

# THE CULTURE OF LAW: UNDERSTANDING THE INFLUENCE OF LEGAL TRADITION ON TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES

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## I. INTRODUCTION

When discussing issues of transitional justice, it is easy for those steeped in the Western tradition to assume that the best form of justice in the aftermath of a crisis is a trial before a judge and punishment handed down by a court according to the law. Our cultural understandings of law and the role that law and legal institutions play in the judicial process and punishment of one's peer are centered on formal proceedings and a decision as to whether an individual is guilty or innocent. This belief in, and reliance on, the court system is something which stems from our own legal cultural and experience with the law. Western legal traditions such as the common law and civil law are based on well-defined judicial institutions, written law, and the presence of legal professionals to determine what is the appropriate punishment in any situation. Not all legal traditions are grounded in these same understandings of the law and the role of law in society. There are other legal traditions in the world, where the focus has historically centered on rebuilding community harmony and trust, or reconciling the opposing parties in a conflict to restore balance.<sup>1</sup> Some of these legal traditions find the basis for the laws and concepts of justice in religious principles,<sup>2</sup> and some find it in longstanding customs of the community.<sup>3</sup> In many of these communities, these traditional views of the law and justice have been mixed over time with Western, more institutionalized forms of law.<sup>4</sup> Even in those states, however, it is often the case that society still perceives law and justice in the traditional manner of the community rather than in the Western notion of arrest, trial, and punishment for the individual.

Given the importance of legal tradition in shaping cultural perceptions about justice, this Article seeks to better understand this relationship through a study of the legal traditions of communities that have experienced conflict and

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1. Marek Kaminski et al., *Normative and Strategic Aspects of Transitional Justice*, 50 J. CONFLICT RESOL. 295 (2006).

2. *Id.*

3. *Id.*

4. See Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427, 435 (2007).

are moving into the transitional justice phase. This Article argues that instituting more effective post-conflict transitional justice requires that closer attention be paid to the local understandings of law in making assessments about justice and the best way to achieve peace and harmony in post-conflict societies. For those who work to assist these communities as they rebuild, understanding the local community's perspective on law and justice and the appropriate mechanisms for achieving peace and reconciliation post-conflict will be more effective than simply imposing Western ideals about justice being handed down with a judicial decision.

This Article examines these concepts in the context of Uganda and how the state's legal tradition shapes societal perceptions about justice, peace, and appropriate actions in the aftermath of a crisis.<sup>5</sup> Specifically, this Article considers what local communities, steeped in their own histories and legal traditions, believe are the best solutions in post-conflict societies.<sup>6</sup> This Article explores the role that a state's legal tradition may play in shaping successful transitional justice solutions in the aftermath of crisis.<sup>7</sup> It argues that traditional legal mechanisms such as customary law and religious law must be considered in addition to Western-style codes and courts in order to have a more effective system of transitional justice.<sup>8</sup>

However, it is not just the actual mechanisms of justice that must be considered. Cultural understandings of justice and what is most important to those societies which have suffered must also be taken into account.<sup>9</sup> All societies have their own legal cultures and ideas, born from their own legal traditions, which may, in turn, create different understandings about justice, peace, and other concepts which are so commonly debated among those working in the transitional justice community. Given this reality, close attention needs to be paid to the local culture and society in making assessments about justice and the best way to achieve harmony within the community.<sup>10</sup>

Part II of this Article highlights some of the existing literature on

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5. See PHUONG PHAM ET AL., *WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA* (University of California Press) (2007).

6. See James Ojera Latigo, *Northern Uganda: Tradition-Based Practices in the Acholi Region*, in *TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES* 85 (Luc Huyse & Mark Salter eds., 2008).

7. PHAM ET AL., *supra* note 5, at 43.

8. See Luc Huyse, *Introduction: Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies*, in *TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES* 1, 3 (Luc Huyse & Mark Salter eds., 2008).

9. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, S/2004/616 (Aug. 23, 2004), available at <http://daccess-ods.un.org/TMP/6569926.73873901.html>.

10. James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271, 278 (2005).

transitional justice in post-conflict societies.<sup>11</sup> Building on those who argue for a culturally sensitive approach, Part III discusses the importance of considering legal tradition – a combination of the legal history, culture, and accepted institutions within a society – when assisting communities in post-conflict rebuilding.<sup>12</sup> Part IV turns to Uganda as a case study, examining the Ugandan legal tradition and traditional concepts of justice.<sup>13</sup> In the context of the Ugandan conflict and efforts to rebuild, Part V discusses public preferences in terms of justice, peace, and how these are reflective of Uganda's legal tradition.<sup>14</sup> To understand peoples' attitudes about transitional justice, peace, and law post-conflict, this Article uses survey data collected through a joint project of the Payson Center for International Development at Tulane University, the Human Rights Center at the University of California, Berkeley, and the International Center for Transitional Justice. The survey on Uganda asked participants about their attitudes towards a number of different transitional justice concepts and peace-building efforts. The use of these surveys is crucial because they give a first-hand account of what people who have experienced the conflict believe would be most effective for their own community. Initial research on Uganda shows that a community method of transitional justice, stemming from the Ugandan legal tradition, is more aligned with the desires of Ugandans for their future than Western style courts and laws. Finally, Part VI concludes with a discussion of the impact of considering legal tradition in transitional justice work and avenues for further research.<sup>15</sup>

## II. THE STATE OF TRANSITIONAL JUSTICE

Transitional justice has been defined as procedures, whether formal or informal, which are implemented by a group or institution that is accepted as legitimate in order to deal with perpetrators and provide justice to victims.<sup>16</sup> There are numerous forms of transitional justice mechanisms ranging from international criminal proceedings such as those at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda and the International Criminal Court,<sup>17</sup> domestic or hybrid trials as in Cambodia,<sup>18</sup> truth and reconciliation commissions as in South Africa,<sup>19</sup> amnesties,<sup>20</sup> and local

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11. See Kaminski, *supra* note 1.

