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## How can Local Transitional Justice Mechanisms Work Towards Measures of Non-Recurrence?

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Political Science

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## **Abstract**

This dissertation examines questions of local agency and inclusion. It develops a conceptual understanding of whether, and if so how, local customary justice mechanisms could serve as guarantees of non-recurrence. It looks at how grassroots practices of “justice” could be utilized at the community level to deter the commission of future abuses and prevent the repetition of violent conflict, especially where the state has been completely absent. It specifically explores Acholi indigenous and customary practices of peacemaking and justice in Northern Uganda to understand how local practices could secure a lasting peace and cement communities’ commitment to peaceful coexistence.

While the prevailing literature tends to conceptualize measures of non-recurrence as being the purview of a formal state and governmental apparatus, this conceptualization is based on a narrow idea that state actors are the dominant perpetrators of violence in armed conflicts. However, recent structural shifts in armed conflict demonstrate that non-state armed actors equally commit severe atrocities, resulting in varying degrees of state control, ranging from perennial weakness to complete absence. Therefore, I argue that to effectively terminate violence and prevent the future reoccurrence of violent conflict, measures of non-recurrence must be viewed as a holistic approach that engages a series of actors at different levels, especially non-state armed actors and traditional institutions of conflict management at the local level.

Through the lens of social constructivism, I advance three explanations about how locally-based customary justice could help prevent the recurrence of violent conflict. First, I argue that the various customary justice instruments of how victims and perpetrators make amends at the community level could provide ex-combatants the best route to safely

reintegrate into civilian life, which could, in turn, promote peaceful coexistence and reduce the likelihood of ex-combatants' return to join armed groups. Second, customary justice and other traditional conflict management instruments such as local peace deals could also terminate localized violence, thereby serving as the springboard for broader peace processes to emerge at the national level. Third, the communal orientation of customary justice could serve as social control and accountability mechanism, which could perform a social deterrent function to prevent ex-fighters from returning to combat life.

### **Keywords**

Acholi, customary justice, local turn, the Lord's Resistance Army, measures of non-recurrence, peacebuilding, transitional justice, Uganda.

## Summary for Lay Audience

In societies emerging from armed conflict, several measures are often undertaken to secure long-term peace, including truth-seeking, criminal prosecution of people accused of wrongdoing, repairing the harms of victims, and actions to prevent the future reversion of armed conflict. These measures, often designed and implemented by international and national level actors, fail to secure long-term peace, and most societies tend to revert to armed conflict. These national-level measures tend to fail because they do not adequately pay attention to the conflict's local contexts, including existing local and traditional conflict management systems. This study explores how existing local traditional and customary responses to armed conflict could stop ongoing hostilities, prevent future reversion to that conflict, and secure long-term peace. I advance three arguments about how traditional and customary transitional justice measures could potentially stop armed conflict and prevent a future reversion to violence.

First, I argue that customary transitional justice mechanisms are more suitable to help reintegrated ex-fighters when they return from fighting in the bush. Customary justice is more suitable because they tend to focus on the social dimensions of reintegration of the ex-fighters to reconnect with their families and the general community to get their civilian life back. Second, because recent armed conflict involves several non-state armed groups who often fight against each other at the local level, it might be helpful to pay attention to securing a local level peace agreement among local non-state armed groups. The idea here is that once various local armed groups agree to stop fighting, there could be a “trickle-up” effect, which could provide avenues for larger peace negotiations to emerge at the national level, which could secure long-term peace. Finally, I argue that customary justice

mechanisms often focus on the social dimension, and communities take a collective responsibility to correct their members' wrongs. As a result of this communal nature of customary justice, the entire community serves as a social accountability mechanism that puts "checks" on their potential wrongdoers in their community. This social accountability mechanism could be a powerful tool to prevent people from joining armed groups or participating in armed conflict.

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## Chapter 1

### 1 Introduction

This thesis develops a conceptual understanding of whether, and if so how, local customary justice mechanisms could serve as guarantees of non-recurrence within the scholarly field of transitional justice. The arguments in this study draw from two related bodies of literature—peacebuilding and transitional justice. Before I proceed, it is imperative to illustrate the connection between the two bodies of literature. Historically, peacebuilding and transitional justice have developed mainly in parallel to each other.<sup>1</sup> However, in reality, peacebuilding and transitional justice are bound up together because both bodies of literature tend to engage with similar issues and often have shared goals—that is, how to deal with the legacies of armed conflict.<sup>2</sup> The United Nations (UN) defined peacebuilding as “action[s] to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”<sup>3</sup> Transitional justice, therefore, is part of the broader peacebuilding agenda, one of the elements of peacebuilding that could strengthen and solidify peace.<sup>4</sup>

Transitional justice, broadly, “is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past

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<sup>1</sup> Dustin N. Sharp, “Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique,” *Chicago Journal of International Law* 14, no. 1 (2013): 165.

<sup>2</sup> Catherine Baker and Jelena Obradovic-Wochnik, “Mapping the Nexus of Transitional Justice and Peacebuilding,” *Journal of Intervention and Statebuilding* 10, no. 3 (July 2, 2016): 281, <https://doi.org/10.1080/17502977.2016.1199483>; Sharp, “Beyond the Post-Conflict Checklist,” 186.

<sup>3</sup> Boutros Boutros-Ghali, “An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-Keeping” (UN Security Council, 1992), para. 21, available from [file:///C:/Users/ibayo/Downloads/5EST\\_5EDPI\\_1247-EN.pdf](file:///C:/Users/ibayo/Downloads/5EST_5EDPI_1247-EN.pdf).

<sup>4</sup> A more detailed illustration of the link between peacebuilding and transitional justice is explored in chapter 3.

abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>5</sup> The transitional justice field has several mechanisms that contribute in different ways to promote long-term peace. One of such mechanisms is guarantees of non-repetition, which is part of a comprehensive strategy to redress the aftermath of armed conflict, along with truth-seeking, individual criminal justice, and repairing the harms of victims.

Measures of non-recurrence are interventions taken to prevent the future reoccurrence of armed conflict or prevent future rights violations.<sup>6</sup> In the post-conflict context, the mainstream transitional justice literature tends to conceive measures of non-recurrence narrowly, as state-centric, driven mainly through national and international level actors.<sup>7</sup> The measures commonly used as guarantees of non-recurrence include reforming state institutions, vetting the security forces and the judiciary, training security forces in human rights, and subjecting governmental apparatus to international scrutiny.<sup>8</sup> The core critique of these international and state-centric measures is that they tend to follow a pattern often determined by the dominant liberal peacebuilding and transitional justice framework.<sup>9</sup> Among other things, the liberal peace framework is premised on the idea that democratic governance, the rule of law, strong and accountable state institutions are vital to promoting sustainable peace in societies emerging from armed violence. Although these

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<sup>5</sup> United Nations, “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice” (United Nations General Assembly, March 2010), 2; available from [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>6</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations General Assembly, 2015), para. 16, available from [file:///C:/Users/ibayo/Downloads/A\\_HRC\\_30\\_42-EN.pdf](file:///C:/Users/ibayo/Downloads/A_HRC_30_42-EN.pdf).

<sup>7</sup> Alexander Mayer-Rieckh, “Guarantees of Non-Recurrence: An Approximation,” *Human Rights Quarterly* 39, no. 2 (2017): 416–48, <https://doi.org/10.1353/hrq.2017.0024>.

<sup>8</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2015, para. 23.

<sup>9</sup> Chapter 3 discusses liberal peace in detail.

state-centric measures are essential, they often fail to secure those kinds of guarantees to prevent societies from reverting to armed violence.<sup>10</sup>

The state-centric model often fails because they tend not to capture the multiple configurations that exist below the level of the state, since African states, in particular, were simply divided up by the European powers without any consideration of who lived there, thereby producing a variegated nation.<sup>11</sup> In the Ugandan context, several scholars have observed that the bundling of different ethnic groups together within the borders of a single political state by the colonial imperialists created acrimonious relationships, which partly contributed to the conflict.<sup>12</sup> Therefore, most national and international-level mechanisms of responding to armed conflict often fail to resonate with realities of the specific local contexts, and they often lack a connection among post-conflict societies who often have their “own understandings of identity, sovereignty, institutions, rights, law and needs according to their... socio-historical and cultural traditions.”<sup>13</sup>

The limitations and relative failure of liberal state-centric forms of transitional justice to prevent the reoccurrence of violence have prompted scholars and practitioners to consider the utility of other forms of mechanisms that could prevent the reversion of armed conflict and advance the conditions of peace. This has led scholars and practitioners to turn

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<sup>10</sup> Naomi Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice: The Missing Link?” in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge UK: Cambridge University Press, 2019), 105–30.

<sup>11</sup> Fredrick Kisekka-Ntale, “Roots of the Conflict in Northern Uganda,” *The Journal of Social, Political and Economic Studies* 32, no. 4 (2007): 423.

<sup>12</sup> Kisekka-Ntale, “Roots of the Conflict in Northern Uganda,” 423–25; see also Ogenga Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, African Histories and Modernities (London, UK: Palgrave Macmillan, 2017); Samwiri Rubaraza Karugire, *A Political History of Uganda* (Nairobi: Heinemann Educational Books, 1980).

<sup>13</sup> Oliver P Richmond, “Failed Statebuilding versus Peace Formation,” *Cooperation and Conflict* 48, no. 3 (September 1, 2013): 379, <https://doi.org/10.1177/0010836713482816>.

their attention to, and call for, the use of customary and grassroots practices of responding to armed violence.

This project contributes directly to that literature to advance an understanding of how locally based, traditional, and customary justice could serve as measures that ensure the non-repetition of armed conflict and cement communities' commitment to peaceful coexistence. I argue that the mainstream transitional justice literature, which tends to frame guarantees of non-recurrence within the state-centric liberal peace framework, is narrow, restrictive, and does not account for the complexity of contemporary armed conflicts and civil wars. In contemporary armed conflicts, armed actors and other agents of violence often include non-state armed groups, which play crucial roles concerning how societies confront past abuses and ensure long-lasting peace and stability.<sup>14</sup> These complexities in armed violence present new challenges, including the blurring of victims and perpetrators, leading to difficulties in attributing responsibility.<sup>15</sup> In addition, in most communitarian African societies, the understanding of conflict and peace is constitutive of their social relationships and the normative orders of society.<sup>16</sup> The neoliberal framework of conflict and peace does not often go far enough to consider these constructions of the social reality of people affected by conflict, which partly explains why they often fail. These new realities of armed conflict meant that measures to prevent the reversion of armed conflict must look beyond the focus on democratic governance and statebuilding. Instead, measures

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<sup>14</sup> Annyssa Bellal, "Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), 1.

<sup>15</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Twenty-First Session, A/HRC/21/46 (New York: United Nations General Assembly, 2012), para. 53; available from [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf).

<sup>16</sup> The issue of the social construction of conflict and peace is discussed in detail in chapter 5

of non-recurrence must be thought of as a holistic approach that engages a series of actors at different levels, especially traditional authorities, non-state armed actors, and other agents of violence at the local level.

### **1.1 Research Question**

This thesis answers one fundamental question: How do customary responses to armed conflict achieve measures of non-repetition—that is, stopping armed conflict, preventing a future reversion to that conflict, and cement communities’ commitment to peaceful coexistence? While customary justice and other traditional conflict management systems have long been viewed to play crucial roles in promoting reconciliation and restore social relations, they have not been thought of within the context of measures of non-repetition.

This question arises in part from my work in grassroots peacebuilding. Before returning to the academy, I spent many years working with several peacebuilding organizations in West Africa, particularly in Ghana. Although most of the projects I worked on have been at the subnational and grassroots levels, the interventions are not based on local approaches. Instead, the interventions tend to be skewed toward neoliberal instrumental approaches to peacebuilding. For example, most of our interventions are based on the Western principles of mediation, dialogue, peace education, and developing the capacities of local-level decentralized government agencies to promote democratic governance, the rule of law, and accountability. Even when I engage local elders and traditional authorities in mediation and dialogue, I often follow the western-inspired technocratic blueprint of mediation “best practices.” The result of using these technocratic blueprints is superficial peace outcomes that are not sustainable because those approaches fall short and tend to overlook local contextual repertoires of knowledge of conflict

resolution and customary justice practices. Also, I observed that transitional justice and peacebuilding often occur in relative silos, although they often aim to accomplish similar goals. That is to say, peacebuilding and transitional justice interventions tend to occur in isolation, and there are not many synergetic effects that are necessary for sustainable peacebuilding. Based on these observations and the lessons I learned from my practical peacebuilding experience, I developed an interest in exploring ways practitioners can increase the quality of post-conflict reconstruction approaches to prevent conflict reoccurrence. Over the years, I have focused my academic inquiry on exploring how local contextual knowledge and customary practices of conflict and dispute resolution might add value to peacebuilding and transitional justice synergistically.

This research question is important because it constructs a revised notion of measures of non-recurrence beyond its very restrictive and state-centric usage to include the local as a site for better-enforced measures of non-recurrence. This new framing could provide scholars and practitioners a broader set of tools regarding how measures of non-recurrence could better be implemented, which accounts for the new realities of armed conflict in terms of the role of local agents and non-state armed actors.

## **1.2 Original Contribution to Current State of Knowledge**

In response to the challenges of the state-centered peacebuilding and transitional justice approaches, researchers have made considerable efforts to examine how different aspects of transitional justice mechanisms could be localized to better respond to the specific context in which they are applied. While the literature on how to localize truth-seeking and



reparation abounds, this is not the case with guarantees of non-repetition.<sup>17</sup> The state of research on guarantees of non-repetition invites closer attention and a different level of analysis that goes beyond state-centric approaches. This study makes three interrelated original contributions to the state of knowledge about the utility of customary justice to guarantees of non-repetition.

First, there are many studies on the utility of customary justice to some aspects of transitional justice, such as acknowledgment, truth-seeking, social repair, and reconciliation. However, to date, there has not been adequate academic attention to customary justice's future-looking and conflict-prevention potential. Yet, most customary justice practices and traditional conflict resolution approaches aim to maintain community harmony and preserve future relationships, especially in communitarian African societies.<sup>18</sup> As a result, I argue that the future-looking orientation of customary justice makes them inherently conflict prevention and non-repetition mechanisms. This interpretation of the utility of customary justice makes a novel contribution to the academic literature because it presents an account of how customary approaches of social repair and reconciliation could work as guarantees of non-repetition. I moved away from state-centered practices, such as the reform of abusive state security apparatus, and using a local,

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<sup>17</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations General Assembly, 2015), 9, file:///C:/Users/ibayo/Downloads/A\_HRC\_30\_42-EN.pdf; Alexander Mayer-Rieckh, "Guarantees of Non-Recurrence: An Approximation," *Human Rights Quarterly* 39, no. 2 (2017): 416, <https://doi.org/10.1353/hrq.2017.0024>; Naomi Roht-Arriaza, "Measures of Non-Repetition in Transitional Justice: The Missing Link?," in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge UK: Cambridge University Press, 2019), 105–30.

<sup>18</sup> Guy Oliver Faure, "Traditional Conflict Management in Africa and China," in *Traditional Cures for Modern Conflicts: African Conflict "Medicine"*, ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 159; Joe A. D Alie, "Reconciliation and Traditional Justice: Tradition-Based Practices of the Kpaa Mende in Sierra Leone," in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm: International Idea, 2008), 40.

situated lens to examine how culturally specific justice practices could help rebuild individual and community harmony and prevent the reoccurrence of armed violence. This new interpretation of the utility of customary justice generates new ideas, and directions of measures of non-repetition, which stands to change the way conflict is resolved around the world.

Second, the concept of guarantees of non-repetition itself is still developing and a relatively new domain in the post-conflict peacebuilding and transitional justice literature. The literature on guarantees of non-repetition in this arena is scant, and no thorough sketch of the concept exists, even though it has been theorized in other venues. As guarantees of non-repetition continue to gain more academic and practical attention, there is a need to understand better their meaning, scope, and how it could be implemented. In this respect, this thesis fills a gap. This thesis makes an original contribution by providing a foundational knowledge of the concept by systematic synthesis of the background, historical development, and concrete examples of how it could be applied. I traced the origins of guarantees of non-recurrence from its origins in international state relations to its uptake as one of the mechanisms in the toolbox of dealing with intra-state armed conflicts and civil wars. In doing so, I synthesize the literature and weaves different streams of research together to push the boundaries of measures of non-repetition beyond its usual field of transitional justice and examined its historical development within the broader peace studies literature. By examining measures of non-repetition within the broader peacebuilding literature, I critically examined how the concept is closely related to the cessation of ongoing armed conflict in negotiated peace settlements. The systematic analysis of the origins of the concept of guarantees of non-repetition is vital to developing

a greater understanding of the potential of imagining the local as a site where guarantees of non-repetition could emerge beyond the conventional state-led practices.

Third, the thesis also elucidates the tension between customary justice and formal state-centered approaches and showed how the two could interact and co-exist. The tension and relationship between customary justice and other state-led transitional justice approaches have been one of the fundamental problems scholars and practitioners have grappled with. This study gets at this tension by highlighting how the repertoire of local transitional justice could work alongside other national-level broader transitional justice mechanisms for a more fulsome and transformative change for long-term peace.

While this thesis seeks to understand how measures of non-recurrence could be developed through the use of customary transitional justice mechanisms, it is imperative to note the challenges this raises. One fundamental problem that stands out is the risk of romanticizing or essentializing the local. As illustrated in detail in chapters 4 and 7, I do not take the local for granted. The local involves a range of actors and practices, with varying degrees of competing power relations, which must be recognized.

The local is not perfect, and customary justice and traditional approaches are not a cure-all when it comes to conflict prevention and addressing the legacies of years of civil wars and armed conflict. In chapter 4, I discussed some of the weaknesses of customary justice and other traditional conflict resolution mechanisms. For example, customary justice may not be consistent with universal human rights norms; they may have a limited range of applicability; traditional authorities may abuse customary justice for their own benefit; and millennials may not also understand or be willing to participate in customary processes.

Nevertheless, customary justice and traditional approaches could offer important insights for conflict prevention and redressing the legacies of armed violence. There are many non-state actors, traditional institutions, and customary approaches to preventing armed conflict that could provide durable solutions to post-conflict societies grappling with how to prevent conflict and deal with the legacies of years of civil war. This study, therefore, proceeds while being mindful of these weaknesses and challenges of customary justice and traditional approaches to conflict resolution. I draw upon local traditional institutions and customary justice to understand how it could work as a location for possible measures of non-recurrence specifically and to increase the quality and efficacy of transitional justice interventions more broadly.

### **1.3 Key Concepts**

The key concepts that undergird this work are discussed in detail in the literature review chapter. However, I briefly highlight the four fundamental concepts that are relevant to this study. The key concepts that undergird this study include transitional justice, the local turn, customary justice, and measures of non-recurrence. Although transitional justice began to gain attention in the wake of the Nuremberg Trials after World War II, its current application took shape from post-authoritarian contexts.<sup>19</sup> Over the past few decades, transitional justice has increasingly become one of the crucial mechanisms used to address the legacies of armed conflicts towards achieving long-term peace. In general, transitional

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<sup>19</sup> Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 70; see also Ruti G. Teitel, “Nuremberg and Its Legacy, Fifty Years Late,” in *War Crimes: The Legacy of Nuremberg*, ed. Belinda Cooper, 1st ed. (New York: TV Books, 1999), 44; Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31 (2009): 321–67, <https://doi.org/10.1353/hrq.0.0069>; Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America: Uruguay and Chile*, *Human Rights and Democratization in Latin America* (Oxford University Press, 1997).

justice consists of both judicial and non-judicial processes. The most widely used mechanisms include criminal prosecutions, reparations, amnesty, and truth-telling. In some contexts, various forms of memorials are also often used. These may include establishing national remembrance days; renaming streets and other public spaces; building museums; and honoring mass burial sites.

In this thesis, transitional justice applies in the context of post-conflict and ongoing conflict situations. This suggests that transitional justice instruments could be applicable in situations where open warfare has ended and where violence only slows down, but the conflict *per se* has not ended. Various armed groups might retreat in such a scenario but have not laid down their arms or demobilized. The application of transitional justice in situations where there could be ongoing violence differs from others' ideas that transitional justice applies when violence has ended, and there is a break and institutional change from one regime to another.<sup>20</sup>

Viewing transitional justice this way is significant because, as I have illustrated in detail in chapter 3, the notion of measures of non-repetition draws part of its literature from peace studies—particularly peace agreements. Thus, “the duty to prevent recurrence is hence closely linked to the obligation of cessation of an ongoing violation.”<sup>21</sup> The obligation of cessation or termination is often discussed in the mainstream peace studies literature under peace agreements, disarmament, demobilization, and reintegration (DDR).

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<sup>20</sup> Anja Mihr, “An Introduction to Transitional Justice,” in *An Introduction to Transitional Justice*, ed. Olivera Simić (London and New York: Routledge, 2017), 19; see also Joanna R. Quinn, “Whither the ‘Transition’ of Transitional Justice?” *Interdisciplinary Journal of Human Rights Law* 8, no. 1 (2015): 67; Arthur, “How ‘Transitions’ Reshaped Human Rights,” 334–37.

<sup>21</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence* (2015), para. 18.

Until recently, peace agreements, DDR, and transitional justice initiatives have operated along parallel tracks—with transitional justice focusing on justice and accountability, and peace agreements and DDR focusing on stability and security.<sup>22</sup> As such, this study draws from both peace studies and transitional justice literature, in which transitional justice is taken to mean not only its justice-oriented aims but also include peacebuilding objectives, including efforts to terminate ongoing hostilities.

The other important concepts that underpin this dissertation are the local turn and customary justice. The rise of the local turn in peacebuilding and transitional justice resulted from recognizing the challenges and relative failures of the liberal peace paradigm. The liberal paradigm here is taken to mean the prescription of liberal democratic principles in post-conflict societies, such as promoting democratic governance, the rule of law, and statebuilding, which sometimes do not resonate with the specific local context in which they are applied.<sup>23</sup> Customary justice is used to mean those transitional justice instruments that are grounded in the cultures of conflict-affected societies and have “their roots in the local indigenous societal structures of pre-colonial and pre-contact societies,” rather than being the product of external importation.<sup>24</sup> Some of the customary practices considered

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<sup>22</sup> Anna Cutter Patel, “Transitional Justice and DDR,” in *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War*, ed. Robert Muggah, Routledge Global Security Studies (London; New York: Routledge, 2008), 248; Lars Waldorf, “Just Peace? Integrating DDR and Transitional Justice,” in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram, Jemima García-Godos, Olga Martin-Ortega, and Johanna Herman (London: Routledge, 2012), 62; see also Lars Waldorf, “Introduction: Linking DDR and Transitional Justice,” in *Disarming the Past: Transitional Justice and Ex-Combatants*, eds. Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf, Advancing Transitional Justice Series 4 (Social Science Research Council, 2009), 14–35.

<sup>23</sup> Richmond, “Failed Statebuilding versus Peace Formation,” 379; see also Beate Jahn, “The Tragedy of Liberal Diplomacy: Democratization, Intervention, Statebuilding (Part I),” *Journal of Intervention and Statebuilding* 1, no. 1 (March 1, 2007): 87–106, <https://doi.org/10.1080/17502970601075931>.

<sup>24</sup> Volker Boege, “Potential and Limits of Traditional Approaches in Peacebuilding” (Berghof Research Center for Constructive Conflict Management, 2011), 436; available from [https://berghof-foundation.org/files/publications/boege\\_handbookII.pdf](https://berghof-foundation.org/files/publications/boege_handbookII.pdf); William I. Zartman, “Introduction: African Traditional Conflict ‘Medicine,’” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 7.

here have likely been adjusted and changed over time to fit the current contexts in which they are applied.<sup>25</sup>

The fourth key concept explored in this study is measures of non-recurrence. In its conventional interpretation, measures of non-recurrence are the range of steps states take to terminate ongoing violations and human rights abuses and take measures to prevent or avoid a reoccurrence of similar violations in the future.<sup>26</sup> In this interpretation, the primary responsibility is on the state to guarantee the security of its citizens and ensure violations are prevented in the future. The focus of measures of non-recurrence in this dissertation is much broader. Rather than focusing on the state and its institutions, I broaden measures of non-recurrence to include customary justice mechanisms and other traditional instruments of conflict resolution and peacebuilding at the local level that could terminate ongoing armed conflict and prevent a future reversion to that conflict.

#### **1.4 Clarifying Terminologies and Labels**

A substantial amount of research has been done on transitional justice and peacebuilding practices at the sub-state level. The terminologies used to describe these sub-state transitional justice and peacebuilding practices have generated debates among scholars.<sup>27</sup>

Some have chosen the terms local-based, bottom-up, and indigenous.<sup>28</sup> Some of these

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<sup>25</sup> Zartman, "Introduction: African Traditional Conflict 'Medicine,'" 7.

<sup>26</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence* (2015), paras. 16–18.

<sup>27</sup> See, for instance, 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*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 7–8; William I. Zartman, "Introduction: African Traditional Conflict 'Medicine,'" in *Traditional Cures for Modern Conflicts: African Conflict "Medicine,"* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 7.

<sup>28</sup> See generally Rosalind Shaw, Lars Waldorf, and Pierre Hazan, eds., *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, 1 edition (Stanford, California: Stanford University Press,

terms, such as “traditional” tend to invoke a meaning of some static and anachronistic relics of the past.<sup>29</sup> Locally based or bottom-up could be understood as interventions that are facilitated by local and grassroots actors, regardless of whether the said interventions follow a liberal framework. For these reasons, this dissertation retains Quinn’s use of the term “customary” as the key label to suggest that these practices are commonly used and change over time, which may or may not necessarily be traditional.<sup>30</sup> But the question of customary practices that may or may not be based on tradition is not entirely straightforward. This is a relevant question, especially in Africa, where colonialism and other external factors have had a fundamental impact on social practices. Others question whether, in Africa and places where there has been a fundamental colonial influence, customary practices could claim to be authentically based on tradition? Due to colonialism and other external influences, some ‘original’ traditional institutions and practices have decayed while new ones have emerged.<sup>31</sup> Due to these effects on traditional institutions, some scholars conclude that “strictly speaking, they [traditional institutions and practices] are no longer traditional.”<sup>32</sup>

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2010); Roger Mac Ginty, “Indigenous Peace-Making Versus the Liberal Peace,” *Cooperation and Conflict* 43, no. 2 (June 1, 2008): 139–63, <https://doi.org/10.1177/0010836708089080>; Simon Robins, “Transitional Justice as an Elite Discourse,” *Critical Asian Studies* 44, no. 1 (March 1, 2012): 3–30, <https://doi.org/10.1080/14672715.2012.644885>; Simon Robins, “An Empirical Approach to Post-Conflict Legitimacy: Victims’ Needs and the Everyday,” *Journal of Intervention and Statebuilding* 7, no. 1 (March 1, 2013): 45–64, <https://doi.org/10.1080/17502977.2012.655618>.

<sup>29</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding,” 437.

<sup>30</sup> Joanna R. Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” *Africa Spectrum* 49, no. 3 (2014): 31., Joanna R. Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,”

<sup>31</sup> James Ojera Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 107.

<sup>32</sup> 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*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 8; Adam Kochanski, “The ‘Local Turn’ in Transitional Justice: Curb the Enthusiasm,” *International Studies Review* 22, no. 1 (March 1, 2020): 28, <https://doi.org/10.1093/isr/viy081>; Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” 34.



Nevertheless, scholars such as Osaghae have argued that ‘distorted’ traditional cultural institutions and customary practices could still claim to be traditional.<sup>33</sup> He views tradition as simply the legacy of the past, in the working of society, including transformations—decay and emergence—the past might have gone through.<sup>34</sup> He asserted that traditions may be resistant to change, but the imperviousness does not suggest ‘permanency.’<sup>35</sup> Therefore, traditions, just as customs, are constructed and ‘invented,’ which is a normal process of social change.<sup>36</sup> It “involves the preservation of some traditions and transformations or discarding of others.”<sup>37</sup>

Drawing on these arguments, this project proceeds to use the label *customary practices* to refer to a wide variety of practices that tap into the rituals and symbols of traditional cultural institutions, including those that might have witnessed transformations. These practices are established by common usage and convention, and “they do need to fit the situations that confront them in the present day and be of real utility for their users.”<sup>38</sup> I consider my conceptualization to include customary practices that perform various roles, including retributive and restorative functions.<sup>39</sup> Customary justice systems are not necessarily benign. In some cases, local authorities apply some form of retributive justice in the form of sanctions and punishment to uphold social order.

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<sup>33</sup> Eghosa E. Osaghae, “Applying Traditional Methods to Modern Conflicts: Possibilities and Limits,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, U.S.: Lynne Rienner Publishers, 1999), 204. See also E. J. Hobsbawm and T. O. Ranger, *The Invention of Tradition*, Canto Classics (Cambridge: University Press, 2012).

<sup>34</sup> Osaghae, “Applying Traditional Methods to Modern Conflicts: Possibilities and Limits,” 204.

<sup>35</sup> Osaghae, “Applying Traditional Methods to Modern Conflicts: Possibilities and Limits,” 204.

<sup>36</sup> Hobsbawm and Ranger, *The Invention of Tradition*.

<sup>37</sup> Osaghae, “Applying Traditional Methods to Modern Conflicts: Possibilities and Limits,” 204.

<sup>38</sup> Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” 31.

<sup>39</sup> Quinn, Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” 34.

## 1.5 Theoretical Framework

This study is framed around social constructivist theoretical assumptions. Adler observed that constructivists acknowledge that the “material world shapes and is shaped by human action and interaction.”<sup>40</sup> In other words, social reality is influenced by an individual’s normative interpretations of the material world. Wendt identified two basic tenets of constructivism. First, “structures of human association are determined primarily by shared ideas rather than material forces... [second] the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature.”<sup>41</sup> This means that constructivism values ideas and the human capacity for reflections, intersubjective knowledge, experiences, and collective understanding. This intersubjective knowledge and collective understanding, in turn, impact the manner individuals and social actors cognitively frame the world they know and experience.<sup>42</sup>

The study uses a constructivist framework to critically examine the utility of customary practices that could be utilized as measures of non-repetition. As a lens through which to understand the theoretical question, it often cites the socio-political structure and the dynamic functioning of the Acholi in northern Uganda and how their collective identity and shared history influence how they respond to conflict and armed violence. Constructivism offers a valuable and relevant lens through which the study explores the historical context and how local communities construct their world view, thereby giving legitimacy to customs, norms, and culture. The worldview of local communities is vital in

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<sup>40</sup> Emanuel Adler, “Seizing the Middle Ground: Constructivism in World Politics,” *European Journal of International Relations* 3, no. 3 (September 1, 1997): 322, <https://doi.org/10.1177/1354066197003003003>.

<sup>41</sup> Alexander Wendt, *Social Theory of International Politics* (Cambridge, New York: Cambridge University Press, 1999), 1.

<sup>42</sup> Adler, “Seizing the Middle Ground,” 322.

understanding their unique perceptions and intersubjective understanding of justice and appropriate redress. For example, in the Acholi cultural context, and in other communal communities in Africa, what is meaningful and considered an appropriate response to remedy a wrongful act when an individual commits violence against their own community might make “no sense” in a different socio-cultural context. Therefore, the willingness of victims and the community to live together with alleged perpetrators and ex-combatants depends on how local communities construct their social reality.

Parsons identified two variations of constructivism— modern constructivism and postmodern/post-structural interpretive constructivism.<sup>43</sup> The fundamental difference between postmodernists and modernists strands of constructivism lies in the *extent* to which the subjectivity of social constructs affects the world view of social actors and academic observers.<sup>44</sup> On the one hand, postmodern constructivists understand the social world as a clash of multiple “interpretive agendas than anything that can relate to remotely ‘true’ claims about a ‘real’ world.”<sup>45</sup> On the other hand, modern constructivists contend that, although the social world is constructed, researchers can still analyze the different competing narratives and manage to make some acceptable or *relatively objective* claims about “how the socially constructed world ‘really’ works.”<sup>46</sup> As such, a modern constructivists researcher tends to pay more attention to their own interpretive bias, which helps to analyze different viewpoints to arrive at pragmatic claims and conclusions.

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<sup>43</sup> Craig Parsons, “Constructivism and Interpretive Theory,” in *Theory and Methods in Political Science*, ed. David Marsh and Gerry Stoker, 3rd ed. (Palgrave Macmillan, 2010), 89.

<sup>44</sup> Parsons, “Constructivism and Interpretive Theory,” 90.

<sup>45</sup> Parsons, “Constructivism and Interpretive Theory,” 90.

<sup>46</sup> Parsons, “Constructivism and Interpretive Theory,” 90.

This study is more aligned with the modernist constructivist strand. The modernist constructivism strand helps to consider the various perspectives, voices, and narratives about the history of the Lord Resistance Army (LRA) insurgency in northern Uganda, the narratives about the Acholi ethnic identity, the Acholi cosmology, and their customary practices. I can then examine and sift through the various interpretations and competing narratives to make pragmatic and tentative claims about whether and how customary justice could help terminate armed conflict to prevent the future reversion to that conflict.

### **1.6 Dissertation Outline**

Chapter 2 discusses the main research question and outlines the methodology for this study. I highlight the challenges presented by the global Covid-19 pandemic, which resulted in me pivoting my original research from empirical study to a theory-building exercise. As a result of my inability to undertake fieldwork, the research uses available published sources as the primary means of obtaining information to frame the main theoretical arguments presented in the study.

In chapter 3, I review the existing scholarly literature to provide the analytical context for the study. The chapter starts with a broad overview of post-conflict reconstruction and peacebuilding. This is followed by a discussion of transitional justice as a subfield of peacebuilding and post-conflict reconstruction. I lay out an account of the theoretical debates about some of the major instruments of transitional justice, including criminal prosecution, truth-seeking, and reparation. The chapter also traces the origin, normative foundations, and characteristics of measures of non-recurrence. In discussing measures of non-recurrence, I delve into the debates regarding the tensions between the liberal peacebuilding paradigm and local encounters in post-conflict reconstruction and

transitional justice. I highlight the limitations regarding the mainstream framing of measures of non-recurrence as a state-centric practice and illustrate the importance of resituating measures of non-recurrence at the community level.

Chapter 4 explores the history and main scholarly debates about the rise of the local turn in peacebuilding and transitional justice. It discusses the emerging critical literature that argues for shifting from a top-down liberal peacebuilding paradigm to a deeper engagement with local context and actors. I highlight two strands of the local turn debate. The first school of thought acknowledges the need for increased local ownership and empowerment and is sensitive to the cultural context of peacebuilding and transitional justice interventions. Although the first strand of the local turn argues for increased involvement of local and grassroots actors in peacebuilding and transitional justice, they believe that liberal methodologies and norms, such as democratic governance and statebuilding, are still the best routes to address the legacies of armed violence.<sup>47</sup> The second strand represents a fundamental shift away from the liberal paradigm, which is based on a post-structuralist and postcolonial theoretical framework.<sup>48</sup> These scholars “understand locally-driven peacebuilding as a form of resistance against the dominant discourse and practice of the international peacebuilding project.”<sup>49</sup>

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<sup>47</sup> See generally Roland Paris, *At War's End: Building Peace after Civil Conflict*, 1 edition (Cambridge, U.K. ; New York, NY: Cambridge University Press, 2004); Roland Paris, “Saving Liberal Peacebuilding,” *Review of International Studies* 36, no. 2 (2010): 337–65.

<sup>48</sup> Thania Paffenholz, “Unpacking the Local Turn in Peacebuilding: A Critical Assessment towards an Agenda for Future Research,” *Third World Quarterly* 36, no. 5 (2015): 857, <https://doi.org/10.1080/01436597.2015.1029908>.

<sup>49</sup> Paffenholz, “Unpacking the Local Turn in Peacebuilding,” 859; Oliver P. Richmond, “Resistance and the Post-Liberal Peace,” *Millennium*, May 10, 2010, <https://doi.org/10.1177/0305829810365017>; Homi K. Bhabha, *The Location of Culture*, first edition (London ; New York: Psychology Press, 1994); David Chandler, “Peacebuilding and the Politics of Non-Linearity: Rethinking ‘Hidden’ Agency and ‘Resistance,’” *Peacebuilding* 1, no. 1 (March 1, 2013): 17–32, <https://doi.org/10.1080/21647259.2013.756256>; David Chandler, *Peacebuilding: The Twenty Years' Crisis, 1997-2017*, 1st ed. (Cham, Switzerland: Palgrave Macmillan, 2017); John Paul Lederach, *Building Peace:*

In chapter 5, I examine the ways customary justice could contribute to terminate armed conflict and prevent conflict reoccurrence in the future. Here, I analyze the various elements and functions of customary practices of dispute settlement and conflict resolution procedures as they are related to the concept of non-recurrence. In particular, I explore the Acholi customary practices and social organization, dispute and conflict management practices, and how local communities express their agency to act and rebuild society when the state is unable to do so, especially when state institutions are weakened by conflict. I advance three arguments about how customary justice could lead to the non-recurrence of armed conflict. First, I argue that the various customary justice instruments of how victims and perpetrators make amends at the community level could provide ex-combatants the best route to reintegrate into civilian life, which could, in turn, promote peaceful coexistence and reduce the likelihood of ex-combatants' recidivism. Second, customary justice and other traditional conflict management instruments such as local peace deals could also terminate localized violence, thereby opening the space for broader peace processes to emerge at the national level. Third, the communal orientation of customary justice serves as social control and accountability mechanism, which performs a social deterrent function to prevent ex-fighters from returning to combat life.

In chapter 6, I delve into the history of the civil war in Northern Uganda. I discuss Uganda's socio-political landscape leading to, during, and after independence, which is vital in giving accounts about the identity, authority, and legitimacy of peacebuilding and transitional justice actors in Uganda. In particular, I undertake an overview of the effects of colonialism on the formation of the Acholi ethnic identity. I highlight how colonialism

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*Sustainable Reconciliation in Divided Societies* (Washington, D.C: United States Institute of Peace Press, 1998).

and other historical factors have exacerbated ethnic tensions and divisions, which laid a weak foundation for post-independent Uganda. I highlight examples from the Acholi repertoire of customary practices to show how the various forms of local conflict resolution could terminate armed conflict and prevent societies from returning to armed violence.

The final substantive discussion in this study is chapter 7. Here, I take a step back to reflect on the inescapable role of the central state and international actors in transitional justice and post-conflict reconstruction. The fundamental argument in this chapter is that the post-conflict environment is often complex, leading to contested power dynamics and competing imperatives. Therefore, each mechanism often plays a necessary but only partial role, whether at the international, national, or local level. Drawing from legal pluralism, I argue that to effectively terminate conflict and prevent its reoccurrence in the future, transitional justice efforts must be comprehensive, multi-sectoral, holistic, and interdependent involving international, national, and local actors.

## Chapter 2

### 2 Methodology

The purpose of this study is to develop a conceptual understanding of whether, and if so how, local customary justice mechanisms could serve as guarantees of non-recurrence within the scholarly field of transitional justice. The study was initially conceived to be an empirical study. However, my research work suffered a significant setback due to the global Covid-19 pandemic, when it became apparent that I would not be able to go to the field to collect the primary data to make up the major contribution of my study.<sup>1</sup> During this time, Western university suspended all international outbound student travel to research sites. At the time of writing, university sanctioned international travel outside of Canada for all students will not be allowed until at least April 2022.<sup>2</sup> Given the limited internet availability and difficulty reaching potential research subjects in northern Uganda, it was determined that even virtual interviews would be impossible. For that reason, I decided to pivot my research to focus on building a conceptual framework that attempts to enhance our understanding of how measures of non-recurrence could fit with customary justice practices. As such, this dissertation attempts to identify the common features of customary justice and traditional conflict management practices among the Acholi and in other African contexts to explain and develop theoretical arguments about how customary justice and traditional conflict management could be used as instruments of measures of non-recurrence. Therefore, this dissertation seeks to provide an initial exploration that lays

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<sup>1</sup> Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass: The MIT Press, 2005), 5.

<sup>2</sup> Western University, "COVID-19 Information for the Campus Community," accessed October 13, 2021, available from <https://www.uwo.ca/coronavirus/>.



the foundation and identify promising pathways through which policymakers and researchers could “contribute to more nuanced theories” regarding how to prevent the reoccurrence of armed conflict through customary justice mechanisms.<sup>3</sup>

## 2.1 Geographic Focus and Justification

This study relied heavily on information from the Acholi-sub region in northern Uganda. Besides the Acholi, I also drew upon examples from other communities in Africa with similar usage and practices of customary justice and traditional conflict resolution mechanisms. Some of these include the indigenous methods of conflict resolution among the Pokot, Turkana, Samburu, and Marakwet communities of northern Kenya.<sup>4</sup> Although I have drawn from “snippets” of a range of other examples to build my theoretical arguments, I paid greater attention to the Acholi because it could provide better illustrative lens through which I can better explain the theoretical arguments in this study.

### 2.1.1 The Acholi as an Illustrative Lens

Many African societies have developed complex social systems to deal with disputes, administer justice, and address the legacies of armed violence. To mention a few examples, the institution of *bashingantaha* has been responsible for the peaceful resolution of disputes among the Tutsi and Hutus in Burundi since the seventeenth century.<sup>5</sup> In Gorongosa, in

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<sup>3</sup> Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass: The MIT Press, 2005), 8.

<sup>4</sup> Adan Mohamud, Isabella Masinde, and Ruto Pkalya, “Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet” (Intermediate Technology Development Group - Eastern Africa, January 2004), 6, file:///C:/Users/ibayo/Downloads/4d927e25-5e00-4626-a7a3-12b32e33baf9.pdf.

<sup>5</sup> Tracy Dexter and Philippe Ntahombaye, “The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi” (Geneva: The Centre for Humanitarian Dialogue, 2005), 10–11; available from [https://media.africaportal.org/documents/The\\_Role\\_of\\_Informal\\_Justice\\_Systems\\_in\\_Fostering\\_the\\_Rule\\_of\\_Law\\_in\\_Post-Conf\\_zrYcJz4.pdf](https://media.africaportal.org/documents/The_Role_of_Informal_Justice_Systems_in_Fostering_the_Rule_of_Law_in_Post-Conf_zrYcJz4.pdf).

central Mozambique, community members have used the *magamba* spirits to heal, attain justice, and reconcile in the aftermath of the civil war.<sup>6</sup> In Rwanda, although the recent use of the *gacaca* courts in the wake of the genocide has been criticized for being perverted by the government, they have nonetheless been a key traditional instrument of conflict and dispute resolution in precolonial times.<sup>7</sup>

In the sphere of customary justice and traditional conflict management mechanisms in Africa, the Acholi ethnocultural group in northern Uganda has strategic importance for my research because the Acholi have a wide array of customary practices and, more importantly, they have preserved and extensively utilized many of their customary practices to deal with the almost twenty years of armed conflict. Although the effects of the conflict between the Lord's Resistance Army (LRA) and the Government of Uganda are still deeply felt today, the north has experienced relative peace and has managed to avoid a large-scale armed conflict over the past couple of years. Therefore, given the subject matter that I am interested in, I have much to learn from the Acholi example regarding how customary justice might terminate violence and prevent the future reoccurrence of armed conflict.

Although this thesis is conceptual in nature, and attempts to build a theory that explains the potential utility for measures of non-repetition, it is helpful to have in mind a case in which the theory that is being constructed might be used—a sort of picture in the mind's eye of how one concept or another might look in a concrete context. In this

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<sup>6</sup> Luc Huyse, "Conclusions and Recommendations," in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 189–91.

<sup>7</sup> Huyse, "Conclusions and Recommendations," 187; see also Bert Ingelaere, "The Gacaca Courts in Rwanda," in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 1–22.

instance, the Acholis' use of customary practices through the LRA conflict provides a useful illustrative case; much is written about the use and utility of customary practices, and even more has been written about the Acholi responses to the conflict itself. It is the Acholi context that I have had in mind while developing the theoretical arguments—although it is important to note that this thesis is not a case study, and that the theoretical construction could have been played out against any number of case backdrops.

## 2.2 On Validity

Validity may carry different connotations in qualitative and quantitative research.<sup>8</sup> On the one hand, quantitative and positivist methodological researchers might be interested in internal and external validity, which establishes cause-effect relationships and the degree of generalizability.<sup>9</sup> On the other hand, qualitative researchers might be interested in contextual or qualitative validity, particularly those using a constructivist lens.<sup>10</sup> Creswell and Miller defined qualitative validity as the extent to which research findings and inferences are accurate from the researcher's standpoint, the participant, or "readers for whom the account is written."<sup>11</sup>

There are several methods qualitative researchers can employ to demonstrate the validity of their research. Some of these methods include triangulation, member checking, peer reviews, and external audits.<sup>12</sup> The decision to choose a method often depends on the

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<sup>8</sup> John W. Creswell and J. David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 5th ed. (Los Angeles; London: SAGE Publications, 2018), 274.

<sup>9</sup> Amir Lupovici, "Constructivist Methods: A Plea and Manifesto for Pluralism," *Review of International Studies* 35, no. 1 (January 2009): 212, <https://doi.org/10.1017/S0260210509008389>; Creswell and Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 274.

<sup>10</sup> Lupovici, "Constructivist Methods," 212.

<sup>11</sup> John W. Creswell and Dana L. Miller, "Determining Validity in Qualitative Inquiry," *Theory into Practice* 39, no. 3 (August 1, 2000): 123–24, [https://doi.org/10.1207/s15430421tip3903\\_2](https://doi.org/10.1207/s15430421tip3903_2).

<sup>12</sup> Creswell and Miller, "Determining Validity in Qualitative Inquiry," 124.

nature of the qualitative research. In the context of this study, I employ triangulation as the most appropriate method to enhance the credibility and accuracy of my research. “Triangulation is a validity procedure where researchers search for convergence among multiple and different sources of information to form themes or categories in a study.”<sup>13</sup> In this research, I drew on multiple and different sources of information, as I described in the following section.

### **2.3 Sources of Information**

This study drew information mainly from secondary sources through desk research, although I also analyzed original documents such as the Agreement on the Cessation of Hostilities between Uganda’s government, and the Lord’s Resistance Army signed in Juba on August 26, 2006; the 1966 and 1995 Constitutions of Uganda; and the Uganda National Transitional Justice Policy. Secondary sources seek to discuss, interpret, analyze, and evaluate data and documents that have been published or reported by scholars, research centers, civil society organizations, and government agencies.

The search for secondary sources of information was bound within the following parameters and key thematic areas. A strong focus on peacebuilding and transitional justice that deals with the broader issues of customary justice in Uganda, but I also drew from other examples in other parts of Africa; the liberal peace and its challenges; the insurgency of the Lord’s Resistance Army in northern Uganda; the social and political governance structure of Uganda before and after independence; and literature on Yoweri Kaguta Museveni and the National Resistance Army/Movement. I paid attention to works written around the Lord’s Resistance Army insurgency in 1984 and the Acholi responses to the

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<sup>13</sup> Creswell and Miller, “Determining Validity in Qualitative Inquiry,” 126.

conflict up to the present. However, I occasionally draw upon earlier works published before 1984 if they bear relevance to addressing my research question. Peer-reviewed articles, books, reports from civil society, reports from international intergovernmental organizations such as the United Nations, and documents from the government of Uganda were reviewed. I assessed the sources by critically analyzing and examining the main ideas, relationships, and abstracted information that can explain what is known while highlighting potential areas where new knowledge may be needed.

## **2.4 Limitations of the Methodological Approach**

I was unable to collect primary data from my study location, so I have used others' data and findings to help me formulate a theoretical argument that draws on real-world experiences. Reliance on others' work raises two fundamental challenges. The first is that I have to rely on the researchers' questions and do not have knowledge about the research design and how the overall research was conducted.<sup>14</sup> As such, I have no control over managing potential problems such as the type of questions asked and participants' misunderstanding of specific questions. The second related challenge is about the data analysis, interpretation, and reporting. Here, too, researchers may not provide a great depth of information, and many choose to include or exclude some depth or detail information from their publications. Similarly, researchers' interpretations and subjective judgments might also render a partial account of reality, which could impact my own secondary analysis. As discussed in the section on validity above, I sought to minimize the effects of

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<sup>14</sup> Some scholars indicate their research design in their published work, but others do not. In cases where the researcher writes about their research design, it helps me to assess the credibility of the findings.

these “secondary limitations” by using several sources of information and being mindful of my own implicit biases and other researchers’ subjective judgments.

The other potential limitation is associated with my choice of cases. As already illustrated above, I drew the preponderance of real-world examples from the Acholi ethnocultural group in northern Uganda because I understand the Acholi to have strategic importance to my research question. This could lead to a potential situation of selection bias. Selection bias occurs when cases or research subjects are selected along the dependent variable of the sample population of cases.<sup>15</sup> However, as George and Bennett noted, selecting cases based on their value on a particular outcome could be appropriate in some types of studies and must not be rejected outright.<sup>16</sup> Selecting cases based on a particular outcome of interest and preliminary knowledge of the said case allow for a more robust research design, particularly in exploratory research and studies that aim to develop theoretical arguments.<sup>17</sup> This dissertation research falls within the categories of such exploratory studies described by George and Bennett. Selecting the cases based on the phenomenon of interest allows for identifying potential explanatory variables, which can later be tested against cases in which there is a variation on the dependent variable.<sup>18</sup>

Related to the issue of selection bias is generalizability. Critics argue that case studies are not suitable to provide generalizable conclusions, especially where the events or phenomena under study are rare and unique to a specific context.<sup>19</sup> This means that case studies can make only tentative conclusions regarding how much particular independent

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<sup>15</sup> David Collier and James Mahoney, “Insights and Pitfalls: Selection Bias in Qualitative Research,” *World Politics* 49, no. 1 (1996): 59.

<sup>16</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 23.

<sup>17</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 23.

<sup>18</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 23.

<sup>19</sup> Zaidah Zainal, “Case Study as a Research Method,” *Jurnal Kemanusiaan* 5, no. 1 (2007): 5; Robert K. Yin, *Case Study Research: Design and Methods*, Fifth Edition (Los Angeles, London: SAGE, 2014), 20.

variables affect the outcome. This is particularly relevant to my present study because my study does not go far enough to determine how much, in quantitative terms, each of the customary reconciliation and reintegration rituals contributed to the current relative stability in the Acholi region in the past couple of years. Nevertheless, the aim of this current study is really about formulating theoretical arguments that could provide the necessary foundation and entry points for researchers to contribute to constructing more nuanced empirical generalizable studies.<sup>20</sup> The theoretical arguments do not aim at making generalizable conclusions to all situations of armed conflict.

## **Conclusion**

This thesis is principally an inductive theory-building exercise in which I aim to understand how customary justice could be used as instruments of measures of non-recurrence. I used desk research and relied on available published sources as the primary means of obtaining information. I used the case of northern Uganda as a lens through which to explore how the conceptual claims I made could work in reality. The major limitation of this study method is that because I relied on published sources of information, my own secondary analysis might be impacted by researchers' initial research errors and their subjective interpretations of research subjects' responses. To mitigate these limitations, I used several sources of credible published materials to cross-check facts.

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<sup>20</sup> George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 8.

## **Chapter 3**

### **3 Literature Review**

#### **3.1 Introduction**

In the wake of civil wars and other forms of mass atrocity, states face difficult decisions about rebuilding and coming to terms with the past. Some of the competing issues that must be addressed include how to bring perpetrators to account; reveal the facts and ensure public disclosure of the truth about the past; ensure victims get redress for violations; (re)establish trust and promote reconciliation; and put measures in place that will prevent the reversion to conflict. This chapter reviews and analyzes the existing literature on peacebuilding and traditional justice. The discussions set up the key concepts within which I will develop the theoretical arguments in this study.

The first section discusses and identifies the central elements of peacebuilding. The second section delves into the field of transitional justice and its three core approaches—truth, justice, and reparation. In the next section, I provide a detailed review of the literature on guarantees of non-recurrence, a fundamental concept in this study. It traces the origins and how it evolves to its current application in transitional justice. This is followed by a critique of the conventional understanding and practice of guarantees of non-recurrence in post-conflict contexts. In particular, I illustrate the differences between transitional justice in post-authoritarian context and the current application of transitional justice in post-conflict context.



