

# Customary Mechanisms and the International Criminal Court: The Case of Uganda<sup>1</sup>

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## Introduction

The conflict in the north of Uganda between the Lord's Resistance Army (LRA) and its leader, Joseph Kony, and the Government of Uganda has raged since 1986, when the current president, Yoweri Museveni, seized control of the country. While the conflict clearly has roots in the political mishandling of power,<sup>3</sup> the consequences of the war have generated untold suffering for the people in the north and have further underscored notions of marginalization. In its wake, more than 1.8 million people, many of them ethnic Acholi, are living in camps for internally displaced people (IDP), a figure which represents more than 80% of the population of the region.<sup>4</sup> The government's counter-insurgency strategy of creating 'protected villages' has forced entire communities to flee their homes and livelihoods, reassembling in disjointed, overcrowded camps where they are largely dependent on external assistance. Far from being protected, they continue to be attacked by the rebels on a regular basis.<sup>5</sup> It is also widely estimated that 30,000 children<sup>6</sup> from that region have been abducted by the rebels, the boys to act as soldiers, and kidnapped girls to be used by rebels as sex slaves and as carriers of supplies. Fighting and abduction continue. The region has been decimated socially and economically.

All of this raises serious questions about what can be done to address the impact of the activities of the LRA over the past two decades of conflict, the crimes committed by child soldiers while under the control of the LRA, and the response and involvement in the conflict by the government itself. Various calls for justice, peace, and reconciliation are being heard, and it is increasingly clear that strong measures will have to be put in place in order to adequately and fully address the demands of each.

Accordingly, this paper explores one form of justice which might prove useful in the social rebuilding process. Traditional practices are examined with regard to the conflictual processes of reintegration and amnesty, and with an eye to how things will proceed once the

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<sup>3</sup> For an analysis on the root causes of the conflict, see Zachary Lomo and Lucy Hovil, *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda*, Refugee Law Project Working Paper #11, February 2004.

<sup>4</sup> World Vision, *Pawns of Politics: Children, Conflict and Peace in Northern Uganda* (Kampala: World Vision, 2004), 4.

<sup>5</sup> Médecins Sans Frontières, *Life in Northern Uganda: all Shades of Grief and Fear*, MSF 2004.

<sup>6</sup> Tim Allen points out that "the scale of abduction is a matter of speculation" due to insufficient monitoring. See Tim Allen, *War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention* (London: Crisis States Research Centre, Development Studies Institute, London School of Economics, Feb. 2005), iii.

conflict is ended. The paper also critically examines the utility of these mechanisms in conjunction with, or perhaps as part of, the processes of the International Criminal Court.

### **Efforts and Interventions by the Government of Uganda and the International Community**

In response to numerous failed military attempts at resolving the conflict – with disastrous consequences for civilians – the government, under pressure from civil society, enacted an Amnesty Act in 2000, which allows rebels to receive amnesty if they voluntarily come out of “the bush” – a local colloquialism for the theatre of war and conflict – and renounce rebellion.<sup>7</sup> Seen primarily as a tool for ending the war, it has allowed a significant number of combatants to escape from the rebels and, in theory, return to their communities with monetary packages intended to give them a head-start in their new civilian life. By January 2005 the Amnesty Commission had received 14,695 applications for amnesty.<sup>8</sup>

It must be noted that this conception of amnesty is very different than amnesties that have been implemented in other situations of transitional justice. The amnesty granted in Chile, for example, was granted to military personnel *after* the conflict was finished, and in *blanket* form, to keep them from being prosecuted in the trials that would come after. The amnesty granted in South Africa as part of the Truth and Reconciliation Commission process was granted on an *ad hoc* basis in exchange for testimony. The amnesty in Uganda has been declared *before* the end of the conflict. While people in Uganda appear to perceive of the amnesty as having been very much a tool to end the war, there is less clarity over the consequences it might have afterward.

At the same time, the International Criminal Court (ICC) was asked by President Museveni in December 2003 to investigate the actions of the Lord’s Resistance Army in northern Uganda. The ICC has now determined that there is enough evidence to begin an investigation. What this means, of course, is that those found guilty of crimes, including crimes against humanity and war crimes, all of which have almost certainly been committed in the long-running conflict, will be sentenced and imprisoned according to the penalties set out in the Rome Statute, the legislation upon which the ICC is based.

As a result, there appears to be a contradiction between the Amnesty Act, seen by many as an alternative to punishment, and the investigations and subsequent punishment by the ICC. Indeed, several delegations of community leaders from northern districts, including Lango, Acholi, Iteso and Madi, have prevailed upon the ICC to reconsider or at least to carefully consider its actions in light of the fact that the conflict is still ongoing and the ICC has no special powers of arrest. In other words, people want the amnesty to take precedence at the moment, even though the granting of amnesty to senior members of the LRA is not necessarily a final measure in the minds of many; certain individuals could still face prosecution by the ICC. It also raises the question as to just how far down the chain of command such prosecutions will reach – at what “rank” or number of crimes against humanity or war crimes committed will the prosecutors cap their investigations? Yet another question is the perceived adequacy of any punishment that the ICC can offer, since internationally-conceived prison conditions are vastly different than what prisoners could expect in Uganda. Numerous additional logistical and legal questions surround the whole viability of the process. Ultimately, however, it is the people living in the war-affected region who will have to live with the decisions that are being made.

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<sup>7</sup> For more information on the Amnesty Act and its implementation, see Lucy Hovil and Zachary Lomo, *Whose Justice? Uganda’s Amnesty Act 2000: The potential for peace and long-term reconciliation*, Refugee Law Project Working Paper #15, February 2005.

<sup>8</sup> *Ibid.*, 7.