12. U.N. Secretary-General, *supra* note 9, at 12.

13. See Huyse, *supra* note 8.

14. Patrick Vinck et al., *Exposure to War Crimes and Implications for Peace Building in Northern Uganda*, 298 J. AM. MED. ASS'N 543, 553 (2007).

15. *Id.* at 548-50.

16. Kaminski, *supra* note 1, at 300-01.

17. Sikkink & Walling, *supra* note 4.

18. *Id.*

19. *Id.*

20. *Id.* at 435.

procedures like the gacaca courts in Rwanda.<sup>21</sup> While the term “transitional justice” has been used to encompass the development of judicial institutions and the rule of law in any state in transition,<sup>22</sup> this Article focuses on the narrower area of transitional justice in post-conflict situations.

The body of research on transitional justice has increased significantly since the end of the Cold War.<sup>23</sup> It is an interdisciplinary subject that crosses the lines of political science, law, sociology, and psychology. Transitional justice and the rebuilding of post-conflict societies will continue to be extremely important as long as societies continue to suffer conflict. In the past two decades, the concept of transitional justice for post-conflict societies has become much more institutionalized and now forms a part of the United Nations mandate.<sup>24</sup> While institutionalization is important because it focuses international attention and resources on those situations needing external assistance in order to rebuild in the aftermath of conflict, this centralization at the international level can contribute to the Westernization of transitional justice projects. This is not necessarily the result of an imperialistic intent; it is often Western states, Western advocacy groups, or Western NGOs that have the resources and personnel to assist with transitional justice activities in the aftermath of a conflict. As a result, diplomats, lawyers, advocates, and others who work in this area turn to the forms of justice they are most familiar with, such as legal rules, judges, courts, and punishment as mechanisms of justice.

There has been much debate as to whether transitional justice is best achieved through a top-down manner, stemming from international organizations like the United Nations, or whether it is best left to individual states and communities.<sup>25</sup> Some scholars have classified this duality as exogenous transitional justice and endogenous transitional justice.<sup>26</sup> In the exogenous case, transitional justice mechanisms are created from the outside, often by neutral parties not engaged in the conflict.<sup>27</sup> International institutions are currently the largest purveyors of exogenous transitional justice.<sup>28</sup> Endogenous transitional justice is when the justice mechanisms are developed and administered by the post-conflict society-in-transition.<sup>29</sup> Some scholars argue that addressing transitional justice from the top-down through international institutions is necessary because there are more resources

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21. Kaminski, *supra* note 1, at 301.

22. See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 7 (2d ed. 2010); Sikkink & Walling, *supra* note 4.

23. Kaminski, *supra* note 1, at 296.

24. See U.N. Secretary-General, *supra* note 9.

25. Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. TRANSITIONAL JUST. 5, 10 (2009); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 275-76 (2008).

26. Kaminski, *supra* note 1, at 295-96.

27. *Id.*

28. *Id.*

29. *Id.* at 295.

available, there are already institutions in place, and the international tribunals are removed from the immediate local tensions.<sup>30</sup> Those in favor of a more localized approach argue that the extraordinary range of national experiences and cultures make the possibility of a universally relevant formula for transitional justice untenable.<sup>31</sup> Others supporting this position argue that international institutions like the ICTY have no real impact and do nothing to improve peace and harmony in the long run.<sup>32</sup>

Arguments on both sides remain largely focused on the institutional mechanisms of achieving justice, of placing blame, and seeking retribution or apology. Some argue about the “moral obligation to prosecute and punish perpetrators.”<sup>33</sup> These arguments raise questions about morality generally, and whether or not a universal sense of right and wrong exists. While most can universally agree that certain actions, like genocide, are wrong, there may not be an agreement on the moral obligations that stem from such actions. Universal agreement that certain actions are wrong does not automatically result in agreement on how to respond to the actions. Responses will be culturally grounded, and therefore, the entire notion of what constitutes justice in post-conflict societies must be considered.

In order to be effective, transitional justice must take into account “indigenous and informal traditions for administering justice or settling disputes” because this is the only way to do so in conformance with local traditions.<sup>34</sup> Since cultural beliefs about law and justice are grounded in such traditions, they must be taken into account during the peacemaking process – even if it means not achieving “justice” in a way recognized by Western states.

While consideration of whether alternative mechanisms of justice grounded in local tradition are better suited to different societies is certainly a

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30. See GERRY J. SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 12 (2004); David Wippman, *The International Criminal Court, in THE POLITICS OF INTERNATIONAL LAW* 151 (Christian Reus-Smit ed., 2004); M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 55 (1995); M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 466 (1999); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573, 575 (2007); Jack Donnelly, *State Sovereignty and Human Rights*, 16 n. 2 (Denver Graduate School of Int'l Studies, Working Paper No. 21, 2004), available at <http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf>; Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150 (2001).

31. Diane Orentlicher, *'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, 1 INT'L J. TRANSITIONAL JUST. 10, 18 (2007).

32. Meernik, *supra* note 10, at 278. See also TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT 'MEDICINE' (William Zartman ed., 2000); A.J. McADAMS, JUDGING THE PAST IN UNIFIED GERMANY (2001); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 12 (2003/2004).