### 3.2 Peacebuilding

Considerable work has been done by scholars and practitioners dealing with the concept of peacebuilding. Galtung's pioneering work on peace research in the 1960s and 1970s arguably contributed in a significant way to elevate the idea of peacebuilding into an intellectual, academic field. In his 1975 work, for instance, Galtung differentiated between peacebuilding, peacemaking, and peacekeeping.<sup>1</sup> Whereas peacekeeping aims to keep "the antagonists away from each other under mutual threats of considerable punishment if they transgress," peacemaking, which Galtung associated with conflict resolution, seeks to "get rid of the source of tension."<sup>2</sup> Both peacekeeping and peacemaking do not get at addressing what Galtung called the "war machinery" in society.<sup>3</sup> Peacebuilding, therefore, aim to address the "war machinery." It is more enduring, which "has a structure different from, perhaps over and above, peacekeeping and ad hoc peacemaking... More particularly, a structure must be found that remove causes of wars and offer alternatives to war in situations where wars might occur."<sup>4</sup>

Building on Galtung's work, other scholars such as Lederach, also defined peacebuilding as "a comprehensive concept that encompasses, generates, and sustains the full array of processes, approaches, and stages needed to transform conflict toward more sustainable, peaceful relationships."<sup>5</sup> In Lederach's framing, peacebuilding is more than a

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<sup>1</sup> Johan Galtung, "Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding," in *Peace, War and Defense: Essays in Peace Research*, ed. Johan Galtung, vol. II (Copenhagen: Christian Ejlertsen, 1976), 282–304.

<sup>2</sup> Galtung, "Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding," 282–90.

<sup>3</sup> Galtung, "Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding," 290.

<sup>4</sup> Galtung, "Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding," 297–98.

<sup>5</sup> John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Inst of Peace Press, 1998), 20.

“postaccord reconstruction... It involves a wide range of activities and functions that both precede and follow peace accords.”<sup>6</sup>

Many peacebuilding actors, too, including the United Nations, have been involved in international peacebuilding. For instance, in the United Nations, the concept of peacebuilding began to gain importance in the aftermath of the Cold War, especially with Boutros-Ghali’s report on the Agenda for Peace in 1992.<sup>7</sup> Boutros-Ghali defined peacebuilding as an “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”<sup>8</sup> The United Nations and other international aid and development agencies use a more expansive approach to peacebuilding. The argument is that since the underlying causes of conflict are often varied, so too, must the means of addressing conflict be extensive and cover a wide range of sectors.

In the agenda for peace, the United Nations views peacebuilding as rebuilding institutions and infrastructures in war-torn states, addressing economic despair, social injustice, political oppression, and re-establishing bonds of mutual trust.<sup>9</sup> Through successive UN policy documents, such as the 1996 Agenda for Democratization and the 2000 Brahimi report, the UN expanded the idea of peacebuilding. In these documents, the UN conceives peacebuilding to include building the entire fabric of society, including institutional strengthening, the rule of law, justice, electoral reforms, and other issues that

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<sup>6</sup> Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, 20.

<sup>7</sup> The report, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping*, outlined the analysis and recommendations of the ways the UN can improve and strengthen its peacekeeping and peacemaking missions in the post-cold war era. In the report, Boutros-Ghali, the Secretary-General of the United Nations from January 1992 to December 1996, discussed the concept of peacebuilding and indicated its relationship to peacekeeping and peacemaking.

<sup>8</sup> Boutros Boutros-Ghali, "An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping," *International Relations* 11, no. 3 (December 1, 1992): 204.

<sup>9</sup> Boutros-Ghali, "An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping," 203.

would often be considered as development, such as equitable socio-economic and humanitarian interventions.<sup>10</sup> The scope and boundaries of peacebuilding have generated debates among scholars and peacebuilding actors. Some central discussions include the desired outcome of peacebuilding, the timing of interventions, and the sectors of peacebuilding interventions.

### **3.2.1 The Outcome of Peacebuilding Interventions: Positive or Negative Peace**

One of the central debates in peacebuilding is the desired outcome of interventions. Two competing visions of the outcome of peacebuilding exist. While some have argued that peacebuilding must aim to attain negative peace, others say peacebuilding must strive to achieve positive peace.<sup>11</sup> Galtung first introduced the concept of positive and negative peace in his 1964 editorial in the *Journal of Peace Research*.<sup>12</sup> He further theorized the notion of positive and negative peace in 1969, in which he provided an expanded view of violence as the basis for understanding the dimensions of peace.<sup>13</sup> To understand the two visions of peace, Galtung distinguished between actor-oriented and structure-oriented

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<sup>10</sup> See, for instance, United Nations, *An Agenda for Democratization*, Fifty-First Session of the General Assembly Agenda item 41, A/51/761 (New York: United Nations General Assembly, 1996), para. 46; available from

[https://www.un.org/fr/events/democracyday/assets/pdf/An\\_agenda\\_for\\_democratization.pdf](https://www.un.org/fr/events/democracyday/assets/pdf/An_agenda_for_democratization.pdf); United Nations, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, Fifty-First Session of the General Assembly Agenda item 87, A/55/305–S/2000/809 (New York: United Nations General Assembly, 2000), paras. 35–47; available from <https://www.un.org/ruleoflaw/files/brahimi%20report%20peacekeeping.pdf>.

<sup>11</sup> Scholars like Schmid and Bönisch have expressed skepticism about the ideals of positive peace. See generally Alfred Bönisch, "Elements of the Modern Concept of Peace," *Journal of Peace Research* 18, no. 2 (1981): 165–73; Herman Schmid, "Peace Research and Politics," *Journal of Peace Research* 5, no. 3 (September 1, 1968): 217–32, <https://doi.org/10.1177/002234336800500301>; Kenneth E. Boulding, "Twelve Friendly Quarrels with Johan Galtung," *Journal of Peace Research*, July 1, 2016, <https://doi.org/10.1177/002234337701400105>.

<sup>12</sup> Johan Galtung, "An Editorial," *Journal of Peace Research* 1, no. 1 (March 1, 1964): 2, <https://doi.org/10.1177/002234336400100101>.

<sup>13</sup> Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969): 168–69.

explanations of violence.<sup>14</sup> Actor-oriented violence is direct and often visible and personal, whereas structure-oriented violence is built into the structure of society and is often invisible.<sup>15</sup> Galtung noted that the expanded view of violence to include direct and structural violence implies peace is both the absence of direct and structural violence.<sup>16</sup> He therefore defined negative peace to be the absence of direct violence, which is actor-oriented and often personal or physical, and positive peace to be the absence of structural violence and socio-economic transformation of society.<sup>17</sup>

Call and Cousens made parallel arguments regarding the outcomes of peacebuilding. They identified three approaches to peacebuilding—the maximalist, middle ground, and minimalist outcomes.<sup>18</sup> Similar to the positive peace argument, maximalists believe that peacebuilding must address the structural factors embedded in the society that create the conditions for armed conflicts.<sup>19</sup> Minimalists think it is more realistic for peacebuilding to focus on ending overt organized violence and ensuring that there are ‘minimal’ security and political order that could ensure there is no renewed warfare.<sup>20</sup> The middle ground approach to peacebuilding advocates moving beyond the minimalist position, but argues that the maximalist visions of peace, too, maybe so “demanding that they cannot realistically be attained for several generations even under the best of circumstances.”<sup>21</sup> Instead, the middle ground conceptualizes peacebuilding that is more

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<sup>14</sup> Galtung, “Violence, Peace, and Peace Research,” 169–83.

<sup>15</sup> Galtung, “Violence, Peace, and Peace Research,” 169–70.

<sup>16</sup> Galtung, “Violence, Peace, and Peace Research,” 183.

<sup>17</sup> Galtung, “Violence, Peace, and Peace Research,” 183–84.

<sup>18</sup> Charles T. Call and Elizabeth M. Cousens, “Ending Wars and Building Peace: International Responses to War-Torn Societies,” *International Studies Perspectives* 9, no. 1 (2008): 6–7.

<sup>19</sup> Call and Cousens, “Ending Wars and Building Peace,” 6.

<sup>20</sup> Call and Cousens, “Ending Wars and Building Peace,” 7.

<sup>21</sup> Anders Themnér and Thomas Ohlson, “Legitimate Peace in Post-Civil War States: Towards Attaining the Unattainable,” *Conflict, Security & Development* 14, no. 1 (January 1, 2014): 62.

than a mere absence of overt organized violence, to include more attainable ‘decent’ institutional and structural transformations that meet a moderate, pragmatic, and normative threshold of governance.<sup>22</sup>

### 3.2.2 The Timing of Interventions

Another debate is about the phases and timing of engagement of peacebuilding interventions. In other words, when can actors engage in peacebuilding intervention and when can they end? There is little agreement among scholars and peacebuilding actors regarding the timeframes of engagements. Some scholars and peacebuilding actors tend to see peacebuilding as only applicable to ‘post-conflict’ contexts.<sup>23</sup> However, scholars like Lederach envisions peacebuilding as a long-term engagement that is not limited to post-conflict contexts. Peacebuilding can precede the cessation of direct violence and follow the signing and implementation of a peace agreement, as well.<sup>24</sup> Lederach argued that limiting

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<sup>22</sup> Call and Cousens, “Ending Wars and Building Peace,” 8.

<sup>23</sup> Some scholars argue that the term “post-conflict” is an inaccurate description because it does not adequately represent the conditions of many societies which continue to experience varied and severe forms of violence even when overt frontline fighting has ended. Finnström and Atkinson have stated that a “post-conflict” context “can often be more violent than a conflict itself.” See for instance, Sverker Finnström and Ronald R. Atkinson, “Building Sustainable Peace in Northern Uganda,” *Sudan Tribune*, May 12, 2008, sec. Comment and Analysis, para. 11; available from <https://www.sudantribune.com/spip.php?article27105>; Daniel Lambach, “Oligopolies of Violence in Post-Conflict Societies” (German Institute of Global and Area Studies, 2007); available from [https://www.giga-hamburg.de/de/system/files/publications/wp62\\_lambach.pdf](https://www.giga-hamburg.de/de/system/files/publications/wp62_lambach.pdf). Bearing in mind the fuzziness regarding the concept of “post-conflict”, I use it throughout this study to refer to a situation of a decline or a cessation of direct violence and hostilities due to the signing of a peace accord, a ceasefire, or a cessation due to claims of victories by either side of the warring parties. The decline or a cessation of direct hostilities presents a window of opportunity for long-term peace to emerge. There can be renewed warfare if this window of opportunity is not properly managed. See, John J. Hamre and Gordon R. Sullivan, “Toward Postconflict Reconstruction,” *The Washington Quarterly* 25, no. 4 (December 1, 2002): 83–96, <https://doi.org/10.1162/016366002760252554>. For a discussion on the difference between a ceasefire and peace agreement, see, Joakim Kreutz, “How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset,” *Journal of Peace Research* 47, no. 2 (March 1, 2010): 245, <https://doi.org/10.1177/0022343309353108>.

<sup>24</sup> Lederach, *Building Peace*, 20.

peacebuilding to only situations of cessation of armed hostilities could undermine the potential for societal transformations that are needed for sustainable peace.<sup>25</sup>

### **3.2.3 The Sectors of Peacebuilding Interventions**

Because it is often challenging to attribute armed conflict to only one variable, there are often multiple issues to address in attempting to achieve sustainable peace. These issues are often multi-sectoral, multi-dimensional, and multi-level.<sup>26</sup> Generally, scholars and practitioners believe peacebuilding engagements should address issues of security; democracy and good governance; justice and the rule of law; economic and physical recovery, and reconciliation.<sup>27</sup> The importance of addressing various thematic sectors of post-conflict societies has led to the development of several fields to deal with the legacies of armed violence. One of these fields is transitional justice, which has evolved over the past decades as a specialized area of practice and academic inquiry in post-conflict societies. Figure 1 illustrates the relationship between transitional justice and other thematic sectors in the context of peacebuilding and post-conflict reconstruction.

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<sup>25</sup> Lederach, *Building Peace*, 20.

<sup>26</sup> Michael Lund, "What Kind of Peace Is Being Built? Taking Stock of Post-Conflict Peacebuilding and Charting Future Directions" (International Development Research Centre (IDRC), January 2003), 13; available from <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.494.1386&rep=rep1&type=pdf>.

<sup>27</sup> Dan Smith, "Towards a Strategic Framework for Peacebuilding: Getting Their Act Together Overview Report of the Joint Utstein Study of Peacebuilding" (the Royal Norwegian Ministry of Foreign Affairs, April 2004), 10, 28; available from <https://www.regjeringen.no/globalassets/upload/kilde/ud/rap/2004/0044/ddd/pdfv/210673-rapp104.pdf>.

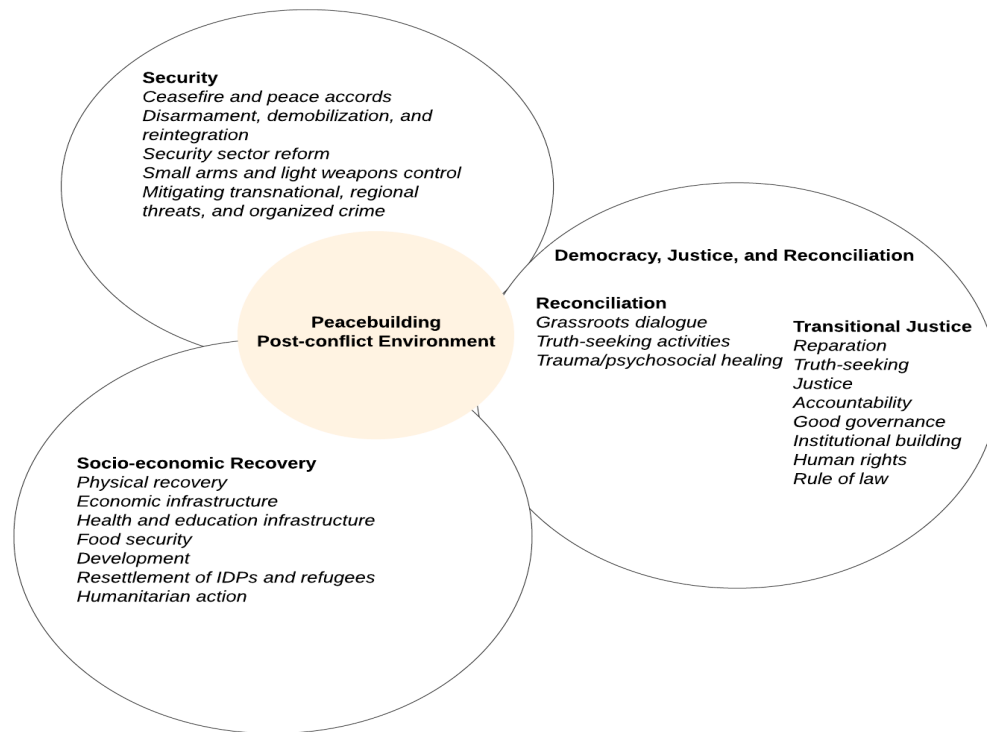


Figure 1. Thematic sectors in peacebuilding and post-conflict reconstruction.<sup>28</sup>

### 3.3 Transitional Justice

As states emerging from civil conflict, authoritarian regimes, and genocide struggle to deal with difficult questions of how to deal with the past and move forward, the field of transitional justice has emerged to provide solutions. Over the past decades, transitional justice has developed as an academic field of scholarship and practice. The notion of transitional justice as a field of scholarly interest and practice gained attention during the third wave of democratization in Latin America and Eastern Europe.<sup>29</sup> The term transitional justice was used to refer specifically to the transition from a dictatorial regime to

<sup>28</sup> Content adapted from Smith, "Towards a Strategic Framework for Peacebuilding." 28 fig 2; John Paul Lederach and Katie Mansfield, "Strategic Peacebuilding Pathways" (Kroc Institute for Peace Studies), accessed July 20, 2020; available from [https://kroc.nd.edu/assets/231045/printable\\_wheel.pdf](https://kroc.nd.edu/assets/231045/printable_wheel.pdf).

<sup>29</sup> Raluca Grosescu, "The Use of Transitology in the Field of Transitional Justice: A Critique of the Literature on the 'Third Wave' of Democratisation," *Historiein* 15 (December 3, 2015): 102.

democracy.<sup>30</sup> Scholars like Teitel define transitional justice within this framework of democratic transition. Teitel conceives transitional justice to be associated with “periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes.”<sup>31</sup>

Over the past decades, transitional justice has evolved from being seen as a tool used strictly in democratic transitions in former authoritarian states to a crucial component of peacebuilding and post-conflict reconstruction. In its later conceptualization, transitional justice involves a wide variety of measures that are used to respond to widespread systemic violations, confront the past, and promote long-term peace and reconciliation in post-conflict societies.<sup>32</sup> Transitional justice is both backward-and forward-looking. This means actors must find ways to bring closure to the past, while instituting measures to show commitment to building a healthy civil society in the future that ensures violence does not recur.<sup>33</sup> Transitional justice mechanisms are therefore designed, with both their backward-and forward-looking functions in mind. Although the modalities of transitional justice mechanisms are many, the key concepts that form the global paradigm of transitional justice include justice and accountability, truth-seeking, and reparations.<sup>34</sup> At least in

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<sup>30</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31 (2009): 321–67, <https://doi.org/10.1353/hrq.0.0069>.

<sup>31</sup> Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69.

<sup>32</sup> Arthur, “How ‘Transitions’ Reshaped Human Rights.”

<sup>33</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1 edition (New York: Beacon Press, 1998), 4.

<sup>34</sup> Lieselotte Viaene and Eva Brems, “Transitional Justice and Cultural Contexts: Learning from the Universality Debate,” *Netherlands Quarterly of Human Rights* 28, no. 2 (June 1, 2010): 199, <https://doi.org/10.1177/016934411002800204>; See also Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations, 2015), 7 para 23; available from <https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf>.



theory, these processes work in complementarity to achieve the backward and forward-looking aims of transitional justice.

### 3.3.1 Justice and Accountability

The events following World War II were perhaps the watershed moment of the international focus on trials to achieve justice and accountability for human rights violations.<sup>35</sup> Following the Second World War, the victorious Allied powers established International Military Tribunals (IMT) in Germany and Japan. The purpose of these Military tribunals was to prosecute and punish people who have committed war crimes during the Nazi aggression.<sup>36</sup> The establishment of the international military criminal tribunals was considered revolutionary in terms of seeking justice for atrocity crimes. Teitel, for instance, argues that modern transitional justice began in 1945 with the establishment of the “allied-run Nuremberg Trials, ...[which] reflects the triumph of transitional justice within the scheme of international law.”<sup>37</sup>

Despite the significant influence the Nuremberg trials have had on the development of transitional justice, scholars have criticized both the Nuremberg and Tokyo war crimes trials for pursuing victors’ justice and that “some of the charges were retroactive and selectively applied.”<sup>38</sup> The statute for the International Military Tribunal of the Far East (IMTFE), for instance, was drafted exclusively by the United States (U.S.), leading some to argue that the U.S. was looking to avenge the Japanese for their surprise attack on Pearl

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<sup>35</sup> Teitel, “Transitional Justice Genealogy.”

<sup>36</sup> Ruti G. Teitel, “Nuremberg and Its Legacy, Fifty Years Late,” in *War Crimes: The Legacy of Nuremberg*, ed. Belinda Cooper, 1st edition (New York: TV Books, 1999), 44.

<sup>37</sup> Teitel, “Transitional Justice Genealogy,” 70.

<sup>38</sup> Kirsten Sellars, “Imperfect Justice at Nuremberg and Tokyo,” *European Journal of International Law* 21, no. 4 (November 1, 2010): 1085, <https://doi.org/10.1093/ejil/chq070>.

Harbor.<sup>39</sup> Also, the global uptake of universal human rights norms, following World War II, has also been criticized by critical scholars for its lack of understanding of group or collective rights, which are both necessarily cultural and contextual.<sup>40</sup>

Trials to address human rights violations are not limited to international courts. Several efforts have been made to prosecute war crimes domestically. For example, apart from the International Military Tribunal at Nuremberg, post-World War II trials included a variety of domestic national German criminal courts.<sup>41</sup> In 2008, Uganda established an international criminal division at its high court for the domestic prosecution of atrocity crimes.<sup>42</sup> In some cases, hybrid courts are created, like the Special Court for Sierra Leone that was established after the Sierra Leonean civil war to prosecute people accused of serious violations of international human rights law and domestic Sierra Leonean law.<sup>43</sup>

Scholars disagree about whether trials are beneficial to long-term peace and reconciliation in states emerging from long periods of civil war and gross human rights violations.<sup>44</sup> On the one hand, some argue that the prosecution of political leaders who are accused of committing egregious crimes could interfere with sustainable peace and

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<sup>39</sup> Richard H. Minear, *Victors' Justice: Tokyo War Crimes Trial* (Princeton University Press, 1971).

<sup>40</sup> On how democratic transitions influence the global human rights discourse, see Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–67, <https://doi.org/10.1353/hrq.0.0069>. On a discussion of cultural relativity of human rights see Jack Donnelly, "Cultural Relativism and Universal Human Rights," *Human Rights Quarterly* 6, no. 4 (1984): 400–419.

<sup>41</sup> David Cohen, "Transitional Justice in Divided Germany after 1945," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge, New York: Cambridge University Press, 2006), 59.

<sup>42</sup> Human Rights Watch, "Uganda's International Crimes Division," *Justice for Serious Crimes before National Courts* (blog), 2012.

<sup>43</sup> William A. Schabas and Shane Darcy, eds., *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (Springer Netherlands, 2004).

<sup>44</sup> Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, 2006).

reconciliation.<sup>45</sup> These scholars argue that criminal trials may undermine peace settlements because warlords may be crucial for ongoing peace negotiations.<sup>46</sup> On the other hand, some scholars and human rights advocates point to the deterrent effects of prosecutions. They argue that there can be no sustainable peace and reconciliation without the prosecution of perpetrators of those accused of human rights violations.<sup>47</sup>

### 3.3.2 Truth-Seeking

Truth commissions are another formal means that post-conflict societies use to acknowledge and come to terms with past violations. The mandate of truth commissions varies. However, they coalesce around the idea of investigating periods of abuse and making recommendations to remedy past violations. Hayner identifies four primary elements of truth commissions. First, truth commissions center on investigating past violations. Second, truth commissions do not focus on a specific event but attempt to investigate patterns of human rights violations over a period of time. Third, truth commissions are temporary bodies, and their operation ceases to exist after a report is submitted. Fourth, truth commissions are vested with some authority that enables it to have greater access to information.<sup>48</sup> Although many scholars have adopted Hayner's definition,

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<sup>45</sup> Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28 (January 1, 2004): 6, <https://doi.org/10.1162/016228803773100066>; see also Schabas and Darcy, *Truth Commissions and Courts*.

<sup>46</sup> Anthony D'Amato, "Peace vs. Accountability in Bosnia," *The American Journal of International Law* 88, no. 3 (1994): 500, <https://doi.org/10.2307/2203717>.

<sup>47</sup> Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54, no. 4 (2010): 939–63. For a discussion on the trade-offs between peace and justice, see Robert C. Johansen, "Peace and Justice? The Contribution of International Judicial Processes to Peacebuilding," in *Strategies of Peace: Transforming Conflict in a Violent World*, ed. Daniel Philpott and Gerard F. Powers, Studies in Strategic Peacebuilding (New York: Oxford University Press, 2010), 189–230; Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal," *Human Rights Quarterly* 20, no. 4 (1998): 737–816.

<sup>48</sup> Hayner, "Fifteen Truth Commissions - 1974 to 1994," 604.

others have noted that some of the elements she identified pose challenges.<sup>49</sup> Dancy et al. note that Hayner's emphasis on the submission of a report as the primary outcome of a truth commission's work seems to be limiting. They point to truth commissions in Bolivia and in the former Federal Republic of Yugoslavia that have taken testimonies but did not succeed in submitting a final report. Dancy et al. argue that a final report must be the goal of truth commission, but not the defining feature.<sup>50</sup>

There has been a remarkable increase in the number of truth commissions around the world. Since the 1970s, more than forty-five truth commissions have been created.<sup>51</sup> The majority of these are in Latin America and Africa. There is a great deal of variation among them regarding their nature and mandate of investigation.<sup>52</sup> For example, the Argentinean National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas) was created to investigate the disappearances of people during the military rule between 1976 and 1983.<sup>53</sup> The Commission for Historical Clarification

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<sup>49</sup> Geoff Dancy, Hunjoon Kim, and Eric Wiebelhaus-Brahm, "The Turn to Truth: Trends in Truth Commission Experimentation," *Journal of Human Rights* 9, no. 1 (February 2, 2010): 45–64, <https://doi.org/10.1080/14754830903530326>.

<sup>50</sup> Dancy, Kim, and Wiebelhaus-Brahm, "The Turn to Truth."

<sup>51</sup> "Truth Commission Digital Collection," United States Institute of Peace, 2011; available from <https://www.usip.org/publications/2011/03/truth-commission-digital-collection>. It should be noted that the number of truth commissions worldwide is disputed. Wiebelhaus-Brahm, for instance, reports that there are nearly seventy-five cases of potential truth commissions worldwide. However, academic researchers have not reported on some of the cases because of two reasons. First, researchers defined truth commissions in (limited) ways, and second, these truth commissions failed to attract international attention. See Eric Wiebelhaus-Brahm, "What Is a Truth Commission and Why Does It Matter?" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 1, 2009); available from <https://papers.ssrn.com/abstract=1611719>.

<sup>52</sup> The name of the truth commission sometimes reflects the nature, mandate, and breadth of the investigations. For instance, Sierra Leone created a Truth and Reconciliation Commission. Uganda created a Commission of Inquiry into the Disappeared as well as a Commission of Inquiry into Violations of Human Rights. Guatemala created a Commission for Historical Clarification. However, these can be generically called "truth commissions". See, Hayner, "Fifteen Truth Commissions--1974 to 1994"; Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2 edition (New York: Routledge, 2010); Angela D. Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions* (Cham, Switzerland: Palgrave Macmillan UK, 2019).

<sup>53</sup> Emilio Ariel Crenzel, *Memory of the Argentina Disappearances: The Political History of Nunca Más* (Routledge, 2012).

(Comisión para el Esclarecimiento Histórico) in Guatemala was established in 1997 to clarify human rights abuses that occurred during the thirty-six-year conflict from 1960 to 1996.<sup>54</sup> Other notable countries with truth commissions include Chile, El Salvador, Peru and Colombia.<sup>55</sup>

Burundi, Côte d'Ivoire, Liberia, Morocco, Rwanda, Sierra Leone, South Africa, and Uganda are among the African countries that have created truth commissions to investigate various forms of past abuses. Uganda, for instance, has had two truth commissions. The Commission of Inquiry into the Disappearances of People in Uganda Since 25 January, 1971 was first established in 1974 to investigate enforced disappearances in the first years of Idi Amin's Government from 1971 until 1974.<sup>56</sup> Then, in 1986, Yoweri Museveni created the Commission of Inquiry into Violations of Human Rights to investigate human rights abuses, including "mass murders, arbitrary arrests, the role of law enforcement agents and the state security agencies, and discrimination, which occurred between 1962 and January 1986."<sup>57</sup> Sierra Leone, too, created its Truth and Reconciliation Commission in 2002, among other transitional justice instruments, to investigate and report on the human rights violations that occurred from 1991 to 2002. The objective of the commission was to "create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone...

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<sup>54</sup> Christian Tomuschat, "Clarification Commission in Guatemala," *Human Rights Quarterly* 23, no. 2 (2001): 233–58.

<sup>55</sup> Jonathan C. Hamilton, "Latin American Truth Commissions: Confronting the Past" (White & Case LLP, 2014); available from <https://www.whitecase.com/sites/whitecase/files/files/download/publications/ProBono-Report-Latin-America-Truth-Commissions.pdf>; "Truth Commission Digital Collection."

<sup>56</sup> Alicia C. Decker, "'Sometime You May Leave Your Husband in Karuma Falls or in the Forest There': A Gendered History of Disappearance in Idi Amin's Uganda, 1971–79," *Journal of Eastern African Studies* 7, no. 1 (February 1, 2013): 125–42, <https://doi.org/10.1080/17531055.2012.755306>.

<sup>57</sup> Joanna R. Quinn, "Constraints: The Un-Doing of the Ugandan Truth Commission," *Human Rights Quarterly* 26, no. 2 (2004): 403.

to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.”<sup>58</sup>

### 3.3.3 Reparations

The United Nations Commission on Human Rights spells out four forms of reparations, namely, restitution, compensation, satisfaction, and rehabilitation.<sup>59</sup> The purpose of restitution is to “re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights.”<sup>60</sup> The function of compensation is to cover any economic damages, including loss of property, loss of opportunities, loss of earnings, medical and other expenses, as well as other damages resulting from human rights abuses and armed conflict.<sup>61</sup> Beyond material compensation, symbolic reparations, which aim to ensure the satisfaction of parties involved, are also commonly used. They may include apologies, an official acknowledgment of government’s complicity or direct participation in committing the atrocities, and/or public disclosure of the “names and positions of those responsible” for the atrocities.<sup>62</sup> Public commemoration days and memorials could also serve as measures of satisfaction. Rehabilitation may include legal, medical, and psychosocial services with the view to restoring the dignity of the injured person. It should

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<sup>58</sup> “The Mandate of the Truth and Reconciliation Commission,” Sierra Leone Truth and Reconciliation Commission, para. 6(1), accessed July 17, 2020; available from [https://www.sierraleonetr.com/index.php/view-report-text-vol-1/item/vol-one-chapter-one?category\\_id=19](https://www.sierraleonetr.com/index.php/view-report-text-vol-1/item/vol-one-chapter-one?category_id=19).

<sup>59</sup> Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-Fifth Session, E/CN.4/Sub.2/1993/8 (Geneva, Switzerland: UN Commission on Human Rights, 1993), 56, chapter IX para 137(8-11); available from [http://hrlibrary.umn.edu/demo/van%20Boven\\_1993.pdf](http://hrlibrary.umn.edu/demo/van%20Boven_1993.pdf).

<sup>60</sup> van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 57 article 8.

<sup>61</sup> van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 57 article 9.

<sup>62</sup> Naomi Roht-Arriaza, “Reparations Decisions and Dilemmas,” *Hastings International and Comparative Law Review*, 2004, 159.

be noted that these forms of reparation are not mutually exclusive. They can be used singularly or jointly. The critical consideration is to ensure victims have full and appropriate redress, which are proportional to the injury caused.<sup>63</sup> The question of full and proportional reparation is important because it helps to put a check on states to uphold their domestic and international legal obligations and prevent them from using reparations programs as political tools instead of the purpose of eliminating the injury committed.<sup>64</sup>

Notwithstanding the importance of reparations, many governments have been slow in implementing reparation programs. For example, truth commissions in El Salvador, Guatemala, Panama, and South Africa have recommended the implementation of reparation programs, but not much has been achieved in terms of the implementation.<sup>65</sup> The difficulty in implementing reparations programs could be due to one or both of the following reasons. First, there is often a lack of political will. Second, this difficulty could be due to insufficient funds and competing uses of the states' scarce resources.

In spite of the challenges regarding funds and the lack of political will, reparations programs, whether material or symbolic, have increasingly been viewed to have the potential to contribute to positive peace by addressing the specific needs of victims. Roht-Arriaza has proposed a range of ways reparation can take to address survivors and local community needs. For example, by giving victims of extraordinary suffering preferential

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<sup>63</sup> United Nations 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*, General Assembly Sixtieth Session, A/RES/60/147 (New York: United Nations General Assembly, 2006), 7 chap IX para 15; available from <https://www.un.org/ruleoflaw/files/BASICP~1.PDF>.

<sup>64</sup> United Nations General Assembly, 56 chap IX para 15-18.

<sup>65</sup> Roht-Arriaza, "Reparations Decisions and Dilemmas."

access to certain government services, encouraging the establishment of community-based development initiatives, and instituting community-level acknowledgment.<sup>66</sup>

### **3.4 Guarantees of Non-Recurrence**

States emerging from civil wars, genocide, and other armed hostilities are often met with the need to bring alleged perpetrators to account, to seek the truth about the past violations, and to help victims recover through various forms of reparations. While scholars and practitioners have given significant attention to truth seeking, criminal accountability, and reparation, little attention has been given to guarantees of non-recurrence as a TJ practice. This section begins to trace the origins of guarantees of non-recurrence, how it has evolved over time to its current application in transitional justice and post-conflict reconstruction. I then consider how guarantees of non-recurrence progressed into public international law, international human rights law, the United Nations soft law documents, and to transitional justice in post-authoritarian and post-conflict contexts.

#### **3.4.1 The Early Practice of Guarantees of Non-Recurrence**

Historically, instances of guarantees of non-recurrence have been present in international diplomatic practice since the 19th century, although it has not always explicitly described as such.<sup>67</sup> Historically, guarantees and measures of non-recurrence are part of diplomatic practices used to resolve disputes and to ensure the continuation of the diplomatic relations between states.<sup>68</sup> It is important to note that the diplomatic use of measures of non-

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<sup>66</sup> Roht-Arriaza, "Reparations Decisions and Dilemmas."

<sup>67</sup> Scott Sullivan, "Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition," *UCLA Journal of International Law & Foreign Affairs* 7 (2002): 268.

<sup>68</sup> Sullivan, "Changing the Premise of International Legal Remedies."



recurrence was not standard or uniform practice among states. The kinds of guarantees that might be requested by an injured state were not always specific. In most cases, the accused state has the discretion to adopt any measure, or a variety of measures deemed appropriate to prevent the recurrence of the wrongful act.<sup>69</sup> In some instances, the measures could take the form of a verbal assurance or a promise by the accused state that it will not repeat the unlawful act. In other cases, too, the measures might take the form of specific tangible action(s), such as a change in policy or law that could result in the non-recurrence of the unlawful act.<sup>70</sup>

For example, the events following the Boxer Rebellion, which occurred between 1899–1901, illustrate the diplomatic practice of guarantees of non-recurrence. A violent anti-Western and anti-Christian insurgency broke out in Northeast China in 1899.<sup>71</sup> In September 1901, the Western powers signed the Boxer Protocol with China, which formally ended the rebellion. The West sought several remedies from China because they concluded that China did not do enough to stop the Boxers from carrying out the rebellion. Among others, the Chinese Government agreed to take several measures aimed at the non-recurrence of similar acts of violence. Article V of the Boxer Protocol states:

China has agreed to prohibit the importation into its territory of arms and ammunition, as well as of materials exclusively used for the manufacture of arms and ammunition. An Imperial Edict has been issued on the 25th of August, forbidding said importation for a term of two years. New Edicts may be issued subsequently extending this by other successive terms of two years in case of necessity recognized by the Powers.<sup>72</sup>

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<sup>69</sup> Naomi Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice: The Missing Link?,” in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge UK: Cambridge University Press, 2019), 105–30.

<sup>70</sup> Sullivan, “Changing the Premise of International Legal Remedies.”

<sup>71</sup> Eric Ouellet, “Multinational Counterinsurgency: The Western Intervention in the Boxer Rebellion 1900–1901,” *Small Wars & Insurgencies* 20, no. 3–4 (2009): 507–27, <https://doi.org/10.1080/09592310903027074>.

<sup>72</sup> “Settlement of Matters Growing out of the Boxer Uprising (Boxer Protocol),” September 7, 1901, article V; available from <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0302.pdf>.

The Chinese Government took additional steps to prohibit the Chinese from residing in areas near foreign embassies and determined that all such areas would be under the exclusive control of foreign powers.<sup>73</sup> In these examples, the accused state, China, took specific formal measures in the form of policy changes and legislation that would prevent the recurrence of similar unlawful acts, like the Boxer Rebellion. Although the example of the Boxer Rebellion took place under the context of deeply colonized relations, where the Chinese were under the occupation of foreign powers, I use it here to illustrate how guarantees of non-recurrence progressed from interstate diplomatic relations to become part of the reparative regime in public international law, international human rights law, the United Nations' instruments, and domestic national transitional mechanisms. This is important because it illustrates the origin story of the concept of guarantees of non-repetition and helps develop a more systematic understanding of its focus. Thus, it shows how the concept evolves into its exiting use as a mechanism of post-conflict reconstruction.

### **3.4.2 Guarantees of Non-Recurrence in Public International Law**

Guarantees of non-recurrence entered mainstream public international law (PIL) through the work of the International Law Commission (ILC).<sup>74</sup> The ILC was established by United Nations General Assembly Resolution 174(II) in 1947 for “the promotion of the progressive development of international law and its codification.”<sup>75</sup> Through its

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<sup>73</sup> “Settlement of Matters Growing out of the Boxer Uprising (Boxer Protocol),” article VII.

<sup>74</sup> Sullivan, “Changing the Premise of International Legal Remedies.”

<sup>75</sup> United Nations General Assembly, *Statute of the International Law Commission 1947* (New York: United Nations, 2005), 2 article 1; available from <https://legal.un.org/docs/?path=../ilc/texts/instruments/english/statute/statute.pdf&lang=EF>.

codification work, the ILC developed guarantees of non-recurrence alongside compensation, restitution, and satisfaction as part of the general legal obligation of states to redress any internationally wrongful act.<sup>76</sup> Guarantees of non-recurrence have appeared in several of the ILC's draft articles on state responsibility. For example, in 1961, in his Special Report on State Responsibility, García-Amador observed in Article 27 that "in any such case [of a wrongful act which caused injury to a state] as aforesaid the state of nationality shall have the right... to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that state."<sup>77</sup> The inclusion of Article 27, entitled "Measures to prevent the repetition of the injurious act," represents one of the initial efforts to include measures of non-recurrence in the work of the ILC to develop and codify international law.<sup>78</sup>

In its 2001 draft articles, the ILC put guarantees of non-recurrence together under the same section as the cessation of a breach of international law. However, while cessation is "concerned with securing an end to continuing wrongful conduct," guarantees of non-recurrence "serve a preventive function and may be described as a positive reinforcement

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<sup>76</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001* (New York: The United Nations, 2008), pt. two, chapter 1, articles 30, 35, 36, and 37; available from [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>77</sup> Francisco V. García-Amador, "Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens-Reparation of the Injury," in *Yearbook of the International Law Commission 1961*, International Law Commission, vol. II, 13th session, A/CN.4/SER.A/1961/Add. 1 (New York: United Nations, 1962), 49 article 27(2); available from [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1961\\_v2.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1961_v2.pdf).

<sup>78</sup> Diana Guarnizo-Peralta, "Guarantees of Non-Repetition and the Right to Health: Review of the Law and Evolving Practice of Judicial and Semi-Judicial Bodies at Global and Regional Levels" (Ph.D. Thesis, Colchester UK, University of Essex Department of Law, 2016), 36; available from <http://repository.essex.ac.uk/17355/1/PHD%20VERSION%20FINAL%20%202009.07.2016.pdf>.

of future performance.”<sup>79</sup> Here, the ILC viewed the cessation of the wrongful act and measures of non-recurrence as separate, but linked aspects of remedying a wrongful act.<sup>80</sup>

The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible state’s obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

Assurances or guarantees of non-repetition... are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past.<sup>81</sup>

The distinction above is important because cessation and measures of non-recurrence are both necessary aspects of restoring and repairing a wrongful conduct. In the case of a continuing violation, cessation must occur before the state responsible for the internationally wrongful act may offer appropriate measures to prevent the future occurrence of the breach. Roht-Arriaza further elaborated that measures of non-recurrence are forward-looking and seek to “open up possibilities of addressing root causes and continuing manifestations of the initial violations.”<sup>82</sup>

### **3.4.3 Guarantees of Non-Recurrence in International Human Rights Law**

From public international law, guarantees of non-recurrence entered the sphere of international human rights law and have appeared in different United Nations human rights documents. While public international law governs relations between sovereign states, international human rights law deals with violations that are committed by states against

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<sup>79</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001*, 88 article 30(1).

<sup>80</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 88 article 30(1).

<sup>81</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 89-90 article 30(5)(11).

<sup>82</sup> Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice,” 110.

individuals. Unlike public international law, in international human rights law, breaches and violations of the law are committed against human beings, not against a state. Hence, guarantees of non-recurrence in international human rights law impose remedies and measures that protect individuals from human rights violations and deter acts of future abuses.<sup>83</sup> Guarantees of non-recurrence in international human rights law, therefore, put obligations on states to refrain from rights violations and to carry out measures that will also prevent other actors from violating human rights.<sup>84</sup>

Guarantees of non-recurrence have been imported into many United Nations human rights instruments and policy documents. For example, UN Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Theo van Boven, captured guarantees of non-recurrence as a form of reparation in his 1993 report.<sup>85</sup> Under the section on guarantees of non-recurrence, van Boven observed that states must take measures to “preventing the recurrence of violations by such means [as]: (i) ensuring effective civilian control of military and security forces; (ii) restricting the jurisdiction of military tribunals; (iii) strengthening the independence of the judiciary.”<sup>86</sup> These principles and guidelines were further developed by various UN special rapporteurs and subsequently adopted by the UN General Assembly in 2005.<sup>87</sup>

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<sup>83</sup> Shelton Dinah, *Remedies in International Human Rights Law*, Third Edition (Oxford, New York: Oxford University Press, 2015).

<sup>84</sup> Roht-Arriaza, “Measures of Non-Repitition in Transitional Justice.”

<sup>85</sup> van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 56 para 137(4).

<sup>86</sup> van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, 57-58 article 11(h).

<sup>87</sup> Roht-Arriaza, “Measures of Non-Repitition in Transitional Justice.”

There are several instances in which regional human rights courts have issued orders to redress gross violations of human rights and to prevent future recurrence. The Inter-American Court on Human Rights (IACtHR), for instance, in its jurisprudence on several cases has issued recommendations to states to carry out measures to guarantee that gross violations of human rights are not repeated. In some cases, the court may hesitate to give specific instructions on the kinds of measures states should take to prevent future violations. For example, in the case involving the forced disappearance of Trujillo Oroza in Bolivia, the IACtHR observed in its ruling that Bolivia “has the obligation to take all necessary steps to ensure that these grave violations are not repeated, an obligation whose fulfillment benefits society as a whole.”<sup>88</sup> Similarly, in 1997, when Ecuadorian police unlawfully arrested and detained Iván Suárez Rosero on suspicion of Suárez’s involvement in drug trafficking, the IACtHR observed that Ecuador is obligated “to adopt such measures as may be necessary to ensure that violations such as those established in the instant case never again occur in its jurisdiction.”<sup>89</sup> In these cases, the court issued general and broad recommendations without providing much detail on the specific legislative or policy measures the accused state must take to prevent the repetition of violations.

Unlike the Inter-American Court, the Inter-American Commission on Human Rights (IACHR) takes a different approach in settling cases of human rights abuses. Among other functions, the IACHR facilitates friendly settlement between parties at the

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<sup>88</sup> Trujillo-Oroza v. Bolivia (Inter-American Court of Human Rights February 27, 2002), para 110. For details of the case, see Olivia Scharrer, “Trujillo Oroza v. Bolivia,” *Loyola of Los Angeles International and Comparative Law Review* 36, no. 4 (2014): 1257–79.

<sup>89</sup> Suárez-Rosero v. Ecuador (Inter-American Court of Human Rights November 12, 1997), para 106. For details of the case, see Karen Cody, “Suárez Rosero v. Ecuador,” *Loyola of Los Angeles International and Comparative Law Review* 40, no. 3 (2017): 1117–31.

commission's own initiative or at the request of any of the parties.<sup>90</sup> The commission has reached friendly settlements in which states have agreed to take various specific modalities and measures, including legislative measures, to prevent future occurrence of rights violations. The friendly settlement of the *Inmates of the Penitentiary of Mendoza v. Argentina* case illustrates an example of where specific measures were issued to guarantee that violations would not be repeated. In 2003, inmates of the Penitentiary of Mendoza lodged a petition with the Inter-American Commission on Human Rights accusing the Republic of Argentina for violating their right to life, health, and inhumane conditions of detention.<sup>91</sup> In the final report of the friendly settlement, the Inter-American Commission on Human Rights found that Argentina had violated the rights of the inmates as protected by the American Convention on Human Rights. The province of Mendoza and the national government of Argentina agreed to take normative legislative measures including:

- a) create a local prevention agency within the framework of the Optional Protocol of the Convention against Torture and other Cruel Inhumane and Degrading Treatment or Punishment, and take the necessary steps to achieve the approval thereof;
- b) create the office of the Human Rights Ombudsman of Mendoza, whose responsibility shall be the defense of the human rights of the entire population (right to health, education, security, development, a healthy environment, freedom of information and communication, of consumer and users, etc.) and take the necessary steps to achieve the approval thereof;
- c) create an office of a Special Prosecutor to benefit persons deprived of liberty and take the necessary steps to achieve the approval thereof;

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<sup>90</sup> Inter-American Commission on Human Rights, "Rules of Procedure of the Inter-American Commission on Human Rights," Organization of American States: Democracy for peace, security, and development, August 1, 2009, chap. II paragraph 40; available from <http://www.oas.org/en/iachr/mandate/basics/rulesiachr.asp>.

<sup>91</sup> The Inter-American Commission on Human Rights, "Friendly Settlement Argentina Inmates of the Penitentiaries of Mendoza," Case 12.532 (Washington, DC: The Inter-American Commission on Human Rights, July 21, 2011), available from [http://www.worldcourts.com/iacmhr/eng/decisions/2011.07.21\\_Mendoza\\_Penitentiary\\_Inmates\\_v\\_Argentina.pdf](http://www.worldcourts.com/iacmhr/eng/decisions/2011.07.21_Mendoza_Penitentiary_Inmates_v_Argentina.pdf)

d) create a government Office of the Public Defender to litigate before chambers of criminal sentence execution of the courts, and to take the necessary steps to achieve the approval thereof.<sup>92</sup>

The above agreements illustrate explicit forward-looking measures determined by the IACHR that aim to redress the root causes of the violations, ensure the protection and enjoyment of individual rights, and “guarantee” that future violations would not occur.

#### **3.4.4 Guarantees of Non-Recurrence in the United Nations System**

From public international law to international human rights law, guarantees of non-recurrence entered the sphere of the United Nations development of human rights instruments. The end of the Cold War presented an opportunity for the UN to restructure the international legal order and set clear standards that stipulate how to deal with gross human rights violations.<sup>93</sup> Since the 1990s, guarantees of non-recurrence have appeared in various UN guideline documents regarding how to redress gross impunity and structural violations of human rights. Similar to the work of the ILC, most of the earlier work of the UN on preventing gross human right violations framed guarantees of non-recurrence as an element of reparation.<sup>94</sup> In 2005, the UN General Assembly adopted 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

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<sup>92</sup> The Inter-American Commission on Human Rights, “Friendly Settlement Argentina Inmates of the Penitentiaries of Mendoza,” 7 paragraph 1 (a-d).

<sup>93</sup> Richard B. Lillich, “The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World,” *Tulane Journal of International and Comparative Law* 3 (1995): 2. See also Viaene and Brems, “Transitional Justice and Cultural Contexts,” 201.

<sup>94</sup> Theo van Boven, *Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-Eighth Session, E/CN.4/Sub.2/1996/17 (Geneva, Switzerland: UN Commission on Human Rights, 1996), 4–5, paragraph 12-15, file:///C:/Users/ibayo/Downloads/E\_CN.4\_Sub.2\_1996\_17-EN.pdf.



Law. The principles that the General Assembly adopted expanded on the measures Theo van Boven had initially proposed in his 1993 report, including the following:

- (a) Ensure that all civilian and military proceedings abide by international standards of due process, fairness, and impartiality;
- (b) Protect persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;...
- (e) Provide, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promote the observance of codes of conduct and ethical norms, in particular, international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promote mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.<sup>95</sup>

Subsequent revisions of the UN guidelines framed guarantees of non-recurrence as a *distinct transitional justice mechanism*—not as a subset of reparation, as had earlier been posited.<sup>96</sup> The separation of guarantees of non-recurrence from reparation, and framing it as a standard transitional justice mechanism, is highly influenced by the work of Pablo de Greiff, a transitional justice scholar and the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence (2012-2018). In 2015, de Greiff provided further clarity in his special report, in which he noted that guarantees of non-recurrence are “part of a comprehensive transitional justice strategy,” which states can

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<sup>95</sup> United Nations 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*, sec. IX Par. 23.

<sup>96</sup> In his 1997 Principles, UN Special Rapporteur on the Impunity of Perpetrators of Violations of Human Rights (Civil and Political), Louis Joinet, discussed guarantees of non-repetition as a subset of reparations. Louis Joinet, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119*, E/CN.4/Sub.2/1997/20 (New York: UN Economic and Social Council, 1997), para. 40(3), file:///C:/Users/ibayo/Downloads/E\_CN.4\_Sub.2\_1997\_20-EN%20(1).pdf.

develop into a policy to address the aftermath of mass violations.<sup>97</sup> In his report, de Greiff elaborated on some conceptual questions concerning: a) what constitutes a “guarantee”; b) the beneficiaries of the guarantee measures—individual victims, a group of victims, or the broader society; and c) the duty bearers who are to provide the guarantees.<sup>98</sup> He observed that the beneficiaries of guarantees of non-recurrence is the broader society and the state institutions are the primary duty bearers, who are under obligation to provide guarantees to prevent non-recurrence.<sup>99</sup>

Over the years, guarantees of non-recurrence have advanced still further, from public international law into the sphere of transitional justice and post-conflict reconstruction. The application of guarantees of non-recurrence in societies emerging from armed conflict is more in line with international human rights law and the UN human rights instruments than it is with public international law. This is quite understandable when one considers the dominant debates associated with the origins of transitional justice. One of the dominant theories scholars have espoused is about the wave of regime changes that swept across many post-communist and authoritarian states, and the need to hold past repressive regimes accountable.<sup>100</sup> The transitional justice model that emerged as many post-authoritarian states attempt to transition to liberal democracy was based on state-building, institutional reforms, and strengthening democratic governance.<sup>101</sup> Subsequently, as civil wars, interethnic conflict, other intrastate violence raged after the cold war, the original ideas of transitional justice which were developed during the periods

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<sup>97</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2015, chap. III article 14.

<sup>98</sup> de Greiff, *Report of the Special Rapporteur*, chap. III section B, paragraph 20.

<sup>99</sup> de Greiff, *Report of the Special Rapporteur*, chap. III section B, paragraph 26.

<sup>100</sup> Teitel, “Transitional Justice Genealogy”; Arthur, “How ‘Transitions’ Reshaped Human Rights.”

<sup>101</sup> Teitel, “Transitional Justice Genealogy.”

of authoritarian transitions became core components of peace processes in many post-conflict societies.<sup>102</sup>

### 3.4.5 The Uptake of Guarantees of Non-recurrence in National Level Peace Processes

The uptake of guarantees of non-recurrence at the domestic level normally draws heavily on peace agreement provisions. Badran defined peace agreement as “a consensual contract between some or all conflict protagonists to settle all or part of the incompatibility and regulate future interaction, with a view to ending armed conflict.”<sup>103</sup> Since the end of the post-cold war, there has been a remarkable increase in peace agreements as a means to end civil wars and intrastate conflicts.<sup>104</sup> Research has shown that between 1990-2001, only 18 percent of civil wars ended in victory by one side, while 38 percent ended with a peace agreement.<sup>105</sup> Intrastate conflicts in the aftermath of the cold war are five times likely to end in peace agreements than during the cold war period.<sup>106</sup> In negotiating peace

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<sup>102</sup> Harvey M. Weinstein et al., “Stay the Hand of Justice: Whose Priority Take Priority?” in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, ed. Rosalind Shaw, Lars Waldorf, and Pierre Hazan, 1 edition (Stanford, California: Stanford University Press, 2010), 33. See also Joanna R. Quinn, “The Development of Transitional Justice,” in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs, Research Handbooks in International Law (Cheltenham, UK: Edward Elgar Publishing, 2017), 11–33.

<sup>103</sup> Ramzi Badran, “Intrastate Peace Agreements and the Durability of Peace,” *Conflict Management and Peace Science* 31, no. 2 (April 1, 2014): 194, <https://doi.org/10.1177/0738894213501133>.

<sup>104</sup> There are scholarly debates about the effectiveness of peace agreement to lead to long-term peace. While some peace agreements fall apart within months, others last for years and create the conditions for long-term peace. The literature on civil war termination, the implementation, and the stability of peace agreements is beyond this study's scope. For scholarly debates on the stability of peace agreements see, for instance, Ramzi Badran, “Intrastate Peace Agreements and the Durability of Peace,” *Conflict Management and Peace Science* 31, no. 2 (April 1, 2014): 193–217, <https://doi.org/10.1177/0738894213501133>; Caroline A. Hartzell, “Explaining the Stability of Negotiated Settlements to Intrastate Wars,” *Journal of Conflict Resolution*, July 1, 2016, <https://doi.org/10.1177/0022002799043001001>; Stephen John Stedman, Donald Rothchild, and Elizabeth M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner Publishers, 2002).

