382. With reference to the fair trial guarantees in the Acholi traditional justice instrument see Hovil & Quinn (n 2) 42.

94 Connolly (n 16) 246, 248.

95 Connolly (n 16) 257. On the other hand, there contrary opinions expressed pointing to the fairness of the indigenous justice instruments such that '[o]ne can go so far as to say that in an African tribunal the individual probably had a better guarantee of procedural fairness than in a Western court, for African tribunals sought a reconciliation of the parties approved by the community. Because reconciliation required a slow but thorough examination of any grievance, litigants had every opportunity to voice their complaints in a sympathetic environment. By comparison, the highly professionalized Western mode of dispute processing is calculated to alienate and confuse litigants' Penal Reform International (n 16) 139. With regard to ethnic bias or prejudice, Ingelaere & Kohlhagen (n 28) 51, add that for example in Burundi both Hutu and Tutsi were included in the composition of *bashingantahe* councils. Also no ethnic prejudice was observed at the local level during the proceedings. Quite contrary, many of the *bashingantahe* played an important role in preventing and mitigating ethnic violence.

96 Clark (n 32) 806. For more details on the weaknesses of the indigenous justice systems

4 Concluding remarks and proposed transitional justice model

The desirable future model of transitional justice should include indigenous practices contributing to creating a hybrid or complementary model that combines different justice systems or, as called by Stephen C Roach, a multilayered justice model. Such a model fits into the growing trend that advocates for legal pluralism mentioned in the introduction. This legal pluralism means that 'two or more legal systems coexist in the same social field'.[97] As Dawid Bunikowski and Patrick Dillon argue:

> In the case of legal pluralism, all rules that can be taken into consideration in a given case are *legitimate*, they are 'equally' important. Legitimacy may come from a legal system; more typically it is vested in traditions, long-standing customs, beliefs, or religion. In the words of the Italian philosopher of law Francesco Viola, legal pluralism is not 'plurality *in the* order' but '*of the* orders'.[98]

In accordance with the trend of legal pluralism, transitional justice must be construed in a holistic and integral manner, embracing state justice systems, indigenous justice systems as well as various political, social and legal instruments and all this in order to strengthen the possibilities of achieving the intended aims. The balance between them must be established but the scales must be tilted slightly more towards indigenous justice instruments than it is today. As the given examples – mainly from Africa – show, the use of indigenous justice mechanisms is increasingly popular and not only for the classical dispute resolution but in the framework of transitional justice as a response to international crimes such as genocide, crimes against humanity and war crimes. The goals of the transitional justice may be multiple and not only limited to punishing the perpetrators although it might be difficult to imagine successful transitional justice without some form of responsibility of the perpetrators, but does it have to criminal? In my belief the perspective of the victims is crucial here and their voice should be decisive. The voice of indigenous communities should be taken into account. Such a voice may be expressed through the indigenous channels of justice.[99] Views and opinions of international non-

see Penal Reform International (n 16) 27-128.

97 Clark (n 32) 765.

98 Bunikowski & Dillon (n 89) 41.

99 As a cultural leader in Uganda said: 'Kony being convicted and taking him to The Hague, that is taking him to heaven. His cell will have air conditioning, a TV, he will be eating chicken, beef. He will be given a chance to work in the jail and earn something.

governmental organisations such as Amnesty International or Human Rights Watch criticising indigenous justice mechanisms[100] are shaped by the Western attitude to justice that does not necessarily have to be superior to the indigenous or traditional justice concepts. In this framework *gacaca* or similar instruments suffer from lack of formal criminal justice features but it should be kept in mind that such instruments are rather non-legal or not entirely legal and their equally important goal is reconciliation. The state justice model and indigenous instruments should be regarded as complementary and supplementary. Depending on the will of the population, especially taking into account the voices and needs of the victims, such a hybrid transitional justice model may have retributive, deterrent and restorative outcomes. The dominant outcome will vary. The fact is that in the real-life transitional justice framework elements of both justice systems – state and indigenous – are/may be necessary in order to achieve the intended goals. This again shows that in practice the best model is for those systems to complement each other. Here again *gacaca* may be given as an example of a combination of those two extremes.[101]