## Methodology

This paper is based on interviews conducted in October and November 2004 by the author, and in March 2005 by staff at the Refugee Law Project in Kampala. In total, 109 individuals were interviewed – 42 by the author, and the balance by RLP staff members. The majority of interviews took place in the northern districts of Gulu, Kitgum and Pader, with additional interviews in Kampala with key stakeholders. In the north, a wide variety of individuals were interviewed, including local government officials, religious and cultural leaders and, most importantly, civilians currently living in the IDP camps. Where not specified in the footnotes, all interviews were conducted in English; those conducted in the Acholi language were conducted by an Acholi-speaking RLP staff member, or by an English-speaking RLP staffer with the assistance of a translator. The approach throughout was qualitative, utilizing interview maps that loosely defined the structure of each interview, but left sufficient flexibility for interviewees to raise issues pertinent to them and in the order in which they thought appropriate.

## Traditional Mechanisms

It is important to understand both the genesis and application of what are commonly referred to as ‘traditional’ mechanisms – although it could be argued that ‘localised’ or ‘customary’ are more appropriate descriptions. Societies around the world developed and used a variety of instruments to resolve problems and conflicts, including native communities in North America, and across Africa and many other continents as well; each of Uganda’s many ethnic communities traditionally used different forms of customary mechanisms to deal with conflict. And although in some instances these kinds of traditions have disappeared, subsumed by the Western model of retributive justice, in other places they are still an active part of community life.

Customary mechanisms are based on traditional values and teachings, and in many instances look very similar to the kinds of mechanisms that would have existed in pre-Western societies. In other instances, they are simply modelled on old institutions, with changes made to make them relevant to contemporary circumstances; in this way, they are “neo-traditional” institutions.<sup>9</sup> These mechanisms have also been formalized, in that their proceedings are regularised and carried out according to pre-arranged and codified rules. These mechanisms either provide a parallel model of justice, or sometimes they are used in conjunction with Western mechanisms. Although these mechanisms broadly fit within very different approaches to justice, whether retributive or restorative, and fulfil different roles within their respective societies, from cleansing and welcoming to prosecution and punishment, what they have in common is that they draw upon traditional customs and ideas in the administration of justice in modern times.

## Application in Uganda

Within the rich diversity of ethnic traditions found in Uganda, many of these same kinds of customary mechanisms exist. Traditional acknowledgement customs and ceremonies are practiced by many of the 56 different ethnic groups across Uganda. Such ceremonies have been widely practiced in different areas of the country. For example, the Karamojong rely on the *akiriket* councils of elders to adjudicate disputes according to traditional custom,<sup>10</sup> which

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<sup>9</sup> Stephen Brown, “Forging National Unity in Rwanda: Government Strategies and Grassroots Responses,” a paper presented at *Reconciliation*, a conference held by the Nationalism and Ethnic Conflict Research Centre at The University of Western Ontario, May 14-15, 2005.

<sup>10</sup> Bruno Novelli, *Karimojong Traditional Religion* (Kampala: Comboni Missionaries, 1999) 169-172, 333-340.

includes various forms of cultural teaching and ritual cleansing ceremonies.<sup>11</sup> *Kitewuliza*, a juridical process with a strong element of reconciliation, was traditionally used by the Baganda to bring about justice.<sup>12</sup> The Lugbara utilise a system of elder mediation in family, clan and inter-clan conflict.<sup>13</sup>

The Acholi carry out a ceremony called *mato oput* (drinking the bitter herb), and another called *nyouo tong gweno* (a welcome ceremony in which an egg is stepped on over an *opobo* twig). *Nyouo tong gweno* is used to welcome back anyone who has been away from his home for an extended period of time. These ceremonies allow the Acholi to acknowledge that this person has been accepted back into the community, and that the community is pleased to have them back.

For the Acholi, for one to stay away from his home for a long time, that is never acceptable, that is always something bad, something associated with bitterness. So these words always are part of the ceremony for returnees. *Wa ojoli paco*, these are also words spoken at the ceremony. It means, “we welcome you home.” It is to say that, “the people have forgiven you everything, the Acholi people welcome you back and they now want you to take responsibilities in the community.” Immediately you are welcomed in the community, the community is beginning to extend its services and responsibilities to you. People will come and talk to you. Once a child is born in Acholi culture, that child becomes part and parcel of that particular family, and the clan, and then the community. So the whole community would also expect some responsibility from you.<sup>14</sup>

Presently, both ceremonies are being used to welcome ex-combatant child soldiers home after they have left the rebel army.<sup>15</sup> And in 1985, *gomo tong* (the bending of spears), an inter-tribal reconciliation ceremony, was held to signify that “from that time there would be no war or fighting between [the following ethnic groups:] Acholi and Madi, Kakwa, Lugbara or Alur of West Nile.”<sup>16</sup>

Certainly, and not surprisingly, the role played by traditional mechanisms of justice has changed. For instance, several interviewees acknowledged the fact that external influences, such as colonialism and now the country’s central government, have altered the way in which justice is administered. In addition, there was frequent reference to the fact that ‘the youth’ do not recognize or understand such mechanisms any longer, a complaint that is not uncommon in societies around the world. The introduction of other religions, and in particular Christianity, appears to have led many to reject traditional mechanisms – although a number of people referred to the level of compatibility between their religious beliefs and Acholi traditional mechanisms, and saw no contradiction.

As Finnstrom observes:

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<sup>11</sup> Peter Lokeris, Minister of State for Karamoja, interview with author, 18 Nov. 2004, Kampala, Uganda.

<sup>12</sup> Waliggo, “The Human Right to Peace,” 7. Also, idem, “On Kitewuliza in Buganda, 3 May 2005” author’s collection, 1.

<sup>13</sup> Joseph Ndrua, “A Christian Study of the African Concept of Authority and the Administration of Justice among the Lugbari of North Western Uganda,” (M.A. diss., Catholic Higher Institute of East Africa, 1988), 42-56.