<sup>105</sup> Lise Morjé Howard and Alexandra Stark, “How Civil Wars End: The International System, Norms, and the Role of External Actors,” *International Security* 42, no. 3 (2017): 134.

<sup>106</sup> Badran, “Intrastate Peace Agreements and the Durability of Peace,” 194.

agreements, warring parties are often involved in significant negotiation to construct institutions and agreements that will advance their interests.<sup>107</sup>

Peace agreements often contain a wide variety of provisions that aim to address and mitigate the factors that could lead to the recurrence of civil wars.<sup>108</sup> Along with other initiatives, security sector reform; lustration and vetting; disarmament, demobilization and reintegration; and institutional strengthening have become some of the standard provisions in many peace agreements.<sup>109</sup> Some of these provisions, such as lustration and vetting, and security sector reforms, have become significant components in the implementation of guarantees of non-recurrence in many national-level peace processes.<sup>110</sup> Several reasons can explain why some peace agreements provisions have become standard practices of guarantees of non-recurrence at the national level. The first is due to normative shifts in the international practice of conflict resolution, which has led to what Mac Ginty called the “standardization of peacebuilding through ‘best practice.’”<sup>111</sup> Secondly, and more importantly, as Roht-Arriaza observed, these measures “have become the major components in the practices of GNR in part as an artifact of early transitions” and the normative obligation for states to respect human rights and prevent recurrence of

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<sup>107</sup> Hartzell, “Explaining the Stability of Negotiated Settlements to Intrastate Wars,” 6.

<sup>108</sup> Michaela Mattes and Burcu Savun, “Fostering Peace after Civil War: Commitment Problems and Agreement Design,” *International Studies Quarterly* 53, no. 3 (2009): 739.

<sup>109</sup> Madhav Joshi, Jason Michael Quinn, and Regan Patrick M., “Annualized Implementation Data on Intrastate Comprehensive Peace Accords, 1989-2012,” *Journal of Peace Research* 52, no. 4 (2015): 554.

<sup>110</sup> Naomi Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice: The Missing Link?” in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge UK: Cambridge University Press, 2019), 124.

<sup>111</sup> Roger Mac Ginty, “Routine Peace: Technocracy and Peacebuilding,” *Cooperation and Conflict*, August 22, 2012, 289, <https://doi.org/10.1177/0010836712444825>.

violations.<sup>112</sup> Thirdly, these measures are consistent with many of the UN and other international instruments to combat impunity.<sup>113</sup>

Although peace agreement provisions have become significant components of national-level guarantees of non-recurrence, the mainstream peace agreement literature does not explicitly use the concept “guarantees of non-recurrence... The development and peacebuilding communities do most activities [that are normally] grouped under the category of guarantees of non-recurrence without using the term.”<sup>114</sup> The focus of this dissertation is much broader, and it utilizes the concept of non-recurrence not exclusively as an instrument of transitional justice but also as an instrument of peacebuilding. This is true because a notable number of measures that could terminate ongoing armed conflict and prevent a future reversion to that conflict have included both peacebuilding and transitional justice instruments. For example, one of the measures that could be utilized to prevent societies from reverting to armed conflict is disarmament, demobilization, and reintegration (DDR). However, DDR processes often involve overlapping activities and actors that fit within the broader peacebuilding and transitional justice agenda.<sup>115</sup>

As earlier illustrated, the fundamental characteristic that distinguishes guarantees of non-recurrence from other core transitional justice mechanisms is that they are forward-looking and preventive in nature.<sup>116</sup> Guarantees of non-recurrence carry the general “idea

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<sup>112</sup> Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice,” 124.

<sup>113</sup> See, for instance, Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations, 2015), 7 para 23; available from <https://www.ohchr.org/Documents/Issues/Truth/A-HRC-30-42.pdf>.

<sup>114</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence” 417.

<sup>115</sup> Jemima García-Godos and Chandra Lekha Sriram, “Introduction,” in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram et al., 1st ed. (London: Routledge, 2012), 1–19.

<sup>116</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2015, para. 24.

that forward-looking changes need to be part of the mix of post-violation reconstruction... and [guarantees of non-recurrence] should do what's needed to make sure violations do not happen again."<sup>117</sup> Several measures fall under the category of guarantees of non-recurrence.<sup>118</sup> However, the measures that post-conflict states often tend to use include reforming state institutions and the security sectors.<sup>119</sup>

Guarantees of non-recurrence, in the form of institutional reform, therefore, involve reviewing and restructuring state security institutions so that they are accountable to the populations, respect human rights, and protect the rule of law.<sup>120</sup> The Organization for Economic Cooperation and Development states that the goals of the institutional, judiciary, and security sector reforms are to i) establish effective governance, oversight, and accountability in the security system; and ii) improve the delivery of security and justice services.<sup>121</sup> Reforming public institutions so that they are accountable to, and trusted by, the population can take various forms, including creating or adopting international legal frameworks to ensure the protection of human rights and civilian oversight of the security sector.<sup>122</sup>

Security sector reforms, too, have been implemented in various post-conflict context. For instance, the European Union funded the implementation of security sector

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<sup>117</sup> Roht-Arriaza, "Measures of Non-Repitition in Transitional Justice," 124.

<sup>118</sup> Guarantees of non-recurrence measures may also include lustration and vetting.

<sup>119</sup> Roht-Arriaza, Roht-Arriaza, "Measures of Non-Repitition in Transitional Justice," 124; de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, para. 23.

<sup>120</sup> Herbert Wulf, "Security Sector Reform in Developing and Transitional Countries" (Berghof Research Center for Constructive Conflict Management, 2004); available from [https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Dialogue\\_Chapters/dialogue2\\_wulf.pdf](https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Dialogue_Chapters/dialogue2_wulf.pdf).

<sup>121</sup> "Communication from the Commission to the Council and the European Parliament: A Concept for European Community Support for Security Sector Reform" (Commission of the European Communities, 2006); available from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0253:FIN:EN:PDF>

<sup>122</sup> P. Jackson and P. Albrecht, *Reconstructing Security after Conflict: Security Sector Reform in Sierra Leone* (Springer, 2010).

reform in Bosnia.<sup>123</sup> In Sierra Leone, after the civil war, the government of the United Kingdom funded and led comprehensive security and justice sector reform with the view of creating accountable security institutions as pre-conditions for the attainment of long-term peace.<sup>124</sup>

As this historical development indicates, guarantees of non-recurrence have evolved independently in different areas of practice. However, each level of development and realm of practice is informed by previous developments of the concept. In other words, although the realms of practices of guarantees of non-recurrence are institutionally independent of each other, one can see a linear progression and application of the concept from the international level to their uptake at the national level. For analytical purposes, the historical evolution of guarantees of non-recurrence is summarized in Table 1.

Table 1: The Evolution of Guarantees of Non-recurrence.

<b>Nature and the level of GNR</b>	<b>Context of non-recurrence</b>	<b>The aim and examples of measures</b>
<b>International/interstate GNR as a tool of interstate diplomatic Practice</b>	Injury caused by one state against another Breach of bilateral and multilateral agreements	Repair diplomatic relationship <ul style="list-style-type: none"> <li>• <i>Promise not to repeat the wrongful act</i></li> <li>• <i>Recognition of the rights of the abused state</i></li> <li>• <i>Adopt policy and legislative measures</i></li> </ul>
<b>International/interstate GNR in Public International Law through ILC codification of state responsibility</b>	State responsibility to remedy internationally wrongful act	Repair legal relationship between states <ul style="list-style-type: none"> <li>• <i>Modification, creation, and/or adoption of pieces of legislation/policies</i></li> </ul>

<sup>123</sup> Ana E. Juncos, "EU Security Sector Reform in Bosnia and Herzegovina: Reform or Resist?" *Contemporary Security Policy* 39, no. 1 (January 2, 2018): 95–118, <https://doi.org/10.1080/13523260.2017.1391625>.

<sup>124</sup> Adrian Horn, Funmi Olonisakin, and Gordon Peake, "United Kingdom-led Security Sector Reform in Sierra Leone," *Civil Wars* 8, no. 2 (June 1, 2006): 109–123.

	Breach of international criminal law	
<b>National/intrastate</b> GNR in International Human Rights Law and United Nations Guidelines	Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law	Prevent systemic abuses of State power Prevent other actors from human rights abuses Protect and ensure the enjoyment of human rights <ul style="list-style-type: none"> <li>• <i>Regional human rights courts and human rights treaty bodies issue various orders to guarantee non-recurrence</i></li> </ul>
<b>National/intrastate</b> GNR in Transitional Justice and post-authoritarian context	Gross human rights abuses Torture Enforced disappeared Summary killing Unlawful detention etc.	Prevent systemic abuse of state power Prevent commission of specific violation and atrocity <ul style="list-style-type: none"> <li>• <i>Reform and vet national police and armed forces</i></li> <li>• <i>strengthen the judiciary and the rule of law institutions</i></li> <li>• <i>civilian oversight of security forces</i></li> <li>• <i>ratification of human rights treaties</i></li> <li>• <i>human rights training for government officials etc.</i></li> </ul>
<b>National/intrastate</b> GNR in Transitional Justice and post-armed conflict context	Civil war, complex interethnic conflicts, genocide	Prevent systemic abuse of state power Prevent non-state armed groups from committing violence and restarting armed conflict <ul style="list-style-type: none"> <li>• <i>Reform and vet national police and armed forces</i></li> <li>• <i>strengthen the judiciary and the rule of law institutions</i></li> <li>• <i>civilian oversight of security forces</i></li> <li>• <i>disband unofficial armed groups</i></li> <li>• <i>transform antagonistic relationships and (re)establish trust etc.</i></li> </ul>



### 3.4.6 A Critique of Guarantees of Non-Recurrence in Current Transitional Justice Practice

As scholars have observed, several of the guarantees of non-recurrence measures have been technocratic and state-centered.<sup>125</sup> Security sector reforms, which have been used in post-conflict contexts, have had mixed records of success.<sup>126</sup> Part of the reason for this is “the reinforcement and replication of core ideas, discourses and frameworks” of transitional justice without adequate consideration of local contexts.<sup>127</sup> This section first critiques and highlights some of the challenges regarding how guarantees of non-recurrence have been applied in current transitional justice and post-conflict reconstruction. In particular, I illustrate the differences between transitional justice in post-authoritarian context and the kinds of post-conflict context in which it is currently applied. The key differences I note concern the types of conflict, the scope of abuse, and the actors involved. In the second part, I propose a different conceptual framing of guarantees of non-recurrence and illustrate how I want to pursue it in this study.

For many years, the conventional understanding of guarantees of non-recurrence has been situated within the liberal democratic framework and human rights discourse. This is because, as discussed above, guarantees of non-recurrence and transitional justice processes, in general, emerged during the process of democratization in Eastern Europe and Latin America, in which armed violence was mostly vertical.<sup>128</sup> That is, in most cases, the state largely perpetrated the violence against its citizens. Therefore, guarantees of non-

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<sup>125</sup> Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice,” 125.

<sup>126</sup> Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice,” 125.

<sup>127</sup> Mac Ginty, “Routine Peace,” 297.

<sup>128</sup> Rachel Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges,” in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Paul Seils and Roger Duthie (New York: International Center for Transitional Justice, 2017), 117–39.

recurrence in the post-authoritarian context were framed with the view of preventing or deterring (mostly) the state and its agents from committing future atrocities and human rights violations against its population. In his special report, de Greiff observes that the object of guarantee of non-recurrence is not to prevent isolated violations, but violations that “presuppose systemic abuses of (State) power that have a specific pattern and rest on a degree of organizational set-up.”<sup>129</sup>

Despite the continued emphasis and focus of guarantees of non-recurrence on the abuse of state power, in recent times, the state cannot be seen to be the dominant author or perpetrator of violence in most contemporary conflicts.<sup>130</sup> Armed conflict and civil wars are much more complex. Contemporary conflicts often involve horizontal armed violence and multiple armed groups. The changing nature of conflicts from authoritarian contexts to situation of civil wars and other forms of contemporary armed conflict presents practical challenges to current practices of transitional justice and post-conflict reconstruction.

The fundamental problem is the large numbers of non-state armed actors involved in contemporary armed conflicts, which often results in difficulties in attributing responsibility.<sup>131</sup> In recent times, a great deal of violence and rights violations are perpetrated by several non-state armed groups. For example, more than seven non-state armed groups fought in the Liberian civil war.<sup>132</sup> In terms of the responsibility of

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<sup>129</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2015, chap. III section B, paragraph 25.

<sup>130</sup> Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges.”

<sup>131</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Twenty-First Session, A/HRC/21/46 (New York: United Nations General Assembly, 2012), para. 53, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf).

<sup>132</sup> The TRC of Liberia, “Truth and Reconciliation Commission Consolidated Final Report” (Monrovia, Liberia: Truth & Reconciliation Commission of Liberia, 2009), 336; available from [http://www.trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf).

perpetrators, the final report of the Liberian Truth and Reconciliation Commission observed that “all armed groups whether affiliated with warring factions or with the Government of Liberia are responsible for the commission of human rights violations... including war crimes and egregious domestic laws violations of Liberia.”<sup>133</sup> In Sierra Leone, Human Rights Watch reported that non-state armed groups committed the worst violations.<sup>134</sup> In many other contemporary armed conflicts around the world, similar trends exist about the involvement of many non-state armed groups.

In addition to the question of attributing responsibility, there is also the related challenge of accountability. While non-state armed groups, in theory, are subject to international humanitarian rights law, it is challenging to hold them accountable when they commit atrocity crimes in armed conflict.<sup>135</sup> Therefore, the emphasis of guarantees of non-recurrence on reforming state institutions and the security sector ignores the reality that non-state armed actors are often not under the control of state institutions and state-centric measures would not be the most appropriate way to hold them accountable. As Mayer-Rieckh alludes, violations in post-authoritarian context often have a specific pattern of abuse of state power, and the causes, resources, and structures used to perpetrate the abuse can be identified.<sup>136</sup> Although contemporary armed conflict may have similar patterns of violations, the violence is relatively localized and diffused with limited state repression or

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<sup>133</sup> The TRC of Liberia, 336.

<sup>134</sup> Human Rights Watch, “Shocking War Crimes in Sierra Leone,” Human Rights Watch, June 24, 1999, para. 11; available from <https://www.hrw.org/news/1999/06/24/shocking-war-crimes-sierra-leone>.

<sup>135</sup> Annyssa Bellal, “Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council” (Geneva Academy of International Humanitarian Law and Human Rights, December 2016); available from [https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7\\_web.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf).

<sup>136</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence.”

direct abuse of state power.<sup>137</sup> In such a situation, it is often challenging to know which armed group committed which specific violations.<sup>138</sup> This presupposes that insofar as guarantee of non-recurrence measures remain state-centric, they would be inadequate to prevent the reoccurrence of violent conflict.

In spite of the above differences, the debate about guarantees of non-recurrence in post-conflict settings is highly influenced by the post-authoritarian human rights context. The literature on guarantees of non-recurrence does not adequately address how other mechanisms beyond the purview of the state, such as customary justice mechanisms, could contribute to any guarantee of non-recurrence. To apply the framework of guarantees of non-recurrence from a post-authoritarian context to a post-conflict setting, there is the need for further analysis of the contexts and the kinds of violations that we seek to prevent from repetition. As de Greiff observes, interventions that could “approximate anything resembling guarantees of non-recurrence following mass violations cannot be achieved through ‘institutional engineering’ or institutional reforms alone... Lasting societal transformations [to guarantee non-recurrence] require interventions not only in the institutional sphere but also in the cultural sphere and at the level of personal, individual dispositions.”<sup>139</sup> Guarantees of non-recurrence need not only focus on preventing the systemic abuses of state power. There is a practical need to include a variety of measures

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<sup>137</sup> In many contemporary armed conflicts, such as in Cambodia and Sudan, the state still perpetrated large numbers of atrocities. But the fundamental point here is that the dynamics and scale of state repression in current conflicts differs from authoritarian context. See Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges,” 127.

<sup>138</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2012, para. 53; see also Annyssa Bellal, “Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict,” in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, eds. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), 235–57.

<sup>139</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2015, chap. III section C, paragraph 32.

that could deter and dissuade non-state armed groups, who often maintain a close connection to local communities, from committing atrocities.

### **3.4.7 Guarantees of Non-Recurrence in the Context of this Study**

From the foundational reference documents, especially from the work of the International Law Commission and other UN human rights instruments, guarantees of “non-repetition” and “non-recurrence” have often been used interchangeably. The ILC has also used “assurances” of non-recurrence. The ILC distinguishes “assurances” from “guarantees” of non-recurrence: On the one hand, assurances of non-recurrence are verbal assertions from the accused state that it will not engage in the wrongful act. On the other hand, guarantees of non-recurrence could involve a more substantive commitment that results in a tangible change in policy or law designed to avoid the repetition of the wrongful act.<sup>140</sup>

The ILC acknowledges that, depending on the nature of the obligation in question, the “State may not be in a position to offer a firm guarantee of non-repetition.”<sup>141</sup> Mayer-Rieckh also observes that the term “guarantees” of non-recurrence is misleading because “hardly any measure taken by a state can be a definitive guarantee that a violation does not recur.”<sup>142</sup> Roht-Arriaza, too, observed that aiming for “measures” aimed at non-recurrence is more realistic description than guarantees, “since there are few actual guarantees in life, or in transitional justice.”<sup>143</sup> In light of this, I believe the term *measures* of non-recurrence is a more appropriate term than *guarantees* of non-repetition, and have opted to use that

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<sup>140</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001*.

<sup>141</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, pt. two chapter 1, article 30(12).

<sup>142</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 432.

<sup>143</sup> Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice,” 107.

term throughout the dissertation. My decision to use the term *measures* instead of *guarantees* of non-recurrence, as is mostly used in the literature is not just a simple issue of semantics. Rather, it is fundamental to the context in which I apply the concept. For instance, the term “guarantee” is used more appropriately when considering the application of the concept of non-recurrence in the context of inter-state relations where, in some cases, the state’s actions are bound by enforcement mechanisms. In the context where there are appropriate enforcement measures, actors could, for example, be held to account if they renege on the agreements to terminate hostilities and not to renew violence. On the contrary, in the current application of the concept at the domestic level, especially in the context of customary justice, there are limited or no compliance mechanisms, and there is no guarantee that all armed actors will comply to non-recurrence measures. Therefore, *measures*, instead of a specific *guarantee*, aimed at securing non-recurrence, appropriately conveys the intent of this study. I adopt this language in a broad sense to include a variety of actions aimed at preventing the recurrence of armed conflict and violations.

It is also important to clarify what de Greiff calls the “object” of measures of non-recurrence. The object relates to the sort of violations that we seek to prevent from occurring again. He noted that the “object” of measures of non-recurrence “is not the prevention of isolated abuses, but gross human rights violations... [that] presuppose systemic abuses of (State) power that have a specific pattern.”<sup>144</sup> Mayer-Rieckh elaborated on the “object” of measures of non-recurrence when he noted that preventing recurrence deals with “confronting specific acts that were committed in the past and maybe committed again in the future, and that can be studied in terms of their causes, effects, agents,

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<sup>144</sup> de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 2015, chap. III section B, paragraph 25.

resources, and structures used to make them happen.”<sup>145</sup> Understanding the *object of prevention* as specific acts of violation which presuppose a certain degree of systemic abuse of state power aligns more within the context of systemic human rights abuses in an authoritarian regime, which do not fit easily in a modern post-conflict context. Unlike in authoritarian regimes, most contemporary armed conflicts are not just the outcome of a determinable linear pattern of cause and effect, but a result of complex factors involving the state, various interest groups, individuals, and communities at large.<sup>146</sup> And, whereas “transitions from authoritarianism sought a form of justice that could enable the move to [liberal] democracy, transitions from conflict have sought ways of dealing with the [complexity of the] past that enable the move to peace.”<sup>147</sup> The increasing complexity and multidimensional character of contemporary armed conflicts require a more flexible and broader approach to measures aimed at non-recurrence.

Therefore, from a post-conflict perspective, this study proceeds with a broader view of measures of non-recurrence. Hence, rather than confronting “specific acts of violence” that rest on “systemic abuse of state power,” it may be useful to conceptualize the object of measures of non-recurrence in terms of establishing conditions and social transformations, which has the potential to prevent the reversion to armed conflict. Effective measures to prevent the recurrence of armed conflict in a post-conflict context requires thinking beyond the instruments of liberal democracy, which are often outside the reach of customary institutions—one of the important actors in securing long-term peace

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<sup>145</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 433.

<sup>146</sup> Halvard Buhaug and Scott Gates, “The Geography of Civil War,” *Journal of Peace Research* 39, no. 4 (2002): 417–33.

<sup>147</sup> Christine Bell, “Contending with the Past: Transitional Justice and Political Settlement Processes,” in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Paul Seils and Roger Duthie (New York: International Center for Transitional Justice, 2017), 109.

after armed conflict. The analysis in this study theorizes and develops a conceptual framework for the utility of customary practices of justice to prevent the recurrence of armed conflict and atrocity. The study does not aim to provide definitive customary solutions to non-recurrence. Instead, it undertakes both theory building and conceptual scoping to consider customary practices of justice as one of the varieties of measures that could have the potential to prevent a future reversion to conflict.

### 3.5 The Local Turn in Transitional Justice

In the attempt to search for durable peace following civil war or authoritarian regimes, many societies have turned to “local” approaches as a way to reckon with past violations.<sup>148</sup> These local approaches are varied and they are context-specific.<sup>149</sup> They are community-based and “draw upon traditional customs and ideas in the administration of justice.”<sup>150</sup> Among others, the factors that prompted the local turn in transitional justice include the relative failure of national and international-level justice mechanisms to secure long-term peace in post-conflict societies.<sup>151</sup> Scholars have criticized national and international-level

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<sup>148</sup> Lars Waldorf, “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice,” *Temple Law Review* 79, no. 1 (April 15, 2006): 1–87; see also Rosalind Shaw, Lars Waldorf, and Pierre Hazan, eds., *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, 1 edition (Stanford, California: Stanford University Press, 2010); Alexander Laban Hinton, ed., *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (Rutgers University Press, 2011); Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008); Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford; Portland, Oregon: Hart Publishing, 2008).

<sup>149</sup> Joanna R. Quinn, “What of Reconciliation? Traditional Mechanisms of Acknowledgement in Uganda,” in *Reconciliation(s): Transitional Justice in Postconflict Societies*, ed. Joanna R. Quinn (Montreal: McGill-Queen’s Press, 2009), 174–205.

<sup>150</sup> Joanna R. Quinn, “The Impact of Internal Conflict on Customary Institutions and Law: The Case of Uganda,” *Journal of African Law* 59, no. 2 (October 2015): 224, <https://doi.org/10.1017/S0021855315000042>; see also Erin Baines, “Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice,” *African Affairs* 109, no. 436 (2010): 409–30.

<sup>151</sup> Lars Waldorf, “Local Transitional Justice – Customary Law, Healing Rituals, and Everyday Justice,” in *An Introduction to Transitional Justice*, ed. Olivera Simić (Routledge, 2017), 157–76. See also Dustin N. Sharp, “Addressing Dilemmas of the Global and the Local in Transitional Justice,” *Emory International Law Review* 29, no. 1 (2015 2014): 71–118; Oliver P. Richmond, “Emancipatory Forms of Human Security



transitional justice practices as externally driven, state-centric, top-down, and technocratic with little regard to the specific contexts in which armed conflict occurs.<sup>152</sup>

The debate regarding the local turn in transitional justice can be seen as two competing strands. The first strand of the debate understands the local turn as a fundamental shift from the hegemonic interpretation of the liberal peace.<sup>153</sup> Scholars argue that most national and international-level transitional justice practices are informed by liberal democratic norms, which may not be universally applicable across different political and conflict contexts.<sup>154</sup> Mac Ginty observed that the liberal democratic framework had an uncritical influence on peacebuilding and transitional justice in post-conflict societies, where the socio-political experiences are different from those of the West.<sup>155</sup> For these scholars, transitional justice must recast its focus away from its current fixation on liberal state-building and international “universal” norms towards a model that recognizes and utilizes local norms, practices, and alternative understanding of justice.<sup>156</sup> The second

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and Liberal Peacebuilding,” *International Journal* 62, no. 3 (September 1, 2007): 459–78, <https://doi.org/10.1177/002070200706200302>; Peter Finkenbusch, “‘Post-Liberal’ Peacebuilding and the Crisis of International Authority,” *Peacebuilding* 4, no. 3 (September 1, 2016): 247–61, <https://doi.org/10.1080/21647259.2016.1193937>; Oliver P Richmond, “Failed Statebuilding versus Peace Formation,” *Cooperation and Conflict* 48, no. 3 (September 1, 2013): 378–400, <https://doi.org/10.1177/0010836713482816>; Oliver P. Richmond, “Resistance and the Post-Liberal Peace,” *Millennium*, May 10, 2010, <https://doi.org/10.1177/0305829810365017>.

<sup>152</sup> Mac Ginty, “Routine Peace”; Hanna Leonardsson and Gustav Rudd, “The ‘Local Turn’ in Peacebuilding: A Literature Review of Effective and Emancipatory Local Peacebuilding,” *Third World Quarterly* 36, no. 5 (May 4, 2015): 825–39, <https://doi.org/10.1080/01436597.2015.1029905>; Chandra Lekha Sriram, “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,” *Global Society* 21, no. 4 (October 1, 2007): 579–91, <https://doi.org/10.1080/13600820701562843>; Timothy Donais, “Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes,” *Peace & Change* 34, no. 1 (2009): 3–26, <https://doi.org/10.1111/j.1468-0130.2009.00531.x>.

<sup>153</sup> Roger Mac Ginty and Oliver P. Richmond, “The Local Turn in Peace Building: A Critical Agenda for Peace,” *Third World Quarterly* 34, no. 5 (June 1, 2013): 763–83, <https://doi.org/10.1080/01436597.2013.800750>; Finkenbusch, “‘Post-Liberal’ Peacebuilding and the Crisis of International Authority.”

<sup>154</sup> Bhikhu Parekh, “The Cultural Particularity of Liberal Democracy,” *Political Studies* 40, no. s1 (1992): 170, <https://doi.org/10.1111/j.1467-9248.1992.tb01819.x>.

<sup>155</sup> Mac Ginty, “Routine Peace”; Parekh, “The Cultural Particularity of Liberal Democracy.”

<sup>156</sup> Rosalind Shaw and Lars Waldorf, “Introduction: Localizing Transitional Justice,” in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, ed. Rosalind Shaw and Lars

strand of the debate conceives the local turn as a move to advance local participation and ownership while preserving the normative and universal standards of the liberal framework as the best route to achieve long-term peace.<sup>157</sup> These scholars believe that the relative failure of national and international transitional justice mechanisms is due to its lack of participation of “local” actors and civil society.<sup>158</sup> Hence, they consciously seek to involve local actors through “sensitization” and “capacity building” workshops to enhance participation and local ownership.<sup>159</sup>

This study draws from the first strand of the debate, which advocates transitional justice to recast its focus away from the technocratic and standardized liberal framework of transitional justice. It interrogates and reveals the limitations of the liberal-informed interpretation of how we go about to advance peace in the aftermath of mass atrocity. The study aims to understand whether and how customary practices in administering justice in the wake of armed conflict could prevent the reversion of conflict and contribute to long-term peace.

### **3.5.1 Customary Mechanisms of Transitional Justice**

Many societies emerging from destructive violence in Africa and other parts of the world have relied on customary justice practices to come to terms with the past.<sup>160</sup> For example, in Liberia, the “Palava Hut” has been a local community-based conflict resolution

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Waldorf, 1 edition (Stanford, California: Stanford University Press, 2010), 25; Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict*.

<sup>157</sup> Roland Paris, “Peacebuilding and the Limits of Liberal Internationalism,” *International Security* 22, no. 2 (1997): 58, <https://doi.org/10.2307/2539367>; Roland Paris, “Saving Liberal Peacebuilding,” *Review of International Studies* 36, no. 2 (2010): 337–65; Birte Julia Gippert, *Local Legitimacy in Peacebuilding: Pathways to Local Compliance with International Police Reform* (Routledge, 2017).

<sup>158</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice.”

<sup>159</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 4.

<sup>160</sup> Quinn, “The Impact of Internal Conflict on Customary Institutions and Law,” 222.

mechanism that seeks reconciliation by providing the space for victims and perpetrators to share experiences with the hope of fostering long-term peace.<sup>161</sup> In Sierra Leone, the Kpaa Mende ethnic group has used a combination of rituals and ceremonies to bring about reconciliation based on their belief in the supernatural and local conception of forgiveness and revenge.<sup>162</sup> In Northern Uganda, customary justice mechanisms, such as *mato oput*, *moyo tipu*, *tumu kir*, and the relatively rare *gomo tong* ceremony are practiced in local communities affected by conflict as part of the measures to ensure accountability and reconciliation.<sup>163</sup> These practices have the potential to resonate with ex-combatants and rebel groups, who draw their members from local constituencies and continue to maintain a close connection with local communities. A compendium of local practices among the Acholi in northern Uganda observed that “culturally-based ways of coping in Acholi are characterized by, and based upon, high levels of mutual support in closely knit social units... and they have the potential to make a considerable contribution to healing in post-war society.”<sup>164</sup> The authors of the compendium emphasized that customary processes are relevant for measures of non-recurrence because, among other things, they have their

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<sup>161</sup> Rosalind Raddatz, “Tempering Great Expectations: Peacebuilding and Transitional Justice in Liberia,” in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram et al., 1st ed. (London: Routledge, 2012), 178–200; Erica S. Lawson and Vaiba K. Flomo, “Motherwork and Gender Justice in Peace Huts: A Feminist View from Liberia,” *Third World Quarterly* 41, no. 11 (November 1, 2020): 1863–80, <https://doi.org/10.1080/01436597.2020.1793663>.

<sup>162</sup> Joe A. D. Alie, “Reconciliation and Traditional Justice: Tradition-Based Practices of the Kpaa Mende in Sierra Leone,” in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm: International Idea, 2008), 123–46.

<sup>163</sup> Thomas Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (Gulu, Uganda: Caritas Gulu Archdiocese, 2006); Erin Baines, “The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda,” *International Journal of Transitional Justice* 1, no. 1 (March 1, 2007): 91–114, <https://doi.org/10.1093/ijtj/ijm007>; Quinn, “What of Reconciliation? Traditional Mechanisms of Acknowledgement in Uganda”; Joanna R. Quinn, “Social Reconstruction in Uganda: The Role of Informal Mechanisms in Transitional Justice,” *Human Rights Review* 8, no. 4 (2007): 389–407, <https://doi.org/10.1007/s12142-007-0020-8>.

<sup>164</sup> Harlacher et al., *Traditional Ways of Coping in Acholi*, 8, 53.

foundations in local culture, beliefs, and norms that bind communities together.<sup>165</sup>

Rose makes a compelling argument about the role of culture in customary justice mechanisms. Rose observes that “culture pertains to knowledge transmitted across generations through imitations and teaching rather than genes.”<sup>166</sup> Rose’s understanding is ideal because it suggests that culture is not an inherent static attribute of a group. Instead, culture continues to change across generations and time. Rose’s definition is also consistent with the use of the word “customary” instead of “traditional” practices, which “conveys the idea that these practices are commonly used and founded upon long-continued practices... and they have continued to develop and change across time.”<sup>167</sup> In *Why Culture Matters Most*, Rose argued that culture is key to producing high-trust society, which promotes inter-group relationships.<sup>168</sup> Applying the framework of Rose, customary justice mechanisms could have the potential to achieve non-recurrence because they are grounded in certain kinds of shared moral beliefs, which produces a high-trust society. And high-trust society is an important attribute that could significantly prevent the reversion to armed conflict.<sup>169</sup>

Additionally, customary responses depend on collectively-valued identities to secure the much-needed voluntary cooperation of community members to adhere to community values and norms which underpin customary justice practices.<sup>170</sup> Hall and Lamont observe further that cultural dimensions such as social networks, identity, and

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<sup>165</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*.

<sup>166</sup> David C. Rose, *Why Culture Matters Most* (Oxford University Press, 2018), 3.

<sup>167</sup> Joanna R. Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” *Africa Spectrum* 49, no. 3 (2014): 31.

<sup>168</sup> Rose, *Why Culture Matters Most*.

<sup>169</sup> Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges.”

<sup>170</sup> Peter A. Hall and Michèle Lamont, eds., *Successful Societies: How Institutions and Culture Affect Health* (Cambridge University Press, 2009).

social capital are useful in “securing the [voluntary] cooperation of others,” which are very important to restore trust and relationships in a post-conflict context, which could be useful to secure non-recurrence of armed conflict and atrocity.<sup>171</sup> This means that customary justice is not just merely an institutionalized set of practices. Customary practices are a manifestation of collective community understanding and the social construction of conflict and peace that is rooted in that community’s culture, traditions, and religious beliefs—they reflect that community’s worldview, and respond to the conflict by centering those thoughts and beliefs in the very foundations of what “justice” means to that community. Therefore, peace and conflict resolution is rooted in human interaction, the construction of identity, and social processes in the community. This holistic and communal view of customary practices tends to be absent from the neoliberal view of justice, which often fails to acknowledge the embedded and contextual nature of conflict and peace.<sup>172</sup>

Hence, the fundamental claim is that measures of non-recurrence that is grounded in the very life experiences, beliefs, norms, and culture of communities is more likely to guarantee their acceptance and promote the non-recurrence of violence and abuses. Also, measures of non-recurrence developed around culturally based norms and values will be suitable in preventing horizontal conflicts, especially in communities where people depend on each other’s continuous social relationships.

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<sup>171</sup> Hall and Lamont, *Successful Societies*, 9.

<sup>172</sup> See chapter 5 for a detailed analysis of the social construction of conflict, identity, and how social interaction impacts how communities attempt to resolve conflict using customary justice processes.

## Chapter 4

### 4 The Ongoing Debate of the “Local” Turn

#### 4.1 Introduction

The key question facing societies emerging from civil war, genocide, ethnic conflict, and other mass atrocities is how best to deal with the legacy of the past. Advocates of liberal peacebuilding and transitional justice have long claimed that international norms and values should lead in the search for sustainable peace and reconciliation. Following the end of World War II, the Cold War, and the collapse of the Soviet Union, the dominant world order sought to promote liberal states, democratization, a free market, and individual human rights. Many scholars then argued that the way to support sustainable peace was to promote or, in some cases, ‘transplant’ this ‘ideal-type’ world order in war-torn societies.

The widespread acceptance of the liberal forms of peacebuilding and transitional justice, though, seems not to live up to expectations. “Rather than creating conditions for stable and lasting peace, efforts to hold a quick set of elections and economic reforms [in many war-torn societies] did little to address the drivers of conflict, and in some cases, produced perversely destabilizing results.”<sup>1</sup> Some scholars, therefore, have raised serious concerns regarding the promise of the liberal peace project. Critics expressed the worry that the liberal forms of peacebuilding and transitional justice are overly externally driven, state-centric, top-down, and without significant regard to the needs of those affected by armed violence.<sup>2</sup> Bolstering this view, many critical scholars, peacebuilding and

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<sup>1</sup> Roland Paris, “Saving Liberal Peacebuilding,” *Review of International Studies* 36, no. 2 (2010): 341.

<sup>2</sup> Dustin N. Sharp, “Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique,” *Chicago Journal of International Law* 14, no. 1 (2013): 169; Oliver P.

transitional justice practitioners have advanced several arguments to eschew one-size-fits-all models.<sup>3</sup> They claim peacebuilding and transitional justice must recast away from its current fixation on liberal state-building and universal norms. They advocate for a model that recognizes and utilizes local norms, practices, and alternative understanding of justice.<sup>4</sup> This ‘new’ model, they claim, will be sensitive and compatible with the cultural, political, and social conditions of societies emerging from violent conflict.

Drawing on the literature on peacebuilding and transitional justice, this chapter examines the theoretical paradigms of the local turn. It highlights the potential positive attributes as well as the weakness of the local turn. To set the context within which I advance the main theoretical arguments of this study, the chapter begins by setting the broad parameters within which the local transitional justice debate is located. To do that I highlight the events leading to the internationalization of transitional justice based on the liberal peace and international human rights discourse. It is vital to start the discussion from this broad perspective because, as I illustrate below, transitional justice took shape at the time when human rights issues and demands for accountability were high on the global

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Richmond, “The Romanticisation of the Local: Welfare, Culture and Peacebuilding,” *The International Spectator* 44, no. 1 (March 1, 2009): 149–69, <https://doi.org/10.1080/03932720802693044>; Kora Andrieu, “Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm,” *Security Dialogue* 41, no. 5 (October 14, 2010): 537–58, <https://doi.org/10.1177/0967010610382109>.

<sup>3</sup> Oliver P. Richmond, *A Post-Liberal Peace* (Routledge, 2011); see also Vivienne Jabri, “War, Government, Politics: A Critical Response to the Hegemony of the Liberal Peace,” in *Palgrave Advances in Peacebuilding: Critical Developments and Approaches*, ed. Oliver P Richmond (United Kingdom: Palgrave Macmillan, 2010), 41–57; Roger Mac Ginty, “Indigenous Peace-Making Versus the Liberal Peace,” *Cooperation and Conflict* 43, no. 2 (June 1, 2008): 139–63, <https://doi.org/10.1177/0010836708089080>; United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, S/2004/616 (New York: UN Security Council, 2004); available from <https://www.unhcr.org/protection/ruleoflaw/4506bc494/rule-law-transitional-justice-conflict-post-conflict-societies-report-secretary.html>.

<sup>4</sup> Rosalind Shaw and Lars Waldorf, “Introduction: Localizing Transitional Justice,” in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, ed. Rosalind Shaw and Lars Waldorf, 1 edition (Stanford, California: Stanford University Press, 2010), 25. See also Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008).

landscape. The second section delves into the theoretical paradigms of the local turn. It begins with the debates in peacebuilding because the discourse on the local turn in peacebuilding has a significant influence on the move towards the local in transitional justice. I identify and discuss two competing claims about the local turn: those who view the local turn as a fundamental shift from the hegemonic interpretation of the liberal peace, and those who conceive the local as a move to achieve local participation and ownership of the peace process, while maintaining the normative standards of the liberal framework.

The third section highlights some notable positives and potential excesses of the local. While it is impossible to generalize, it is frequently taken that customary justice could make the following notable contributions to securing justice in the aftermath of armed violence. First, customary justice tends to be flexible and could adapt to deal with the blurry victim-perpetrator identities, which is a reality in contemporary conflicts. Second, customary justice could be accessible, affordable, and has a greater reach than formal justice systems. Third, the emphasis tends to focus on healing, building social harmony, and the continuation of future relationships. Fourth, victims' diverse ideas about what justice means could be accommodated in customary justice practices. While acknowledging these positives, customary justice may be discriminatory and could re-enforce pre-war exploitative structures. The social fiber of communities, on which customary justice depends, may also be devastated by several decades of violence, which could negatively affect its utility. Researchers are also concerned about the ability of customary justice to deal with inter-communal conflicts and mass crimes such as genocide. The final section of this chapter attempts to locate the local in this study and to clarify some key terminologies I have used throughout this dissertation.



## 4.2 Transitional Justice and The Liberal Peace: The Internationalization of Transitional Justice

The events following the Second World War, especially through the Nuremberg trials, provided the foundation for the “triumph of transitional justice within the scheme of international law.”<sup>5</sup> The legacy of the Nuremberg trials to criminalize wrongdoing after the Second World War “forms the basis of modern human rights law” which, in turn, influences current transitional justice.<sup>6</sup> Over the past decades, transitional justice has evolved into a global project that includes legal institutions, international human rights norms, and United Nations’ policy frameworks.<sup>7</sup>

Taking cues from the Nuremberg trials, transitional justice was initially formulated to respond to the excessive abuse of state power, especially in places that were transitioning from authoritarian rule to democracy.<sup>8</sup> The primary measures included judicial interventions and the proliferation of international norms that seek to uphold human rights.<sup>9</sup> The fundamental premise underlying the universality of international human rights is to prevent governmental abuse of state power and to place obligations and duties on states to uphold universal values and protect human rights.<sup>10</sup> The enormous importance of enforcing international human rights standards is explicitly stated in the United Nations Charter, which obligates member states to “respect... human rights and fundamental freedoms for

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<sup>5</sup> Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 70.

<sup>6</sup> Teitel, “Transitional Justice Genealogy,” 70.

<sup>7</sup> Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” *Third World Quarterly* 29, no. 2 (February 1, 2008): 275, <https://doi.org/10.1080/01436590701806848>.

<sup>8</sup> Teitel, “Transitional Justice Genealogy,” 70; see also Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31 (2009): 321–67, <https://doi.org/10.1353/hrq.0.0069>; Nagy, “Transitional Justice as Global Project”; Andrew G. Reiter, “The Development of Transitional Justice,” in *An Introduction to Transitional Justice*, ed. Olivera Simić (London and New York: Routledge, 2017), 1–27.

<sup>9</sup> Arthur, “How ‘Transitions’ Reshaped Human Rights.”

<sup>10</sup> Douglas Lee Donoho, “Relativism versus Universalism in Human Rights: The Search for Meaningful Standards,” *Stanford Journal of International Law* 27, no. 2 (1991 1990): 357.

all without distinction as to race, sex, language, or religion.”<sup>11</sup> Further to the notion of the universality of human rights “is the assumption of a universal human nature,” which confers human rights as “natural rights inherent” in all human beings.<sup>12</sup>

In addition to normative standards to protect human rights, the need to institute criminal accountability measures was also a principal component of transitional justice. For example, prompted by the Nuremberg trials, the United Nations created several International Criminal Tribunals to deal with war crimes in various jurisdictions. In 1993, the United Nations passed a Resolution to establish the International Criminal Tribunal for the Former Yugoslavia to prosecute persons accused of war crimes and violations of international humanitarian law in the territory of the Former Yugoslavia.<sup>13</sup> In 1994, the United Nations established the International Criminal Tribunal for Rwanda to prosecute people responsible for the Rwandan genocide and other violations of international law.<sup>14</sup> Similar criminal prosecutions were carried out in a hybrid court system. Sierra Leone’s hybrid Special Court is a prominent example.<sup>15</sup> Beyond criminal accountability measures, various United Nations policy frameworks, too, have given further impetus for the

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<sup>11</sup> The United Nations, *The United Nations Charter* (San Francisco, U.S: The United Nations, 1945), chap. IX article 55(c); available from <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

<sup>12</sup> Raimon Panikkar, “Is the Notion of Human Rights a Western Concept?” *Diogenes* 30, no. 120 (December 1, 1982): 80–81, <https://doi.org/10.1177/039219218203012005>.

<sup>13</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006).

<sup>14</sup> Schabas, *The UN International Criminal Tribunals*

<sup>15</sup> Charles Chernor Jalloh, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013). Other examples include the Special Tribunal for Cambodia and the Special Tribunal for Lebanon. see John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor: University of Michigan Press, 2014); Tamirace Fakhoury, “Assessing the Political Acceptance of Hybrid Courts in Fractured States: The Case of the Special Tribunal for Lebanon” (International Nuremberg Principles Academy, 2017); available from <https://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Lebanon.pdf>.

internationalization of transitional justice. Notable examples include the right to truth, the right to a remedy and reparations, and the International Criminal Court.<sup>16</sup>

Although the transitional justice field pursued a separate track from peacebuilding, both fields are increasingly seen to be tightly linked.<sup>17</sup> As Sriram observed, the link between peacebuilding and transitional justice is necessary, as “it would be a mistake to seek to ‘do justice’... without addressing the horrors of the recent past.”<sup>18</sup> However, the linkage has meant that a lot of the peacebuilding apparatus, including its fixation on liberal democracy and state-building, are subsumed in transitional justice.<sup>19</sup> In other words, transitional processes are explicitly linked to democratization, the rule of law, and institutional reform strategies.

The fundamental claims of liberal peace are structured around western discourses and interpretations about conflict and peace. For decades, there has been increasing support to promote liberal democratic values in countries emerging from violent conflict. The liberal peace framework claims that liberal values such as individual freedoms, human rights, active civil society, individual accountability, and democratic governance are considered fundamental to promoting sustainable peace and development.<sup>20</sup> These universal international human rights frameworks and western liberal democratic values gradually became the *de facto* standards of the field and practice of transitional justice.<sup>21</sup>

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<sup>16</sup> Nagy, “Transitional Justice as Global Project”; Lieselotte Viaene and Eva Brems, “Transitional Justice and Cultural Contexts: Learning from the Universality Debate,” *Netherlands Quarterly of Human Rights* 28, no. 2 (June 1, 2010): 199–224, <https://doi.org/10.1177/016934411002800204>.

<sup>17</sup> Sriram, “Justice as Peace?” 586; Sharp, “Beyond the Post-Conflict Checklist,” 165.

<sup>18</sup> Sriram, “Justice as Peace?” 586.

<sup>19</sup> Sriram, “Justice as Peace?” 586.

<sup>20</sup> Oliver P. Richmond and Audra Mitchell, *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism* (Palgrave Macmillan, 2012).

<sup>21</sup> Viaene and Brems, “Transitional Justice and Cultural Contexts”; Teitel, “Transitional Justice Genealogy.”

Inevitably, transitional justice suffers similar, if not the same, flaws and limitations of the liberal peacebuilding.

### **4.3 Strands of the Local Turn Debate**

The discourse on the local turn in peacebuilding has had a significant influence on the move towards the local in transitional justice. This is because, in the post-conflict context, peacebuilding and transitional justice have dealt with similar issues.<sup>22</sup> Most of the arguments about the local turn in transitional justice parallel the debates in the peacebuilding literature. Hence, this section begins with the debate about the local turn in peacebuilding, followed by a discussion of the literature on the local turn in transitional justice.

#### **4.3.1 The Local Turn in Peacebuilding**

After the Cold War, the international community and researchers in post-conflict reconstruction and peacebuilding believed that the (re)building of liberal democratic institutions to promote the rule of law, respect individual freedoms, human rights, marketization, and active civil society offered the greatest prospects for long term peace.<sup>23</sup> In the early 1990s, the United Nations led the global community in promoting peacebuilding, focusing on mediation, peacekeeping, and liberal state-building.<sup>24</sup> The UN's 1992 Agenda for Peace became the primary foundational document for

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<sup>22</sup> Sharp, "Beyond the Post-Conflict Checklist," 167.

<sup>23</sup> Arthur, "How 'Transitions' Reshaped Human Rights"; Roland Paris, *At War's End: Building Peace after Civil Conflict*, 1 edition (Cambridge, U.K.; New York, NY: Cambridge University Press, 2004).

<sup>24</sup> Thania Paffenholz, "Unpacking the Local Turn in Peacebuilding: A Critical Assessment towards an Agenda for Future Research," *Third World Quarterly* 36, no. 5 (2015): 858, <https://doi.org/10.1080/01436597.2015.1029908>.

peacebuilding globally.<sup>25</sup> However, the challenges and the limitations of the liberal democratic recipe became evident after the failure of the UN to support long-term peace in many countries that had endured years of armed conflict.<sup>26</sup> For example, Paris observed that postwar elections and democratic institutional reforms in Angola, Bosnia, Cambodia, El Salvador, and Rwanda did not address the drivers of conflict as anticipated. “Rather than creating conditions for stable and lasting peace, efforts to hold a quick set of elections and economic reforms did little to address the drivers of conflict, and in some cases, produced perversely destabilizing results.”<sup>27</sup> After analyzing the global liberal peace approach and the factors that led to its limited success, the United Nations, a number of international peace practitioners, and researchers understood that there is a need for a change in approach.<sup>28</sup> In response to the limited achievements of the liberal democratic peace, an understanding emerged among international peacebuilding practitioners and scholars for a shift to a context-specific peacebuilding model.

Two theoretical frameworks have fundamentally influenced this shift in focus towards the local. The first strand of the local turn debate emphasized the necessity of local ownership and the empowerment of local and grassroots actors, while the second strand of

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<sup>25</sup> Boutros Boutros-Ghali, “An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-Keeping” (UN Security Council, 1992), file:///C:/Users/ibayo/Downloads/%5EST\_%5EDPI\_1247-EN.pdf.

<sup>26</sup> Paffenholz, “Unpacking the Local Turn in Peacebuilding,” 858.

<sup>27</sup> Paris, “Saving Liberal Peacebuilding,” 341.

<sup>28</sup> Séverine Autesserre, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention*, Problems of International Politics (Cambridge: Cambridge University Press, 2014); Paffenholz, “Unpacking the Local Turn in Peacebuilding”; Thania Paffenholz, “International Peacebuilding Goes Local: Analysing Lederach’s Conflict Transformation Theory and Its Ambivalent Encounter with 20 Years of Practice,” *Peacebuilding* 2, no. 1 (January 2, 2014): 11–27, <https://doi.org/10.1080/21647259.2013.783257>. For examples of documents of international organizations that proposed a change in direction of international peacebuilding towards the local, see OECD, *Improving International Support to Peace Processes: The Missing Piece, Conflict and Fragility* (Paris, France: OECD Publishing, 2012); available from <http://dx.doi.org/10.1787/9789264179844-en>; United Nations, *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, General Assembly Sixty-Third Session, A/63/881–S/2009/304 (New York and Geneva: United Nations General Assembly, 2009); available from [https://www.un.org/ruleoflaw/files/pbf\\_090611\\_sg.pdf](https://www.un.org/ruleoflaw/files/pbf_090611_sg.pdf).

the debate drew from critical post-structural scholarship and understand the local turn as a form of resistance against the hegemonic discourse of the liberal peace paradigm.<sup>29</sup> These two strands of the local turn debate are elaborated below.

The first strand of the local turn argued for the necessity to empower local actors and increase their ability to take ownership of peacebuilding interventions.<sup>30</sup> In this framing, local actors are construed to be primarily middle-level civil society leaders, religious leaders, and other subnational domestic actors.<sup>31</sup> Local actors are empowered to set the agenda of peacebuilding but it is apparent that they still need “support from the international community in the form of training, and the building of peace infrastructures.”<sup>32</sup>

One of the theoretical underpinnings of the necessity to empower local actors for effective peacebuilding is Lederach’s “middle-out” conflict transformation approach.<sup>33</sup> Lederach divides peacebuilding actors into three levels: Level one actors include the top government representatives, leaders of opposition movements, and key political and military leaders who have interest in the conflict. Level two involves “middle-range” actors who occupy formal positions in various sectors of the society such as “education, business,

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<sup>29</sup> Paffenholz, “Unpacking the Local Turn in Peacebuilding,” 858–61; see also Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (United Kingdom: Palgrave Macmillan, 2011); Oliver P. Richmond, “Critical Agency, Resistance and a Post-Colonial Civil Society,” *Cooperation and Conflict*, December 2, 2011, <https://doi.org/10.1177/0010836711422416>.

<sup>30</sup> Paffenholz, “Unpacking the Local Turn in Peacebuilding,” 859; see also ICTJ, “Building Sustainable Peace and Development After Massive Human Rights Violations: Report of the Working Group on Transitional Justice and SDG16+” (International Center for Transitional Justice, May 2019); available from [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_WG-TJ-SDG16+\\_2019\\_Web.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_WG-TJ-SDG16+_2019_Web.pdf); Martin Ola Lundqvist and Joakim Öjendal, “Atomised and Subordinated? Unpacking the Role of International Involvement in ‘The Local Turn’ of Peacebuilding in Nepal and Cambodia,” *Journal of Peacebuilding & Development* 13, no. 2 (August 1, 2018): 16–30, <https://doi.org/10.1080/15423166.2018.1470023>.

<sup>31</sup> John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Inst of Peace Press, 1998).

<sup>32</sup> Paffenholz, “Unpacking the Local Turn in Peacebuilding,” 860.

<sup>33</sup> Lederach, *Building Peace, Sustainable Reconciliation in Divided Societies*, 37–61.

agriculture, or health.”<sup>34</sup> They may also include leaders of non-governmental organizations, religious groups, and academic institutions. Importantly, middle-level actors must “know and be known by the top-level” actors, but their influence is not controlled by formal government authority.<sup>35</sup> Level three actors represent the masses at the grassroots. They include leaders of indigenous organizations, traditional institutions, and other community leaders who “understand intimately the fear and suffering with which much of the population must live.”<sup>36</sup> To sustain the peace process, Lederach affirmed that peacebuilding theory should focus on the middle-range actors. The middle-range actors have the potential to connect both the top and the grassroots actors, and they hold the “greatest potential for establishing an infrastructure that could sustain the peacebuilding process over the long term.”<sup>37</sup>

Beyond academic research, the local turn has also become prevalent in the peacebuilding work of many intergovernmental organizations, aid agencies, and international non-governmental organizations.<sup>38</sup> For example, the United Nations’ 2000 Brahimi Report recommended that “effective peacebuilding requires active engagement with the local parties, and that engagement should be multidimensional in nature.”<sup>39</sup> In re-examining its international peace processes, the Organization for Economic Co-operation and Development (OECD) acknowledged that to improve the quality of its international

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<sup>34</sup> Lederach, *Building Peace, Sustainable Reconciliation in Divided Societies*, 41.