For a complementary and holistic model to work efficiently it is indispensable to overcome the sense of resistance to non-state forms of justice that – to a certain extent – are and have to be outside the state control. On the other hand, those that opt for or support a legal-pluralist model need 'to overcome an aversion to state influence on indigenous justice'.[102] Such complementarity may be achieved, firstly, by way of incorporation of the indigenous justice system into the state system. Formal or official incorporation or partial incorporation, like in the case of *gacaca*, has some benefits but also causes or may cause some problems. The outcome may benefit from such values as impartiality, uniformity of the law and legitimacy accompanying the state-justice system, but on the other hand it inevitably leads to indigenous justice losing some of its informality, flexibility, dynamism and voluntary character. This marriage of both of those forms of justice also demands from states a higher level of sensibility to indigenous justice customs and institutions and also co-operation to strategically and sustainably delineate 'the blurry lines

I'd rather he be here and see what he has done. Let him talk to the person he has ordered the lips to be cut off. Let him talk and hear. The Acholi mechanisms must be allowed to run their course first, so that peace can be brought about. Only if at that stage there is a complainant who wants to take Kony to court should legal action be taken' – quote from Hovil & Quinn (n 2) 13.

100 Hovil & Quinn (n 2) 49.

101 Huyse (n 8) 6.

102 Huyse (n 8) 54.

between formal and informal law'.[103] Due to those doubts and fears many commentators claim that those two systems should remain separate and independent from each other.[104] Separation however is not to mean

> the insulation of community courts from supervision or accountability. A system of regional (or provincial) ombudsmen should be established to oversee the work of community forums and to enforce uniform standards.[105]

Secondly, the complementary function of the indigenous and state justice systems may also be achieved by way of their coexistence similar to the model adopted by the USA towards the Native justice system. It exists along the state justice system with its jurisdiction clearly delineated. The rule is that the jurisdiction of those two systems is divided and neither system may encroach upon the jurisdiction of the other. It may partly resemble the independence of different state justice systems.[106] This indicates that a better solution would be parallel independence with some links to the state justice system like the right to appeal to state courts. However, some parts of the indigenous justice should probably stay outside the state's control.[107] Hence, indigenous justice mechanisms should not be a part of state justice systems but rather a part of the official transitional justice strategy.

Another idea is to introduce some sort of labour division: the most serious crimes should be adjudicated by the national courts (or in some cases international tribunals like the ICC) while the less serious crimes could be dealt with by the indigenous justice system. On the other hand, the international criminal tribunals are distant and not directly accessible. One should take into account the needs and opinions of the victims and other sectors of the society. For example 'in East Timor 69 per cent of people would use local justice and 13 per cent the formal system for theft, while 91 per cent recognize the formal system as the appropriate mechanism for murder trials'.[108] Ordinary Rwandans prefer the *gacaca* courts over the national courts and the ICTR.[109] In Burundi, 73 per cent

103 Huyse (n 8) 56. For more on the possible way of recognising indigenous or informal justice systems, see also Connolly (n 16) 239-294.

104 Connolly (n 16) 247; Penal Reform International (n 16) 129.

105 Penal Reform International (n 16) 98.

106 Connolly (n 16) 248-249. See also Tribal-State Judicial Consortium 'Tribal Courts: What you should know about Tribal Courts' https://tribalstate.nmcourts.gov/tribal-courts.aspx (accessed 8 August 2019).