<sup>14</sup> Middle-aged man, interview in Acholi language with RLP interviewer, 5 March 2005, Gulu town.

<sup>15</sup> For an excellent description of *mato oput* see Sverker Finnstrom, *Living With Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda* (Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology No. 35, 2003), 297-299.

<sup>16</sup> *Ibid.*, 299.

It is important to note that drinking the bitter root (*mato oput*) is not simply a tradition of some glorious past. In the midst of war this reconciliation ritual is conducted in Acholiland and clan feuds are settled there. Even though a murderer is sent to prison, a reconciliation ritual ought to be conducted... These practices, far from being dislocated in a past that no longer exists, have always continued to be situated socially. They are called upon and performed to address present concerns. Of course, like any culturally informed practice, with time they shift in meaning and appearance.<sup>17</sup>

There is, however, some evidence of their decline.<sup>18</sup> “The traditional values, cultural knowledge and social institutions of everyday life are threatened.”<sup>19</sup> And the social meanings of the ceremonies that are still practiced appear, in some cases, to be shifting<sup>20</sup> as people move farther away from their *gemeinschaft* communities. This is especially true in regions where large numbers of people have been forced out of their homes and into IDP camps.<sup>21</sup>

#### Application in northern Uganda

In the case of northern Uganda, it is also important to distinguish between cultural mechanisms that naturally change over time, and those that have been altered by the conflict. Indeed, in the majority of interviews, the war was seen as being the dominant factor in explaining the reduced use of traditional mechanisms amongst Acholi people. In particular, numerous interviewees referred to the issue of displacement as having created an environment in which carrying out traditional ceremonies had become impossible. For many, this was symbolized by the fact that people are no longer able to sit around a campfire in the evenings and talk, as it is too dangerous. Thus the oral tradition and all that is bound up in it has been subsumed beneath the constant threat of violence. Many interviewees referred to the fact that the essence of their lives had been destroyed by displacement: the physical structures of the camps have created an artificial environment that has damaged the fabric of the communities.

The net impact of the large-scale displacement caused by the war is a strong belief that traditional mechanisms can no longer be applied in any meaningful way in a context of displacement: ceremonies have little meaning when there is no place to perform them, and food is so scarce that there are no animals left to sacrifice. “The pre-war cultural agency of the displaced Acholi people diminishes. In the long run, the situation is of course socially destructive.”<sup>22</sup>

In addition, children are no longer growing up within the type of environment that is conducive to passing on ideas and values that underpin many of the cultural mechanisms. To some, this has generated a feeling that traditional mechanisms have become obsolete. However, a significant number of those interviewed were of the opinion that once people have returned home, there is no reason why the use of traditional mechanisms should not be revived in some form, given the right conditions. As one woman said, “[traditional mechanisms] can work if all the people have gone to their normal settlements, not as IDPs. Because then you are sure of where your son or child is. But if we return to our homes, then we can start to do these things

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<sup>17</sup> Ibid., 296-299.

<sup>18</sup> Allen reports that a study funded by the Belgian government revealed that young people no longer automatically respect the elders. Allen, *War and Justice in Northern Uganda*, 76.

<sup>19</sup> Finnstrom, *Living With Bad Surroundings*, 201.

<sup>20</sup> Ibid., 298.

<sup>21</sup> Ibid., 201.

<sup>22</sup> Finnstrom, *Living With Bad Surroundings*, 204.

again.”<sup>23</sup> Indeed, for many, the use of traditional mechanisms is seen to be a vital component to the whole process of return, symbolizing aspects of social cohesion that have been (temporarily) lost during displacement.

Others, however, believe that traditional mechanisms could be carried out in the camps. One interviewee said, “Our chiefs are trying to revitalize the system, but not fully. Because now, many of the cleansing ceremonies for example are done here in Gulu. If it could be done in the camps, I think many of the young there would see, ‘this is the way things used to be done.’ But when things are only done in Gulu, then only the wrongdoers see what is being done.”<sup>24</sup> Still, it appears that traditional rituals are currently fulfilling an important role in the present context and, more importantly, are referred to in ideas for future reconciliation.

#### The scale of war

Another impact of the war on the use of traditional mechanisms of justice identified by interviewees refers to the magnitude of what has taken place in northern Uganda, which is widely seen as something unprecedented. In particular, many referred to the fact that killing has taken place on such a scale that it is no longer possible to determine who is responsible for individual deaths.

The very nature of this conflict, which has forced people to kill within their own families, is unparalleled in the region’s history. As one man living in the same IDP camp said, “Kony has brought killings where people kill in their own clans and families. This is so complex that I do not think it can easily be handled.”<sup>25</sup> Indeed, it is vital that the nature of the conflict, which has impacted people’s lives at a very personal level, is taken into account in any mechanisms of justice that are implemented. Civilians have not only borne the brunt of the conflict, they have also been the main source of brutality, as abducted children have been forced to carry out many of the atrocities committed by the LRA. These same children, once they have escaped, are, in theory, being reintegrated back into their ‘communities’ and considerable pressure is being put on people to accept them.

#### Thinking beyond conflict

In Uganda, peace is a precondition for justice. Yet, it seems that for many interviewees, the possibility of peace returning to the north has been elusive for such a long time that they have ceased to think about peace as a genuine possibility. As a result, many interviewees gave the impression that they were unable to think about what should happen once the conflict has ended. Instead, they were primarily preoccupied with thinking about how an end to the conflict could be achieved.

With regard to the majority of returnees who are widely recognized as having been abducted in the first place, there was a willingness to accept them back. But for many this is not an easy thing to do, and the reintegration process is far from straight forward. Many responses stemmed from a recognition of the depth to which the conflict has penetrated within the society. Given the number of those abducted and returning on a daily basis, allowing for the acceptance of former combatants has become vital to the process of societal rebuilding, and goes a long way to building social trust and social cohesion, as discussed above. As one young woman said, “The fact that everyone’s child was abducted in one way or another and may have committed

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<sup>23</sup> Elderly woman, interview in Acholi language with RLP interviewer, 14 March 2005, Kichwa.