<sup>35</sup> Lederach, *Building Peace, Sustainable Reconciliation in Divided Societies*, 41.

<sup>36</sup> Lederach, *Building Peace, Sustainable Reconciliation in Divided Societies*, 42–43.

<sup>37</sup> Lederach, *Building Peace, Sustainable Reconciliation in Divided Societies*, 60–61.

<sup>38</sup> Paffenholz, “Unpacking the Local Turn in Peacebuilding,” 858; see also United Nations, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, Fifty-First Session of the General Assembly Agenda Item 87, A/55/305–S/2000/809 (New York: United Nations General Assembly, 2000); available from <https://www.un.org/ruleoflaw/files/brahimi%20report%20peacekeeping.pdf>; OECD, *Improving International Support to Peace Processes: The Missing Piece, Conflict and Fragility*.

<sup>39</sup> United Nations, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, 7.

peacebuilding approaches, there is the need to build and “deepen global, regional and local partnerships... [and] combine local/regional versatility, understanding, and political legitimacy.”<sup>40</sup> In the view of the OECD and other international aid agencies, building partnerships with local actors is a cost-effective way to pool the resources needed to improve the quality of international peacebuilding.<sup>41</sup>

The key idea here is to enhance the participation of the middle-level actors to make peacebuilding work efficiently and gain legitimacy. This approach of the local turn takes as given the assumptions and institutionalized structures of the liberal peace framework and try to make it work efficiently at the local level.<sup>42</sup> Practitioners and scholars who subscribe to this view of the local turn believe that “there is no realistic alternative to some form of liberal peacebuilding,” and the liberal peace can be saved insofar as it is made more adaptable to the local context.<sup>43</sup>

Critical peacebuilding scholars have, however, raised concerns regarding this kind of framing of the local turn. Critics have noted that the view of the local as merely increasing the participation and empowerment of local actors, risk being dominated by the inherent power of international peacebuilders under the guise of local empowerment.<sup>44</sup> Implementing the liberal peace interventions under the guise of local ownership is viewed by some scholars as a form of Eurocentrism which privileges the West’s interpretation of

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<sup>40</sup> OECD, *Improving International Support to Peace Processes: The Missing Piece, Conflict and Fragility*, 69.

<sup>41</sup> OECD, “International Engagement in Fragile States: Can’t We Do Better?” (OECD Publishing, 2011), 23; available from <https://www.oecd.org/dac/conflict-fragility-resilience/docs/IEFS.pdf>.

<sup>42</sup> Filip Ejdus and Ana E. Juncos, “Reclaiming the Local in EU Peacebuilding: Effectiveness, Ownership, and Resistance,” *Contemporary Security Policy* 39, no. 1 (January 2, 2018): 8, <https://doi.org/10.1080/13523260.2017.1407176>.

<sup>43</sup> Paris, “Saving Liberal Peacebuilding,” 340.

<sup>44</sup> Paffenholz, “International Peacebuilding Goes Local.”



social reality while casting doubts on other forms of knowledge.<sup>45</sup> Mac Ginty pointed to the risk of co-opting local elites to implement the agenda of the liberal peace, which he argued can “minimize the space for alternative versions of peace.”<sup>46</sup> The critique of the hegemony of the liberal peace and its potential for the co-optation of local elites have shifted the conceptualization of peacebuilding to critical, locally produce ways of thinking about peace. The second theoretical perspective of the local turn emerged from these criticisms.

In the second strand of the local turn, critical researchers like Richmond, Mac Ginty, and Jabri conceptualize local peacebuilding as an emancipatory project and a form of resistance against the hegemonic liberal peace.<sup>47</sup> This conceptual approach unpacks peacebuilding as a discursive framework that allows for different viewpoints and understandings, which take into consideration the complexity of social interactions that may give rise to violent conflicts.<sup>48</sup> These scholars advocate for the “need to more deeply explore the complex and multi-faceted roots of the conflicts themselves, discounting one-track, linear explanations that seek a direct cause of conflict in favor of a more locally attuned understanding of cultural, historical and political contexts.”<sup>49</sup> The call for a locally-

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<sup>45</sup> Meera Sabaratnam, *Decolonising Intervention: International Statebuilding in Mozambique* (London and New York: Rowman & Littlefield International, 2017), 22.

<sup>46</sup> Roger Mac Ginty, “Hybrid Peace: The Interaction Between Top-Down and Bottom-Up Peace,” *Security Dialogue* 41, no. 4 (August 1, 2010): 403, <https://doi.org/10.1177/0967010610374312>. See also Gearoid Millar, “For Whom Do Local Peace Processes Function? Maintaining Control through Conflict Management,” *Cooperation and Conflict* 52, no. 3 (September 1, 2017): 293–308, <https://doi.org/10.1177/0010836716671757>.

<sup>47</sup> Oliver P. Richmond, “Becoming Liberal, Unbecoming Liberalism: Liberal-Local Hybridity via the Everyday as a Response to the Paradoxes of Liberal Peacebuilding,” *Journal of Intervention and Statebuilding* 3, no. 3 (November 1, 2009): 324–44, <https://doi.org/10.1080/17502970903086719>; Richmond, *A Post-Liberal Peace*; Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace*; Jabri, “War, Government, Politics: A Critical Response to the Hegemony of the Liberal Peace.”

<sup>48</sup> Elisa Randazzo, *Beyond Liberal Peacebuilding: A Critical Exploration of the Local Turn* (Routledge, 2017), 7, <https://doi.org/10.4324/9781315617688>.

<sup>49</sup> Randazzo, *Beyond Liberal Peacebuilding: A Critical Exploration of the Local Turn*, 38.

attuned understanding of conflict invites a conceptual reconsideration of the methodologies employed to study the conflicts we want to resolve.<sup>50</sup> These researchers see the local as a space for resistance against the dominant discourse of liberal peacebuilding.

Analytically, the fundamental differences between the first and the second theoretical approaches of the local turn lie in how the “local” is understood. The first framing understood the local as a site where the liberal universal norms and peacebuilding methodologies assumed technical superiority.<sup>51</sup> The local is essentially “reproduced through the lens of the universal, to the neglect of the socio-cultural” context.<sup>52</sup> In other words, using this theoretical approach, the presumption is that liberal peace and its focus on state-building, free markets, democracy, and human rights promotion remain the principal route to attain sustainable peace. The local is important insofar as it serves to achieve effectiveness, ownership and help remedy the potential “foreignness” of the liberal peace.

On the opposite end, the second school of thought interprets the local as having its own agency and call into question the standardized practices and ideas of the liberal framework—state-building, free markets, democracy, and human rights promotion. Instead of liberal universal norms taking technical superiority, the second approach espoused a “new” understanding of peace that is based on local agency and ways of knowing. In other words, the local is not merely an instrument for ensuring the efficiency, effectiveness, and ownership of peacebuilding, but sustainable peace could emerge through and constitutive

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<sup>50</sup> Randazzo, *Beyond Liberal Peacebuilding: A Critical Exploration of the Local Turn*.

<sup>51</sup> Roger Mac Ginty, “Routine Peace: Technocracy and Peacebuilding:,” *Cooperation and Conflict*, August 22, 2012, 289–90, <https://doi.org/10.1177/0010836712444825>.

<sup>52</sup> Baines, “Spirits and Social Reconstruction after Mass Violence,” 413.

of the social, historical, and cultural context of communities affected by years of armed conflict.<sup>53</sup>

### 4.3.2 The Local Turn in Transitional Justice

Similar to the local turn in peacebuilding, the field of transitional justice has taken a shift toward the local in recent years. The increasing interest in the local is linked to the limitations in conventional approaches of transitional justice. As explained in the first section of this chapter, transitional justice emerged in part as a response associated with transitions from authoritarianism to democracy.<sup>54</sup> The conceptual boundaries of transitional justice were defined by the practical challenges human rights activists faced in countries where authoritarian regimes had crumbled.<sup>55</sup> Violence under these authoritarian regimes “was largely experienced by citizens at the hands of the state.”<sup>56</sup> Therefore, much of the focus of transitional justice processes was on “legal-institutional reforms and responses—such as punishing leaders, vetting abusive security forces, and replacing state secrecy with truth and transparency.”<sup>57</sup>

These initial transitional justice processes are now commonly used in post-conflict contexts where there is no clear transition from oppressive authority to democracy, and where the state is not the main perpetrator of violence and human rights abuses.<sup>58</sup> For

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<sup>53</sup> Gearoid Millar, “Preserving the Everyday: Pre-Political Agency in Peacebuilding Theory,” *Cooperation and Conflict* 55, no. 3 (September 1, 2020): 310–25, <https://doi.org/10.1177/0010836720904390>.

<sup>54</sup> Arthur, “How ‘Transitions’ Reshaped Human Rights.”

<sup>55</sup> Arthur, “How ‘Transitions’ Reshaped Human Rights.”323.

<sup>56</sup> Lisa Denney and Pilar Domingo, “Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field,” in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), 211.

<sup>57</sup> Arthur, “How ‘Transitions’ Reshaped Human Rights,” 321–22.

<sup>58</sup> Tim Allen and Anna Macdonald, “Post-Conflict Traditional Justice: A Critical Overview” (Justice and Security Research Programme, London School of Economics, 2013), 4; available from [http://eprints.lse.ac.uk/56357/1/JSRP\\_Paper3\\_Post-conflict\\_traditional\\_justice\\_Allen\\_Macdonald\\_2013.pdf](http://eprints.lse.ac.uk/56357/1/JSRP_Paper3_Post-conflict_traditional_justice_Allen_Macdonald_2013.pdf); Denney and Domingo, “Local Transitional

instance, although state power abuse was a feature of armed violence in places such as the Democratic Republic of the Congo, Guatemala, Liberia, Peru, Sierra Leone, and northern Uganda, a complex range of non-state armed actors perpetrated human rights abuses, too.<sup>59</sup> Theidon adequately described the peculiarity of abuses in such places as “intimate violence” where, “frequently, the enemy is a son-in-law, a godfather, an old schoolmate, or the community that lies just across the valley.”<sup>60</sup> Transitional justice processes pursued after such experiences of “intimate violence” require more than legal-institutional reforms and other liberal notions of peace and justice. As a result, the application of the initial western-inspired transitional justice frameworks in these radically different contexts of violence yielded limited successes in producing reconciliation and long-term peace.

Due to the limited success of the liberal form of transitional justice, practitioners and critical scholars increasingly recognized that the liberal transitional justice model could not be applied universally across different political and conflict contexts. They argued that moral rights and values, including human rights, are culturally determined and are relative to the societal context in which they arise.<sup>61</sup> Others have also argued that liberal democracy cannot claim universal validity because it is designed for a particular cultural context.<sup>62</sup> Therefore, attempts to claim universal validity of liberal democracy is to impose “on other countries systems of government unsuited to their talents and skills, destroys the coherence

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Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field,” 212.

<sup>59</sup> Denney and Domingo, “Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field,” 212.

<sup>60</sup> Kimberly Theidon, “Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru,” *Journal of Conflict Resolution* 50, no. 3 (June 1, 2006): 433, <https://doi.org/10.1177/0022002706286954>.

<sup>61</sup> Donoho, “Relativism versus Universalism in Human Rights,” 345; see also Jack Donnelly, “Cultural Relativism and Universal Human Rights,” *Human Rights Quarterly* 6, no. 4 (1984): 400–419.

<sup>62</sup> Bhikhu Parekh, “The Cultural Particularity of Liberal Democracy,” *Political Studies* 40, no. s1 (1992): 170, <https://doi.org/10.1111/j.1467-9248.1992.tb01819.x>.

and integrity of their ways of life, and reduces them to mimics, unable and unwilling to be true either to their traditions or to the imported norms.”<sup>63</sup> Scholars argue that principles such as individual criminal accountability and the protection of human rights, which are associated with liberal notions of peace, are less likely to lead to long-term peace.”<sup>64</sup>

The concerns raised by critical transitional justice scholars mirror the debate raised by critical peacebuilding scholars. The fundamental interest of these scholars is to recast transitional justice away from its focus liberal statebuilding and democratic governance towards a model that recognizes and utilizes local norms, practices, and alternative understanding of justice.<sup>65</sup> Hence, one of the key catalysts for the local turn is about the profound need to take “a deeper, more critical look” at transitional justice practices and reframe the conversation based on broader understanding of justice.<sup>66</sup> For McEvoy, the debate is about developing a thicker understanding of transitional justice to let go the legalism, while encouraging the “willingness to countenance the role of other [non-legal] actors and forms of knowledge.”<sup>67</sup> And, in Gready’s framing, justice needs not to be distant but be embedded within and established in such a way as to “engage the communities, cultures and contexts of conflict.”<sup>68</sup>

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<sup>63</sup> Parekh, 169. Parekh clarifies later in his paper that his argument is not to suggest that liberal democratic institutions have no value for non-western societies. Rather, the point is that liberal democracy cannot be “mechanically transplanted” in non-western societies. He argues that value and applicability of liberal democracy in non-western societies has to take into consideration the existing cultural resources and institutions.

<sup>64</sup> Parekh, *The Cultural Particularity of Liberal Democracy*, 169.

<sup>65</sup> Rosalind Shaw and Lars Waldorf, “Introduction: Localizing Transitional Justice,” in *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, ed. Rosalind Shaw and Lars Waldorf, 1 edition (Stanford, California: Stanford University Press, 2010), 25. See also Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008).

<sup>66</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 5.

<sup>67</sup> Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34, no. 4 (2007): 411.

<sup>68</sup> Paul Gready, “Analysis: Reconceptualising Transitional Justice: Embedded and Distanced Justice,” *Conflict, Security & Development* 5, no. 1 (April 1, 2005): 10,

The second major strand of the local turn in transitional justice arose from the concern of scholars and practitioners that transitional justice has conventionally been state-led and deployed from top to bottom. Scholars argued that the top-down nature of transitional justice is due to the field's over-reliance on trials, state-led truth commissions, reparations, and institutional reforms, which prioritize global norms over local forms of justice.<sup>69</sup> Scholars therefore proposed what has been called "transitional justice from below," which emphasizes the need for tailored solutions to different transitions rather than "ready-made" models.<sup>70</sup> To attain longer-term sustainability, transitional justice needs to shift "away from the top-down 'one-size-fits-all' approach to allow 'voices from below' to be heard and heeded."<sup>71</sup> Robins argues for a victim-centered approach in which survivors prioritized their basic needs instead of resigning their fate to elites in distant national capitals.<sup>72</sup>

Beyond scholars, global intergovernmental organizations such as the UN and international non-governmental organizations have also acknowledged the limitations of the liberal peace model of transitional justice. The UN, the United States Agency for International Development, the Danish International Development Agency, the UK's Department for International Development, and others have undergone a shift in thinking

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<https://doi.org/10.1080/14678800500103218>. See also Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," *Human Rights Quarterly* 24, no. 3 (2002): 573–639.

<sup>69</sup> Adam Kochanski, "The 'Local Turn' in Transitional Justice: Curb the Enthusiasm," *International Studies Review* 22, no. 1 (March 1, 2020): 29, <https://doi.org/10.1093/isr/viy081>.

<sup>70</sup> Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford ; Portland, Oregon: Hart Publishing, 2008).

<sup>71</sup> Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up," *Journal of Law and Society* 35, no. 2 (2008): 265.

<sup>72</sup> Simon Robins, "Transitional Justice as an Elite Discourse," *Critical Asian Studies* 44, no. 1 (March 1, 2012): 3–30, <https://doi.org/10.1080/14672715.2012.644885>.

and practice towards the local.<sup>73</sup> The 2004 UN Secretary General’s report on the rule of law and transitional justice seemingly opened the global space for widespread support for the relevance of local transitional justice mechanisms, among international development organizations. The report reads, in part:

Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations...

Similarly, due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition. Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice. Particularly in post-conflict settings, vulnerable, excluded, victimized and marginalized groups must also be engaged in the development of the sector and benefit from its emerging institutions.<sup>74</sup>

A closer reading of the UN’s observation, however, reveals a paradox. On the one hand, the Secretary General’s report acknowledges the explicit importance of transitional justice measures to recognize and utilize “indigenous and informal traditions for administering justice.”<sup>75</sup> Yet, while expressing a commitment to the use of indigenous and informal tradition, the report claims this must be done according to “common basis in international norms and standards,” which necessarily subsumes local approaches into

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<sup>73</sup> USAID, “Conflict Assessment Framework” (United States Agency for International Development, June 2012); available from [https://pdf.usaid.gov/pdf\\_docs/pnady739.pdf](https://pdf.usaid.gov/pdf_docs/pnady739.pdf); DFID, “The UK Government’s Approach to Stabilisation: A Guide for Policy Makers and Practitioners” (DFID-Stabilization Unit, 2019); available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/784001/The\\_UK\\_Government\\_s\\_Approach\\_to\\_Stabilisation\\_A\\_guide\\_for\\_policy\\_makers\\_and\\_practitioners.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784001/The_UK_Government_s_Approach_to_Stabilisation_A_guide_for_policy_makers_and_practitioners.pdf).

<sup>74</sup> United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, S/2004/616 (New York: UN Security Council, 2004), 1, and 12 para 36; available from <https://www.unhcr.org/protection/ruleoflaw/4506bc494/rule-law-transitional-justice-conflict-post-conflict-societies-report-secretary.html>.

<sup>75</sup> United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 12 para36.

“international legal norms.”<sup>76</sup> The view of the UN about the local meant that the state and the principles of liberal democratic governance are the standard practices through which post-conflict countries could reckon with past abuses.<sup>77</sup>

Nevertheless, the UN’s commitment to localizing transitional justice encouraged several international organizations to adopt policies that recognize local agency and participation as important considerations in transitional justice processes. Because of the overlapping goals of peacebuilding and transitional justice, international organizations have developed local engagement policy frameworks to address both peacebuilding interventions as well as transitional justice activities.<sup>78</sup> At the global level, one of the landmark policy frameworks is the New Deal for Engagement in Fragile States.<sup>79</sup> The New Deal recognizes that international global engagement in transitional states has often failed because of the lack of inclusiveness, local ownership, and country leadership. Therefore, the New Deal “commit[s] to focus on new ways of engaging, to support inclusive country-led and country-owned transitions out of fragility.”<sup>80</sup> Several donor countries in the West have developed in-country policies that seek to ensure context-specific peacebuilding and transitional justice approaches. In its conflict Assessment Framework, the United States Agency for International Development explicitly observed that “it is an all-too-common tendency to look to models that appear to have worked in other contexts without sufficient

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<sup>76</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 5.

<sup>77</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 4.

<sup>78</sup> Sharp, “Beyond the Post-Conflict Checklist,” 167.

<sup>79</sup> International Dialogue, “A New Deal for Engagement in Fragile States,” (International Dialogue on Peacebuilding and Statebuilding, November 30, 2011); available from [http://www.pbsdialogue.org/media/filer\\_public/07/69/07692de0-3557-494e-918e-18df00e9ef73/the\\_new\\_deal.pdf](http://www.pbsdialogue.org/media/filer_public/07/69/07692de0-3557-494e-918e-18df00e9ef73/the_new_deal.pdf).

<sup>80</sup> International Dialogue, “A New Deal for Engagement in Fragile States,” 2.



regard for the country-specific conditions and dynamics. Conflict programming must be rooted in local dynamics if it is to be effective.”<sup>81</sup>

In summary, while peacebuilding and transitional justice have historically pursued separate tracks, and have sometimes been viewed to be in tension, they have inexorably been working in the same geographies and on very similar issues.<sup>82</sup> Because of the overlapping footprints of peacebuilding and transitional justice, they have borne similar critiques from scholars and practitioners. Both peacebuilding and transitional justice have been criticized for being externally driven, state-centric, top-down, and without significant regard to the needs of those affected by armed violence.<sup>83</sup> Prompted by these criticisms, both peacebuilding and transitional justice witnessed a noticeable turn to the local. Although scholars and practitioners agree that there has been a shift from the liberal state-centric paradigms to engage more with “local” constituents as the drivers of transitional justice and peacebuilding processes, they have a different understanding of how to get there. Two main perspectives underlie the local turn debate. On the one hand, some argue that the local turn is about critically reframing the discourse from Western perspectives. For these scholars, the local turn is one of “critical agency... and contested, post-liberal

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<sup>81</sup> USAID, “Conflict Assessment Framework” (United States Agency for International Development, June 2012), 34; available from [https://pdf.usaid.gov/pdf\\_docs/pnady739.pdf](https://pdf.usaid.gov/pdf_docs/pnady739.pdf). For similar international policy frameworks that made explicit commitments to engage more with local populations in transitional justice processes, see OECD, “International Engagement in Fragile States: Can’t We Do Better?” (OECD Publishing, 2011); available from <https://www.oecd.org/dac/conflict-fragility-resilience/docs/IEFS.pdf>; DFID, “The UK Government’s Approach to Stabilisation: A Guide for Policy Makers and Practitioners” (DFID-Stabilization Unit, 2019); available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/784001/The\\_UK\\_Government\\_s\\_Approach\\_to\\_Stabilisation\\_A\\_guide\\_for\\_policy\\_makers\\_and\\_practitioners.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784001/The_UK_Government_s_Approach_to_Stabilisation_A_guide_for_policy_makers_and_practitioners.pdf).

<sup>82</sup> Sharp, “Beyond the Post-Conflict Checklist,” 167.

<sup>83</sup> Sharp, “Beyond the Post-Conflict Checklist,” 169; see also Oliver P. Richmond, “The Romanticisation of the Local: Welfare, Culture and Peacebuilding,” *The International Spectator* 44, no. 1 (March 1, 2009): 149–69, <https://doi.org/10.1080/03932720802693044>; Kora Andrieu, “Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm,” *Security Dialogue* 41, no. 5 (October 14, 2010): 537–558, <https://doi.org/10.1177/0967010610382109>.

conception of peace.”<sup>84</sup> On the other hand, some argue the local turn is motivated by the need to enhance local participation through empowerment. For this group, the limitations of the liberal paradigm in transitional justice and peacebuilding can be remedied by deepening local engagement, while international norms and standards remain the ‘best’ practices. In this view, transitional justice practitioners seek the opinions of local actors, civil society, and other local authorities through outreach and sensitization workshops.<sup>85</sup>

### **4.3.3 The Positive Attributes of the Local Turn**

Despite the differences in theoretical perspectives, scholars and practitioners are mostly agreed in touting the benefits of the local turn. Before I delve into the various debates about the benefits of the local turn, it would be naïve to assume that customary justice approaches are the panacea to terminating armed conflict and securing long-term peace. Rather, their applicability and effectiveness are context-dependent and cannot be applied in every case. These customary justice practices are never all the same, but on balance, they are generally thought to make the following positive contributions.

First, for practical reasons, scholars argue that local processes of transitional justice are more beneficial when it comes to dealing with very complex situations of victim-perpetrator dynamics and the artificial dichotomy of ‘guilty’ or ‘not guilty’ verdicts associated with formal prosecutorial justice.<sup>86</sup> Contemporary violent conflicts “are characterized by moral ‘grey zones,’ in which different forms of guilt and innocence are mixed.”<sup>87</sup> Huyse observed that in civil wars, “there are circumstances in which it is almost

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<sup>84</sup> Richmond, “Critical Agency, Resistance and a Post-Colonial Civil Society,” 420.

<sup>85</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 4.

<sup>86</sup> Luc Huyse, “Victims,” in *Reconciliation After Violent Conflict: A Handbook*, ed. Teresa Barnes, David Bloomfield, and Luc Huyse (Stockholm: International IDEA, 2003), 54–65.

<sup>87</sup> Allen and Macdonald, “Post-Conflict Traditional Justice,” 13.

impossible to draw a clear line between victims and perpetrators... and this alternation of roles is an important consideration in preparing and implementing reconciliation programmes... [and] no coexistence or mutual trust will develop if the rotating nature of violence is not recognized and admitted.”<sup>88</sup> For instance, in the conflicts in Liberia, Rwanda, Sierra Leone, and northern Uganda the concept of “child soldiers” muddles the victim-perpetrator categories because abducted children who fought in these conflict were sometimes forced to murder their own family members and terrorized their villages.<sup>89</sup> Supporters of local transitional justice, therefore, argue that in such circumstances, conventional criminal prosecutions, which often require a ‘guilty’ or ‘not guilty’ verdict, are not suitable to deal with the subtleness needed to address such a mix of guilt and innocence.<sup>90</sup> Customary responses to armed violence, scholars argue, are beneficial to deal with such complex situations because they could provide the flexibility needed to deal with the intricacies of survivor identities.<sup>91</sup> As Baines reported, abducted children and youth in northern Uganda continue to maintain their innocence when they return from combat to

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<sup>88</sup> Huyse, “Victims,” 64; See also Erin K. Baines, “Complex Political Perpetrators: Reflections on Dominic Ongwen,” *The Journal of Modern African Studies* 47, no. 2 (2009): 163–91.

<sup>89</sup> Kyra Fox, “The Complex Combatant: Constructions of Victimhood and Perpetrator-Hood in Gulu District, Northern Uganda” (Independent Study Project (ISP) Collection, 2016), 28–35; available from [https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=3481&context=isp\\_collection](https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=3481&context=isp_collection); see also Baines, “Complex Political Perpetrators”; Tristan Anne Borer, “A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa,” *Human Rights Quarterly* 25, no. 4 (2003): 1088–1116; Huyse, “Victims”; Kieran McEvoy and Kirsten McConnachie, “Victims and Transitional Justice: Voice, Agency and Blame,” *Social & Legal Studies* 22, no. 4 (December 1, 2013): 489–513, <https://doi.org/10.1177/0964663913499062>.

<sup>90</sup> Allen and Macdonald, “Post-Conflict Traditional Justice,” 13; 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*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 15.

<sup>91</sup> Huyse, “Introduction: Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies,” 15.

live in the midst of the communities they once victimized.<sup>92</sup> In such a situation, customary justice mechanisms could be the appropriate avenue to achieve social reconstruction.<sup>93</sup>

The second practical argument is about the question of access and the capacity of the formal justice system after violent conflict. Accesses and capacity of formal justice systems in the context of post-conflict societies can take different forms, including cost, availability, physical infrastructure, and personnel. Scholars have argued that in many societies emerging from conflict, where there have been years of mass atrocity crimes, the states' formal justice systems are often destroyed, which can make formal justice delivery difficult. For example, in 1994, the Rwandan Patriotic Front-led government in Rwanda arrested thousands of alleged perpetrators of the genocide. However, no prosecution took place for several years after the arrest because the Rwandan legal systems had been destroyed by the conflict, "with the vast majority of the judges, lawyers, and magistrates dead or in exile."<sup>94</sup> In Sierra Leone, a part of the country's Supreme Court building was burned down due to the conflict, and since the 1970s, no "legal opinions had been published" in the country, which hampered the delivery of formal justice.<sup>95</sup> In such circumstances of devastated formal justice systems, proponents suggest that customary justice provides the natural option for communities to utilize in their attempt to deal with the legacies of armed violence.

The two arguments above are quite pragmatic in their approach to discussing the benefits of the local transitional justice because they are not based on value judgments

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<sup>92</sup> Baines, "Spirits and Social Reconstruction After Mass Violence," 425.

<sup>93</sup> Baines, "Spirits and Social Reconstruction After Mass Violence," 425.

<sup>94</sup> Timothy Longman, "Justice at the Grassroots? Gacaca Trials in Rwanda," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge UK Cambridge University Press, 2006), 206–28.

<sup>95</sup> Sriram, "Justice as Peace?" 589.

about local culture and traditions but based on the practical realities that exist in some post-conflict contexts. The shifting identities of survivors of armed violence is a reality in many contemporary armed conflicts, which has significant implications of how a victim or perpetrator is defined. Criminal prosecutions, and in some cases, state-led formal truth commissions, often use strict criteria to identify the kind of crimes that should or can be investigated or prosecuted. However, as Huyse observed, this definition of crimes excludes some crimes as irrelevant, yet, in the view of the numerous victims of armed violence, all such crimes are relevant and need redress.<sup>96</sup> Therefore, unlike the fixed legal rules of the formal justice system, customary responses are said to be flexible and could practically adapt to resolve conflicts even when the line between victim and perpetrator is blurred.<sup>97</sup>

Similarly, on a practical level, the destruction of legal infrastructure in the aftermath of armed conflict often means that communities emerging from armed conflict have little or no option but to turn to customary systems of justice. Besides the destruction of legal infrastructure by armed conflict, there are many situations in which formal justice systems are limited and not accessible to most marginalized people.<sup>98</sup> In such situations of limited access to formal justice systems, customary and traditional modes of justice become the natural option for the majority of people who have been in one way or another affected by years of violence. For instance, it is estimated that about 85% of Sierra Leone's population resorts to customary justice systems to resolve disputes.<sup>99</sup> In Burundi, the *bashingantahe*

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<sup>96</sup> Huyse, "Victims," 65.

<sup>97</sup> Owor Lino Ogora, "A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda," *Uganda Living Law Journal* 6 (2008): 6.

<sup>98</sup> Ewa Wojkowska, "Doing Justice: How Informal Justice Systems Can Contribute" (United Nations Development Programme – Oslo Governance Centre, 2006), 12; available from <https://www.un.org/ruleoflaw/files/UNDP%20DoingJusticeEwaWojkowska130307.pdf>.

<sup>99</sup> Leila Chirayath, Caroline Sage, and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," Background Paper for the World Development Report 2006: Equity and Development" (Washington, D.C: World Bank-World Development Report, 2005), 3; available from

is the traditional system of dispute resolution, and plays an important role in maintaining social cohesion and peace in the *collines*, where about 90% of the population live.<sup>100</sup>

On the normative side, the key argument is that unlike formal justice, which focuses on individual criminal accountability, local and customary systems of transitional justice tend to focus on restoring community harmony and communal atonement.<sup>101</sup> Supporters of local justice mechanisms argue that criminal prosecutions may increase instability and thwart the quest for peace. However, local justice often aims to repair, create social harmony, and enable social healing.<sup>102</sup> This argument is based on the belief that relationships with the larger community shape a person's social identity.<sup>103</sup> Proponents assert that local forms of justice prioritize restorative justice and the restoration of communal harmony to the extent that "the relationship between parties to the conflict has to be preserved to a mutually satisfying level, even if this is to the detriment of the outcome about the issue at stake."<sup>104</sup>

A related argument about the benefit of local forms of justice concerns the notion of justice. A lot has been written on the question of what justice means to victims of armed conflict. Robins, for instance, argues that transitional justice interventions in Nepal did not

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<http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=F4B7DC2E4B90C2D4F09993E81CB73761?doi=10.1.1.574.6598&rep=rep1&type=pdf>.

<sup>100</sup> Tracy Dexter and Philippe Ntahombaye, "The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations the Case of Burundi" (Geneva: The Centre for Humanitarian Dialogue, 2005), 6; available from

[https://media.africaportal.org/documents/The\\_Role\\_of\\_Informal\\_Justice\\_Systems\\_in\\_Fostering\\_the\\_Rule\\_of\\_Law\\_in\\_Post-Conf\\_zrYcJz4.pdf](https://media.africaportal.org/documents/The_Role_of_Informal_Justice_Systems_in_Fostering_the_Rule_of_Law_in_Post-Conf_zrYcJz4.pdf). The *colline* is the smallest administrative unit in Burundi.

<sup>101</sup> Joe A. D Alie, "Reconciliation and Traditional Justice: Tradition-Based Practices of the Kpaa Mende in Sierra Leone," in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm: International Idea, 2008), 140.

<sup>102</sup> Alie, "Reconciliation and Traditional Justice: Tradition-Based Practices of the Kpaa Mende in Sierra Leone," 140.

<sup>103</sup> Parekh, "The Cultural Particularity of Liberal Democracy," 169.

<sup>104</sup> Susanne Buckley-Zistel, *Conflict Transformation and Social Change in Uganda: Remembering after Violence*, Rethinking Peace and Conflict Studies (Palgrave Macmillan UK, 2008), 25.

work as expected because the processes were built on the human rights and legalistic frameworks, which prioritized prosecutorial justice over restorative and victims' needs.<sup>105</sup> He observed that although prosecutorial justice may address violations and hold perpetrators accountable, they are limited in promoting remedies since they often ignore the social, cultural, and economic rights of victims.<sup>106</sup> Millar, similarly observed that justice is a "culturally variable," which must reflect local peoples beliefs about the world.<sup>107</sup> Baines, too, observed that "justice" cannot be delivered from above, but rather, that "justice is a social project," which should be delivered through strategies employed by the war-affected population.<sup>108</sup> Proponents, therefore, note that local forms of transitional justice could work better to deal with the legacies of armed conflict because they could incorporate victims' own conceptions of justice.

#### **4.3.4 The Weaknesses of Customary Transitional Justice**

Local forms of transitional justice have increased in places as diverse as Afghanistan, Rwanda, Sierra Leone, Timor Leste, and Uganda. This increased attention to the use of local forms of transitional justice has not occurred without criticisms. Critics argue that the 'local' is not homogenous, but is a contested space that produces unequal power relations, discrimination, and violence.<sup>109</sup> Some maintain that the scope and several years of violence

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<sup>105</sup> Robins, "Transitional Justice as an Elite Discourse."

<sup>106</sup> Robins, "Transitional Justice as an Elite Discourse."

<sup>107</sup> Gearoid Millar, *An Ethnographic Approach to Peacebuilding: Understanding Local Experiences in Transitional States* (Routledge, 2014), 23, <https://doi.org/10.4324/9780203701270>.

<sup>108</sup> Baines, "Spirits and Social Reconstruction after Mass Violence," 415.

<sup>109</sup> Joanne Wallis, "Is 'Good Enough' Peacebuilding Good Enough? The Potential and Pitfalls of the Local Turn in Peacebuilding in Timor-Leste," *The Pacific Review* 30, no. 2 (March 4, 2017): 254, <https://doi.org/10.1080/09512748.2016.1220417>; Richmond, "The Romanticisation of the Local"; Roger Mac Ginty and Oliver P. Richmond, "The Local Turn in Peace Building: A Critical Agenda for Peace," *Third World Quarterly* 34, no. 5 (June 1, 2013): 763–83, <https://doi.org/10.1080/01436597.2013.800750>; Dahlia Simangan, "When Hybridity Breeds Contempt: Negative Hybrid Peace in Cambodia," *Third World Quarterly* 39, no. 8 (August 3, 2018): 1525–42, <https://doi.org/10.1080/01436597.2018.1438184>.

could destroy the social fiber of communities that traditional systems of conflict management depend.<sup>110</sup> Others also question the applicability of local transitional justice approaches in inter-communal conflicts, especially in increasingly heterogeneous and pluralistic societies.<sup>111</sup> Finally, human rights advocates and international organizations are worried that local transitional justice measures are ill-equipped to deal with mass atrocities such as genocide and other atrocity crimes.<sup>112</sup> Each of these points is unpacked below.

One of the most commonly cited pitfalls of local transitional justice is that there are ethnic, gender, and generational hierarchies embedded in their practice. Scholars argue that in many communitarian societies, especially in African contexts, social relations are closely connected with hierarchies, which could be a tool to repress particular groups, especially women and youth.<sup>113</sup> Critics are concerned that local systems of justice are often dominated by men, community-level elites, and power holders. In some African societies, women and children are not allowed to be active participants in some of the traditional conflict management practices. For example, Quinn reports that in parts of Uganda, including Karimoja, women do not play active roles in traditional practices of conflict resolution and peacemaking.<sup>114</sup> Women and men received different ‘punishment’ if both

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<sup>110</sup> William I. Zartman, “Conclusion: Changes in the New Order and the Place for the Old,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 225–26.

<sup>111</sup> Victor Igreja and Beatrice Dias-Lambranca, “Restorative Justice and the Role of Magamba Spirits in Post-Civil War Gorongosa, Central Mozambique,” in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences,* ed. Luc Huyse and Mark Salter, Handbook, SE-103 34 (Stockholm Sweden: International IDEA, 2008), 67.

<sup>112</sup> Luc Huyse, “Conclusions and Recommendations,” in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences,* ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 191.

<sup>113</sup> Allen and Macdonald, “Post-Conflict Traditional Justice,” 13.

<sup>114</sup> Joanna R. Quinn, “Gender and Customary Mechanisms in Uganda,” in *Confronting Global Gender Justice: Women’s Lives, Human Rights,* ed. Debra Bergoffen et al. (New York: Routledge, 2010), 482–519.



were to commit the same type of crime.<sup>115</sup> In Khost province in Afghanistan, Schmeidl raised concerns about the problematic customary practice of settlement, which involves the exchange of girls to compensate for criminal offenses.<sup>116</sup> In other post-conflict contexts, researchers have documented that the younger generations are also concerned that customary practices could be used as a vehicle to arbitrarily discipline them and take away their land and other possessions.<sup>117</sup> These criticisms indicate that while the local has some utility, it may re-enforce pre-conflict structures such as contestation of power, violence, and hierarchical structures, which can have a detrimental effect on the way customary transitional justice is practiced.<sup>118</sup>

The second fundamental criticism presents a dilemma because it is predicated on one of the most cited benefits of local transitional justice mechanisms. Thus, the argument that local justice systems depend on social connections and harmony. But critics argue that, in the most likelihood, the very social networks that customary mechanisms depend on are sometimes destroyed by many decades of violent conflict. Quinn made a related observation when she remarked that the scale of conflict, too, has a considerable impact on the way communities could use customary mechanisms to resolve disputes.<sup>119</sup> She noted that the scale and magnitude of the conflict in Uganda, may “have caused such traditions to become dislocated or modified beyond any useful form.”<sup>120</sup> Critics are therefore

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<sup>115</sup> Joanna R. Quinn, “Gender and Customary Mechanisms in Uganda,” a Paper Prepared for Presentation at the Global Gender Justice Symposium (Global Gender Justice Symposium, Fairfax, VA, 2008), 1–26.

<sup>116</sup> Susanne Schmeidl, “Engaging Traditional Justice Mechanisms in Afghanistan,” in *The Rule of Law in Afghanistan: Missing in Inaction*, ed. Whit Mason (Cambridge: University Press, 2011), 168.

<sup>117</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 16.

<sup>118</sup> Shaw and Waldorf, “Introduction: Localizing Transitional Justice,” 16.

<sup>119</sup> Joanna R. Quinn, “The Impact of Internal Conflict on Customary Institutions and Law: The Case of Uganda,” *Journal of African Law* 59, no. 2 (October 2015): 232, <https://doi.org/10.1017/S0021855315000042>.

<sup>120</sup> Quinn, “The Impact of Internal Conflict on Customary Institutions and Law,” 232.

skeptical whether local justice can live up to its expectation when years of brutal violence have destroyed “the very social and material systems upon which indigenous processes depend.”<sup>121</sup>

On a similar line of argument, critiques are worried whether local process of transitional justice could resolve inter-communal conflict since their scope is often limited to a specific ethno-cultural group. They question the utility of customary justice mechanisms in resolving conflicts that cut across different ethno-cultural groups who do not share the same belief systems. In a related argument, Quinn noted that the stratification of contemporary society and rapidly increasing urbanization makes it difficult for the practice of local transitional justice mechanisms.<sup>122</sup> A similar concern, especially among international human rights groups, is that local customary practices are ill-equipped to deal with large scale impunity committed by high-level government officials, state military, or rebel commanders. Human rights advocates who support this view claim that to achieve long-term peace, there must be some form of deterrence of crimes, which can come about through criminal prosecution.<sup>123</sup> However, they fear that customary justice mechanisms are not equipped to handle such ‘high’ level prosecutions, which could lead to many alleged perpetrators of human rights abuse and violators of international humanitarian law escape punishment.

While researchers recognize that some of the criticisms of customary justice systems are legitimate, they argue that the criteria used for the assessment are too strict and

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<sup>121</sup> Allen and Macdonald, “Post-Conflict Traditional Justice,” 16.

<sup>122</sup> Quinn, “The Impact of Internal Conflict on Customary Institutions and Law,” 235.

<sup>123</sup> Robert C. Johansen, “Peace and Justice? The Contribution of International Judicial Processes to Peacebuilding,” in *Strategies of Peace: Transforming Conflict in a Violent World*, ed. Daniel Philpott and Gerard F. Powers, Studies in Strategic Peacebuilding (New York: Oxford University Press, 2010), 189.

legalistic, and often fail to view customary justice and traditional conflict management approaches within their unique contexts.<sup>124</sup> Critical decolonial scholars argue that the criticisms about the weaknesses of customary justice and other traditional conflict resolution mechanisms, particularly in Africa, are hinged on the Western outsiders' view that African societies are not capable of managing their affairs and cannot be left on their own to address conflict and manage their societies.<sup>125</sup> Keeping customary justice and other forms of traditional conflict management systems at bay is how Western countries imagine they are keeping their homelands safe from the threat of the "Other." Still, many scholars and practitioners remain optimistic about local transitional justice's potential to prevent conflict recurrence and attain long-term peace. This optimism stems from customary justice's rootedness in long-standing practices, systems of beliefs, and values, that have held, and continue to hold, African communities and societies together for centuries.

#### **4.3.5 Locating the 'Local Turn' in this Project**

As discussed earlier in this chapter, scholars and practitioners approach the local from different theoretical perspectives. The lack of conceptual consensus adds a layer of complexity to any project—such as mine—that uses the 'local' as a central frame. To avoid ambiguity, it is necessary to develop a conceptual understanding of where the local is located in my work. This section begins by addressing the 'elephant in the room': that is the fundamental question of the temptation to essentialize the local. In researching the potential of local forms of transitional justice, there is a tendency to romanticize the local. But, as Richmond reminds us, "caution is needed in approaching, interrogating, and

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<sup>124</sup> Kochanski, "The 'Local Turn' in Transitional Justice," 36.

<sup>125</sup> Achille Mbembe, *Critique of Black Reason* (Durham, NC: Duke University Press, 2017).

deploying culturally ‘sensitised’ approaches: culture should not be re-essentialised nor necessarily perceived as a benign site of agency.”<sup>126</sup>

It is important to talk about the risk of romanticizing the local because, first, it opens up avenues to have frank conversations about the potentials and limits of what customary justice can and cannot achieve. Second, a conversation about romanticizing the local opens opportunities for customary justice and other local interventions to be vertically and horizontally connected to the broader peace processes and actors “in ways that contribute to the emergence of a renewed social contract between state and citizens.”<sup>127</sup> Without being open about idealizing customary justice, they risk “being atomized... [and occurring] in isolation from other local, national, or international peace processes,” which can impede on the efforts to create the conditions for sustainable peace.<sup>128</sup>

The call for the turn to the local is neither a project to dismiss the liberal peace, nor a project to exalt the superiority of local transitional justice over conventional liberal forms of justice. In Richmond’s words, the local is neither necessarily “a benign site of agency,” or an “idealised and homogenised construction,” which has the inherent potential to be the panacea to the challenges in post-conflict societies.<sup>129</sup> Instead, the emphasis on a local turn is a call for increased attention to the realities on the ground in post-conflict societies. It is an exercise to “uncover its positive attributes as well as the more normally perceived

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<sup>126</sup> Richmond, *A Post-Liberal Peace*, 182.

<sup>127</sup> Timothy Donais, “Bringing the Local Back In: Haiti, Local Governance and the Dynamics of Vertically Integrated Peacebuilding,” *Journal of Peacebuilding & Development* 10, no. 1 (January 2, 2015): 41, <https://doi.org/10.1080/15423166.2015.1010987>.

<sup>128</sup> Martin Ola Lundqvist and Joakim Öjendal, “Atomised and Subordinated? Unpacking the Role of International Involvement in ‘The Local Turn’ of Peacebuilding in Nepal and Cambodia,” *Journal of Peacebuilding & Development* 13, no. 2 (August 1, 2018): 18, <https://doi.org/10.1080/15423166.2018.1470023>.

<sup>129</sup> Birgit Bräuchler and Philipp Naucke, “Peacebuilding and Conceptualisations of the Local,” *Social Anthropology* 25, no. 4 (2017): 432, <https://doi.org/10.1111/1469-8676.12454>; Richmond, *A Post-Liberal Peace*, 182.

negative attributes,” too.<sup>130</sup> The question of the source, nature, and limits of knowledge has relevance to the various approaches that we employ to end violent conflict.<sup>131</sup> Therefore, the turn to the local is an attempt to 1) critically interrogate and reveal the limits of the dominant interpretation of how we go about to advance peace in the aftermath of mass atrocity, and 2) invite alternative interpretations and sources of knowledge about how to advance peace in the wake of mass atrocity.<sup>132</sup>

## **Conclusion**

While peacebuilding and transitional justice have historically pursued separate paths, they dealt with similar issues. Because of their overlapping footprints, they have both witnessed similar criticisms from scholars and practitioners. Both have been criticized for being externally driven, state-centric, top-down, and with little regard to the needs of those affected by armed violence. Prompted by these criticisms, both peacebuilding and transitional justice have now witnessed a noticeable turn to the local. Although there is agreement about the need to shift from the liberal state-centric paradigms to engage more with “local” constituents of armed violence, scholars and practitioners have different opinions on how to achieve the shift. On the one hand, some wish to maintain international norms and standards while increasing the engagement of local actors mainly through outreach, sensitization, and local empowerment. They maintain that any involvement with local actors must conform with international norms and standards. On the other hand, the

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<sup>130</sup> Richmond, *A Post-Liberal Peace*, 154.

<sup>131</sup> Buckley-Zistel, *Conflict Transformation and Social Change in Uganda*, 15.

<sup>132</sup> The local turn is also sometimes discussed within the context of the call to re-distribute resources from North to South to support the basic material needs of local communities, and to address the conditions of global economic inequalities that contribute to atrocities in the first place.

second strand of argument maintains that the local turn is one of critical local agency to recast transitional justice from its focus on the liberal framework.

Despite the different paths scholars pursue to get to the local, they agree that customary justice offers several positives. First, it has greater flexibility to deal with the blurry identities of victims and perpetrators. Second, it has the capacity and could serve local communities when state formal justice systems are either devastated by the conflict or not available to the thousands of post-conflict victims. Third, it prioritizes social harmony and building social relations over retributive justice, which has the potential to disintegrate peace processes. Fourth, customary justice pays attention to victims' own ideas of what justice means to them, unlike the legalistic understanding of justice associated with conventional, transitional justice approaches. Equally important, though, are some notable weaknesses of customary justice approaches. Critics worry that customary justice could re-enforce pre-war discriminatory structures in communities. They argue the social fiber of society, which customary justice depends on may be destroyed by years of violence, which could render customary justice challenging to administer. Finally, the ability for customary justice to deal with inter-communal conflicts, as well as deal with mass crimes such as genocide, has also been cited as potential weaknesses.

## Chapter 5

### 5 Resituating Measures of Non-Recurrence at the Local Level: The Potentials of Customary Justice

#### 5.1 Introduction

This chapter explores the potential of customary justice and advances theoretical arguments about how customary transitional justice instruments could stop ongoing hostilities, prevent future reversion to armed conflict, and secure long-term peace. I argue that customary justice approaches grounded in the customs and culture of conflict-affected societies could play important roles to terminate conflict and ensure that society does not revert to armed violence. As I noted in the previous chapter, by customary justice, I mean practices that have their roots in the indigenous societal structures, customary institutions, and traditional conflict resolution instruments that have been practiced over a considerable period. To demonstrate the relevance of customary justice practices to measures of non-recurrence, this chapter first addresses the changing discourse of armed violence and the hybrid nature of recent armed conflicts. I argue that because of the changing discourses of armed violence and the hybridity of armed conflict, it is important to pay greater attention to customary justice responses to armed violence. In the second section, I outline a framework and the elements of effective measures of non-recurrence. In the final section, I explain how customary justice mechanisms might end conflict and prevent its recurrence.

Although this chapter argues that customary justice could have the capacity to terminate armed conflict and prevent its recurrence, it is essential to emphasize that my arguments are primarily normative and only seek to illustrate the promise customary justice

holds and how its strengths could be drawn upon to prevent the reoccurrence of armed violence. As I illustrate below in chapter 7, the causes of armed conflict are diverse, and often lead to a highly complex post-conflict environment. As a result, the advocacy for the use of customary responses to address armed conflict does not suggest they are adequate in terminating violence in all situations. The complexity of the post-conflict environment requires a range of interventions, including interventions from the national and international arenas. I take on these issues below in chapter 7 and show how customary justice could co-exist with and complement other transitional justice interventions at the national and international levels.

## 5.2 Discourses on Armed Conflict and Civil War

This section aims to critically inquire into armed conflict and civil war analysis to interrogate narratives that have dominated the civil war and violent conflict discourse. Here, I challenge the hegemonic position of the mainstream rationalists' analysis of conflict. It is important to point out that an analysis of the extant literature on the theories of civil war and armed conflict is not the focus of this section. While I discuss, at least in part, some of the theories of the causes of armed conflict and civil war, I do so primarily to set the basis on which I advance the main arguments in this chapter.<sup>1</sup> In other words, I

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<sup>1</sup> There are other important bodies of literature about the causes of civil war, although these are beyond the scope of this study. For example, critical feminist scholars have analyzed the militarized masculinity and gendered power relations that lead to civil war and armed conflict. See Cynthia Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire* (Berkeley, CA: University of California Press, 2004); Cynthia Cockburn, "The Continuum of Violence: A Gender Perspective on War and Peace," in *Sites of Violence: Gender and Conflict Zones*, ed. Wenona Giles and Hyndman Jennifer (University of California Press, 2004), 24–44; Dyan Mazurana, Angela Raven-Roberts, and Jane Parpart, eds., *Gender, Conflict, and Peacekeeping* (New York: Rowan and Littlefield, 2005); Carolyn Nordstrom, *Shadows of War: Violence, Power, and International Profiteering in the Twenty-First Century*, California Series in Public Anthropology 10 (Berkeley, CA: University of California Press, 2004); Sara E Davies and Jacqui True, "Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In,"



base the main arguments in this chapter on a specific understanding of armed conflict, which differs from rationalists' explanation of violent conflict and civil war. First, I discuss the rationalists' explanation of civil war. Second, I shift away from the rationalists' explanations and draw on a normative framework to argue that armed conflict is a social construct and a form of human action centrally located in the relational encounters of social agents and the structural properties of social systems.

### 5.2.1.1 The Rationalist's Explanation of Armed Conflict/Civil War

Rationalists' explanations of civil war and violent conflict emphasize the "rationality" of individual social agents.<sup>2</sup> Rationalists explain civil wars in terms of economic variables and argue that wars occur when the incentive for rebellion is larger than the cost of waging civil war or insurgency.<sup>3</sup> Following Collier and Hoeffler, scholars have advanced various arguments suggesting that actors are motivated to engage in armed violence when there are credible opportunities for private economic and material gains.<sup>4</sup>

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*Security Dialogue* 46, no. 6 (December 1, 2015): 495–512, <https://doi.org/10.1177/0967010615601389>; Caroline O. N. Moser and Fiona Clark, eds., *Victims, Perpetrators Or Actors?: Gender, Armed Conflict and Political Violence* (London ; New York: Zed Books, 2001).

<sup>2</sup> Alex Mintz and Karl DeRouen Jr, *Understanding Foreign Policy Decision Making* (Cambridge: Cambridge University Press, 2010), 57.

<sup>3</sup> Paul Collier and Anke Hoeffler, "On Economic Causes of Civil War," *Oxford Economic Papers* 50, no. 4 (1998): 563; see also David Keen, "The Economic Functions of Violence in Civil Wars (Special Issue)," *The Adelphi Papers* 38, no. 320 (1998): 1–89.