33. See Huuse, *supra* note 8.

34. U.N. Secretary-General, *supra* note 9 at 12.

welcome shift in transitional justice thinking, it is not enough by itself. It is also necessary to consider different cultural views about peace and justice and what is truly required in the aftermath of a crisis. This is why it is important to consider a state's legal tradition when focusing on transitional justice in a particular place because legal tradition encompasses both institutional structure and culture.<sup>35</sup> Taking cultural preferences into account is the only way to truly achieve peace and justice in the aftermath of a crisis.

### III. LEGAL TRADITION

*[L]ocal cultures, beliefs, and social factors play a role in shaping attitudes and opinions toward peace. Efforts to establish peace and accountability mechanisms must be informed by population-based data that reflect the opinions, attitudes, and needs of all sectors of a society.*<sup>36</sup>

Legal tradition is a key factor to consider when thinking about issues of post-conflict peace and reconciliation because law is a cornerstone of society. Legal tradition is the set of deeply-rooted, historically-conditioned attitudes about the nature of law, the role of law in society and the polity, and the proper organization and operation of a legal system in existence within a state or community.<sup>37</sup> Depending on the historical origins and development of law within a particular community, legal tradition may be based on codes such as those in the civil law tradition<sup>38</sup> or based on judicial decisions such as those in the common law tradition.<sup>39</sup> Legal tradition may also be based on the moral precepts of religion, as with the Islamic law tradition,<sup>40</sup> or on long-standing communal practices designed to ensure harmony and balance, as in many of the Asian and African traditions.<sup>41</sup> Each of these different traditions shapes the perceptions of law and justice within their own communities, and these perceptions, in turn, shape beliefs about the best course of action in post-conflict situations. It is therefore important to take legal tradition and historical understandings of law and justice into account when seeking effective

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35. Dana Zartner Falstrom, *Thought Versus Action: The Influence of Legal Tradition on French and American Approaches to International Law*, 58 ME. L. REV. 337, 344 (2006).

36. See Vinck et al., *supra* note 14.

37. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 1-2 (3d ed. 2007); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677 (2000).

38. Emilia Justyna Powell & Sara McLaughlin Mitchell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397, 398-99 (2007).

39. *Id.*

40. *Id.*

41. Huyse, *supra* note 8, at 14; see also Shali Wu & Boaz Keysar, *The Effect of Culture on Perspective Taking*, 18 PSYCHOL. SCI. 600 (2007).

transitional justice mechanisms in a post-conflict situation because this will provide more stability, success, and ultimately peace in that community.

Legal tradition is more than simply the legal institutions and processes, which make up a state's legal system. It also encompasses the legal culture, which develops within a state based on the historical foundations of the law and the society's perceptions about the appropriate role of the rule of law.<sup>42</sup> Cultural attributes include societal attitudes about law, such as the understanding of the purpose of law within a society and the role that law plays in daily life.<sup>43</sup> The purpose of law can be broken down into two categories: individualist and communal.<sup>44</sup> In an individualist society, the purpose of law is focused on the protection of the rights of the individual.<sup>45</sup> Correspondingly, legal institutions in individualist societies often focus on adversarial trial procedures where individuals can bring claims if their rights are violated.<sup>46</sup> A communal purpose of law, in contrast, is focused on maintaining harmony for the greater good.<sup>47</sup> Rights of individuals are replaced by the good of the community.<sup>48</sup> For example, even if an individual is wronged because something was stolen from him or her, redress is focused on making the community whole and restoring harmony, rather than providing restitution for the victim and punishment for the perpetrator.<sup>49</sup> Whether a society maintains an individualist or communal approach to the law influences what is considered appropriate behavior, both under the law and in response to violations of the communal norms.

Legal culture may also encompass a number of other characteristics that play a role in preferred methods of transitional justice. The sources of law may be of cultural importance. For example, if legal rules are seen as ancient norms handed down through the generations or grounded in religion, this will have a different impact on legal culture than if legal rules are passed by a democratic majority in parliament or through authoritarian decree. Methods of punishment stem from legal culture as well. In those communal cultures where the most important thing is restoration of communal harmony, punishments are more likely to be focused on forgiveness.<sup>50</sup> In individual legal cultures, punishment is more likely to focus on punitive measures such as fines or jail.<sup>51</sup> Finally, some legal cultures believe that the behavior of the community transcends the present.<sup>52</sup> Whether tied to ancestors and heirs, or whether grounded in

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42. Falstrom, *supra* note 35, at 342.

43. *Id.* at 347.

44. This has also been described in literature as independent versus interdependent. See Wu & Keysar, *supra* note 41.

45. Falstrom, *supra* note 35, at 361.

46. *Id.* at 362.

47. *Id.* at 351.

48. *Id.*

49. *Id.* at 351-52.

50. Huyse, *supra* note 8, at 68.

51. *Id.* at 4.

52. *Id.* at 11-12.

spirituality, some legal cultures encompass not just one's behavior in the present, but what this might mean for past or future generations.<sup>53</sup> This, again, is quite different from the major Western legal traditions of the common and civil law, which are secular in nature and grounded firmly in the present.

Institutional attributes of a legal tradition are those institutions and mechanisms in place within a state or society charged with making, applying, and enforcing the law. Legal institutions can include community councils, religious tribunals, civil or criminal courts, as well as numerous other mechanisms for ensuring that the law is followed.<sup>54</sup> In the common and civil law traditions, legal institutions usually encompass the legislative, executive, and judicial branches of the state or local government.<sup>55</sup> Law is usually grounded in a constitution or code. In religious and customary legal traditions, by contrast, institutions are often more localized and less formal.<sup>56</sup> Both cultural and institutional attributes draw from and reflect on the other, and each is socially constructed by the historical development and unique culture of a particular society.