<sup>24</sup> Middle-aged man, interview in Acholi language with RLP interviewer, 3 March 2005, Gulu town.

<sup>25</sup> Ibid.

atrocities at the moment makes it important for the whole community to now say, ‘we want total reconciliation.’”<sup>26</sup>

However, it is vital that the reintegration process not be taken for granted. While there is an overall willingness to accept the majority of former combatants back, more needs to be done to facilitate the long-term process and assist the communities in absorbing former combatants. The emphasis on the issue of the senior commanders has perhaps detracted from the daily reality in which former combatants, whether voluntarily or not, are moving within the wider spaces of society. As a religious leader said, “The trouble with ICC is that you go and arrest the... six or so leaders of the LRA. But we are saying, ‘the war has been here for nearly 19 years. Is it really true that there are only six people who did wrong?’”<sup>27</sup> Indeed, numerous interviewees referred to the fact that, while the conflict continues, people will accept former combatants, but once it is over, then more needs to be done to avert tensions and future conflict from arising. In other words, the long-term implications of amnesty – of having former combatants returning to the areas in which they operated as combatants – needs to be given serious consideration. The levels of acceptance and forgiveness that exist must not be taken for granted. As one man living in an IDP camp in Gulu said,

The amnesty says you are forgiven, but for us, they still have to come and talk to the parents and compensation will have to be done. Even if the amnesty has done its work the ceremony of *mato oput* has to be done and compensation paid... But when they come back, they will not be rushed into paying compensation. But when the people go back to their homes, that is when they will slowly begin to deal with these issues and with the compensation.<sup>28</sup>

A few of those interviewed admitted that they are unwilling to accept former combatants back regardless of whether or not they were abducted. As one elderly woman said, “Even those who were abducted, they are no longer our children. They are now with Kony and they take instructions from Kony to kill us. They should also be killed.”<sup>29</sup> Or in the words of an elderly woman, “People are bitter, like me, I am so bitter. I feel they should kill that person who killed my son.”<sup>30</sup>

While these comments were in the minority, it is still vital that such opinions are taken into consideration both while the conflict is still ongoing, and in any post-conflict environment. This reflects some of the inadequacies within the amnesty process, which places unrealistic demands on communities that are already living under extraordinary strain. In particular, the lack of accountability built into the amnesty was frequently referred to, particularly in connection with the return of more senior combatants who are now seen to be living a life of luxury in Gulu town. As one interviewee said, “when these commanders come out, not one time do they acknowledge their crimes. And that adds to the pain. The people want these commanders to admit that they were in the wrong. That is one factor that makes it not easy for reconciliation.”<sup>31</sup>

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<sup>26</sup> Young woman, interview with RLP interviewer, 6 March 2005, Gulu town.

<sup>27</sup> Religious leader, interview in Acholi language with RLP interviewer and translator, 10 March 2005, Gulu town.

<sup>28</sup> Man, interview in Acholi language with RLP interviewer and translator, 10 March 2005, Unyama IDP camp, Gulu.

<sup>29</sup> Woman, interview in Acholi language with RLP interviewer and translator, 13 March 2005, Amida IDP camp, Kitgum.

<sup>30</sup> Elderly woman, interview in Acholi language with RLP interviewer and translator, 13 March 2005, Amida IDP camp, Kitgum.

<sup>31</sup> NGO worker, interview with RLP interviewer, 6 March 2005, Gulu town.

Or, as a young woman living in squalid conditions in an IDP camp said, “These commanders, they now live better than we do... they come out and are so arrogant.”<sup>32</sup>

This points to an important difference between the traditional Acholi system of justice (in particular the *mato oput* ceremony) and the amnesty: in the case of the former, a vital part of the ritual is acknowledgement and truth telling, something that is missing from the amnesty process. People are clearly disturbed by the lack of accountability within the process that, in turn, creates an environment in which receiving an amnesty certificate is seen as a complete process in and of itself. Such an impression is underscored by the way in which the government is using senior ex-combatants to tempt others out of the bush. While this might be accepted as an effective strategy for ending the war, further mechanisms need to be built into the process to satisfy people’s understandings of justice in a post-conflict environment. Thus, while support for the amnesty as a means of getting the rebels out of the bush was widely shared, with most interviewees able to explain their reasons for supporting the amnesty in terms of achieving an end to conflict, the views of what should happen next were much more divergent and less well thought out. The majority of civilians see the amnesty process as being the surest way to absorb the thousands of abductees/ex-combatants back into society. However, there was also a recognition that further processes will need to be put in place to facilitate a genuine reintegration process in the long-term. In addition, and not surprisingly, there was considerable divergence of opinion relating to the issue of what should happen to the LRA’s senior commanders, in particular Kony.

It seems clear that the appropriate use of these customary mechanisms ought to be fostered and encouraged. “No society can build a civilization on borrowed values. In order for [Uganda] to have a real civilization for peace, tolerance, world understanding and democracy, human rights, authentic integral liberation and development, [Uganda] must look at its own heritage, and basing on its best values in that heritage, build the real and permanent culture and civilization of peace and peaceful resolution of conflicts.”<sup>33</sup> Whatever institutions are implemented in northern Uganda, they must be built on Ugandan values, specifically those espoused by the people who have been affected directly by the conflict. “People feel that western methods are more sophisticated so traditional methods are not being used.”<sup>34</sup> “Maybe the western method on its own, or the traditional method on its own, will suffice. Or maybe we need a blend.”<sup>35</sup> “We should maybe look back at what went wrong, and how people used to solve issues and use traditional roots to inform current policies.”<sup>36</sup>

### **“Justice” and Law**

The following section forms a preliminary and exploratory analysis of how traditional mechanisms might be placed within the standards required by international law. Indeed, some consider the kinds of customary mechanisms discussed here too informal to meet the often-strenuous requirements of international law in establishing accountability for crimes. Others have seen them as “second best.” For these reasons, traditional institutions have long been disregarded. Beginning in colonial times, traditional customs were belittled, and set aside for use

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<sup>32</sup> Woman, interview with RLP interviewer, 9 March 2005, Palenga IDP camp, Gulu.