<sup>4</sup> James D. Fearon and David D. Laitin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review* 97, no. 1 (2003): 75–90, <https://doi.org/10.1017/S0003055403000534>; David Keen, *Useful Enemies: When Waging Wars Is More Important Than Winning Them* (New Haven, CT: Yale University Press, 2012); Keen, "The Economic Functions of Violence in Civil Wars (Special Issue)"; Indra De Soysa and Eric Neumayer, "Resource Wealth and the Risk of Civil War Onset: Results from a New Dataset of Natural Resource Rents, 1970—1999," *Conflict Management and Peace Science* 24, no. 3 (July 1, 2007): 201–18, <https://doi.org/10.1080/07388940701468468>; Carles Boix, "Economic Roots of Civil Wars and Revolutions in the Contemporary World," *World Politics* 60, no. 3 (2008 2007): 390–437; Collier and Hoeffler, "On Economic Causes of Civil War."

However, these scholars have arrived at different results and conclusions regarding the role of economic and material benefits in violent conflict and civil war. Their points of disagreement are largely around whether opportunities for material gain, in terms of availability of natural resources, exploitable commodities, and access to political power, increases the risk of civil war onset or, access to material resources only have effects on the longevity of armed conflict. For instance, Fearon doubts Collier and Hoeffler's argument that natural resource and primary commodity exports increase a country's risk of civil war onset. Instead, he suggested that rebel groups' access to resources that can be exploited tends to enable longer civil wars, but the availability of economic resources in themselves are not a good measure for rebel groups to take up arms.<sup>5</sup> Ross agrees with Fearon and argued that the characteristics of specific economic resources are important in determining how they impact violent conflict and civil war.<sup>6</sup> He observed that resources that can easily be looted or require minimally skilled labor to extract are correlated with armed conflict duration but not the onset of armed conflict.<sup>7</sup> Similarly, Lujala observed that the resource's location is also important in determining how they can impact civil war.<sup>8</sup> He argued that oil resources located onshore tend to increase the risk of civil war onset by 50%, while offshore oil resources do not affect civil war onset.<sup>9</sup>

Despite the varying conclusions, the point of convergence of the rationalist's strand of argument is that armed actors are motivated by economic opportunities, material gains,

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<sup>5</sup> James D. Fearon, "Why Do Some Civil Wars Last So Much Longer than Others?" *Journal of Peace Research* 41, no. 3 (May 1, 2004): 284, <https://doi.org/10.1177/0022343304043770>; Fearon and Laitin, "Ethnicity, Insurgency, and Civil War," 87–88.

<sup>6</sup> Michael L. Ross, "What Do We Know about Natural Resources and Civil War?" *Journal of Peace Research* 41, no. 3 (2004): 338.

<sup>7</sup> Ross, "What Do We Know about Natural Resources and Civil War?" 338.

<sup>8</sup> Päivi Lujala, "The Spoils of Nature: Armed Civil Conflict and Rebel Access to Natural Resources," *Journal of Peace Research* 47, no. 1 (2010): 15–28.

<sup>9</sup> Lujala, "The Spoils of Nature: Armed Civil Conflict and Rebel Access to Natural Resources," 16.

and political power. The individual actor is considered a purposive agent and a utility maximizer. Conflict analysts take the individual as the primary unit of analysis and a rational utility maximizer who will “conduct a civil war if the perceived benefits outweigh the costs of rebellion.”<sup>10</sup>

Although rational actor models have empirical utility, they seem to focus more on the individual’s instrumental rationality as the central unit of analysis. Rationalist explanations often neglect the fact that the acting subject is a social agent whose actions are situated within the structural properties of societies of which they are members. Instead of rationalists’ economic explanations of armed conflict, social theories seem better able to explain and locate civil war and armed conflict in society. In particular, the notion of civil war as a social and human phenomenon or a social construct that emerges through, and constitutive of, social practices advanced by Jabri has real relevance.<sup>11</sup> The framework argues that although material and economic elements are important, violent conflict is essentially a human action that takes place within the context of social relations and through such processes as group formation, identity, symbolic affiliations, and the construction of normative expectations and codes of conduct.<sup>12</sup>

### **5.2.2 Armed Conflict as a Human and Social Phenomenon**

Understanding armed conflict as a social phenomenon must begin with what Jabri calls the continuities of social life. The continuities of social life are understood in terms of the production and reproduction of social properties or systems that make community life

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<sup>10</sup> Collier and Hoeffler, “On Economic Causes of Civil War,” 563.

<sup>11</sup> Vivienne Jabri, *Discourses on Violence: Conflict Analysis Reconsidered* (Manchester University Press, 1996), 3.

<sup>12</sup> Jabri, *Discourses on Violence*, 4–8.

possible. These social properties are conceived as a society's culture, including beliefs, ritual practices, ceremonies, and customs that define the relationship between individuals and their society.<sup>13</sup> The social properties then serve as modes where discourses take place and the processes through which certain values and discourse come to be salient around which actors "come to be willing participants in violent conflict."<sup>14</sup>

In this framework, conflict parties are viewed as situated members of complex societies whose identities are "constructed through and constitutive of the structural properties of pattern and regularized social systems."<sup>15</sup> The ability for conflict actors to mobilize others to be willing participants in violent conflict could be explained first by the individual's membership of a group, and second, by the complex societal norms, beliefs, values, and institutions which are embedded in the "histories and memory traces of collectivities... and in the nature of the societies in terms of their common beliefs and sentiments."<sup>16</sup> The meanings of ideas such as "sacrifice," "honor," and "prestige" are constructed by bounded social communities that "reify and reward such actions [as armed conflict] taken by individuals" in the name of their community.<sup>17</sup>

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<sup>13</sup> Ann Swidler, "Culture in Action: Symbols and Strategies," *American Sociological Review* 51, no. 2 (1986): 273, <https://doi.org/10.2307/2095521>.

<sup>14</sup> Jabri, *Discourses on Violence*, 21.

<sup>15</sup> Jabri, *Discourses on Violence*, 120; see also Susanne Buckley-Zistel, *Conflict Transformation and Social Change in Uganda: Remembering after Violence*, Rethinking Peace and Conflict Studies (Palgrave Macmillan UK, 2008), 14.

<sup>16</sup> Jabri, *Discourses on Violence*, 123; see also Vamik D. Volkan, "Transgenerational Transmissions and Chosen Traumas: An Aspect of Large-Group Identity," *Group Analysis* 34, no. 1 (2001): 79–80, 87–88, <https://doi.org/10.1177/05333160122077730>; Buckley-Zistel, *Conflict Transformation and Social Change in Uganda*, 7.

<sup>17</sup> Jabri, *Discourses on Violence*, 42; see also Vamik Volkan, *Bloodlines: From Ethnic Pride To Ethnic Terrorism* (Boulder: Basic Books, 1998).

### 5.2.2.1.1 The Underlying Mechanisms of Armed Conflict as a Human and Social Phenomenon

To support the conception of armed conflict as a human and social construct, it is important to understand the processes that link social systems such as norms, values, beliefs, and regularized structural properties to conflictual relations and armed conflict. Giddens introduced three structural properties of social systems. He calls these structures of signification, legitimation, and domination.<sup>18</sup> Structures of signification constitute the interpretative schemes and modes of discourses actors draw upon to make meaning of their social interactions. For Giddens, structures of signification are central to the communicative processes of social actors.<sup>19</sup> Structures of signification may include shared symbolic orders, language, modes of discourse, and other cultural codes, which make the interaction between social actors meaningful.<sup>20</sup> Structures of legitimation are those codes of conduct and normative expectations in society that enable and simultaneously constrain social conduct.<sup>21</sup> Structures of legitimation can be both formal and informal codes of conduct that “legitimate some actions while censoring others.”<sup>22</sup> Structures of domination are defined as social actors’ power asymmetries and differential capabilities to mobilize allocative and authoritative resources to further their actions.<sup>23</sup> In addition to actors’ differential capabilities to mobilize allocative and authoritative resources, structures of domination also exist by the very presence of codes of signification and legitimation norms—norms that allow certain discourses while sanctioning others.<sup>24</sup>

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<sup>18</sup> Anthony Giddens, *The Constitution of Society* (Cambridge UK: Polity Press, 1984), 30.

<sup>19</sup> Giddens, *The Constitution of Society*, 31.

<sup>20</sup> Roger M. Keesing, “Theories of Culture,” *Annual Review of Anthropology* 3 (1974): 79.

<sup>21</sup> Giddens, *The Constitution of Society*, 30.

<sup>22</sup> Jabri, *Discourses on Violence*, 83.

<sup>23</sup> Giddens, *The Constitution of Society*, 33.

<sup>24</sup> Jabri, *Discourses on Violence*, 83.

These three structural properties of social systems—signification, legitimation, and domination—become institutionalized into political, legal, and symbolic orders in the long-term, which are central to the day-to-day activities of social agents. It should be noted that each of the three elements or structural properties is linked to the other and social agents draw on them in various contexts in time and space in their daily encounters and relationships to solve different problems.<sup>25</sup> Over time, as social actors draw on these properties of social systems in varying configurations to solve different kinds of problems, contestations could emerge as some discourses, and institutionalized social and political orders become dominant while others are rendered invisible. In such situations of contestation, situated actors employ structures of domination—asymmetries and differential capabilities in allocative and authoritative resources—to generate counter discourses that unsettle the established order. As Jabri argued, this leads to a dialectical process, and a realm of conflictual relationship arises as actors attempt to produce “new” modes of dominant discourses, symbolic affiliations, and normative expectations.<sup>26</sup> The following are the two key theoretical assumptions undergirding the view that armed conflict is a social and human phenomenon.

First, the theory considers conflict actors not as rational and autonomous agents, separate from society, but as constitutive of societies whose actions produce and reproduce social systems, such as customs, beliefs, normative expectations, and shared meanings,

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<sup>25</sup> The view that actors draw on structural properties of social systems, which include norms, beliefs, ritual practices, and so on in various context to pursue different objectives parallels Swidler’s notion of culture as a toolkit “of symbols, stories, rituals, and world-views, which people may use in varying configurations to solve different kinds of problems.” see Swidler, “Culture in Action,” 273.

<sup>26</sup> Jabri, *Discourses on Violence*, 83; see also Steven I. Wilkinson, “A Constructivist Model of Ethnic Riots,” in *Constructivist Theories of Ethnic Politics*, ed. Kanchan Chandra (New York: Oxford University Press, 2012), 360–61.

which define the institutional continuities of social life.<sup>27</sup> The central point here is that the individual and society are mutually constitutive, which means the individual's actions cannot be separated from society's constitutive elements. These social systems are both enabling and constraining factors that are central in the decision-making of armed actors. In Jabri's view, these enabling and constraining factors are vital in determining "the mode of behavior [of actors] within situations of conflict," and these enabling and constraining factors "cannot merely be analyzed in terms of immediate cost/benefit" calculations or reduce to the "rationality" of actors.<sup>28</sup> Therefore, the motivations and actions for warring parties in a conflict are not considered given but are constituted in the individual's situated nature as a community member.

Second, this framework argues that instances of civil war and armed violence are a manifestation of social processes and "deeply held social norms institutionalized across time and space and reinforced through structures of domination."<sup>29</sup> The relationship between the individual and their community is situated in identity and group formations constructed along the lines of inclusion and exclusion, which is reinforced by institutional structures that legitimate violence.<sup>30</sup> In other words, violent conflict is a human, relational, and social construct deeply embedded in societies' historical and social continuities.<sup>31</sup> This means that conflict analysis and the approaches to addressing it must consider actors' historical and social situatedness.

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<sup>27</sup> Jabri, *Discourses on Violence*, 8.

<sup>28</sup> Jabri, *Discourses on Violence*, 15.

<sup>29</sup> Jabri, *Discourses on Violence*, 157; Buckley-Zistel, *Conflict Transformation and Social Change in Uganda*, 14.

<sup>30</sup> Wilkinson, "A Constructivist Model of Ethnic Riots."

<sup>31</sup> Buckley-Zistel, *Conflict Transformation and Social Change in Uganda*, 14.

### 5.2.3 Hybrid Violent Conflict

Many of today's armed conflicts cannot be viewed as conventional civil wars between the state and an organized armed opposition with a defined political agenda.<sup>32</sup> Since the 1990s, armed conflicts, especially in Africa, continue to be much more complex, involving a diversity of actors, issues, and interests, and different forms of atrocities.<sup>33</sup> For instance, violent conflicts in Burundi, Liberia, Rwanda, Sierra Leone, Somalia, and Sudan have witnessed large-scale atrocities against civilians, including killings, rape, and the destruction of villages.<sup>34</sup> These acts of violence are often committed by not only government-backed forces but by a range of paramilitary groups, self-defense groups, and rebel groups.<sup>35</sup> The characteristics of hybrid violent conflict are twofold—the involvement of a multiplicity of armed actors and issues, and the wars often emerge in weak or fragile states.

First, in terms of actors, recent intra-state wars and violent conflicts have generated new players who hold significant sway over how peace can be attained. These actors range from military groups, rebel leaders, political elites, and community-level traditional leaders. In today's conflicts, “traditional social entities such as extended families, lineages, clans, ‘tribes’... and ethnolinguistic groups become parties to the violent conflict(s), introducing their own agendas into the overall conflict setting.”<sup>36</sup> For example, in the northern Ugandan conflict, researchers suggested that many Acholi supported the rebels

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<sup>32</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding”; see also Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press, 1999).

<sup>33</sup> Robin Luckham, Ismail Ahmed, Robert Muggah, Sarah White, “Conflicts and Poverty in Sub-Saharan Africa: An Assessment of the Issues and Evidence,” Working Paper (Brighton, Sussex: Institute for Development Studies, March 2001), 4–10; available from <https://www.ids.ac.uk/download.php?file=files/dmfile/Wp128.pdf>.

<sup>34</sup> Buckley-Zistel, *Conflict Transformation and Social Change in Uganda*, 13.

<sup>35</sup> Kaldor, *New and Old Wars*.

<sup>36</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding,” 433.



due to grievances that they hold against regimes that have ruled over them over the years. Yet others, too, supported the government due to the rebel incursions, abductions, and merciless murders of Acholi people.<sup>37</sup> The conflict in the Democratic Republic of Congo is also described as a mosaic of insurgent groups, including various rebel movements, ethnic militias, and state military.<sup>38</sup>

Second, in addition to the constellation of actors and issues, these “new” wars often emerge and are fought in the context of weak or fragile states. State fragility is a contested concept, and different labels have been used, including collapsed states, failed states, crises states, and so on.<sup>39</sup> This study used fragile and weak states—sometimes interchangeable—to refer to states in which the government cannot or is unwilling to deliver core functions and meet the expectations of the majority of its people, including the provision of security, which often leads to a failure or breakdown of state-society relations.<sup>40</sup> In weak states, other non-state actors often wield a considerable amount of power, and the state is often one actor among other actors that claim authority and legitimacy within the state’s sovereign territory.<sup>41</sup> In other words, there are often competing institutions in weak or

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<sup>37</sup> Tim Murithi, “African Approaches to Building Peace and Social Solidarity,” *African Journal on Conflict Resolution* 6, no. 2 (2006): 9–34.

<sup>38</sup> Koen Vlassenroot, “Armed Groups and Militias in Eastern DR Congo” (The Nordic Africa Institute, 2008), file:///C:/Users/ibayo/Downloads/vlassenroot%20Armed%20Groups%20and%20Militias%20in%20eastern%20DRC.pdf; see also Emizet F. Kisangani, “Conflict in the Democratic Republic of Congo: A Mosaic of Insurgent Groups,” *International Journal on World Peace* 20, no. 3 (2003): 51–80.

<sup>39</sup> Dele Olowu and Paulos Chanie, “Introduction: Renewed Interest in State Weakness and Fragility,” in *State Fragility and State Building in Africa: Cases from Eastern and Southern Africa*, ed. Paulos Chanie and Dele Olowu (New York: Springer, 2016), 1.

<sup>40</sup> Claire McLoughlin, “Topic Guide on Fragile States” (Governance and Social Development Resource Centre, University of Birmingham, 2012), 9; available from <http://www.gsdrc.org/docs/open/con86.pdf>; Olowu and Chanie, “Introduction: Renewed Interest in State Weakness and Fragility”; Louise Andersen, Bjørn Møller, and Finn Stepputat, “Introduction: Security Arrangements in Fragile States,” in *Fragile States and Insecure People? Violence, Security, and Statehood in the Twenty-First Century*, ed. Finn Stepputat, Bjørn Møller, and Louise Andersen (London and New York: Palgrave Macmillan, 2007), 3–19.

<sup>41</sup> Eghosa E. Osaghae, “Fragile States,” *Development in Practice* 17, no. 4–5 (August 1, 2007): 692, <https://doi.org/10.1080/09614520701470060>; see also Volker Boege, “On Hybrid Political Orders and Emerging States: State Formation in the Context of ‘Fragility’” (Berghof Research Center for Constructive

fragile states, and different logic of orders co-exist.<sup>42</sup> “The logic of the ‘formal’ state, the logic of traditional ‘informal’ societal order, the logic of globalization and international civil society with its abundance of highly diverse actors... and development aid agencies” are examples of different competing orders that claim to provide peace and security in fragile states during, and in the aftermath of violent conflict.<sup>43</sup>

In this context of hybrid violence and competing logic of orders in recent conflicts, non-state traditional institutions, actors, and customary justice mechanisms add an essential dimension to the toolbox of instruments used to respond to armed violence. Although state forces have often been complicit in perpetrating abuses, the trend of recent conflicts shows that all sides commit abuses against civilians.<sup>44</sup> In contemporary armed conflict, state-centric socio-political, economic, and traditional social factors often overlap, in which traditional actors and tribal warriors might become warlords or members of rebel groups.<sup>45</sup>

Through the efforts to understand conflict as a social and relational construct, valuable theoretical insights could be gained regarding non-state and traditional mechanisms of dealing with the aftermath of armed conflict. Therefore, effective efforts to terminate violent conflict and ensure that society does not revert to violence must overcome state-centric methods.

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Conflict Management, 2008); available from [https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/boege\\_et\\_al\\_handbook.pdf](https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Handbook/Articles/boege_et_al_handbook.pdf).

<sup>42</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding.”

<sup>43</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding.” 433.

<sup>44</sup> Lisa Denney and Pilar Domingo, “Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field,” in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Roger Duthie and Paul Seils (New York: International Center for Transitional Justice, 2017), 212.

<sup>45</sup> Luckham et al., “Conflicts and Poverty in Sub-Saharan Africa: An Assessment of the Issues and Evidence,” 1–10.

### **5.3 A Framework of Measures of Non-Recurrence**

This section builds on the discussions presented in chapter 3 about the historical development of measures of non-recurrence. In this chapter I put special focus on the uptake and applicability of measures of non-recurrence in national level peace processes. The following discussion lays out how guarantees of non-recurrence relate to transitional justice and the specific approaches that are used at the national level to prevent the non-recurrence of armed conflict. Measures of non-recurrence, broadly, are interventions taken to terminate violence and prevent the future reoccurrence of armed conflict or prevent future rights violations.<sup>46</sup> This section proceeds, first, by outlining measures of non-recurrence based on more formal state measures. Next, I argue for an alternative model outside of the realm of formal state legal and institutional processes.

#### **5.3.1 A State-Centric Model of Measures of Non-Recurrence**

Formal mechanisms of measures of non-recurrence often point to, among other things, reforming institutions, disbanding unofficial armed groups, vetting the security forces and the judiciary, and protecting human rights.<sup>47</sup> Based on these mechanisms, Mayer-Rieckh identified three elements that underlie effective measures of non-recurrence in the aftermath of serious and massive human rights violations. These include, first, disabling the capacities of abusive institutions and actors. Second, building the integrity capacity of

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<sup>46</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations General Assembly, 2015), para. 16, file:///C:/Users/ibayo/Downloads/A\_HRC\_30\_42-EN.pdf.

<sup>47</sup> de Greiff, *Report of the Special Rapporteur*, 7.

abusive institutions, and third, verbal or symbolic signaling.<sup>48</sup> Each of these elements is described in detail below.

First, Mayer-Rieckh focused his framework of measures of non-recurrence on disabling the abusive and operational capacities of state security, justice institutions, and groups “that allowed, facilitated, promoted, or committed violations.”<sup>49</sup> He argued that serious human rights violations often require resources, skills, and a degree of organization to perpetrate. These resources can include weapons, ammunition, and other operational expertise. Therefore, effective measures of non-recurrence must consist of measures that can disable these operational capacities that enable institutions to perpetrate violations. Some of the measures he noted include “disbanding abusive groups, units, or institutions; disarming, demobilizing and reintegrating combatants; decommissioning and destroying ammunition, weapons, armored vehicles and other equipment used to commit such violations.”<sup>50</sup>

Other measures may also include vetting, particularly the security forces and the judiciary. The central idea is to rid institutions of abusers and render it difficult for abusive institutions and groups to repeat violations.<sup>51</sup> As de Greiff clearly articulated, the idea of ridding institutions of abusers as well as the structures that enable them to commit abuses is “something akin to an anti-Mafia measure.”<sup>52</sup> That is, to “disable structures within which

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<sup>48</sup> Alexander Mayer-Rieckh, “Guarantees of Non-Recurrence: An Approximation,” *Human Rights Quarterly* 39, no. 2 (2017): 416–48, <https://doi.org/10.1353/hrq.2017.0024>.

<sup>49</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 435.

<sup>50</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 436.

<sup>51</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 436; see also Pablo de Greiff, “Vetting and Transitional Justice,” in *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Pablo de Greiff and Alexander Mayer-Rieckh, Advancing Transitional Justice (New York: Social Science Research Council, 2007), 482–520.

<sup>52</sup> de Greiff, “Vetting and Transitional Justice,” 526.

individuals... in fact, carried out criminal acts, who may have refrained from criminal activity were it not for those structures.”<sup>53</sup>

The second element is to build integrity capacities. Building integrity capacities involve efforts to strengthen trust and build accountability in state institutions. These accountability-, trust-, and integrity-building mechanisms can include “reinforcing internal accountability, such as ethics codes, internal accountability procedures, line supervision, and internal discipline; building external oversight, such as parliamentary oversight.”<sup>54</sup> Building integrity capacities fosters trust, promotes the inclusion of victims and other marginalized groups in governance processes that reinforce the validity and respect of fundamental human rights.<sup>55</sup> As Davies argued, conflicts can be prevented when institutions respect human rights and allow individuals and groups to express their views without fear.<sup>56</sup>

Efforts to promote institutions’ integrity are essential because, after periods of conflict, corrupt, weak, or dishonest institutions may resist facing the past, and they may also work to undermine the rule of law and other transitional justice processes.<sup>57</sup> Credible and transparent institutions are needed that will be receptive and more willing to cooperate in disclosing the full truth of past abuses. Building inclusive institutions may involve a comprehensive restructuring of the judiciary and security services to be efficient and fair, which can help get other transitional justice mechanisms off the ground.

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<sup>53</sup> de Greiff, “Vetting and Transitional Justice,” 526.

<sup>54</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 437.

<sup>55</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 437.

<sup>56</sup> Lynn Davies, “The Potential of Human Rights Education for Conflict Prevention and Security,” *Intercultural Education* 21, no. 5 (October 1, 2010): 465, <https://doi.org/10.1080/14675986.2010.521388>.

<sup>57</sup> Matiangai V.S. Sirleaf, “The Truth About Truth Commissions: Why They Do Not Function Optimally In Postconflict Societies” (University of Baltimore School of Law, May 2015), 2298, <file:///C:/Users/ibayo/Downloads/SSRN-id2309537.pdf>.

The third element of effective measures of non-recurrence is what Mayer-Rieckh calls verbal or symbolic signaling.<sup>58</sup> He observed that this prevention strategy involves states “verbally or symbolically signaling a commitment to overcome the legacy of human rights violations and an endorsement of fundamental human rights norms.”<sup>59</sup> Symbolic signaling measures can include official apologies, memorials and museums, and other verbal or symbolic commitments. Scholars have argued that interventions such as memorials and museums seek to prevent future violence and atrocities by educating the public and revealing the horrors of past conflicts.<sup>60</sup> Memorials could help in trauma healing and serve as a site of “learning from the past and perpetual vigilance,” which could help prevent future conflicts.<sup>61</sup>

Mayer-Rieckh’s framework provides a viable way to prevent the recurrence of violent conflict. However, the concern is that his framework relies heavily on the state as the principal point of reference. As Boege argued, “the problem does not lie with the state as such, but with the tendency to overwhelmingly rely on political structures and institutions that are in many ways alien to the societies that they are expected to govern.”<sup>62</sup> For transitional justice efforts, particularly measures of non-recurrence, to be effective, they must resonate with the societies and the cultural context within which they are expected to be used. I develop below an alternative view of measures of non-recurrence beyond the state-centric interventions.

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<sup>58</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 437.

<sup>59</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 437.

<sup>60</sup> Brandon Hamber, “Conflict Museums, Nostalgia, and Dreaming of Never Again,” *Peace and Conflict: Journal of Peace Psychology* 18, no. 3 (2012): 268, <https://doi.org/10.1037/a0029076>.

<sup>61</sup> Laurie Beth Clark, “Never Again and Its Discontents,” *Performance Research* 16, no. 1 (March 1, 2011): 73, <https://doi.org/10.1080/13528165.2011.561677>.

<sup>62</sup> Volker Boege, Anne Brown, Kevin Clements, Anna Nolan, “Building Peace and Political Community in Hybrid Political Orders,” *International Peacekeeping* 16, no. 5 (November 1, 2009): 600, <https://doi.org/10.1080/13533310903303248>.

### 5.3.1.1 Rethinking Measures of Non-Recurrence Beyond a State-Centric Model

Measures of non-recurrence should not only be conceptualized as being within the purview of formal state and governmental apparatus. Instead, they must also be thought of as a holistic approach that engages a series of actors at different levels, especially non-state actors at the local level. As I have argued above, recent trends in armed conflicts increasingly show that there are cases where a wide variety of non-state armed groups commits violence. Often, people who engage in violence against one another must live together again in the same communities.<sup>63</sup> In many instances, children and youth are forced “to join armed groups and often to exercise power, control, and brutality against families and neighbors.”<sup>64</sup> To ensure peace, members of the society must find ways to (re)build trust and begin to recognize the shared values and norms that bind the community together. To strengthen community ties and inter-connectedness, conflict resolution mechanisms must allow people to reconstruct their lives based on the shared community norms that could restore the conditions for peace and communal coexistence. This process of restoring community ties and rebuilding trust must draw upon cultural values and traditional norms of justice and peace. Therefore, efforts to terminate armed conflict and prevent its recurrence at the community level are “not a matter of political accommodation at the highest level; rather it involves interdependent relationships in the everyday lives of a considerable number of people.”<sup>65</sup> Based on these structural shifts in armed conflict and the idea that armed conflict is embedded within social relations or is a social phenomenon,

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<sup>63</sup> Erin Baines, “Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice,” *African Affairs* 109, no. 436 (2010): 410, <https://doi.org/10.1093/afraf/adq023>.

<sup>64</sup> Baines, “Spirits and Social Reconstruction after Mass Violence,” 410.

<sup>65</sup> John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C: United States Inst of Peace Press, 1998), 55.

I advance three explanations about how locally-based customary “justice” could help prevent the recurrence of violent conflict.

First, customary justice mechanisms could address the reintegration component of disarmament, demobilization, and reintegration more efficiently. Second, customary justice approaches could establish local zones of peace through customary mediation peace agreements, which could terminate inter-communal violence. The termination of inter-communal conflicts directly influences national peace processes, which eventually have implications on conflict non-recurrence. Third, the communal orientation of customary justice approaches creates a social control and accountability mechanism which could dissuade non-state armed groups, who often have social and kinship ties to their communities, from engaging in violence, thereby preventing conflict recurrence. Each of these points is discussed in detail below.

#### **5.3.1.1.1 Customary Justice could Sustain Reintegration to Prevent Conflict Recurrence**

In many post-war societies such as in Liberia, Sierra Leone, and Uganda, ex-combatants often commit atrocities against the civilian population—sometimes against their own communities. In these situations, they may face challenges in returning to their communities. Some of these challenges may include stigmatization, “finger pointing and name calling by community members, family and elders.”<sup>66</sup> Name-calling and stigmatization could be sources of stress and emotional pain, which could jeopardize returnees’ opportunities to adjust to civilian life after years of fighting. Therefore, in the

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<sup>66</sup> Erin Baines, “The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda,” *International Journal of Transitional Justice* 1, no. 1 (March 1, 2007): 108, <https://doi.org/10.1093/ijtj/ijm007>.



wake of relative peace, when armed groups lay down their arms and fighters begin to return to their communities, reintegration measures could be more effective if they are rooted in the cultural and social norms of communities' expectations.

Mayer-Rieckh asserted that disarmament, demobilization, and reintegration (DDR) is an important element that makes up any process to formulate measures of non-recurrence, which could disable the capacity of abusive institutions and prevent armed factions from reverting to armed conflicts.<sup>67</sup> DDR is a “process that contributes to security and stability in a post-conflict recovery context by removing weapons from the hands of combatants, taking the combatants out of military structures, and helping them to integrate socially and economically into society by finding civilian livelihoods.”<sup>68</sup>

DDR is a multi-layered process involving three major components. The first component is disarmament, which involves collecting, documenting, controlling, and disposing of small arms, light and heavy weapons, ammunition, and explosives from combatants.<sup>69</sup> The second is demobilization, which is when active armed factions are dismantled or formally decommissioned.<sup>70</sup> The third component is reintegration, which is the aspect that is most relevant to my current argument. Reintegration consists of measures to assist ex-combatants in acquiring a civilian status. These measures may include

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<sup>67</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 436.

<sup>68</sup> United Nations, “Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS)” (United Nations Department of Peacekeeping Operations, 2006), 6; available from <https://resourcecentre.savethechildren.net/node/10983/pdf/UN-2006-IDDRS.pdf>.

<sup>69</sup> United Nations, “1.10: Introduction to the IDDRS” (UN DDR Resource Centre, May 9, 2014), 2; available from <https://www.unddr.org/modules/IDDRS-1.10-Rev-2014.pdf>.

<sup>70</sup> Kimberly Theidon, “Transitional Subjects: The Disarmament, Demobilization, and Reintegration of Former Combatants in Colombia,” *International Journal of Transitional Justice* 1, no. 1 (March 1, 2007): 71, <https://doi.org/10.1093/ijtj/ijm011>.

economic activities in which ex-combatants are offered economic incentives such as land, credit, and sometimes skills training to help them settle into civilian life.<sup>71</sup>

Reintegration is a complex process that involves grassroots cooperation, especially from communities where ex-combatants are returning. However, reintegration programs have conventionally been formulated within a military and security framework, which often fails to pay sufficient consideration to the social and cultural context of armed conflict.<sup>72</sup> Kaplan and Nussio, for example, have noted that the technocratic nature of reintegration and the lack of sufficient consideration of the social and cultural context have led to reintegration failures and ex-combatants' recidivism.<sup>73</sup> They observed that recidivism is the most severe form of reintegration failure, which could drive armed actors' remobilization back into conflict.<sup>74</sup> For instance, Themnér noted that the lack of community involvement is among the factors that led to reintegration failure and renewed armed conflict in the Democratic Republic of Congo.<sup>75</sup>

The importance of local communities and customary justice mechanisms in the reintegration process relates to the notion that the community, rather than the individual, is the primary unit for attaining reconciliation and long-term peace. Ex-combatants are not isolated from their communities but are part of a collective with a shared history and collective normative expectations. Ex-combatants' familial relations, kinship ties, culture, and community norms are salient factors for reconstructing their relationships after years

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<sup>71</sup> Theidon, "Transitional Subjects," 71.

<sup>72</sup> Sami Faltas, "DDR without Camps: The Need for Decentralized Approaches," *Topical Chapter for the Conversion Survey*, 2005, 1.

<sup>73</sup> Oliver Kaplan and Enzo Nussio, "Explaining Recidivism of Ex-Combatants in Colombia," *Journal of Conflict Resolution* 62, no. 1 (January 1, 2018): 64–93, <https://doi.org/10.1177/0022002716644326>.

<sup>74</sup> Kaplan and Nussio, "Explaining Recidivism of Ex-Combatants in Colombia," 67.

<sup>75</sup> Anders Themnér, *Violence in Post-Conflict Societies Remarginalization, Remobilizers and Relationships*, First (New York: Routledge, 2011).

of living a combatant life. Customary justice mechanisms serve important performative aspects such as rituals and traditional “purification” ceremonies that seek to (re)establish group unity and connect ex-combatants to their communities.<sup>76</sup> The rituals and symbolic aspects of customary justice could deal with the deep cleavages in communities caused by years of violent conflict. Kaplan and Nussio assert that social institutions and norms of expectations could serve as social control that could restrain ex-combatants and reduce the risk of renewed conflict.<sup>77</sup> Similarly, Hill et al. observed that social reintegration in terms of acceptance by ex-combatants’ family and community could counteract the possible stigmatization and discrimination, which could reduce recidivism among ex-combatants.<sup>78</sup>

As ex-combatants seek to construct a new way of life, customary justice mechanisms rooted in the traditions, culture, and social norms of expectations could ensure social control and create a stable environment where they could safely reintegrate into the local communities. Among the Acholi in northern Uganda, for instance, researchers reported that most people believe in the phenomenon of *cen*—vengeful spirit of a dead person.<sup>79</sup> Many ex-combatants and warlords often have social ties to traditional beliefs such as *cen*, and when they returned after years of fighting, they often “feel ‘haunted.’”<sup>80</sup> The belief in *cen* illustrates the “centrality of the relationship between the natural and

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<sup>76</sup> Theidon, “Transitional Subjects,” 88.

<sup>77</sup> Kaplan and Nussio, “Explaining Recidivism of Ex-Combatants in Colombia,” 70.

<sup>78</sup> Richard Hill, Taylor Gwendolyn, and Jonathan Temin, “Would You Fight Again? Understanding Liberian Ex-Combatant Reintegration” (The United States Institute of Peace, 2008), 4–5; available from <https://www.usip.org/sites/default/files/sr211.pdf>.

<sup>79</sup> Erin Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration” (Liu Institute for Global Issues. Gulu District NGO Forum. Ker Kwaro Acholi, September 2005), 72; available from [https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf).

<sup>80</sup> Baines, “The Haunting of Alice”; see also Thomas Harlacher, Francis Xavier Okot, Caroline Obonyo, Mychelle Balthazard, and Ronald Atkinson, *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, 59.

supernatural worlds in Acholi, the living and the dead, and the normative continuity between an individual and the community.”<sup>81</sup>

As documented by Baines, for most ex-combatants, participation in customary justice and cultural rituals, such as removing *cen*, is thought to have a therapeutic effect, which could help prevent ex-combatants’ dangerous or abnormal behaviors once they return.<sup>82</sup> Researchers into Acholi traditional practices have reported that customary justice mechanisms could prevent revenge killings and the reversion to armed violence by restoring the “bitterness” that exists between family members of people who have been killed during the northern Uganda conflict and returnees or ex-combatants.<sup>83</sup> Customary justice mechanisms in northern Uganda, such as “stepping on the egg,” “washing of tears,” and “drinking the bitter herb,” are useful instruments that could facilitate reintegration by restoring broken relationships and building unity across clans, and promoting a spirit of forgiveness.<sup>84</sup>

Also, customary justice is more effective in sustaining reintegration because it could help provide avenues to assure ex-combatants’ safe return to communities, often without fear of revenge.<sup>85</sup> In the absence of an assurance of a safe return to communities, ex-combatants may consider it worthy to go back to the “bush” and combat life. The return of armed groups to fighting might occur because periods of conflicts or social instability

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<sup>81</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration,” 72.

<sup>82</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 73.

<sup>83</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 63.

<sup>84</sup> Baines, “The Haunting of Alice;” Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda.”

<sup>85</sup> Victor Igreja and Beatrice Dias-Lambranca, “Restorative Justice and the Role of Magamba Spirits in Post-Civil War Gorongosa, Central Mozambique,” in *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter, Handbook, SE-103 34 (Stockholm Sweden: International IDEA, 2008), 67.

may create “unsettled lives” where different ideologies often compete with other sets of beliefs.<sup>86</sup> Ex-combatants may, therefore, adhere to a given ideology that may push them back into fighting. In such situations of unsettled periods, societies need to reassert cultural norms that provide order to social relations and interactions. Hence, while providing economic opportunities and other state-led interventions might help reintegrate ex-combatants, customary justice could help reaffirm community values, which sends the signal to other rebel members and combatants that “should they return home, they will be welcomed and forgiven.”<sup>87</sup> On this basis, customary justice ceremonies could build the foundation to reduce recidivism and prevent combatants from returning to violent conflict, thereby substantially eliminating the risk of conflict recurrence.

### 5.3.1.2 Customary Mediated Peace Agreements

In the liberal peace framework, it is assumed that most peace processes and other measures to terminate armed conflict and prevent it from reoccurrence occur at the national level. These processes often involve negotiated political settlement among state apparatuses, political elites, high-level rebel leaders, and sometimes with the support of the international community. However, efforts to terminate conflict and prevent it from reoccurring could be thought of in terms of local peace agreements, which are often mediated at the local level. Andrieu observed that locally negotiated peace agreements could create local zones of civility or democracy in parts.<sup>88</sup>

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<sup>86</sup> Swidler, “Culture in Action,” 278–80.

<sup>87</sup> Baines, “The Haunting of Alice,” 110.

<sup>88</sup> Kora Andrieu, “Civilizing Peacebuilding: Transitional Justice, Civil Society, and the Liberal Paradigm,” *Security Dialogue* 41, no. 5 (October 14, 2010): 545, <https://doi.org/10.1177/0967010610382109>; Richard L. Sklar, “Developmental Democracy,” *Comparative Studies in Society and History* 29, no. 4 (October 1987): 686–714, <https://doi.org/10.1017/S0010417500014845>.

Customary mediated peace agreements are locally based and are rooted in traditional cultural beliefs and norms. Such peace agreements are vows between warring parties to end hostilities, which are often facilitated by traditional indigenous institutions and local leaders such as tribal elites, chiefs, and other community elders. The content of these agreements varies, but they commonly include addressing inter-communal grievances, community feuds, or tit-for-tat killings commonly associated with insurgencies.<sup>89</sup> As Lederach argued, these local peace agreements are characterized by a reliance on local elders who often engage in “lengthy oral deliberations” regarding the immediate safety and survival concerns of the masses of the population at the local level.<sup>90</sup>

Unlike national-level peace agreements, the agreements made in customary mediated peace agreements are often verbal declarations and assurances. The traditional elders from the various communities make verbal declarations and vow to stop the conflict, live in harmony, and that the killing will not be renewed.<sup>91</sup> The agreements are affirmed as a social contract through rituals and customary ceremonies. While the nature of the ceremonies and ritual practices differ across ethnic groups, weapons and other instruments of war such as guns, spears, bows, and arrows are collected in most situations. The collected items of war are bent, broken, and then buried or thrown into a river.<sup>92</sup> The parties

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<sup>89</sup> Laura Wise, Christine Bell, and Robert Forster, “Local Peace Processes: Opportunities and Challenges for Women’s Engagement” (UN Women, 2019), 2; available from <https://www.politicalsettlements.org/wp-content/uploads/2019/08/PA-X-Spotlight-Local-Peace-Processes-Digital.pdf>.

<sup>90</sup> Lederach, *Building Peace*, 52–53.

<sup>91</sup> Adan Mohamud, Isabella Masinde, and Ruto Pkalya, “Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet” (Intermediate Technology Development Group - Eastern Africa, January 2004), 38, file:///C:/Users/ibayo/Downloads/4d927e25-5e00-4626-a7a3-12b32e33baf9.pdf.

<sup>92</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration”; Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*.

seal the agreement with oaths and ritual ceremonies, which mark the “official” end to the hostilities. The rituals administered are often embedded in the cultural and traditional belief systems and norms of expectations of the communities involved.<sup>93</sup>

The verbal declarations made in the ceremonies are morally binding, and they become the inter-cultural codes of conduct that guide future inter-communal interaction of the societies concerned. Future interactions are guided by the adverse consequence of defying the agreement, and community members actively seek non-violent ways to resolve grievances. As a compliance measure, traditional elders from all the relevant communities involved in the peace pact will make incantations and invoke ancestral spirits to “punish” any group or community that might defy the peace pact. In some cases, material compensations are required when a community reneges on the peace pact.<sup>94</sup> It is important to note that it is not the cost of the material compensation *per se* that serves as a compliance or deterrent mechanism that prevents the reversion of armed violence. The enforcement of these traditional peace agreements lies in the belief in the supernatural powers of ancestral spirits and other cultural taboos invoked during the rituals to reaffirm communal values. These rituals are “considered a highly sacred act that evokes ancestors and requires that, once the ritual is completed, no further blood may be shed.”<sup>95</sup> “In the act of bending the spear, the spirits of both sides are evoked and promised killings would stop. If, without due cause, conflict started again, the tip of the spear would turn back against the aggressor.”<sup>96</sup>

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<sup>93</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*.

<sup>94</sup> Mohamud, Masinde, and Pkalya, “Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet,” 38.

<sup>95</sup> Baines, “The Haunting of Alice,” 107.

<sup>96</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 30

The ancestral supernatural powers are believed to be beyond the individual and could affect a whole clan, ethnic group, or community when invoked.<sup>97</sup>

In many parts of the world, especially in Africa, these customary mediated peace agreements have maintained peace between groups for many years. For instance, it is to a customary mediated peace pact between the Pokot and Samburu communities in Kenya called a *miss*, which was brokered about a hundred years ago, that the current peace between the two communities is attributed.<sup>98</sup> This agreement solidified peace between the two groups, and it meant enough that peace has held for a century. A similar *miss* was brokered in 2000 between the Pokot and their neighbors in Uganda, the Sabiny, ensuring a cordial relationship between the two communities.<sup>99</sup> In Acholi culture, the *gomo tong*—the bending of spears—was an interethnic ritual that was performed to end violence between a number of neighboring groups, in which each group bent a spear to signal a commitment not to return to armed violence.<sup>100</sup> *Gomo tong* was a “vow by both sides evoking ‘the living dead’ and promising that such killings would not be repeated.”<sup>101</sup> A *gomo tong* was carried out in 1985 between the Acholi, Alur, Lugbara, and Madi, and that peace continues at the time of writing.<sup>102</sup>

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<sup>97</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*.

<sup>98</sup> Mohamud, Masinde, and Pkalya, “Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet,” 38.

<sup>99</sup> Karimi, “Indigenous Democracy,” 39.

<sup>100</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, 91.

<sup>101</sup> Harlacher et al., *Traditional Ways of Coping in Acholi*, 91. In-depth case studies of some of these customary justice practices are provided in chapter 6.

<sup>102</sup> Sverker Finnström, *Living With Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda* (Uppsala: Uppsala Studies in Cultural Anthropology, 2003), 299; see also Dennis Pain, *“The Bending of Spears”: Producing Consensus for Peace & Development in Northern Uganda* (London, UK: International Alert, 1997).



Customary mediated peace agreements could emerge for several reasons. First, local peace agreements could come about when the state has limited influence or has lost its trust and legitimacy in certain high-intensity fighting areas. This might be the case when the state is an active perpetrator of violence in those areas. In this situation, traditional leaders and indigenous institutions hold a higher degree of trust and legitimacy with conflict parties. Customary justice mechanisms and indigenous institutions become important arenas of power and legitimacy that could be deployed effectively to dissuade local armed actors from engaging in abuses and preventing the repetition of violations. Second, the state's lack of political will or a mere abdication of duty may spur local actors to take up peacemaking responsibilities in their communities. Because most contemporary conflicts are nested in local-level conflicts, when national-level peace negotiations stall, local peace processes could remain ongoing and maybe the bedrock from which the national-level peace could emerge. Third, at times too, local peace agreements could emerge due to exhaustion since war is experienced at the grassroots level "with great immediacy, both in terms of violence and trauma... as people (warring parties often) live in close proximity and continued interdependency."<sup>103</sup>

Hence, in discussing measures to prevent the repetition of armed violence, customary mediated peace agreements could create local zones of peace, which could stop hostilities between armed groups. The sophisticated cultural beliefs guide local communities' moral order, and when a community reneges on a customary mediated agreement, it is believed a misfortune will befall the offending community.<sup>104</sup> Hence, the

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<sup>103</sup> Lederach, *Building Peace*, 55.

<sup>104</sup> Baines, "Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration," 72.

“punishment” and the communal consequences associated with violating such customary vows and rituals could serve as dissuasive measures to prevent future conflicts.

As I discussed above, the notion of the hybridity of violent conflict holds that, although most contemporary armed conflicts and civil wars may have a national character, they are often fluid and entangled in complex local conflict dynamics. There are often spillover effects, and violence is not confined to one community. Things like weapons and armed groups could easily cross from one community to another. These spillover effects occur because local communities are often inter-connected socially and culturally. The fluidity and inter-communal dimensions in recent armed conflicts meant that these conflicts need more than a national-level approach to manage and address. As a result, customary mediated peace agreements could be viable options to end inter-communal hostilities, which are often nested in wider national-level conflict dynamics.

#### **5.3.1.2.1 Restorative, Relational, and Future-Oriented Customary Justice**

The draft articles on state responsibility explicitly spell out that assurances and guarantees of non-recurrence are essentially about “the reinforcement of a continuing legal relationship and the focus is on the future, not the past.”<sup>105</sup> On this basis, customary justice could be thought of as intrinsically geared at conflict prevention and non-recurrence. This is so because, although customary justice carries out several functions, including redressing past harms and punishment, they are fundamentally oriented towards restoration and continuing the future relationship between warring groups. Traditional elders often show

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<sup>105</sup> James Crawford, “Fourth Report on State Responsibility,” in *Yearbook of the International Law Commission 2001*, International Law Commission, vol. II Part One, Fifty-Third Session, A/CN.4/SER.A/2001/Add.1 (New York and Geneva: United Nations, 2007), 90; available from [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2001\\_v2\\_p2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf).

extreme care to “limit as much as possible any disruption in the social equilibrium.”<sup>106</sup> The “cooperation between conflict parties in the future has to be guaranteed.”<sup>107</sup> To guarantee future cooperation between conflict parties, communities often take deliberate acts necessary for the community “to save face and to restore personal and communal harmony.”<sup>108</sup>

The restorative principles and the focus on maintaining future relationships allow for armed conflict to be viewed as an unwelcome disturbance to the community’s balance and harmony, requiring corrective intervention by elders and community leaders.<sup>109</sup> Restoring future relationships is guided by the principle of justice in which the whole group to which an individual belongs takes the guilt and responsibility for their member’s wrongdoing.<sup>110</sup> Therefore, armed conflict could be prevented through the following: 1) collective guilt and responsibility could serve a dissuasive function by creating social control and accountability mechanism, which could redress violations and prevent conflict recurrence; 2) the communal orientations of customary justice mean communities tend to have a shared destiny and a common sense of collective security. Particularly, community members feel obligated to draw on their customary justice to maintain their own security and prevent conflict recurrence when the state loses its moral obligation to provide security. Each of these two points is discussed in detail below.

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<sup>106</sup> Guy Oliver Faure, “Traditional Conflict Management in Africa and China,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 163.

<sup>107</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding,” 439.

<sup>108</sup> “National Institute of Justice Restorative Justice Symposia Summary” (U.S. Department of Justice, 1998), 12; available from <https://www.ncjrs.gov/pdffiles1/nij/248890.pdf>.

<sup>109</sup> Faure, “Traditional Conflict Management in Africa and China,” 159; see also “National Institute of Justice Restorative Justice Symposia Summary” (U.S. Department of Justice, 1998), 13; available from <https://www.ncjrs.gov/pdffiles1/nij/248890.pdf>.

<sup>110</sup> Faure, “Traditional Conflict Management in Africa and China,” 163.

### 5.3.2.3.1 The Communal Nature of Customary Justice could Serve as a Dissuasive Measure to Non-Recurrence

In order to restore future relationships, customary justice places a high value on communal life. “[M]aintaining positive relations within the society is a collective task in which everyone is involved.”<sup>111</sup> Customary justice conceives the individual as bounded through kin-relations, not only to their community but also to the spirit world. The spirit world is believed to have the dual power to inflict suffering and, at the same time, heal and restore the relationship between individuals and communities that have been divided by war.<sup>112</sup> Such an understanding of selfhood is what Ross described as embedded and relational.<sup>113</sup> In other words, people and their communities are connected, and communities are not merely a collection of individuals, but their “existence” is intricately linked based on reciprocity and mutual exchange of privileges and obligations.<sup>114</sup>

The view of the individual as embedded and relational is expressed in the traditional belief of *ubuntu*. In *ubuntu*'s traditional practice, when an individual commits a severe crime like murder, the entire community feels obligated to share in the blame.<sup>115</sup> In situations of conflict, too, “each member of the community is linked to each of the disputants, be they, victims or perpetrators... and a law-breaking individual thus transforms

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<sup>111</sup> Timothy Murithi, “Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu,” *Journal of Pan African Studies* 1, no. 4 (2006): 29; Tim Murithi, “A Local Response to the Global Human Rights Standard: The Ubuntu Perspective on Human Dignity,” *Globalisation, Societies and Education* 5, no. 3 (November 1, 2007): 277–86, <https://doi.org/10.1080/14767720701661966>; see also “National Institute of Justice Restorative Justice Symposia Summary,” 12.

<sup>112</sup> Igreja and Dias-Lambranca, “Restorative Justice and the Role of Magamba Spirits in Post-Civil War Gorongosa, Central Mozambique,” 68–69.

<sup>113</sup> Rupert Ross, *Indigenous Healing: Exploring Traditional Paths* (Penguin Canada, 2014).

<sup>114</sup> Kariuki Muigua, “Traditional Conflict Resolution Mechanisms and Institutions” (Kariuki Muigua and Company Advocates, October 2017), 5; available from <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf>.

<sup>115</sup> Murithi, “Practical Peacemaking Wisdom from Africa.”

his or her group into a law-breaking group.”<sup>116</sup> During dispute resolution, if there is some form of compensation owed, the offender’s clan is often responsible for mobilizing payment of that compensation imposed by customary leaders as part of remedial measures. Therefore, the collective nature of taking responsibility for crimes and other violations creates an obligation owed to the community by the offender.<sup>117</sup> In this case, the offender is brought under a form of social control, and the clan or community members make sure that the “offender” does not revert to committing crimes and violations in the future.<sup>118</sup> Family and clan members make efforts to bring their members under social control because they deem it necessary to regain dignity, trust and restore communal harmony, which might have been lost due to their members’ “crimes.”<sup>119</sup>

#### **5.3.2.3.2 Communities could Pursue Socially Regenerative Pathways to Prevent Conflict**

To prevent conflict reoccurrence and foster future coexistence, communities take actions that reinforce mutually beneficial relationships that self-replicate to build inclusive and stronger communities. I call these self-replicating mutually beneficial relationships, socially regenerative pathways to non-recurrence. Socially regenerative pathways to non-recurrence invoke a relational view of a community that includes organic living, reciprocity, and solidarity instead of an individual rights-based view of a liberal democratic framework.<sup>120</sup> A socially regenerative model is based on cultural values and attitudes in which community members’ daily life and interactions are “inextricably bound up,”

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<sup>116</sup> Murithi, “Practical Peacemaking Wisdom from Africa.” 29.

<sup>117</sup> Boege, “Potential and Limits of Traditional Approaches in Peacebuilding.”

<sup>118</sup> Murithi, “African Approaches to Building Peace and Social Solidarity.”

<sup>119</sup> “National Institute of Justice Restorative Justice Symposia Summary,” 12.

<sup>120</sup> Muigua, “Traditional Conflict Resolution Mechanisms and Institutions.”

thereby fostering a climate within which peace could flourish.<sup>121</sup> In such a model, the social set-up is such that community members' security is highly dependent on their kin group or community.<sup>122</sup> The dependence on one's kin group or community to provide security is especially crucial when the state retreats or jeopardizes its moral obligation to provide security guarantees to its citizens. In situations where there has been a retreat of the state, which often occurs in most fragile states, community members evoke their shared social order to keep peace and ensure that society does not revert to armed violence.<sup>123</sup>

Liberal democratic efforts to prevent the recurrence of armed conflict often pay attention only to perpetrator structures and state security institutions.<sup>124</sup> These institutional structures and state-level mechanisms are not designed to foster social regenerative pathways such as re-building social solidarity and reciprocity that promote community support systems that could be relied upon when the state fails in its duty to provide security. Customary justice approaches could fill this gap by pursuing pathways that strengthen group relations in ways that produce and replicate shared beliefs, common sentiments, and norms that provide a rationale for "letting go revenge," which is significant to prevent the reversion of armed conflict.<sup>125</sup> In the aftermath of the conflict in Mozambique, for instance, traditional healers and local chiefs urged the war victims "to rule out *ku hirindzira*

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<sup>121</sup> Murithi, "Practical Peacemaking Wisdom from Africa," 28.