107 Penal Reform International (n 16) 135.

108 McAuliffe (n 24) 72.

109 Ingelaere (n 27) 51.

of those interviewed gave a positive evaluation of the work already done by *bashingantahe*.[110]

Consequently, we need 'holistic, multi-faceted responses to atrocity as a spectrum of mutually supportive mechanisms harmonizing as many perspectives as possible'.[111] And to state briefly as this issue deserves another article and has actually been examined in the legal literature, one should consider the idea that indigenous mechanisms described above are compatible with the basic mitigated human rights (for example fair trial guarantees) and are to be treated as complementary within the meaning of article17 of the ICC Statute and, consequently, have priority. As provocatively argued by James Ojera Latigo, in the present state of international justice:

> [I]t is morally and politically wrong to create new institutions that carry forward the inequities of the past and impose them on marginalized communities such as the Acholi in complete disregard of their norms and institutions – which are, moreover, often based on sounder ethical principles than those of a positivistic, secular system[112].

Moreover, those two systems may borrow from each other what is at the moment needed and helpful. This in turn reflects and contributes to constant evolution of the indigenous justice systems. Despite the need for

110 Naniwe-Kaburahe (n 1) 168.

111 McAuliffe (n 23) 63.

112 Latigo (n 9) 101. For more details on the principle of complementarity in the ICC Statute see P Seils *Handbook on complementarity. An introduction to the role of national courts and the ICC in prosecuting international crimes* (2016) https://www.ictj.org/sites/default/files/subsites/complementarity-icc/ (accessed 9 August 2019). On the complementarity principle in the context of indigenous justice see I Eberechi 'Who will save these endangered species? Evaluating the implications of the principle of complementarity on the traditional African conflict resolutions mechanisms' (2012) 20 *African Journal of International and Comparative Law* 22; SC Roach 'Multilayered justice in Northern Uganda: ICC intervention and local procedures of accountability' (2013) 13 *International Criminal Law Review* 249 (the author argues that 'closer and more effective ties between the ICC and local procedures of justice can be developed. This is not to say that local procedures of justice can and will substitute for the ICC and vice versa. Nor that the ICC will prosecute below the top brass in this country, namely, Joseph Kony and his top commanders, two of whom are now dead. Rather, it is to say that the revival of the *mato oput* (ancient) procedure in 2000 represents a plausible and timely opportunity to advance an effective multilayered model of justice'at 250. As rightly claimed in Hovil & Quinn (n 2) 36: 'Why is it that so-called international standards – obviously a collection of cultural norms from a select group of nations – are being used as benchmarks, when the inverse might actually be ideal? That is, some of the questions arising from the on-going conflict in northern Uganda and other transitional situations should inform current international law, rather than constantly having to bend these complex situations to fit international standards'.

indigenous justice systems to remain largely independent it does not mean that they do not deserve governmental support, quite the contrary – as part of the cultural heritage of humankind they should be preserved as much as possible.[113] National governments should support the revival of and assist in the implementation of indigenous reconciliation and justice mechanisms, for example by providing additional compensation needed to conduct indigenous/traditional rituals on a larger scale.[114] This funding should respect the cultural and social traditions of indigenous peoples with the simultaneous (sometimes mitigated) respect for human rights, with special emphasis on the rights of women (who have been marginalised).

In the hybrid model, the indigenous justice system must be adjusted where there is such a need and it must respect international human rights because only in this way will a fair and stable legal system and social order be preserved.[115] However, when regarding the mutual relations between Western forms of justice and human rights on one hand and indigenous justice on the other, one must remember about the autonomy of indigenous peoples and their right to self-determination which should be treated as an important interpretative principle and an instrument shaping the perspective towards indigenous peoples. This could lead to less formalistic and more modified implementation of, for example, fair trial guarantees without undermining the indigenous laws. A patronising attitude should be avoided. Indigenous sovereignty existed long before the colonial or dominant authorities and societies took power. As Padraig McAuliffe argues, in the transitional context human rights concerns should be ameliorated to some extent.[116] In other words, '[i]n that fusion, a clear commitment to human rights … must be matched by a demonstrated commitment to cultural diversity as well'.[117]