<sup>33</sup> Waliggo, “The Human Right to Peace,” 9.

<sup>34</sup> Rose Othieno, Centre for Conflict Resolution, interview with author, 5 Nov. 2004, Kampala, Uganda.

<sup>35</sup> Confidential interview by author with NGO official, 1 Nov. 2004, Kampala, Uganda.

<sup>36</sup> Confidential interview by author with Sabin man studying at Makerere University, 7 Nov. 2004, Kampala, Uganda.



only by “natives” within the colonies, while separate mechanisms for use by ‘non-natives’ were maintained, effectively creating a dual system.<sup>37</sup> And as African nations, in the throes of anticolonialism, began to declare independence in the 1950s and 1960s (including Uganda in 1962), eventually the two systems were integrated to some extent.<sup>38</sup>

Just what shape processes of justice should take, however, remains ambiguous. Ugandans themselves appear to be divided on the appropriate approach. And although there is considerable debate, even at the grassroots level, about the kinds of mechanisms that have been sanctioned by the Government of Uganda to deal with the LRA, these mechanisms are not entirely understood. Interviewees stressed the importance of holding all sides to account – including members of the LRA and the Government of Uganda – along with addressing the root causes of the conflict, while keeping in mind the real consequences of the conflict and the limitations that the war in northern Uganda has imposed.

How to hold all sides to account is difficult. Those interviewed spoke of a number of different solutions which drew on a number of different models of justice, including both restorative and retributive ideas. The difficulty arises in part because African justice, and especially the kinds of mechanisms traditionally employed by the Acholi, encompasses facets of both restoration and retribution. Interviewees did not distinguish between the two, and often spoke of both as being necessary.

The debate is further complicated by the many different processes which have been initiated in Uganda. Instead of a coherent and planned approach to “justice,” the Government of Uganda has instead implemented two very different and contradictory approaches; it initiated an amnesty process to bring combatants out of the bush in an effort to stop the conflict; and then, when it seemed that the amnesty was not sufficient, the Government of Uganda called upon the International Criminal Court to step in and carry out Western-style justice. In the meantime, the religious and traditional leaders have used customary mechanisms, including *mato oput* and *nyouo tong gweno*, to address the former combatants; the idea of justice under them goes well beyond simply punishing perpetrators in prisons. And so, many different processes, including Ugandan justice, amnesty, restoration, and Western justice, are at play.

One further complication is the inherent contradiction that arises from this discussion: Why is it that so-called international standards – obviously a collection of cultural norms from a select group of nations – are being used as benchmarks, when the inverse might actually be ideal? That is, some of the questions arising from the on-going conflict in northern Uganda and other transitional situations should inform current international law, rather than constantly having to fit these complex situations to fit “international standards”. This section attempts to sort out some of these ideas, and how international instruments, including the Rome Statute and the International Covenant on Civil and Political Rights, might allow Ugandans to adopt a modified solution using some features of international mechanisms, while still utilizing customary ideals and traditional mechanisms that meet the requirements of international law.

### Retributive Models

While it is vital not to over-romanticize traditional mechanisms, it is also important to bear in mind the fact that the Western retributive model is far from perfect. In the face of modern conflicts in which civilians are often caught up in the frontline, and in which clear categories of perpetrators and victims often do not exist, many different problems arise from using the

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<sup>37</sup> Mahmood Mamdani, *Citizen and Subject* (Kampala: Fountain Publishers, 1996), 109-110.

<sup>38</sup> *Ibid.*, 128-130.

Western retributive model. Such justice is often accused of sacrificing the rights of defendants for social solidarity; distorting historical understandings of a nation's past; fostering delusions of purity and grandeur; requiring extensive admissions of guilt and repentance; risks having its legal efforts to influence collective memory fail because such memories arise "only incidentally"; and forces authorities to conceal deliberateness of purpose.<sup>39</sup> This type of retribution, sometimes referred to as the "liberal-prosecutorial model," has been deemed by some as inappropriate in transitional contexts.<sup>40</sup> "The limitations of formal justice are most vivid when there are 'many dirty hands,'"<sup>41</sup> as there are in civil conflicts like the conflict in northern Uganda.

The implementers of retributive institutions see their task as mainly technical in nature, and often fail to take contextual factors into consideration. This has been called "global legalism from above" and is seen as one of the biggest difficulties of outside experts participating in the building of appropriate institutions in post-conflict societies.<sup>42</sup> These programmes are often "one-size-fits-all" and therefore less effective than tailor-made solutions, since they target institutions and structures rather than getting to the heart of the problem.<sup>43</sup> In other words, while many of the ideals are good in theory, when applied to a complex conflict such as the one in northern Uganda, they look inadequate if applied in isolation. It is a mistake to assume that simply prosecuting and, hopefully, convicting Kony and a few of his senior commanders will satisfy the needs of justice in this context. Worse, still, is the possibility that Kony might be released, for instance, on a plea of insanity, as has been suggested.

#### Capabilities of Traditional Mechanisms

Customary mechanisms, on the other hand, are able to perform a number of different functions within transitional communities, as they have done for many years.<sup>44</sup> Traditional mechanisms are extremely complex, in part because their judicial functions are bound up with the extensive social education received in the home and in the community, through teaching surrounding the celebrations and everyday activities of the community.<sup>45</sup> Traditional practices have been used to deal with conflict at every level of Ugandan society, within groups, communities, clans and neighbourhoods.