<sup>122</sup> Christopher Agulanna, "Community and Human Well-Being in an African Culture," *Trames* 14, no. 3 (2010): 290.

<sup>123</sup> Joanna R. Quinn, "The Impact of State Abdication on Transitional Justice: When Non-State Actors Fill the Post-Transition Gap," *Peacebuilding* 9, no. 2 (2021): 114-128, <http://dx.doi.org/10.1080/21647259.2021.1895626>.

<sup>124</sup> Mayer-Rieckh, "Guarantees of Non-Recurrence," 435.

<sup>125</sup> Murithi, "Practical Peacemaking Wisdom from Africa."

(revenge)... [Instead] to do *ku lekererana* (to forgive one another) as the best strategy to” prevent conflict and create the space to restore social relations.<sup>126</sup>

## **Conclusion**

In this chapter, I advanced three theoretical arguments regarding how customary justice could work towards measures of non-recurrence. First, I argued that for DDR to disable the capacity for abusive institutions to effectively prevent conflict recurrence, reintegration efforts have to be culturally sensitive and rooted in the social norms of expectations. Customary justice approaches could provide effective ways for ex-combatants to reconstruct their lives after years of combat life. This prevents ex-combatant from remobilizing and engaging in future violence. Second, as armed conflicts increasingly become complex, diffused, and entangled in a web of actors, customary justice approaches could create local zones of peace, which could help stop inter-ethnic hostilities. Customary justice approaches could become important avenues for measures of non-recurrence because the cultural beliefs and moral order which are invoked to broker local peace agreements dissuade the relevant communities from engaging in future violence. Third, customary justice could also prevent conflict recurrence because they are fundamentally oriented towards maintaining future relationships among people who had been divided because of conflict. Because customary justice tends to focus on maintaining community harmony and future interactions, communities often take a collective responsibility to correct their members’ wrongs and serve as a collective social accountability mechanism

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<sup>126</sup> Igreja and Dias-Lambranca, “Restorative Justice and the Role of Magamba Spirits in Post-Civil War Gorongosa, Central Mozambique,” 67.

that could be a powerful tool in preventing community members from engaging in armed violence.

It is important to clarify that, while I highlighted above some of the ways customary justice could work towards measures of non-recurrence, I do not aim to make a causal argument. Thus, instead of “intervention A will lead to outcome B,” my argument is rather, that “intervention A may open up a space for action in this location, which might have an effect on people and relationships elsewhere, which may open up spaces for further action.”<sup>127</sup> In other words, my working propositions are primarily ontological. They are normative arguments regarding the nature of being and the constitution of communal societies, who often draw on customary justice mechanisms to deal with armed conflict. As Mayer-Rieckh warned, conflict “non-recurrence can never be fully guaranteed by any set of measures.”<sup>128</sup> More theorizing and close contact studies are needed to establish whether these theoretical propositions will have the intended effects. In the next chapter, I draw on documented case studies to provide an in-depth illustration of how customary justice might work to terminate conflict and prevent its recurrence.

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<sup>127</sup> Danny Burns, “Facilitating Systemic Conflict Transformation Through Systemic Action Research,” in *The Non-Linearity of Peace Processes: Theory and Practice of Systemic Conflict Transformation*, ed. Daniela Körppen, Norbert Ropers, and Hans J. Giessmann, 1st ed. (Michigan: Verlag Barbara Budrich, 2011), 104, <https://doi.org/10.2307/j.ctvbkjz66>.

<sup>128</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 432.



## Chapter 6

### 6 Customary Justice and Measures of Non-Recurrence: Reflecting on the Experiences from Northern Uganda

#### 6.1 Introduction

No individual member of a given community lives as though detached from a history of that particular community to which one belongs. This sense of belonging to a past is not only treasured by members of a given community, as it fully explains their origin (both mythical and historical); it is also what shapes their primary conviction of good or evil, what they hold onto as ‘values’ as well as all that constitutes the justification for their acts. What is even more specific is the fact that a people’s past becomes the most referential element to reckon with in the aftermath of a violent conflict.<sup>1</sup>

In chapter 5, I constructed three theoretical propositions to illustrate how customary justice could prevent violent conflict reoccurrence. First, customary justice could address the reintegration component of ex-combatants more efficiently, reducing the risk of reprisal from community members. Second, traditional authorities and fragmented armed actors could negotiate “localized” peace agreements, which could have wider implications in stopping violence and preventing conflict reoccurrence. Third, the future-looking orientation of customary justice approaches makes communities adopt practices that “assure” the continuation of future relationships among warring parties. But as the above quotation aptly illustrates, one cannot appreciate how the Acholi customary justice practices could be useful in achieving the above propositions without the history of the northern Uganda conflict and knowledge of the Acholi sociopolitical system. In large part, the shared history and socio-political system, and common identity shape the values and

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<sup>1</sup> David-Ngendo Tshimba, “Beyond the Mato Oput Tradition: Embedded Contestations in Transitional Justice for Post-Massacre Pajong, Northern Uganda,” *Journal of African Conflicts and Peace Studies* 2, no. 2 (December 1, 2015): 63; available from <http://dx.doi.org/10.5038/2325-484X.2.2.3>.

belief systems of the Acholi, which is very important in their effort to reckon with the aftermath of 20 years of brutal conflict.

This chapter looks specifically at the experiences of the Acholi following the 20 years of the Lord's Resistance Army (LRA) insurgency, as a lens to understand the theoretical arguments I mounted in previous chapters. This is not a conventional case study, *per se*. However, reflecting on the Acholi experiences, using what others have reported can add contexts, reify, and illustrate how the theory-building exercise in this thesis might look like in reality. Section one deals with the historical background of the northern Uganda conflict. Section two highlights discourse on the Acholi ethnic identity and their social and traditional governance institutions. Section three draws on some practical examples to illustrate how the Acholi customary practices might help terminate violence and prevent armed conflict reoccurrence.

## **6.2 Historical Background of the Northern Uganda Conflict**

As many scholars have noted, the northern Uganda conflict is a complex one—there is no consensus or one theoretical and factual account of the causes of the conflict in northern Uganda.<sup>2</sup> Hence, this section should be read as a partial account of the historical events of the conflict. Nevertheless, it is an important account as it illustrates how the Acholi of northern Uganda mainly became the victims of the brutality of the Lord's Resistance Army (LRA). And yet, the LRA emerged from the north intending to liberate the people of the north from the “National Resistance Army and on seeking revenge on behalf of the Acholi

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<sup>2</sup> James Ojera Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 88.

for the atrocities committed by soldiers [of the NRA].”<sup>3</sup> I begin by situating the northern Uganda conflict in a wider national post-colonial political context.

### 6.2.1 The Legacies of Colonialism

An important historical fact one cannot ignore in discussing the northern Uganda conflict is British colonial legacies. I must, however, caution that a discussion of the impact of British colonial rule and the historical development of the conflict does not suggest that colonialism *caused* the conflict. As many scholars have observed, the discussion of colonialism and the conflict in Uganda is important because British colonial rule predisposed the country to violent conflict by exacerbating existing inter-group differences.<sup>4</sup>

Until the British arrival, present-day Uganda was made up of centralized and decentralized states.<sup>5</sup> The centralized states were hierarchical kingdoms, with Kings as the head of the polity.<sup>6</sup> Pre-colonial centralized kingdoms included Ankole, Buganda, Bunyoro-Kitara, and Toro.<sup>7</sup> Although one cannot claim uniformity in the degree of decentralization and democratic practices, most of the decentralized states were governed by a heterarchical structure, including clan leaders, village heads, heads of hamlets, and down to the household level.<sup>8</sup> The decentralized societies included Acholi, Alur, Bugishu,

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<sup>3</sup> Refugee Law Project, “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit” (Refugee Law Project, 2014), 144.

<sup>4</sup> Robert Blanton, T. David Mason, and Brian Athow, “Colonial Style and Post-Colonial Ethnic Conflict in Africa,” *Journal of Peace Research* 38, no. 4 (July 1, 2001): 480, <https://doi.org/10.1177/0022343301038004005>; see also Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N.J: Princeton University Press, 1996); Ogenga Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, African Histories and Modernities (London, UK: Palgrave Macmillan, 2017); Samwiri Rubaraza Karugire, *A Political History of Uganda* (Nairobi: Heinemann Educational Books, 1980).

<sup>5</sup> Karugire, *A Political History of Uganda*, 1–7, 21–22.

<sup>6</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, 31–62.

<sup>7</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 32.

<sup>8</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 63–64.

Bukonjo, Karamoja, Lango, Madi, and Teso.<sup>9</sup> The Bunyoro-Kitara kingdom was considered the largest and most powerful in central and eastern Africa in the sixteenth and seventeenth centuries.<sup>10</sup> However, by the time the Europeans arrived in the late nineteenth century, the Buganda Kingdom had developed the most powerful, “elaborate and tightly knit centralized state in the region.”<sup>11</sup> When Britain officially declared a protectorate over Uganda in 1894, the Kingdom of Buganda became their main allies, perhaps due to Buganda’s powerful centralized command and control structure.<sup>12</sup>

In 1900, Britain signed the Buganda Agreement, which conferred special privileges on the Buganda Kingdom, one Kingdom among many in the Protectorate. The agreement stipulated the relationship between Buganda and the imperial power. It redefined the Kingdom’s boundaries, including annexing other territories that essentially expanded the Buganda Kingdom’s authority across the Protectorate.<sup>13</sup> To establish the colonial state, the imperial powers carried out warfare and conquest.<sup>14</sup>

In the 19th century, for example, [in a different kingdom in what is now the North-west Uganda] they killed the West Nile traditional leader, Chief Aliku, and gave military support to the Tooro Kingdom against the Bunyoro Kingdom when the latter refused to sign a cooperation agreement similar to the one the Baganda had signed. When the people of Lamogi in Acholiland rebelled against colonisation in the early 20th century, these rebellions were violently crushed. The newcomers also indirectly caused conflict in different areas of society amongst Ugandans. This occurred, for example, through the introduction of money, the subjugation of traditional leaders and Kingdoms, and the introduction of foreign religions.<sup>15</sup>

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<sup>9</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 62.

<sup>10</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 35.

<sup>11</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 45.

<sup>12</sup> Carol Summers, “Intimate Colonialism: The Imperial Production of Reproduction in Uganda, 1907-1925,” *Signs* 16, no. 4 (1991): 792.

<sup>13</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, 85; see also J. Oloka-Onyango, “The Question of Buganda in Contemporary Ugandan Politics,” *Journal of Contemporary African Studies* 15, no. 2 (July 1, 1997): 173–89, <https://doi.org/10.1080/02589009708729610>; Nakanyike B. Musisi, “Morality as Identity: The Missionary Moral Agenda in Buganda, 1877–1945,” *Journal of Religious History* 23, no. 1 (1999): 51–74, <https://doi.org/10.1111/1467-9809.00073>.

<sup>14</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, 75.

<sup>15</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 14–15.

The warfare and conquest were used to restructure and redefined many of the pre-colonial polities' territorial boundaries.<sup>16</sup> Diverse pre-colonial polities of varying forms and strengths were forcefully aggregated and lumped together with new bureaucratic chiefs appointed to take charge of the affairs of the newly constituted polities.<sup>17</sup> "Peasant communities were reproduced," and indirect rule became the model of colonial administration and domination over the colonial state.<sup>18</sup> Over time, the powers and authority of the newly appointed bureaucratic chiefs grew into patronage and coercion.<sup>19</sup> The "increasing powers of coercion and their [the appointed chiefs] accumulative control of patronage led to the emergence of a class interest," which changed the relations between the "chiefs" and the people.<sup>20</sup> The coercive indirect rule and patronage led to political and civil inequality resulting in what Mamdani calls "a mediated—decentralized—despotism."<sup>21</sup> From 1894 to 1962, Uganda's political landscape was characterized by alliance formation where the north and south were granted different privileges. For example, the north was predominantly the source of labor recruitment, while the south was much more likely to benefit from formal education.<sup>22</sup> The north-south divide evolved partly

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<sup>16</sup> Mamdani, *Citizen and Subject*, 16.

<sup>17</sup> John Tosh, "Colonial Chiefs in a Stateless Society: A Case-Study from Northern Uganda," *The Journal of African History* 14, no. 3 (1973): 474; Beverly Gartrell, "British Administrators, Colonial Chiefs, and the Comfort of Tradition: An Example from Uganda," *African Studies Review* 26, no. 1 (1983): 2, <https://doi.org/10.2307/524608>; Fredrick Kisekka-Ntale, "Roots of the Conflict in Northern Uganda," *The Journal of Social, Political and Economic Studies* 32, no. 4 (2007): 422.

<sup>18</sup> Mamdani, *Citizen and Subject*, 17.

<sup>19</sup> Joan Vincent, "Colonial Chiefs and the Making of Class: A Case Study from Teso, Eastern Uganda," *Africa: Journal of the International African Institute* 47, no. 2 (1977): 140, <https://doi.org/10.2307/1158734>.

<sup>20</sup> Vincent, "Colonial Chiefs and the Making of Class," 140.

<sup>21</sup> Mamdani, *Citizen and Subject*, 17; see also Kisekka-Ntale, "Roots of the Conflict in Northern Uganda," 428.

<sup>22</sup> Mahmood Mamdani, "Class Struggles in Uganda," *Review of African Political Economy* 2, no. 4 (November 1, 1975): 35–36, <https://doi.org/10.1080/03056247508703264>; Kisekka-Ntale, "Roots of the Conflict in Northern Uganda," 428.

due to the colonial project that reorganized the existing hierarchies within Ugandan society to support the capitalist interests that brought Uganda into the global economy for exploitation for the benefit of the imperial powers.<sup>23</sup> The division, rivalries, and alliance that characterized the colonial state “continued to pervade early political party formation in Uganda.”<sup>24</sup>

### 6.2.2 Politics and Instability in Post-colonial Uganda

Towards the end of the colonial period, the major organized political parties included the Uganda People’s Congress (UPC), The Democratic Party (DP), and the *Kabaka Yekka* (KY), which means Kabaka Alone in Luganda.<sup>25</sup> The political parties were formed along ethnic, religious, and regional divisions, which reflected the “fragmented nature of the state and the political culture of discrimination... that [had] dominated the political landscape” since colonial rule.<sup>26</sup> For instance, the UPC, was affiliated with the north and was an anti-Buganda party.<sup>27</sup> The KY was a loyalist party to King Kabaka.<sup>28</sup>

After independence, the first election occurred in 1962, which saw the UPC, under Milton Obote’s leadership, form an uneasy alliance with the KY.<sup>29</sup> The UPC/KY alliance won the majority of the seats and formed a government with a politician from Uganda’s northeast, Lango, Milton Obote as the Prime Minister, and the Kabaka Mutesa of Buganda,

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<sup>23</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N.J: Princeton University Press, 1996); Adam Branch and Zachariah Mampilly, *Africa Uprising: Popular Protest and Political Change* (London; New York: Zed Books, 2015).

<sup>24</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 19.

<sup>25</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, 135–55.

<sup>26</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, 135.

<sup>27</sup> Karugire, *A Political History of Uganda*, 166.

<sup>28</sup> Ian Hancock, “Patriotism and Neo-Traditionalism in Buganda: The Kabaka Yekka (‘The King Alone’) Movement, 1961-1962,” *The Journal of African History* 11, no. 3 (1970): 424.

<sup>29</sup> Karugire, *A Political History of Uganda*.

as President.<sup>30</sup> However, the UPC and the KY alliance was short-lived due to political and ideological difference, which led to weakness in the government, and culminated in a coup in 1966 in which many Baganda were killed, and the Kabaka fled to the UK.<sup>31</sup> Obote imposed a unitary constitution and led many reforms, including abolishing the kingdoms' independent powers and revoking the Buganda Kingdom's privileges.<sup>32</sup>

Obote began to purge the military of army officers he deemed were not loyal to him to consolidate his power.<sup>33</sup> Obote's purging spree resulted in the emergence of two camps in the army—one loyal to Obote, and the other to General Idi Amin.<sup>34</sup> Soon tensions began to emerge between the Obote camp who are overwhelmingly soldiers from Lango and Acholi on the one hand, and Idi Amin and his loyalists from West Nile, on the other hand.<sup>35</sup> The tensions culminated in Idi Amin seizing power through a coup in 1971.<sup>36</sup>

Amin governed the country with great terror and widespread violence and torture. As a *de facto* dictator, he set up a military tribunal, and gave the military powers to arrest, prosecute, and punish those Amin considered his political enemies, especially Obote's supporters from Acholi and Lango.<sup>37</sup> In 1979, Amin was overthrown by a joint military force, the Uganda National Liberation Army (UNLA) and the Tanzanian People's Defense Force (TPDF).<sup>38</sup> Following a brief interim administration, a general election took place in

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<sup>30</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda, 1979 to 2016*, 153.

<sup>31</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 162, 181.

<sup>32</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 191–94.

<sup>33</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 229.

<sup>34</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 230.

<sup>35</sup> Otunnu, *Crisis of Legitimacy and Political Violence in Uganda*, 231–33.

<sup>36</sup> Emma Leonard Boyle, "Was Idi Amin's Government a Terrorist Regime?" *Terrorism and Political Violence* 29, no. 4 (July 4, 2017): 598, <https://doi.org/10.1080/09546553.2015.1005741>.

<sup>37</sup> Boyle, "Was Idi Amin's Government a Terrorist Regime?" 601–4.

<sup>38</sup> Sabiti Makara, Lise Rakner, and Lars Svåsand, "Turnaround: The National Resistance Movement and the Reintroduction of a Multiparty System in Uganda," *International Political Science Review* 30, no. 2 (March 1, 2009): 187, <https://doi.org/10.1177/0192512109102436>. For an analysis of why the conflict took on a regional dimension when Tanzania became involved, see George Roberts, "The Uganda–Tanzania War, the

1980. Only four political parties competed in the election.<sup>39</sup> Amidst allegations of election rigging, the UPC won the election, which marked the second coming of Obote as Uganda's President.<sup>40</sup>

Obote's second term was marked by a roughly equal number of human rights abuses, torture, looting, and widespread violence as Amin's term.<sup>41</sup> In 1981 the National Resistance Army led by Yoweri Kaguta Museveni, an ethnic Ankole from Uganda's southwest, launched an insurgency against the government of Obote in Luwero.<sup>42</sup> Obote continued to face many internal tensions and was unable to mount a unified force against the NRA. In particular, Obote was accused by the Acholi of favoring his own ethnic group, the Langi.<sup>43</sup> The internal divisions culminated in a military coup in 1985 led by two Acholi commanders, Bajilio Olara Okello and Tito Okello.<sup>44</sup> A Military Council was announced, with Tito Okello as the Chairman and Head of State, which governed Uganda between August 1985 and January 1986.<sup>45</sup> Amidst a continued demands and attacks on the government, The Military Council agreed to peace talks with the NRA in Nairobi, Kenya,

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Fall of Idi Amin, and the Failure of African Diplomacy, 1978–1979,” *Journal of Eastern African Studies* 8, no. 4 (October 2, 2014): 692–709, <https://doi.org/10.1080/17531055.2014.946236>.

<sup>39</sup> Justin Willis, Gabrielle Lynch, and Nic Cheeseman, “‘A Valid Electoral Exercise’? Uganda’s 1980 Elections and the Observers’ Dilemma,” *Comparative Studies in Society and History*. 59, no. 1 (January 25, 2017): 8, <https://doi.org/10.1017/S001041751600058X>.

<sup>40</sup> Willis, Lynch, and Cheeseman, “‘A Valid Electoral Exercise’? Uganda’s 1980 Elections and the Observers’ Dilemma,” 18.

<sup>41</sup> Aili Mari Tripp, “The Changing Face of Authoritarianism in Africa: The Case of Uganda,” *Africa Today* 50, no. 3 (2004): 4.

<sup>42</sup> Frank Schubert, “‘Guerrillas Don’t Die Easily’: Everyday Life in Wartime and the Guerrilla Myth in the National Resistance Army in Uganda, 1981–1986,” *International Review of Social History* 51, no. 1 (April 2006): 94, <https://doi.org/10.1017/S0020859005002348>.

<sup>43</sup> Stefan Lindemann, “Just Another Change of Guard? Broad-Based Politics and Civil War in Museveni’s Uganda,” *African Affairs* 110, no. 440 (July 1, 2011): 393–94, <https://doi.org/10.1093/afraf/adr023>; Amii Omara-Otunnu, *Uganda’s Second Coup: The Reassertion of Military Muscle (1985)*, St Antony’s (London: Palgrave Macmillan UK, 1987), 163.

<sup>44</sup> Lindemann, “Just Another Change of Guard?” 394.

<sup>45</sup> Jimmy K. Tindigarukayo, “Uganda, 1979–85: Leadership in Transition,” *The Journal of Modern African Studies* 26, no. 4 (1988): 618.



which resulted in a peace agreement in December 1985.<sup>46</sup> The peace agreement fell apart and the NRA renewed its assault against the government of Okello, leading to the defeat and overthrow of the Military Council in January 1986.<sup>47</sup> At that time, Yoweri Museveni, who was then leader of the NRA/NRM, became and has remained President of Uganda up to the time of writing.

### **6.2.3 The War in Northern Uganda: The National Resistance Army and the Lord's Resistance Army (1986-2006)**

After the capture of power from Okello in 1986, the National Resistance Army (NRA) under the leadership of Museveni pursued a “revenge campaign” against the north over “alleged atrocities committed by the former Northern-led governments [the Okello, Obote, and Amins’ regimes.]”<sup>48</sup> The NRA embarked on Operation Fagia (to sweep), especially in Kitgum and Gulu districts in the north, leading to torture, abduction, burning of villages, and killing many civilians and former soldiers with the UNLA.<sup>49</sup> To resist the NRA atrocities in the north, former UNLA soldiers regrouped in southern Sudan and formed the Uganda People’s Democratic Movement/Army (UPDM/A) with the support of the Sudanese.<sup>50</sup> The UPDA launched an attack on the NRA, and atrocities and violence in the north continued until a Peace Accord was brokered by a civil society organization, the

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<sup>46</sup> Tindigarukayo, 619; Omara-Otunnu, *Uganda’s Second Coup*, 168.

<sup>47</sup> Schubert, ““Guerrillas Don’t Die Easily,”” 96; Tindigarukayo, “Uganda, 1979-85,” 621.

<sup>48</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 138.

<sup>49</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 138.

<sup>50</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 141.

Goodwill Peace Mission, in June 1988 in Gulu.<sup>51</sup> The Peace agreement resulted in members of the UPDA being integrated into the NRA.<sup>52</sup>

However, not every member of the UPDA supported the Peace Accord with the NRA. As a result, many soldiers of the UPDA broke ranks and formed splinter insurgent groups with their own identities.<sup>53</sup> Some of these splinter groups included “*Ci-lil* (Go and spread the rumors [to the NRA]), *Cel-ibong* (Shoot and charge/feel [the NRA soldiers to see whether they are dead]) and *Agoyo-ayaro* (Smash [the NRA] completely).”<sup>54</sup> Most of the insurgent groups that opposed the Peace Accord joined what was known as the Trinity Wars, led by Alice Auma’s (Lakwena) Holy Spirit Mobile Forces (HSMF), which continued to fight the NRA.<sup>55</sup>

Joseph Kony, who was a key member of the HSMF launched the Lord’s Resistance Army (LRA) after Alice was forced into exile in Kenya.<sup>56</sup> The NRA had committed many atrocities against the Acholi communities, and because of their promise to seek revenge against the NRA, the LRA initially gained widespread support among the Acholi. Many former HSMF followers and soldiers joined the LRA to continue the rebellion to fulfill

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<sup>51</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 142.

<sup>52</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 142.

<sup>53</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 143.

<sup>54</sup> “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 143.

<sup>55</sup> “Lakwena” is believed to be a spirit, and Alice is the spiritual medium for Lakwena. Alice emerged as the leader of a group known as the Holy Spirit Mobile Forces, and she was popularly known as Alice Lakwena. “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit,” 143, 145, 146.

<sup>56</sup> Behrend, *Alice Lakwena and the Holy Spirits*, 192; For a detailed discussion of the LRA origins, see Tim Allen and Koen Vlassenroot, eds., *The Lord’s Resistance Army: Myth and Reality*, Illustrated edition (London: Zed Books, 2010).

HSMF's goal of liberating the "Acholi people and Uganda, [from the terror of the NRA]."57 Joseph Kony initially followed the principles of the HSMF and claimed he was directed by the Holy Spirit to "teach the Acholi to follow the Ten Commandments."58 However, Kony does not seem to have been motivated by religion and soon abandoned the HSMF's prayers and stones strategy and launched a full-scale violent insurgency against the NRA.59

The NRA responded to Kony's insurgency by unleashing violence and terror on civilian populations in Acholi, especially in Gulu and Kitgum.60 The NRA's violent campaign made "the [civilian] general population [in Acholi] afraid to associate with Kony."61 The fear in the civilian population to associate with Kony made him feel betrayed by the Acholi. He, therefore, responded with violence, looting, abduction, and forced recruitment of civilians into the LRA.62 The LRA brutality and forced recruitment made it impossible for many people in Acholi communities, including children, to stay uninvolved since they would be suspected of collaborating with the NRA. Many men, women, and children were drawn into combat. As a result, "everybody" in Acholi was affected in one

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<sup>57</sup> "Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit," 148; see also Ruddy Doom and Koen Vlassenroot, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda," *African Affairs* 98, no. 390 (1999): 5–36.

<sup>58</sup> "Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit," 150. The basic principle of the HSMF was the belief in prayer and the use of stones and "holy water," to protect HSMF soldiers from the enemy—the NRA. The belief in prayer was also a tactic to cultivate internal cohesion among the rebels. See Tim Allen and Koen Vlassenroot, eds., *The Lord's Resistance Army: Myth and Reality*, Illustrated edition (London: Zed Books, 2010); Fredrick Kisekka-Ntale, "Roots of the Conflict in Northern Uganda," *The Journal of Social, Political and Economic Studies* 32, no. 4 (2007): 433; and Behrend, *Alice Lakwena and the Holy Spirits*.

<sup>59</sup> For a detailed discussion of the tactics of the LRA see Allen and Vlassenroot, *The Lord's Resistance Army*.

<sup>60</sup> Kasajja Phillip Apuuli, "The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda," *Criminal Law Forum* 15, no. 4 (December 1, 2004): 392–93, <https://doi.org/10.1007/s10609-005-2232-4>.

<sup>61</sup> "Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit," 151.

<sup>62</sup> Apuuli, "The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda," 394.

way or the other, either actively fighting in the bush or in a supporting role.<sup>63</sup> For nearly two decades, the LRA-NRA war in the north caused massive human rights violations and widespread atrocities on the civilian population, creating a situation where many abductees were forced to turn into killers.<sup>64</sup>

The accurate figures of the number of people killed in the conflict vary depending on the reporting institution, however, it is generally accepted that the northern Uganda conflict was one of the most horrific atrocities in Africa.<sup>65</sup> For example, in 2003, the United Nations Under-Secretary-General for Humanitarian Affairs described the situation in northern Uganda as “one of the worst humanitarian crises in the world.”<sup>66</sup> Estimates put the people who were internally displaced by the conflict to be between 1.8 and 2 million,

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<sup>63</sup> Zachary Lomo and Lucy Hovil, “Behind the Violence: Causes, Consequences and the Search for Solutions in Northern Uganda” (Institute for Security Studies, 2004), 22–23; available from <https://issafrica.s3.amazonaws.com/site/uploads/Mono99.pdf>.

<sup>64</sup> Owor Lino Ogora, “A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda,” *Uganda Living Law Journal* 6 (2008): 6; see also Doom and Vlassenroot, “Kony’s Message.” A number of scholars have undertaken a detailed analysis of the LRA-NRA conflict highlighting their motivations, objectives, and interests. Such a detailed analysis of the LRA-NRA conflict is beyond the scope of the present study. For detailed analysis of the LRA-NRA conflict, see Anthony Vinci, “Existential Motivations in the Lord’s Resistance Army’s Continuing Conflict,” *Studies in Conflict & Terrorism* 30, no. 4 (April 1, 2007): 337–52, <https://doi.org/10.1080/10576100701200173>; Frank Van Acker, “Uganda and the Lord’s Resistance Army: The New Order No One Ordered,” *African Affairs* 103, no. 412 (July 1, 2004): 335–57, <https://doi.org/10.1093/afraf/adh044>; Allen and Vlassenroot, *The Lord’s Resistance Army*; Advisory Consortium on Conflict Sensitivity (ACCS, “Northern Uganda Conflict Analysis” (Advisory Consortium on Conflict Sensitivity, 2013), available from [https://reliefweb.int/sites/reliefweb.int/files/resources/ACCS\\_Northern\\_Uganda\\_Conflict\\_Analysis\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/ACCS_Northern_Uganda_Conflict_Analysis_Report.pdf); Anthony Vinci, “The Strategic Use of Fear by the Lord’s Resistance Army,” *Small Wars & Insurgencies* 16, no. 3 (2005): 360–81, <https://doi.org/10.1080/09592310500221336>; Kristof Titeca and Theophile Costeur, “An LRA for Everyone: How Different Actors Frame the Lord’s Resistance Army,” *African Affairs* 114, no. 454 (January 1, 2015): 92–114, <https://doi.org/10.1093/afraf/adu081>.

<sup>65</sup> “Northern Uganda: Understanding and Solving the Conflict” (Brussels/Nairobi: International Crisis Group, April 14, 2004); available from <https://d2071andvip0wj.cloudfront.net/77-northern-uganda-understanding-and-solving-the-conflict.pdf>; “Counting the Cost: Twenty Years of War in Northern Uganda” (Civil Society Organisations for Peace in Northern Uganda, March 30, 2006), <file:///C:/Users/ibayo/Downloads/DCB8DB47FF361247C1257141004EB173-csopnu-uga-30mar.pdf>; Thomas P. Ofcansky, *Uganda: Tarnished Pearl Of Africa* (Boulder, Col: Routledge, 1999).

<sup>66</sup> “Head of UN Humanitarian Affairs Office Visits Northern Uganda,” United Nations Meetings Coverage and Press Releases, November 10, 2003, para. 6; available from <https://www.un.org/press/en/2003/af750.doc.htm>.

a figure that represented more than 80% of the population in the region.<sup>67</sup> As of 2006, the number of camps for internally displaced people in northern Uganda stood at 202.<sup>68</sup> Beyond an unknown number of direct combat deaths, reports estimate that about 129 people died daily in the internally displaced peoples' camps due to poor sanitation, health care, and deplorable living conditions within the camps.<sup>69</sup> Amnesty International estimates more than 25,000 children were abducted by the LRA and carried into the bush as child soldiers during the conflict.<sup>70</sup>

Despite the horrific suffering, abduction, and cycle of killings of many northern Ugandans, the actions of the Government of Uganda (GOU) suggest it had little desire for a genuine attempt to end the conflict. The lack of capacity or unwillingness of the GOU to defend the population and end the LRA insurgency was evident in the repeated rhetoric of high-ranking officers that the LRA had been defeated and the war was over.<sup>71</sup> Some of the GOU counter-insurgency campaigns were considered damaging and woefully failed to protect the civilian population from the LRA atrocities. For example, the decision to force the people from Acholi – about 200,000 people – into supposedly protected camps “in effect surrendered much of the countryside to the LRA.”<sup>72</sup> The GOU's army failed to protect the civilian populations within these “protected” camps. Scholars have offered several explanations for why the Museveni's government failed to protect the Acholi

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<sup>67</sup> “Counting the Cost: Twenty Years of War in Northern Uganda,” 7.

<sup>68</sup> “Counting the Cost: Twenty Years of War in Northern Uganda,” 7.

<sup>69</sup> “Counting the Cost: Twenty Years of War in Northern Uganda,” 7, 14–16.

<sup>70</sup> “Uganda: Child ‘Night Commuters,’” Amnesty International, March 26, 2011, para. 5; available from <https://www.amnestyusa.org/reports/uganda-child-night-commuters/>.

<sup>71</sup> “Northern Uganda: Understanding and Solving the Conflict,” 14.

<sup>72</sup> “Northern Uganda: Understanding and Solving the Conflict,” 14; see also Tim Allen, “War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Interventions” (London, UK: Crisis States Research Centre, London School of Economics, February 2005); available from [https://www.files.ethz.ch/isn/56421/2005-02\\_AllenICCRReport.pdf](https://www.files.ethz.ch/isn/56421/2005-02_AllenICCRReport.pdf).

civilian population. One explanation is that the “continuation of the conflict provides a crisis environment that enables the government” to adopt arbitrary policies to consolidate its political power.<sup>73</sup> The majority of the NRA constituency was also based in the south, and the Acholi, who are northerners, have been viewed by the NRA as the enemy against Museveni and his government.<sup>74</sup> The LRA’s killing and abduction continued within the protected camps, which further threaten the peace and security of the people in the Acholi sub-region.<sup>75</sup>

In response to sustained pressure from the international community, civil society actors, and several successive attempts at peace talks, the GOU and the LRA convened peace talks in Juba, South Sudan, in 2006.<sup>76</sup> Although the peace talks were beset with problems, a peace agreement was eventually signed between the Republic of Uganda and the Lord's Resistance Army in Juba, in what was then Sudan, on 29 June 2007, paving the way for reconciliation efforts to begin.<sup>77</sup>

As the guns fell silent and ex-fighters began returning from the bush, the blurred lines between the victim and perpetrator dichotomy became staggering and revealing. An uneasy tension and strained relations exist among, for instance, those who felt they had no choice but to join either the rebels or the government forces; those who were perceived to

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<sup>73</sup> International Crisis Group, “Northern Uganda: Understanding and Solving the Conflict” (Brussels/Nairobi: International Crisis Group, April 14, 2004), 11, available from <https://d2071andvip0wj.cloudfront.net/77-northern-uganda-understanding-and-solving-the-conflict.pdf>.

<sup>74</sup> International Crisis Group, “Northern Uganda: Understanding and Solving the Conflict,” 10.

<sup>75</sup> “Northern Uganda: Understanding and Solving the Conflict,” 15.

<sup>76</sup> *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan*, S12007143 5 (New York: United Nations Security Council, 2007); available from [https://peacemaker.un.org/sites/peacemaker.un.org/files/UG\\_070629\\_AgreementonAccountabilityReconciliation.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070629_AgreementonAccountabilityReconciliation.pdf).

<sup>77</sup> *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan*, 1.

have joined the fighting willingly; those who stood by; and the members of the wider community.<sup>78</sup> This complexity explains, in part, the motivations to look beyond state-centered mechanisms to prevent the recurrence of violent conflicts. Since state-centered mechanisms often focused on a neat distinction between perpetrator and victim, the road to preventing the reoccurrence of violent conflict requires steps beyond the boundaries of state-centered mechanisms. In the sections that follow, I discuss the Acholi traditional Governance, their worldview and draw on some examples to illustrate how Acholi customary justice could provide a meaningful way to prevent conflict reoccurrence.

### **6.2.3.1 Ethnicity, Traditional, and Governance Institutions of the Acholi**

To understand the workings of the Acholi traditions in relation to customary justice and conflict management, one needs to understand the historical identity of the Acholi, their institutional governance systems, and the legitimacy of local authority. In explaining how a group's shared history and identity impacts on how they respond to situations of adversity, Adler observed that when a group of people are metaphorically tossed in the air

[w]here they go, how, when and why, is not entirely determined by physical forces and constraints; but neither does it depend solely on individual preferences and rational choices. It is also a matter of their shared knowledge, the collective meaning they attach to their situation, their authority and legitimacy, the rules, institutions, and material resources they use to find their way, and their practices, or even, sometimes, their joint creativity.<sup>79</sup>

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<sup>78</sup> Anyeko et al., “The Cooling of Hearts,” 122.

<sup>79</sup> Emanuel Adler, “Seizing the Middle Ground: Constructivism in World Politics,” *European Journal of International Relations* 3, no. 3 (September 1, 1997): 320–21, <https://doi.org/10.1177/1354066197003003003>.

#### 6.2.4 The Acholi Ethnic Identity

Ethnicity has been variously conceptualized. For Weber, ethnic groups are “those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of custom or both, or because of memories of colonization and migration... it does not matter whether or not an objective blood relationship exists.”<sup>80</sup> Others view ethnic identity based on groups having a real or imaginary association and a specified territory recognized by others.<sup>81</sup> Two theories dominate the debate regarding ethnicity, identity, and the theory of belonging—the social constructivist and the primordialists views.<sup>82</sup> Social constructivists essentially focus on how individuals and groups “construct” their social reality. They look at how social phenomena are created and institutionalized. For social constructivists, social reality is not given but produced and reproduced based on peoples’ experiences, knowledge, interpretation, and shared meaning.<sup>83</sup> Hence, ethnic identities are constructed based on historical, social, and political configurations.<sup>84</sup>

Primordialists, on the other hand, argue that ethnic groups held together an infinity of personal ties such as extended kinship relations, which tend to be endured over many generations.<sup>85</sup> Others view the primordial conception as the “essentialist view of ethnicity

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<sup>80</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978), 389.

<sup>81</sup> See generally, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, First (UK: Verso, 1983).

<sup>82</sup> Murat Bayar, “Reconsidering Primordialism: An Alternative Approach to the Study of Ethnicity,” *Ethnic and Racial Studies* 32, no. 9 (November 1, 2009): 1639, <https://doi.org/10.1080/01419870902763878>; see also Kanchan Chandra and Steven Wilkinson, “Measuring the Effect of ‘Ethnicity,’” *Comparative Political Studies* 41, no. 4–5 (April 1, 2008): 515–63, <https://doi.org/10.1177/0010414007313240>.

<sup>83</sup> Emanuel Adler, “Seizing the Middle Ground: Constructivism in World Politics,” *European Journal of International Relations* 3, no. 3 (September 1, 1997): 322, <https://doi.org/10.1177/1354066197003003003>.

<sup>84</sup> Chandra and Wilkinson, “Measuring the Effect of ‘Ethnicity’”; Fredrik Barth, *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*, First edition (Boston, MA: Little Brown & Company, 1969); Paul R. Brass, *Ethnicity and Nationalism: Theory and Comparison* (New York: SAGE Publications, 1991).

<sup>85</sup> Henry E. Hale, “Explaining Ethnicity,” *Comparative Political Studies* 37, no. 4 (May 1, 2004): 460, <https://doi.org/10.1177/0010414003262906>.



in which ethnic groups are taken as given.<sup>86</sup> The significant difference between the constructivist and primordial views is that, while constructivists argue that individuals have multiple, not single, ethnic identities, which can vary depending upon a set of social, economic, and political processes, “primordialists see a single ethnic identity with multiple dimensions.”<sup>87</sup>

With specific reference to the Acholi ethnic identity, the constructivist school of thought argues that the Acholi ethnicity is a colonial construction, emphasizing that “Acholi as a distinct and collective identity are a British creation.”<sup>88</sup> The primordialists school of thought rejects the view that the Acholi ethnic identity came about due to the colonial “modernity” project and the creation of the Uganda state. Instead, they assert that the evolution of the Acholic ethnic identity began with the earliest settlement of people in the area we now call Acholi, long before the first known European arrival.<sup>89</sup> The debate about the ethnic identity of the Acholi is vital because it situates the politics of Acholiland within the national context regarding the institutions, relationships, and values that govern societal interactions.

Although the origin story of the Acholi ethnic identity continues to be a source of debate, historical evidence suggests that the formation of the Acholi ethnic identity started

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<sup>86</sup> Juma Okuku, *Ethnicity, State Power and the Democratisation Process in Uganda* (Uppsala, Sweden: Nordic Africa Institute, 2002), 8.

<sup>87</sup> Kanchan Chandra, “Newsletter of the Organized Section in Comparative Politics of the C American Political Science Association,” *American Political Science Association*, 2001, 7; Bayar, “Reconsidering Primordialism,” 1643.

<sup>88</sup> Charles Amone and Okullu Muura, “British Colonialism and the Creation of Acholi Ethnic Identity in Uganda, 1894 to 1962,” *The Journal of Imperial and Commonwealth History* 42, no. 2 (March 15, 2014): 239, <https://doi.org/10.1080/03086534.2013.851844>.

<sup>89</sup> Ronald R. Atkinson, “The Evolution of Ethnicity among the Acholi of Uganda: The Precolonial Phase,” *Ethnohistory* 36, no. 1 (1989): 20, <https://doi.org/10.2307/482739>.

around the late seventeenth century.<sup>90</sup> The earliest settlers in the present Acholiland claim to be direct descendants of the Luo-speaking Central Sudanic and Eastern Nilotic group.<sup>91</sup> Presently, the Acholi can be found mainly in the northern Uganda districts of Agago, Amuru, Gulu, Kitgum, Lamwo, Nwoya, Omoro, and Pader.<sup>92</sup> Their neighbors include Karamoja Sub-region in the east, Lango in the south-east, Bunyoro in the southwest, West Nile in the west, and South Sudan in the north.<sup>93</sup>

#### **6.2.4.1 Socio-Political Organization and Governance Institutions**

The chiefdoms are the macro-level of community governance. The chiefdom comprised a collection of villages under the political authority of the *rwodi moo* (chief of the oil).<sup>94</sup> The authority of the *rwodi moo* was, however, not absolute. Power was shared with lineage elders and clan heads. The totality of the socio-political system—that is, from the elementary family unit to the chiefdoms makes Acholiland’s traditional system and political order. There are currently 52 recognized chiefdoms in the Acholi sub-region headed by the *Lawi Rwodi* (paramount chief).<sup>95</sup> The chiefdoms down to the hamlet have a similar structure, evolutionary origin, and governance arrangements, yet distinct and

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<sup>90</sup> Ronald R. Atkinson, *The Roots of Ethnicity: The Origins of the Acholi of Uganda Before 1800* (Philadelphia: University of Pennsylvania Press, 1994), 81.

<sup>91</sup> Atkinson, “The Evolution of Ethnicity among the Acholi of Uganda,” 21.

<sup>92</sup> Pamela Atim et al., “Prevalence of Major Limb Loss (MLL) in Post Conflict Acholi Sub-Region of Northern Uganda: Cross Sectional Study” (University of Manchester, May 14, 2020), 6; available from <https://www.biorxiv.org/content/10.1101/2020.05.14.095836v1.full.pdf>.

<sup>93</sup> “The Project for Rural Road Network Planning in Northern Uganda Final Report Volume 2: Main Report” (Ministry of Works and Transport, The Republic of Uganda, 2012), 2–1; available from [https://openjicareport.jica.go.jp/pdf/12068391\\_01.pdf](https://openjicareport.jica.go.jp/pdf/12068391_01.pdf).

<sup>94</sup> Sophie Komujuni and Karen Büscher, “In Search of Chiefly Authority in ‘Post-Aid’ Acholiland: Transformations of Customary Authorities in Northern Uganda,” *Journal of Eastern African Studies* 14, no. 1 (January 2, 2020): 107, <https://doi.org/10.1080/17531055.2019.1711312>.

<sup>95</sup> Erin Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration” (Liu Institute for Global Issues. Gulu District NGO Forum. Ker Kwaro Acholi, September 2005), 31, [https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005\\_Roco\\_Wat\\_I\\_Acoli.pdf](https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf).

separated from other political units in terms of hierarchical power and authority. The relationship between the various structures of governance was not based on hierarchy and superiority. Instead, they were heterarchical interwoven governing arrangements based on respect, not fear, and regulations, not command.<sup>96</sup>

Before colonialism, the Acholi governance system was rooted in the people's norms, customs, and traditional beliefs.<sup>97</sup> The *rwodi moo*, was "chosen by supernatural powers, and was enthroned and specifically anointed with fat preserved from the carcasses of lions in solemn religious ceremonies."<sup>98</sup> They were held in high esteem and believed to have a relationship, communicate, and take instructions from "invisible deities and spirits of ancestors."<sup>99</sup> The Acholi system of belief is based on a supreme being, *Jok-kene*, which lives in the Acholi sacred shrines in hamlets, villages, and chiefdoms.<sup>100</sup> The elders resolve conflicts amicably through well-developed customary conflict resolution and management mechanisms. The institution of the Grand Council was responsible for dealing with cases including "mass killings and land disputes between different clans... it made laws... dealt firmly with recalcitrant individuals and groups and ensured that everyone conformed strictly to the Acholi world view."<sup>101</sup>

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<sup>96</sup> John JaraMogi Oloya, "How Did Governance in Acholi Dovetail with Violence? A Case Study of Multiperiod Communal Practices in a Fragile Situation in Uganda" (Ph.D. Thesis, Bradford, UK, University of Bradford, 2015), 136–37; available from [https://bradscholars.brad.ac.uk/bitstream/handle/10454/15707/U02014556\\_PHDThesis2015\\_0621-%202017.pdf?sequence=1&isAllowed=y](https://bradscholars.brad.ac.uk/bitstream/handle/10454/15707/U02014556_PHDThesis2015_0621-%202017.pdf?sequence=1&isAllowed=y).

<sup>97</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 102.

<sup>98</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 102.

<sup>99</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 102.

<sup>100</sup> Stephen Lamony, "Approaching National Reconciliation in Uganda. Perspectives on Applicable Justice Systems" (The Ugandan Coalition for the International Criminal Court, 2007), 8; available from <https://land.igad.int/index.php/documents-1/countries/uganda/conflict-7/1172-approaching-national-reconciliation-in-uganda-perspectives-on-applicable-justice-systems/fileLINO OWOR OGORA>.

<sup>101</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 103.

Unfortunately, the authority of the anointed chiefs was severely weakened by colonialism. The imposition of “invented” traditional chiefs and colonial administrators meant that “power dynamics have shifted drastically... [and] the ability of kin-based groups to provide checks and balances was taken away,” which severely compromised the ability of cultural leaders to perform their duties.<sup>102</sup> Nevertheless, in the absence of functioning democratic governance, the Acholi in northern Uganda have employed their nuanced customary practices of conflict management and traditional cleansing rituals to regain control and agency over their lives and address some of the effects of the almost 20-year brutal war.

### **6.3 Customary Justice, the Reintegration of Ex-combatants, and Non-Recurrence**

There is a repertoire of traditional conflict management systems used for centuries among the Acholi, which are still relevant today, and they continue to provide a strong system of dealing with the aftermath of conflict outside of formal state-centric approaches.<sup>103</sup> The use of customary justice became even more necessary because the state had failed to provide security and protection to the people of the north. The lack of decisive government response in ending the LRA insurgency meant that these traditional practices were necessary for local communities to address the violence and ensure stability and safety. These customary mechanisms vary, and the procedures are not quite the same for every

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<sup>102</sup> Joanna R. Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” *Africa Spectrum* 49, no. 3 (2014): 35.

<sup>103</sup> For a detailed discussion of the various customary justice practices of the Acholi, see Thomas Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War* (Gulu, Uganda: Caritas Gulu Archdiocese, 2006).

clan. In the case of reintegration of ex-combatants, the *nyono tong gweno* and *mato oput* have been widely used.

### 6.3.1 Nyono Tong Gweno (Stepping on the Egg)

Traditionally, the *nyono tong gweno* ceremony was used to welcome members who have been away outside of their clan for a long time.<sup>104</sup> One's absence from a community could be voluntary or forced. These situations could include embarking on a long period of hunting expedition or a temporal relocation to a different community for farming. A person could also leave their homestead due to a dispute with people from their clan or community. Upon their return, individual families and clans often performed *nyono tong gweno* to formally welcome the person back home and fully reintegrate them into the community. The belief is that when one is away outside of their clan or territory for an extended period, one "could contract spirits that—if not cleansed—would bring misfortune to the whole community."<sup>105</sup>

From the height of the LRA insurgency, community members began to adapt *nyono tong gweno* to welcome and facilitate ex-combatants' reintegration. In most situations, mass *nyono tong gweno* has been performed involving hundreds of LRA returnees, including some of their top commanders such as Brigadiers Banya and Sam Kolo.<sup>106</sup> The ceremony is often the first important welcoming ritual conducted before the ex-fighters are then moved to their communities or designated reintegration centers.<sup>107</sup> While at the reintegration centers or in the communities, village elders would follow up with other

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<sup>104</sup> Harlacher et al., *Traditional Ways of Coping in Acholi*, 66.

<sup>105</sup> Harlacher et al., *Traditional Ways of Coping in Acholi*, 65.

<sup>106</sup> Harlacher et al., *Traditional Ways of Coping in Acholi*, 66.

<sup>107</sup> Ogora, "A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda," 4.

traditional rituals to reconcile the ex-fighters with the communities. Prominent among these traditional ceremonies is the *mato oput*. *Mato oput* marks “the peak of a process of conflict resolution, specifically referring to a killing that has occurred in the community.”<sup>108</sup>

### 6.3.2 Mato Oput

In the Acholi culture, the killing of a human being is strictly forbidden. If a killing does occur within the same clan or involving different clans, the Acholi supreme deity, *jogi*, and ancestral spirits of the victim’s clan will be provoked against the offender’s clan.<sup>109</sup> This creates a “supernatural barrier between the clan of the killer and the clan of the person(s) who has/have been killed.... This supernatural barrier remains in force until the killing is atoned.”<sup>110</sup> *Mato oput* is the traditional Acholi ceremony used in situations involving either intentional or accidental inter-clan killing or within the same clan.<sup>111</sup> When the killing has not been atoned the clans of the perpetrator and victim abstain from participating in communal social and economic activities until *mato oput* is performed and compensation is paid for the wrongful death.<sup>112</sup> The period where both clans must undertake no common activity serves two purposes. First, it provides the elders of both clans the opportunity to investigate and determine the facts of the case. Second, it serves to keep the two clans apart to prevent reprisal and revenge killing. The fact-finding exercise involves both the alleged perpetrators, their families, and the victims. With the encouragement of family members,

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<sup>108</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, 79.

<sup>109</sup> Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” 103.

<sup>110</sup> Latigo, 103.

<sup>111</sup> Ogora, “A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda,” 1; Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” 103; Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*.

<sup>112</sup> Ogora, “A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda,” 1.

ex-combatants are expected to voluntarily reveal and confess their role in the conflict and the crimes they have committed to their community.<sup>113</sup> This fact-finding is important because for *mato oput* to proceed, it requires identifying the victims and the alleged perpetrators' voluntary acknowledgment of guilt.<sup>114</sup>

The actual *mato oput* ritual is the culmination of a long process of mediation between the two clans, which involves the establishment of the truth about the killing, accountability, and acknowledgement of wrongdoing by the perpetrator.<sup>115</sup> Once the “facts” of the case are determined, the two clans, in most cases, determine an appropriate compensation according to the culture, traditions, and norms of the clans. After successfully completing the ritual, the social interactions between the two clans can resume, and both clans can now share common sources of water, grazing land, and so on. The *mato oput* ritual provides an opportunity for the clans of the victim and the perpetrator to deal with the consequence of the conflicts and show a commitment to live together again in harmony. As Latigo observed, the aim of *mato oput* is the “pursuit of a decent society, with the primary focus on coexistence and the restoration of relationships between former enemies as a basis for the prevention of the recurrence of gruesome crimes.”<sup>116</sup>

Several researchers who have written about the impact of traditional rituals on the reintegration of ex-combatants in northern Uganda found that rituals such as *nyono tong gweno* and *mato oput* could be viable ways to reintegrate ex-combatants in a way that minimize the possibilities of reprisal and revenge killings.<sup>117</sup> Researchers have reported

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<sup>113</sup> Tim Murithi, “Rebuilding Social Trust in Northern Uganda,” *Peace Review* 14, no. 3 (September 1, 2002): 293, <https://doi.org/10.1080/1367886022000016848>.

<sup>114</sup> Ogora, “A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda,” 4.

<sup>115</sup> Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” 107–8.

<sup>116</sup> Latigo, 108.