Law is a foundational component of society and evolves as society develops. Law not only creates the rules that govern everyday action, but also provides the shared understandings by which people are able to live together in a society.<sup>57</sup> There can be no society without a system of law to regulate the relations of its members with one another.<sup>58</sup> Legal tradition is the embodiment of this set of beliefs. The unique cultural and institutional characteristics of a state's legal tradition thus create certain beliefs about law and appropriate actions under the law that should guide transitional justice efforts. The legal traditions of the common and civil law will seek different forms of justice than the legal traditions of religious or customary law traditions. Identifying the cultural and institutional attributes present in a given state or among a given population, and tailoring transitional justice mechanisms to a particular legal culture will increase the chances of cultural acceptance.

Legal tradition as an important explanatory factor for behavior has long been recognized within the field of comparative law, but the study of legal tradition in the field of political science is more recent. Current scholarly work on legal tradition supports the idea that the attributes found in a domestic legal tradition shape attitudes about the appropriate course of action.<sup>59</sup> For example,

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53. *Id.*

54. See RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (2d ed. 1978).

55. *Id.*

56. *Id.*

57. See LOUIS HENKIN, HOW NATIONS BEHAVE 330 (2d ed. 1979).

58. See J.L. BRIERLY, THE LAW OF NATIONS (Sir Humphrey Waldock 6th ed. 1963).

59. Recent works that consider the role that legal tradition include: BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); SARA McLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, DOMESTIC LAW GOES GLOBAL: LEGAL



these studies have all found that the more closely a domestic legal tradition aligns with international law, the more open a state is to accepting the jurisdiction of an international court<sup>60</sup> or ratifying an international treaty.<sup>61</sup> This same alignment affects transitional justice mechanisms. States in which the legal tradition already encompasses acceptance of judges, courts and trials may be more open and accepting of international (or exogenous) forms of transitional justice.<sup>62</sup> Conversely, states in which the legal tradition is very different from the general rules of international tribunals, which dominate global transitional justice efforts, may be less receptive to these types of top-down mechanisms.<sup>63</sup> Instead, legal traditions focused on community and harmony may prefer local solutions attuned to the individual attributes of the group's legal tradition.

#### IV. A CASE STUDY: UGANDA

Since its independence from Britain in October 1962, Uganda has seen almost a quarter century of conflict.<sup>64</sup> During this time period, Uganda has had six presidents and suffered severe political instability and turmoil.<sup>65</sup> The current president, Yoweri Kaguta Museveni, came into power in 1986 after an armed struggle against the regime of the late General Tito Okello.<sup>66</sup> Conflict and humanitarian disaster, however, increased dramatically in Uganda in the late 1990s and early 2000s as the Lord's Resistance Army (LRA), led by Joseph Kony, began committing widespread atrocities in its fight with the Ugandan government.<sup>67</sup> While their goals are somewhat unclear, the LRA claims to seek

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TRADITIONS AND INTERNATIONAL COURTS (2011); Dana Zartner Falstrom, *Thought Versus Action: the Influence of Legal Tradition on French and American Approaches to International Law*, 58 ME. L. REV. 337 (2006); Sara McLaughlin Mitchell & Emilia Justyna Powell, *The International Court of Justice and the World's Three Legal Systems*, 69 J. POL. 397 (2007) [hereinafter *Three Legal Systems*]; Emilia Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violations*, 53 INT'L. STUDIES Q. 149 (2009); Emilia Justyna Powell & Krista E. Wiegand, *Legal Systems and the Peaceful Resolution of Territorial Disputes*, 27 CONFLICT MGMT. AND PEACE SCI. 128 (2010).

60. See *Three Legal Systems*, *supra* note 59.

61. See SIMMONS, *supra* note 59.

62. An example of this can be seen in the case of the International Criminal Tribunal for the Former Yugoslavia. The states which emerged from the Yugoslav War – Bosnia, Croatia, Serbia, etc. – all have legal traditions grounded in civil law. This tradition focuses on detailed written codes to outline the law and courts to resolve legal disputes. This coupled with a legal culture that was largely secular and moderately individualistic made an international criminal tribunal a recognizable and palatable option for transitional justice.

63. Huyse, *supra* note 8, at 3-6.

64. *Background Note: Uganda*, U.S. DEP'T. STATE (Feb. 3, 2012), <http://www.state.gov/r/pa/ei/bgn/2963.htm>.

65. *Id.*

66. *Id.*

67. *Uganda Profile*, BBC NEWS (Nov. 25, 2011), <http://www.bbc.co.uk/news/world-africa-14107906> (last visited Feb. 5, 2012).

to overthrow the Ugandan government in order to run the country along the framework of the Ten Commandments.<sup>68</sup>

The war between the Ugandan government and the LRA is considered "one of the worst humanitarian crises in the world."<sup>69</sup> The conflict has resulted in an untold number of deaths, a displacement of an estimated eighty to ninety percent of the Acholi population in the northern part of the country,<sup>70</sup> and the abduction of tens of thousands of children to serve as soldiers and slaves.<sup>71</sup> People in the northern parts of Uganda – Acholi, Lango, and Teso – have lived in fear of the LRA and have also suffered at the hands of the government, whose movement of people into protective camps has resulted in more death and abuse.<sup>72</sup>

In 2005, the LRA was largely pushed out of northern Uganda, but continues to operate from neighboring Democratic Republic of Congo.<sup>73</sup> The LRA and the Ugandan government made efforts to craft a peace agreement. However, after two and a half years, Kony ultimately refused to sign the Final Peace Agreement in April 2008.<sup>74</sup> While LRA atrocities in Northern Uganda have diminished, the fighting continues.