The role and impact of traditional or indigenous mechanisms in post-conflict societies consists most of all of their filling some gaps in state justice systems, such as dissatisfaction with the formal justice system, decontextualisation of instruments that are not able to meet the challenges of transitional justice (no 'one size fits all' formula) and breakdown of formal justice systems (like in Rwanda or failed states like Somalia) or the inability of the formal justice system to deal with the intricate distinctions between moral and legal guilt (as with the Uganda's child soldiers). Criminal trials only recognise criminal guilt but not the moral or political

113 Latigo (n 9) 147.

114 Roach (n 112) 253.

115 McAuliffe (n 23) 61.

116 McAuliffe (n 23) 79.

117 Nhlapo (n 25) 63.

responsibility and do not identify the wider political context of violence. *Gacaca*, for example, was a response to the failure of the state institutions to provide accountability and reconciliation. In Burundi *bashingantahe* could serve social cohesion and allow for recovery of stability after the conflict. 'More importantly, traditional mechanisms can act as interim instruments in cases where an official transitional justice policy is absent, delayed or crippled by political constraints'.[118] Indigenous justice instruments also provide some justice and security in areas where state justice systems cannot (for example distant rural areas). Moreover, state justice systems do not always sufficiently contribute to reconciliation so the 'pursuit of national reconciliation today should include establishing an appropriate and effective African [or more broadly indigenous] traditional system of restorative justice as an alternative option to a Western justice system'.[119]

Not all of those instruments succeeded entirely or at all. For example, *bashingantahe* councils succeeded in several communities contributing to reconciliation, but failed in the majority of the others. Similar doubts were raised with reference to *gacaca* courts in Rwanda.[120] So there is much to improve. Hence, the answer to the question about the contribution to reconciliation is more complicated than just 'yes' or 'no'. Indigenous justice mechanisms when applied with the political will and support from the state as well as in accordance with the customs and traditions of indigenous communities as well as the mitigated human rights standards may definitely contribute to reconciliation as one of the aims of transitional justice. Also their healing potential should not be dismissed.

For all the above reasons, particularly taking into account the strengths of indigenous legal practices, such practices should be rediscovered, revitalised and recognised. Indigenous justice systems are bottom up alternatives to formal justice frequently regarded as imposed by the colonisers. As Padraig McAuliffe eloquently summarises, '[t]hrough the process of integrating indigenous justice with the formal system, justice sector reformers endeavor to "build mutually beneficial linkages between the system … to harness the positive aspects of each system and mitigate the negatives"'.[121]

To conclude, all the justice systems should be part of the same whole and they should complement each other in a synergistic way, utilising the positives of them both and minimising or eliminating the negatives.

118 Huyse (n 89) 190; Tobin (n 68) 73-74.

119 Latigo (n 9) 111.

120 Huyse (n 8) 12.

121 McAuliffe (n 23) 44.

Indigenous justice is different from but not inferior to state justice systems and should be a part, distinct but still a part, of the justice systems. The indigenous legal customs are part of the human culture or even human heritage that should not be lost, that must not be lost. Dawid Bunikowski and Patrick Dillon claim that '[c]ustoms, religious beliefs, traditions, rules, social morality are often better regulators of human behaviour than state law'.[122] Indigenous instruments are enduring and express the common wisdom of the generations of indigenous peoples and as such should gain even more attention. Recent years are proof of growing support in favour of combining customary models of justice with Western models of justice to form a kind of legal pluralism, in which both customary and state laws are accepted.[123] What should also be noted is that in order to secure indigenous rights, including the right to self-determination, it is necessary to 'build a bridge between "your legal regimes and ours"', as stated by Alejandro Argumendo, a Quechua activist in 1993.[124]

122 Bunikowski & Dillon (n 89) at 42.

123 Hovil & Quinn (n 2) 49.

124 Tobin (n 68) 72.