<sup>117</sup> See generally Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London ; New York: Zed Books, 2006); Allen, “War and Justice in Northern Uganda: An

that some ex-combatants often display anti-social behaviors, including the use of violence and “threatening to kill a family or community member, beatings and in some cases, murder.”<sup>118</sup> Traditional Acholi believes these violent behaviors come about due to *cen*—the vengeful spirit of a dead person. If these traditional rituals are not performed, they believe “the *cen* of the killed person would be expected to haunt the killer and cause disease in his family or clan.”<sup>119</sup> In some cases, the returnees who engage in violent and anti-social behaviors are banished from the communities or camps, and some often end up returning “to the bush or join the UPDF [or the LRA].”<sup>120</sup>

*Nyono tong gweno* and *mato oput* provide two levels of benefits—at both the individual and community levels—that could help prevent conflict recurrence. First, at the individual level, *nyono tong gweno* and *mato oput* help facilitate the psychological reintegration of returnees.<sup>121</sup> The rituals serve to atone the atrocities the ex-fighters have committed—they cleanse and chase away *cen* and other potential violent behavior that might befall individuals. Research reports suggest that returnees “often felt more accepted following a communal cleansing ceremony, and they were better able to communicate and

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Assessment of the International Criminal Court’s Interventions”; Anyeko et al., “The Cooling of Hearts”; Erin Baines, “The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda,” *International Journal of Transitional Justice* 1, no. 1 (March 1, 2007): 91–114, <https://doi.org/10.1093/ijtj/ijm007>; Erin Baines, “Spirits and Social Reconstruction after Mass Violence: Rethinking Transitional Justice,” *African Affairs* 109, no. 436 (2010): 409–30, <https://doi.org/10.1093/afraf/adq023>; Ogora, “A Case Study of the Acholi Local Justice Mechanism of Mato Oput in Northern Uganda”; Joanna R. Quinn, “Beyond Truth Commissions: Indigenous Reconciliation in Uganda,” *The Review of Faith & International Affairs* 4, no. 1 (March 1, 2006): 31–37, <https://doi.org/10.1080/15570274.2006.9523235>; Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda”; Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration.”

<sup>118</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration,” 41.

<sup>119</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, 80.

<sup>120</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration,” 41.

<sup>121</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 41.



socialize with community members.”<sup>122</sup> After a communal cleansing ceremony, a former combatant reported that he “felt that people also loved them and were thinking about them” despite the atrocities they have committed.<sup>123</sup> In an in-depth interview conducted to ascertain the impact of rituals on returnees, the researchers reported observable positive changes in the behaviors of returnees, such as less aggressive behaviors and a general improvement in their social relationship.<sup>124</sup>

Second, at the community level, *nyono tong gweno* and *moto oput* illustrate the communities’ readiness to welcome ex-combatants and give them a “second chance” despite the atrocities they have committed, sometimes against their own communities and families. The rituals signals that “the door of the family [and community] is open, encouraging the returnee to pass through it and join the family again... By reunifying the person and their family, the returnee is encouraged to contribute to the health and productivity of the community.”<sup>125</sup>

The ceremony calls upon entire communities to bear witness, including local leadership, in this process of welcoming. It is an occasion where the general community comes together and ascertains the return of one of their members. It is an opportunity for the general community to share benefits of uniting as members of the same clan. It also instills a feeling of belonging to the community. Communal cleansing ceremonies are also a form of sensitization as they help the community accept and welcome returnees back home. In some ways, it serves as a reminder to them that they are indeed a community, that they share the same Acholi culture and values.<sup>126</sup>

As the above quotation illustrates, carrying out customary justice through rituals such as *nyono tong gweno* and *mato oput* could have an impact at the individual and community

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<sup>122</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 45.

<sup>123</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 45.

<sup>124</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 45.

<sup>125</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 39.

<sup>126</sup> Baines, “Roco Wat I Acoli Restoring Relationships in Acholi-land,” 46.

levels to ensure social control and create a stable environment where ex-combatants could safely reintegrate into the local communities. The feeling of belonging to the community removes the fear of revenge from ex-combatants and provides assurances of a safe return to communities. During unsettle periods created by conflict, communities need to reassert cultural norms that give order to social relations and interactions. *Nyono tong gweno* and *mato oput* provide such avenues of assurances to reassert social and cultural values. Such assurances of community acceptance reduce the fear of revenge killing, reducing ex-combatants' potential of being banished (to the bush) or fleeing from hostile community attitudes. This could substantially minimize ex-combatants' desire to return to combat life and/or engage in activities that could derail the peace process and plunge the community back into violence.

#### **6.4 Local Peace Agreements and Conflict Non-Recurrence: The Potential of *Gomo Tong***

Given the increasing influence of non-state armed actors in civil wars, such as the LRA insurgency, an alternative starting point to ending atrocities and preventing reoccurrence of armed conflict could be to start by exploring avenues of peace at the local level and asking how the local peace could feed into national-level processes. Historical examples show that customary justice mechanisms have been drawn upon to create local peace agreements between different ethnic groups. In northern Uganda, although there is only one recorded use of *gomo tong*, it has significant potential to preventing armed conflict.

*Gomo tong* (bending the spear) is an interethnic reconciliation ritual that marks the end of a violent conflict resolution. As I described in chapter 5, the *gomo tong* ritual is a sacred vow between two conflicting parties, which is performed by invoking ancestral

spirits to end hostilities.<sup>127</sup> The completion of the ritual signifies an agreement between the two parties not to shed any further blood.<sup>128</sup> The performance of *gomo tong* is very rare, and probably the most recent record of *gomo tong* practice is the one between the West Nile and the people of Acholi following the fall of Amin.<sup>129</sup> During the colonial invasion, *gomo tong* was also used to consolidate peace between the Payira and Koch clans.<sup>130</sup> There are also records of similar local peace agreements being performed elsewhere in Uganda. For example, a similar ritual, *amelokwit*, cemented a local peace agreement between the Iteso and the Karamojong in 2004, which paved the way for the two communities to carry out joint activities to address their disputes.<sup>131</sup>

The following statement regarding the local agreement between the West Nile and Acholi is noteworthy when it comes to local peace agreements' potential to prevent the reoccurrence of violent conflicts.

In 1985, *gomo tong* was used in a landmark effort to resolve the serious tensions between on the one side the Acholi, who were killed on a large scale by Idi Amin and his henchmen during his dictatorial regime, and on the other the people of West Nile (where Amin came from), who suffered severe reprisals in 1980 after Amin's fall. It is instructive to note that later on the West Nile Bank Front (WNBF) I & II, composed mainly of people from West Nile who had joined Museveni's army, refused to be deployed to fight the LRA, citing the 1985 *gomo tong* ceremony between the two communities, which remains eternally binding.<sup>132</sup>

The above quotation's significance is that it illustrates how local peace agreements embedded in the customary practices could be invoked to prevent different ethnic groups from going to war against each other. More importantly, it demonstrates that some

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<sup>127</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 106.

<sup>128</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 106.

<sup>129</sup> Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 133.

<sup>130</sup> Allen, Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 133.

<sup>131</sup> Dennis Pain, *"The Bending of Spears": Producing Consensus for Peace and Development in Northern Uganda* (London, UK: International Alert, 1997).

<sup>132</sup> Latigo, "Northern Uganda: Tradition-Based Practices in the Acholi Region," 106–7.

customary practices could have interethnic relevance. *Gomo tong* could be performed between different Acholi clans or between neighboring ethnic groups—as in the Acholi and the West Nile case. Like the *mato oput*, the performance of the ritual itself is often preceded by a long mediation process between the two ethnic groups involved in violent conflict. “Elders of the two groups would sit down to discuss the reasons that triggered and perpetuated the conflict. After agreeing to end the fighting, chiefs and elders of both sides would warn their people to stop the killing... [and] discuss how to limit any possibilities of future conflicts and killings.”<sup>133</sup>

The above examples show that customary justice that creates spaces for local agency and is rooted in people’s local culture and traditions merits further investigation in terms of efforts to terminate violent conflict and prevent its recurrence. Although there is wide variation in customary practices among ethnic groups, practices such as *gomo tong* show enormous potential and could have wider and strategic importance in terminating interethnic violence to advance the prospects of nationwide stability. A series of local peace agreements between various fragmented armed groups could end hostilities at the local level, serving as a springboard for a national peace process to emerge. Therefore, considering that contemporary armed conflicts are often fragmented and inexorably connected, locally mediated peace arrangements rooted in culture and traditions deserve closer inquiry in terms of their viability to terminating violence and how they could be effectively deployed to prevent conflict recurrence.

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<sup>133</sup> Harlacher et al., *Traditional Ways of Coping in Acholi: Cultural Provisions for Reconciliation and Healing from War*, 92.

## 6.5 The Communal Nature of Customary Justice in Preventing Conflict Recurrence

In most communitarian African societies, communities are not merely composed of a collection of individuals, but their very “existence” is made “meaningful” through their connection with other community members.<sup>134</sup> However, recent complex conflicts often create intimate enemies, thereby effectively weakening the social fabric that holds society together.<sup>135</sup> As I illustrated in the section on the history of the northern Uganda conflict, both the LRA and the NRA have used extreme violence to exercise control over civilian populations, forcing children to commit brutality against families and neighbors.<sup>136</sup> The severe brutalities of the conflict have in many ways fragmented social cohesion and undermined social trust, community values, and norms. As a result, to prevent conflict from reoccurring, the mechanisms we employ must seek to heal social divisions, focus on the restoration of broken relationships, and involve the family and general community.<sup>137</sup>

As I argued in chapter 5, Acholi social, moral belief, and justice practices are fundamentally based on reinforcing a continuing relationship, and the focus is on the future. In other words, although customary justice may redress past harms and punishment, they are fundamentally oriented towards restoration and continuing the future relationship between warring groups. To prevent new crimes, revenge killings, and the potential return to armed violence, community elders work toward forging a “social future where both

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<sup>134</sup> Kariuki Muigua, “Traditional Conflict Resolution Mechanisms and Institutions” (Kariuki Muigua and Company Advocates, October 2017), 5, <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf>.

<sup>135</sup> Intimate enemies arise from a situation where armed groups commit violence against their own villages and families. See Kimberly Theidon, “Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru,” *Journal of Conflict Resolution* 50, no. 3 (June 1, 2006): 439, <https://doi.org/10.1177/0022002706286954>.

<sup>136</sup> Baines, “Spirits and Social Reconstruction after Mass Violence,” 410.

<sup>137</sup> Murithi, “Rebuilding Social Trust in Northern Uganda,” 291.

perpetrators and victims, and their respective families, live together.”<sup>138</sup> To forge future cooperation between conflict parties, communities often take deliberate acts necessary for the community to restore personal and communal harmony. Restoring future relationships is guided by the principle of justice in which the whole group to which an individual belongs takes the guilt and responsibility for their member’s wrongdoing. To illustrate how this works in practice, let us consider the following case reported by Lamony Stephen.<sup>139</sup>

Before the rituals of *nyono tong gweno* and *mato oput* could be performed, Otim, an ex-combatant must confess and acknowledge his wrongdoings.<sup>140</sup> Otim’s clan elders are obligated to inform the family and elders of the person(s) Otim had confessed to have killed—In this case Otim confessed he killed Okeny’s. When Otim’s elders arrived at Okeny’s clan, they (Otim’s clan elders) announced that “*we* unfortunately abducted and killed your son, Okeny... now *we* have come to humbly beg for pardon and declare that *we* are ready to pay compensation for such capital offense [italics added].”<sup>141</sup> Take note of the use of the pronoun “we” by Otim’s clan leaders in reporting the death of Okeny. Once Otim’s clan takes responsibility and announces that *they*, not Otim, killed Okeny, the individual perpetrator, in this case, Otim “goes into the background.”<sup>142</sup> His clan and, in most cases, his community’s elders, become collectively involved to ensure a non-violent

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<sup>138</sup> Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” 117.

<sup>139</sup> Lamony, “Approaching National Reconciliation in Uganda. Perspectives on Applicable Justice Systems,” 5–10.

<sup>140</sup> Lamony, “Approaching National Reconciliation in Uganda. Perspectives on Applicable Justice Systems,” 10.

<sup>141</sup> Lamony, Lamony, “Approaching National Reconciliation in Uganda. Perspectives on Applicable Justice Systems,” 10.

<sup>142</sup> Lamony, Lamony, “Approaching National Reconciliation in Uganda. Perspectives on Applicable Justice Systems,” fn. 14 at 10.

and peaceful resolution of the situation, with the maintenance of social harmony and the preservation of future relationship between the two clans a priority.<sup>143</sup>

This sort of collective responsibility cultivates a social fabric that “keeps the Acholi people in harmony with the forces of life around.”<sup>144</sup> Collective guilt does not suggest individual perpetrators do not account for their actions. As already discussed in earlier sections, a requirement for the *mato oput* and *nyono tong gweno*, and indeed many of the customary justice, is that the individual perpetrator must accept full responsibility, voluntarily and truthfully admit to the crimes they have committed. Individuals often take full responsibility because they, too, take the preservation of future relationships very seriously. As a result, even if the alleged perpetrators do not believe in the traditional interpretation of *cen*, they often take proactive steps to participate in ceremonies to absolve themselves of responsibility for any future misfortune that may befall their clan or community.<sup>145</sup>

The following case illustrates the commitment of individuals to work towards preserving a future relationship. Harlacher reports a case of a young man from Pabo,

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<sup>143</sup> Whether the communitarian nature of customary justice encourages or impedes perpetrators’ willingness to participate in traditional communal rituals has been debated. Some have argued that perpetrators may refuse to participate in traditional communal rituals because the shame and guilt is too great to bear, and the confession to their crimes may threaten their family or community’s positive image. See for instance, Adam Azzain Mohamed, “Shame Culture and Inter-Group Conflicts: Experiences From Sudan,” *Journal of Cultural Studies* 5, no. 1 (2003): 68–86; John George Peristiany, *Honour and Shame: The Values of Mediterranean Society* (Chicago: University of Chicago Press, 1974); Noa Weiss-Klayman, Boaz Hameiri, and Eran Halperin, “Group-Based Guilt and Shame in the Context of Intergroup Conflict: The Role of Beliefs and Meta-Beliefs about Group Malleability,” *Journal of Applied Social Psychology* 50, no. 4 (2020): 213–27, <https://doi.org/10.1111/jasp.12651>. Nevertheless, customary justice has well-developed mechanisms to encourage acknowledgment of responsibility. For instance, the very idea of restorative justice emphasizes the relationship between the victim, the perpetrator, and the community as opposed to punishing the offender. Restorative justice sometimes encourages perpetrators to come forward and admit their wrongdoing, with the hope that their families and community will welcome them back into the society.

<sup>144</sup> Lamony, Lamony, “Approaching National Reconciliation in Uganda. Perspectives on Applicable Justice Systems,” 8.

<sup>145</sup> Thomas Harlacher, “Traditional Ways of Coping with Consequences of Traumatic Stress in Acholiland: Northern Ugandan Ethnography from a Western Psychological Perspective” (Ph.D. Thesis, Switzerland, University of Freiburg, 2009), 187; available from <http://doc.rero.ch/record/17432/files/HarlacherT.pdf>.

northern Uganda, who wanted the ritual of *mato oput* performed for a killing he had committed. In narrating his motivation to take part in *mato oput*, the young man noted: “I want that everything ends well [alluding to the spiritual and social dimension of *mato oput*] so that in future, if malaria comes [to befall my children], people would not have a pretext to accuse me. I also hope that when the ceremony is concluded, good relationships will again exist.”<sup>146</sup> The narratives of Otim and the young man from Pabo are not isolated but could be said to be the fundamental feature that drives the Acholi communal justice practices.

These narratives are significant for conflict prevention in three fundamental respects. First, they illustrate that customary justice is future-looking, and community members and individuals take actions that will reinforce future relations and prevent any disruption in the social equilibrium.<sup>147</sup> Second, the communal approach to conflict resolution ensures that the communities act as witnesses to the decisions reached and the promises made.<sup>148</sup> Communities continue to “serve as a standard for monitoring the subsequent behavior of the miscreant... [and] performs the function of correctional services while allowing the culprits to continue their usual productive activities” in the community.<sup>149</sup> Third, the rich cultural expression where communities perform “correctional services” and collectively monitor perpetrators’ subsequent behavior brings offenders under a form of social control and accountability. In the aftermath of violent conflict, the Acholi have employed various creative ways, including relying upon

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<sup>146</sup> Harlacher, “Traditional Ways of Coping with Consequences of Traumatic Stress in Acholiland,” 187.

<sup>147</sup> Guy Oliver Faure, “Traditional Conflict Management in Africa and China,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 163.

<sup>148</sup> Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” 114.

<sup>149</sup> Latigo, “Northern Uganda: Tradition-Based Practices in the Acholi Region,” 114.



collective respect for the norms, values, and social institutions that regulate its members' behavior. These forms of customary justice of social control and accountability are crucial in securing communities' safety and preventing future violence, especially when the state is absent, or its apparatus is not equipped to address community reconciliation where "intimate enemies" must live side-by-side in the future.

## **Conclusion**

I set out in this chapter to reflect on and use the experiences of the Acholi as a lens to understand and solidify the theoretical arguments I raised in previous chapters about whether and how customary justice might be useful means for measures of non-recurrence. The argument advanced here takes a starting point that armed conflict is a relational construct where warring parties' identities are constructed through and constitutive of social systems' structural properties. Understanding conflict as a social construct is useful in thinking about the intimate nature of the northern Uganda conflict and how customary practices have played a key role in reckoning with the past. Similarly, instead of viewing measures of non-recurrence as largely formal state-led intervention, they need to be thought of as a wholistic approach that engages a series of actors at different levels, especially at the local level.

Continuing from the above theoretical setup, this chapter first discussed the historical background to the northern Uganda conflicts, locating it within the wider national post-colonial political context. I traced the Acholi ethnic identity to a shared history, territory, and claims to being direct descendants of the Luo-speaking group. Although the imposition of colonial administrative chiefs has weakened the traditional authority of the

“anointed chiefs” and, to some extent, the customary justice system, the Acholi have managed to maintain and have utilized customary justice to reckon with the aftermath of the civil war in northern Uganda. Drawing on research reports and policy documents, I showed how the Acholi customary justice helped integrate ex-combatants in ways that reduce stigmatization, name-calling, and the risk of ex-combatants being declared pariahs. Customary justice could also help terminate violence and prevent conflict recurrence through local peace arrangements. Finally, I argued that a fundamental feature of the Acholi customary justice practices is the moral understanding of collective responsibility, which is essential in preserving harmony and social fabric. The communal nature of the justice practices enables society to monitor ex-combatants’ behavior and bring them under social control and accountability, which is important to reduce the risk of communities reverting to conflict.

Although the conflict has officially ended, its impacts continue to linger. Despite a semblance of democracy, researchers have described the Ugandan government as semi-authoritarian, where many government institutions are despotic and serve at the behest of the President.<sup>150</sup> State institutions and national political leaders seem “too far removed from the communities they are supposed to serve,” creating uncertainties for many northern Ugandans who are still grappling with the impact of the civil war.<sup>151</sup> Amid such uncertainty and an unsettled period, I agree with Adler that the Acholi’s future would not be entirely “determined by physical forces and constraints... [and] solely on individual preferences

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<sup>150</sup> Tom Goodfellow, “Legal Manoeuvres and Violence: Law Making, Protest and Semi-Authoritarianism in Uganda,” *Development and Change* 45, no. 4 (2014): 753, <https://doi.org/10.1111/dech.12097>.

<sup>151</sup> Karolina Werner, “From Inclusive Governance to Peace: Exploring African Governance Systems” (Ph.D. Thesis, Waterloo, Wilfrid Laurier University, 2019), 184; available from <https://scholars.wlu.ca/cgi/viewcontent.cgi?article=3324&context=etd>.

and rational choices. It is also a matter of their shared knowledge, the collective meaning they attach to their situation,” and the legitimacy of traditional authority, rules, and institutions.<sup>152</sup> Indigenous institutions and traditional authority will continue to remain important to many northern Ugandans. As I wrap up in the next chapter, I will make some recommendations regarding how indigenous institutions and customary practices could be strengthened to complement national efforts to forge a peaceful future to reduce the risk of violent conflict reoccurrence.

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<sup>152</sup> Adler, “Seizing the Middle Ground,” 320–21.

## **Chapter 7**

### **7 Beyond the Near-Exclusive Focus on the Local: The Interaction Between Formal and Customary Transitional Justice**

#### **7.1 Introduction**

I approached this thesis from a bottom-up perspective and have advanced arguments that prioritized local agency, resources, and ways of knowing. I only mentioned the central state as a point of reference in juxtaposition to the local to highlight the imperative of the local as a site of measures of non-recurrence. I did not explicitly discuss the central and necessary role the state and international actors play in preventing the reversion of armed violence and pursuing long-term peace. My arguments could incorrectly be understood as an attempt to absolve the state of responsibility in post-conflict transition and free national actors of their complicity in producing and sustaining the structures that tend to ignite and contribute to conflict.

I do not wish to suggest a bypass of the state and international actors or an exclusive focus on the local. In fact, most post-conflict societies are often fraught with competing interests, power asymmetries, and the risk of returning to armed violence is often present. The fact that post-conflict states tend to be arenas of competing interests and power asymmetries brings to the fore the inevitable need to employ several carefully balanced transitional justice initiatives at multiple levels to prevent the reversion to armed conflict and pursue reconciliation and long-term peace.

This chapter addresses the question of how formal justice could interact with customary justice in a post-conflict state.<sup>1</sup> To establish the interaction between formal and customary justice, I begin with a discussion of the complexity of the post-conflict environment. I argue that the post-conflict environment often is an arena of contested power dynamics and competing narratives. As a result, customary justice at the local level only serves a necessary but partial role.

Considerable research exists, especially in the peacebuilding literature, about the complexity of the post-conflict environment and the need for interdependent actions at various levels and by different actors. Lederach, for instance, uses the web as a metaphor to describe the complexity of the social context in which post-conflict reconstruction can occur. Lederach observed that “peacebuilding [and transitional justice] is an enormously complex endeavor in unbelievably complex, dynamic, and more often than not destructive settings of violence.”<sup>2</sup> As a result of such complexities in the post-conflict environment, Lederach advocates for a non-linear approach to dealing with the aftermath of conflict.<sup>3</sup> On a similar line of thought, de Conning argues sustainable peace requires a complexity informed approach, in which international actors focus their effort on creating the “space for societies to develop resilient capacities for self-organization.”<sup>4</sup> Millar argues for a trans-

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<sup>1</sup> The use of the term “formal justice” in this thesis refers exclusively to transitional justice instruments that are often state-centric and led by national and international actors. This distinction is important because in some contexts customary justice can be formalized with some degree of codification and protocols.

<sup>2</sup> John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace*, Reprint edition (New York: Oxford University Press, 2005), 33. See also Gearoid Millar, “Toward a Trans-Scalar Peace System: Challenging Complex Global Conflict Systems,” *Peacebuilding* 8, no. 3 (July 2, 2020): 261–78, <https://doi.org/10.1080/21647259.2019.1634866>.

<sup>3</sup> John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Inst of Peace Press, 1998). See also Daniela Körppen, Norbert Ropers, and Hans J. Giessmann, eds., *The Non-Linearity of Peace Processes: Theory and Practice of Systemic Conflict Transformation* (Verlag Barbara Budrich, 2011)

<sup>4</sup> Cedric de Coning, “From Peacebuilding to Sustaining Peace: Implications of Complexity for Resilience and Sustainability,” *Resilience* 4, no. 3 (September 1, 2016): 166, <https://doi.org/10.1080/21693293.2016.1153773>. See also Kristoffer Lidén, “Building Peace between

scalar approach—across the local, national, and international—to peace research which could provide a “deeper understanding of the non-linear impacts of peace interventions.”<sup>5</sup> Richmond, too, advocates for “a pathway towards creating a liberal-local hybrid form of peace” that engages with local voices and their experiences of violent conflict.<sup>6</sup> While these are important bodies of work in the peacebuilding literature regarding non-linearity, complexity, trans-scalar peace, and hybridity, this chapter draws heavily on transitional justice literature. The chapter draws on the transitional justice literature to show how the relationship between Uganda’s customary and state justice systems have shifted over time, from pre-independence to the present. The illustration of the shifting relationship between the customary and formal justice systems is vital to the notion of legal pluralism, which is the foundation through which I advance my argument regarding how customary and state justice systems could co-exist synergistically. In other words, this chapter emphasizes on questions of the different forms of justice practices but not peacebuilding *per se*.

Therefore, in the second section, I reiterate some of the significant contributions of international and national actors in transitional justice. In the third section, I draw on the concept of legal pluralism as an analytical tool to understand the various legal orders in Uganda before, during, and post-independence. In the fourth section, I advance a framework by which customary and formal transitional justice could interact. I argue for integrating and harmonizing customary and formal justice that could lead to a complete

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Global and Local Politics: The Cosmopolitical Ethics of Liberal Peacebuilding,” *International Peacekeeping* 16, no. 5 (November 1, 2009): 616-34, <https://doi.org/10.1080/13533310903303255>.

<sup>5</sup> Gearoid Millar, “Trans-Scalar Ethnographic Peace Research: Understanding the Invisible Drivers of Complex Conflict and Complex Peace,” *Journal of Intervention and Statebuilding* 15, no. 3 (May 27, 2021): 290, <https://doi.org/10.1080/17502977.2021.1896180>.

<sup>6</sup> Oliver P. Richmond, “Becoming Liberal, Unbecoming Liberalism: Liberal-Local Hybridity via the Everyday as a Response to the Paradoxes of Liberal Peacebuilding,” *Journal of Intervention and Statebuilding* 3, no. 3 (November 1, 2009): 333, <https://doi.org/10.1080/17502970903086719>.

cooperative pluralist legal environment. In the final section, I raise the issue of codification which may arise if customary justice processes must be integrated and harmonized with the formal justice system.

## **7.2 The Post-conflict Environment: Fragility, Complexity, and Competing Imperatives**

The arguments in chapter 5 of this thesis are primarily developed around the idea that armed conflicts and civil wars in recent decades are increasingly becoming much more complex, involving a diversity of actors, issues, and interests. Consequently, the post-conflict environment is often unpredictable, complicated, and characterized by competing imperatives. Some of these factors include the lack of clear transition; the history and nature of the conflict; the type and scope of violence; and the variety of actors involved. Other important factors include the relationship and degree of involvement between international and national actors.

One of the fundamental complexities associated with the post-conflict environment is when the transition begins and ends. Transitional justice has traditionally been viewed as a clear transition with a break from the past regime.<sup>7</sup> However, in places like Uganda, the old regime is still firmly in place, and as such, “no genuine transition to democratic governance and the rule of law has ever really begun.”<sup>8</sup> The privileged economic and social status of political elites remain deeply embedded in governmental structures, and the

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<sup>7</sup> Joanna R. Quinn, “Whither the ‘Transition’ of Transitional Justice?,” *Interdisciplinary Journal of Human Rights Law* 8, no. 1 (2015): 67.

<sup>8</sup> Joanna R. Quinn, *Thin Sympathy: A Strategy to Thicken Transitional Justice* (University of Pennsylvania Press, 2021), 23; Valérie Arnould, “Transitional Justice and Democracy in Uganda: Between Impetus and Instrumentalisation,” *Journal of Eastern African Studies* 9, no. 3 (July 3, 2015): 354-74, <https://doi.org/10.1080/17531055.2015.1089698>; Susan Dicklitch, “The Incomplete Democratic Transition in Uganda,” in *Economic Liberalization, Democratization and Civil Society in the Developing World*, ed. Remonda Bensabat Kleinberg and Janine A. Clark, International Political Economy Series (London: Palgrave Macmillan, 2000), 109–28.

regime continues to carry out various forms of campaigns of “repression and violence, [which] may stay the same or even worsen.”<sup>9</sup> A context like Uganda where the old regime is essentially still in place raises important policy implications regarding the kind of strategy that could be useful for state-local interaction without the capture and co-optation of customary justice.

The post-conflict environment is also influenced by the history, scope, and nature of the conflict, including the number and variety of armed groups. For example, in Uganda, violence was attributed to both the LRA and government forces.<sup>10</sup> In addition, children were also conscripted as fighters, “many forcibly, which led to questions about whether at trial they should be treated as villains... or victims.”<sup>11</sup> These factors regarding armed groups and the scope of violence are essential in designing post-conflict transitional justice measures. For instance, in cases where children have been conscripted, further complexity arises since the “line between victim and perpetrator might be difficult to determine, and who might be better served by a restorative and rehabilitative approach.”<sup>12</sup>

The interaction between international and domestic politics is also another important factor that influences the post-conflict environment. Domestic and international politics bound most post-conflict settings. In Uganda, the presence of the ICC presented its own set of challenges when the persecutor issued an arrest warrant for Joseph Kony and

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<sup>9</sup> Quinn, *Thin Sympathy*, 35.

<sup>10</sup> Refugee Law Project, “Compendium of Conflicts in Uganda: Findings of the National Reconciliation and Transitional Justice Audit” (Refugee Law Project, 2014), 138.

<sup>11</sup> Rachel Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges,” in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, ed. Paul Seils and Roger Duthie (New York: International Center for Transitional Justice, 2017), 127.

<sup>12</sup> Kerr, “Transitional Justice in Post-Conflict Contexts,” 127.



some of his high-profile commanders.<sup>13</sup> A major concern was the potential of the arrest warrant to jeopardize the Juba Peace Talks.<sup>14</sup> In Sierra Leone, the establishment of the Special Court also influenced the way Sierra Leone's truth and reconciliation commission conducted its proceedings.<sup>15</sup> Hence, the presence or absence and varying degrees of interaction between domestic and international actors cannot be ignored when considering how customary justice could interact with other formal national and international level transitional justice measures.

From what is discussed above, the post-conflict environment is best described as what Pratt calls a contact zone where “radically asymmetrical relations of power” co-exist and interact.<sup>16</sup> An understanding of this complexity suggests that post-conflict transitional justice processes are not often and cannot be straightforward or “crafted... and rolled out in neat factory packaging.”<sup>17</sup> Instead, transitional justice processes in most post-conflict environments are “complex and messy, involving a disparate range of political, social, emotional, and psychological factors, all operating at different levels— individual, familial, group, societal, state and regional” levels.<sup>18</sup> As a result, it is crucial to explore the inescapable role of the international and national actors and how they could effectively interact with customary processes at the local level. Although I approach my work from a

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<sup>13</sup> Tim Allen, “War and Justice in Northern Uganda: An Assessment of the International Criminal Court’s Interventions” (London, UK: Crisis States Research Centre, London School of Economics, February 2005), [https://www.files.ethz.ch/isn/56421/2005-02\\_AllenICCReport.pdf](https://www.files.ethz.ch/isn/56421/2005-02_AllenICCReport.pdf).

<sup>14</sup> Allen, “War and Justice in Northern Uganda,” 44.

<sup>15</sup> Charles Chernor Jalloh, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013).

<sup>16</sup> Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation*, Second Edition (London; New York: Routledge, 2008), 8.

<sup>17</sup> Roger Mac Ginty and Oliver Richmond, “The Fallacy of Constructing Hybrid Political Orders: A Reappraisal of the Hybrid Turn in Peacebuilding,” *International Peacekeeping* 23, no. 2 (March 14, 2016): 2, <https://doi.org/10.1080/13533312.2015.1099440>.

<sup>18</sup> Kerr, “Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges,” 126.

bottom-up perspective, one must be realistic in their expectations and be modest regarding what each intervention can and cannot achieve. The following section looks at some of the vital roles international and national level actors play at the formal level in preventing conflict from reoccurring and helping societies deal with the aftermath of violent conflict.

### **7.3 The International and Global Gaze**

Historically, transitional justice has been driven primarily by international and national level actors.<sup>19</sup> Since the Nuremberg trials, after the second World War, several developments in the international front, such as establishing International Criminal Tribunals, Hybrid Courts, the International Criminal Court, and international norms such as the right to truth, the right to reparation, have strengthened the role of international actors in transitional justice. The establishment and proliferation of international research centers and non-governmental organizations, such as the International Center for Transitional Justice, have also contributed and influenced the direction of the theory and practice of transitional justice. Among the diverse roles international actors play in transitional justice, include institutional strengthening, pursuing individual criminal, and developing international norms, principles, and best practices. Each of these is discussed below.

#### **7.3.1 State Building and Institutional Strengthening**

One way international actors influence transitional justice is to support (re)building the government and state institutions necessary to promote stability and internal order to ensure long-term peace. The Organization for Economic Cooperation and Development, for instance, observed that building state institutions is one of the main ways to promote

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<sup>19</sup> Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” *Third World Quarterly* 29, no. 2 (February 1, 2008): 275, <https://doi.org/10.1080/01436590701806848>.

stability and order in a post-conflict environment.<sup>20</sup> The role of international actors in institutional strengthening and state-building is relevant in transitional justice because, after years of violent conflict or civil wars, national institutions and political systems tend to be weak.<sup>21</sup> This is especially true in cases such as in Uganda where despotic leaders continue to hold power and “the state and its institutions are in a state of slow decay, rotting from the top down.”<sup>22</sup> In the context of the slow decay of the state and its institutions, international transitional justice actors can play a vital role in building strong and accountable institutions under which individual rights and the rule of law are respected.

### **7.3.2 Individual Criminal Accountability**

In highlighting the genealogy of transitional justice, Teitel characterized the first phase of transitional justice to be “associated with interstate cooperation, war crimes trials, and sanctions.”<sup>23</sup> Perhaps one of the fundamental core principles undergirding transitional justice, especially at the international level, as the Nuremberg trials demonstrate, is the pursuit of individual criminal accountability. Following the Nuremberg trials, the pursuit of individual criminal accountability gained momentum in most post-conflict states.

The involvement of the international actors to prosecute war crimes is often necessary due to several reasons, including the lack of resources, a lack of political will, a lack of technical expertise, or a combination of all. Consequently, the international community has been actively involved in pursuing criminal accountability in various post-conflict contexts. For instance, in 1993, the International Criminal Tribunal for the Former

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<sup>20</sup> OECD, “International Engagement in Fragile States: Can’t We Do Better?” 27.

<sup>21</sup> James Fearon and David Laitin, “Neotrusteeship and the Problem of Weak States,” *International Security* 28 (April 1, 2004): 5–43, <https://doi.org/10.1162/0162288041588296>.

<sup>22</sup> Quinn, *Thin Sympathy*, 22.

<sup>23</sup> Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 70.

Yugoslavia (ICTY) was established to prosecute crimes against humanity.<sup>24</sup> A year later, in 1994, the International Criminal Tribunal for Rwanda (ICTR) was also established by United Nations Security Council.<sup>25</sup> Similar to the ICTY, the mandate of the ICTR was to “hear cases of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.”<sup>26</sup> In addition to these criminal tribunals, other hybrid courts have been used in the past. The Special Court for Sierra Leone is one of the prominent examples of such hybrid courts, which was established jointly between the Government of Sierra Leone and the United Nations in 2002.<sup>27</sup> Besides the criminal tribunals and the hybrid courts, the coming into being of the permanent International Criminal Court (ICC) solidified the central role of the international community to hold individuals criminally accountable for war crimes and violations of international law and international humanitarian law.

### **7.3.3 International Instruments and Norms**

Another crucial means by which international actors contribute to transitional justice is by developing international instruments and norms. Some of these include 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, and the Right to the Truth.<sup>28</sup> These international principles and norms perform several vital functions in the

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<sup>24</sup> Joanna R. Quinn, “The Development of Transitional Justice,” in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs (Cheltenham, UK: Edward Elgar Publishing, 2017), 17.

<sup>25</sup> William A. Schabas, *The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006).

<sup>26</sup> Quinn, “The Development of Transitional Justice,” 17.

<sup>27</sup> Jalloh, *The Sierra Leone Special Court and Its Legacy*.

<sup>28</sup> Theo Van Boven, “Victims’ Rights To A Remedy And Reparation: The New United Nations Principles And Guidelines,” *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, January

transitional justice enterprise. Some of them include codifying and identifying a range of ways victims, disenfranchised groups, and survivors of crimes under international humanitarian law may exercise their fundamental human rights, including access to remedy and reparations.<sup>29</sup> These international instruments and norms also shape states' behaviors and put them under obligation to investigate cases of human rights abuses, crimes against humanity, violations of international law, and international humanitarian law.

#### **7.4 The National Gaze: The Central Role of the State and its Institutions**

The centrality of the state in transitional justice is one of a “contradiction, albeit perhaps a necessary one.”<sup>30</sup> This is because, in most post-conflict societies, such as in northern Uganda, the state is often absent, and local communities must instead utilize their time-tested traditional conflict management measures to prevent conflict and ensure peace. Yet, given the complex nature of armed conflicts, a multi-layered and multi-sectoral approach to transitional justice is often needed to reckon with past atrocities. As a result, it would be naïve to think that one could prevent the recurrence of conflict or ensure long-term peace, more broadly, without the involvement of the central state.

No matter what one thinks about the relative strengths of customary justice, some interventions are vital to the transitional justice enterprise that traditional institutions and customary justice are not adequately equipped to address. The state's role is particularly

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1, 2009, 17–40; Eduardo González and Howard Varney, eds., “Truth Seeking Elements of Creating an Effective Truth Commission” (International Center for Transitional Justice, 2013); available from <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>.

<sup>29</sup> Lorna McGregor, “International Law as a ‘Tiered Process’: Transitional Justice at the Local, National and International Level,” in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford ; Portland, Oregon: Hart Publishing, 2008), 67–71.

<sup>30</sup> Paul Gready, “Introduction,” in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge, UK: Cambridge University Press, 2019), 19.

important in strengthening accountability mechanisms that could help create some of the conditions needed to restore confidence and trust in the state and its institutions. For instance, at the state level, reformed and accountable courts “can more impartially render judgment.”<sup>31</sup> A reformed police service or prosecutor’s office, too, could professionally investigate state officials who have been complicit in committing human rights abuses during periods of armed conflict.<sup>32</sup> These are a few examples of vital things that could help restore trust and confidence in the state after years of armed violence, which the state and international actors are more placed to lead in the process.

Scholars such as Roht-Arriaza and de Greiff have argued for transitional justice to move beyond its narrow focus on civil and political rights to include redress for other rights violations such as economic, social, and cultural rights.<sup>33</sup> Undoubtedly, for transitional justice to effectively redress socio-economic rights, the state has a vital role to play. This is because the violations of socio-economic rights could become embedded in society and become “normalized” over time. Positive change could most successfully be brought about by new legislations or policies by the state that address social, economic, and cultural rights violations.<sup>34</sup>

As the above illustrates, national and international level actors have a tremendous influence and will continue to play critical roles in the theory and practice of transitional

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<sup>31</sup> Alexander Mayer-Rieckh, “Guarantees of Non-Recurrence: An Approximation,” *Human Rights Quarterly* 39, no. 2 (2017): 431, <https://doi.org/10.1353/hrq.2017.0024>.

<sup>32</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 431.

<sup>33</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations General Assembly, 2015), 9, file:///C:/Users/ibayo/Downloads/A\_HRC\_30\_42-EN.pdf; Naomi Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice: The Missing Link?,” in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge UK: Cambridge University Press, 2019), 105–30.

<sup>34</sup> Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice,” 130.

justice. National and international level contributions and functions will continue to be diverse, intricate, and imperfect. In chapters 1, 3, and 4 of this thesis, I highlighted several relative weaknesses and criticisms of the formal transitional justice processes. One notable complaint is that state-centric formal processes often fail to meet the expectations of victims and people at the community level. At the international level, too, the international tribunals, for instance, have been criticized for being located far from the victims and communities they were supposed to serve and also “poorly understood by the wider public.”<sup>35</sup> The International Criminal Court has also been accused of biases in selecting its cases, and some of its interventions could potentially jeopardize the gains in peacebuilding.<sup>36</sup>

Despite these challenges, it is only when there is a meaningful engagement with formal international and national-level transitional justice interventions that practitioners and scholars could move closer to ensuring that formal interventions reflect the needs of victims and are responsive to the context in which they are applied. It would be a mistake to ignore formal national and international level approaches because of their shortcomings. A rejection of formal national and international transitional justice approaches due to their weakness will be a failure “to recognize the omnipresence of legal processes which will continue to result in hegemonic structures unless engaged with [other informal processes

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<sup>35</sup> Dustin N. Sharp, “Transitional Justice and ‘Local’ Justice,” in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs, Research Handbooks in International Law (Cheltenham, U.K.: Edward Elgar Publishing, 2017), 145; Quinn, “The Development of Transitional Justice,” 17–18.

<sup>36</sup> Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (London ; New York: Zed Books, 2006), 96; see also Celestine Nchekwube Ezennia, “The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?” *International Criminal Law Review* 16, no. 3 (May 27, 2016): 448–79, <https://doi.org/10.1163/15718123-01603006>.

such as customary justice].”<sup>37</sup> In the following section, I propose a framework by which formal national and international transitional justice processes could interact with customary justice in ways that ensures meaningful and active participation of sub-national, local level actors, traditional institutions, and customary justice processes. I employ the concept of legal pluralism as an analytical tool to identify and reveal the dynamic interactions between customary and formal justice systems.

### 7.5 Legal Pluralism: A Brief Overview

Legal pluralism is often defined as a “situation in which two or more legal systems co-exist in the same social field.”<sup>38</sup> Legal pluralism exists in many states in varied forms ranging from the interaction between customary justice, national-level legal system, and the international systems where legal norms migrate across territorial boundaries.<sup>39</sup> In post-conflict Uganda, where the customary justice system operates side by side with the formal justice system, the notion of legal pluralism has vast theoretical and practical implications in thinking about a framework of how customary justice and formal justice could interact. Depending on the nature of the relationship, state and non-state legal systems of justice and dispute resolution could work together in tandem or find themselves in a clash.<sup>40</sup> To help understand the relationship between formal and customary justice mechanisms, Swenson

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<sup>37</sup> McGregor, “International Law as a ‘Tiered Process’: Transitional Justice at the Local, National and International Level,” 52.

<sup>38</sup> Sally Engle Merry, “Legal Pluralism,” *Law & Society Review* 22, no. 5 (1988): 870; see also John Griffiths, “What Is Legal Pluralism?” *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (January 1, 1986): 1–55, <https://doi.org/10.1080/07329113.1986.10756387>; Margaret Davies, “Legal Pluralism,” in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert M. Kritzer (Oxford University Press, 2010), 922–47.

<sup>39</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (New York: Cambridge University Press, 2012), 95; Mahabat Sadyrbek, *Legal Pluralism in Central Asia: Local Jurisdiction and Customary Practices* (Routledge, 2017), 10.

<sup>40</sup> Brian Z. Tamanaha, “A Concise Guide to the Rule of Law,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 13, 2007), 10–11; available from <https://content.csbs.utah.edu/~dlevin/conlaw/tamanaha-rule-of-law.pdf>.



proposes four archetypes of legal pluralism in a wide range of settings. These are combative, competitive, cooperative, and complementary legal pluralist environments.<sup>41</sup>

In a combative legal pluralist environment, the state and non-state justice systems “seek explicitly to undermine, discredit, supplant, and—ideally—destroy the other.”<sup>42</sup> In such a context, customary institutions overtly reject the legitimacy of states’ authority and power, while the state uses its institutions to repress and outlaw non-state adjudicatory authority.<sup>43</sup> Combative legal systems tend to be characteristics of “countries facing an active insurgency... [or where] post-conflict state-building has failed or is clearly trending in a negative direction.”<sup>44</sup>

A competitive legal pluralist environment is where there are parallel systems of the administration of justice where the state’s legal authority is not actively undermined or challenged by non-state actors.<sup>45</sup> Although the state’s legal authority is not overtly challenged, there could often be deep tensions between the state and customary justice systems because the values of the state legal systems tend to diverge from the norms, values, and “the common vernacular of groups within society.”<sup>46</sup> In a competitive legal pluralist environment, the state continuously seeks ways to assert itself in places previously beyond its control. Competitive legal pluralist environments are characteristics of many

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<sup>41</sup> Geoffrey Swenson, “Legal Pluralism in Theory and Practice,” *International Studies Review* 20, no. 3 (September 1, 2018): 442, <https://doi.org/10.1093/isr/vix060>.

<sup>42</sup> Swenson, “Legal Pluralism in Theory and Practice,” 443.

<sup>43</sup> Miranda Forsyth, “A Typology of Relationships between State and Non-State Justice Systems,” *The Journal of Legal Pluralism and Unofficial Law* 39, no. 56 (January 1, 2007): 73, <https://doi.org/10.1080/07329113.2007.10756615>.

<sup>44</sup> Swenson, “Legal Pluralism in Theory and Practice,” 443.

<sup>45</sup> Swenson, “Legal Pluralism in Theory and Practice,” 444.

<sup>46</sup> Tamanaha, “A Concise Guide to the Rule of Law,” 11.

states during colonialism where customary traditional institutions are given an amount of authority to “make rules or by-laws for the communities [they] govern.”<sup>47</sup>

In a cooperative legal pluralist context, both the state and customary justice actors are often willing to work together towards achieving common goals.<sup>48</sup> To a large extent, customary justice maintains some autonomy and authority in dispute resolution at the local level. Unlike competitive legal pluralism, tensions and clashes are less frequent in a cooperative pluralist legal system. Often clashes occur, not due to the competition of judicial power or questions of jurisdiction, but sometimes due to excesses of customary justice such as discriminatory practices against women and issues of individual rights violations. Cooperative legal pluralism is characteristic of states where there have been substantial and “meaningful advances toward the consolidation of democratic governance bound by the rule of law.”<sup>49</sup>

In complementary legal pluralism, the state enjoys legitimate, effective legal authority and has the capacity to enforce its mandate.<sup>50</sup> In this context, customary justice is subordinated and controlled by the state and is only called upon as a complementary adjudicative mechanism. The state may mandate local justice institutions to mediate some kinds of disputes. However, formal state law retains the final authority in the outcome of dispute resolutions. Complementary legal pluralism often exists in advanced democracies where the legal systems choose to “allow private arbitration, mediation, and other forms of alternative dispute resolution” as complementary dispute resolution fora.<sup>51</sup>

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<sup>47</sup> Forsyth, “A Typology of Relationships between State and Non-State Justice Systems,” 83.

<sup>48</sup> Swenson, “Legal Pluralism in Theory and Practice,” 445.

<sup>49</sup> Swenson, “Legal Pluralism in Theory and Practice,” 445.

<sup>50</sup> Roger Mac Ginty, “Indigenous Peace-Making Versus the Liberal Peace,” *Cooperation and Conflict* 43, no. 2 (June 1, 2008): 142, <https://doi.org/10.1177/0010836708089080>.

<sup>51</sup> Swenson, “Legal Pluralism in Theory and Practice,” 445; see also Steven Shavell, “Alternative Dispute Resolution: An Economic Analysis,” *The Journal of Legal Studies* 24, no. 1 (1995): 1–28; Thomas

Although the above analysis illustrates four models of legal pluralism, they should not be viewed as mutually exclusive. Instead, they are best viewed as a spectrum of increasing acceptance of the validity and legitimacy of the adjudicative power and authority of both the state legal system and customary justice.<sup>52</sup> Thus, one type of legal pluralist environment could fuse into another. They help conceptualize the fundamental characteristics of the relationships between state and non-state justice mechanisms, which could inform transitional justice efforts in a fluid post-conflict environment.

I use Swenson's archetypes of legal pluralism as a lens to identify and analyze the spectrum of change to the legal environment that Uganda has experienced. Swenson's archetypes are relevant to explaining Uganda's legal order before, during, and after independence. In particular, they help to understand how customary justice has been shaped by the complex interaction with colonial administrators, resulting in conflicting justice processes in Uganda. Understanding these complex arrays of legal orders in Uganda will aid in the attempt to find a suitable middle ground in which international, national, and customary justice could constructively interact to prevent the reoccurring of armed violence and ensure long-term peace.

#### **7.5.1.1 Legal Pluralism in Uganda: Pre-colonial, Colonial, and Post-Independence**

Before the advent of colonialism in Uganda, customary law and traditional practices have been the primary legal system of many ethnic groups in Uganda.<sup>53</sup> Customary and

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Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,'" SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 14, 2009); available from <https://papers.ssrn.com/abstract=1380922>.

<sup>52</sup> Forsyth, "A Typology of Relationships between State and Non-State Justice Systems," 69.

<sup>53</sup> See generally Joanna R. Quinn, "Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda," *Africa Spectrum* 49, no. 3 (2014): 29–54.

traditional justice enjoyed significant autonomy, and these carried out several conflict resolution functions, including mediation, arbitration, adjudication, restitution, and were the primary mode of dealing with disputes and conflict resolution.<sup>54</sup>

However, with the arrival of the British colonists, Western practices of dispute resolution were introduced, effectively creating a distinct polarized system of justice.<sup>55</sup> The landscape of the justice system that evolved in Uganda during this time was along the spectrum of competitive legal pluralism where two parallel systems operate. “At one end [of the spectrum] were the courts of chiefs and headmen... courts that dispensed justice according to customary law. At the other end was a hierarchy of courts cast in the metropolitan mold, courts designed to solve disputes involving nonnatives.”<sup>56</sup> In this context, adjudicative authority was allocated between state and customary justice based on state law and the subject matter’s appropriateness. For instance, on the one hand, modern state law was based on the “language of rights for citizens guaranteed by civil law.”<sup>57</sup> On the other hand, customary justice was under native authority, based on a “patchwork of customs and practices considered customary.”<sup>58</sup>

After independence, in 1967, during Milton Obote’s regime, customary and traditional institutions were abolished throughout the country.<sup>59</sup> The legal order during this time was one of a combative pluralist environment. The state engages in repressive strategies and actively seeks to undermine and outlaw customary systems of justice. Traditional institutions were outlawed under article 118 of the 1967 Ugandan

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<sup>54</sup> Quinn, “Tradition?!” 34.

<sup>55</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N.J.: Princeton University Press, 1996), 109.

<sup>56</sup> Mamdani, *Citizen and Subject*, 109.

<sup>57</sup> Mamdani, *Citizen and Subject*, 109.

<sup>58</sup> Mamdani, *Citizen and Subject*, 111.

<sup>59</sup> Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” 34.

constitution.<sup>60</sup> In such a combative legal pluralist environment, state repression often becomes an important tool for the state to exert a monopoly on legal authority.<sup>61</sup>

Uganda's customary justice system was subsequently revived and given explicit recognition in the 1995 Constitution. Article 246(1) of the 1995 constitution explicitly states that "subject to the provisions of this constitution, the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies."<sup>62</sup> In furtherance of the provisions in Article 246, customary justice has been discussed and prominently featured in various national-level policies, including the Juba Peace Agreement. Clause 3.1 of the 2007 Agreement on Accountability and Reconciliation emphasizes that "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>63</sup>

Local Council Courts (LCCs) were also established under the Local Council Court Act, 2006, for the administration of justice at "every village, parish, town, division and

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<sup>60</sup> *The Constitution of the Republic of Uganda* (Kampala, Uganda: The Republic of Uganda, 1966), article 118; available from <https://www.worldstatesmen.org/Uganda-Const-1967.pdf>.

<sup>61</sup> Forsyth, "A Typology of Relationships between State and Non-State Justice Systems," 73.

<sup>62</sup> *The Constitution of the Republic of Uganda* (Kampala, Uganda: The Republic of Uganda, 1995); available from

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44038/90491/F206329993/UGA44038.pdf> article 246(1). Customary justice was finally included in the constitution because Museveni thought he had the Kingdoms under his control and did not perceive them as a threat to his authority.

<sup>63</sup> *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement Juba, Sudan*, S12007143 5 (New York: United Nations Security Council, 2007), 5, clause 3.1, [https://peacemaker.un.org/sites/peacemaker.un.org/files/UG\\_070629\\_AgreementonAccountabilityReconciliation.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070629_AgreementonAccountabilityReconciliation.pdf).

sub-county level.”<sup>64</sup> The LCCs are mandated to handle civil disputes governed by Customary Law, regarding “(a) disputes in respect of land held under customary tenure; (b) disputes concerning marriage, marital status, separation, divorce or the parentage of children; (c) disputes relating to the identity of a customary heir; (d) Customary bailment.”<sup>65</sup>

In addition, Uganda’s recent national transitional justice policy acknowledges that the

[t]raditional justice system plays an invaluable function in conflict and dispute resolution especially among disadvantaged populations in conflict and post conflict environments... In Uganda, traditional justice has been used as more formal authority than formal law in most communities... They have been credited for facilitating peace processes between the Government [of Uganda] and the rebel factions, as well as tribal groups caught in conflict propaganda. They [traditional justice] sustained peace and tranquility in Ugandan communities, a virtue that needs to be strengthened.”<sup>66</sup>

### **7.5.2 A Pseudo Cooperative Pluralist Legal Order?**

Despite the formal recognition of customary justice in several national policy documents and transitional justice mechanisms happening at different levels, the current condition in Uganda falls short of full cooperation between formal and customary justice. The context in Uganda could best be described as a pseudo cooperative legal pluralist environment because there is no real cooperation, and tensions still exist between formal and customary justice about judicative power and jurisdictional authority. For example, the ICC’s indictment of Joseph Kony ignited fierce friction between local Acholi customary justice

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<sup>64</sup> *The Local Council Courts Act, 2006* (Kampala, Uganda: Government of Uganda, 2006); available from <http://extwprlegs1.fao.org/docs/pdf/uga138974.pdf> article 3.