Such practices include adjudication or arbitration, mediation, reconciliation, compensation, and various rites and symbols.<sup>46</sup> It is clear that in the practical definition of many of these elements, the boundaries between restorative and retributive justice, as mentioned above, begin to blur.<sup>47</sup>

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<sup>39</sup> Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction Publishers, 1997) 7-8.

<sup>40</sup> Peter E. Harrell, *Rwanda's Gamble: Gacaca and a New Model of Transitional Justice*, (New York: Writers Club Press, 2003) 5.

<sup>41</sup> Nancy L. Rosenblum, "Justice and the Experience of Injustice," in Martha Minow, *Breaking the Cycles of Hatred; Memory, Law and Repair*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 2002) 78.

<sup>42</sup> Antonio Franceschet, "Global Legalism from Above: Kant and the Problem of Transitional Justice," a paper prepared for presentation on the panel, "Transitional Justice: Local and International Dimensions," at the Canadian Political Science Association Annual Meeting, 2 June 2005.

<sup>43</sup> Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Oxford: Polity Press, 2002) 68.

<sup>44</sup> Aylward Shorter, *African Culture* (Nairobi: Paulines Publications Africa, 1998), 65.

<sup>45</sup> Eric O. Ayisi, *An Introduction to the Study of African Culture*, 2nd ed. (Nairobi: East African Publishers, 1979), 110.

<sup>46</sup> Waliggo, "The Human Right to Peace," 7.

<sup>47</sup> Andrew Oldenquist, "An Explanation of Retribution," *The Journal of Philosophy* 85.9 (Sept. 1988): 471.

Wrapped up in each of these functions is the element of reconciliation. “Reconciliation was always an essential and final part of every legal and other peaceful settlement of conflict...[Yet] it also stood on its own.”<sup>48</sup> In many different ethnic configurations, such as the institutions of the Karamojong, reconciliation is always the first element of this process to be attempted.<sup>49</sup> And of the Acholi mechanisms, Rwot Onen David Acana II said, “*poro lok ki mato opul*” (“Peace talks and reconciliation are the best way to resolve conflict.”)<sup>50</sup>

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<sup>48</sup> Waliggo, “The Human Right to Peace,” 9.

<sup>49</sup> Bruno Novelli, *Aspects of Karimojong Ethnosociology* (Verona: Museum Combonianum no. 44, 1988), 73.

<sup>50</sup> Quoted in Allen, *War and Justice in Northern Uganda*, 67.

### Potential Difficulties in the Use of Traditional Mechanisms

Traditional practices, however, are not without their shortcomings, and little has been written about the manner in which customary mechanisms might meet the stringent requirements of international law in determining accountability and the manner in which “justice” in whatever guise should proceed. “Unwittingly reinforcing iniquitous practices or undesirable power authorities out of deference to local customs, culture and leaders” can be a particularly harmful outcome of customary mechanisms.<sup>51</sup> There is clear evidence of this, in fact, in looking at the way in which colonial powers unfairly and prejudicially empowered particular chiefs instead of others, thereby “turning [them] into an enabling arm of state power.”<sup>52</sup> Among the Acholi, European colonial powers favoured different clans and chiefs, by times the Payira, the Paicho, and the Padibe, although today the Payira “promote their chief as the paramount Acholi leader.”<sup>53</sup>

It is therefore vital to recognize that “not all customary laws are necessarily benign, as they have undergone their own troubled history and evolution, and their content may not necessarily be uniformly acceptable to all citizens or communities in the country.”<sup>54</sup> The fear, of course, is that bias and prejudice could tend to strip away the uniformity of such institutions, since their “substantive and procedural rules are imprecise, unwritten, democratic, flexible, *ad hoc*, and pluralistic.”<sup>55</sup>

One further difficulty was highlighted repeatedly in the interviews conducted with those living in the war-affected region. Interviewees frequently used concepts of restoration and retribution interchangeably, seemingly without realizing that these concepts are seen as strictly defined and completely incompatible in the international system. As discussed above, it is obvious that the Acholi traditional mechanisms, in particular, skillfully combine these elements – and that, as a result, people familiar with these mechanisms see no reason why they ought to be kept apart.

It is, therefore, important to understand exactly what standards customary mechanisms must meet in order to satisfy those who insist that only Western models will suffice, if traditional models are to be used. These requirements are of two basic types: The first is *procedural*, and is concerned with the procedures and protocol that are to be followed in carrying out “justice.” The second is *accountability*, which is therefore concerned with punishing criminals for offences they have committed.

The *Rome Statute* provides the “gold standard” for addressing the most heinous of crimes; it forms the basis of procedural and accountability standards to be upheld by the International Criminal Court. This document, of course, is of major importance in the debate about what should be done regarding punishment of those involved in the commission of crimes in the Ugandan conflict because in December 2003, President Museveni asked the ICC to look into the situation in northern Uganda, and the Chief Prosecutor of the ICC has since determined that there is a reasonable basis to open an investigation. The Rome Statute complements other legal instruments, including the United Nations Genocide Convention and the Geneva Conventions, for example, and lays out the rules that pertain to accountability for crimes including genocide, crimes against humanity, and war crimes.

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<sup>51</sup> Mani, *Beyond Retribution*, 84.

<sup>52</sup> Mamdani, *Citizen and Subject*, 122-124.

<sup>53</sup> Finnstrom, *Living With Bad Surroundings*, 70; more generally 69-71.

<sup>54</sup> Mani, *Beyond Retribution*, 81.

<sup>55</sup> Richard Abel, *The Politics of Informal Justice*, vol. 2 (London: Academic Press, 1982) 2.