Also in 2005, at the referral of the Ugandan government, the International Criminal Court (ICC) issued indictments for five of the top leaders of the LRA, including Joseph Kony.<sup>75</sup> In response to the ICC indictment, the LRA offered to negotiate a peace deal in exchange for the dismissal of the ICC charges.<sup>76</sup> While the international response to this offer was one of outrage, the local response in Uganda was a bit different. A number of tribal elders and traditional leaders in Uganda believed that the ICC indictments interfered with the process of peace and that it would be better to find a solution internally.<sup>77</sup> With the LRA largely

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68. *Id.*

69. Alex Moorehead & Jemera Ron, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, 17 HUM. RTS. WATCH 12(A) 13 (Sept. 2005) available at <http://www.hrw.org/sites/default/files/reports/uganda0905.pdf>.

70. Estimates for the number displaced range from 1.5 – 1.8 million. *Id.*

71. TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 64 (2006).

72. Moorehead & Ron, *supra* note 69, at 33.

73. *Background Note: Uganda*, *supra* note 64.

74. *Id.*

75. The others indicted included the following: Joseph Kony's deputy Vincent Otti (now deceased) and LRA commanders Raska Lukwiya (now deceased), Okot Odhiambo, and Dominic Ongwen. The five LRA leaders were charged with crimes against humanity and war crimes, including murder, rape, sexual slavery, and enlisting of children as combatants. Ernest Harsch, *Seeking Peace with Justice in Uganda*, AFRICA RENEWAL, Jan. 2006, at 20 available at <http://www.un.org/ecosocdev/geninfo/afrec/vol19no4/194uganda.html>.

76. Joseph Wasonga, *Rediscovering Mato Oput: The Acholi Justice System and the Conflict in Northern Uganda*, 2 AFRICA PEACE AND CONFLICT J. 27 (2009).

77. Barney Afako, *Reconciliation and Justice: 'Mato Oput' and the Amnesty Act*, CONCILIATION RESOURCES (2002), <http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>.

out of Uganda, thousands of displaced persons and former soldiers will be returning to their communities, and questions about transitional justice will emerge with increasing frequency. The best mechanism of transitional justice for Uganda will consider the Ugandan legal tradition in forming a post-conflict plan.

Western notions of law and justice are very different from the legal tradition that has developed on the African continent. Western-style trial and punishment “does not fit with traditional African jurisprudence.”<sup>78</sup> The African legal tradition, rather, maintains a view of justice that “is aimed at ‘the healing of breaches, the redressing of imbalances, [and] the restoration of broken relations.’”<sup>79</sup> This legal tradition focuses on rehabilitation of both the victim and the perpetrator, as well as the reintegration of the perpetrator into the community in order to restore balance and harmony.<sup>80</sup> While there are numerous differences among the African states, many states, including Uganda, share a heritage in the legal tradition of Africa, commonly described as a customary legal tradition. While each distinct country within the African continent has developed its own legal tradition, there are certain general commonalities among the countries of Africa that form part of the early development of the individual legal traditions.

Those areas of Africa south of the Sahara were ruled for centuries by ancestral customary laws.<sup>81</sup> The basic tenet of this customary tradition is that conceptions of law stem from respect for the traditions of one’s ancestors and fear and respect of the supernatural.<sup>82</sup> The binding nature of law in these societies comes from the pressure of the group, and not wanting to act against the group for fear of shame and banishment.<sup>83</sup> The African customary tradition has historically been a social system of law centered in each community with communal methods for dispute resolution and the creation of new laws as needed by changing circumstances.<sup>84</sup>

Therefore, in terms of purpose of law, customary legal traditions are generally collectivist or communalist in nature.<sup>85</sup> The whole community is involved in decisions such as the meting out of justice and punishment, and an impersonal decision by a court does not reflect communal preferences.<sup>86</sup> Also in customary legal traditions, every person in the community is considered to be

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78. Huyse, *supra* note 8, at 5 (quoting DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 51 (1999)).

79. *Id.*

80. *Id.*

81. DAVID & BRIERLEY, *supra* note 54, at 548.

82. *Id.*

83. *Id.* at 551. Alternatively, communal pressure and action can also lead members of the community to commit legal violations.

84. *Id.* at 548.

85. *See id.* at 551.

86. *See id.*

part of a larger group of living, deceased, and not-yet-born members.<sup>87</sup> These are communal groups, where a crime committed by one individual against another is seen as a crime by one clan or community against another.<sup>88</sup> Spirits of ancestors are very strong and are called on to assist in remedying wrongs and facilitating communal harmony.<sup>89</sup> Therefore, a "justice" imposed by the state government or an international institution does not encompass the appropriate mechanisms for true resolution to a wrong.