<sup>65</sup> *The Local Council Courts Act, 2006*, sec. 10, third schedule.

<sup>66</sup> *National Transitional Justice Policy* (Kampala, Uganda: Ministry of Internal Affairs, Government of Uganda, 2019), 10; available from [https://drive.google.com/file/d/1zbqYZgRVpUpDrQUTM5c\\_GeMsuItrB9O2/view](https://drive.google.com/file/d/1zbqYZgRVpUpDrQUTM5c_GeMsuItrB9O2/view).

leaders and the ICC.<sup>67</sup> Also, although the Acholi highly utilized customary justice to facilitate the re-integration of ex-combatants, the relationship between customary justice and the other state-led components such as the disarmament and demobilization of armed groups was uncoordinated and *ad hoc*, rather than a planned and holistic approach.<sup>68</sup> There is no clear framework for how to balance these different justice mechanisms. The modalities of interaction between customary justice and formal justice represent one of the critical policy challenges of transitional justice practice.

#### **7.5.2.1.1 From Pseudo to Full Cooperation: Towards Integration and Harmonization**

To effectively prevent post-conflict societies from reverting to armed violence, I envision a legal order in Uganda characterized by a shift from pseudo to full cooperation between formal and customary justice in which customary justice retains significant autonomy, authority and not subordinated or viewed as a second-best alternative to formal justice. Integration and harmonization seem to be the ideal approach that could lead to a complete cooperative pluralist legal environment and comprehensive outcomes. I view the *integration* of different systems as a “mutually agreeable contact leading to interdependencies that cause little or no change in contact partners.”<sup>69</sup> In an integrative approach, the core and essential constitutive elements of customary justice remain intact

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<sup>67</sup> Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London; New York: Zed Books, 2006).

<sup>68</sup> Phil Clark, “Bringing Them All Back Home: The Challenges of DDR and Transitional Justice in Contexts of Displacement in Rwanda and Uganda,” *Journal of Refugee Studies* 27, no. 2 (June 1, 2014): 254, <https://doi.org/10.1093/jrs/fet051>; Quinn, *Thin Sympathy*, 24–25.

<sup>69</sup> Michael Dear and Andrew Burridge, “Cultural Integration and Hybridization at the United States-Mexico Borderlands,” *Cahiers de Géographie Du Québec* 49, no. 138 (2005): 303, <https://doi.org/10.7202/012559ar>.

and “sovereign.”<sup>70</sup> In this context, the original quality and resonance of customary justice is maintained, which is important for performing its intended functions.

Harmonization, too, is viewed as the other “best” approach to achieve a complete cooperative legal pluralism, especially in post-conflict environments where customary justice is officially recognized by the state, and efforts are made to consolidate democratic governance.<sup>71</sup> In this approach, national and international actors are willing “to tolerate some normative differences in adjudication standards, as opposed to trying to get non-state venues to act like state courts.”<sup>72</sup> Thus, the state and international actors often support and actively encourage customary justice practitioners “to act in a manner consistent with state law” and core values, such as respecting women and children’s rights.<sup>73</sup> Integration and harmonization could work together in a way that allows for a certain level of support for customary justice to function better in terms of enhancing fairness and minimizing potential abuses. This support could come from various international and national level actors. At the same time, international and national level actors must not consider their support as an avenue to interfere with the autonomy and independent legitimacy of customary justice. Figure 2 illustrates the “ideal” model of interaction between formal and customary justice.

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<sup>70</sup> Dear and Burrige, “Cultural Integration and Hybridization at the United States-Mexico Borderlands,” 303.

<sup>71</sup> Swenson, “Legal Pluralism in Theory and Practice,” 445, 447. Swenson clarifies that harmonization in a cooperative legal pluralist environment does not suggest a “just” law. Attempts are being made to consolidate democratic governance and the rule of law, but there can still be episodes of human violations and oppressive behaviors by the state. This scenario is reminiscent of the current situation in Uganda, where efforts are being made to consolidate democratic governance, yet, there are instances where the state still uses its power to repress its citizens.

<sup>72</sup> Swenson, “Legal Pluralism in Theory and Practice,” 447.

<sup>73</sup> Tanja Chopra and Deborah Isser, “Access to Justice and Legal Pluralism in Fragile States: The Case of Women’s Rights,” *Hague Journal on the Rule of Law* 4, no. 2 (September 2012): 337–58, <https://doi.org/10.1017/S187640451200019X>.



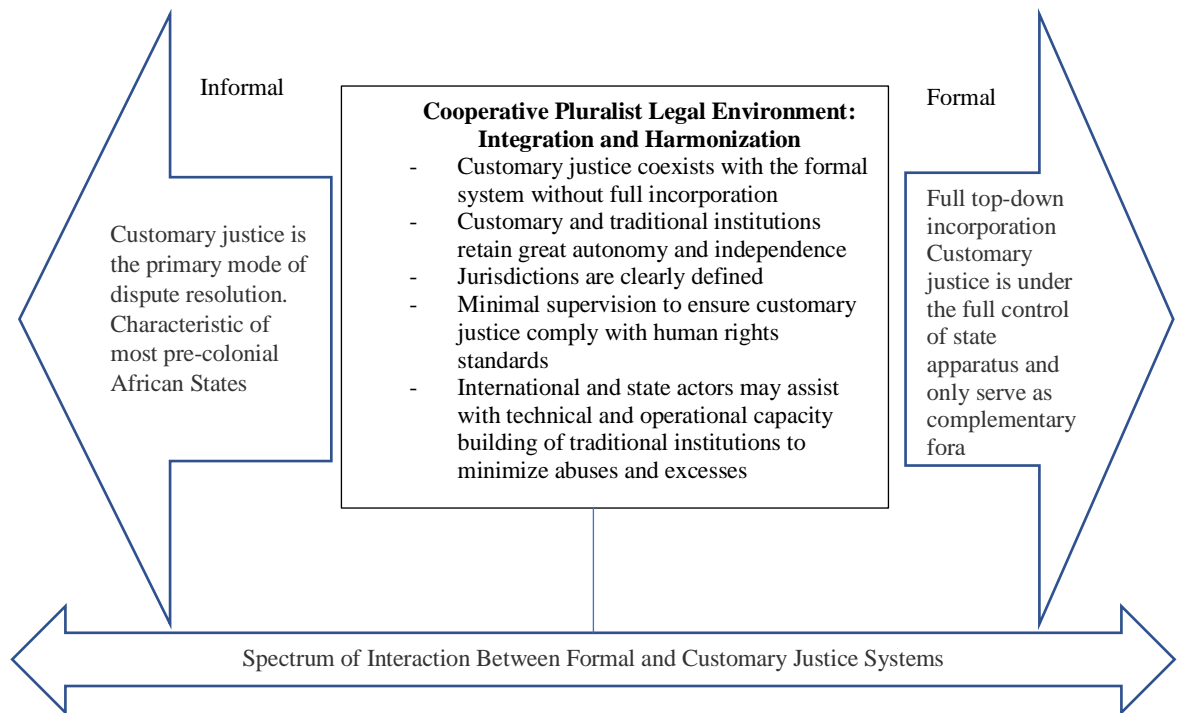


Figure 2. A Model for the Interaction Between Formal and Customary Justice.<sup>74</sup>

As figure 1 illustrates, the proposed model allows informal customary justice to exist independently of the formal state structures with considerable autonomy. Rather than a full top-down incorporation of customary justice into the state legal apparatus, the proposed model envisages a mutual positive interaction and a “process of negotiation as multiple sources of power in a society compete, coalesce, [and] seep into each other.”<sup>75</sup> Thus, it is an approach that does not focus on blueprints but, instead, is based on a fundamental epistemological change, resulting in a situation where formal national and international level transitional justice could reach an uneasy and perhaps uncomfortable

<sup>74</sup> The contents of this figure are drawn from Forsyth, “A Typology of Relationships between State and Non-State Justice Systems,” 70; Swenson, “Legal Pluralism in Theory and Practice,” 445–47; Wojkowska, “Doing Justice: How Informal Justice Systems Can Contribute,” 25–30.

<sup>75</sup> Ginty and Richmond, “The Fallacy of Constructing Hybrid Political Orders,” 2.

accommodation with customary justice approaches. This model also allows for minimal accountability mechanisms to safeguard and protect the rights of vulnerable groups and other excesses of customary justice. International actors may collaborate with state institutions to develop the technical and operational capacities of traditional institutions to minimize abuses and other discriminatory practices of customary justice.

#### **7.5.2.2 Integration and Harmonization in Practice**

There are several opportunities for integration and harmonization between formal and customary justice systems that could lead to effective cooperative pluralist legal order. Integration and harmonization could result when actors develop transitional justice interventions and policies in ways that are appropriate and consistent with the traditional system of norms, values, and beliefs of local communities. For example, the structure of Sierra Leone's truth and reconciliation commission (TRC) came close to such an integrated and harmonized approach. Sierra Leone's TRC made explicit provisions and integrated customary ritual practices in the working of the TRC.<sup>76</sup> In Kelsall's view, although the "truth" that was satisfactory to the local communities was not forthcoming, the addition of traditional ritual and reconciliation ceremony to the TRC's proceedings "created an emotionally charged atmosphere that succeeded in moving many of the participants and spectators... which arguably opened an avenue for reconciliation and lasting peace."<sup>77</sup> Kelsall argued that the TRC faced many challenges, including its relationship with the Special Court, however, the traditional "ceremony of repentance and forgiveness... struck

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<sup>76</sup> Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone," *Human Rights Quarterly* 27, no. 2 (2005): 361–91.

<sup>77</sup> Kelsall, "Truth, Lies, Ritual, 363.

deeply resonant chords with the participants and forged a reconciliatory moment,” which was significant and necessary for the state to regain credibility among local constituency.<sup>78</sup>

Another example where customary and formal transitional justice mechanisms could be integrated and harmonized explicitly is the process of disarmament, demobilization, and reintegration (DDR). As I discussed above, customary justice contributed significantly to the reintegration process of many ex-fighters into their communities. However, the relationship and the modalities of interacting with other formal state-led aspects of the DDR were somewhat spontaneous and uncoordinated. Hence, instead of *ad hoc* interactions, there could be a deliberate, planned, and coordinated strategy where customary justice is integral to the entire DDR process from the international, national, and local levels. Beyond the official recognition of customary justice in national policy documents, there could be a comprehensive strategy that explicitly details the specific tasks that the state, international actors, and the customary and traditional institutions will each play in the overall DDR process. For the system to be effective, customary and traditional institutions must maintain their independence and authority to perform their tasks without undue interference or control by the state.

An approach that consciously and explicitly integrates and harmonizes customary justice with formal justice measures could also serve as a vital foundation for reclaiming trust and enhancing the state’s legitimacy. In Uganda, the state’s complicity in perpetuating violence makes it lose trust, and its legitimacy is often challenged by those who feel marginalized and violated during the conflict.<sup>79</sup> As a result, concerns often arise whether the state institutions and structures of governance could claim some legitimacy in

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<sup>78</sup> Kelsall, “Truth, Lies, Ritual,” 363.

<sup>79</sup> Oomen, “Justice Mechanisms and the Question of Legitimacy,” 182.

administering interventions that seek to bring repair and reconciliation. However, integrating and harmonizing customary justice into national and international level transitional justice processes could be a governance strategy that could maintain peace and stability and prevent conflict from reoccurring. The way the state engages, interacts, accommodates, and negotiates with customary justice in which different sources of knowledge and power coalesce could enable the state to regain and (re)build trust and be seen as a credible actor in the eyes of the people who suffered several years of brutality. The state could be seen as a credible actor in providing repair and redress when its actions are deemed worthy, meaningful, and appropriate within some socially constructed system of norms, values, and beliefs.<sup>80</sup> Mutual interaction and cooperation between formal and customary justice could also enhance “learning between informal and state systems, [which] can improve the effectiveness of both sets of institutions.”<sup>81</sup>

If customary justice should be effectively integrated and harmonized with formal national and international level processes, then there will have to be some type of “criteria for what counts as an acceptable procedure,” and many modalities about the relationship must be worked out, too.<sup>82</sup> This raises a vital question regarding whether and how customary justice mechanisms should be codified and what that might mean regarding their *originality* and *authenticity*.

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<sup>80</sup> Mark C. Suchman, “Managing Legitimacy: Strategic and Institutional Approaches,” *The Academy of Management Review* 20, no. 3 (1995): 574–75, <https://doi.org/10.2307/258788>.

<sup>81</sup> Wojkowska, “Doing Justice: How Informal Justice Systems Can Contribute,” 29.

<sup>82</sup> Pål Wrange, “The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord’s Resistance Army/Movement - a Legal and Pragmatic Commentary,” *Uganda Living Law Journal* 6 (2008): 30; Joanna R. Quinn, “Mad Science? Possibilities for and Examples of Synthetic (Neo)Traditional Practices of Justice and Acknowledgement,” *Air & Space Power Journal - Africa and Francophonie* 5, no. 3 (September 22, 2014): 60.

## 7.6 Furthering the Interaction Between Customary and Formal Justice: A Necessary Tension

This chapter argues that to have a more fulsome and transformative change that could cease hostilities and prevent societies from reverting to armed conflict, there is the need for formal state and customary justice mechanisms to work synergistically. However, the interaction and co-existence of customary and state formal justice systems have often generated tensions. In Uganda, this tension has existed since colonial times, especially as seen in the dual judicial system created by the colonial administration – the native courts on the one hand and the state courts based on the English Penal Code on the other hand.<sup>83</sup> Following independence, customary law and the state judicial systems have co-existed, albeit in a fractious relationship. The fundamental challenges that created the tension between the formal state judicial system and customary justice are twofold. First, the issue of scope/jurisdictional authority, and second, the issue of codification.

First, tensions around the scope/jurisdictional authority center around deciding on the circumstances or crimes that would warrant the use of customary justice and those crimes that would warrant the use of the state's judicial retributive justice system. The decision on the appropriate forum to address disputes has also blurred the lines between political and judicial considerations.<sup>84</sup> For instance, Uganda's local council courts have faced interference from political elites who often use their authority to bypass the local

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<sup>83</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, N.J: Princeton University Press, 1996), 109.

<sup>84</sup> Simon Robins, "Restorative Approaches to Criminal Justice in Africa: The Case of Uganda," in *The Theory and Practice of Criminal Justice in Africa*, ed. Annie Barbara Chikwanha-Dzenga (Pretoria, South Africa: Institute for Security Studies, 2009), 75–76, available from file:///C:/Users/ibayo/Downloads/The\_theory\_and\_practice\_of\_criminal\_just.pdf.

courts and seek redress in the state's formal judicial system.<sup>85</sup> Additionally, decisions about when to apply customary justice versus when to use the state's retributive justice system inevitably touch on the ubiquitous issue of the justice-peace discourse, which provoked fierce debate in Uganda when the ICC issued an arrest warrant for Joseph Kony and some of his rebel commanders.<sup>86</sup>

The second tension is centered on the question of codification of customary justice. Several scholars have raised concerns about codifying customary justice.<sup>87</sup> Robins, for instance, observed that “it is the nature of customary law that it is dynamic and so resists being written down”<sup>88</sup> Nagy also worries that codifying customary justice could pervert the process, resulting in customary practices losing their flexibility and risk “‘one-sizing’ traditional justice.”<sup>89</sup> Examples abound in Africa, where codification has changed the form and structure of customary justice. For example, scholars and practitioners have raised concerns about how the *gacaca* courts in Rwanda have been captured and controlled by the state to foster and achieve the political objectives of the Rwandan government.<sup>90</sup> The codification and national-level legislation have transformed the original *gacaca* into

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<sup>85</sup> Nakayi Rose, “The Role of Local Council Courts and Traditional Institutions in Resolving Land Disputes in Post-Conflict Northern Uganda,” *Malawi Law Journal* 7, no. 1 (January 1, 2013): 133–34, <https://doi.org/10.10520/EJC161847>.

<sup>86</sup> Tim Allen, “War and Justice in Northern Uganda: An Assessment of the International Criminal Court’s Interventions” (London, UK: Crisis States Research Centre, London School of Economics, February 2005), available from [https://www.files.ethz.ch/isn/56421/2005-02\\_AllenICCReport.pdf](https://www.files.ethz.ch/isn/56421/2005-02_AllenICCReport.pdf).

<sup>87</sup> Quinn, “Mad Science?” 60; see also T. W. Bennett and T. Vermeulen, “Codification of Customary Law,” *Journal of African Law* 24, no. 2 (ed 1980): 206–19, <https://doi.org/10.1017/S0021855300009542>; Brett L. Shadle, “‘Changing Traditions to Meet Current Altering Conditions’: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60,” *The Journal of African History* 40, no. 3 (November 1999): 411–31, <https://doi.org/10.1017/S0021853799007513>; R. E. S. Tanner, “The Codification of Customary Law in Tanzania,” *East African Law Journal* 2, no. 2 (1966): 105–16.

<sup>88</sup> Robins, “Restorative Approaches to Criminal Justice in Africa: The Case of Uganda,” 74.

<sup>89</sup> Rosemary Nagy, “Centralizing Legal Pluralism? Traditional Justice in Transitional Contexts,” in *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, ed. Chandra Lekha Sriram et al., 1st ed. (London: Routledge, 2012), 82.

<sup>90</sup> See for example Bert Ingelaere, “The Gacaca Courts in Rwanda,” in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 32.

something relatively different than before.<sup>91</sup> For instance, the main goal of the “original” *gacaca* was the restoration of social harmony. However, scholars considered its recent use in the aftermath of the 1994 genocide as a highly formalized approach oriented towards retributive justice to the extent where the *gacaca* courts could even impose prison sentences.<sup>92</sup>

The other problem, of course, is that one cannot simply take a set of practices and instrumentalize them. As explained above, customary practices are deeply embedded in socio-cultural and religious beliefs and carried out through rituals and patterns of behaviour that have been built over time and have taken on a distinct meaning. It is precisely because of the meaning ascribed to such practices that they matter so much. Attempts to codify them could alter the practices and the meaning to such an extent that they no longer resemble their former form, and no longer hold that meaning.

Depending on how the above tensions and frictions are managed, three outcomes could emerge.<sup>93</sup> The first outcome is the desirable situation where customary and state formal justice systems could strengthen each other and function synergistically to promote post-conflict reconciliation and secure long-term peace. The second potential outcome—an undesirable outcome—could emerge in which the state could weaken customary justice. This could be a likely outcome in transitioning states, where the rule of law and democratic institutions are still developing, and despotic leaders are still in power. In such a context, in the desire to consolidate and centralize its power, the state could view customary justice

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<sup>91</sup> Bert Ingelaere, “The Gacaca Courts in Rwanda,” 32.

<sup>92</sup> 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*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International Idea, 2008), 6.

<sup>93</sup> These outcomes are not self-containing. They could occur in a continuum in which on one extreme end, there is a “perfect” integration and the other end there is an overt adversarial relationships between customary and formal state judicial systems.

and traditional institutions as a threat and take steps to outlaw it. The state could also use legislation to gain control of customary justice and capture it to serve political interests. The third—another undesirable outcome—is that, in post-conflict settings such as Uganda, where public trust in state institutions has been undermined by years of conflict, the tension between customary and formal state justice systems could escalate where traditional institutions could choose not to engage the state in peace processes in an adversarial manner. The failure of traditional institutions to engage the state could further erode the trust between the local communities and the state, which could potentially weaken the state and its institutions.

While a complete resolution of these tensions is beyond the scope of this chapter, it is reasonable to raise and bring them to the fore, which is vital to enriching the debate regarding the interaction of customary and formal state justice systems.<sup>94</sup> Nevertheless, one way to move towards a useful framework of interaction between customary justice and the state would be through *minimal codification* in which local communities' control how codification occurs.

In a post-conflict environment like Uganda, where democratic governance is yet to be consolidated and episodes of state repression still exist, I am hesitant to propose a “high” degree of codification that will involve modalities of state oversight and regulation of

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<sup>94</sup> The aim of this chapter is not to address the historiography of legal plurality in Uganda. Rather, it is an attempt to sketch out some of the existing tensions about the complex interaction between customary justice and the state. Addressing this tension would require a separate in-depth study of legal pluralism in Uganda. There is a dearth of literature that is written from the inside (Native African Scholars) that address these tensions about the interplay between customary justice and the state. Few researchers such as Mahmood Mamdani and Zachariah Mampilly have raised these tensions only in passing as part of broader studies but did not address them in detail. See generally, Mamdani, *Citizen and Subject*; Adam Branch and Zachariah Mampilly, *Africa Uprising: Popular Protest and Political Change* (London; New York: Zed Books, 2015).



customary justice by the state. In post-conflict contexts where the rule of law could easily be shoved aside, state oversight and regulation risk an intrusion and co-optation of customary justice by state institutions and political elites, which may result in customary justice losing its independence, authority, and flexibility. For instance, the local council courts (LCC) in Uganda are currently under the control of the state, and decisions can be appealed up to the High Court.<sup>95</sup> This has undermined the LCCs' autonomy, and as Nakayi reported, "in some cases politicians use their influence to emasculate the authority of [the LCC] officers by encouraging some people to defy [the local] court orders."<sup>96</sup> Therefore, a minimal codification would be appropriate to guide the relationship and interaction between formal and customary justice while maintaining the autonomy and independence of customary justice. My vision of minimal codification would also be appropriate to address some of the weaknesses of customary justice.

As I argued in chapter 4, one of the criticisms of customary justice, especially in the African context, is gender exclusion and the paternalism embedded in the decision-making structures in indigenous societies. As such, most customary justice and traditional conflict resolution processes tend to be patriarchal and not gender-sensitive. Yet, social relations within communities and how they are negotiated are entangled in various levels of armed conflict in society. These social relations and exclusionary processes are reflected in the disproportionate impact of conflict on women's lives. For instance, studies revealed customary justice in Uganda has often failed to uphold women's property rights, which

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<sup>95</sup> *The Local Council Courts Act, 2006* (Kampala, Uganda: Government of Uganda, 2006), <http://extwprlegs1.fao.org/docs/pdf/uga138974.pdf> article 32.

<sup>96</sup> Nakayi Rose, "The Role of Local Council Courts and Traditional Institutions in Resolving Land Disputes in Post-Conflict Northern Uganda," 133–34.

reinforces unequal power relations in local communities.<sup>97</sup> Globally, there have been efforts at improving women's participation in peace processes. For instance, the United Nations Resolution 1325, on women, peace, and security, adopted in 2000, stresses the importance of women's equal participation in all efforts to maintain and promote peace and security.<sup>98</sup> Customary justice processes could learn from some of these global initiatives and adapt customary dispute and armed conflict resolution processes to take on some of the global progress in promoting gender equality in post-conflict reconstruction.

Minimal codification could include the following: First, a good-enough *rule of engagement* could be established that is sensitive to the specific social, cultural, and historical contexts of local communities. Rules of engagement are necessary to ensure that the state and international actors have *predictable* mutual cooperation with traditional institutions, which does not undermine the autonomy and independence of customary justice. Second, related to the above is recognizing and giving customary justice a place in the large scheme of transitional justice and post-conflict reconstruction. In this context, state and international actors should not view customary justice as a second-best alternative, which often is the case. Third, customary justice should be allowed to work while ensuring a degree of accountability of traditional institutions and the broader community. Such an accountability mechanism would enhance compliance and promote procedural fairness of customary justice. Compliance and accountability could include mechanisms to protect women's rights and increase women's role in all conflict prevention

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<sup>97</sup> Lynn Khadiagala, "The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights," *Development and Change* 32, no. 1 (2001): 60, <https://doi.org/10.1111/1467-7660.00196>.

<sup>98</sup> United Nations, *Resolution 1325 (2000) Adopted by the Security Council at Its 4213th Meeting, on 31 October 2000*, S/RES/1325 (2000) (New York: United Nations Security Council, 2000), 1, available from [https://peacemaker.un.org/sites/peacemaker.un.org/files/SC\\_ResolutionWomenPeaceSecurity\\_SRES1325%282000%29%28english\\_0.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/SC_ResolutionWomenPeaceSecurity_SRES1325%282000%29%28english_0.pdf).

and resolution decision-making processes. In this respect, the state could facilitate and guide how traditional institutions could implement customary justice in a less exclusionary way while allowing traditional authorities to interpret customary justice according to their worldviews of justice and peace.

## **Conclusion**

As I discussed throughout this chapter, for customary justice to make a significant impact in reckoning with the past and prevent the reoccurrence of violent conflict, customary mechanisms need to be appropriately supported and linked to national-level broader processes. The debate about the relationship between customary justice and formal justice should not be a stand-off in terms of which mechanism is superior. Rather, it should be about how each could leverage their unique strengths to redress and repair a complex and often fraught post-conflict environment. Hence, transitional justice and post-conflict reconstruction measures should not be viewed as mutually exclusive choices between customary practices and formal justice.<sup>99</sup>

International actors have a significant influence in shaping transitional justice. They will continue to play vital roles in the development of transitional justice norms, especially those that ensure that states apparatus respect the rights of marginalized groups. Regardless of the relative weakness of formal national-level approaches, the state also has an equally important role in ensuring that post-conflict communities do not revert to violence. A

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<sup>99</sup> Lorna McGregor, "International Law as a 'Tiered Process': Transitional Justice at the Local, National and International Level," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Oxford ; Portland, Oregon: Hart Publishing, 2008), 49.

reformed state legal apparatus, for instance, is vital to providing fair and accountable administration of justice and promoting the rule of law.

While it is vital for formal justice to engage with local processes, we must acknowledge the risk of co-optation, control, and the manipulation of customary justice. Therefore, it is important to identify ways formal justice mechanisms could integrate with customary justice that do not compromise local communities' cultural, social, and normative belief systems. The model suggested above does not aim for universal applicability in every post-conflict context. It should be viewed within the unique situation of each post-conflict environment's historical, pragmatic, socio-cultural, and political factors. It serves as a guide that might be useful as scholars and practitioners think through the ways to prevent the reoccurrence of violent conflict, whether one approaches their work from a bottom-up or top-down perspective.

## **Chapter 8**

### **8 Conclusions**

This thesis sought to discuss a new perspective and build our conceptual understanding of how the local could be a site for strong and better-enforced measures of non-recurrence that account for the role of traditional institutions, local leaders, and non-state armed actors in armed conflict. I presented a revised notion of measures of non-recurrence beyond its restrictive state-centric usage that is more adaptable and contextually sensitive to the complexities of post-conflict states. The findings pointed to the potential of customary justice to terminate violence and prevent its reoccurrence within post-conflict settings, especially at the local level.

This conclusion has three main sections. In the first section, I highlight the original contribution of this thesis and discuss four fundamental ways customary justice to non-repetition add value to the broader discourse of transitional justice and post-conflict reconstruction. In the second section, I summarize the main arguments in the thesis. In the third section, I raised some limitations of this research, and in the final section, I suggest some areas of future research.

#### **8.1 The Added Value and Contribution to Knowledge**

This thesis makes a novel contribution in the sense that it expands and gives more depth to discussions of measures of non-recurrence that lead to new and important directions of how customary justice could be adapted to terminate civil wars and prevent societies from reverting to armed conflict. By linking customary justice and measures of non-

recurrence—which is new—the analytical focal point of this thesis sheds new light on, and is explicit about, the role of customary justice beyond reconciliation, acknowledgment, truth-seeking, and social repair.

The first value of measures of non-recurrence is that, more than anything else, they aim to prevent further armed conflict. This benefit might seem obvious, but it is worth pointing out because, as many scholars have noted, measures of non-recurrence are the least developed aspect of transitional justice, and the position it occupies in the spectrum of transitional justice measures can be fuzzy.<sup>1</sup> Second, customary justice of non-recurrence could deal with ex-combatants who are often viewed as obstacles to transitional justice from achieving its broader goals. Third, the cessation of localized violence is central to end violence, alleviate the abuse against the civilian population, which sets the foundation for other transitional justice and post-conflict reconstruction measures to emerge. The fourth point highlights the importance of customary justice in policy and practices among international development actors.

### **8.1.1 The Core Focus is on Conflict Prevention**

Truth-telling may seek to acknowledge violations, reparations may address the material and symbolic forms of repair, and prosecution may hold individuals criminally accountable. But the complexity and viciousness of recent armed conflicts meant that additional measures are needed to address post-conflict legacies and ensure long-term

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<sup>1</sup> Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, Human Rights Council Thirtieth Session, A/HRC/30/42 (New York: United Nations, 2015), 6, file:///C:/Users/ibayo/Downloads/A\_HRC\_30\_42-EN.pdf; Alexander Mayer-Rieckh, “Guarantees of Non-Recurrence: An Approximation,” *Human Rights Quarterly* 39, no. 2 (2017): 417, <https://doi.org/10.1353/hrq.2017.0024>; see also Naomi Roht-Arriaza, “Measures of Non-Repetition in Transitional Justice: The Missing Link?” in *From Transitional Justice to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge UK: Cambridge University Press, 2019), 105–30.

peace. Measures of non-recurrence is one of the additional measures that is needed to redress the legacies of armed violence and prevent the future reversion to armed conflict.<sup>2</sup> In other words, dealing with the legacy of armed conflict and serious human rights violations cannot be achieved only through prosecution, truth-telling, and reparation, but must, at the same time, include other measures that aim to prevent armed groups from reverting to armed violence and prevent conflict from happening again in the future. At its core, measures of non-recurrence more broadly seek to establish the conditions in which societies emerging from violent conflict are less likely to revert to violence. Therefore, measures of non-recurrence play important functions, particularly in contexts where the risk of the continuation of violence exists, or where violence is still ongoing. In most post-conflict settings, such as in northern Uganda, often people who engage in violence must live together again, increasing the risk of tensions and renewed violence. In such contexts, customary justice to non-recurrence serves vital roles to identify culturally appropriate entry points to prevent renewed violence, which serves as part of the larger solutions to achieving long-term peace and reconciliation.

### **8.1.2 Dealing with Potential Peace “Spoilers” to Advance Broader Transitional Justice Goals**

The long-term broader goal of transitional justice is an “attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>3</sup> One of the things that might get in the way of post-conflict

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<sup>2</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 430.

<sup>3</sup> United Nations, “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice” (United Nations General Assembly, March 2010), 2, [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

societies from achieving justice, accountability, and reconciliations is when there is still the risk of ex-combatants' return to violence. This is because ex-combatants are often considered "potential 'spoilers' of a peace process," and therefore, their successful reintegration is very vital to ensuring post-conflict societies achieve the goals of reconciliation.<sup>4</sup> The findings from this thesis demonstrate that customary justice is a valuable tool for reintegrating ex-combatants on individual, interpersonal, and community levels, which could prevent renewed violence and open the way for post-conflict societies towards achieving the broader goal of reconciliation. Unlike mainstream reintegration that often focuses on the economic and political aspects, customary justice of reintegration focuses on the social and relational dimensions. Reintegration rituals deal with the individual ex-combatant and pay particular attention to victims' perspectives, their families, traditional leaders, and, more importantly, the general community.

The United Nations Department of Peacekeeping underscored the central role of communities in reintegration when it observed that "ultimately it is communities who will, or will not, reintegrate ex-combatants and it is communities who will, or will not, benefit from a successful DDR program."<sup>5</sup> In chapter 6, I illustrated how ex-combatants who have participated in communal reintegration ceremonies felt relief from *cen* (vengeful spirit), felt more accepted, better able to communicate, and socialize with community members."<sup>6</sup> Hence, customary justice measures such as reintegration rituals play vital roles to

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<sup>4</sup> Lars Waldorf, "Introduction: Linking DDR and Transitional Justice," in *Disarming the Past: Transitional Justice and Ex-Combatants*, ed. Ana Cutter Patel, Pablo de Greiff, and Lars Waldorf, Advancing Transitional Justice Series 4 (Social Science Research Council, 2009), 16.

<sup>5</sup> United Nations, "Integrated Disarmament, Demobilization and Reintegration Standards (IDDRS)" (United Nations Department of Peacekeeping Operations, 2006), 12–13, <https://resourcecentre.savethechildren.net/node/10983/pdf/UN-2006-IDDRS.pdf>.

<sup>6</sup> Baines, "Roco Wat I Acoli Restoring Relationships in Acholi-land," 45.



“neutralize” potential peace spoilers at the community level, which advances the broader goals of transitional justice to achieve long-term reconciliation.

### **8.1.3 Cessation of Localized Armed Violence Supports Larger Transitional Justice Goals**

In many contemporary armed conflicts and civil wars, getting to the negotiating table and arriving at a negotiated political peace agreement at the national level is often a major challenge. National level political negotiation often takes so long to reach a peace agreement partly due to the multiple parties involved who often have distinct preferences.<sup>7</sup>

While national-level political peace agreements become elusive, the humanitarian cost of armed conflict and civil wars continues to increase. As chapter 5 illustrates, customary justice could terminate pockets of violence at the local level, offer a glimmer of hope to alleviate civilians’ suffering and stem the cycles of violence within specific conflict localities. The termination of localized violence and abuses could, in turn, provide stability, lay the foundation, and open opportunities for other transitional justice measures to emerge. Local peace agreements, if adequately supported, could deliver tangible long-term peace at the local level. For instance, although the *gomo tong* is a relatively rare customary practice, reports show it successfully kept some West Nile Bank Front members away from joining the Museveni’s army to fight the LRA. Similarly, the local peace deal between the Pokot and Samburu communities solidified peace between the two groups for almost a century.<sup>8</sup> These findings demonstrate the need to develop strategies to take advantage of

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<sup>7</sup> David E. Cunningham, “Veto Players and Civil War Duration,” *American Journal of Political Science* 50, no. 4 (2006): 875, <https://doi.org/10.1111/j.1540-5907.2006.00221.x>.

<sup>8</sup> Adan Mohamud, Isabella Masinde, and Ruto Pkalya, “Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet” (Intermediate Technology

the benefits of local peace deals. Local peace deals contribute to the larger solutions to conflict by preventing armed violence and keeping armed groups away from engaging in future violence.

#### **8.1.4 Advancing Policy and Practice**

This study contributes to enhancing awareness and drawing more attention of international actors to customary justice. Although there is increasing attention to the positive contribution of customary justice to address the legacy of violent conflict, support to the customary justice systems remains low by international development actors and donors. For instance, despite the World Bank's efforts in promoting justice sector reforms, it does not have many projects that "deal explicitly with traditional legal systems, despite their predominance in many of the countries involved."<sup>9</sup> To increase the support to the customary justice sector, there is the need to enhance awareness and understanding of the positive contribution of customary justice among international development agencies. I tackle this head-on in this thesis. By moving the analysis of measures of non-repetition to the local level, I broadened practitioners' and international development agencies' understanding of how customary justice could contribute to preventing conflict reoccurrence. This broadened notion of non-recurrence provides policymakers, particularly international actors, who envision measures of non-recurrence as a path to long-term peace, new possibilities, and alternative ways to respond to the specific needs of post-conflict

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Development Group - Eastern Africa, January 2004), 38, available from file:///C:/Users/ibayo/Downloads/4d927e25-5e00-4626-a7a3-12b32e33baf9.pdf.

<sup>9</sup> Leila Chirayath, Caroline Sage, and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," Background Paper for the World Development Report 2006: Equity and Development" (Washington, D.C: World Bank-World Development Report, 2005), 3, available from <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=F4B7DC2E4B90C2D4F09993E81CB73761?doi=10.1.1.574.6598&rep=rep1&type=pdf>.

societies. The arguments I advance in chapters 5 and 6 regarding how customary justice could be adopted to satisfy the goals of non-recurrence increase the set of tools available to international agencies who want to adapt and adopt customary justice practices to deal with the legacy of civil wars and armed conflict.

## 8.2 A Summary of Key Arguments

Chapter 3 charted the path of this study, in which I look at the trajectory and origins of the concept of measures of non-recurrence. The practice of measures on non-recurrence originates in international diplomatic relations in which a state that violates a tenet of international law is notified to take “a specific action that would actively reduce the likelihood of another violation.”<sup>10</sup> Measures of non-recurrence were further developed and adopted by the United Nations in its *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*. Over time, the context in which measures of non-recurrence might apply shifted from the domain of the law of state responsibility to national level-transitional justice practices.

I took stock and examine the academic debates on the subject of the local turn in chapter 4. I argued that two central strands mark the local turn debate. The first strand argues for an increased engagement of local actors through outreach, sensitization, and local empowerment while maintaining the international and liberal peacebuilding and transitional justice approaches. Paris, for instance, is one of the most outspoken upholders of this position.<sup>11</sup> The second strand argues for a move beyond the technocratic liner

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<sup>10</sup> Scott Sullivan, “Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition,” *UCLA Journal of International Law & Foreign Affairs* 7 (2002): 268.

<sup>11</sup> Roland Paris, “Saving Liberal Peacebuilding,” *Review of International Studies* 36, no. 2 (2010): 337–65.

blueprints of the liberal framework of transitional justice and post-conflict reconstruction. Proponents of this strand argue for critical scholarship and a fundamental epistemological change by recognizing different ways of knowing.<sup>12</sup> This thesis is inspired by the second strand of the local turn. I argued that for customary justice to effectively address the legacy of armed violence and prevent societies from reverting to armed conflict, we must rethink and reformulate our understanding of conflict and peace beyond the linear assumptions. Such reframing views armed conflict as complex and often embedded in historical, cultural, and socio-political constructs.<sup>13</sup>

Chapter 5 fills an important gap in the scholarly literature regarding how customary justice might contribute to measures of non-recurrence. Although a lot has been written about the potentially positive role of customary justice in dealing with the legacy of armed violence, their forward-looking potential, particularly regarding the notion of measures of non-recurrence, has not been sufficiently explored. Several scholars, such as Boege, Buckley-Zistel, Faure, Osaghae, and Zartman, have written about how customary justice is fundamentally oriented toward restoring and re-enforcing the continuing future relationship between warring groups.<sup>14</sup> Despite the future-looking functions of customary

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<sup>12</sup> Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace*; Roger MacGinty and Oliver Richmond, eds., *The Liberal Peace and Post-War Reconstruction: Myth or Reality?* 1 edition (London: Routledge, 2009); Mac Ginty, “Indigenous Peace-Making Versus the Liberal Peace”; Lederach, *Building Peace*; John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace*, Reprint edition (New York: Oxford University Press, 2005).

<sup>13</sup> Vivienne Jabri, “War, Government, Politics: A Critical Response to the Hegemony of the Liberal Peace,” in *Palgrave Advances in Peacebuilding: Critical Developments and Approaches*, ed. Oliver P Richmond (United Kingdom: Palgrave Macmillan, 2010), 41–57; Vivienne Jabri, *Discourses on Violence: Conflict Analysis Reconsidered* (Manchester University Press, 1996); Anthony Giddens, *The Constitution of Society* (Cambridge UK: Polity Press, 1984).

<sup>14</sup> Guy Oliver Faure, “Traditional Conflict Management in Africa and China,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 163; Volker Boege, “Potential and Limits of Traditional Approaches in Peacebuilding” (Berghof Research Center for Constructive Conflict Management, 2011), [https://berghof-foundation.org/files/publications/boege\\_handbookII.pdf](https://berghof-foundation.org/files/publications/boege_handbookII.pdf); Susanne Buckley-Zistel, *Conflict Transformation and Social Change in Uganda: Remembering after Violence*, Rethinking Peace and Conflict Studies

justice, they have not been thought of or not yet been recognized as being able to perform the function of non-reoccurrence.

This thesis fills this theoretical gap in chapter 5 by advancing three theoretical arguments, which illuminate the link between customary justice and non-recurrence. First, I argued that customary justice such as reintegration rituals could provide practical ways for ex-combatants to reconstruct their lives after years of combat life. The involvement of the general community in performing reintegration rituals helps create a social control and accountability mechanism which could serve as a dissuasive mechanism to prevent ex-combatants from remobilizing and engaging in future violence. Second, local peace deals negotiated by traditional authorities could terminate ongoing violence to provide the needed stability for national-level peace discussions to emerge. In some cases, local peace deals could be ends in themselves and deliver “tangible improvements on the ground that the top-level talks singularly failed to do.”<sup>15</sup> Third, the communal orientation of customary justice tends to reinforce interdependencies among community members. In such a situation, communities evoke their shared social order to keep peace and ensure that society does not revert to armed violence. “Building interdependencies make it impossible for parties to walk away from each other or to renew conflict.”<sup>16</sup>

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(Palgrave Macmillan UK, 2008); Eghosa E. Osaghae, “Applying Traditional Methods to Modern Conflicts: Possibilities and Limits,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, U.S.: Lynne Rienner Publishers, 2000), 201–17; William I. Zartman, “Conclusion: Changes in the New Order and the Place for the Old,” in *Traditional Cures for Modern Conflicts: African Conflict “Medicine,”* ed. William I. Zartman (Boulder, Col: Lynne Rienner Publishers, 2000), 219–30.

<sup>15</sup> Rim Turkmani et al., “Hungry for Peace: Positives and Pitfalls of Local Truces and Ceasefires in Syria” (Security in Transition: London School of Economics, 2014), 44; available from <http://www.securityintransition.org/wp-content/uploads/2014/11/Home-Grown-Peace-in-Syria-report-final-1-3.pdf>.

<sup>16</sup> Zartman, “Conclusion: Changes in the New Order and the Place for the Old,” 226.

In chapter 6, I analyzed the historical development of the conflict in northern Uganda and how colonialism's social and cultural dynamics influence the Acholi ethnic identity. I traced the history of the LRA insurgency and how the Acholi became the main targets of the LRA's ferocity, although the LRA has its roots from the Acholi sub-region. I drew on what other scholars have reported to provide concrete examples to support my theoretical arguments. For instance, I established how customary justice and reintegration rituals cleanse ex-combatants from *cen*, paving the way for them to reconnect with their families and communities.

To become efficient in addressing the legacy of armed violence and break the cycle of violence, it is better to envision a transitional justice approach by which various interrelated interventions are implemented at various levels. As such, in chapter 7, I looked at how customary justice could more broadly interact with formal national and international-level interventions "synergistically, rather than work against each other."<sup>17</sup> I argued that a post-conflict environment is complex and is often an arena of competing power. Therefore, although I approach my work from a bottom-up perspective, I believe that integrated efforts between the state and the local are necessary to effectively ensure that societies emerging from violence do not revert to armed conflict. Utilizing legal pluralism as an analytical lens, I argued that rather than a mere recognition or mention of customary justice in national policy documents, there must be a clear roadmap of how customary justice could be integrated into national-level transitional justice policies. The roles of local and national level actors should be clarified, so that customary practices retain

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<sup>17</sup> Luc Huyse, "Conclusions and Recommendations," in *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, ed. Luc Huyse and Mark Salter (Stockholm Sweden: International IDEA, 2008), 195.

their autonomy and authority rather than be brought under the control of state authority. In cases where national-level actors would interfere in customary justice practices, it should be within the context of ensuring procedural fairness and checking excesses, such as customary justice's discriminatory practices.

### **8.3 Potential Limitations**

This thesis is principally a theory-building exercise in which I sought to develop an understanding of how measures of non-recurrence could be usefully built through the use of local mechanisms. As an analytical tool, I also used the case of northern Uganda as a lens through which to explore the conceptual claims I made. This approach could be seen to have the following limitations.

Although I drew data from several snippets of examples, the preponderance of my argument is based on scholars and practitioners' work in northern Uganda and about a specific area, the Acholi sub-region. As a result, some may argue that this research is particularistic to the Acholi culture and the northern Ugandan conflict. Hence, my findings cannot wholly be applied to other contexts. This is a legitimate limitation. Nevertheless, the context of the northern Ugandan conflict and its manifestations mirrors most civil wars in Africa. Also, "the broad principles and inclinations" of customary justice have been similar in Africa.<sup>18</sup> The fundamental difference in customary justice is the institutional practices and political organizations based on clan, ethnic group, or social organization.<sup>19</sup> Hence, notwithstanding the specificity of this research, the theoretical arguments I advance offer broader theoretical insights and provide a valuable framework to conceptualize

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<sup>18</sup> Osaghae, "Applying Traditional Methods to Modern Conflicts: Possibilities and Limits," 210.

<sup>19</sup> Osaghae, Osaghae, "Applying Traditional Methods to Modern Conflicts," 210.

measures of non-recurrence in other post-conflict contexts, particularly in Africa. Besides, the effective implementation of customary justice in any post-conflict context requires flexibility and imagination. Therefore, transitional justice practitioners could use the ideas raised in this thesis as a guide to engage in a deeper analysis of each conflict context and adopt the appropriate customary justice measures that could be useful to prevent the non-recurrence of armed conflict.

#### **8.4 Unanswered Questions and Areas of Future Research**

This thesis opened two new lines of inquiry that could help advance our understanding of how customary justice could prevent societies from renewed armed conflict. First, a potential area of further research concerns local peace agreements. In chapters 5 and 6, I argued that local peace agreements could terminate ongoing intertribal violence and, in some cases, have held peace for many years. However, the mechanisms and contextual conditions under which local peace processes are constructed to prevent the reoccurrence of interethnic violence is an under-explored question. The fundamental question to be explored is: *How can peace agreements negotiated at the local level have broader effects and influence?* In other words, how could the benefits of local peace agreements move from their grassroots origins to have wider effects? Answers to this question will contribute directly to the literature and advance our understanding of what local peace deals could achieve at the micro (community) and macro—national, regional, and international levels. Such analysis would be critical to furthering our ability to better support locally grounded peace deals to end civil wars and ensure long-term social and political stability.



Second, how do we know if customary justice to non-recurrence contributes to preventing renewed violence and armed conflict? This question is about measuring the effectiveness of customary justice to non-recurrence. “The effectiveness of guarantees of non-recurrence will be measured by the extent to which they ensure that violations do not happen again.”<sup>20</sup> In this line of inquiry, *conflict non-recurrence* could be treated as the outcome variable, and *customary justice*, the independent variable. One would be interested in examining the duration in which peace is sustained following interventions in the realm of customary justice. This study will allow practitioners and scholars to empirically access the mechanisms that enable customary justice to prevent episodes of violence in the future.

### **8.5 Final Thoughts: A Cause for Cautious Optimism**

The conceptual framework presented in this thesis has contributed to the ongoing discussion on the role of customary justice practices in post-conflict societies, broadly, and specifically on how customary justice might work to prevent future renewed violence. Customary justice, however, has its strengths and weakness (see chapter 4). This calls for a reason for us to be cautiously optimistic about what customary justice can and cannot achieve. Post-conflict contexts and customary justice vary, and there is no one *silver bullet*. “Effective prevention of recurrence cannot be provided by a single measure or even by a few measures.”<sup>21</sup> The way to think about making progress is to see customary justice as a way to recognize the autonomy and creativity of local agents and provide opportunities for the plurality of knowledge that account for the diverse lived experience

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<sup>20</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 433.

<sup>21</sup> Mayer-Rieckh, “Guarantees of Non-Recurrence,” 433.

of post-conflict societies. We must, however, be cautious not to romanticize the local. The local is not a homogenized construction or inherently considered to be inclusive and egalitarian.<sup>22</sup> The observations of Latigo provide a convincing summary of how we should view the potential of customary justice in dealing with the legacy of armed conflict.

Neither glorifying traditional approaches as the only cure nor relegating them to the realm of the devilish is helpful to people seeking assistance in their suffering. It is only prudent to acknowledge the positive potential of traditional rituals and beliefs, not as contradictory to or competing with other approaches but as complementary to them. To ignore or discard traditional ways that have been seen to work in the past makes no sense. On the other hand, they cannot provide the cure for all ills.

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<sup>22</sup> Birgit Bräuchler and Philipp Naucke, "Peacebuilding and Conceptualisations of the Local," *Social Anthropology* 25, no. 4 (2017): 432, <https://doi.org/10.1111/1469-8676.12454>.

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## Curriculum Vitae

### Education

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**Ph.D. Cand., Political Science and Transitional Justice**      **Expected completion  
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Department of Political Science, The University of Western Ontario, London, Canada  
Thesis title: How can Local Transitional Justice Mechanisms work towards Measures of  
Non-Repetition?

**M.A., Peace and Conflict Studies**  
**May 2017**

Kroc Institute for International Peace Studies, University of Notre Dame, Indiana, USA  
Capstone title: The South Africa Youth Movement and the Mandela “Sellout” Rhetoric:  
Potential Consequences and Paths for Change

**M.A., Development Management**  
**December 2009**

Institute of Development Research and Development Policy, Ruhr Universität, Bochum,  
Germany  
Thesis title: Community Participation in Poverty Reduction Interventions: Examining the  
Factors that impact the Community-Based Organization Empowerment  
Project in Ghana

**B.A., (Honors) Integrated Development Studies**  
**April 2005**

University for Development Studies, Tamale, Ghana

### Fellowships and Awards

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**Western University Social Science Graduate Alumni Award (2020), CAD 3,000**

**Australian Government Department of Foreign Affairs, AUD 25,798**

The award is a competitive grant to African mid-career professionals to advance key regional policy objectives and increase their home countries’ institutional capacity. I was one of the 12 recipients from Africa to participate in professional leadership and policy training at the University of Sydney, Australia, August – October 2012.

**German Academic Exchange Service (DAAD), EUR 13,500**

A Competitive external award from the Government of Germany to support my M.A. studies in International Development Management – Ruhr University Bochum, Germany 2008 – 2010.

## Academic and teaching experience

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### **The University of the Western Ontario, London, Canada**

Graduate Teaching Assistantships (2017 - Present):

- Women, Sex, and Politics, POL 3207G (Winter 2021)
- Studies in Transitional Justice and Post-Conflict Reconstruction, T.J. 3001G (Winter 2020)
- Problems in Transitional Justice and Post-Conflict Reconstruction, T.J. 2001F (Fall 2017, 2018, and 2019)
- Building Peace in a World of Conflict, SJPS 2302A/B (King's University College, Fall 2019)
- Issues in International Law, POL 3201G (Winter 2018, and 2019)

## Policy and Practice Experience

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**Institute for Justice and Reconciliation, Cape Town, South Africa** Jul 2016 – Dec 2016

*Visiting Research Scholar, South Africa*

- Conducted desk research on African regional conflict systems, cross-border transitional justice, and opportunities for regional reconciliation.

**National Program Manager/Coordinator, Ghana Country Office** Sep 2013 - Aug 2015

*West Africa Network for Peacebuilding, Ghana*

- Responsible for the Ghana country office's overall leadership and strategic direction—managing the entire portfolio of projects, including annual budget forecasts, proposal development, narrative and financial reports, donor compliance, and ensuring high-quality program impact.

**Program Specialist** Dec 2012 - Aug 2013

*United Nations Development Program, U.N. Joint Program on Human Security, Ghana*

- Facilitated direct project implementation and delivery, including identifying entry points to mainstream conflict prevention, gender equality, youth economic empowerment/business development in the work of decentralized state agencies.

**Program Officer**

Jan 2010 - Nov 2012

*CARE International, Ghana*

- Oversaw the coordination, implementation, and delivery of project activities at the field level relating to local governance and capacity development and conflict prevention in rural 200 rural villages.

**Professional Membership/Affiliation**

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- Peace and Justice Studies Association (PJSA), A North American affiliate of the International Peace Research Association.

**Conference Presentations and Invited Talks**

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- “Environmental resource conflict between migrant pastoralists and Indigenous smallholder farmers in Ghana,” a paper presented at the 2015 Peace and Justice Studies Association Annual Conference, James Madison University, Harrisonburg, Virginia, United States.
- “Local Political Agency and Inclusion: Re-Situating Promises of Non-Repetition,” a paper presented at the 2021 Canadian Peace Research Association Conference, Federation for the Humanities and Social Sciences (Congress 2021), University of Alberta, Canada.
- The Center for Social Concerns—International Summer Service Learning, University of Notre Dame, Indiana, United States.  
Invited speaker (March 2016): A presentation to undergraduate students traveling to Ghana and other African countries for an international summer learning program. The presentation focused on the history, culture, economics, religion, and politics of Africa.
- Kellogg Institute for International Studies, University of Notre Dame, Indiana, United States.  
Invited speaker (May 2017): A presentation to undergraduate students who intend to pursue international development work and research in Africa. The presentation focused on the landscape of international development and the aspects of U.S. involvement in Africa.
- Transitional Justice Club, Western University, London, Ontario, Canada  
Panel Discussant (November 2018): Post-Conflict Environment: Refugees and Internally Displaced Persons. The panel discussion focused on the factors that make people leave their home country or their place of residence and what needs to happen for their safe return.