And, while it is clear that such mechanisms could easily meet the procedural requirements of international law, their utility in establishing accountability for crimes, and their ability to provide adequate facility for punishing such actions is less clear. In this regard, the Rome Statute, in defining the terms of reference for the ICC, is instructive. The Rome Statute clearly lays out which crimes are punishable, and just what should be done when these crimes have been committed. The ICC is charged with considering “the most serious crimes of concern to the international community... [including]: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes.”<sup>56</sup>

Beginning in the Preamble, the Rome Statute outlines its commitment to questions of peace, justice and accountability. In it, the States Parties to the Statute “Recogniz[e] that such grave crimes threaten the peace, security and well-being of the world... Determin[e] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes... and Resolv[e] to guarantee lasting respect for and the enforcement of international justice.”<sup>57</sup>

Yet customary mechanisms, too, have long addressed questions of peace, justice and accountability. These matters were traditionally managed by the leaders of the community.<sup>58</sup> “The traditional leaders oversee the general peace of their subjects. These institutions used to work with the community to reconcile the conflicts in the community, and also murder. If someone has done these things, he needs to accept the guilt. [“Accepting the guilt” is seen as acknowledgement in Acholi culture.] If someone does not accept the guilt, he is left free and remains outside the community. The fundamental thing is for the criminal to be alive and contribute to strengthening society.”<sup>59</sup>

And these customs were traditionally passed on through strong social and cultural education, passed on from one generation to the next. Acholi children were traditionally taught a representative proverb, *te okono pe kiputu* (“the stump of the pumpkin should not be uprooted”). This proverb was symbolic of two basic principles: first, that they should not destroy Acholi traditions; and second, that they should respect their “clan, relations, elders, ancestors and holy shrines.”<sup>60</sup>

#### Rome Statute regarding Traditional Mechanisms

The Rome Statute leaves the door open with regard to investigations and prosecutions conducted nationally. Although Article 17.1.c stipulates that, “a case is inadmissible where... the person concerned has already been tried for conduct which is the subject of the complaint...”, it is feasible that Ugandans could utilize these customary mechanisms and still meet the requirements of international law.

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<sup>56</sup> Rome Statute of the International Criminal Court, Article 5.1. Aggression presently stands as a fourth listed crime, but is undefined. Accordingly, individuals cannot yet be investigated and prosecuted by the ICC for the Crime of Aggression. As per section 5(2) of the Rome Statute, the ICC will have jurisdiction over Aggression if and when a definitional provision is adopted in accordance with the Rome Statute’s amendment provisions. Pursuant to section 123, in 2009 there will be a major Review Conference of the Assembly of States Parties at which time any amendments to the Rome Statute may be made, including the definition of crimes. Meanwhile, a special working group within the Assembly of States Parties has been charged with formulating draft proposals. Aggression will likely remain undefined for some time to come. Many thanks to Adrian Jones of McMaster University for this clarification.

<sup>57</sup> Rome Statute of the International Criminal Court, Preamble.

<sup>58</sup> Finnstrom, *Living With Bad Surroundings*, 292.

<sup>59</sup> Geresome Latim, Executive Secretary, *Ker Kwaro Acholi*, interview with author, 22 Nov. 2004, Gulu, Uganda.

<sup>60</sup> Finnstrom, *Living With Bad Surroundings*, 274.

However, Article 17.1.b directly addresses non-retributive mechanisms, and allows the state itself, in this case the Government of Uganda, to pursue any cases it chooses by means of sanctioned or approved mechanisms after a thorough investigation by any means it chooses – potentially including the use of customary mechanisms.

It has been suggested, however, that the ICC is also capable of supporting mechanisms that are restorative in nature:

Article [53.1.b] specifically juxtaposes the traditional criminal justice considerations – the gravity of the crime and the interests of the victims – with the broader notion of “interests of justice” and clearly indicates that the latter might trump the former. Thus, the ordinary meaning of this text, examined in the light of its object and purpose, suggests that “interests of justice” is a relatively broad concept.<sup>61</sup>

The matter of the amnesties granted by the Amnesty Commission, however, complicate the matter of meeting international rule of law requirements to some extent. It appears that these amnesties could not be upheld in the face of an ICC investigation, even though, as mentioned in both Section 1 and Section 5.5, above, the main goal of the Ugandan amnesty has been to end the conflict and save lives, not to shield criminals:

The bestowal of... amnesties could never satisfy the complementarity test [of the Rome Statute]. First, there would likely be no “investigation.” Second, even if there were an “investigation...” it could hardly be said that there was a “decision” not to prosecute... One could argue that the *primary* intent was to promote reconciliation and not to shield perpetrators, but nevertheless it would be undeniable that the means chosen was to shield perpetrators. Thus there would clearly be *an* intent (a substantial even if not primary intent) to shield perpetrators.”<sup>62</sup>

Still, the balance of amnesty reporters (who are called “perpetrators” in the language of the Rome Statute) could be dealt with by customary mechanisms. This would leave the major perpetrators, including Kony and others, to be dealt with by the ICC. And this scenario conforms nicely with the stated wishes of many of those interviewed for this study.

What is clear is that the Rome Statute and the ICC are in no way meant to “discourage attempts by national states to come to terms with their past... It would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.”<sup>63</sup> Some, in fact, have suggested that the ICC should defer to national mechanisms.<sup>64</sup> Still, “the ICC must be committed to prosecution and

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<sup>61</sup> An excellent discussion of this can be found in Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,” in *Bringing Power to Justice?* eds. Joanna Harrington, Michael Milde and Richard Vernon (Montreal: McGill-Queen’s University Press, 2005) 9.

<sup>62</sup> *Ibid.*, 24-25.

<sup>63</sup> Alex Boraine, *A Country Unmasked: South Africa’s Truth and Reconciliation Commission* (Cape Town: Oxford University Press, 2000) 433.