The legal institutions of the African legal tradition also center on social groupings such as tribes, castes, villages, and bloodlines.<sup>90</sup> These social groupings are thought to endure through time; therefore, no laws can be considered which adversely affect either past or future generations.<sup>91</sup> Because of this, certain Western-style legal mechanisms focused on individuals such as the adversarial trial system do not have corresponding provisions or protections in the African tradition.<sup>92</sup> The group is the basic unit in the historical African legal tradition and the group is responsible for addressing wrongs and deciding remedies.<sup>93</sup> Corresponding to this focus on the group, the law is ordered primarily based on individual obligations to the community rather than individual rights for oneself. This is contrary to the way law functions in the Western traditions.<sup>94</sup> Legal obligations are not necessarily distinguished from communal and moral obligations.<sup>95</sup>

A final facet which must be considered when examining the states of Africa is the effect that colonialism had on the legal traditions of the states. Whether France, England, Belgium, Italy, Germany or others, the colonizing states brought their own legal cultures and institutions to Africa with them. The effects of colonialism on the historical legal traditions in Africa have varied.<sup>96</sup> For example, the French in Africa followed a policy called "assimilation" which was centered on maintaining a single legal tradition within each state.<sup>97</sup> Because French law was considered superior, if there was a conflict between more than one legal tradition in those areas that the French colonized, the French legal tradition was adopted and French law applied.<sup>98</sup> Moreover, the French relied only on French judges to resolve legal disputes, even in rural

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87. Wasonga, *supra* note 76, at 31-32.

88. *Id.*

89. *Id.* at 31

90. DAVID & BRIERLEY, *supra* note 54, at 550.

91. *See id.* at 550-51

92. *Id.* at 551. For example, land belongs to one's ancestors and descendants just as much as it does to oneself during one's lifetime. Therefore, an individual does not have an inherent right to dispose of the land on his or her own.

93. *Id.* at 550.

94. *Id.*

95. *Id.*

96. *Id.* at 556.

97. *Id.* at 555.

98. *Id.*

areas.<sup>99</sup> Therefore, even in those cases where local and traditional rules would apply, the French judges often distorted the law due to their misunderstandings of the native legal tradition.<sup>100</sup> This resulted in a blending of the indigenous legal tradition with the French tradition, although in most cases the French tradition remained in place and the native tradition was largely lost.<sup>101</sup>

In English Africa, on the other hand, the English colonizers had very little interest in the local legal traditions.<sup>102</sup> Following English tradition, English common law applied to the English colonizers themselves, local legal traditions remained in place for the indigenous populations, and the only instances in which the two intersected was when there was not a local law to cover a given situation.<sup>103</sup> This policy of “indirect rule” allowed the original peoples to continue to apply their own legal traditions, according to their own customs.<sup>104</sup> This left a legacy in former English colonies which resulted in greater continuity of the local legal traditions.<sup>105</sup>

However, whatever the tradition of the colonizer, the result for the legal traditions of Africa has been mixed. Often, the Western-style courts were set up only in the major cities, leaving much of the African population to continue developing their own legal cultures.<sup>106</sup> In many instances, components of the common or civil law traditions would blend with the customary traditions, incorporating new rules, new language, or new ideas.<sup>107</sup> This, of course, is part of any legal tradition. Legal culture adopts and changes as society develops. These changes can come from within, or be imposed or imported from the outside. In many instances though, such changes are superficial and limited to legal institutions. The true belief of the people as to the purpose of law and how justice should be done remains culturally distinct.<sup>108</sup> When the colonial powers removed themselves from Africa, the legal order they imposed on their colonies often went with them.

This colonial history has had a lasting effect on all the individual states created within Africa. Uganda’s legal tradition is grounded in African customary law with some influences of the English Common law.<sup>109</sup> In Uganda,

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99. *Id.*

100. *Id.* at 562.

101. *Id.*

102. *Id.* at 555.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* at 559.

107. *See id.*

108. *Id.* at 520 (“The imposition of the European common and civil law traditions imposed a new social order on the traditional African societies; a ‘rigid and formalistic one, incomprehensible’” compared to the traditional culture.).

109. *The World Factbook: Uganda*, CENT. INTELLIGENCE AGENCY (2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html> (last visited Feb. 5, 2012).

under English colonial rule, traditional practices were officially prohibited in 1962, but this did not mean that traditional practices disappeared.<sup>110</sup> Like many African states, what ultimately developed was a dual system; a traditional one largely utilized in rural areas and a hybrid one drawn from the legal system of the colonial power used in the major cities.<sup>111</sup> The creation of a new legal system at independence and the outlawing of the traditional practices were also primarily institutional changes. They did not necessarily change the legal culture that existed in Uganda, a culture steeped in the customary traditions. Legal culture takes much longer to change – as does any major cultural shift – so attitudes about law did not necessarily change just because there was an official ban on traditional practices.

#### V. THE UGANDAN LEGAL TRADITION AND TRANSITIONAL JUSTICE

The legal tradition of Uganda and ideas about the purpose of law and the best mechanisms for achieving this purpose shape public perceptions about transitional justice. This is born out in the results of a survey of the Ugandan people on their attitudes about peace, justice, and social reconstruction.<sup>112</sup> First, in response to the question of what their main priorities are in the aftermath of the conflict, the largest percentage of respondents (45%) listed health care as their number one priority.<sup>113</sup> The second most common response (44%) was peace,<sup>114</sup> with 72% of these respondents defining peace simply as an absence of violence with no mention of punishment or even justice.<sup>115</sup> In fact only 3% of the respondents listed justice as their top priority.<sup>116</sup> In order of importance, the remaining responses were as follows: livelihood concerns, including food (43%),<sup>117</sup> agricultural land (37%),<sup>118</sup> money and finances (35%),<sup>119</sup> and education for the children (31%).<sup>120</sup> These priorities in the aftermath of conflict

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110. Joanna Quinn, *The Thing Behind the Thing: Christian Responses to Traditional Practices of Acknowledgement in Uganda*, REV. FAITH AND INT'L AFF., Spring 2010, at 3, 4.

111. *Id.*

112. PHAM ET AL., *supra* note 5. The Tulane University Payson Center for International Development, the University of California, Berkeley Human Rights Center, and the International Center for Transitional Justice conducted the population-based survey, from April to June 2007 in eight districts in northern Uganda. *Id.* at 2. The districts included in the survey were those most affected by the conflict, including both Acholi and non-Acholi districts. *Id.* Teams of eight to sixteen men and women fluent in the local languages interviewed a total of 2,875 people using a standard questionnaire. *Id.* All data provided in this Article stems from the report issued from this survey.

113. *Id.* at 23.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

suggest that the respondents were primarily concerned with basic human survival, and second, the ability to achieve the peace and well-being necessary to live. Focus on ideas of retribution and justice was not foremost on the minds of the respondents.

The participants were then asked more detailed questions about transitional justice issues.<sup>121</sup> First, they were asked how they would define justice.<sup>122</sup> In response to this question, 41% of respondents simply said “being fair.”<sup>123</sup> Only 29% of the respondents mentioned trials in conjunction with justice,<sup>124</sup> and fewer than 8% equated justice and peace when asked to define justice.<sup>125</sup> This, coupled with the responses to overall priorities described above, implies that the primary concern among respondents in the aftermath of crisis does not have anything to do with seeing perpetrators tried and imprisoned. The focus of the community is elsewhere – rebuilding, fairness, and restoring community harmony. These responses are all in line with the legal culture stemming from the Ugandan legal tradition. This view is seconded by the report issued post-survey, which states: “This may mean that many respondents do not strongly associate justice with current institutions such as the courts, but more with a general notion of fairness.”<sup>126</sup>

Next, participants were asked what the best mechanism would be to achieve justice.<sup>127</sup> Nearly half the respondents (49%) said local customs and rituals should be used.<sup>128</sup> In addition, two-thirds of the respondents (67%) said that to achieve justice it would be necessary to chase away bad spirits to first establish peace.<sup>129</sup> Again, these ideas derive directly from the Ugandan legal tradition.<sup>130</sup> Respondents were also asked about accountability for the perpetrators, and over two-thirds stated that it was important to hold those responsible for committing human rights violations accountable.<sup>131</sup> Accountability, however, was viewed in a specific way, with 65% of the respondents saying that apologizing to the community before being allowed to return was the first important step.<sup>132</sup> Emphasis was also placed on truth-seeking (over 90% supported the establishment of a truth commission),<sup>133</sup> amnesties,<sup>134</sup> and pardons as a way to both provide victims with closure and

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121. *Id.* at 35.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 43.

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.* at 35.

132. *Id.* at 4.

133. *Id.*

134. *Id.*

provide peace.<sup>135</sup> Eighty percent of the respondents, when given the choice of peace with amnesty or peace with trials, chose peace with amnesty.<sup>136</sup> Fifty-four percent of respondents supported forgiveness, reconciliation, and reintegration of LRA members.<sup>137</sup>

In relation to traditional forms of justice, 49% of respondents said local customs would be a good way to address the LRA actions,<sup>138</sup> and 57% of respondents said returning LRA members should participate in traditional ceremonies.<sup>139</sup> Of the various forms of traditional ceremony, *Mato Oput* received the most support (48%).<sup>140</sup>

In terms of international transitional justice institutions like the ICC, responses were mixed.<sup>141</sup> Overall the survey finds that “many respondents may see the ICC as a useful source of pressure on the LRA to participate in peace negotiations but do not want the court to hinder a settlement.”<sup>142</sup> Knowledge of the existence of the ICC had increased in 2007 to 60% of respondents (as compared to 27% in 2005).<sup>143</sup> Only 29% of respondents, however, identified the ICC as the most appropriate mechanism for achieving justice.<sup>144</sup>

As these numbers show, there are significantly different ideas about the conceptions of peace and justice among the Ugandan respondents than one would likely see in a survey of respondents in the United States. Given this, it is important to consider what the best mechanism for rebuilding post-conflict societies is. By understanding the legal tradition of Uganda and cultural understandings of law – such as the preference for rituals banning spirits and local customs – the peace-building efforts will ultimately be more successful.

As is evident from these survey responses, there is little support for Western-style trials and punishment of incarceration. Moreover, the primary concern of a majority of respondents doesn't even focus on “justice” in the way it is thought of in the United States. Rather, the focus is on peace, forgiveness, and rebuilding the community.<sup>145</sup> These ideas reflect the communal nature of the Ugandan legal tradition.

The preference for an alternative form of transitional justice, steeped in the culture of Uganda, has emerged to some extent in the post-conflict efforts. Both the Ugandan government and the LRA have conducted surveys of the people to determine what they think is the most appropriate post-conflict

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135. *Id.*

136. *Id.* at 37.

137. *Id.* at 36. In the Lwo language, widely spoken in Uganda, “‘amnesty’ and ‘forgiveness’ are not distinct – the same word (*timo-kica*) is used for both.” ALLEN, *supra* note 71, at 76-77.

138. PHAM ET AL., *supra* note 5, at 43.

139. *Id.*

140. *Id.*

141. *Id.* at 5.

142. *Id.*

143. *Id.*

144. *Id.* at 36.