<sup>64</sup> For example, UN Secretary General Kofi Annan has suggested that it would be “inconceivable” for the ICC to set aside an approach like that adopted in the South African situation: Kofi Annan, “Speech at the Witwatersrand University Graduation Ceremony (1 September 1998),” quoted in Charles Villa-Vicencio, “Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet,” *Emory Law Journal* 49.1 (2000): 222. See also Mahnoush H. Arsanjani, “The International Criminal Court and National Amnesty Laws,” *ASIL Proceedings* 93 (1999): 65-8; and Michael Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” *Cornell International Law Journal* 32.1 (1999): 507-27.

can defer to non-prosecutorial programs only in exceptional situations”<sup>65</sup> as in northern Uganda, where the conflict has been on-going for nearly 20 years.

### Building on Success

As such, it appears that customary mechanisms used traditionally by the Acholi could, in fact, meet both the procedural and accountability standards of international law, as required by the International Criminal Court. Yet that system, like any system, could be improved upon to some degree. It is likely that the mechanisms themselves would likely have to be formalized to some extent. And afterward they would have to be approved by the state or by the ICC investigators. But it is possible that they could play an important role even within the context of coming to terms with the crimes committed during the conflict in northern Uganda.

Certainly, these kinds of traditional mechanisms could be allowed to work in conjunction with the activities of the International Criminal Court, sanctioned as they are by the Rome Statute. The key, of course, is that the Rome Statute and ICC have not yet been tested in this way. No precedents exist. And the Ugandan case will almost certainly be the first to “test” the ICC’s stand on such issues.

Currently, ‘traditional’ mechanisms are *ad hoc* at best, underscored by the fact that there is a clear discrepancy in opinion between the leadership and those living in IDP camps. Moreover, the extent to which there is misunderstanding over the meaning and content of different mechanisms is underscored by the fact that numerous interviewees referred to *mato oput* as covering anything seen to be broadly ‘traditional’. One way to address this would be for the Acholi to codify those mores and traditions that make up these customary mechanisms and institutions. In other words, the expectations of the community ought to be written down so that everyone in the community knows or is able to access such rules. These rules would then also inform the decisions taken by the elders or community leaders.<sup>66</sup> This would clearly address any questions of bias and flexibility. Codification and other “fair procedures [would] serve to satisfy neutral observers”<sup>67</sup> and reinforce already-existing community standards.

In order for any mechanisms to work, however, the community must be deeply involved in the process. “Efforts to strengthen social capital [must] allow communities to take development into their own hands.”<sup>68</sup>

A basic tenet of social reconstruction or reclamation is the need for post-war communities to define and take ownership of the process of justice and reconciliation... Peacemaking and peacebuilding are not sustainable unless their form and content are shaped by local actors. While individuals and groups locked in conflict are obviously concerned about physical and economic security, they also crave respect,

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<sup>65</sup> Robinson, “Serving the Interests of Justice,” 9.

<sup>66</sup> Ayisi calls these community leaders “men of prestige” and considers them distinct from men of knowledge or “elders.” See *An Introduction to the Study of African Culture*, 69.

<sup>67</sup> Rosenblum, “Justice and the Experience of Injustice,” 83.

<sup>68</sup> Nat J. Colletta, Markus Kostner, and Ingo Wiederhofer, *The Transition from War to Peace in Sub-Saharan Africa* (Washington: World Bank, 1996) 3. See also Robert Putnam, *Making Democracy Work* (Princeton: Princeton University Press, 1993), 169, 177; Gabriel Almond and Sidney Verba, *The Civic Culture* (Princeton: Princeton University Press, 1963), 264-265, 284.

acknowledgement and affirmation. They want to be involved in decisions which affect their lives, and they resent being treated as the object of some other body's plans.<sup>69</sup>

Involvement at many levels will increase public confidence.<sup>70</sup> This involvement will also “strengthen local societal structures (including legal ones) as a means of providing the ongoing structures necessary for development. Traditions here are layered, and Western ones, to the extent that they are received, [must be] adjusted to those which exist already.”<sup>71</sup>

Indeed, there is growing support in favour of combining customary models with Western models to form a kind of “state law pluralism,” in which official state law accepts both customary and modern laws. This has been successfully done in African countries including Chad, Central African Republic, and the Democratic Republic of Congo. An alternative would be to integrate customary and Western legal codes into one, as has been done in both Ghana and Senegal.<sup>72</sup> The Western retributive system is more than capable of incorporating alternative legal traditions,<sup>73</sup> and linking modern and customary mechanisms will strengthen public trust.<sup>74</sup>

Whatever the case, “[j]ustice, like beauty, is in the eye of the beholder and can be interpreted in a variety of ways.”<sup>75</sup> It can legitimately take many forms.<sup>76</sup> It remains to be seen what those living within the conflict zone will choose.

### Conclusions

The situation in northern Uganda is complicated; this paper presents only one dimension of the difficulties faced by the community there. However, it is clear that Ugandans know and trust the customary mechanisms of justice that have traditionally been used. It is equally clear that the ICC is still in the formational stage. As such, there is still time for the inclusion of traditional mechanisms when the ICC finally takes shape in the investigation and prosecution of crimes committed in Uganda.

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<sup>69</sup> Harvey M. Weinstein and Eric Stover, “Introduction: Conflict, justice and reclamation,” in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, eds. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004) 18-19.

<sup>70</sup> Mark Plunkett, “Reestablishing Law and Order in Peace-Maintenance,” *Global Governance* 4.1 (1998): 68.

<sup>71</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) 336. The elements discussed here are sometimes identified as the “Communitarian Restorative Model.” See Harrell, *Rwanda's Gamble*, 59-65.

<sup>72</sup> Mani, *Beyond Retribution*, 83.

<sup>73</sup> Glenn, *Legal Traditions of the World*, 328.

<sup>74</sup> Mani, *Beyond Retribution*, 84.

<sup>75</sup> Weinstein and Stover, “Introduction: Conflict, justice and reclamation.” 4.

<sup>76</sup> *Ibid.*, 10.



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