145. *Id.* at 23.



process.<sup>146</sup> A preliminary pact on accountability and reconciliation signed by the government of Uganda and the LRA in 2007 states: “Traditional justice mechanisms, such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc*, and *Tonu ci Koka* and others 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.”<sup>147</sup>

There are a number of traditional legal practices reflective of Ugandan legal culture that have been proposed as alternatives to Western-style courts. The most widely supported is the *Mato Oput*.<sup>148</sup> *Mato Oput* means to drink “the bitter root” and is based on the Acholi understanding of life.<sup>149</sup> There are no courts in *Mato Oput*, but rather the process is based on apology, remorse, and the acceptance of responsibility for one’s actions.<sup>150</sup> The whole community partakes of the bitter drink, which is believed to symbolize the bitterness of the past and a promise to never taste such bitterness in the future.<sup>151</sup> The perpetrator and victim or the relatives of the victim drink together first, and then the whole community.<sup>152</sup> This process is followed by a meal together.<sup>153</sup> This is followed by forgiveness, which is considered essential.<sup>154</sup> The *Mato Oput* process is a cleansing ritual for the victim in order to remove any vengeful spirits (which again, a majority of survey respondents think is important).<sup>155</sup> This process cleanses the victim, the perpetrator, and the whole community.<sup>156</sup> *Mato Oput* is representative of the main cultural and institutional characteristics of the Ugandan legal tradition, with its focus on the community, one’s ancestors and spirits, and recreating harmony among all parties.

Other traditional options include *Moyo kum*, which is a “cleansing the body” ritual.<sup>157</sup> In this practice, during a meeting of the elders, men and women who have returned from captivity have their guilt washed away so they may live together in harmony with the community again.<sup>158</sup> Another traditional practice is *nyono tong gweno* (“stepping on the egg”).<sup>159</sup> This practice has been used for the return of over 12,000 LRA soldiers in order to reintegrate them into their communities and cleanse them of their deeds and any unwelcome spirits.<sup>160</sup>

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146. *Id.* at 2.

147. HUYSE, *supra* note 8, art. 3.1.

148. PHAM ET AL., *supra* note 5, at 43.

149. *Id.* at n.50

150. *Id.* at 36.

151. *See* Latigo, *supra* note 6.

152. *Id.* at 103.

153. Wasonga, *supra* note 76, at 35.

154. Latigo, *supra* note 6, at 107.

155. *Id.* at 103.

156. *Id.*

157. *Id.* at 106.

158. HUYSE, *supra* note 8, at 11.

159. Latigo, *supra* note 6, at 106.

160. *Id.*

Whichever of these traditional practices might be chosen, all have a greater chance for creating lasting peace and harmony than do international, or even state courts. The legal culture of Uganda, based on the customary legal tradition, does not focus on the individual punishment and retribution that trials and courts provide. The culturally-grounded beliefs about law focus rather on apology, forgiveness, and rebuilding communal harmony. Based on the responses given in the survey, this is exactly what the people of northern Uganda wish for as a mechanism of transitional justice.

Successful transitional justice is not just about finding the right mechanism for redressing wrongs. It is also important to consider what the people involved truly desire. If faced with a similar situation, people in the United States would likely want justice in the form of trial and punishment in a court of law. This is due to the fact that the legal tradition of the United States is steeped in individual rights based on a constitution which provides for due process. But that is not the legal tradition of Uganda, which is reflected in the survey responses. "Justice" is not even what concerns most respondents (only 3% mention it as their top priority).<sup>161</sup> Peace is a top priority followed by rebuilding lives and livelihood.<sup>162</sup> This is also reflective of the Ugandan legal tradition and is something that should be taken into account. Transitional justice may, in fact, not necessarily mean "justice" at all.

## VI. CONCLUSION

Rebuilding states like Uganda in the aftermath of a conflict often calls for outside assistance in the form of money, food, or personnel. War is devastating, and it is the global community's responsibility to assist those who are struggling to regain their lives in the aftermath of such crises. But needing outside assistance is not the same as needing outside ways of doing things. So often, the debate over transitional justice centers on whether international courts, regional courts, or state courts are most appropriate to administer justice.<sup>163</sup> The reality is that not utilizing courts may be better.

This is where understanding the legal tradition of a state can be of use. Legal tradition provides a window into the cultural and institutional histories and understandings of a society when it comes to the rule of law and appropriate standards of behavior. When looking at the responses of the Ugandan survey participants, the Ugandan legal culture is reflected. When providing assistance and support in the aftermath of the crisis, the existing culture should be respected. Only if the result is supported by and supportive of local cultural beliefs about the law can peace be achieved. This does not mean no one should be tried in a court of law. The Ugandan government has

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161. PHAM ET AL., *supra* note 5, at 23.

162. *Id.*

163. Latigo, *supra* note 6, at 193.

repeatedly indicated that it intends to have the leaders of massacres tried either at the ICC or in the Ugandan court system.<sup>164</sup> This is supported by the survey respondents, 59% of which said “it is important to have trials for LRA leaders”.<sup>165</sup> But sentiments are different for the thousands of LRA members who were not in leadership positions.<sup>166</sup>

Understanding the legal traditions of individual societies has the potential to provide useful, practical information to those engaged in the process of peace-building in post-conflict societies, as well as rule-of-law building programs. Western conceptions of justice and law should not be imposed on post-conflict societies. By taking into account historical, cultural, institutional, and societal factors that exist in a given society and understanding how legal tradition shapes societal perceptions of issues such as justice, peace, and societal harmony, significantly more targeted and ultimately more successful assistance to societies emerging from conflict can be provided. The survey responses highlighted in this Article support the thesis that transitional justice does not mean the same thing for everyone. Therefore, those studying peace-building and seeking to assist with the process would be more helpful if these cultural factors were taken into account.

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164. PHAM ET AL., *supra* note 5, at 9-10.

165. *Id.* at 4-5.

166. *Id.*

